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REPORT OF THE

**ROYAL  
COMMISSION  
AND BOARD  
OF INQUIRY**

INTO THE PROTECTION  
AND DETENTION OF  
CHILDREN IN THE  
NORTHERN TERRITORY

**VOLUME 1**

LETTER TO THE  
GOVERNOR- GENERAL,  
LETTER TO THE CHIEF  
MINISTER





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

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17 November 2017

His Excellency General the Honourable Sir Peter Cosgrove AK MC (Retd)  
Governor-General of the Commonwealth of Australia  
Government House  
CANBERRA ACT 2600

Your Excellency

In accordance with the Letters Patent issued to us on 1 August 2016, as amended by Letters Patent dated 9 February 2017, 27 June 2017 and 7 September 2017, we have inquired into and prepared a report on the protection and detention of children in the Northern Territory.

We have the honour to present to you our Final Report. We also return herewith the Letters Patent.

We are also submitting this report to the Hon Michael Gunner MLA, Chief Minister of the Northern Territory.

Yours sincerely



Margaret White AO

Michael Gooda



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

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17 November 2017

The Hon Michael Gunner  
Chief Minister  
Parliament House  
DARWIN NT 0800

Dear Chief Minister

In accordance with the Appointment of Board of Inquiry dated 3 August 2016, we have inquired into and prepared a report on the protection and detention of children in the Northern Territory.

We have the honour to present to you our Final Report.

Yours sincerely

Two handwritten signatures in blue ink. The first signature is 'Margaret White' and the second is 'Michael Gooda'.

Margaret White AO

Michael Gooda

# EXECUTIVE SUMMARY



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# EXECUTIVE SUMMARY

The Commission's inquiry into the detention and care and protection systems of the Northern Territory has revealed systemic and shocking failures. Children and young people have been subjected to regular, repeated and distressing mistreatment and the community has also failed to be protected. The systemic failures occurred over many years and were ignored at the highest levels.

The systems have failed to address the challenges faced by children and young people in care and detention. Indeed, in some cases, they have exacerbated the problems the children and young people faced. These failures are all the more startling in light of the multiplicity of previous reports and inquiries that have investigated youth detention and child protection systems.

The procedures and requirements of the law have simply not been followed in many instances. The systems failed to comply with the basic binding human rights standards in the treatment of children and young people. Government policies and procedures were ignored, systems designed for adults were inappropriately applied to youth, or they simply did not exist.

The systems this Commission examined exist to serve the interests of children and young people and their communities. Those interests include the interests of some of the most vulnerable babies and children in the community, the vast majority of whom are Aboriginal. The Commission heard from many people who had experienced the systems as children and from members of their families. Once they became aware of the work of the Commission they came forward in large numbers.

The narrative of the Commission's work became clear from the stories of those who exposed their lives to the Commission and to the public. The life trajectory of children and young people in care and detention was repeated over and over. The Commission was told about children born to families in crisis, struggling with addictions, mental health issues, domestic violence and the many challenges of poverty.

Instead of receiving the support those families needed to care for their children we heard of removal from the family and often from the community. Once in the child protection system we heard of inappropriate placements, dislocation from community and culture and a lack of support or follow

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through to address the trauma so many children had suffered in their young lives. As children absconded from places where they did not feel at home or where they felt unsafe and lonely or to be with other children who had become their family, the next step was contact with the criminal justice system and ultimately detention. That is not, of course, the story of all children in care but it was certainly the story of most children in detention.

The Commission received many suggestions for improvement to the child protection and detention systems. Children, their families, people working in the systems both in the Northern Territory and other parts of Australia and the world, and experts, gave the Commission many ideas for improvement and fundamental change. Enriched by those ideas, the Commission has made numerous recommendations to address the failures of the care and detention systems. Some recommendations are capable of immediate implementation. Others will require sustained, long term commitment to new approaches.

The conduct of this inquiry and the presentation of this report should be the end of the beginning. The commissioning governments, the Commonwealth and the Northern Territory, have the opportunity to achieve lasting change to stop the abuses of the past and to help ensure that all children in the Northern Territory can flourish and reach their potential.

## YOUTH DETENTION IN THE NORTHERN TERRITORY

### Introduction

On 25 July 2016, footage of a child being thrown across a room, pinned to the ground, stripped naked, and strapped to a chair with a hood over his head shook the nation. The title of the Four Corners program, 'Australia's Shame' matched the sentiments shared by many. Days later when this Commission and Board of Inquiry was appointed the treatment of children and young people was in the public's consciousness. The images raised fundamental questions about why and how children could possibly be treated in this way. That the Northern Territory's youth detention system was capable of meting out this treatment, even to one child, was compelling evidence of a system that had surely collapsed.

Regrettably, whilst this treatment was extreme, it was not isolated, as the Commission has seen and heard. The body of evidence gathered by the Commission has led to a glaring conclusion. During the relevant period, the Northern Territory's youth detention system failed at multiple levels. The failures were extensive, and in many instances, very serious and of fundamental concern. Children and young people were held in dreadful conditions:

*The back cells were the worst places ... They were so hot ... they stunk ... When I was in the back cells, I felt like I was going mad. I would bang on the bars of the cell, like I was a caged animal, a monkey.<sup>1</sup>*

Laws were repeatedly breached. Policies were non-existent or ignored. Mistreatment and misconduct was allowed to occur because oversight systems were weak and management failed to act effectively once presented with the warnings. Problems were left to fester until there was an eruption of crises – including the notorious incident, also screened on Four Corners, when children, many of them doing nothing wrong, were subjected to the horrific experience of being tear gassed in their cells.

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At times, the youth detention system damaged children and young people who should have been rehabilitated. As a result, it is likely that the system, which was meant to make the community safer, in fact made it more dangerous.

Improvements have been made since 2016. The new Northern Territory Government elected only weeks after the Commission started its work, has also made changes and announced measures to improve the system. Many of these are positive and have the Commission's support. However, throughout the course of the Commission, information has been received about troubling incidents still occurring in detention centres in the Northern Territory demonstrating the need for comprehensive and enduring reforms.

The Northern Territory Government's changes and announcements are evidence of recognition that urgent work is needed to fix a failed system. At the same time, however, the position adopted by the Northern Territory Government in this inquiry has been difficult to reconcile with this acknowledgment. In its initial hearing submissions to the Commission, the Northern Territory Government did not engage with the majority of the terms of the inquiry given by the Governor-General and former Chief Minister of the Northern Territory. Rather, the Northern Territory Government suggested that:

*historical matters, and the point-in-time analysis they invite, are of limited utility for the purposes of making findings and recommendations designed to achieve systemic reform.<sup>2</sup>*

The Northern Territory Government subsequently refined this approach by arguing that past findings should be confined to the issues of interest from which some knowledge of the present is to be drawn.<sup>3</sup> Such an attitude to the past not only ignores the directions given by the Governor-General and the former Chief Minister for the conduct of this inquiry, but must also be rejected for other reasons. To suggest, as the Northern Territory Government did, that any failings were not systemic but rather exceptional, and the result of a small group of challenging detainees being supervised by untrained staff, was on any view inconsistent with the evidence given by the Northern Territory Government's own witnesses – who were not challenged about their evidence on these matters.

The failings of the relevant period resulted from a disregard for evidence of what works, and insistence on a punitive approach that demonstrably does not. The willingness to change shown by the Northern Territory Government is accepted and commended. However, the record of failures makes a compelling case for further, fundamental, long-lasting reform.

## Purpose of youth detention

The *Youth Justice Act (NT)* commenced in 2006 and is the legislative framework for youth detention in the Northern Territory. The *Youth Justice Act* reflected contemporary policy and academic thinking in the area of youth justice which were based on restorative models of justice.

This legislation has much to commend it including the principles which are intended to support its interpretation. These principles reflect key human rights standards applicable to children and Aboriginal peoples. However, there has been a failure to embrace these principles in applying the Act in the Northern Territory's youth detention centres and, at times, those detention centres have functioned without proper regard to the requirements of the legislation.

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A significant cause for this has been a failure of successive governments to fund adequately the facilities, therapeutic services and staffing requirements which would allow the principles to be respected.

Many staff members in the centres were not familiar with their direct or delegated obligations under the Act. More remarkably, even executive staff members did not seem always to understand their obligations and at times seemed prepared to put them to one side in the face of operational expediency or security concerns.

Governments cannot choose to ignore the law.

The way detention centres were operated, at times, and the way some individual youth justice officers behaved, implied that the essence of the detention system was punitive. In the Commission's view, and consistent with the principles of the Act, once a child or young person enters a detention facility, the focus of their time in detention should be their rehabilitation. The aim is to prevent further offending for the benefit of the youth and safety of the community as a whole. Keith Hamburger AM, former Queensland Corrective Services Director-General, described the principle in this way:

*'in a civilised society we don't incarcerate people for punishment and treat them brutally. Sadly, it does happen though. But that's not the mission. The mission is, as we've talked about, is to stabilise those people, understand them as individuals, and get some individual personal pathway plans in place to support those people back to a law-abiding society in some way'<sup>4</sup>.*

## The physical conditions

The Commission is of the view that the Northern Territory Government failed to provide suitable youth detention facilities or even the most basic physical conditions for detained children and young people under its care during much of the relevant period. Former Minister John Elferink described the former Don Dale Youth Detention Centre as follows:<sup>5</sup>

*I don't believe that the physical structure of Don Dale enabled it for the most basic of human functions.<sup>6</sup>*

Since 2006, there have been five different facilities that operated as youth detention centres in the Northern Territory. Only two of those facilities were designed to accommodate children, with the remaining three originally designed for adult prisoners. The Commission heard from many witnesses that none of the Northern Territory facilities were fit for purpose, including those currently in use.

The Commission agrees.

The detention centres were not fit for accommodating, let alone rehabilitating, children and young people. They were characterised by:

- limited space to provide services, education and training, and to run the programs and activities that children and young people needed to help them rehabilitate and stay occupied
- harsh, prison-like conditions, with poor or no natural light, creating an oppressive and unnatural environment

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- they were unclean, unkempt, dire, rundown and ‘stank of urine’,<sup>7</sup> and
  - they exposed residents to extremes of temperature – the heat of Darwin days and cold of Alice Springs nights - due to damage caused in incidents combined with poor facility design.

The facilities had features that increased risks to both detainees and staff including fire hazards and design features that had the potential to heighten the risk of self-harm and mental health issues. The impact of the facilities together with aspects of other conditions in the centres very evidently played a part in the incidents that occurred during the relevant period.

The Northern Territory Government accepts that the current facilities are not suitable and that new, purpose-built secure accommodation is needed, separate from adult correctional facilities and different from the detention centres of the past and present. The Commission agrees with the statement of the Deputy Chief Executive Officer of Territory Families to the effect that the current centres ‘have no therapeutic value’ and that Territory Families ‘has to do things vastly differently’.

## Verbal abuse, excessive control and humiliation

*‘There were certainly a number of male officers who were – it seemed that their sole purpose for being there was to feel good about themselves and to wield their power over other people.’<sup>8</sup>*

In the Northern Territory’s youth detention centres, children and young people were treated in a manner which many would regard as completely unacceptable. While it is not the case that this was the only way detainees were treated, the Commission uncovered a range of behaviours, attitudes and practices which has allowed it to conclude that the treatment was not isolated.

The Commission received a considerable body of evidence about inappropriate conduct by youth justice officers directed towards detainees. The conduct took many forms and some of it can be characterised as abuses of power and excessive forms of control and humiliation. The Commission received evidence that youth justice officers had:

- subjected detainees to verbal abuse and racist remarks
- exerted controlling behaviour, such as withholding necessities like food, water and the use of toilet facilities
- dared detainees, or offered bribes to detainees, to carry out degrading, humiliating and/or harmful acts, or to carry out acts of physical violence on each other, and
- used mobile phones in inappropriate, humiliating and potentially harmful ways.

These acts were carried out on children, some as young as 13, by the very people who were charged with their care – officers who had power and control over them day and night. This left the children with no place to turn and further exacerbated their vulnerability to the impacts of the abuse.

*I asked the guards at night to open my hatch and give me water but they said, “No, we don’t give a fuck about you”. I just waited all night until the next morning before I drank anything.<sup>9</sup>*

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## Use of force

This vulnerability of the children was heightened by the way in which the children were physically controlled. The deliberate application of physical force by a youth justice officer on a detainee would generally be a criminal assault if it were not specifically authorised by legislation. The Commission heard from many detainees about the circumstances in which physical force was used on them. In the course of its inquiry, the Commission identified the use of the following forms of force:

- controlling the detainee's head and neck areas
- the use of 'ground stabilisation' by restraining, throwing or tackling the detainee to the ground
- applying body weight pressure to the detainee while the detainee was restrained on the ground, and
- the use of inappropriate contact, including applying force or pressure to a child's genital areas, colloquially known as the 'wedgie'.

Many of the detainees treated in this way were physically small and very young. All of these actions were prohibited by the relevant training given to youth justice officers.

*"The next thing I remember I was being slammed onto the concrete really hard and having four or five guards on top of me ... there was a knee on the back of my neck. I felt like there was heaps of weight on me and I couldn't breathe. I started coughing and I said, "Get off me, get off me, I can't breathe" and I was trying to scratch their hands with my nails."<sup>10</sup>*

Much of the evidence before the Commission was indiscriminately disputed by the Northern Territory Government. Notwithstanding this, the Commission has concluded that their objections to the evidence given by individual detainees do not affect the overall likelihood that much of the conduct in fact occurred.

Some of this conduct has been captured in closed circuit television (CCTV) footage and retained. In those cases, the description given by the detainee in question proved to be accurate. Where CCTV footage was not retained, the Commission generally had access to the testimony of youth justice officers, and vulnerable witnesses, written records of incidents created by youth justice officers and on some occasions, medical reports. Unsurprisingly, the detail of what former detainees said had occurred is not recorded in the written records generated by youth justice officers. Medical reports in some cases are consistent with the conduct described by detainees.

The Commission has found that, often contrary to the training received, youth justice officers restrained children using force to their head and neck areas, including putting them in chokeholds. Children were 'ground stabilised' by being thrown forcefully onto the ground, including in some cases causing their heads to have forceful contact with hard surfaces. The Commission has found that youth justice officers on occasion, in contravention of training and with potentially dangerous consequences, applied pressure or body weight to the child's 'window of safety', being their torso area. The Commission has also found that one youth justice officer, in contravention of training, escorted children by giving them 'wedgies' which caused pressure and discomfort on their genitals.

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The Commission was required to consider whether treatment in youth detention may have breached the law. The Commission has found that many of the uses of force outlined above may have breached the law as is outlined in this report.

## Restraints and strip searches

The *Youth Justice Act* permits the use of handcuffs or a similar device to restrain a detainee if the superintendent is of the opinion that an emergency situation exists and a detainee needs to be temporarily restrained to protect that detainee or the safety of another person. The Commission has found that handcuffs were used from time to time internally within detention centres in situations that were not emergencies. Despite directives prohibiting this practice, restraining detainees in this way continued even after this Commission was announced. A direction for this practice to cease was issued only in August this year.

Youth justice officers conducted strip searches of detainees on a relatively frequent basis through the relevant period. At the current and former Don Dale Youth Detention Centres for the period between January 2007 and June 2015, a total of 4,898 strip searches were recorded as having been conducted. Of those searches, 29 resulted in contraband being found. At the Alice Springs Youth Detention Centre for the period between November 2008 and August 2016, a total of 1,478 strip searches were recorded as having been conducted. Of those strip searches, 12 resulted in contraband being found.

The public's attention and much evidence was heard in the public hearings about the use of the spit hood, the restraint chair and the application of tear gas on young people while they were confined in isolation cells. These incidents are the subject of ongoing legal proceedings. The use of these devices is symptomatic of a youth justice system in crisis. The Commission has explored how this crisis developed, as outlined further in this report, and has recommended that these devices be prohibited in youth detention centres.

The Commission considers that the legislative framework of the *Youth Justice Act* relating to the use of force and restraint does not adequately protect children in detention. In closed institutions, such as detention centres, it is of paramount importance that the power be clearly defined and circumscribed. The vulnerability of children and young people to physical and psychological control by adults imposes a special responsibility on legislatures, communities and staff within youth detention centres to restrict the permission to resort to force only to situations where it is truly necessary.

## Isolation

Some of the most disturbing treatment revealed to the Commission and exposed in public hearings was the isolation of children in concrete cells for extended periods of time.

The Commission's investigations found that isolation was used on children and young people excessively and punitively during the latter part of the relevant period. From 2012 to August 2014 at the former Don Dale Youth Detention Centre, young people were confined in isolation cells, primarily in the Behaviour Management Unit (BMU), for up to 23 hours a day, for days and weeks on end. The conditions in the BMU were oppressive: it was small, hot, smelly and had no natural light. Many young people were housed in the BMU as part of a regime of behaviour management known as

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'Intensive Management Plans' (IMP) instituted by management staff.

In Alice Springs, a number of young people were isolated under the IMP regime at Aranda House in mid-2012. They were locked in their rooms for up to 21 hours and 30 minutes a day over a number of months.

*'The kids emerged from isolation more angry, more frustrated, more hopeless.'*<sup>11</sup>

As records often did not provide a complete and accurate picture of how long a child was kept in isolation and the circumstances of the placement, the full extent of the breaches cannot be determined. However, it may be concluded that breaches occurred on a systemic scale.

The senior executive and senior management responsible for youth detention during the latter part of the relevant period showed a disregard for compliance with the legislation in placing children and young people in isolation for extended periods including beyond the statutory limits. As should have been obvious to all involved in carrying out and overseeing the use of isolation of the kind described above in the youth detention centres, it contributed to poor behaviour and the occurrence of serious incidents.

As a result, there was a day to day cycle of misbehaviour, isolation and punishment. The leadership of youth detention centres failed to prevent the cycle continuing.

At the current Don Dale Youth Detention Centre, children and young people who are housed in the High Security Unit are still subject to harsh conditions and extended periods locked in their rooms under an 'Intensive Individual Management Plan' regime. Even if this is not isolation under the *Youth Justice Act*, it is likely to have detrimental effects on a child and unlikely to improve challenging behaviours.

*Once things got really bad in the BMU and I told the guards that I wanted to kill myself.*<sup>12</sup>

The law should not permit the kind of isolation suffered by children and young people held in the BMU and in isolation at the other detention centres. This isolation occurred due to careless management, poorly drafted directives that were not at all appropriate for youth detention, badly trained and inexperienced staff, inadequate facilities and a punitive approach to managing children and young people.

Rarely, there may be situations in detention when it is necessary to separate children and young people from each other. The *Youth Justice Act* should specify clearly the circumstances in which this can occur and for how long. Such separation should only be used as a last resort, be closely monitored and reported. Children should have access to case workers and medical professionals during any period of separation, including psychologists, and this should be guaranteed by legislation.

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Legislative changes must be supported by policy and training of staff. The Northern Territory Government must ensure that all policies, directives and written instructions to staff accord with the legislation and that staff are trained adequately in legal and policy requirements. It should also introduce strong systems to ensure compliance with those requirements.

## The operation of youth detention facilities

For children and young people, stability, consistency and routine is fundamental. Any youth detention centre that cannot provide this will encounter difficulties. The basic requirements of running an institution of this nature is to ensure consistency in decision making and allow both staff and children to develop routines, to understand the rules and to understand the behaviour that is acceptable. During the relevant period, this did not occur.

These failings started from the time of admission into the detention centre. The Commission has found that detainees were not always properly informed of the rules, did not have them explained in ways that they could understand, and were sometimes left to work out the rules for themselves.

From at least 2010 onwards, detention centres in the Northern Territory operated without up to date standard operating procedures. The failure to do so affected the day-to-day running of the centres. Staff gave evidence of how the failure to provide consistency in daily routines made working shifts harder and in some cases led staff members to run the centres as they saw fit on a shift-by-shift basis. This created a situation in which staff and detainees did not know what they were permitted to do which acted as a catalyst in the escalation of behaviour and critical incidents involving detainees.

## Transfers of detainees

The Commission heard evidence of children younger than 15 being transferred to adult prisons. While in the adult facilities, they were on some occasions placed in isolation cells. Other young people gave evidence about being placed in close proximity with adult prisoners. One detainee told the Commission:

*'I was worried about going into the adults section... I was worried that they would run at me and bash me and that the guard who was taking me to the cell wouldn't do anything about it. I just kept my head down and tried not to look them in the eye.'*<sup>13</sup>

## Health services in detention

Children and young people in detention were in the care of the Northern Territory Government. Health screening and health care provided in the youth detention centres was insufficient to meet the complex health care needs of the detainees. Those health care needs commonly included hearing loss, vision impairment, fetal alcohol spectrum disorder, mental health and drug and alcohol addiction. If undiagnosed and untreated, these conditions could impact on how detainees were treated and any rehabilitative benefit detention could have.

The inadequacy of the system was most clearly revealed when a child or young person was declared to be 'at risk', meaning at risk of self harm. The system and procedures employed were likely to cause further distress and harm to those in a heightened and vulnerable state. The 'at risk'

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procedures were punitive and focused on containment rather than a therapeutic approach that dealt with the underlying drivers of a child or young person's behaviour. The staff were not sufficiently trained or experienced to know how to deal with these intricate and complicated circumstances.

The story of one young person revealed how the system was unable to cope with her complex needs. The young person's experiences in a self-harming incident were considered by a professor of psychiatry, Dr Jon Jureidini. He described the experience as follows:

*Later that day, at around 9pm, the [young person] is videoed with a noose around her neck, standing on top of [redaction] apparently with the intention of jumping off. A range of officers function very effectively to ensure her safety. They appear to make little attempt to interact with her but it is not reasonable to expect officers in this situation to be highly skilled at talking down a suicidal individual, and concentrating on the practical purpose of ensuring her safety seems entirely appropriate. However, once she was brought to the ground, their treatment of her seemed overly harsh. [While she lay limp she was handcuffed.] The period immediately after a crisis such as this offers an opportunity for closeness and positive emotional expression, so that their response to this episode can be seen an opportunity missed.<sup>14</sup>*

## Education

Children must attend school each day and it is the responsibility of parents and guardians, and in the case of children in detention, the Northern Territory Government, to ensure that they do so. Teaching young people in a youth detention setting comes with significant challenges - a transient population with a range of ages, education levels, aptitudes and language skills as well as a range of difficult health conditions. It also presents an opportunity to capture children and young people who may not have had adequate education whilst in the community. Some detainees took up this opportunity and reflected to the Commission on the positive experiences in the school environment. The schools in the youth detention centres provided a prospect for engagement and rehabilitation.

However, for many detainees who passed through the detention centres, they were not provided with the basic opportunities for education that children and young people are entitled. The failings of the education system during the relevant period included:

- a failure to inquire into children's individual learning needs
- a failure to harness the specialist expertise and support of special education teachers
- a failure to support the cultural needs of the children and support their practice of Aboriginal languages
- a failure to ensure that the school had the appropriate information about the child's educational history to facilitate progress and reintegration into community schools, and
- overcrowding which resulted in children and young people having limited and inadequate access to education.

The Commission heard evidence of one principal who excluded detainees from school for extended periods, disproportionately, culminating in one child being suspended for one month. At other times, children were excluded from school who were in most need of engagement, such as those 'at risk' and on behavioural management plans.

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## Case management and exit planning

Without adequate planning for release, the system is '*absolutely setting up a young person to fail*'.<sup>15</sup> Throughout the relevant period, a majority of children and young people were ineligible for intensive, individualised case management and exit planning services. These services are important to a child and young person's prospects of rehabilitation and can reduce the risk of re-offending. The high remand population in youth detention is a barrier to effective rehabilitation planning and program delivery to both remanded and sentenced young people.

Case management services across the detention centres were understaffed. Case managers were commonly unable to perform much more than basic case management functions.

Adequate exit planning and post-release service delivery depended on external, non-government organisations delivering case management services additional to those offered by the Northern Territory Government's youth detention case management unit. A well-planned and supported transition from detention can be the circuit breaker in a cycle of reoffending.

## Treatment of girls in detention

The Commission heard that some girls and young women suffered in detention. Due to the minimal number of female staff, they could not always be supervised by female officers. Some girls and young women were inappropriately physically handled, restrained and stripped of their clothing by male youth justice officers. They were also subject to inappropriate sexual attention by staff.

Girls also received discriminatory treatment in their access to services and accommodation in youth detention centres. The detention centres were not designed to accommodate females and their operation did not ensure their needs were met in an equal way to boys. Girls had less access than male detainees to the most basic things that all children and young people are entitled, such as personal hygiene facilities, recreation areas and education. For example, at the current Don Dale Youth Detention Centre, some girls and young women were required to shower in a room accessed from an open quadrangle, and screened only by a plastic shower curtain that '*blows open in the wind*'.<sup>16</sup>

## Culture and family contact

The Commission found that throughout the relevant period, youth detention services in the Northern Territory failed to support the rights of Aboriginal children and young people to build and maintain their connection to culture and language. The Commission heard that Aboriginal children and young people were placed in isolation without family contact and without any attempt to mitigate the impact of this practice. Similarly there were Aboriginal children and young people transferred from Alice Springs and Darwin, which increased the sense of alienation and isolation they must have felt separated from their culture and family. These decisions were said to have been made without any notice to the detainees, their family members or any substantive consideration of the impacts that the transfer could have on the detainee's ability to maintain contact with their family and culture.

The training of staff in cultural competence and awareness was inadequate and not all staff had completed the offered training due to staff shortages. There is an obvious need for staff members working in youth detention to be better equipped with knowledge and training, which will assist in

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ensuring that Aboriginal children and young people maintain their connection to their culture. An approach to youth detention that recognises and uses the value of connection to culture for Aboriginal children and young people will improve rehabilitation, and is also likely to reduce reoffending and make the community safer. Recruitment and training of detention centre staff members should equip them to provide culturally appropriate support for detainees. The cultural backgrounds of children and young people in detention should also be reflected in the staffing profile.

## Detention centre staff

The skills and attitude of members of staff had a significant impact on the experiences of children and young people in the detention centres in the relevant period. Some staff members developed positive relationships with the children. One youth justice officer said using de-escalation skills *'helped me in my job and I think made a difference to the ways detainees treated me'*.<sup>17</sup> However, many were not sufficiently experienced, not appropriately trained or simply not suitable for working with vulnerable youth in a detention centre.

Regrettably, the difficulties did not end there. The youth justice officer work force was predominantly casualised, the centres were recurrently understaffed, and many youth justice officers reported feeling unsupported and ill-equipped to carry out their responsibilities.

The origins of the issue can be traced to the recruitment of youth justice officers. Evidence before the Commission was that there were ongoing difficulties with recruitment in youth detention in the Northern Territory throughout the relevant period. Substandard recruitment practices led to an influx of inexperienced staff members who were responsible for some of the most vulnerable children and young people in the community.

Little attempt was made to improve the position through induction or ongoing training. The training of youth justice officers was poor in a number of respects:

- the training was far too brief to cover the range of skills, systems, processes and compliance matters that needed to be addressed
- the training was not mandatory and was de-prioritised to operational needs, resulting in youth justice officers working in youth detention centres without undertaking even the basic induction training
- the training was not properly refreshed and rolled out when new policies were introduced, and
- to the extent that shadow shifts were used as a training tool, they were at times carried out by other inexperienced or underqualified staff.

The Commission heard that from 2010 the youth detention centres' approach to managing detainees tended to become progressively harsh and punitive. Some youth justice officers clearly worked hard to apply and maintain the standards required in the Youth Justice Regulations (NT) in these difficult circumstances, but a number resorted to punitive and sometimes violent methods to control the detainees. This allowed an environment to flourish where some detainees were bullied and belittled by those who ought to have been committed to their care. Far from being good role models, some youth justice officers' own poor behaviour in swearing at detainees and breaching rules endorsed a certain indifference to rules and discipline.

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## Record-keeping

*Record keeping is an important part of procedures and it serves to maintain and substantiate the actions of staff. Accurate records also provide transparency; their absence provide[s] suspicion.<sup>18</sup>*

Michael Vita, Centre Manager at Cobham Juvenile Justice Centre

Maintaining accurate records in closed environments such as youth detention centres facilitates oversight, both internal and external, and helps to prevent abuses of power.

At the legislative and policy level in the Northern Territory, there appears to have been an extensive framework for accurate records to be maintained. Legislation and directives issued by the Commissioner required records to be maintained about activities including the use of restraints, isolation, searches, the use of force and complaints. Youth detention centres also have extensive CCTV coverage, but it was automatically overwritten after a period of 30 to 60 days.

The evidence before the Commission in relation to record keeping revealed that in practice these standards were often not met. Individuals at every level of the youth detention centre system told the Commission that there were deficiencies in record keeping requirements. For instance, on at least one occasion, CCTV footage was deleted after the minimum retention period, despite multiple police requests that it be provided to them for the purpose of an investigation.

Basic record keeping requirements, such as obtaining sign-offs from supervisors, were not complied with, and records were not prepared in a timely manner. Further, the Commission identified examples where records prepared by youth justice officers about very serious matters, such as the use of force against detainees in which those youth justice officers were involved, were sanitised or misleading.

These failings have created a situation where records of the activities that occurred in youth detention centres about very serious matters, such as the use of force against detainees, cannot be assumed to be complete and accurate records of the events. Further, the absence of a record about a particular event cannot be assumed to indicate that the event did not occur.

## Oversight and complaint systems

Robust oversight of youth detention centres is essential to protect the rights of detainees. Oversight is an important tool in monitoring a 'behind closed doors' environment, in which there is always the potential for staff to abuse their power against the vulnerable.

During the relevant period, the Northern Territory lacked strong oversight and complaint processes for youth detention centres. Some children and young people in detention did not know that oversight and complaint mechanisms existed, at least upon their admission and induction into detention. If they did know, they chose not to invoke these mechanisms because they believed, often for good reason, it would not improve their position. Some of the failings identified by the Commission included:

- The Professional Standards Unit provided limited internal oversight of youth detention centres. Its effectiveness as an oversight mechanism was constrained by inadequate management responses to its reports and findings.
- The Official Visitors program failed to identify serious instances of mistreatment that were occurring in youth detention centres. The Official Visitors program was structurally incapable of achieving effective oversight.
- The Northern Territory Ombudsman did not oversee youth detention in any meaningful way, and its relevant powers and functions were largely transferred to the Children’s Commissioner in 2011, after which the Ombudsman had a minimal role. Dylan Voller’s interaction revealed that the Ombudsman’s oversight of youth detention was deficient.<sup>19</sup>
- The establishment of the Children’s Commissioner in 2007 and the expansion of its role in 2011 are welcome developments. The Children’s Commissioner did conduct investigations which revealed some examples of serious mistreatment which are chronicled in parts of this report. However, the effectiveness of the Children’s Commissioner in fulfilling these duties has been constrained by a lack of a general power to investigate matters of a systemic nature rather than individual complaints.
- The Northern Territory Police have demonstrated a complete failure to investigate, uncover and prosecute potential criminal behaviour in the youth justice system throughout the relevant period.

Any system of oversight and monitoring is only effective if those who receive reports from those bodies, both internal and external, pay due regard to the findings and recommendations. There was a failure by some superintendents, Executive Directors, the Commissioner of Corrections and Ministers to do this during the relevant period.

## Leadership and Management

*‘Places of detention are not about bars, wire, concrete and locks. What they are about is systems.’*

John Elferink<sup>20</sup>

Throughout the relevant period, the Northern Territory had adequate legislation, parliamentary conventions and administrative guidelines to make good governance of the youth detention system feasible. Senior administrators and ministers had, or should have had, oversight of the evolving problems in youth detention.

However, senior executives and management led a detention system which focused more on punishing than rehabilitating the children and young people in their care. In doing so, they created rather than solved problems and the long-term consequences of their actions have likely made the community less safe. At the same time, their actions caused suffering and, very possibly, in some cases, lasting psychological damage, to those who not only needed their help but whom the state had committed to their care.

The failures included an unwillingness to spend any money on youth detention, and a failure to invest in new facilities when they were badly needed. Between 2009 and 2012, the government chose to fund infrastructure and services for adult corrections as part of its ‘New Era in Corrections’ policy,

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rather than youth justice.

This failure to invest in youth detention led to a series of ill-considered and expensive decisions to 'patch-up' the ailing infrastructure.

This lack of investment obstructed recruitment activities and training initiatives for staff. Notwithstanding attempts by the Department to invest in recruitment and training following repeated warnings of the problems, the Government decided not to commit funds to this cause. Ministers and senior managers were clearly made aware of the resulting implications for detainees, staff and the operations of detention centres.

The lack of experience and qualifications of senior managers in youth detention contributed to a punitive and security-focused approach to the treatment of children and young people in detention. One of the key symbols of the failings was the absence of up to date sets of standard operating procedures capable of implementation within the centres. Extraordinarily, the standard operating procedures were not updated between 2007 and 2014. In their place, 170 separate standalone directives and individual procedures were issued. This made the system so complex that it was difficult for staff to comprehend and consistently follow the relevant procedures and for detainees to know the rules. This led one report of the Professional Standards Unit to conclude:

*Detainees and staff inform that there is no consistency between different shifts; one will allow you to do something while the next one doesn't. This not only makes it hard for the offenders to know what they can and can't do, it allows them to be manipulative and play one shift off against another.<sup>21</sup>*

The attitude of senior management to compliance with the law also impacted on the proper administration and operation of the youth detention system as a whole. It was the obligation of the Minister and the Commissioner to ensure that the *Youth Justice Act*, in so far as it related to youth detention, was administered according to the law. Rather than foster compliance, they presided over decision making which demonstrated insufficient regard for the limitations on powers conferred by the *Youth Justice Act*.

Similarly, the Department, led by former Corrections Commissioner Middlebrook, had at times a prickly relationship with external oversight bodies, such as the Children's Commissioner and service providers.

In relation to many matters that caused harm in the youth detention centres in the Northern Territory, this information successfully filtered to the Ministers responsible for the system and yet decisions were not made to invest and support the system. The very clear statement of the dire state of affairs was presented to senior management in the form of a memorandum from the Department's Professional Standards Unit in September 2014. The memorandum concluded:

*The issues revealed in this review appear to show a fundamental lack of awareness of the staffing problems in detention and the complete failure of centre management to address or attempt to address the issues.*

*While the current situation has developed over a number of years, it is the responsibility of current management to resolve the problems. A large part of which could be done*

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*by active leadership and direction of which, according to staff, there is none. It appears that the issues have been allowed to just drift along and no real effort has been made to create positive change in the centre as a whole for a very long time. This has resulted in staff apathy and ongoing resentment and consequent poor behaviour from detainees.*

*It should be obvious to anyone that if you treat youths like animals by not communicating, threatening, belittling them, withholding food and other entitlements they will react in an aggressive way. Most of these incidents were most probably entirely preventable with the use of appropriate communication and open interaction with the detainees combined with a regular routine to keep them occupied.<sup>22</sup>*

It is clear that the use of open interaction and communication methods with detainees would not have supported the punitive, tough on crime agenda which appeared to infiltrate Government decision making.

Those incarcerated in the detention centres were left to remain in an intolerable set of circumstances which prevailed due to the absence of leadership.

## **A fresh start: modelling secure residential accommodation**

The model for secure residential accommodation used in the current Don Dale Youth Detention Centre and the Alice Springs Youth Detention Centre fails to meet the needs of the young people and fails to make the community safer.

The Commission received evidence of the best-practice approaches to secure residential accommodation for young people from around the world. The Commission has concluded that the Northern Territory should build new secure accommodation facilities based on four propositions:

- the best results are achieved in small, home-like facilities that focus on delivering therapeutic and educational services, and keeping young people busy
- staff members at all levels must be trained in, and understand and appreciate that the purpose of secure accommodation facilities is to turn around the lives of troubled young people and make them productive members of a safe society
- the design, philosophy and operating principles must be developed in consultation with the community. The Aboriginal population in the Northern Territory needs to be considered in the reform planning process, and
- a new, secure, residential model should be developed alongside reforms to minimise the number of young people who need to be detained at all. Building new facilities should not distract decision-makers from the real goal of keeping young people out of detention.

This model is a conscious rejection of the so called 'tough on crime' approach to managing youth offending. In the course of its work the Commission has listened carefully to members of Northern Territory community who are angry or frightened about youth crime and who believe that harsh conditions of imprisonment may deter children from offending. They may not agree with the Commission's recommendations to provide young people who have offended with a range of professional services and high-quality education within a therapeutic environment. The Commission understands this point of view, but the evidence overwhelmingly shows that the therapeutic approach has the best prospect of reducing youth offending and supporting young people to become law

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abiding and useful members of society. If young people do not reoffend, the community is safer. These reforms are also likely to deliver a significant financial dividend to the Northern Territory. A report prepared for the Commission by Deloitte Access Economics modelled the Commission's proposed reforms and found that over a 10-year period they would produce an estimated \$335.5 million in savings for the Northern Territory. For every \$1 spent on these reforms, the Northern Territory would receive a return of \$3.40. Put simply, although an initial investment will be needed, over a 10-year time period these reforms would more than pay for themselves.

## THE PATH INTO DETENTION

*[W]here children are dealt with in the community, they tend to be less likely to reoffend than if they're incarcerated.*

Mr Charlie Taylor, Chair of the Youth Justice Board for England and Wales

A significant aim of a youth justice system must be the prevention of crime. If achieved, this will keep communities safer, reduce the burden of crime and put children on a path to living a fulfilling and productive life. In an effective youth justice system, very few young people will end up in detention. It would be used only for children who are violent and persistent offenders.

### Arrest

*'The first time I got arrested was at [redacted] in Darwin when I was 13. I got arrested for fighting and the police pepper sprayed me. I was trying to spit the spray out of my mouth and then the police charged me for assault for trying to spit on them. I can't remember if I was searched by police. The police did not interview me. I got a fine.'*

Vulnerable Witness BQ

When a child is caught offending their first exposure to the youth justice system will be contact with the police, who are the gateway for entry into the system. At this first moment, the child or young person can be diverted away from the youth justice system. If the police choose to issue a warning, the young person may learn from their brush with the law. If they choose to make an arrest, the next step can be the watchhouse, followed by the possibility of bail or detention on remand.

Despite the laws designed to uphold the principle that arrest should be used as a last resort, police are increasingly choosing arrest over the option of issuing a summons. In the last ten years, the number of arrests has spiked. In 2015–16, the police made 1,457 arrests of children and young people. In 2006–07 they made 423 arrests. Some children were arrested at school while participating in class.

There are insufficient protections for children once arrested. There is no requirement that children receive legal advice before an interview, and the Commission heard that the support person,

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who must be present for an interview, could be a stranger and may be someone who does not understand their role in the process.

There is no legal restriction in the Northern Territory on a child being held in a watch house with adults, nor is there any limit on the length of time they can be held without charge. This is a problem. Records for one night in the Alice Springs watch house showed that three children, under the age of 15, were held in the watch house for more than 30 hours each, after which all three were subsequently released on bail. On the same night one 11 year old child was held for 17 hours before being released on bail.

## Bail

*'Once a young person, particularly the younger they are, goes into remand...it introduces the young person to the normalised life of being managed by the criminal justice system.'*<sup>23</sup>

Professor Eileen Baldry

On an average day in 2015–16, 71% of young people in detention in the Northern Territory were there on remand. The evidence shows that there were many cases where the young person was denied bail and held in detention on remand, but, on going to court, they were then released without any further detention sentence.

If more children were granted bail, the number of young people in detention would drop dramatically. This would require a sizeable shift in the way bail is managed now. During the relevant period, if the decision was made to charge a child, and the police or the courts were considering whether to grant bail they were hindered by a lack of bail accommodation services.

When bail was granted, often the conditions imposed were impractical, difficult to comply with or unrealistic, and could lead to further criminalisation:

- Curfews, non-association orders, and substance restrictions were common, despite the lack of maturity, which might be needed to understand the importance of, and comply with, such conditions. The police practice of visiting family homes in the late hours of the night for curfew checks was seen as particularly intrusive.
- Breach of bail became an offence in 2011, with the result that a young person could end up in detention as a result of breaching a bail condition. In 2015-16, 94 young people received an order of detention for breach of a bail condition.

A vulnerable witness who told his story to the Commission, had a curfew as part of his bail conditions, which required him to be at home from 7pm to 7am. This very young child could not tell the time. He *'didn't really know what time it was and when [he] had to go back home'*. As a result he breached his bail condition and was arrested for breaching his curfew at 7.55pm. This child was one of the youngest person to be put into youth detention and was kept in isolation for his own safety. This child has only spent time in detention on remand or received sentences for time served.<sup>24</sup>

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The Commission recommends a range of reforms to the current approach to bail and the bail laws including introducing:

- bail provisions specific to children and young people in legislation
- establishing a bail support program and appropriate bail accommodation, and
- removing provisions that make breach of bail a criminal offence for children.

## Diversion

Under the *Youth Justice Act* police are required to refer young people to diversion before charging in most cases, and the courts also have the power to refer children to diversion.

*'Youth diversion enables offenders to take responsibility for their actions, make reparations for the harm they have caused and build their own capacity to make better decisions in the future.'*<sup>25</sup>

Senior Constable Matthew McKinlay  
Alice Springs Police Youth Diversion Unit

The police have a Youth Diversion Unit which is actively engaged in the process of diversion, and there are service providers across the Northern Territory, providing diversion services and programs. In 2015–16 35% of the 2,082 children and young people apprehended by police were diverted. The vast majority of children who are diverted do not reoffend according to Northern Territory Police data.

The Commission strongly supports the principle of diversion for young offenders. Ideally, the Northern Territory should be matching the use of diversion in New Zealand, where 80% of youth are diverted. Limitations in the *Youth Justice Act* which restrict access to diversion should be re-visited and an admission of guilt should not be required for entry to diversion, as has been adopted elsewhere.

The Commission identified a number of problems in relation to diversion, including the need for more diversion programs, delays in the process, the problem of delivering diversion programs in remote areas and the under-resourcing of the Youth Diversion Unit and diversion options.

Additional funding for youth diversion programs was announced during the course of the Commission, covering new youth diversion workers and additional funding for youth diversion programs. This is welcome, but more will need to be done to build up diversion as an option which both removes young people from the criminal justice system, and delivers diversion programs which are effective in changing behaviour.

## Court process

Decisions to send children to detention, either on remand or sentence, are ultimately made in court. The Northern Territory has a Youth Justice Court which hears criminal proceedings against children, with a Managing Judge and Judges of the Local Court, but it does not have a standalone court for

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children and young people, unlike almost every other Australian jurisdiction.

The current or former heads of the Children's Courts in NSW, Queensland, Western Australia and New Zealand each spoke to the Commission of the value of a distinct Children's Court. Such a court can more easily give effect to modern therapeutic models of justice for children and young people, with specialist training for judges and all involved in the process, bringing together youth justice and child protection cases. This recognition of connection between the two is reinforced by the number of children in the Northern Territory who experience both out of home care and detention. For reasons set out fully in this report, the Commission recommends that a separate court be established in the Northern Territory for both youth justice and child protection matters.

In the Northern Territory, again unlike other jurisdictions in Australia, youth justice proceedings are held in open court unless the court orders otherwise. Media reporting identifying young offenders can affect their prospects of rehabilitation, their sense of identity and their connection to the community. The names of young people before the court can be posted on social media, with all of the adverse effects on the young person which would be expected. One young person told the Commission that when his name was published this *'made me feel like everybody knew that I was a criminal and not a person ... It feels like the public can see right through me ... I began to feel like I was a lost cause'*.<sup>26</sup> The Commission recommends that youth justice matters should be heard in a closed court.

To reflect more recent scientific evidence about the developing brain of children and young people, their limited capacity for reflection before action, and their overall immaturity, the Commission recommends that the age of criminal responsibility be raised to 12 years. While this would be a first for Australia, other countries with similar systems of law and government have a minimum age of 12 and many much older. Juvenile offending under 12 is seen as largely a welfare issue in those countries.

Consistently with those considerations and the strong evidence that children are damaged by entry into detention, the Commission also recommends that no child under the age of 14 years be sentenced to detention, except in cases of the utmost criminal seriousness.

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# CHILD PROTECTION

## Introduction

*The situation in child protection in the Northern Territory at present is dire. There is an urgent need for reform to stop another generation being damaged.*

Dr John Rudge, clinical psychologist

The Commission has listened to the stories and views of children, families and communities. These voices tell of a system that harmed when it should have protected, which ignored when it should have supported, and which ultimately, needs fundamental change.

Every child is entitled to be born into a world in which they will survive, thrive, learn and grow, make their voices heard and reach their full potential. Those who care for and about them, and they themselves, must be able to hold leaders and decision-makers accountable for policies and their implementation that affect them. This is especially so when their parents, their natural carers, are unable to do so. In those circumstances others must step in, usually the government, to care for those who cannot care for themselves.

*I want there to be a better system so that other kids don't have to deal with the pain that I felt and still feel.*

Vulnerable Witness, DB<sup>27</sup>

Australia's contemporary child protection services were designed in another era, when it was thought only a few children needed to be protected from physical violence and gross neglect at home, and when society had a different understanding of the impacts on a child of exposure to physical abuse, sexual abuse, emotional abuse, neglect and physical violence. It was also a time when our understanding and appreciation of the importance of connection to culture, to community and the significance of identity to our well-being and development was not well developed.

The child protection system in the Northern Territory, based on the paradigm of yesterday, has failed to change to meet the demands of today. The Commission found a system in crisis, incapable of caring for the children of the Northern Territory when that care was most needed. Such is the pressure on the system, and so stretched are the available resources, that many tasks essential to securing the safety and wellbeing of children in care are being done poorly or not at all. Laws are being broken. Policies are being breached.

This state of affairs has been principally brought about by what is not being provided - an effective early support and intervention system. The system as designed is often unable to provide adequate support to vulnerable children and families until the risks of harm are considered to be so great that the child is removed.

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Despite the well-meaning focus on the prevention of harm to children, the system's removal of children from their families has frequently not led to better outcomes. In fact the stories that the Commission has heard about children in care have led it to question the logic of the whole system.

It is simply not acceptable for the government to remove a child from family and community only to cause them even greater harm and damage than if they remained.

*'Welfare thinks that all you need to do to look after a baby is to give it food and a house, keep an eye on it and take it for regular check-ups. That's for balanda babies. For aboriginal babies there's more. We have to show our ancestors who the new babies are. We take them out to the bush and we show the ancestors the babies and we tell them who is the mother one and who is the father one. We put ash on that little baby and he is part of the family then. Welfare know nothing about our gurrutu [respect] and our raypirri [law]. There are lots of things about our culture and raising aboriginal children that Welfare don't know.'*<sup>28</sup>

Vulnerable witness DI

## How big is the problem?

The number of notifications received by the statutory child protection agency and the number of children under child protection orders has tripled over ten years. The constant demands of this influx make a reactive and crisis driven approach almost inevitable.

Taking this perspective, the Commission was concerned to hear the number of notifications made to Territory Families has increased from around 3,000 per year in 2006–07 to more than 20,000 per year in 2015–16.<sup>29</sup> This is a more than 600% increase in notifications at a time when the Territory's population has only increased by 19%.<sup>30</sup>

New research has revealed that:

- 50.3% of Aboriginal children have been the subject of a notification or report to child protection by the age of 10,<sup>31</sup> making them 2.3 times more likely than non-Aboriginal children to have had a notification by that age
- 23.8% of Aboriginal children have had a substantiated report made in relation to them by the age of 10, making them 4.8 times more likely than non-Aboriginal children to have had a substantiation by that age, and
- 7.5% of Aboriginal children have had at least one out of home care placement by the age of 10,<sup>32</sup> making them 4.5 times more likely than non-Aboriginal children to have had an out of home care placement by that age.<sup>33</sup>

It suggests that most Aboriginal families and communities will be directly affected by the child protection system or know someone affected by it. For those less familiar with the Territory, this will be difficult to comprehend. These numbers frame the task at hand.

A system pivotal to the lives of so many Territorians and responsible for the welfare of vulnerable

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children must function effectively. However its failings are numerous:

- grossly overburdened caseworkers
- delays in completing investigations
- untrained residential care workers
- missing and inadequate care plans
- financially unsustainable and unsuitable purchased home based care
- poor reunification planning
- breaches of the Aboriginal Child Placement Principle
- poor communications with troubled families
- no or minimal support for children leaving out of home care, and
- callers notifying of potential risks of harm left on hold for up to 5 hours.

The Commission has been told that the Northern Territory Government is planning significant changes to the system, with the introduction of new measures to address a number of the issues raised during the Commission's inquiry. While the Commission welcomes the Northern Territory Government's recent reform planning for the child protection system, these steps are long overdue.

Achieving the change which needs to occur will be a complex and protracted process, requiring financial and political commitment. The change process must also involve the informed and aligned support of the Commonwealth Government, and active and co-ordinated engagement with the non-government sector, including close collaboration with Aboriginal organisations.

## The crossover cohort

*'A lot of the [resicare] workers were quick to call the police on me. If I got upset and threw or pushed stuff they would say, 'if you don't calm down we're calling police'. Sometimes they just called the police straight away without any warning.'*

Vulnerable witness DB<sup>34</sup>

The Commission has heard many stories of the 'constant roundabout' of unstable and multiple placements, educational disengagement and repeat offending experienced by children who have passed through both the child protection and youth justice systems. The transition from the care and protection system to the criminal justice system is too common. The Northern Territory Government has failed to grapple with this considerable problem and the resultant specific needs of this crossover group.

A 2016 research report from the Australian Institute of Health & Welfare found that:

- young people placed on care and protection orders were 27 times more likely to also be under youth justice supervision compared to young people in the general population, and
- those receiving child protection services were 23 times more likely to also be under youth detention compared to individuals in the general population, with almost half (45%) of the young people in youth detention also involved in the child protection system in the same year.<sup>35</sup>

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Research conducted for the Commission by the Menzies School of Health showed that the majority of children in the Northern Territory who had a proven guilty offence (75.2% of Aboriginal children and 60% of non-Aboriginal children) had previously been reported to child protection.

The Northern Territory Government's own research in 2016 indicates that children the subject of a child protection order were almost five times more likely to offend than other children.

Vulnerable witness DL's story illustrates the familiar path from care to detention. Once in care DL began absconding where he came under the influence of other troubled young people. A magistrate before whom he appeared expressed concern at the lack of knowledge of DL's carer about his background and circumstances. He was placed in care with other children he had offended with and on two occasions when DL was on bail, the Department placed him with other children with whom he was forbidden to associate under his bail conditions.

DK, the youth's mother, told the Commission that when she saw DL at the Courthouse:

*He was dirty, he stunk, he had ripped clothes. I said to him "Where the hell did they pick you up from?" I shook my head in shame. I remember [the DCF case worker] did not turn up. I don't think anyone from DCF was there for him at court that day. I contacted a family member and came up with \$100 to give DL for clothes. I was upset he was in rags.<sup>36</sup> ... I just wanted to break down and cry.<sup>37</sup>*

The link between care and crime suggests that one method of attacking youth crime would be to take all measures possible to avoid bringing a child into care.

## Aboriginal engagement

*'Children go into that system... They've been placed with non-Aboriginal families. They know nothing about their law. They know nothing about their culture. They know nothing about the people they're connected to. They've missed out on their ceremonies. They've missed out on all of those things, and it's hard to reconnect.'*

Dr Christine Fejo-King<sup>38</sup>

In a system in which 89% of the children are Aboriginal, particular regard must be had to Aboriginal participation in the child protection decision-making processes and actions of government departments and non-government organisations. A lack of meaningful Aboriginal participation, and an absence of avenues through which such participation can occur, is a major contributor to failures of government policy with respect to Aboriginal people.

The Aboriginal Child Placement Principle provides a strong statement of what needs to be done to enhance and preserve the connection of Aboriginal children with their culture, family, community, and identity. However the gap between the intent to implement the Principle and its successful application is well documented.

In the Northern Territory in 2016, almost two-thirds of Aboriginal children were not placed with

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relatives, other Aboriginal caregivers or in Aboriginal residential care facilities.

Barriers to implementation of the Principle include:

- a shortage of Aboriginal foster and kinship carers
- poor identification and assessment of Aboriginal foster and kinship carers
- poor support for the involvement of Aboriginal families and communities in decision-making about their children
- limitations to cultural care planning and support for ongoing connection to culture
- inconsistent measurement of compliance with the Principle, and
- factors impacting the operation of Aboriginal child care agencies.<sup>39</sup>

*We feel that child protection workers could communicate more effectively about decisions that are made about our children. Sometimes we don't know why our children have been taken away and what we need to do to get them back. If a child has to be removed then workers should give us regular updates. We don't know what our children are doing when they are away. We think the worst possible things must be happening because we just don't know.<sup>40</sup>*

Bunawarra Dispute Resolution Elders (in Maningrida)

## Early Support

*'In the absence of preventive services, all we're doing is waiting until the harm is done and then trying to provide some sort of remediation. There has to be a focus on preventing those children coming into care but also on enabling their families to provide safety.'*

Dr Howard Bath<sup>41</sup>

Many of the problems that beset the statutory child protection system in the Northern Territory find their root in the lack of an effective early support and intervention framework. The colossal demands placed on the Department to process and investigate over 20,000 notifications a year, and rising, are largely a function of vulnerable children only becoming the focus of attention once the harm or risk of harm has arisen. Tools that should be used only as a last resort, such as directive orders on parents and the removal of children from their homes, have for some families, become the first experience of any 'support' from the system.

Numerous early support programs and services are offered in the Northern Territory by the Northern Territory Government, the Commonwealth and non-government organisations. However, the Commission did not identify any comprehensive framework for co-ordination between them. Nor did it uncover any proper assessment of need so that services could be appropriately targeted. This, evidently, results in:

- gross inefficiencies and waste
- disjointed services, less effective at achieving a long lasting benefit, and
- lower uptake and trust of the services offered.

A report to the Northern Territory Government advised that ‘families were visited by multiple organisations at the same time, each with no knowledge of the other’. It also reported that ‘a lack of service co-ordination and case management across the sector is giving communities a disjointed service response that hinders the services provided and the willingness of families to participate’.<sup>42</sup>

## Entering the child protection system

*‘No one actually cares about you emotionally. You’re a case file, you’re just a number. I felt like I wasn’t a person in welfare.’*

Personal Story of AH<sup>43</sup>

The statutory response system was never designed to handle the ever increasing numbers of notifications, investigations, and children in out of home care. In 2010–11, 6,533 notifications were received and 634 children were living in out of home care. By 2015–16, 20,465 notifications were received and 1,020 children were living in out of home care. Neglect constituted the largest category of substantiated notifications.

The Commission examined the passage of notifications through the intake process and heard evidence concerning the operation of the relevant sections of the Department. Limitations identified by the Commission included the under-resourcing and inadequately planned staffing of the Central Intake Team. The evidence indicated that notifiers were encountering unacceptable delays in attempting to contact Territory Families by telephone to notify a potential risk of harm to a child. Other issues included delays in completing investigations.

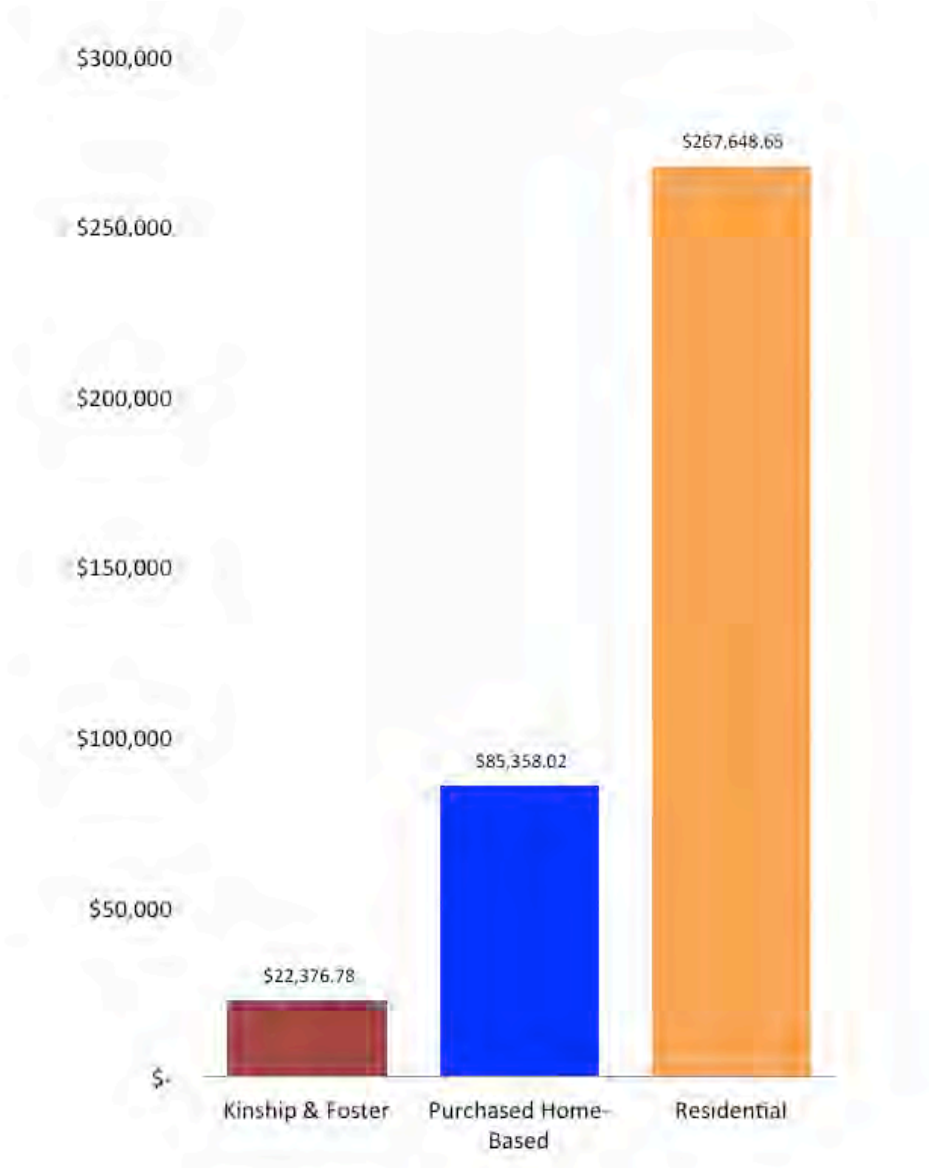
## Out of home care

*People who have been in out of home care and in unstable placements have the highest risk of social exclusion as adults and are over-represented on every measure of social pathology and disadvantage.<sup>44</sup>*

The Northern Territory has the highest rate of children in out of home care in Australia. It also has the highest proportion of children who have been in care for more than a year. The majority of children in the Northern Territory exiting care after more than 12 months had experienced three or more placements.

The out of home care system struggles to accommodate more children than it can handle, at greater expense than it can afford. As the numbers of kinship and foster carers have fallen behind the number of children entering the system, the Northern Territory Government has resorted to very costly purchased home based care to make up the shortfall.

The Northern Territory Government produced to the Commission the costs of out of home care for different types of care, and the number of children in each type of care during the 2015–16 financial year. Based on this information, the Commission calculated that the average cost per child for the various out of home care services per annum varies significantly.<sup>45</sup>



The Commission also examined the conditions and circumstances of children placed in residential care. Particular issues that were identified included high rates of absconding, substance abuse, offending and other high-risk behaviours, often in the company of other children in residential care. The Commission formulated a number of recommendations to improve the environment of these placements and their operation.

When DC was placed in out of home care at the age of 11, for example, within a short period he was absconding frequently and spending periods of time living on the streets. Under the influence of

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other young people in the residential care home, DC moved from sniffing volatile substances to poly substance abuse including alcohol and cannabis. DC’s caseworker recognised that DC was at risk of serious harm due to the inappropriate placement and the lack of supervision.

*It was agreed by all present at this meeting that this was not an ideal placement for [DC] to be in – 11 year old boy being allowed to do as he pleases and out at all hours of the night in Darwin CBD.*

The Commission found that the Northern Territory Government has failed to comply with the statutory requirement that all children in out of home care have timely care plans. Care plans are essential as repositories of information concerning the child’s needs, services provided by the Department and other organisations, work being done with the family, contact arrangements and any goals for reunification. The absence of a finalised care plan for a child, a basic record required by law, is an indicator of systemic dysfunction.

The Department has continuing duties not only to ensure appropriate and safe placements for children who have been removed, but to take all necessary and reasonable measures to strengthen the stability of the placement and monitor its suitability in meeting the needs of the child.

## Legislation and legal process

*‘While removal of a child is sometimes necessary, it must be acknowledged that removal itself can cause a form of trauma both to the children and the parents. In this context, it is critical to ensure that families have the right to hear the allegations, safety plans and any proposal to remove the child, and respond to these, in the language they are best able to express themselves in.’*

Brianna Bell<sup>46</sup>

The legislation governing the care and protection of children is at the core of the child protection system. It has to strike the right balance between constructing a system designed to protect children from harm while also empowering government action, surrounded with processes and checks appropriate to the exercise of a power to intervene in a family and remove a child.

The Commission reviewed the statutory instruments that underpin the child protection system and the legal processes by which child protection orders are made. Child protection litigation has an inherent friction; it is essential that courts are as informed as possible and that parents are appropriately engaged, while at the same time minimising any adverse impact on the child. The statutory framework for that process must emphasise the primacy of the child’s interests at all stages, provide ample opportunities and mechanisms for resolving disputes outside the courtroom and ensure the court’s imprimatur and oversight is maintained on key decisions concerning the child.

However, three key amendments were identified that in the Commission’s view are required to improve the legal process for making child protection orders:

- ‘Recognised Entities’, which are organisations declared by the Chief Executive Officer of Territory

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Families to be appropriately qualified cultural advisors, are to be included in mediation procedures and able to provide submissions to the court on the best interests of the child based on their cultural knowledge, experience and observations

- providing further detail and clarity in the criteria and preconditions for a child protection order, including that the order be the least intrusive in the circumstances and that the views of a 'Recognised Entity' are taken into account, and
- improving mediation mechanisms by formalising family group conferencing, whether at the direction of the court or the Chief Executive Officer, so that before contested litigation concerning a child protection order can occur there must have been a mediation conference convened by an independent facilitator, with the relevant and significant people in the child's life present.

## Changing the Approach

*'Increasingly we're seeing an economic focus on early childhood and on prevention.... If you just care about the economics, it just makes...so much more sense economically to prevent and intervene early. And increasingly we're seeing interest by economists, World Bank, WHO [World Health Organisation], all around the world arguing for prevention - increased attention to early intervention.'*

Professor Frank Oberklaid<sup>47</sup>

Changing the current approach to child protection in the Northern Territory will present considerable challenges, and introducing the changes the Commission believes are needed will be neither easy nor quick. To get it right, a long term view is needed, and a planned approach is essential.

To this end, the Commission has developed a package of recommendations aimed at reconceptualising and realigning child protection in the Northern Territory. Underlying the approach is a shift in focus away from statutory intervention and towards early support for families. The Commission believes that only by tackling the risk factors for neglect from an early age, within the family, will it be possible over time to both reduce the risk of harm to children and see fewer children taken into care.

The foundation of the Commission's proposed approach to child protection consists of three elements:

- the development of a Generational Strategy for Families and Children for addressing child protection and the prevention of harm to children led by the Chief Minister's Department
- the adoption of a public health approach to child abuse and neglect, covering both prevention and protection, and
- the establishment of a network of at least 20 Family Support Centres, providing place-based services to families across the Northern Territory.

The Generational Strategy takes a long view, as it must. It comprises a ten year operational framework which in the Commission's view, as a whole of government plan, should be led by the Chief Minister's Department. The Strategy should specify plan and deliver core and targeted services matched to meet actual needs. Such services need to be place-based, available and accessible. The Strategy will need benchmarks and outcome measures, to test its delivery of improvements to the

lives of vulnerable children and families in the Northern Territory.

The Strategy, and the broader public health approach of which it is a part, would be overseen by a Tripartite Forum consisting of the Commonwealth and Northern Territory Governments and the community sector. The Commission believes that the involvement of each is essential.

Designing a successful Strategy requires having the right information. The Strategy needs to start with a proper understanding of the nature and prevalence of child harm in the Northern Territory, where and why children are being harmed or neglected, and what is needed. Research needs to be undertaken to establish an evidence base to plan services and programs to address the problems. A mapping exercise should also be undertaken to establish the availability and accessibility of the current services being delivered and the existing state of referral pathways between Commonwealth, Territory and community services, and a Services Register developed. This research and data analysis will be led and continued by an early support research unit to be based in the Chief Minister's Department.

The Commission has recommended that the mode of delivery for these core and targeted services be through a network of Family Support Centres. The purpose of the Centres includes:

- providing or ensuring the **provision of the core and targeted services** identified in the Generational Strategy
- providing information to **families engaging with the child protection** system
- acting as **'recognised entities'** under child protection legislation for the purpose of providing views in child protection cases, and
- acting as an **entry point** in the event that a Northern Territory-wide dual pathways model is implemented.

The Commission's proposed approach is set out in the recommendations, and a chronology for the planning and implementation of the reforms is set out in the table below. Some of the steps proposed feed into the Northern Territory Government's own reform plans.

Action	Estimated Timing
Establishing new coordination bodies	Within 3 months
Consulting with the sector	Within 6 months
Information gathering, research, studies and mapping exercise	Within 12 months
Establishing research unit	Within 6 months
Establishing the Commission for Children and Young People	Within 18 months
Producing the Strategy	Within 18 months
Developing and making available core and additional services	Within two years
Establishing the new Family Support Centres	Within two years

The Strategy proposed by the Commission is a fundamental change in approach to the problem of how to best protect children from harm. It involves shifting resources, and shifting focus, onto prevention. The Commission's view is that unless urgent action of this kind is taken to re-direct and re-focus the effort and investment now being expended on protecting children, child protection reports will continue to rise, placing unsustainable pressure on the system.

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## Oversight

*'... I think we place too much onus on the young people to be able to advance these issues and introduce them into the system when they're making complaints. We know from our work that about half the young people have a rough idea what to do to make a complaint, but a lot of them are then concerned if they do make a complaint. What's the consequences? Am I going to get into trouble? Will I get somebody else into trouble?'*

Dr Joseph McDowall<sup>48</sup>

The deeply personal and intrusive nature of a government intervention into the life of a family, whether supportive or coercive, makes the presence of fair, independent and effective oversight mechanisms a fundamental necessity.

The Children's Commissioner is the primary agency in the Northern Territory with the powers and responsibilities to provide oversight of the child protection system. The Commissioner carries extensive oversight responsibilities. Along with responding to complaints the Commissioner must monitor the administration of the Care and Protection of Children Act and the ways in which the Chief Executive Officer of Territory Families deals with suspected harm to children in care.

Yet the Commission found that the Office of the Children's Commissioner was so under-resourced that it could not fulfill its statutory functions. The vital importance of its work is not reflected in the funding and staffing levels it is afforded. Both its powers and its resources need to be substantially fortified.

This is particularly so given the internal review mechanisms within the Department of Territory Families, which the Commission examined. Current processes could be greatly improved. Data recording and structural issues risk compromising internal oversight. Progress implementing recommended changes should be monitored. Of greatest potential value, Territory Families could start to use review teams, as set out in the legislation, involving other agencies and community organisations in reviews of its service delivery and approach.

## Commission for Children and Young People

The Commission reviewed the operations of the Children's Commissioner and its role in relation to vulnerable children. The breadth and gravity of its responsibilities means the Office of the Children's Commissioner must consistently have at its disposal the personnel and resources required to fulfil any statutory obligations. Some of the issues to be addressed from that investigation were that the Children's Commissioner:

- lacked the capacity and resources to properly carry out the statutory functions
- did not have unfettered access to children in the child protection and youth detention systems, and
- did not have the power to commence an own initiative investigate into youth detention issues, as it has in the child protection sphere.

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The Commission believes there is urgent need to broaden the jurisdiction and expand the resources currently assigned to the Children’s Commissioner, and that this should be done by evolving the agency into a Commission for Children and Young People. The Commission proposes that the expanded agency would have two Commissioners, at least one of whom must be an Aboriginal person.

The Commission for Children and Young People would have statutory responsibilities in relation to all children in the Northern Territory, not just those defined as ‘vulnerable’. This would allow the new Commission to have greater involvement in diversion, early support, and prevention advocacy and oversight.

The functions of the Commission for Children and Young People would be extended to allow for:

- mechanisms for wider consultation with communities and the non-government sector
- monitoring the administration of the *Youth Justice Act* or its successors
- increased capacity for complaints and own initiative investigations into individual and systemic weaknesses in the systems
- provision of advice to Territory Families and other government departments, and
- monitoring the implementation of recommendations from this Commission and other inquiries.

The Commission understands that the level of resourcing required to establish adequately and maintain an expanded agency will be significant. For this reason, the Commission has not recommended the creation of any other oversight or review bodies, instead concentrating responsibilities and resources into a single entity. It is the Commission’s view that the Commission for Children and Young People will need to be funded for two Commissioners and around 20 to 25 staff, to provide the resources for inspections, facility visits and community consultations across the Northern Territory.

## THE NORTHERN TERRITORY CONTEXT

To make recommendations that would effect lasting change, as part of its Inquiry the Commission examined the broader context within which the youth justice and child protection systems exist in the Northern Territory. To this end the Commission also examined funding, data collection and information-sharing and the underlying drivers that contribute to a child or young person’s involvement in child protection and youth justice systems.

### Funding

A consistent theme heard by the Commission was that there is insufficient funding in the Northern Territory to address the issues it is grappling with. However, having reviewed financial data available to the Commission, the Commission considers that the underlying problem is not the level of overall funding but that Commonwealth and Northern Territory Government investment is not rigorously tracked, monitored or evaluated to ensure that it is appropriately distributed and directed. Value for the money expended cannot be demonstrated.

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The major investment in Aboriginal affairs over many years has delivered mixed success, often with dimly poor returns. The combination of under-performing programs, poor coordination across governments and a lack of engagement with Aboriginal people in the design and delivery of services is producing continually poor results. The approach must be changed.

## Context and challenges

Focusing solely on the youth justice and child protection systems fails to recognise the profound social, cultural and economic problems which confront many people in the Northern Territory today and particularly Aboriginal people. The Commission found that many of the children who come into contact with the youth justice and child protection systems do so as a result of the underlying drivers of socioeconomic inequality including racism, remoteness, poverty, housing issues, poor physical and mental health and disabilities. This includes cognitive impairments such as fetal alcohol spectrum disorder, as well as trauma and intergenerational trauma.

This forms the backdrop for many of the children and young people who get caught up in the youth justice and child protection systems in the Northern Territory and is a fundamental challenge which must be acknowledged and addressed.

## Community engagement and looking forward

Community engagement is crucial to taking these issues forward. Policies and programs achieve better outcomes when the intended beneficiaries are directly involved in their design, implementation and monitoring. Aboriginal people have repeatedly called for more direct engagement in decisions and activities that shape their lives and futures. And at least in policy statements, governments have long recognised that the 'partnerships' or engagement needed for more effective policy and programs go beyond consultation or advice and require that Aboriginal communities engage from a position of empowerment and self-determination.

The recommendations on community engagement in this report are not novel or ground breaking. But, as history shows, it will be revolutionary for the Territory. The community want to be engaged, and children and young people need things to change. The Northern Territory needs to start leading on child protection, youth justice and Aboriginal affairs.

## CONCLUSION

The establishment of this Commission has presented an opportunity to bring about a fundamental shift in policy not only in the youth justice and child protection systems, but also in the wider Northern Territory community. By implementing the recommendations of this report, the Commonwealth and Northern Territory Governments can make significant progress in reducing the inequalities that currently exist to give the children and young people of the Northern Territory the hope and the opportunities they deserve.



## ENDNOTES

- <sup>1</sup> Exh.128.001, Statement of AU, 18 February 2017, tendered 23 March 2017, paras 34-35.
- <sup>2</sup> Submission, Northern Territory Government, 23 May 2017, para. 4.
- <sup>3</sup> Submission, Northern Territory Government, 10 July 2017.
- <sup>4</sup> Transcript, Keith Hamburger, 6 October 2016, p. 400: lines 45-47; p. 401: lines 1-3.
- <sup>5</sup> Transcript, John Elferink, 27 April 2017, p. 3214: lines 42-43.
- <sup>6</sup> Transcript, John Elferink, 27 April 2017, p. 3214: lines 42-43.
- <sup>7</sup> Transcript, John Elferink, 27 April 2017, p. 3124: lines 22.
- <sup>8</sup> Transcript, Louise Inglis, 24 March 2017, p. 1784: lines 32-36.
- <sup>9</sup> Exh.251.001, Statement of BA, 17 February 2017, tendered 31 March 2017, para. 49.
- <sup>10</sup> Exh.118.001, Statement of BH, 12 February 2017, tendered 22 March 2017, para. 16.
- <sup>11</sup> Transcript, Kelly Dedel, 29 June 2017, p. 5285: line 11.
- <sup>12</sup> Exh.179.001, Statement of BE, 18 February 2017, tendered 27 March 2017, para. 44.
- <sup>13</sup> Exh.123.001, Statement of AS, tendered 22 March 2017, para. 29.
- <sup>14</sup> Exh.641.000, Statement of Jon Jureidini (Confidential Exhibit), 28 May 2017, tendered 29 June 2017.
- <sup>15</sup> Transcript, Antoinette Carroll, 13 December 2016, p. 739: lines 22-23.
- <sup>16</sup> Exh.031.002, Annexure 1 to the Statement of Keith Hamburger, A Safer Northern Territory through Correctional Interventions, 31 July 2016, tendered 5 December 2016, p. 142.
- <sup>17</sup> Exh.151.001 Statement of Greg Harmer, 3 February 2017, tendered 24 March 2017, para. 78.
- <sup>18</sup> Exh.437.002, Annexure 2 to Statement of Michael Vita, 11 January 2017, tendered 12 May 2017, p. 16.
- <sup>19</sup> See Chapter 22 (Detention system oversight).
- <sup>20</sup> Transcript, John Elferink, 27 April 2017, p. 3107: lines 5-7.
- <sup>21</sup> Exh.125.001, YJ Detention Review Sept 2014, 19 September 2014, tendered 23 March 2017, pp. 2-3.
- <sup>22</sup> Exh.125.001, YJ Detention Review Sept 2014, 19 September 2014, tendered 23 March 2017, p. 5.
- <sup>23</sup> Transcript, Eileen Baldry, 8 May 2017, p. 3488: lines 2-14.
- <sup>24</sup> Exh.123.001, Statement of AS, 22 February 2017, tendered 22 March 2017, paras 5, 9.
- <sup>25</sup> Exh.362.000, Statement of Matthew McKinlay, 21 April 2017, tendered 10 May 2017, para 14.
- <sup>26</sup> Exh.180.001, Statement of AQ, 15 February 2017, tendered 28 March 2017, para 80.
- <sup>27</sup> Exh.577.000, Statement of DB, 9 June 2017, tendered 26 June 2017, para. 131.
- <sup>28</sup> Exh.651.000, Statement of DI, 15 June 2017, tendered 20 June 2017, para. 81.
- <sup>29</sup> Exh.680.002, Annexure ST-1 to statement of Sven Thormann, 4 January 2017, tendered 30 June 2017, table 1.
- <sup>30</sup> ABS 2016 Northern Territory Census Community Profiles: Time Series Profile, released 27 June 2017, Table T01.
- <sup>31</sup> Exh.512.000, A statistical overview of children's involvement with the NT child protection system, Undated, tendered 19 June 2017, slide 7.
- <sup>32</sup> Based on data from Exh.512.000, A statistical overview of children's involvement with the NT child protection system, Undated, tendered 19 June 2017, slide 7.
- <sup>33</sup> Based on data from Exh.512.000, A statistical overview of children's involvement with the NT child protection system, Undated, tendered 19 June 2017, slide 7.
- <sup>34</sup> Exh.577.000, Statement of DB, 9 June 2017, tendered 26 June 2017, para. 44.
- <sup>35</sup> Australian Institute of Health and Welfare, 2016, *Young people in child protection and under youth justice supervision 2013-14*. Australian Institute of Health and Welfare: Canberra. Data Linkage Series No. 21. Catalogue No. CSI 22.
- <sup>36</sup> Exh.555.000, Statement of DK, 15 June 2017, tendered 23 June 2017, para. 62.
- <sup>37</sup> Exh.555.000, Statement of DK, 15 June 2017, tendered 23 June 2017, para. 63; Exh.556.021, Intake notes for the period 11 April 2016 to October 2016, 11 April 2016, tendered 23 June 2017, p. 1680.
- <sup>38</sup> Transcript, Christine Fejo-King, 21 June 2017, p. 4665: lines 19-24.
- <sup>39</sup> Arney F et al., August 2015, 'Enhancing the implementation of the Aboriginal and Torres Strait Islander Placement Principle', *Child Family Community Australia Paper No. 34*, Australian Institute of Family Studies, pp. 7-8.
- <sup>40</sup> Exh.526.000, Statement of Bunawarra Dispute Resolution Elders (Maningrida), 15 June 2017, tendered 20 June 2017, para. 10.
- <sup>41</sup> Transcript, Dr Howard Bath, 31 May 2017, p. 4205: lines 39-42.
- <sup>42</sup> Exh.1137.001, Deloitte, 2017, *Implementing Dual Pathways on Child Protection, Territory Families*, tendered 1 November 2017, p. 7.
- <sup>43</sup> Transcript of Interview, AH, 29 May 2017, p. 2 (see the Commission's *Voices* publication).
- <sup>44</sup> Jackson, S and Cameron, C, 2012, 'Leaving Care: Looking ahead and aiming higher', *Children and Youth Services Review*, vol. 34(6), pp. 1107-1114.
- <sup>45</sup> Based on and subject to the same limitation as Exh.648.000, OOHCC Data, undated, tendered 30 June 2017, amounts were recalculated based on a data correction from the Northern Territory Government (Exh.1149.001, Letter from the Northern Territory Government re Kim Charles' Statement, 29 September 2017, tendered 3 November 2017).
- <sup>46</sup> Exh.678.001, Statement of Brianna Bell, 26 May 2017, tendered 30 June 2017, para 36.
- <sup>47</sup> Transcript, Frank Oberklaid, 29 May 2017, p. 4016: lines 8-18
- <sup>48</sup> Transcript, Joseph McDowall, 23 June 2017, p. 4938: lines 36-41.



# GLOSSARY OF TERMS AND ABBREVIATIONS



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# GLOSSARY OF TERMS AND ABBREVIATIONS

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<b>ABS</b>	Australian Bureau of Statistics
<b>ACCA</b>	Aboriginal Child Care Agency
<b>ACOSS</b>	Australian Council of Social Service
<b>ACPP</b>	Aboriginal Child Placement Principle
<b>AHRC</b>	Australian Human Rights Commission
<b>AIC</b>	Australian Institute of Criminology
<b>AIHW</b>	Australian Institute of Health and Welfare
<b>AIFS</b>	Australian Institute of Family Studies
<b>AIS</b>	Aboriginal Interpreter Service
<b>AJJA</b>	Australian Juvenile Justice Administrators
<b>AMSANT</b>	Aboriginal Medical Services Alliance Northern Territory
<b>APO NT</b>	Aboriginal Peak Organisations Northern Territory
<b>ASYASS</b>	Alice Springs Youth Accommodation and Support Services
<b>ATSIC</b>	The Aboriginal and Torres Strait Islander Commission

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<b>Beijing Rules</b>	Standard Minimum Rules for the Administration of Juvenile Justice
<b>BMU</b>	Behavioural Management Unit or Behaviour Management Unit in the former Don Dale Youth Detention Centre.
<b>CAALAS</b>	Central Australian Aboriginal Legal Aid Service
<b>CAT</b>	Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
<b>CCTV</b>	Closed Circuit Television
<b>CDEP</b>	Community Development Employment Project
<b>CERD</b>	Convention on the Elimination of All Forms of Racial Discrimination
<b>CICAYDAS</b>	Children in Care and Youth Detention Advice Service
<b>CLC</b>	Central Land Council
<b>CLP</b>	Country Liberal Party
<b>COAG</b>	Council of Australian Governments
<b>Congress</b>	Central Australian Aboriginal Congress
<b>CRC</b>	United Nations Convention on the Rights of the Child
<b>Danila Dilba</b>	Danila Dilba Health Service
<b>DCM</b>	Northern Territory Government - Department of the Chief Minister
<b>DCS</b>	Northern Territory Government - Department of Corrective Services
<b>DAGJ</b>	Northern Territory Government - Department of Attorney-General and Justice
<b>DPP</b>	Director of Public Prosecutions
<b>FASD</b>	Fetal Alcohol Spectrum Disorder
<b>Havana Rules</b>	Rules for the Protection of Juveniles Deprived of their Liberty
<b>HSU</b>	High Security Unit in the current Don Dale Youth Detention Centre.
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>IOMS</b>	Integrated Offender Management System
<b>NAAJA</b>	North Australian Aboriginal Justice Agency

<b>NAIDOC</b>	National Aborigines and Islanders Day Observance Committee
<b>NAPCAN</b>	National Association for the Prevention of Child Abuse and Neglect
<b>NGO</b>	Non-government organisation
<b>NLC</b>	Northern Land Council
<b>NTER</b>	Northern Territory Emergency Response ('the Intervention')
<b>NTLAC</b>	Northern Territory Legal Aid Commission
<b>NTCOSS</b>	Northern Territory Council of Social Service
<b>NTOCC</b>	Northern Territory Office of the Children's Commissioner
<b>OPCAT</b>	Optional Protocol to the Convention against Torture
<b>PFES</b>	Northern Territory Government Department of Police, Fire and Emergency Services
<b>PSU</b>	Professional Standards Unit
<b>RCIADIC</b>	Royal Commission into Aboriginal Deaths in Custody
<b>Regional Councils</b>	Local government, for example shires
<b>Riyadh Guidelines</b>	Guidelines for the Prevention of Juvenile Delinquency
<b>RMO</b>	Reform Management Office
<b>Shires</b>	Rural areas with their own elected councils
<b>SNAICC</b>	Secretariat of National Aboriginal and Islander Child Care
<b>SOP</b>	Standard Operating Procedure
<b>Sorry business</b>	An expression referring to a period of Aboriginal cultural practices and protocols associated with death.
<b>Spit hood</b>	A restraint device used to prevent a person from spitting or biting
<b>Submission</b>	A response from a person or organisation that gives opinions or ideas
<b>Superintendent</b>	The person who is in charge of managing a detention facility
<b>UNDRIP</b>	United Nations Declaration on the Rights of Indigenous Peoples
<b>Vienna Guidelines</b>	Guidelines for Action on Children in the Criminal Justice System

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## Vulnerable witness

A person who:

- is under 21 years old
  - is in detention or who has been in detention
  - is in care or who has been in care
  - is a parent, step-parent, sibling, grandparent or person acting as or regarded as a parent of a person who is or was in care (in relation to information or evidence they gave to the Commission about their relative who is or was in care), or
  - the Commission has decided to treat as a vulnerable witness.
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# TERMS OF REFERENCE



ENTERED ON RECORD by me in Register of Patents No. 51, page 54, on 1 AUGUST 2016



ELIZABETH THE SECOND, by the Grace of God Queen of Australia and Her other Realms and Territories, Head of the Commonwealth:

TO

The Honourable Margaret Jean White AO; and  
Michael Lloyd Gooda

GREETING

WE do, by Our Letters Patent issued in Our name by Our Administrator of the Government of the Commonwealth of Australia on the advice of the Federal Executive Council and under the Constitution of the Commonwealth of Australia, the *Royal Commissions Act 1902* and every other enabling power, appoint you to be a Commission of inquiry, and require and authorise you, to inquire into the following matters:

- (a) failings in the child protection and youth detention systems of the Government of the Northern Territory during the period since the commencement of the *Youth Justice Act* of the Northern Territory (the *relevant period*);
- (b) the treatment, during the relevant period, of children and young persons detained at youth detention facilities administered by the Government of the Northern Territory (the *relevant facilities*), including the Don Dale Youth Detention Centre in Darwin;
- (c) whether any such treatment during the relevant period may:
  - (i) amount to a breach of a law of the Commonwealth; or
  - (ii) amount to a breach of a law in force in the Northern Territory; or
  - (iii) amount to a breach of a duty of care, or any other legal duty, owed by the Government of the Northern Territory to a person detained at any of the relevant facilities; or

Secretary to the Federal Executive Council

- (iv) be inconsistent with, or contrary to, a human right or freedom that:
  - (A) is embodied in a law of the Commonwealth or of the Northern Territory; and
  - (B) is recognised or declared by an international instrument; or
- (v) amount to a breach of a rule, policy, procedure, standard or management practice that applied to any or all of the relevant facilities;
- (d) both:
  - (i) what oversight mechanisms and safeguards (if any) were in place during the relevant period at the relevant facilities to ensure that the treatment of children and young persons detained is appropriate; and
  - (ii) whether those oversight mechanisms and safeguards have failed, or are failing, to prevent inappropriate treatment, and if so, why;
- (e) whether, during the relevant period, there were deficiencies in the organisational culture, structure or management in, or in relation to, any or all of the relevant facilities;
- (f) whether, during the relevant period, more should have been done by the Government of the Northern Territory to take appropriate measures to prevent the recurrence of inappropriate treatment of children and young persons detained at the relevant facilities and, in particular, to act on the recommendations of past reports and reviews, including:
  - (i) the Review of the Northern Territory Youth Detention System Report, of January 2015; and
  - (ii) the Report of the Office of the Children's Commissioner of the Northern Territory about services at Don Dale Youth Detention Centre, of August 2015;

- (g) what measures should be adopted by the Government of the Northern Territory, or enacted by the Legislative Assembly of the Northern Territory, to prevent inappropriate treatment of children and young persons detained at the relevant facilities, including:
  - (i) law reform; and
  - (ii) reform of administrative practices; and
  - (iii) reform of oversight measures and safeguards; and
  - (iv) reform of management practices, education, training and suitability of officers; and
  - (v) any other relevant matters;
- (h) what improvements could be made to the child protection system of the Northern Territory, including the identification of early intervention options and pathways for children at risk of engaging in anti-social behaviour;
- (i) the access, during the relevant period, by children and young persons detained at the relevant facilities, to appropriate medical care, including psychiatric care;
- (j) any matter reasonably incidental to a matter mentioned in paragraphs (a) to (i).

AND We further declare that you are not required by these Our Letters Patent to inquire, or to continue to inquire, into a particular matter to the extent that you are satisfied that the matter has been, is being, or will be, sufficiently and appropriately dealt with by another inquiry or investigation or a criminal or civil proceeding.

AND, without limiting the scope of your inquiry or the scope of any recommendations arising out of your inquiry that you may consider appropriate, We direct you, for the purposes of your inquiry and recommendations, to consider the following matters, and We authorise you to take (or refrain from taking) any action that you consider appropriate arising out of your consideration:

- (k) the need to establish mechanisms to facilitate the timely communication of information, or the furnishing of evidence, documents or things, in accordance with section 6P of the *Royal Commissions Act 1902* or any other relevant law, including, for example, for the purpose of enabling the timely investigation and prosecution of offences;
- (l) the need to ensure that evidence that may be received by you that identifies particular individuals as having been subject to inappropriate treatment is dealt with in a way that does not prejudice current or future criminal or civil proceedings or other contemporaneous inquiries;
- (m) the need to establish appropriate arrangements in relation to current and previous inquiries, in Australia and elsewhere, for evidence and information to be shared with you in ways consistent with relevant obligations so that the work of those inquiries, including, with any necessary consents, the testimony of witnesses, can be taken into account by you in a way that avoids unnecessary duplication, improves efficiency and avoids unnecessary trauma to witnesses.

AND We direct you to make any recommendations arising out of your inquiry that you consider appropriate.

AND We appoint you, the Honourable Margaret Jean White AO, to be the Chair of the Commission.

AND We declare that you are a relevant Commission for the purposes of sections 4 and 5 of the *Royal Commissions Act 1902*.

AND We declare that you are authorised to conduct your inquiry into any matter under these Our Letters Patent in combination with any inquiry into the same matter, or a matter related to that matter, that you are directed or authorised to conduct by any Commission, or under any order or appointment, made by the Government or a Minister of the Northern Territory.

AND We declare that in these Our Letters Patent:

*child* means a person under the age of 18 years, and *children* has a corresponding meaning.

AND We:

- (n) require you to begin your inquiry as soon as practicable; and
- (o) require you to make your inquiry as expeditiously as possible; and
- (p) require you to submit to Our Governor-General a report of the results of your inquiry, and your recommendations, not later than 31 March 2017.

IN WITNESS, We have caused these Our Letters to be made Patent.

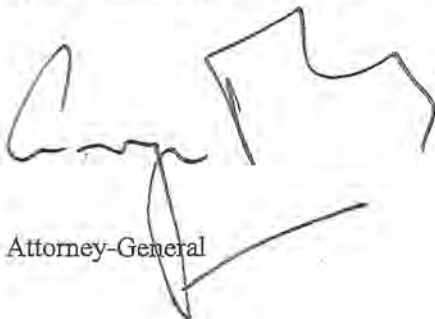
WITNESS the Honourable Paul de Jersey AC QC,  
Administrator of the Government of the Commonwealth of  
Australia.

Dated *1st August* 2016



Administrator

By His Excellency's Command



Attorney-General





# 1

## THE WORK OF THE COMMISSION



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# THE WORK OF THE COMMISSION

## INTRODUCTION

On 1 August 2016, the Commission was established to examine the youth detention and child protection systems in the Northern Territory. The Letters Patent, signed by the Administrator of the Government of the Commonwealth of Australia on behalf of the Governor-General, appointed the Hon Margaret White AO and Mr Mick Gooda as the Commissioners and set out the Terms of Reference for the inquiry.

This followed the airing of the ABC's Four Corners TV program, 'Australia's Shame', on 25 July 2016, which included shocking images of children and young people in detention in the Northern Territory. On 3 August 2016, the Northern Territory Government established a Board of Inquiry with almost identical terms of reference. In this report, the Royal Commission and Board of Inquiry are referred to collectively as 'the Commission'.

The Commission was asked to report by 31 March 2017. Due to the size of the task and the volume of documentary evidence and witnesses, the reporting date was extended three times to 17 November 2017. An interim report was delivered on 31 March 2017.

As was noted on the first day of the Commission's public hearings, there had already been many reports, reviews and inquiries into the matters the Commission was asked to investigate, though there had been little improvement. The Commission was determined not to be 'just another inquiry' that fails to lead to positive and long-lasting change for the community and the children and young people of the Northern Territory.

Its hope is that there will be no future need for an inquiry of this kind.

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## The Terms of Reference

The Terms of Reference directed the Commission to examine the Northern Territory's youth detention and child protection systems from 1 August 2006, the date that the *Youth Justice Act* (NT) came into effect.

The Commission was required to inquire into failings in the youth detention and child protection systems and to make any recommendations that it considered appropriate. Specific matters that the Commission was asked to examine included:

- the treatment of children and young people detained at youth detention facilities administered by the Northern Territory government
- whether any treatment may have breached laws, legal duties, rules, policies, procedures or international human rights embodied in Northern Territory or Commonwealth laws
- whether there were deficiencies in the facilities' organisational culture, structure or management, and in oversight mechanisms and safeguards, and
- what improvements could be made to the child protection system.

The Terms of Reference stated that the Commission was not required to inquire into any matter that it was satisfied had been, was being, or would be dealt with sufficiently and appropriately by another inquiry, investigation or legal proceeding.

The full Terms of Reference are provided in this volume.

## FINANCIAL MATTERS

The Commission completed its inquiry within the budget allocated by government.

Funding was provided to agencies to support people who engaged with the Commission processes, as outlined below:

- the North Australian Aboriginal Justice Agency (NAAJA) who provided initial legal advice, referral, community outreach and liaison services through the Children in Care and Youth Detention Advice Service (CICAYDAS), and
- Danila Dilba Health Service, Relationships Australia (NT) and the Central Australian Aboriginal Congress who provided counselling support services.

Witnesses were entitled to certain reimbursements for the costs associated with giving evidence. Financial assistance for legal representation was available to witnesses who met eligibility criteria.

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## CHILDREN'S VOICES

It is children who are involved in the care and protection and youth justice systems, and to begin to understand their experiences they must be listened to. The Commission heard from children in a range of ways, including:

- talking to children in Don Dale Youth Detention Centre and Alice Springs Youth Detention Centre in groups and individually
- youth forums
- personal stories, see below, and
- witness statements and evidence,.

In addition to describing in vivid terms their, often graphic, disturbing and horrifying descriptions of their perceptions of what happened to them in detention and/or in care and protection, these children shared their ideas for improvements to the system in the *'hope that what... happened [to them] doesn't happen to other kids'*<sup>1</sup>. One young person who gave evidence to the Commission said, *'I think it is too late for people like me, that I've missed my chance...I would like the Royal Commission to make these changes for kids who are in detention now'*.<sup>2</sup> He is still a teenager. It cannot and should not be too late. He deserves more.

## METHODS OF INQUIRY AND INVESTIGATION

To address the Terms of Reference, the Commission gathered a vast body of information by a variety of means.

### Notices to Produce

The Commission had powers under the *Royal Commissions Act* (Cth) and the *Inquiries Act* (NT) to require people to provide documents to the Commission. It issued 'Notices to Produce' to obtain policy and procedure documents, staff manuals, records including incident and investigation reports, child protection and detention case files, emails, CCTV footage and statements on particular topics. Many of these records were tendered into evidence in the public hearings.

More than 500 notices to produce were issued. A large number of these were to the Northern Territory Government. The Commission acknowledges the burden this put on the government's staff and lawyers, and is grateful for their assistance and cooperation. Much of the material produced was highly sensitive, and its production raised complex issues of law.

### Witnesses and informants

The Commission received more than 480 witness statements including from former government ministers, Northern Territory Government officials, current and former managers and staff members of youth detention centres, case workers, foster carers, principals and teachers, lawyers, healthcare workers, Australian and overseas experts, vulnerable witnesses and family of vulnerable witnesses.

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Many of those witness statements were prepared with the assistance of the Solicitors for the Northern Territory, NAAJA, Central Australian Aboriginal Legal Aid Service (CAALAS), Northern Territory Legal Aid Commission and private lawyers.

More than 400 witness statements were tendered in the public hearings.

The Commission's staff members met with people who provided information to the Commission on a voluntary basis. They were encouraged to seek legal advice before giving any information.

## Personal stories

Children and young people who were in, or had experienced, detention or out of home care, their families, and community members were also able to tell their '*personal stories*' to the Commission. The Commission received over 386 personal stories representing the views of 509 people. Chapter 2 (Personal stories) outlines how the Commission collated these personal stories and what they told the Commission. The stories were used by the Commission to identify issues in the care and protection and youth justice systems.

## Submissions

The Commission received approximately 500 submissions from the public, covering all aspects of the Terms of Reference and on particular issues or on draft findings. The submissions were made by individuals, service providers, non-government organisations, academics, health professionals, researchers, international experts and others.

The Commission is grateful for all the submissions it received. These submissions helped the Commission to understand the issues and develop lines of inquiry. While not every submission is referred to in the report, the Commission read and considered every submission it received.

## Issues Paper

The Commission released an issues paper in April 2017 on child protection, calling for submissions to assist in developing recommendations on how to improve the child protection system. The Commission sought submissions from any interested person or organisation, including children, parents and other family members, community members, service providers and experts in the field of child protection. The Commission has used the submissions to develop recommendations to government.

# COMMUNITY ENGAGEMENT

Wide-ranging engagement with Aboriginal communities was an important priority for the Commission and a critical part of its work. It was essential to understand the overrepresentation of Aboriginal children and young people in detention and out of home care. If policies, legislation and programs are to be effective and sustainable, the people most affected by them should be involved

in their development, implementation and evaluation. The Commission discusses the importance of this principle in Chapter 7 (Community engagement).

Throughout the inquiry, Community Engagement Officers were based in Darwin and Alice Springs and travelled to the following communities across the Northern Territory, as well as several communities in the cross-border region with Western Australia.

Adelaide River	Groote Eylandt	Stirling
Ali Curung	Gunbalanya	Tara
Alice Springs	Hermannsburg	Tennant Creek
Alyangula, Groote Eylandt	Imanpa	Ti tree
Amoonguna	Jabiru	Timber Creek
Ampilawatji	Kalkarindji	Titjikala
Angurugu, Groote Elylandt	Katherine	Umbakumba, Groote Elyandt
Areyonga	Lajamanu	Utopia
Arparre	Maningrida	Wadeye
Barunga	Mt Liebig	Wurrumiyanga –Tiwi Islands
Beswick	Mt Theo	Yarralin
Binjari	Mutitjulu	Yirrkala
Brumby Plain	Ngukurr	Yuendumu
Bulla	Nhulunbuy	
Daguragu	Nyirripi	
Daly River	Papunya	
Darwin	Peppimenarti	
Elliott	Santa Teresa	
Finke	Ski Beach	

The Community Engagement Officers explained the purpose of the Commission and its processes to communities, children and young people, worked closely with local organisations and heard communities’ and individuals’ stories and concerns. These stories and concerns were relayed to the Commission. This vital information helped the Commission to understand the complex issues that communities face and informed the Commission’s work, including in developing lines of inquiry and many of the recommendations in this report.

## Community and stakeholder meetings

The Commission held 13 public meetings with communities in the Northern Territory to hear directly from people affected by the youth detention and child protection systems. The Commission held meetings in:

- Darwin
- Tiwi Islands
- Alice Springs

- 
- Santa Teresa
  - Maningrida
  - Tennant Creek
  - Katherine
  - Yirrkala
  - Groote Eylandt
  - Yuendumu
  - Mutitjulu

More than 1,000 people attended the community meetings including families, individuals, children, young people, local leaders, service providers, community organisations, carers, school principals, teachers, current and former youth detention centre workers, health professionals and police officers.

At youth forums in Darwin and Alice Springs, the Commission heard about children and young people's experiences of out of home care and detention.

The Commission also attended meetings with the Northern Land Council and Central Land Council.

## Roundtables and targeted meetings

The Commission considered it vital to hear from a wide range of people involved in the youth detention and child protection systems and held 13 roundtables and targeted meetings including with:

- current and former youth detention centre workers in Darwin and Alice Springs
- current members of Northern Territory Police in Darwin and Alice Springs
- members of the Northern Territory judiciary, including the Chief Justice of the Northern Territory and Chief Judge of the Local Court
- individual victims of crime, and victims of crime groups such as Victims of Crime NT
- residential care workers in Alice Springs and Darwin
- foster carers in Alice Springs and Darwin, and
- Territory Families caseworkers.

The Commission held an expert roundtable in Alice Springs on 24 February 2017 to discuss diversion of children and young people from the youth justice process and alternative approaches to detention. Experts included academics, researchers, providers of diversion programs, representatives of other programs, community organisations, police officers from the Northern Territory and other states and territories and representatives of the Northern Territory Government.

Further details about some of these roundtables and meetings are in the Commission's Interim Report.

## Site visits

The Commission visited four of the youth detention facilities used in the Northern Territory during the relevant period:

- Aranda House in Alice Springs (no longer in use)
- Alice Springs Youth Detention Centre

- the former Don Dale Youth Detention Centre, and
- the current Don Dale Youth Detention Centre.

These facilities are discussed in detail in Chapter 10 (Detention facilities). The Commission also visited the Darwin City Watch House, the Alice Springs Watch House, the courts in Darwin and Alice Springs, residential care homes, several schools and diversion programs.

## Visits to facilities outside the Northern Territory

The Commission examined approaches to youth detention and child protection in other parts of Australia and New Zealand. This included a range of site visits and meetings in seven jurisdictions: the Australian Capital Territory, New South Wales, Victoria, South Australia, Western Australia, Queensland and New Zealand. Although invited to participate in the Australian Children’s Commissioners and Guardians conference in Tasmania and also to visit facilities in Tasmania, the Commission’s hearings timetable precluded this. The Commission:

- visited youth detention facilities in the Australian Capital Territory, New South Wales, Western Australia, South Australia, Queensland and New Zealand
- visited youth courts in New South Wales, Western Australia, South Australia, Victoria and New Zealand and met with their judicial officers
- visited diversion and support programs in New South Wales, Western Australia and Queensland
- visited a training academy for youth justice officers in Western Australia
- met with police officers in the Australian Capital Territory, New South Wales and New Zealand, and
- met with government departments and visited residential facilities for children and young people in New Zealand.

The Commission is indebted to all those who facilitated and participated in those visits and for their generosity and encouragement to the Commission and its work.

## PUBLIC HEARINGS

The Commission held 54 days of public hearings in ten blocks, two of which were directions hearings. Hearings were held in the locations and on the dates shown in the table below.

Date	Location	Hearing
6 September 2016	Darwin	Directions hearing

Date	Location	Hearing
11 – 13 October 2016	Darwin	<p><b>Hearings on former inquiries</b></p> <p>Evidence from experts and authors of past reports and reviews</p>
5 – 14 December 2016	Darwin	<p><b>Hearings on youth detention</b></p> <p>Evidence from:</p> <ul style="list-style-type: none"> <li>• Northern Territory Government officials</li> <li>• medical professionals</li> <li>• Northern Territory Legal Aid Commission</li> <li>• Central Australian Aboriginal Legal Aid Service</li> <li>• young people who have experienced youth detention</li> </ul>
10 March 2017	Brisbane, Darwin, Canberra, Sydney	<p><b>Directions hearing</b></p>
13 – 17 March 2017	Alice Springs	<p><b>Hearings on youth detention</b></p> <p>Evidence from:</p> <ul style="list-style-type: none"> <li>• young people who had experienced youth detention</li> <li>• current and former youth justice officers, superintendents and managers of youth detention centres</li> <li>• a former government Minister and Northern Territory Government officials</li> <li>• an academic expert</li> <li>• current and former case workers, teachers and other service providers</li> </ul>
20 – 31 March 2017	Darwin	<p><b>Hearings on youth detention</b></p> <p>Evidence from:</p> <ul style="list-style-type: none"> <li>• young people who had experienced youth detention</li> <li>• current and former youth justice officers, superintendents and managers of youth detention centres</li> <li>• current and former Northern Territory Government officials</li> <li>• an academic expert</li> <li>• a medical professional</li> <li>• current and former case workers and other service providers</li> </ul>

Date	Location	Hearing
19–28 April 2017	Darwin	<p><b>Hearings on youth detention</b></p> <p>Evidence from:</p> <ul style="list-style-type: none"> <li>• a young person who had experienced youth detention</li> <li>• current and former youth justice officers, superintendents and managers of youth detention centres</li> <li>• current and former Northern Territory Government officials</li> <li>• case workers, a teacher and other service providers</li> </ul>
8–12 May 2017	Darwin	<p><b>Hearings on criminal justice processes leading to detention</b></p> <p>Evidence from:</p> <ul style="list-style-type: none"> <li>• young people who had experienced youth detention</li> <li>• judges</li> <li>• experts</li> <li>• police</li> <li>• lawyers</li> <li>• organisations that children and young people had contact with when they entered the youth justice system and experienced when they left detention</li> </ul>
29 May – 2 June 2017	Alice Springs	<p><b>Hearings on child protection</b></p> <p>Evidence from:</p> <ul style="list-style-type: none"> <li>• children and young people who had been in out of home care and their families</li> <li>• Northern Territory Government officials</li> <li>• academic experts</li> <li>• Aboriginal community support workers</li> <li>• foster carers</li> <li>• community organisations, including the Secretariat of National Aboriginal and Islander Child Care</li> <li>• a former government Minister</li> <li>• current and former Northern Territory Government officials</li> </ul>

Date	Location	Hearing
19–30 June 2017	Darwin	<p><b>Hearings on child protection, youth detention and alternative approaches</b></p> <p>Evidence from:</p> <ul style="list-style-type: none"> <li>• experts on child protection</li> <li>• residential care providers</li> <li>• respected community Elders</li> <li>• community organisations (current and disbanded)</li> <li>• a former government Minister</li> <li>• Australian and international experts</li> </ul>

A total of 214 witnesses gave evidence in the Commission’s hearings. In addition to hearing evidence, the Commission heard 18 recorded personal stories.

Most of the Commission’s hearings were open to the public and live streamed on the Commission’s website. More than 6,000 pages of hearing transcripts were produced. Between November 2016 and October 2017 the Commission’s website has been viewed over 72,000 times, by nearly 25,000 individual users, including over 14,000 views of the webcast of the public hearings.

## Vulnerable witnesses

It was essential that the Commission hear from people most affected by the systems it was investigating. It received evidence from 34 young people who had experienced the youth detention system and/or the child protection system. The Commission heard from a further seven parent or grandparent carers of children in the child protection system.

Taking evidence from young people posed challenges, as it does in any legal proceeding. Children and young people are vulnerable witnesses. Their identities cannot be disclosed and steps must be taken to minimise the risk that the experience of giving evidence will cause them harm.

To manage these risks, the Commission developed and followed practice guidelines and directions based on methods used by the courts. This approach aimed to allow the Commission to hear evidence from children and other vulnerable people in a manner that reduced harm to the witness without adversely affecting the reliability of the witness’s evidence.

Vulnerable witnesses included children and young people up to the age of 21, anyone who was currently or had been in care or detention, certain relatives of children in care and anyone with a cognitive disability or mental illness. The Commission was very concerned to ensure that young people’s engagement with the Commission did not affect them adversely, consistent with the Terms of Reference, which required it to consider such matters. As discussed throughout this report, many of

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the young people who gave evidence had experienced significant trauma in their lives.

Each of the following protocols was followed:

- before any vulnerable witness in detention gave evidence, the Commission arranged for the witness to be assessed by a qualified person or service to ensure the witness had consented to giving their evidence freely and knowingly, and to identify any support needed to give that evidence,
- each vulnerable witness had the support of a lawyer and could have a support person with them when they gave evidence,
- counselling was available to vulnerable witnesses, and
- each vulnerable witness was given a pseudonym, for example, 'AD', 'AS' and 'BE'. These pseudonyms are used in this report.

The Commission made confidentiality directions it considered appropriate. Special arrangements were made available for vulnerable witnesses to give evidence, including closing the hearing, the use of video streaming from a separate location to the hearing room and limiting the form of cross-examination. Transcripts of these closed hearings were made available publicly as soon as identifying information was removed and the appropriate checks carried out.

The Commission acknowledges the assistance provided by the government-funded support services to people affected by the Commission's work, including counsellors, therapeutic support and health professionals, and the free legal advisory service provided by Children in Care and Youth Detention Advice Services (CICAYDAS).

A small number of closed court hearings were held on the conduct of a former youth justice officer. These hearings were conducted in closed court due to the sensitive nature of the issues investigated. Information about the investigation, including the former officer's identity, the details of the conduct and the Commission's findings cannot be published. More information about this matter is provided in Chapter 23 (Leadership and management).

### **Hearing numbers**

- 54 days of formal public hearings
- 214 witnesses
- More than 1000 exhibits, many of which included multiple documents
- More than 6,000 pages of transcripts
- 18 recorded personal stories

- 12 case studies

## Participation in hearings

The Northern Territory Government, NAAJA, CAALAS, Danila Dilba Health Service, current and former government officials and staff members and a number of vulnerable witnesses were granted leave to appear, that is, permission to be heard in the Commission's hearings.

At times, other individuals and organisations were granted leave to appear in particular segments of the hearings that affected their interests.

The Commission also issued a 'Notice of Adverse Evidence' to any person who was adversely named. This gave the person the opportunity to object or seek non-publication directions if appropriate, or respond to the material.

## Hearing procedure

The Commission issued Practice Directions to govern the conduct of the hearings. A Royal Commission is an administrative inquiry, not a judicial inquiry. Its conclusions are opinions which do not affect the right of any party. The Commission's Terms of Reference were very broad and it sought to inquire into as much of the care and protection and youth justice systems of the Northern Territory as it could in the limited time. It is not possible or necessary for a Commission to investigate every fact as it would be, for example, in a criminal trial. Lawyers for the Northern Territory Government complained that a particular person was not called to give evidence or that the Commission did not investigate every point. It was neither necessary nor possible to do this.

Counsel Assisting tendered more than 6,000 documents and other records.

Counsel Assisting questioned witnesses first. Then other counsel were able to ask questions, generally within time limits, if their clients had leave to question the witness.

Hearing time was extremely limited. To hear from the very broad range of witnesses who came before the Commission, it was necessary to limit the time allowed for cross-examination. The Commission often had to commence hearings early in the morning and sit late into the afternoon or early evening to accommodate its very full witness schedule.

The Commission thanks the witnesses, counsel, court reporters and other hearing room staff who had to endure these extended sitting hours.

## PROCESSES AFTER THE HEARINGS

After the hearings finished on 30 June 2017, the Commission undertook a number of processes in the preparation of this report.

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## Submissions on issues examined in hearings

The Commission invited people with leave to appear and anyone who participated as a witness to make submissions on particular topics that were examined in the public hearings. The submissions were taken into account in the preparation of the findings and recommendations in the report.

## Draft findings

The Commission issued a Notice of Adverse Material<sup>3</sup> to persons adversely named by comments and findings the Commission proposed to make. Each notice contained proposed draft findings and references to the evidence in support of the proposed draft findings and covered 65 broad topic areas.

Anyone who received a Notice of Adverse Material had the opportunity to respond in writing to the adverse comments and findings the Commission proposed to make. The Commission received detailed submissions, particularly from the Northern Territory Government. It considered every argument and, where persuaded of its merit, modified the finding and/or report accordingly. The Commission is very grateful for the careful and detailed submissions it received.

## Consultations on recommendations

In developing the recommendations made in the report, the Commission consulted a number of stakeholders, including community representatives, Aboriginal organisations and peak bodies, senior officials of the Northern Territory and Commonwealth Governments and key ministers. This consultation process provided the Commission with valuable information to finalise its recommendations.

## Communicating the recommendations to the communities

The Commission was aware of the importance of community consultation and engagement through the period of this inquiry. However, the Commission routinely heard throughout this consultation process that communities are frequently asked to provide input to inquiries but are less frequently provided with information on their outcomes and the recommendations that have been made as a result of their input. This leaves communities feeling devalued and disempowered.

The Commission considers that the community should be properly informed of the outcomes and recommendations of this Commission. This respects the time and effort of the many people across the Northern Territory who have contributed in the hope of creating lasting change.

Many live in communities where access to the mainstream media is limited and language and literacy barriers make it more difficult to engage with the more formal aspects of this inquiry, but who are nevertheless eager to know how their contribution has been used by the Commission. It is not enough merely to provide them with a copy of the final report. Many people who contributed to the Commission expressed their desire to be not only informed of the outcomes but actively involved in implementing any recommendations.

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The Commission considers that the Commonwealth and Northern Territory Governments have an obligation, in acknowledging the importance of ongoing community engagement, to visit communities and communicate the final outcomes and recommendations of this Commission in a respectful and collaborative manner.

### Recommendation 1.1

**The Northern Territory and Commonwealth governments establish a program of community engagement to visit communities and communicate the outcomes and recommendations of this report.**

## REFERRALS TO THE POLICE

Pursuant to section 6P of the *Royal Commissions Act (Cth)*, the Commission has the power to refer matters to the Northern Territory Police which relates or might relate to contraventions of law. The Commission has to date referred a number of matters to the Northern Territory Police.

These matters cannot be referred to in detail for reasons of confidentiality and any possible prejudice to future police investigations. However, the Commission considers it important to make known that these referrals included:

- potential criminal conduct by youth justice officers
- the harassment of, or threats to, witnesses or potential witnesses before this Commission, and
- the abuse of children in out of home residential care settings, including physical abuse, sexual abuse and neglect.

## RECOMMENDATIONS ON REFORM

### Witness statements and compulsory examinations

At the time of this report, a Bill is currently before the Parliament<sup>4</sup> which proposes amendments to the *Royal Commissions Act* to give a Royal Commission the power to issue a notice requiring a person to give information or a statement in writing. This is proposed to supplement existing powers to require a person to appear to give oral evidence, to produce a document at a hearing<sup>5</sup> or to produce a document without appearing at a hearing.<sup>6</sup>

The Commission acknowledges the concerns raised by the previous Cole Royal Commission into the Building and Construction Industry and the Home Insulation Royal Commission in relation to this reform. Those Commissions indicated that they encountered difficulties with a number of potential witnesses who refused to provide information. The time and cost involved in requiring those persons to give evidence at hearings was significant, and it was argued that these costs could have been alleviated by the power to compel a potential witness to provide a statement in writing.

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This Commission did not experience the same difficulties and in fact had the benefit of a large number of witness statements which were provided without compulsion. In this regard, the Northern Territory Government provided this Commission with more many written statements from its employees, past and present. These statements were provided in response to informal requests from the Commission and they were also volunteered by the Northern Territory Government in response to adverse material. The Commission acknowledges the time and considerable effort which senior bureaucrats devoted to informing the Commission about policies and procedures as well as compiling data particularly with respect to child protection in the Northern Territory. Similarly, the Commission received a large number of statements from vulnerable witnesses. Whilst many of these were ultimately provided under a Notice to Produce, the witnesses prepared the statements and received those notices voluntarily. The former Chief Minister, Mr Adam Giles (the person who established this Board of Inquiry), was the only person who refused the Commission's request for a statement.

Regardless of how witness statements were obtained their provision was critical to the Commission's task. The provision of such a large number of witness statements made the scope and detail of this Commission's inquiry possible in its relatively short timeframe. Notwithstanding that these witness statements were obtained by this Commission without compulsion, it is an example of how witness statements can assist Commissions to work in short timeframes. In this regard, the Commission agrees with the observations of the Australian Law Reform Commission that the power to require witness statements can *'reduce the need for hearings and examinations and enable more flexible, less formal and more cost-effective inquiry proceedings.'*<sup>7</sup>

The time pressures involved in organising formal hearings presided over by the Commissioners was significant. Many more witnesses could have been called but this was simply not possible if the Commission was to complete its work in the time allotted to it. The Commission considers that it could have been further assisted if it had a power to gather oral evidence without the need for a formal public hearing presided over by the Commissioners.

Other investigative bodies in Australia, such as the Australian Securities and Investments Commission and the Australian Competition and Consumer Commission have the power to conduct examinations of individuals by staff members of those bodies.<sup>8</sup> These powers are entrusted to such bodies because of the breadth of their responsibilities, and the complexity of the areas that they regulate.<sup>9</sup> Where a Commission is tasked with a similarly broad investigative function, such as to examine the youth detention and child protection systems over a 10 year period, similar powers would allow it to operate more effectively. The case for this is even stronger where a Commission is given only a limited time in which to conduct its investigations and report.

In the context of a Royal Commission, a similar power could allow a designated staff member (such as Counsel Assisting to conduct examinations of individuals, without the logistical issues of requiring a Commissioner to be present at those examinations. Procedural safeguards would be necessary, such as the right of the examinee's lawyer to attend and ask questions as found in the *Australian Securities and Investments Commission Act 2001 (Cth)*.<sup>10</sup> Further, any use of the information obtained in such examinations should be subject to section 6DD of the *Royal Commissions Act*, which provides that any statement or disclosure by a person in the course of giving evidence is not admissible in any civil or criminal proceedings.

This power would allow for a more cost-effective and expeditious gathering of information which is not of a sufficiently important or probative nature to justify a public hearing but may still be necessary to fill evidential gaps. At the same time, these examinations could also be used to decide whether the

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evidence of relevant witnesses justifies examination at a public hearing.

## Recommendation 1.2

**Amend the *Royal Commissions Act (Cth)* to allow Counsel Assisting to require persons to appear before him/her for examination on oath and to answer questions.**

### Issues concerning sensitive information and the *Freedom of Information Act*

The Commission also has concerns about the long term protection of certain records containing confidential information obtained by the Commission in the course of carrying out its Terms of Reference.

The Commission has received information from men, women and young people who have been, or are, in child protection or youth detention in the Northern Territory over the past ten years and from their families. Consistent with its responsibility to manage any risk to their safety and well-being and to keep their identity and any identity revealing information confidential, the Commission developed a Policy and Procedure for Vulnerable Witnesses. This policy governed the manner in which the Commission engaged with vulnerable witnesses and the protections afforded to them throughout its inquiry.

This Commission is in a similar position to the Royal Commission into Institutional Responses to Child Sexual Abuse which has heard thousands of stories from vulnerable people through the means of 'private sessions' which ensured that they could tell their stories in a safe and confidential environment. In both Commissions providing support to vulnerable witnesses and protecting confidential information has been of the utmost importance.

The Commission considers it particularly important to ensure that the protection those witnesses have received during the life of the Commission will continue once the Commission comes to an end. To this end, the Commission has made a Non-Publication Direction which will make the records relating to these vulnerable people exempt from the operation of the *Freedom of Information Act 1982 (Cth)*. However, it will cease to operate once the 'open access' period under the *Archives Act 1983 (Cth)* is reached.

To protect these records beyond that period, the Commission recommends that amendments be made to the *Freedom of Information Act* and *Royal Commissions Act* which would protect these confidential records beyond the life of the Commission. The Commission considers that the amendments made to those Acts to protect information given to the Royal Commission into Institutional Responses to Child Sexual Abuse in a 'private session' under section 60M of the *Royal Commissions Act* are an appropriate precedent.

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### **Recommendation 1.3**

**Amend the *Royal Commissions Act (Cth)* to grant records relating to vulnerable witnesses (as defined in the *Policy and Procedure for Vulnerable Witnesses*) in this Royal Commission the same protections as contained in section 6OM of the *Royal Commissions Act (Cth)* which relate to information obtained or relating to a 'private session'.**

### **Recommendation 1.4**

**Amend the *Freedom of Information Act (Cth)* to exempt from its application records relating to vulnerable witnesses (as defined in the *Policy and Procedure for Vulnerable Witnesses*) in this Royal Commission.**

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## ENDNOTES

- <sup>1</sup> Exh.128.001, Statement of AU, 18 February 2017, tendered 23 March 2017, para. 68.
- <sup>2</sup> Exh.341.001, Statement of AY, 28 February 2017, tendered 9 May 2017, para. 100.
- <sup>3</sup> This is an additional and separate process to the issuing of notices of adverse evidence, which accompanied or were provided approximate to the service of statements.
- <sup>4</sup> Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Bill 2017.
- <sup>5</sup> *Royal Commissions Act 1902* (Cth), s. 2(1).
- <sup>6</sup> *Royal Commissions Act 1902* (Cth), s. 2(3A).
- <sup>7</sup> Australian Law Reform Commission, 2009, *Making Inquiries Report, A New Statutory Framework*, Canberra, p. 271.
- <sup>8</sup> *Australian Securities and Investments Commission Act 2001* (Cth), s. 19; *Competition and Consumer Act 2010* (Cth), s. 155.
- <sup>9</sup> Australian Securities & Investments Commission, 'ASIC's compulsory information gathering powers' [website], <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-compulsory-information-gathering-powers/>, accessed 5 November 2017.
- <sup>10</sup> *Australian Securities and Investments Commission Act 2001* (Cth), s. 23.



# 2

## PERSONAL STORIES



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# PERSONAL STORIES

*'Telling our story will help so that our voices can be recognised and heard. We don't want people going through the same thing we're going through. Welfare didn't help. We found our own way here on our strength. Telling our story might help other people find their strength.'*

Parent of children in care

## INTRODUCTION

The Commission was tasked with inquiring into the failings of the child protection and youth justice systems in the Northern Territory. These systems do not operate in the abstract. When they operate as intended they can benefit children and their families. However, when they fail they affect people who are among the most vulnerable and disadvantaged in our community.<sup>1</sup> They impact people who are largely without a voice to influence the systems that so profoundly affect the course of their lives.

To examine properly the operation of the child protection and youth justice systems in the Northern Territory it was important that the Commission understood how children and young people in care and detention as well as their families and communities perceived those systems, what they considered were the failings of the systems and the impact of those failings on their lives. Their perspectives and the themes that emerged helped to guide the Commission's inquiries. They also performed the therapeutic function of enabling people to be heard.

Most stories were deeply personal and likely to have caused distress in the telling. The Commission thanks each person who shared their story and acknowledges their courage and strength and the assistance they provided to the Commission.

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## ABOUT PERSONAL STORIES

Personal stories are statements made by people who said they were in care and/or detention during the period covered by the Commission's Terms of Reference as well as their families and communities. They set out their stated experience and perceptions of the child protection and youth justice systems and their recommendations for change. Personal stories include the recorded stories played in the Commission's hearings.

Submissions and statements from experts and people working in care or detention are not classed as personal stories, nor is evidence given before the Commission. The experience of foster carers is summarised in Chapter 33 (Children in out of home care).

The Commission used personal stories to identify potential widespread systemic issues for further investigation. They are not sworn testimony and have not been used by the Commission as evidence from which to make any factual findings, adverse or otherwise, in relation to any person or organisation. The only recommendation which comes out of this chapter reinforces the need to listen to people affected by the child protection and youth justice systems.

The Northern Territory Government submitted to the Commission that the summaries and extracts in this chapter are unfair because it has not been able to identify the authors of the extracts and therefore search their records and assess comments that have been made about the quality of the author's experience of care and detention. That kind of analysis is not the point of the chapter and tends to reinforce the sentiments expressed by those involved with the child protection system in particular, which is not a system that listens to them. That is their perception of it, irrespective of how a care worker, manager or policeman might describe a particular event.

## HOW PERSONAL STORIES WERE OBTAINED

The Commission decided at the outset that it would not compel children and young people who were or had been in care or detention, or their families, to participate in the Commission except in limited circumstances.<sup>2</sup> The Commission was told that people were hesitant to tell their stories due to a range of factors.

### Feelings of shame

Many children and young people were embarrassed to talk about what had happened in their lives and did not want to be in the public eye.

### Impacts of trauma

Most children and young people and many of their family members have suffered trauma related to their experience of care and/or detention.<sup>3</sup> Avoidance, in its many forms, is a well-recognised symptom of trauma.<sup>4</sup> People told the Commission that discussing their time in care or detention evoked traumatic memories. One person said it *'just brings it all back. It is too hard. I want to move on from that time in my life'*.<sup>5</sup>

## Fear of reprisal

Children in care were worried about reprisal from their immediate carers and/or that if they spoke with the Commission it would negatively affect their chance of being returned to their families. Families of children in care also worried about the impact of speaking with the Commission on reunification with their children.

People in detention feared reprisal from youth justice officers or corrections workers. They feared changes to their classifications, being placed in isolation and being moved to another detention centre away from family and friends. A small number told Commission staff members and their own lawyers that they feared assault from youth justice officers if they were seen to be speaking with the Commission.

The Commission did not investigate whether fears of reprisal were well-founded but accepts that the fears were held.

Having decided that children and young people in care or detention and their families would not be compelled to participate, and given people were hesitant to speak to the Commission, the Commission had to create conditions in which they felt comfortable providing information to the Commission. The keys were control and confidentiality.

Vulnerable witnesses had control over whether or not to engage with the Commission, and their level of participation. They could withdraw their consent to participate at any time.<sup>6</sup>

The Commission determined that it would keep the information and personal stories provided by vulnerable witnesses confidential except in limited circumstances.<sup>7</sup>

Vulnerable witnesses who gave evidence were assigned a pseudonym and mostly gave evidence in closed court. Their statement, any annexures and the transcript of their evidence were redacted to remove information that may identify them or any other vulnerable witness. Vulnerable witnesses over the age of 18 could choose to make their evidence public.<sup>8</sup>

People were able to tell their stories to the Commission in a range of ways. They could speak with the Commission directly at community meetings or in private groups. They could provide a group statement to the Commission, which Aboriginal Elders in several communities chose to do. Individuals could contact the Commission, and Commission staff members would take their statement in person or by phone.

As discussed in Chapter 1 (The work of the Commission), the Commission's community engagement team travelled widely, informing people of the Commission's work and taking statements as they went. The Commission also received personal stories from legal services, primarily the Northern Australian Aboriginal Justice Agency and the Central Australian Aboriginal Legal Aid Service. Children in Care and Youth Detention Advice Services (CICAYDAS), the free legal service set up by the Northern Australian Aboriginal Justice Agency and funded by the Commonwealth Government to provide advice and information to people about the Commission, provided 77% of the personal stories received by the Commission.

## WHO TOLD THEIR STORY TO THE COMMISSION

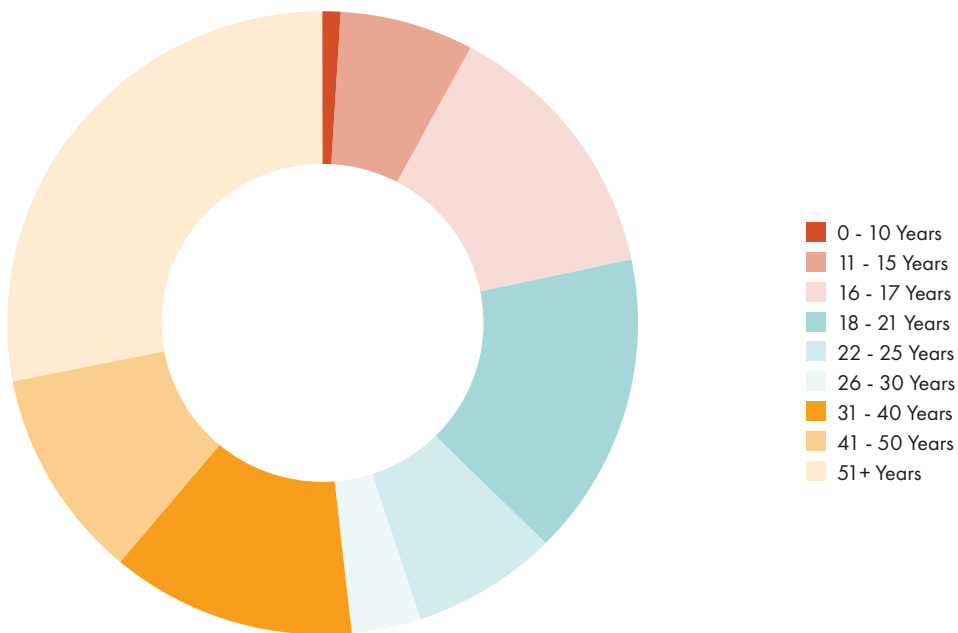
The Commission received 386 personal stories, representing the views of 509 people. Thirteen personal stories were from community groups, 10 of which were from Aboriginal Elders and 28 from couples or other small family groups.

There was a near-even gender split between those providing personal stories to the Commission, with 50.7% male storytellers to 49.3% female storytellers.

The Commission did not collect data on Aboriginality. However, on review of the statements and using information provided by CICAYDAS on the personal statements they collected, at least 88% of personal stories were from Aboriginal people. The level of engagement of Aboriginal people is not surprising. 94% of children and young people in detention in the Northern Territory and 89% of children and young people in out of home care are Aboriginal.<sup>9</sup>

Of the 216 people whose ages were provided to the Commission, 38% were under 21 years old.

Figure 2.1: Ages (where notified) of people providing personal stories



The Commission heard stories from people across the Northern Territory.

<b>Alice Springs</b>	73	<b>Top end other</b>	51	<b>Unknown</b>	101
<b>Darwin</b>	73	<b>Centre other</b>	37		
<b>Katherine</b>	46	<b>Interstate</b>	5		

Of the 509 people who contributed to the 386 personal stories, 218 spoke about detention and 445 spoke about care. Approximately 37% spoke on both issues.

Figure 2.2: Breakdown of people providing a personal story on detention

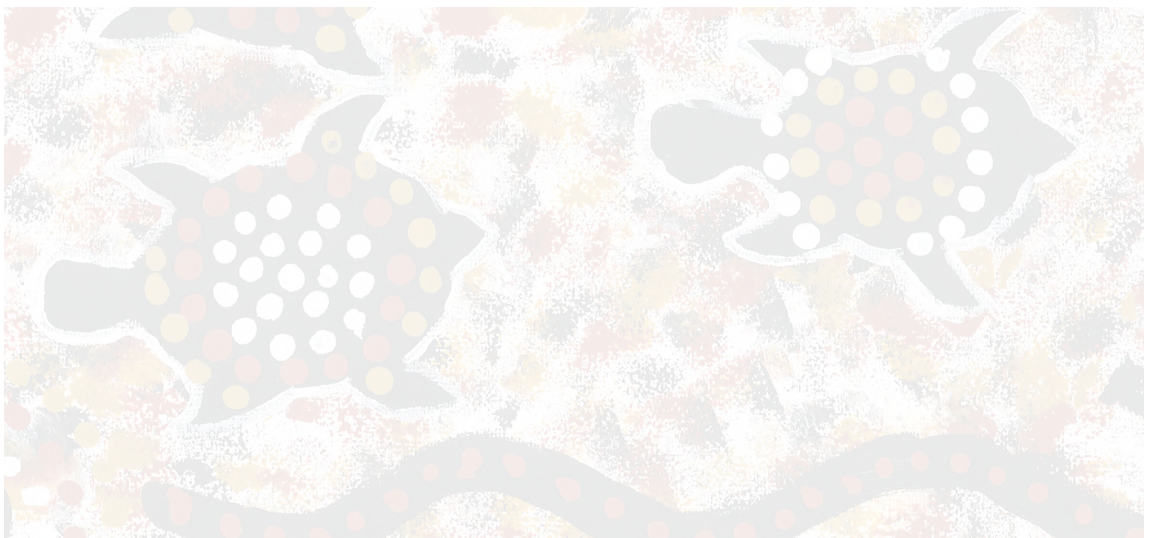
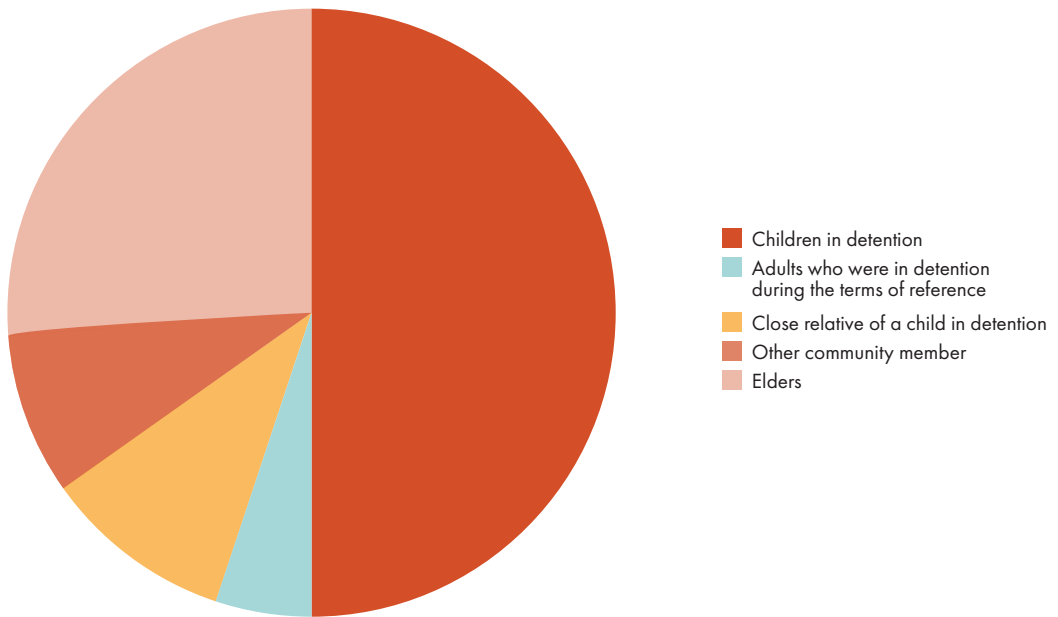
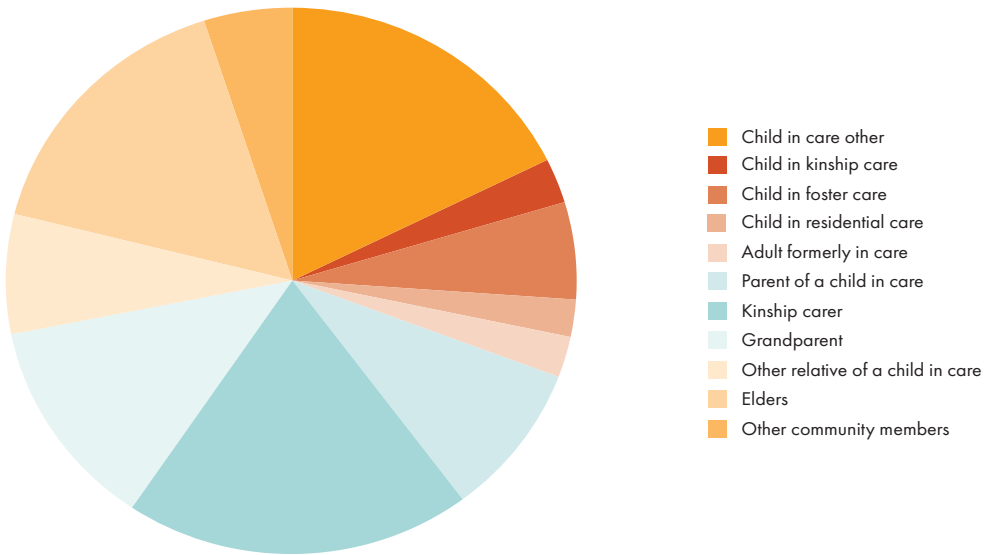


Figure 2.3: Breakdown of people providing a personal story about care



## WHAT PEOPLE TOLD THE COMMISSION

People contacted the Commission to tell their own story, or that of their family or community. Almost all said they were telling their story for the same reason: because they believed the child protection and youth justice systems were failing children and they did not want other children and families to suffer as they had.

*'I am providing this statement after some months of reflection about whether or not to do so. However, I feel that my experiences at Don Dale shaped me and are a big part of the reason I find myself still in the correction system as an adult. I provide this statement in the hope the Commission will use it to protect the next generation of children going through the detention system in the Northern Territory.'*

Person formerly in youth detention, aged 26

The Commission did not instruct people on how to prepare or construct their statements. The information in this chapter summarises the concerns people wanted to raise with the Commission by general themes and are arranged under headings which reflect what people told the Commission about what they thought, felt or experienced. The headings are descriptive and do not reflect any findings of fact by the Commission.

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## EXPERIENCE CHILD PROTECTION

People who provided personal stories to the Commission said that they felt that the child protection system in the Northern Territory fails to protect children and can even harm them.

People were scathing about the Department of Children and Families (now Territory Families, and called 'Welfare' in this chapter). They told the Commission that Welfare fails to listen to them. They spoke of poor communication and decisions made by Welfare, which they considered to be arbitrary. They said that caseworkers were constantly changing and they lacked support. They said that they believed that children's needs were not being addressed, and parents and other carers were not being supported to look after the children in their care.

The Commission heard from 79 children and young people who were in care at the time they provided their personal story and 11 adults who had been in care during the period covered by the Commission's Terms of Reference. All but two spoke of their experience of care as almost entirely negative.

Children and young people said they suffered trauma as a result of the act of removal and that it was the worst day of their lives. Most children said they did not understand why they were being removed from their families, where they were going or for how long. Children spoke of the uncertainty of multiple placements and their feelings of powerlessness and frustration at having no input into where they were placed. They spoke of residential care houses as places where they felt lonely, angry and unsafe. Their perception was that they had ever-changing caseworkers who moved in and out of their lives while having little contact with them.

At times, children and young people said that they recognised good experiences while in care. They spoke of the caseworker who took the time to get to know them, a holiday, the one positive placement. Most people referred to good experiences as occasional and rare.

Children and young people in care said that they lived in fear and felt powerless and frustrated at being unable to change their situation. Of the 90 children and young people who were or had been in care 51 alleged they had experienced abusive treatment ranging from threatening words from carers to serious sexual and physical assaults by foster carers, care workers and other children in care. Stories of this nature led the Commission to investigate and obtain evidence about children's experience of abuse in care, discussed in Chapter 36 (Sexual health and harm).

Children and young people said that they recognised there had been problems in their families when they were removed, but almost all said they thought their lives would have been better if they had stayed with their families. Running through the personal stories of many children and young people in care was a hunger to live with people who loved and cared for them and people they loved and cared for, rather than people who merely attended to their basic needs for which they were paid. Adults who spoke of being in care as children recounted going back to their families and communities as soon as they were able to return.

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## Another 'Stolen Generation'

Many Aboriginal adults who provided their personal story to the Commission spoke of a new Stolen Generation.

*'One time they dragged [my son] out from under a sofa bed. There were six police officers. He was calling out "Mum, I love you. Help me" I said "There's nothing I can do, son". Then he was yelling "You don't love me. You hate me" I sat crying, shaking and wanting to throw up. That's when I had a recognition, sitting in the driveway that day, of what happened with our grandparents and the Stolen Generation.'*

Parent of a child in care

*'We want Welfare to stop coming in like a snake and taking our children. Welfare should come and sit with us, as a community, and work with us to support these kids. They should be placed with Warlpiri families. It is important so they can know their language, their ceremonies, their family, their culture. It is important because we have seen what has happened when this doesn't happen. That was the Stolen Generations. Those kids from Stolen Generations grew up not knowing who they are, not knowing family and where they come from. Kids need to know this to lead our community when they grow up.'*

Warlpiri Elder

## Stories of removal

In their personal stories, people said they suffered greatly when they or their children were removed. People spoke of being taken from school, being taken by police, of being misled by Welfare about where they were going and for how long. Stories of removal were told in vivid and active terms.

*'[T]he police turned up at our unit. When they came in I sat down by the fridge with my children in my arms and told them, "You're not taking my babies". One cop stood by the sliding door with one foot inside and said "If you don't hand them over you're going to be arrested". That policeman had his hand on his right hip over a gun or a taser or something. It was like he was ready to pull it out and shoot me. That's what really intimidated me to come inside with the babies and hand them over. He was a big copper with body armour and everything. It was like they were there for terrorists or something. I sat there the whole day with [my daughter]'s dress and [son]'s shirt. I couldn't leave the house without their shirt and dress for well over a year. I still to this day have their shirt and dress in a pillowcase ... that I sleep with every night.'*

Mother of children in care

*'When Welfare came to [my community] to pack [my granddaughter]'s things ... It made me feel very bad. I felt shame. It felt like they were doing this to attack me. Whenever things like this happen especially in my family, I just see a death. I see a death in me. I can't take it anymore. It's just too shaming. It's like heart attack. It is going to put me dead.'*

Grandparent carer

## Not being properly cared for

Elders within communities and some parents acknowledged in their personal stories that there are children who are not being properly cared for. However, they also said that people should be supported to fulfil their responsibilities as parents, rather than having their children removed.

*'Our parents were here and strong, but some parents are lacking little things. Some parents are staying in Darwin, in Nhulunbuy, drinking and leaving their kids with different family members. Everyone involved, including family with whom children are left, need to understand that these people have responsibility to act like parents and look after them. It's a hard one – keeping their wellbeing. Maybe there is a need for an agreement between the parents and kinship carers that make it clear so that different people need to know who has to do what to benefit the little children.'*

Yolgnu Elder

## Parents and carers want help but don't feel they receive it

Many parents and other carers who told their story to the Commission said they had sought help from Welfare prior to the removal of their children. While some acknowledged they had received some help, none said that they had received the help they needed to address their own issues as parents or the problems their children faced. Similarly, kinship and foster carers who were struggling with children in their care also told the Commission they had sought help from Welfare but felt they did not receive it.

*'I assumed Welfare got involved and helped families that needed help or give direction, point people in the right direction, offer support. I'd say they should have got involved with us and done support. I would have come in from bush and we would have done those programs. Welfare are something from the dark, invisible, we can't see them. We only know their name. We think "Welfare – they come and take our kids". That's all we know about them. We don't know their rules.'*

Parent of children in care

*'DCF ... informed me when I got out of hospital that under no circumstances are you allowed to smack your child. After that, I lost control of the kids a bit. They weren't responding to verbal discipline. Family support coming into the home would have helped at this stage. I needed some practical support to teach me techniques to try to manage my kids' behaviour ... I also started having trouble with my eldest because she was going off-track. I pleaded for help with her from DCF after the police kept returning her to my house drunk. I was repeatedly told by [name] from DCF that [my daughter] was a teenager and I had to just let her go. That's when I realised I couldn't ask DCF for help anymore because I simply wasn't going to get it. I struggled alone because I didn't know where I could get help.'*

Parent of children in care

## Communication

Children and young people spoke consistently about not being consulted or listened to by Welfare, and their resulting frustration.

*'DCF never asked me what I wanted to do or where I wanted to live. They said I was too young but I knew what was going on. I grew up before my time.'*

Young person in care, aged 16

Some parents and kinship carers who told the Commission their story said there was no interpreter when their children were taken and in other dealings with Welfare. Others mentioned that difficulty with literacy was an impediment to understanding in their interactions with Welfare.

*'When our kids were put into our cousin-sister care, I had a police officer come up with file and they said you have to get a lawyer. That was it, then they drove off. The police didn't explain. I don't read. I couldn't read that file and understand. I looked at the paper and said this is too much for me. I need to get a lawyer and what would the lawyer even be for? I don't know how to get a lawyer.'*

Parent of children in care

*'Welfare came and they took [my children] away ... They had no interpreter, no counsellor, they didn't tell us where they were taking them, or for how long ... they just took them kids like that, snap.'*

Parent of a child in care

## Stories of lack of trust

The families of children and young people in care told the Commission they do not trust Welfare. Some said that Welfare did not 'talk straight' in its dealings with them.

*'DCF picked up the three kids early in the morning ... DCF said they had an appointment in town with a doctor. They were not sick. DCF had no paper, no orders. They were going to drop the kids off at [home community] afterwards they said ... The biggest one ... was crying. No contact from DCF, no letter, nothing.'*

Family member of children in care

*'In my experience, the removal of children often starts out with a lie. One example of this is when workers went to a school and told children they were picking them up to take them camping for the weekend. They then went to the children's home and told the parents the same thing, picked up the children's clothes and then took them to a care home. This practice is detrimental to the relationship children have with Territory Families staff and often results in the children being unwilling to engage with services, and when they do, they believe everything that is said to them is a lie.'*

Case worker

*'[People in my community] are very resistant to working with Territory Families. I tried to help them change that view in order for them to get the support they need. We tried to get people to view Territory Families workers as people who were trying to help them get their kids back and not people who are trying to take their kids away but it's very hard when that's not true.'*

Case worker

*'Communication with Territory Families and families was the wrong way. That's where the breakdown is. There is a barrier there. Communication is barrier. Territory Families trick them, talk in a roundabout way. Not a straight way. They say some problems you can fix them but what they're really saying was we're going to take those kids away. If they talk to us straight, family can think about what the option is. Father's family or mother's family. If they're straight with us, we can fight them. This system is new to the Yolgnu. It's like coming into a new world. Education about the system is important.'*

Yolgnu Elder and kinship carer

*'I always give him medication in the morning and afternoon but after he takes that medication he doesn't eat. He's lost 10 kilos over two weeks. I didn't tell the clinic because if I tell them I get into trouble. The clinic worker is a spy for DCF. They spy on kids who are losing weight or who have a sore and they take them away from the community.'*

Kinship carer of a child aged 9

## Stories of loss of culture and identity

Many Elders who told the Commission their personal story said that their primary concern was the loss of culture and identity a child suffers when removed from the community, and the impact of the loss of the child on the community and its future.

*'When kids get taken away family and children cry, cry, cry. Kids then grow up and forget their culture. Culture is the most important thing for Aborigines – for Yolgnu. We need our kids. We love our kids. That's our future generation. Who is going to look after my culture, my land, my sacred sites? We need to take our kids to our land and teach them. They will replace us when we die. Leave our children here, they are the future for us. I thought Stolen Generation was finished, but it's still going.'*

Yolgnu Elder and grandmother of a child in care.'

*'At Casuarina Mall one day, I saw [my nephew] coming towards me. I was waving at him that he didn't recognise me. He used to call me "Mum" I was happy to see him that day. All grown up. It really hurt me that he didn't recognise me. I was with my mother. I said, "[T]his is Jaja. This is your Jaja." He said, "What does Jaja mean?" I said, "It means your grandmother." They have missed a lot of the important funerals. They missed doing ceremony. They can't speak language. They didn't go to their maternal grandmother's funeral. A lot of their family have never seen them again since they were taken.'*

Aunt of young person in care

Children told the Commission they feel the loss of their culture when they go into care and the loss of the connection their culture gives them to their family and community.

*'This is the thing I miss most about being away from [my community] and the thing I worry about for [my brother] as well. I have missed out on ceremonies. I went to one funeral but have missed out on many more. I am worried that I am losing my links to my culture. I am worried [my brother] will never learn the language from our family.'*

Young person in care, aged 15

*'I don't speak any language. When family speak language I feel lost inside because I don't understand them. I have not been to men's ceremony or law. I think this is because of being with Welfare in foster care. I should have gone for law when I was about 12, 13 or 14. Now it's hard for me to try and talk about this with family. It feels like I have been left behind with law and culture.'*

Child in care, aged 17

## Scared and lonely

Many of the children who told their story to the Commission spoke of constant fear and loneliness in care.

*'People don't get how lonely it is in care. I feel like I was lonely every single day. You are just a kid and you are with a bunch of strangers. Every time you get used to a place they move you on and you are lonely all over again. I was also scared all the time in care too. DCF just thought I was being bad when I took off but I felt safe with my mum. I never felt safe in care.'*

Young person in care, aged 17

*'I went into Welfare when I was about 10 or 11. That was when I started doing crimes. I would rather be in Don Dale than be in Welfare. There was no safe place for me because even in jail I got bashed.'*

Young person in care, aged 16

*'The night before last I tucked an 11 year old child into bed and read her a story. When I had finished the story, she asked me, "Will it hurt?" I said, "I don't know little one, I don't know". She went on to ask, "Do boys have it too?" "No", was my reply. She went on to say, "My friends say that when I get one, lot of boys gonna look at me bad way". Yesterday afternoon, I watched NT Families take away this beautiful 11-year-old Indigenous child in my care, to have an Implanon rod inserted. All the while the Case Manager assuring her that, "This is for your protection darling". This child left the house scared and afraid.'*

Carer of a child in care

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## Preference for staying with family

Children and young people in care who spoke to the Commission generally told the Commission they wanted to live with their family. They said that despite the problems in their families they believed they were better off with family than in care. Just one young person said she thought her life improved when she was placed in care.

*'People don't understand what it does to you when you're a kid and all you want to do is be with your family and not a bunch of strangers. I know how I felt growing up without my parents and I don't want my son to ever feel like that. I want him always to feel loved and wanted. No carer ever made me feel like that.'*

Young person formerly care, aged 19

*'DCF did the wrong thing to take me away from my family. My parents did a better job looking after me than DCF. I was only a young teenager when I was taken away. I was taken away from a good life with my parents and siblings. All teenagers are cheeky and naughty from time to time. It doesn't mean they should be taken away from their parents.'*

Young person formerly in care, aged 20

*'Before I was with my parents. Obviously, no one is perfect, but they were only hitting and not bashing me. You know like, like if we spill something my mother would threaten us with a stick but not to hurt us. Even when they were angry, being at home was better than being in care.'*

Child in care, aged 14

*'I know now that the reason DCF took me and my brothers and sisters is because they say there was domestic violence, drug abuse and that we were neglected and living in a dirty house. That's not how I remember things. I was happy and I loved my family and the area where we lived. I didn't see the house as dirty, and I felt safe there. To me it was a normal, happy life, and then the government split us up.'*

Child in care, aged 15

*'I know of a young person who was taken from his parent's care at the age of 7. During the five years that this young person was in the care of the Department, he did not receive any psychiatric assessment, cognitive assessment, counselling, etc., and he still has not. Now Welfare thinks that this young person might have fetal alcohol syndrome or attention deficit hyperactivity disorder. This young person was moved from his parent's care because the parents weren't able to manage his complex behaviour needs.'*

Caseworker and family member of children in care

## Wanting to be loved

A strong theme that emerged from what children and young people who are or were in care told the Commission is that they want someone to care about them. They said that they expected more from a placement than just a roof over their heads and someone to meet their basic needs.

*'No matter whoever the kid is, have love and respect for that kid. If that kid comes into your care, it is for care. Not for you to get money and get paid. That's what it's about for Welfare. Think about that kid, the hardships they're going through. They have been treated wrong, they have been flogged, they have been hurt, they are doing things they don't even know what they're doing, and they're doing wrong things. They need love and to be shown the right way. – Young person who recently left care was having a really bad day, I was upset because I didn't want to move to the other house but I was starting to calm down. A new carer came in. I jokingly said, 'Oh, am I being left with another stranger?' He didn't see that as a joke because he said, 'Don't start with me bruss, because I dealt with more little shits than you'. I yelled that it was just a fucking joke and then we got into each other's faces.'*

Child in care, aged 14

*'I just want a normal family, not different people picking me up. With group home workers, they come and leave. You have your favourites and then they just leave. It's very hard, you like the staff and then the next person comes. The next person might be terrible. I just want somebody who cares about me and who will stay in my life. The system should listen to the kids. They need to genuinely care about them.'*

Child in care, aged 14

## SUGGESTIONS FOR CHANGES TO THE CHILD PROTECTION SYSTEMS

*'The whole system is fucked. They need to start again. Give kids a say. Kids shouldn't be taken away. If they can't live with their parents, live with someone else nearby. No point in trying to fix it. [Welfare] don't know what they're doing.'*

Young person formerly in care, aged 22

People who told the Commission their personal stories of care said that they believed that the child protection system in the Northern Territory requires fundamental change. The Commission received few suggestions for change within the current system. People in care, their families and communities said that they want the system to be redesigned, they want responsibility for children in care to be handed back to the community, and children and young people want to be heard on the decisions that govern their lives. Again, there was commonality on what those changes should be.

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## Families expressed a desire for greater consultation

Parents and carers said Welfare should meet with them and set out clearly what they need to do to keep their children or to have their children returned.

The strong recommendation from families and communities was that, prior to removing children, Welfare should meet with the family and/or community to discuss what support the parents or other carers may need, and if the child does need to be removed, to decide with whom the child should live.

*'Welfare should come and sit with us and with the parents of kids ... Welfare need to sit with us and work together to make the parents know their responsibilities and to help us look after the children.'*

Grandparent of a child in care

## Families requested support to care for children

People who told their story to the Commission indicated that parents and other family carers should be supported to care for the child and address any problems that are putting the child at risk.

*'Before taking a child – because that is not their child, they can keep their own children – especially before taking an Aboriginal child, they should provide support and care to the family. They should stop and think first. If that child is having a problem, the parents will be having a problem of their own. Medical and community support should be provided to the parents. They need help. Talk to the family first. Their family will have a better idea about how to care for the child. Otherwise it's like stealing something.'*

Grandparent carer

## Communities said they want their children to be kept in community

Elders and community groups stated that they wanted to take responsibility for their children and young people and that they wanted to remain in the community.

*'The most important thing for us is to keep kids here in community. Kids are suffering because they are being taken away from their families ... Kids have feelings. The feeling they need to know is that family love them. There is enough love and support in this community. You can't rip them away. It has to change.'*

Community group, Top End

*'I would love for community homes to be set up in Aboriginal communities, so that there is out-of-home care for these children which is actually still within the community. This should be done so that the young people will be in their cultural environment, still be able to attend school and still be engaged with the community, language and extended family. These homes have to be in a safe location.'*

Larrakia Elder and carer

*'Young kids are losing their language and culture by being in care and away from their communities. They are not getting a chance to spend time with their people. There is a need for an Aboriginal organisation to have overarching control of the Aboriginal child welfare system. A lot of the Aboriginal people do not like the current system because they see it like the Stolen Generation again. There is no doubt a need for providing care for children – however, the experience of displacement on the child is a real concern. When a child is taken out of the community, you need to think about whether they are old enough to cope with understanding about family and return to community after being removed.'*

Larrakia Elder and carer

## **Involvement of Elders**

Aboriginal people said that they saw a strong role for Elders in decision-making in child care and protection matters.

*'If Elders are formally involved, the relationship with the court, police and Welfare will get a lot better. Community needs to feel respect is being shown.'*

Elder, Top End community

*'I think it would be good if community Elders could get together with the families to sit down and talk about things when there are problems with looking after children and to see if they think the child needs to go to a foster carer or if there is another family member who can look after that child. I think that this would help those parents be supported and I think that this could be a way that families could make sure they talk about the things they need to do to look after their children, like make sure there is no violence around the children, that their houses are clean, that money is being spent in the right way and not on gambling or grog.'*

Elder, Central Australia

## EXPERIENCES OF DETENTION

*'I would change the whole layout and how [the detention centre] is run. I know it's jail and it's not meant to be fun. The first time I went there I felt sick and scared. The vibe in there is not a good feeling. The first second you walk through the doors you know you will get nothing good from this place. You know they won't be able to rehabilitate you here.'*

Young person formerly in detention, aged 17

The Commission received personal stories from 117 children and young people who were in detention during the period covered by the Commission's Terms of Reference.

Children and young people who were or had been in detention said that they perceived detention as a place with no fixed rules and where their daily lives alternated between boredom and abuse and where demeaning treatment was prevalent. They spoke of leaving prison angrier, harder and less engaged with society than when they arrived.

Children and young people indicated that they perceived punishment in detention as arbitrary. Whether or not you were punished for certain conduct, and the punishment you received, was said to be at the discretion of individual youth justice officers. It was said that punishment not only varied between officers but it was also perceived to depend on the whim of the particular officer at the time.

Children and young people also said that there was a double standard whereby youth justice officers could swear at them, but if they swore they would be punished. The commission received allegations from 24 children and young people that in their opinion youth justice officers goaded detainees into action and would then use the detainee's actions as an excuse to assault and/or punish them. Classification and the length of time they spent in isolation were other areas where children and young people said that they thought there were no rules and they had no means of influencing the outcome.

Children and young people told the Commission in personal stories that they had been assaulted by youth justice officers while in detention.

Children and young people differentiated between youth justice officers they perceived as good and those they thought of as bad. While they often had different experiences with the same officer, a few youth justice officers were mentioned in a number of stories as being abusive, demeaning and capricious in their treatment of detainees.

The commission heard from 94 children and young people who spoke about the conditions in the detention centres. Among their complaints were lack of access to water, poor-quality food, heat, and lack of access to the outdoors.

Some children and young people said that they felt constant fear while in detention. Children told the

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Commission they felt demeaned by the treatment they received in detention with many commenting that they felt they were treated as less than human. 15 children and young people said they had made a complaint about their treatment or the conditions in custody.

*'Did I complain? Nah, what's the point? I complained a few times at first but nothing happens. The guards just screw [the complaint] up and put it in the bin. Nothing changes except [the guards] pick on you even more.'*

Young person formerly in detention, aged 19

## **Guards 'make their own rules'**

Children and young people said to the Commission that they believed there was little certainty about the rules in detention, and that youth justice officers made their own rules.

*'The staff must be forced to follow the existing rules rather than letting them make their own rules. Rather than promoting violence by encouraging inmates to fight with their best mates, counselling should be provided to teach us inmates right and wrong. Officers must realise that we are children who are in detention and deserve to be treated accordingly.'*

Child in detention, aged 15

*'At Don Dale, it just felt like the way it was being run was a "free for all". The guards could do whatever they liked and there didn't seem to be many rules for them. Things were so unpredictable and it was extremely daunting for me.'*

Person formerly in youth detention, aged 26

## **Demeaning treatment**

Many children and young people who had been in detention made allegations of ill-treatment, and said their treatment in detention made them feel angry, scared and ashamed.

Children and young people spoke to the Commission about what they said was a lack of respect and concern in the way some youth justice officers spoke to them.

*'Some of [the guards] talk shit. They tell you, "Suck my dick", and all that shit. Like, they talk gay and all that, saying, "You're going to go to the big house and get raped", and all that shit.'*

Young person in detention, aged 16

*'One of the guards treats us like shit all the time. He disrespects us and threatens us. He swears at us a lot. He calls me a motherfucker and says "fuck" a lot. This makes me feel unsafe and also angry.'*

Young person in detention, aged 15

*'I was self-harming and then I just wanted to finish it all. I was feeling really bad about myself and being there. I told [the youth justice officer] I was going to kill myself. He just said, "Well, go on then. One less to worry about."*

Young person in detention, aged 17

Children and young people complained about the manner in which they said they were physically handled and by youth justice officers' responses to their requests for water or to go to the toilet.

*'I asked for some water. The guards came and grabbed me by the front of the shirt. They put me in the back cells. The back cell has no window, toilet or water. It only has a door nothing else. It is dark ... whenever I press the buzzer and ask to use the toilet, they ignore me. They think it is funny.'*

Young person in detention, aged 12

Children and young people in detention, particularly girls, complained about a perceived lack of privacy in detention and found strip searching humiliating and confronting.

*'I was only 13 years old. We got stripsearched by a ... guard and I felt really uncomfortable. I cried every night after that. They didn't let me call my mum until I had been in there two weeks ... I was in there by myself for two weeks because the other girls got sent to "at risk". In the old Don Dale, they weren't allowed to stripsearch you after a visit – only if you were leaving the centre. They used to stripsearch us after every visit. When I said, "You're not allowed to do this", the guards would turn around and say "it's ... orders!" One of the guards ... would open the door while we were having showers. She would open the door right up even if there were other girls waiting right there for a shower. She stopped doing it because someone bashed her for it ... There*

*was only one shower for the girls in Don Dale and so you had to wait for ages. You should be able to shower by yourself without someone watching you and keeping time.'*

Young person formerly in detention, aged 15

*'I can remember countless mornings and evenings being made to shower amongst the other kids with no privacy and watched by a staff member. No doors on the toilets, no curtains on the showers, and it was a degrading and embarrassing occurrence that I dreaded every day.'*

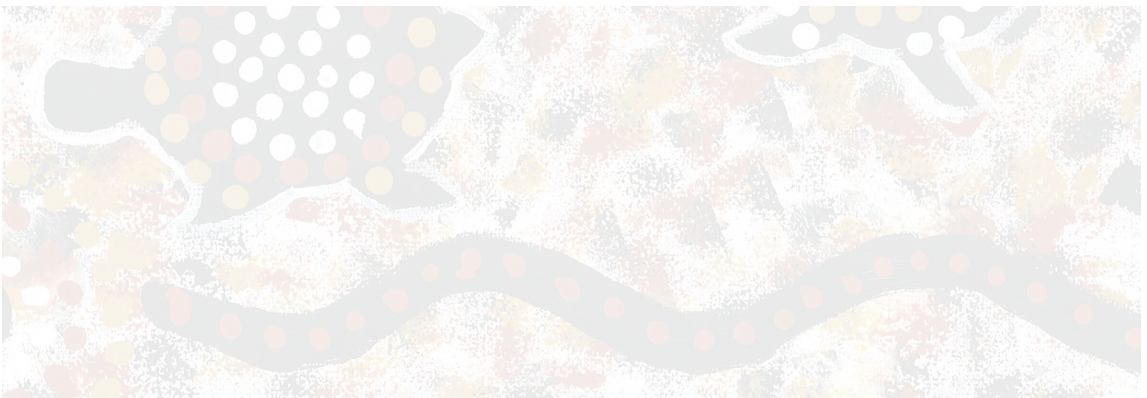
Young person formerly in detention, aged 26

## Stories of anxiety and fear

Children and young people said to the Commission that while they were in custody they often felt fearful or anxious.

*'When I was a child I was quite a small kid and very quiet. I was also suffering from mental health issues. In addition to schizophrenia (which was only recently diagnosed) I have suffered from anxiety, panic disorders and depression, and just felt bad about my life in general. I found the first few times in detention really hard. I was anxious and paranoid about being in a jail environment with people I didn't know. I just wanted to keep to myself ... I remember that when I would get into Don Dale, it would be as if a big dark shadow came over me. I can see now that not having my medication may have made me more vulnerable to depression. But I was also worried about being in a horrible place.'*

Young person formerly in detention, aged 26



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## Isolation and loneliness

Children and young people told the Commission that they felt it was particularly hard being in detention a long way from family and community. They said that often there was no one else in the detention centre from their community or language group and they felt they had no one they could talk to in detention.

*'[When I was taken to Don Dale] I missed my family and friends from [my community]. I felt angry and lonely all the time because I couldn't see my family. I could not call my mother on the phone very much because the reception is not good where she lives. I didn't want to get sent up to Don Dale because I didn't want to be away from my family.'*

Young person in detention, aged 16

*'My family ... is a long way away. I only use imagination to see their faces. It is too far away.'*

Young person in detention, aged 15

*'I was serving a sentence in Alice Springs detention. My mum was coming to visit me regularly at detention. Also my little sisters would come to see me too. It made me feel happy that I would see my mum and younger sisters and brother. One day ... a guard came and said to me, "[W]e have bad news. You're going to Darwin". I felt sad. They didn't give me a reason ... Now I am in Darwin and I can't see my family. I want to go back to Alice Springs and see my family and be near my home.'*

Young person in detention, 16 years old

## Stories of boredom

Children and young people in detention spoke often of boredom in detention, particularly when held in a high-security unit.

*'Most of the time we couldn't keep anything in our rooms. Nothing. No food. No shoes. No videos. No books or comics ... This was the worst thing about Don Dale. We got so frustrated with nothing to do. We would look at that roof and think bad things. About myself. About things to do. Sometimes I would see other kids stealing books or comics from the school. I think they just wanted to read them in their rooms'*

Young person formerly in detention, 18.

## Statements that detention did not rehabilitate

Children and young people who told their story to the Commission commented that, in their view, they had not been rehabilitated in custody. They said that they did not receive the education, counselling, treatment or other support needed to address their behaviour and to give them the tools for adulthood.

*'I thought Don Dale was going to make me better but I think it just made me tougher. I was on the streets and I was mad ... People say, "Look at that boy. He comes in and out of Don Dale". They would respect me. This was a new way of thinking after Don Dale.'*

Young person formerly in detention, aged 19

*'Nothing that happened to me in [detention] helped me on the outside. It just made things worse. I was on the ice real bad then and I was always angry ... I think I was angry all the time because of what happened to me in resicare but no one ever talked to me about that or helped me deal with it.'*

Young person formerly in detention, aged 23

## SUGGESTIONS FOR CHANGE TO YOUTH JUSTICE

### From community groups and Elders

*'We don't want others to clean up our backyard. We want to give them discipline "rapirri" way and get them back on track.'*

Yolgnu community group

In addition to personal stories from children and young people who are or were in detention, the Commission received stories from family members of those children and young people and from community groups who wanted to see the youth justice system change.

As was the case with their recommendations for the child protection system, Elders and other people from the communities from which the children and young people in detention have come wanted radical change.

The changes to the youth justice system sought by Elders and community groups were similar to the changes they sought to the child protection system. They said they wanted responsibility for their children, a role for Elders and to keep their children on country.

*'We think that it is important to bring back rapirri to our communities to help bring up our children in a good way. We need to send children who do the wrong thing to outstations, and give them Yolgnu law. We need to show them bush tucker, hunting, watch nature, tell stories of the places, the dreaming stories and how the beginning was created. Understand our tradition and teach them rapirri. We want to stop kids being taken to Don Dale. When they're sent there they miss out on ceremony and funerals they need to be here for because it is part of their family and ancestry. [We] should be funded to run rehab programs for kids that do the wrong thing...When the kids start getting used to living in jail they start thinking that could be a way of life. But that is really not the life. We need to stop them from getting to that world, that way of thinking.'*

Yolgnu community group

*'The answer to young people getting in trouble is not to just take our young people to jail. There are other options like taking them out bush, teaching them cultural knowledge and taking them away from problems in the community ... We also recommend to build a detention type place here on the [community] so kids are closer to their families – Aboriginal people – Aboriginal staff – train our people to be the workers. '*

Community group, Top End

*'We don't want our Yolngu children to go to Don Dale. We don't want that anymore. We need to start with Elders, strong leaders in the community to assist them. It's important to show our leadership – show our strong leadership spirit to solve what is happening in our community. There are strong leaders in my community to solve what is happening. We need a good way to support each other to show our commitment to stand up with our children and young people. When I attend police meetings, I notice the difference in that young people act differently when an elderly person is there. This because we are the backbone of our community. We know what needs to be done with talking to family and clan leaders. There many positive things happening within [my community]. We have been helping fathers and mothers in family violence programs to learn more about why violence is not good for the clan, the family and the community. We need to make them understand why violence makes children sad, how they are missing out on health and wellbeing and protection. We need support to fund and build a rehab centre – our own rehab centre for Yolngu people. It will be run by Yolngu people to talk to our children and teach them what they should be. We want the kids to be here – make them satisfied. There is a need to remove conflict. Help with their emotional and social issues in their real life.'*

Yolgnu Elder

*'This statement is made to tell you how we in [my community] want to look after our young people who get into trouble. We would like to see opportunities for young*

*people in trouble to be able to stay here and attend ceremonies. If they are sentenced to a term to require them to be released into our care to take them to country to work both cultural and work skills. Teaching and reminding them who they are, building their self-esteem – until they have that they will not be strong. We can teach this. We have Elders in this community who have tertiary education and qualifications who can deliver this service. We just need the support of the government and the courts to assist us to do this.'*

Elder, Top End

## From children and young people

Children and young people in detention also said that they thought the youth justice system should be changed so that they could serve their sentence in their community, close to family and culture.

*'I should have been punished by my Elders not police. I should be taken to ceremony for one year to learn all the discipline. We have our own law.'*

Young person in detention, aged 17

*'They should have something on community for the boys rather than being brought to Darwin. They should move to outstation and stop there, not Darwin. There should be a work camp or something in the community to clear my mind. That would help me to follow the rules rather than coming to Darwin.'*

Young person in detention, aged 19

They also had concrete suggestions for immediate changes to detention: air conditioning, decent food, privacy in toilets and showers, access to water and outdoor space. They indicated that they wanted a clear set of rules about conduct in detention, and for those rules to be explained to them and enforced consistently.

Children and young people said that they wanted more opportunities for education and training.

*'I want to work, be a mechanic. Fixing cars and generator engines. Help me get a job out bush. There's no chance to get that experience here. I want to get out and get a job straight away, no messing around. I want to do something real good to keep me away from drugs and alcohol and trouble.'*

Young person in detention, aged 17

And there was one particular concrete change sought by almost all the younger boys in detention who made recommendations for change.

*'I don't know why they have to keep us inside all the time. We should have more football.'*

Child in detention, aged 13

*'Sport and football make young people happy – no fighting like that when we are playing football.'*

Child in detention, aged 14

## GIVING CHILDREN AND YOUNG PEOPLE A VOICE IN FUTURE

Article 12 of the *United Nations Convention on the Rights of the Child* provides that all people under the age of 18 have the right to express their views and have their views considered in all matters affecting them, including the development of laws and policies.<sup>10</sup> The *Care and Protection of Children Act* provides that children should be able to express their wishes and views when a decision is made involving the child.<sup>11</sup> However, the Commission has found nothing in the laws, policies and practices relating to child protection and youth justice in the Northern Territory to suggest the views of children and young people have been or are taken into account in developing and implementing laws, policies and procedures about matters that concern them.<sup>12</sup> The Commission's inquiries into the child protection and youth justice systems have been greatly assisted by the personal stories of those most affected by those systems, in particular the stories of children and young people who are or were in care or detention.

### **Recommendation 2.1**

**The Northern Territory Government establish mechanisms for children and young people in care and detention to be able to express their views in the development and implementation of laws and policies affecting them, and that those views be given due weight.**

### **Recommendation 2.2**

**The Northern Territory Government:**

- **amend the legislation in the areas of child protection and youth detention to require that children and young people be provided with meaningful opportunities to express their views on the operation of, and amendments to, that legislation and any policy developed to implement that legislation.**
- **Establish a mechanism – for example, a representative council of children in out of home care and youth detention – to enable children and young people to participate in the development and implementation of policy relating to, and any rules of, those institutions.**

- **Establish a mechanism – for example, a representative council of children in out of home care and youth detention – to enable children and young people to participate in the development and implementation of policy relating to, and any rules of, those institutions.**



## ENDNOTES

- <sup>1</sup> Australian Institute of Health and Welfare , 2016, *Vulnerable young people: interactions across homelessness, youth justice and child protection – 1 July 2011 to 30 June 2015*, Canberra, pp. 7-11 and 21-25.
- <sup>2</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Vulnerable Witness Policy and Procedure*, pp. 2-3.
- <sup>3</sup> Australian Institute of Health and Welfare, 2016, *Vulnerable young people: interactions across homelessness, youth justice and child protection – 1 July 2011 to 30 June 2015*, Canberra, pp. 8 , 23.
- <sup>4</sup> Pineles, S, Mustoufi, S, Ready, C, Street, A, Griffin, M, Resich P, 2011, 'Trauma, Reactivity, Avoidant Coping, and PTSD Symptoms: A Moderating Relationship?', *Journal of Abnormal Psychology*, vol. 120(1), p. 242.
- <sup>5</sup> Young person, aged 20, speaking with the Commission about why she no longer wanted to give evidence in the care hearings.
- <sup>6</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Amended Practice Guideline 2*, 13 January 2017.
- <sup>7</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Non-Publication Directions* NPD01/17, NPD02/17, 1NPD5/17 and *Amended Practice Guideline 3*, 22 February 2017.
- <sup>8</sup> Royal Commission into the Protection and Detention of Children in the Northern Territory, *Non-Publication Direction* NPD02/17.
- <sup>9</sup> In relation to the proportion of Aboriginal people in the Northern Territory: Australian Bureau of Statistics, '*Estimates of Aboriginal and Torres Strait Islander Australians, June 2011*', Australian Bureau of Statistics [website], 30 August 2013, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3238.0.55.001/>>, accessed 1 February 2017. Based on the 2011 Census of Population and Housing. In relation to the proportion of the population of youth detention who are Aboriginal: Northern Territory Department of Correctional Services, 2016, *Northern Territory Department of Correctional Services Annual Statistics 2014–15*, Darwin, Northern Territory Government, Darwin, p. 9. In relation to the proportion of young people in out-of-home care in the Northern Territory: Office of the Children's Commissioner Northern Territory, 2016, *Annual Report 2015-2016*, Northern Territory Government, Darwin, p. 64.
- <sup>10</sup> The United Nations Convention on the Rights of the Child was ratified by Australia in 1990.
- <sup>11</sup> The Commission notes that a statement containing a child's views and wishes must be filed in the Family Matters Jurisdiction of the Local Court. The Local Court Family Matters Jurisdiction has a Practice Direction dated 1 July 2015 which requires that, where a legal representative has been appointed for a child, the representative is to file and serve a statement of the child's views and wishes as soon as practicable. Where an application for an order about the care of a child is contested and is directed for a case conference, the statement of views and wishes must be filed and served at least 2 working days before the conference. The Commission has not been informed how effective the case conference is in hearing from children or how it works from the perspective of the Court or other participants in the hearing.
- <sup>12</sup> *Care and Protection of Children Act 2007* (NT) s11.



# 3

## CONTEXT AND CHALLENGES



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# CONTEXT AND CHALLENGES

## INTRODUCTION

Youth justice and child protection systems come into play when community safeguards, parental responsibility, government services and other protective factors fail to ensure the safety and wellbeing of children and young people or to prevent them from committing crimes.

The Commission acknowledges the challenging environment in which these systems operate in the Northern Territory, and the complex range of intersecting factors that affect the extent to which children engage with youth justice and child protection services. It also acknowledges that certain contributing factors cause Aboriginal people to engage with these systems at a much greater rate than non-Aboriginal people.

Lasting, sustainable improvements to the child protection and youth justice systems must be built on understanding the day-to-day realities of life in the Northern Territory. This includes the challenges of delivering services across a sparsely populated region with geographically dispersed communities, including significant Aboriginal populations comprising many tribal groups and cultures. It means understanding the impact of the high prevalence of disability, health-related problems, and low educational attainment and participation in certain areas of the Territory.

It also requires an understanding of the deep scars caused by the historical legacy of colonisation and control of Aboriginal people, and the ongoing impacts of this legacy. For example, while many people understand the entrenched socio-economic disparities between Aboriginal and non-Aboriginal people caused by historical events, there has been less focus on intergenerational trauma and the way it manifests today.

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It is important to understand the risk factors for children and young people in the Northern Territory, such as high rates of substance abuse, other addictions and family violence, and how these contribute significantly to young people becoming engaged in the youth justice and child protection systems.

The Commission further acknowledges that it is crucial to understand that Aboriginal culture, kinship systems and family are part of the solution, as discussed in Chapter 4 (Challenges for Aboriginal people in the Northern Territory).

No one factor alone provides a total explanation for children and young people's involvement in the youth justice or child protection systems in the Northern Territory. Rather, a complex range of factors is relevant. The Commission recognises that the prevalence of these factors does not excuse or justify unacceptable behaviours or diminish the importance of parents and children taking personal responsibility for their actions. However, understanding these factors and how they interact with each other is key to addressing the focus of this Inquiry.

## RATES OF CRIME AND ENGAGEMENT IN THE YOUTH JUSTICE AND CHILD PROTECTION SYSTEMS

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) commented in its submission to the Commission that *'the escalating rate of removal of Aboriginal and Torres Strait Islander children is a national crisis'*.<sup>1</sup>

Aboriginal and Torres Strait Islander children and young people are grossly overrepresented in the youth justice system across Australia. While less than 6% of Australians aged 10–17 are Aboriginal or Torres Strait Islander, on an average day in Australia in 2015–16 they made up over half the population in detention.<sup>2</sup>

This statistic is particularly stark in the Northern Territory which has the highest rate of children and young people in detention or under community-based supervision of all states and territories in Australia.<sup>3</sup>

The rate of children and young people aged 10–17 in detention on an average day in the Northern Territory is 18 per 10,000 compared to a national average of 3 per 10,000.<sup>4</sup> The rate of children and young people under community-based supervision in the Northern Territory on an average day is 40 per 10,000 compared to a national average of 18 per 10,000.<sup>5</sup>

The former Northern Territory Correctional Services Commissioner told the Commission:

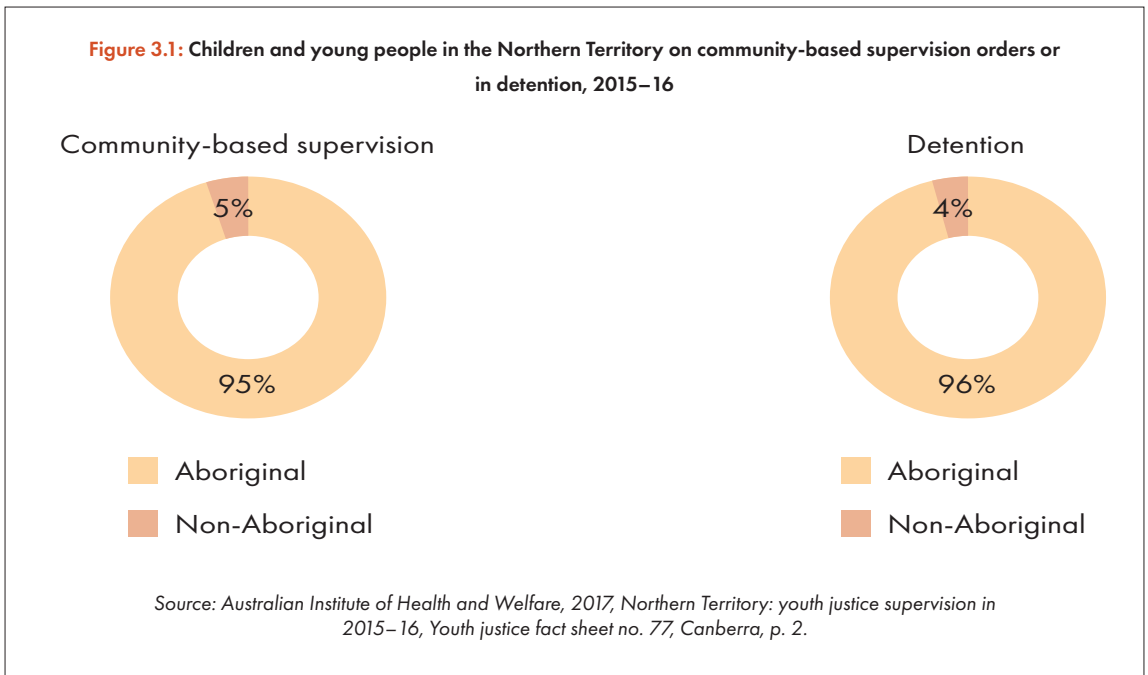
*'I think in the last September [2016] quarter the imprisonment rate in the Northern Territory is 934 per 100,000, which would be one of the worst figures in the world ... I often wonder – now, I'm not in the system, but I often wonder what it's going to be like*

in another five years here in the Northern Territory.<sup>6</sup>

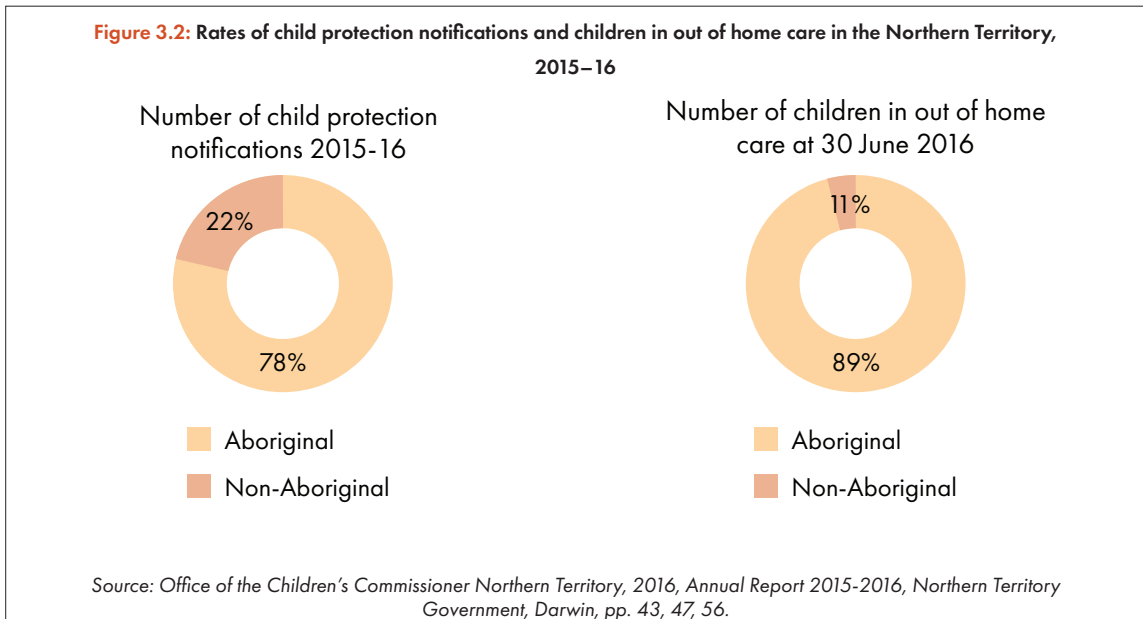
While these rates are extremely disturbing, it is worth remembering that due to the small population in the Northern Territory, the absolute number of young people engaged in the youth justice system is still relatively small. In 2016, there were approximately 29,106 children and young people between the ages of 10 and 19 in the Northern Territory.<sup>7</sup> In 2015–16, 754 children or young people were apprehended for offences across the Northern Territory.<sup>8</sup>

In 2015–16, Aboriginal children and young people aged 10–17 in the Northern Territory were approximately 26 times more likely than non-Aboriginal children and young people to be in detention or under community-based supervision.<sup>9</sup>

Figure 3.1 shows that in 2015–16, Aboriginal children and young people comprised 95% and 96% of those under community-based supervision or detention respectively in the Northern Territory.<sup>10</sup> This is despite Aboriginal children and young people making up only 45% of the total population aged 10-17 in the Northern Territory.<sup>11</sup>



Aboriginal children and young people in the Northern Territory are also overrepresented in the child protection system, as shown in Figure 3.2.



Aboriginal children are also overrepresented in the number of child deaths in the Northern Territory. Of the 242 child deaths recorded between 2011 and 2015, nearly three-quarters, or 74.4%, were Aboriginal children. This is despite the fact that Aboriginal children made up only 41% of children in the Northern Territory in that time.<sup>12</sup>

The overrepresentation of Aboriginal children and young people in the youth justice system occurs in a context in which there is considerable community concern about crime rates.

In 2017, the *Report on Government Services* found that Territorians felt less safe at night in their homes, in public places, walking alone and catching public transport during the day than people in other states and territories across Australia.<sup>13</sup> Between 2015 and 2016, households in the Northern Territory experienced break-ins and attempted break-ins at a much higher rate than the national average.<sup>14</sup> An estimated 8.2% of households in the Northern Territory experienced a break-in, while the national rate was 2.5%. Further, 4.2% of households in the Northern Territory experienced an attempted break-in, while the national rate was 2.1%.<sup>15</sup>

Perceptions of community safety are heavily influenced by the way crime is reported in the media. The Commission received evidence that throughout the relevant period, media reporting ‘heightened the public’s concern for personal and community safety’.<sup>16</sup> The Commission heard that the media in the Northern Territory have regularly published articles in the nature of ‘youth crime waves’ and ‘gangs out of control’.<sup>17</sup> The Commission also observed that local media in the Northern Territory published the names and photographs of children on many occasions.<sup>18</sup>

This community sentiment is despite statistical evidence that in the Northern Territory, children and young people aged 10–17 were less likely to commit crimes than the adult population.<sup>19</sup> Youth crime rates in the Northern Territory have also decreased significantly over the past five years, as shown in Table 3.1.<sup>20</sup>

**Table 3.1: Rate per 100,000 of persons aged 10-17, offending in the Northern Territory, 2008–09 to 2015–16**

Youth Offender Rate, Northern Territory

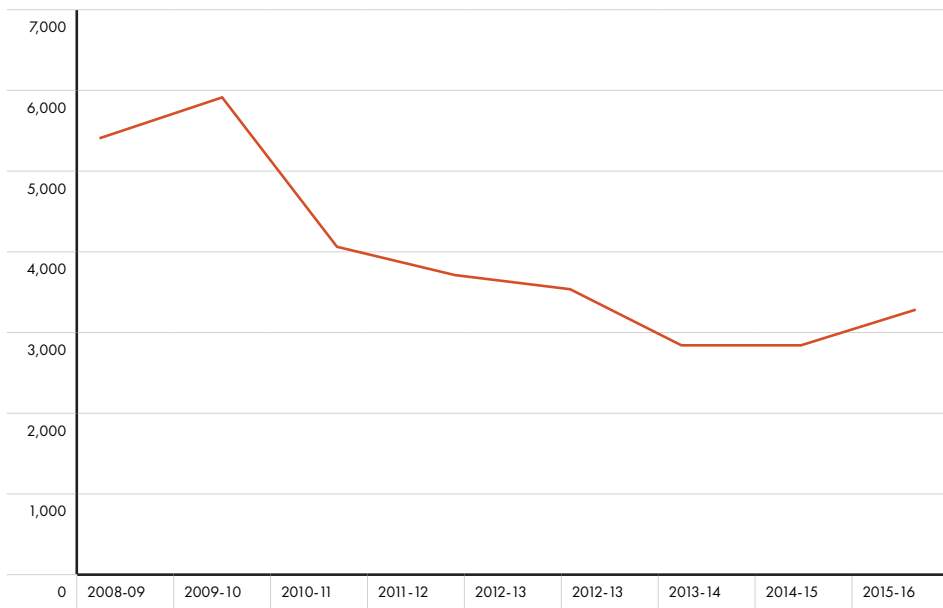
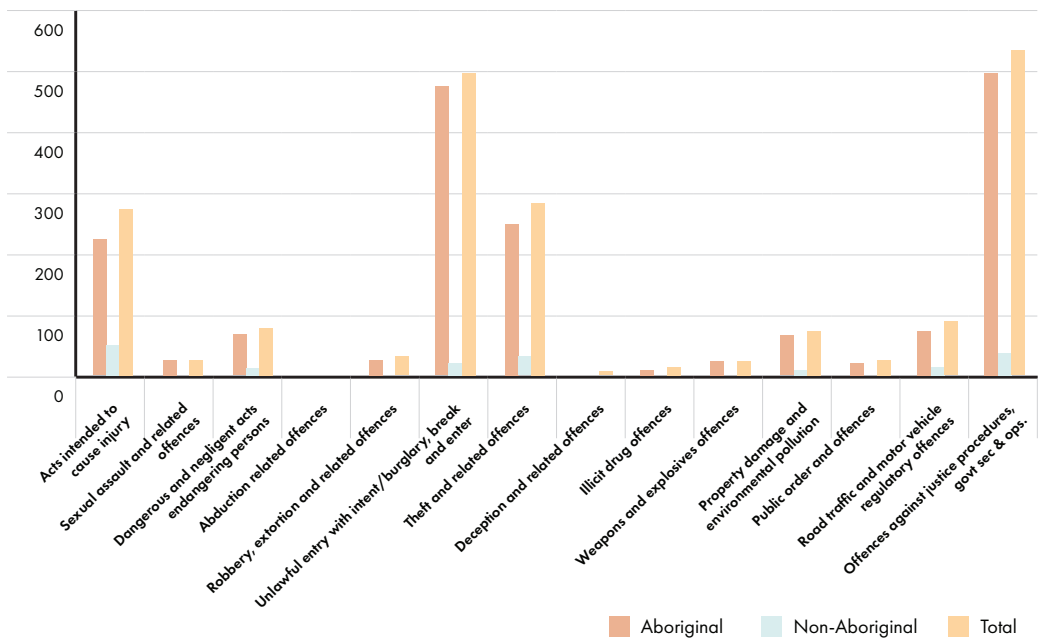


Table 3.2 shows that in 2015–16 the most common offences committed by young people were administrative offences, which includes breach of court order, breach of parole and escape from custody.<sup>21</sup> This was followed by unlawful entry with intent, burglary, and break and enter, then theft and related offences.<sup>22</sup>



**Table 3.2: Youth offences committed in the Northern Territory, 2015–16**



The minor nature of some of their crimes suggests there are many children and young people who should not be in youth detention and that it is neither beneficial to them nor the wider community for them to be detained. Eileen Baldry, Professor of Criminology at the University of New South Wales, told the Commission:

*'... it's quite common for young people to start off in the criminal justice system not being violent and for that to escalate, of course, in the way in which they become enmeshed in the criminal justice system and are taught by others as well.'*<sup>23</sup>

Two-thirds of children and young people in youth detention centres in the Northern Territory were in custody on remand,<sup>24</sup> where *'they are then introduced to the world of criminal justice and corrections and being managed'*.<sup>25</sup>

The Commission recognises that some children and young people commit, and will continue to commit, serious crimes that warrant detention. One focus of this report is on reducing the number of children and young people who enter youth detention centres by diverting those who initially commit minor offences to prevent their escalation to more serious crimes. As Vincent Schiraldi, Senior Research Fellow, Harvard Kennedy School, told the Commission in evidence:

*'Minor offending by youth, especially boys, is actually quite normal behaviour. Most kids do it. But it tends to be only those from minority backgrounds and disadvantage who are punished for it through the juvenile/criminal justice system.'*<sup>26</sup>

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## VICTIMS OF CRIME

The Commission particularly acknowledges the impact of crime on victims. Being the target of a crime can be a traumatic experience that can have a profound impact on a person's security and wellbeing. It can have long-lasting consequences. Victims are understandably angry and frustrated by the continued safety risks that youth crime poses in the Northern Territory.

The Commission met with victims of crime in Alice Springs and Darwin to hear directly how the experience has affected their day-to-day lives. A couple who were in a car accident with a stolen vehicle under police pursuit told the Commission that they had to use their superannuation to purchase a new vehicle, and both suffered injuries. One sustained injuries so severe she has been forced to retire early from a job that she loved.<sup>27</sup> The couple told the Commission they believe that *'more needs to be done about young fellas'* and *'the treatment that youth receive in Don Dale is not helping'*.<sup>28</sup>

The Commission also met with a number of people whose homes had been broken into and robbed, one of the most common offences committed in the Northern Territory. They described the emotional, psychological and financial impact it had on their lives. One victim from Alice Springs told the Commission that his wife is so afraid that she now needs to sleep with the light on. Having their home broken into has made them feel *'very paranoid'*, living in constant fear that their home will be broken into again.<sup>29</sup> The Commission also spoke to a victim from Darwin who feels her life has been ruined after having her home broken into, and has considered leaving the Territory.<sup>30</sup> The incident has had a severe impact on her mental and physical health as she is suffering from depression and anxiety, has used up all of her sick leave and no longer feels safe in her own home.<sup>31</sup>

In a submission to the Commission, Victims of Crime Northern Territory stated:

*In the current Northern Territory paradigm the victims' perspective is not really considered or acknowledged unless they are a witness for the prosecution or presenting an impact statement post-conviction, we consider it a possibility that this has led to a regime where the politicians and the media overemphasise the role of punishment and retribution in sentencing to assuage the unmet needs of the victims to be acknowledged and healed.*<sup>32</sup>

This sentiment was reiterated by some of the victims themselves, one of whom stated *'victims are forgotten people here in Darwin'*.<sup>33</sup> Another victim told the Commission she was unable to go to court to observe the proceedings against the offenders and was not able to complete a victim impact statement as the notification did not arrive in the mail until after the hearing.<sup>34</sup>

Ultimately, one of the most critical aims of any reforms to the current system of youth justice must improve community safety and reduce crime in the Northern Territory. Under the *Youth Justice Act (NT)* *'a balanced approach must be taken between the needs of the youth, the rights of any victim of the youth's offence and the interests of the community'*.<sup>35</sup> Effective youth justice systems aimed at rehabilitating children and young people are essential to ensuring community safety.

When recidivism rates are high, as they are in the Northern Territory, and children and young people

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are often progressing to adult corrections, the logical conclusion is that the system is failing.<sup>36</sup> It is not only failing these children and young people but failing to keep the community safe.

Striking the right balance between implementing reform to the youth justice system and ensuring community safety is of utmost importance to the Commission. The recommendations in this report have been carefully considered in the context of rehabilitating and improving the lives of these young offenders without compromising community safety.

Alternatives to the current youth justice system that take into account the needs of the victim and are aimed at reducing recidivism are discussed in greater detail in Chapter 27 (Reshaping youth justice) and Chapter 28 (A new model for youth detention).

## SOCIO-ECONOMIC CONDITIONS

### Remoteness from major centres

Remoteness is a major defining feature of the Northern Territory, and it creates many challenges in the delivery of services.

The Northern Territory covers approximately 1.4 million square kilometres, representing approximately 20% of Australia's total landmass.<sup>37</sup> However, it is the least densely populated jurisdiction in Australia.<sup>38</sup>

The Australian Bureau of Statistics uses a 'remoteness structure' that divides Australia into broad geographic regions based on the measurement of road distances to service centres. Other than Darwin, which is categorised as 'outer regional', the entire Northern Territory is classified as either 'remote' or 'very remote'.

The Commission acknowledges that there is a considerable difference between the experience of remoteness in places like Alice Springs and Tennant Creek and that in very isolated communities like Lajamanu or Timber Creek, where disadvantage compounds with the greater distance from a major town centre.

Around 80% of the Northern Territory's 58,248 Aboriginal people<sup>39</sup> reside in areas classified as remote or very remote – that is, outside Darwin.

There are more than 1,000 communities on the mainland and islands of the Northern Territory, many of which are geographically dispersed, isolated, and subject to seasonal conditions that make them difficult to access at certain times.

It is not unusual to drive for up to eight hours from urban areas to reach some of these communities. Travel by air is an option, but the cost is prohibitive for most people, particularly as the commercial airlines do not service many communities. Chartering becomes the only option available for that type of travel.

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The Commission observed the effect of remoteness in the Northern Territory during community engagement and consultations. Communities distant from the larger towns have:

- fewer health services
- less economic development, resulting in fewer jobs
- limited educational opportunities, and
- inadequate housing and housing services.

On an average day, children and young people living in remote or very remote areas are twice as likely as those in major cities to be in out of home care,<sup>40</sup> and six times as likely to be under supervision in the youth justice system.<sup>41</sup> Those in very remote areas are 10 times as likely to be under supervision in the youth justice system.<sup>42</sup>

More than two-thirds, or 70.7%, of child deaths in the Northern Territory involved children residing outside the Greater Darwin area.<sup>43</sup>

The Commission received evidence from the Northern Territory Government indicating that the issue of remoteness affects the recruitment and retention of staff.<sup>44</sup> While recruitment in remote areas is an issue in most jurisdictions in Australia, *'the effects are magnified'* in the Northern Territory.<sup>45</sup>

The development of children and young people in remote areas is compromised when there is a revolving door of teachers, doctors, counsellors, sporting coaches and other people outside their families with whom they interact and build relationships.

Remote communities outside centres like Alice Springs and Katherine cannot provide the same access to education and employment that major cities and regional areas can. This means that the families of children and young people are faced with an invidious decision of having to leave their communities to access these basic opportunities.

The Commonwealth Government, together with the Northern Territory Government, recognise that *'Aboriginal people in remote and very remote communities experience significantly poorer life outcomes than the rest of the nation, as measured by the Council of Australian Governments' Closing the Gap targets.*<sup>46</sup>

To address this disadvantage, they entered into a National Partnership Agreement on Northern Territory Remote Aboriginal Investment which provides that:

*[t]he Commonwealth and the Northern Territory have a mutual interest in improving outcomes for Aboriginal people and need to work together to achieve those outcomes, ensuring funding goes to programmes and services that deliver on the ground and benefit Aboriginal people in the remote Northern Territory.*<sup>47</sup>

The National Partnership Agreement commenced on 21 April 2016 and will expire on 30 June 2022. It is budgeted to provide \$986.094 million to the Northern Territory.<sup>48</sup> This and other funding arrangements in the Northern Territory are discussed in detail in Chapter 6 (Funding and expenditure).

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## Education

Education is a fundamental human right and shapes how children and young people grow and transition into adulthood.<sup>49</sup> Children's sense of belonging to school is an important protective factor for their mental health and wellbeing as it can provide them with a sense of stability and security through periods of stress and challenge.<sup>50</sup>

Every child and young person across Australia has the right to receive a quality education, yet the Northern Territory continues to have the lowest literacy and numeracy rates in Australia.<sup>51</sup> The Commission heard evidence that the two biggest triggers for children and young people ending up in the youth justice or child protection systems are poor parenting and little education.<sup>52</sup>

The 2016 NAPLAN *National Report* found that Year 3 students in the Northern Territory achieved only 70–78% of the national minimum standards for reading, grammar, punctuation, spelling, numeracy and literacy, compared with at least 91% in all other Australian jurisdictions.<sup>53</sup>

The Commission accepts that learning outcomes are impacted by the interaction of many factors, including socio-economic status and health.<sup>54</sup>

The Northern Territory Department of Education is responsible for the delivery of educational services and outcomes to children and young people across the Northern Territory, including in youth detention centres. The department provides services to more than 32,000 school-aged children across 151 government schools, covering areas from early education programs to post-schooling pathways.<sup>55</sup> It also regulates and funds 37 non-government schools, including Catholic and other Christian schools, servicing almost 12,000 school-aged children and young people.<sup>56</sup>

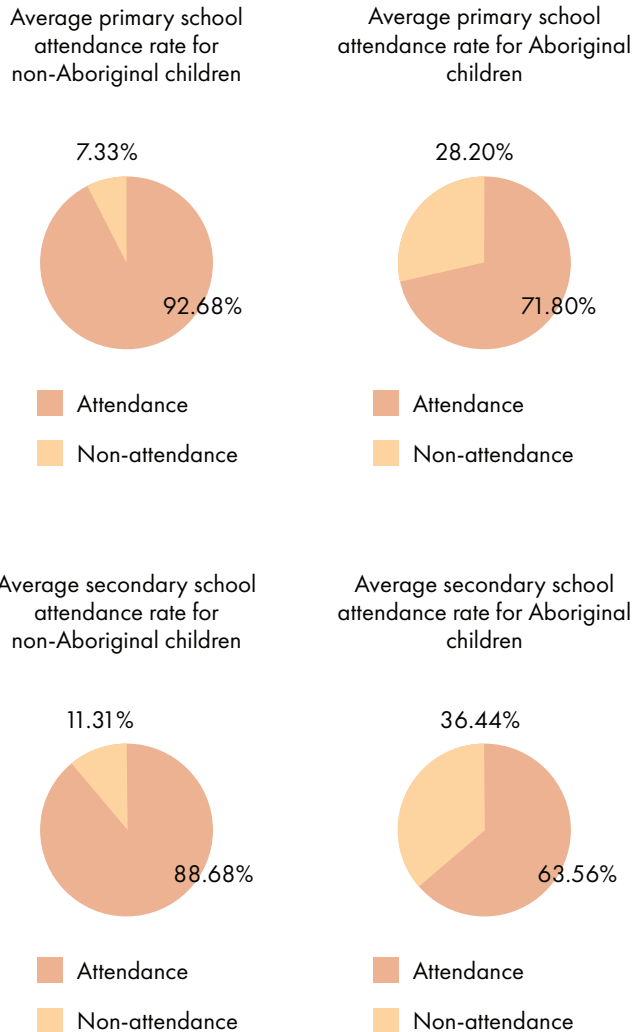
Around 73% of government schools are located in remote and very remote areas, with 46% of Northern Territory students enrolled at these schools.<sup>57</sup> In locations considered to be remote or very remote, young people may travel more than 100 kilometres per day to attend secondary school.

The Northern Territory Government also funds two government 'Schools of the Air', located in Alice Springs and Katherine. These schools aim to bridge education gaps by providing services via radio and electronic communication in remote regions of the Northern Territory.<sup>58</sup>

### ***Low attendance rates***

During the first term of 2017, the Northern Territory Department of Education recorded 34,424 student enrolments and an average attendance rate of 82% across all school years.<sup>59</sup> The average attendance rate was 90.3% for non-Aboriginal children, compared with 69% for Aboriginal children.<sup>60</sup>

**Figure 3.3: Average attendance rates for children in the Northern Territory (primary and secondary schooling)**



In March 2013, the Commonwealth Government allocated funding of \$107.5 million over 10 years under the *Stronger Futures in the Northern Territory* commitment to implement the *Improving School Enrolment and Attendance through Welfare Reform Measure*.<sup>61</sup> By making income support payments conditional, this welfare reform measure aims to encourage those with responsibility for a child or children to ensure that they are enrolled in, and attending, school regularly.<sup>62</sup>

In addition, between January 2014 and December 2015, the Commonwealth Government sought to reduce the truancy rates for children and young people in remote communities through its Remote School Attendance Strategy.<sup>63</sup> Under this strategy, the Government funded school attendance supervisors in 77 schools across five jurisdictions, including the Northern Territory. The supervisors were to work with schools and families to ensure that children and young people attended school every day, where possible.<sup>64</sup> During that period, the strategy cost \$46.5 million.<sup>65</sup>

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The October 2015 *Interim Progress Report* of the strategy found that it was too early to reach firm conclusions about medium and longer-term results of the program. However, it was noted that the program had a positive impact on attendance in the Northern Territory, with 72.5% of schools reporting a higher term three attendance in 2014 than in 2013.<sup>66</sup> It also found that the average number of students attending school on any one day in term three of 2014 was 13% higher than the same period in 2013.<sup>67</sup> On 25 September 2015, the Commonwealth Government announced that the Remote School Attendance Strategy had been extended to the end of 2018 at an additional cost of \$80 million.<sup>68</sup>

## ***Staffing challenges in regional and remote areas***

The Commission heard that the delivery of quality education in regional and remote regions of the Northern Territory is a challenge. One speaker at a community meeting in Tennant Creek commented, *'Kids are struggling to learn and teachers are struggling to teach. Kids in Year 8 in Tennant Creek are being taught at the same level as kids in Year 3 across other parts of the country.'*<sup>69</sup> This observation was not challenged by other attendees, but the Department of Education was not asked for its response.

*'We need experienced teachers. Not 20-year-olds that can't cope ... we have had four principals this year. The fourth one was brought back from retirement as an emergency principal for this term only.'*<sup>70</sup>

Extensive research demonstrates overwhelmingly that the impact teachers have on student learning is greater than all other educational factors, including class size, technology, individualised instruction, streaming by ability, and changing school calendars and timetables.<sup>71</sup>

## ***English as a second language***

For many Aboriginal school-aged children and young people growing up in the Northern Territory, English is not spoken at home, in the community or in the playground.<sup>72</sup> Poor literacy is more common among students who do not speak Standard Australian English at home.<sup>73</sup>

Around 44% of the student population in the Northern Territory are Aboriginal, and approximately 49% of all students have a language background other than English.<sup>74</sup>

The issue of bilingual education was often raised with the Commission during its community consultations<sup>75</sup> and it presents as a controversial topic among Territorians. A body of research suggests that bilingualism contributes greatly to the maintenance of a healthy brain.

*Neuroplastic brain changes, including increased grey matter density, have been found in people with skills in more than one language, from children and young adults through to the elderly...At least one review has found that lifelong bilingualism is associated with an average delay in the onset of dementia by four years.*<sup>76</sup>

The Commonwealth Department of Communications and the Arts provides grants through the Indigenous Languages and Arts program to organisations that support participation in, and the

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maintenance of, Australia’s Aboriginal cultures through language.<sup>77</sup> There may be some opportunity to advance both the goals of better educational outcomes and Aboriginal language preservation if there is further development of the Commonwealth initiative with the Northern Territory Department of Education.

The Commission acknowledges that the education system within the Northern Territory faces complex challenges in relation to attendance and delivery of remote services, and that many promising initiatives have been implemented in recent years.<sup>78</sup>

## Housing

Housing is one of the determinants of wellbeing that influences the rate at which children and young people enter the child protection and youth justice systems in the Northern Territory.

A lack of housing, poor housing conditions and housing instability affect the physical and emotional safety and development of children and young people.<sup>79</sup> The *Convention on the Rights of the Child* (CRC) mandates ‘the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development’.<sup>80</sup>

Housing has been recognised as a problem in the Northern Territory for many years. The 2007 “*Ampe Akelyernemane Meke Mekarle*” *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (Little Children are Sacred report) and the 2010 *Growing them strong, together – Promoting the Safety and Wellbeing of the Northern Territory’s Children – Report of the Board of Inquiry into the Child Protection System in the Northern Territory* (BOI report) each identified poor housing and overcrowding as major contributing factors to poor outcomes for children and families in the Northern Territory.<sup>81</sup>

Data shows that children and young people who have been involved in the child protection and youth justice systems are more likely to experience homelessness.<sup>82</sup>

There remains a shortage of adequate and affordable housing in the Northern Territory, which leads to high rates of homelessness and overcrowding, especially in remote communities. Improving housing is a necessary precondition to reducing the number of children engaging with the child protection system, by giving ‘young parents the best opportunity...to be able to bring up children safe’.<sup>83</sup> For families, ‘everything has its basis in having a home and being able to nurture and look after children’.<sup>84</sup>

## Homelessness

If children and young people do not have access to safe and stable accommodation, they are at risk of homelessness. The 2011 Census of Population and Housing found that the Northern Territory had the highest rate of homelessness in Australia<sup>85</sup> and the highest rate of Aboriginal homelessness.<sup>86</sup>

The Northern Territory and Queensland were the only jurisdictions in which the rate of homelessness among Aboriginal people increased between 2006 and 2011.<sup>87</sup>

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In 2011, one in four Aboriginal people in the Northern Territory was considered homeless. This was 52% of the total number of Aboriginal and Torres Strait Islander people considered homeless nationally.<sup>88</sup> The majority, 92%, of Aboriginal people considered homeless in the Northern Territory were living in 'severely crowded dwellings', compared to 6% in Victoria and 79% in Western Australia.<sup>89</sup>

Children aged under 12 were the largest cohort of any homeless age group, representing 27% of the total Northern Territory homeless population.<sup>90</sup>

For some children and young people, homelessness leads to contact with the youth justice system. One young person, vulnerable witness BC, told the Commission that he was sent to detention 'for breaking into places. I did this because I was homeless and hungry and I needed clothes and money'.<sup>91</sup>

Similarly, vulnerable witness CJ started 'doing crimes to look after myself. I stayed with those different mates, but I was basically homeless'.<sup>92</sup>

Lack of accommodation can hasten a child or young person's path into detention – for example, as grounds for the denial of bail, as discussed in Chapter 26 (The path into detention).

## Overcrowding

Overcrowding puts pressure on water, electricity and sewage infrastructure, and compounds overall poor housing conditions. It can have a significant impact on family wellbeing, straining relationships, placing pressure on food and financial security, and limiting access to household facilities such as the bathroom, kitchen and laundry. Overcrowding is often a factor in the spread of infectious diseases and has been associated with poorer physical and mental health.<sup>93</sup>

Neglect and abuse are commonly associated with overcrowding.<sup>94</sup> A crowded environment has been linked to the potential exposure of children and young people to sexual abuse.<sup>95</sup> It can also contribute to a child or young person's hearing loss during their developmental years, and can compound associated developmental issues.<sup>96</sup>

However, overcrowding can also create a perception that a child is living in conditions of neglect, rather than poverty. Dr Christine Fejo-King explained:

*'... if you look at our communities, there are not enough houses to house our people. So if they are not living in a house, they're living out in the weather ... if that house is safe, if the children are safe in that home, if there are rules about grog and gunja, and all of that in the house not coming into the house, and the children are safe, then that should be the criteria that we're looking at. Not that there are two bedrooms, three televisions, the kids get to go to sports practice for this, that, or the other. Let's really look at what's best for that child.'*<sup>97</sup>

Overcrowding can also be a barrier to family reunification<sup>98</sup> and can contribute to a kinship placement being deemed unsuitable or being delayed due to the number of checks required for

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each resident of a potential kinship carer's home:

*... often a family member who is living in the house may disqualify the whole family. The greater the number of adults in the house, the greater the number of people who must pass criminal history checks and with the high rates of indigenous incarceration, the greater the likelihood that someone in the family has been in prison.<sup>99</sup>*

The Australian Institute of Health and Welfare found that the proportion of Aboriginal and Torres Strait Islander homeless people living in severely crowded dwellings increased with remoteness.<sup>100</sup> Aboriginal and Torres Strait Islander people were overrepresented in homelessness in remote and very remote areas across Australia.<sup>101</sup> Overcrowding is driven by housing shortages, but kinship obligations can also contribute as Aboriginal and Torres Strait Islander families generally offer shelter to homeless relatives.<sup>102</sup>

## ***Demand for housing in the Northern Territory***

The Little Children are Sacred report estimated that 4,000 houses were needed immediately to address the 'disastrous and desperate' housing shortfall in the Northern Territory, with a further 400 houses per year over 20 years required to maintain supply in response to increasing population demand.<sup>103</sup>

The *Territory Housing 2006–07 Annual Report* stated that there were 5,361 public housing dwellings.<sup>104</sup> The *Northern Territory Department of Housing's 2015–16 Annual Report* stated that around 9,960 of the 12,000 dwellings it manages are for public housing.<sup>105</sup> This increase of approximately 4,599 dwellings over the 10 years barely meets the immediate need identified in the Little Children are Sacred report in 2007.

Estimated waiting times for public housing as at 30 June 2017 range from 'less than 2 years' for two-bedroom housing in Palmerston or Katherine, to 6–8 years for one-bedroom accommodation in Darwin/Casuarina or Palmerston.<sup>106</sup> Waiting times are 2–4 years in Alice Springs and Nhulunbuy, and 4–6 years in Katherine and Tennant Creek for one-bedroom accommodation.<sup>107</sup> Many children leaving care who transition to the public housing waiting list are often on the list for years.<sup>108</sup> There is also a significant shortage of affordable private rental accommodation in the Northern Territory.<sup>109</sup>

Despite extended waiting times for public housing, the Commission understands that there is also a lack of specifically funded services assisting homeless people in remote communities.<sup>110</sup>

Addressing housing conditions is not just a matter of constructing more dwellings but understanding the needs of families and communities, including cultural considerations influencing the use of space.<sup>111</sup>

## ***Government initiatives to improve housing in the Northern Territory***

In 2016, the Commonwealth Government announced that the Remote Housing Strategy would deliver \$774 million nationally over 2016–18.<sup>112</sup> As at May 2017, more than 1,200 new houses have been built and over 4,000 existing houses refurbished or substantially upgraded in the

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Northern Territory under this investment.<sup>113</sup> While promising, this figure fails to meet the immediate demand that was identified in 2007 in the Little Children are Sacred report, or in subsequent estimates.<sup>114</sup>

The Northern Territory Government recently committed to improving housing in remote communities through an investment of \$1.1 billion over 10 years.<sup>115</sup>

The Minister for Housing and Community Development told the Commission that his department is focused on:

*'trying to design an Aboriginal housing model. So a community housing model that will be owned, operated and run by Aboriginal interests...considerably enhancing the local authority level of governance within local government'*<sup>116</sup>

The Room to Breathe program, which involves local workers constructing additional living spaces for existing houses, has commenced in 20 Aboriginal communities.<sup>117</sup>

In 2018–19, the Northern Territory Government will receive \$19.2 million in Commonwealth funding under a new National Housing and Homelessness Agreement (NHHA) to increase the supply of new homes and improve outcomes for all Australians across the housing spectrum, including those most in need. Under the NHHA, the Commonwealth will expect states and territories to bring forward actions to reduce overall homelessness, as well as actions to address homelessness for priority groups, such as women and children who have experienced family and domestic violence; children and young people; and Aboriginal Australians.<sup>118</sup>

## Access to recreational activities

Recreational activities are key to promoting positive outlooks for children and young people. The Commission was told of a dearth of youth services, particularly for Aboriginal children and young people in remote locations. Children and young people need structured, culturally appropriate and enjoyable activities complemented by appropriate support services.

In remote communities where recreation and youth services are limited, children and young people have little to occupy them during the day and can often resort to antisocial behaviour.<sup>119</sup> This is particularly the case for children and young people who are disengaged from education and who participate in risky behaviour simply out of boredom.<sup>120</sup>

Children and young people in dysfunctional living situations, for example, those affected by drug and alcohol abuse, domestic violence or gambling, are likely to spend less time in their home environment and more time out in the community, especially at night.

A lack of extracurricular activities outside school hours in some of the more regional and remote locations across the Territory has meant that children and young people 'roam the streets' or turn to crime for 'something to do'.<sup>121</sup>

The Commission was told of the need for increased resources to provide children and young people

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with access to directed recreation and drop-in centres, particularly in the afternoon and evening. This would help to keep them engaged and limit their chances of participating in high-risk or antisocial behaviour.<sup>122</sup>

Research suggests that sport and physical activity programs combined with other targeted interventions play a role in preventing or reducing crime among children and young people.<sup>123</sup>

Government investment in youth services and programs to tackle problems associated with crime and substance abuse has been successful in other jurisdictions. In evidence before the Commission, Dr Tamara Stone, Ontario Ministry of Children and Youth Services, described the introduction of programs and services for children and young people in a remote community in Ontario. She highlighted the importance of recreation and employment skills in *'building strength in young people and protective factors, [to] reduce the likelihood that they're going to come into the justice system.'*<sup>124</sup>

The Commission also heard of the success in Iceland where a range of recreational services were made available to children and young people:

*'... what they invested in was a whole lot of youth services and youth programs that were made free and readily available to young people. So even now, if you were to go to Iceland during summer, you don't see the kids drinking and boozing and carrying on, they're actually engaged in really productive activities. So whether it's arts and crafts, whatever you like, it's there, it's actually providing services to young people. It's the one thing that absolutely is missing in the Northern Territory. You know, if we want to deal with youth offending and youth behaviour then I think we'd better invest in some sort of youth programs. I don't mean to be ... blunt about it, but it just seems to me to be absolutely, bleedingly obvious.'*<sup>125</sup>

## Employment

Employment is an important tool to reduce engagement with the justice system and reoffending as it promotes pro-social interactions and provides routine for children and young people.<sup>126</sup> Strong relationships have been found to exist between unemployment and crime, both for first-time offenders and recidivists.

Working equips young people with vocational skills and responsibility, and teaches them practical life lessons, such as money management. It can also instil a sense of pride, dignity, self-belief and independence.<sup>127</sup> However, the transition from school to work can be a challenge for many young people, particularly in remote areas where there are limited employment opportunities.<sup>128</sup>

Without investment and support to increase activities and employment in the Northern Territory, particularly in remote locations, children and young people will continue to find themselves without stimulation and opportunities for the future. This will inevitably continue to influence their interaction with the youth justice system.

Employment and job security are key factors that influence a person's health and wellbeing. In addition to financial security, participation in the workforce can provide a sense of purpose, build

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confidence and boost self-esteem. Family and community members with stable employment provide strong role models for children and young people and can help influence their direction in life.

A lack of employment opportunities for young people in remote communities emphasises the need for training programs that relate to local conditions and opportunities.<sup>129</sup> The Commission is aware of the substantial ‘fly-in, fly-out’ workforce in remote communities that are usually not local and are not on the ground long enough to understand or engage with the community in which they work.<sup>130</sup> Rather than recruiting non-resident workers, Aboriginal communities need to be supported, trained and employed locally to deliver the programs and services needed.

The Commission has heard from young people themselves about the lack of employment opportunities in remote communities:

*‘I have never had a job, even though I would really like to work. There isn’t really any work or training to do in [REDACTED].’<sup>131</sup>*

In 2014–15, the Northern Territory had the lowest Aboriginal labour force participation rate in Australia.<sup>132</sup>

Additionally, for young people who are exiting detention, having a criminal record may create a significant barrier to them finding a job upon their release.<sup>133</sup>

## **The developing brain and the consequences for children of exposure to trauma and neglect**

Advances in neurobiological research have begun to provide a more in-depth understanding of how the brain develops over time and to consider how this affects children and young people exposed to trauma and neglect.<sup>134</sup>

The adolescent brain is structurally different to that of a mature adult, particularly in the area devoted to impulse control and decision-making.<sup>135</sup> Adolescents engage in increased risk-taking, have poor impulse control and poor planning skills by virtue of the physical structures of their still-growing brains.<sup>136</sup> Judge Andrew Becroft, the New Zealand Children’s Commissioner, gave evidence to the Commission about the significant developmental changes that occur in adolescents that last until a person’s early 20s.<sup>137</sup> The frontal lobe, which provides impulse control and regulation, continues to develop until this time.

*‘It’s a deeply challenging time where kids make some reckless, foolhardy and spontaneous decisions that, thankfully, most will grow out of when the frontal lobe is developed and comes on line.’<sup>138</sup>*

An understanding that there are clear developmental differences between children, young people and adults necessitates a tailored response to children and young people exposed to trauma, including those in the youth justice system.

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## ***Brain development and exposure to trauma***

Brain development in children rises steeply just before birth to the age of one when sensory (sight and hearing) pathways, language ability and higher cognitive functioning are laid down. Development slows significantly after this time.<sup>139</sup>

Research demonstrates that nurturing, responsive relationships build healthy brain architecture, which provides a strong foundation for learning, behaviour and health.<sup>140</sup> Conversely, the younger the child, the more vulnerable the developing brain is to insult. If a child undergoes a strong and prolonged activation of the body's stress response, the stressors can be identified as 'toxic' and in the absence of the 'buffering' protection of adult support, the architecture of the developing brain is disrupted.<sup>141</sup> This will lead to a lower threshold for the activation of stress management systems, which, in turn, can lead to lifelong problems in learning, behaviour, and physical and mental health.<sup>142</sup>

Emerging research suggests that after one or two generations of exposure to toxic stress, genetic effects start to be observed. Professor Frank Oberklaid believes that with early intervention and behavioural management, the clinical manifestations of this can be addressed.<sup>143</sup> However, without effective intervention, the outcomes for the child, the child's family members and the wider community are fairly dire. Ramifications of toxic stress in early life can lead to the onset of health problems such as cardiovascular disease, diabetes, obesity, mental health problems, aggressive behaviour and family violence in adulthood.<sup>144</sup>

From both a social and economic perspective, there is every reason to ensure that every child is given good medical care from conception and grows in a consistent, warm, responsive environment.<sup>145</sup>

The Commonwealth Government recognises the detrimental impact of trauma and neglect on brain development. The Department of Social Services provides a range of services in the Northern Territory to help support families and children. One of these key services is the Intensive Family Support Service (IFSS) program. The IFSS is an evidence-based prevention and early intervention program that aims to reduce child neglect by working intensively with vulnerable families to improve parenting capability and in turn keep children safe, at home with their families, in their communities and out of the child protection system. Key elements of IFSS are its community development approach, including engagement with local communities in establishing new sites and a strong focus on local workforce development.<sup>146</sup>

## ***Neurocognitive disability and the young offender***

Recent neurobiological research has prompted a reassessment of how recognition of developmental immaturity should affect the way society treats young offenders, particularly in determining the age at which criminal responsibility should be imposed. It has also prompted efforts to better understand how undiagnosed neurodevelopmental disabilities contribute to the behaviours that lead young people to offend.<sup>147</sup>

In 2012, the Office of the Children's Commission for England published its report *Nobody made*

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*the connection: The prevalence of neurodisability in young people who offend, which revealed considerably higher rates of neurodevelopmental disorders among young people in custody as compared to young people in the general population.*<sup>148</sup>

Several factors related to neurodisability are likely to increase a child or young person's risk of offending, including factors that may contribute to offending behaviour, such as impulsivity, cognitive impairment, alienation and poor emotional regulation.<sup>149</sup> Neurodisability may also have a secondary association with other risk factors such as poor educational attainment, delinquency and illicit drug use.<sup>150</sup>

The report concluded that it is essential that neurodevelopmental disorders are recognised, assessed and treated when children are still very young, allowing them to be diverted from a potential trajectory into the youth justice system.<sup>151</sup>

There is every reason to believe that a systematic investigation of children in secure custody in Australia would find similar results, notably in relation to fetal alcohol spectrum disorder (FASD).<sup>152</sup> The Australian Early Developmental Census notes that Aboriginal children are twice as likely to be developmentally vulnerable than non-Aboriginal children, although this gap is narrowing.<sup>153</sup>

Failure to address these vulnerabilities will have poor consequences for these children and young people, community safety, and cause enormous financial cost at every level. While every effort must be made to identify, treat and modify the behaviour that leads children and young people to enter the youth justice system, of equal importance is identifying the causes of these neurodevelopmental disabilities and the implementation of social policies to prevent, or at least ameliorate, their occurrence.

## Health and disability

Statistically, Aboriginal and Torres Strait Islander people have the poorest health outcomes of any group in Australia,<sup>154</sup> and children and young people in the Northern Territory have worse health outcomes than their peers across the nation.<sup>155</sup>

The Commission has heard evidence about many health and disability issues that are widespread among children and young people in the Northern Territory, particularly those who have had contact with the child protection and youth justice systems. The most prominent of these include mental health issues, hearing loss and FASD.

Socio-economic disadvantage contributes to the prevalence of poor health outcomes among many sections of Australian society, particularly in the Northern Territory. Notably, the latest census data reveals that the Northern Territory had the second highest median weekly income in the country, at \$871.<sup>156</sup> Yet during the same period, the median weekly income for Aboriginal people in the Northern Territory was \$281.<sup>157</sup>

Socio-economic factors can strengthen or undermine the health of individuals. The most significant of these factors are commonly described as the 'social determinants' of health and wellbeing. They include adequate income, employment, housing, nutrition, education, social inclusion and the

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protective roles of culture, language and land.<sup>158</sup>

A study in the Northern Territory that examined the life expectancy of Aboriginal and non-Aboriginal Australians found that socio-economic disadvantage was the leading risk factor for the gap in life expectancy between Aboriginal and non-Aboriginal Australians.<sup>159</sup>

Children and young people in the Northern Territory have higher rates of adolescent fertility, chlamydial infection and illicit drug use than their peers in Australia.<sup>160</sup> Aboriginal children and young people also suffer from higher rates of skin infections and rheumatic heart disease than non-Aboriginal children and young people.<sup>161</sup>

Then there are the completely preventable illnesses and diseases, some of which are indicative of poverty and extreme disadvantage that have virtually been eliminated in the wider Australian community. For example, trachoma is an eye infection that is the world's leading cause of infectious, preventable blindness. Australia is the only developed country where it is endemic. It primarily occurs in remote and very remote Aboriginal communities.<sup>162</sup> Trachoma is commonly diagnosed in children, and its prevalence is linked to overcrowded housing, limited water supplies, poor waste disposal services and high numbers of flies.<sup>163</sup> In the Northern Territory in 2015, trachoma was reported at endemic levels in 29 communities and at hyperendemic levels in 11 communities.<sup>164</sup>

Rheumatic heart disease is another disease that is common in the developing world, yet in some remote Aboriginal communities in Australia rates are among the highest in the world.<sup>165</sup> It is caused by permanent damage to the heart as a result of acute rheumatic fever, an autoimmune response to an untreated Group A Streptococcal infection, which thrives and spreads in overcrowded housing conditions with low levels of hygiene and poor sanitation.<sup>166</sup> The infection usually presents as a sore throat or skin infection.<sup>167</sup>

Rheumatic heart disease is devastating for children and young people as it can cause strokes and require open-heart surgery.<sup>168</sup> In the Northern Territory between 2005 and 2010, 98% of recorded cases of acute rheumatic fever were for Aboriginal people and 58% of those cases were children aged five to 14.<sup>169</sup>

## **Tobacco**

Each year, smoking kills an estimated 15,000 Australians.<sup>170</sup> Smoking tobacco is the major cause of ill-health in the Northern Territory.<sup>171</sup>

The Northern Territory has the highest smoking prevalence in Australia.<sup>172</sup> Between 2001 and 2013, the Northern Territory consistently had the highest proportion of daily smokers.<sup>173</sup> Between 2014 and 2015, 20% of adult Territorians smoked daily.<sup>174</sup>

In the Northern Territory, most young people take up smoking at 15 years, yet in some remote communities, young people start smoking at 12 or 13 years.<sup>175</sup> This is significant as people are less likely to smoke as adults if they do not take up smoking when they are young.<sup>176</sup>

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People are more likely to smoke in areas of socio-economic disadvantage.<sup>177</sup> Smoking and living in households with smokers is associated with a range of risk factors for children and young people, including an increased risk of developing asthma and respiratory problems.<sup>178</sup> Aboriginal Australians are twice as likely to have asthma as non-Aboriginal Australians.<sup>179</sup>

## **Mental health**

According to the World Health Organization, depression is the leading cause of ill-health and disability in young people globally, with more than 300 million people living with depression. This is an increase of more than 18% between 2005 and 2015.<sup>180</sup> Almost one in seven children and young people in Australia has experienced a mental illness.<sup>181</sup> Children and young people in the Northern Territory have the highest rates of mental illness out of any age group in the Territory.<sup>182</sup>

As in many jurisdictions in Australia, mental health services in the Northern Territory do not have the capacity to meet demand.<sup>183</sup> The Commission was told that mental health services in the Northern Territory receive the lowest funding for mental health services per capita in Australia.<sup>184</sup> The provision of these services is further hindered by the geographical size of the Northern Territory, the remoteness of many of its communities and the complex needs of its disadvantaged population, who are predominantly Aboriginal.<sup>185</sup>

Mental health services, like all other health services, have trouble recruiting and keeping staff members. Staff shortages *'impact on the range of assessment services and therapeutic options available, and the capacity to deliver interventions for children and young people'*.<sup>186</sup> The services and therapeutic options that mental health services in the Northern Territory can offer are also affected by staff availability, expertise and capacity.<sup>187</sup>

The risk of suicide is high among children and young people with mental health issues. In Australia, the rate of suicide among young Aboriginal and Torres Strait Islander people is the highest in the world as a proportion of the population, particularly among young men.<sup>188</sup> The *Final Report of the National Indigenous Intelligence Task Force: 2006-2014* (NIITF) noted that suicide and self-harm affect Aboriginal communities at grossly disproportionate rates and are especially prominent in remote communities across northern Australia.<sup>189</sup> It reported that threats of suicide are increasing and becoming normalised, particularly among children.<sup>190</sup>

The rate of suicide among those in the youth justice system is also alarming, with the Northern Territory recording the highest rate of Aboriginal children and young people self-harming or attempting suicide in custody requiring hospitalisation.<sup>191</sup>

Children and young people who have an increased vulnerability to mental illness may have spent their early childhood exposed to dysfunctional and stressful family dynamics. Those who experience these kinds of relationships can develop behavioural difficulties that stem from the unpredictability of the world in which they grow and develop.<sup>192</sup>

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An unpredictable home environment makes it difficult for an infant or young child to learn to develop consistent responses to situations and people. This can lead to difficulties interacting with people and the world around them and in turn insecure attachment relationships.<sup>193</sup> Insecure attachment relationships increase vulnerability to a range of mental health disorders including depression and other mood disorders, anxiety, hyperactivity, oppositional behaviour, displays of hostility, conduct disorder and aggression.<sup>194</sup>

The Department of Health in the Northern Territory operates two mental health services, the Central Australia Child and Youth Mental Health Service, based in Alice Springs, and the Top End Child and Adolescent Mental Health Team, in Darwin and Palmerston.<sup>195</sup>

The Acting Executive Director of Allied Health, Top End Health Service, identified *'limited resources, training and supervision of staff, and a high turnover of staff, amongst the difficulties associated with the delivery of mental health support in remote areas of the NT'*.<sup>196</sup> She also advised the Commission that the absence of a forensic child adolescent service working in detention centres to promote early intervention is a critical gap in current service delivery and that the inadequate number of child psychiatrists in the Northern Territory is a further limitation.<sup>197</sup>

The Chief Psychiatrist of the Northern Territory told the Commission that *'it is imperative that children and young people in care, and in detention, have access to high-quality health care which should include child and adolescent mental health services'*.<sup>198</sup>

## **Health services**

There are five public hospitals in the Northern Territory, situated in Darwin, Alice Springs, Katherine, Tennant Creek and Nhulunbuy.<sup>199</sup> These and other health services can be difficult to access for those living in small communities hundreds of kilometres from regional centres and cities. Many people in these communities have limited access to public and private transport, with weather conditions making some roads inaccessible at certain times of the year.<sup>200</sup>

Most of the health care services offered to children and young people in remote communities are provided by remote area nurses or Aboriginal health practitioners rather than general practitioners.<sup>201</sup> The more remote the community, the less likely it is for those living there to access a general practitioner.<sup>202</sup>

Outside Darwin, most Aboriginal people in the Northern Territory access health care through Aboriginal Community Controlled Health Services (ACCHSs), which are primary health care services established and operated by local Aboriginal communities to deliver holistic, comprehensive and culturally appropriate health care.<sup>203</sup> As community controlled services, they empower the community to determine what services should be offered and participate in the planning, implementation and evaluation of those services.<sup>204</sup> ACCHSs primarily employ Aboriginal staff, particularly Aboriginal Health Workers, who play a critical role in improving cultural competence in health care delivery.<sup>205</sup> Culturally competent health care services are critical to increasing Aboriginal people's access to health care and the effectiveness of that care, which in turn addresses inequalities in patient health outcomes.<sup>206</sup> Acknowledging the differing challenges in relation to service delivery in the Northern Territory, research conducted in Queensland indicates that ACCHSs are the preferred

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health care services in the communities where they are located.<sup>207</sup>

In 2015, 54% of primary health care to Aboriginal people in the Northern Territory was delivered through ACCHSs.<sup>208</sup>

## **Disability**

Disabilities are significantly under-identified in the Northern Territory.<sup>209</sup> The First Peoples Disability Network noted that some of the reasons for under-identification of disability include lack of a formal diagnosis, not personally identifying as having disability or fear of discrimination preventing disclosure of a disability.<sup>210</sup> Addressing disability is vital to ensuring children and young people are treated according to their diagnosis and not punished for difficult behaviour when greater holistic care and sensitive case management is required.

Aboriginal people may not disclose that they have a disability as they may fear that they will experience double prejudice.<sup>211</sup> There is a mistrust of 'the system' among Aboriginal communities as 'there is a detrimental legacy of past practices of institutionalisation of children and young people with disability, and stories of child removal passed from one generation to the next'.<sup>212</sup>

Hearing loss is the most common disability in Australia.<sup>213</sup> Conductive hearing loss<sup>214</sup> is prevalent in Aboriginal communities, particularly in the Northern Territory.<sup>215</sup> It is predominantly caused by middle ear disease, which is one of the most common childhood illnesses.<sup>216</sup> Aboriginal children experience middle ear disease earlier and more often than non-Aboriginal children.<sup>217</sup>

The effects of hearing loss, especially during developmental years, are profound. It can contribute to poor social and emotional outcomes for children and young people, including '*delayed language development, poor auditory perception and communication, and interpersonal problems*'.<sup>218</sup> These issues in turn impact significantly on the ability of children and young people to learn and participate in school. This leads to increased absenteeism, illiteracy, difficulties gaining employment and other negative psychosocial outcomes.<sup>219</sup>

Children and young people with hearing loss are also more vulnerable to being victims of neglect and emotional, physical and sexual abuse.<sup>220</sup>

## **Fetal alcohol spectrum disorder**

FASD is an umbrella term to describe a spectrum of conditions caused by fetal alcohol exposure during pregnancy and is recognised as the most common cause of intellectual disability in the Western world.<sup>221</sup>

This condition is characterised by pervasive neurodevelopmental impairment.<sup>222</sup> Children and young people with the disorder present with a range of physical, developmental and/or neuro-behavioural

symptoms ranging from:

*characteristic and diagnostic abnormal facial features with severe intellectual disability and short stature, through to a child whose appearance is normal but who has disabling deficiencies in their 'executive' neurological abilities.*<sup>223</sup>

Fetal alcohol exposure results in 'multiple behavioural and functional deficits that persist across the life span'.<sup>224</sup> Dr James Fitzpatrick and Dr Carmela Pestell, two leading FASD researchers and practitioners in Australia, told the Commission that children and young people with the disorder 'have difficulty in nearly every aspect of their behaviour, from paying attention, learning and remembering, and controlling their emotions and urges, to applying what they have learned to everyday experiences'.<sup>225</sup> These children are often unable to control their aggression but they are more likely to display reactive rather than proactive aggression.<sup>226</sup>

FASD is not limited to a particular community or social class. However, 'particularly high pockets of exposure to alcohol during pregnancy are found in the socially and economically disadvantaged communities around the world'.<sup>227</sup> It is likely to be more prevalent in Aboriginal communities, particularly remote communities. Dr Fitzpatrick told the Commission:

*'Where there's a history of colonisation, dispossession of land and culture, exclusion from adequate systems of health and mental healthcare, education, and employment opportunities, high rates of poverty and welfare dependency, high rates of mental health and other problems, there is a concomitant high rate of alcohol use in the community, including amongst pregnant women.'*<sup>228</sup>

A former Director of Youth Justice told the Commission that 'it is generally acknowledged that fetal alcohol syndrome is a major problem amongst young people in the youth justice sector in the Northern Territory'.<sup>229</sup> During his tenure, he believed a high number of detainees had the disorder, based on their physical appearance and medical history.<sup>230</sup>

There is currently no accurate data on the prevalence of FASD in children and young people in the Northern Territory. However, a small study conducted in the Barkly region found that out of 220 clients tested, 70% had one or more indicators of the disorder and nearly all those involved in the study had some level of involvement with the criminal justice system.<sup>231</sup>

One former Minister told the Commission, 'I would accept that there are a high number of FASD sufferers in the Northern Territory'.<sup>232</sup> Children and young people with the disorder have special needs that must be catered for in both the child protection and youth justice systems. They need a therapeutic environment that is structured, predictable, calm and nurturing in order to thrive.<sup>233</sup>

## RISK FACTORS FOR CHILDREN

### Substance misuse

Substance misuse is commonly associated with a range of risks and social issues including suicide,<sup>234</sup> violence, crime, injury and death, and incarceration.<sup>235</sup> Alcohol and other drugs can often be used

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as coping mechanisms, particularly in the context of dealing with unresolved trauma.<sup>236</sup>

Self-medication with alcohol and other drugs to address mental or physical conditions is also common where there is inadequate access to appropriate treatment. Substance misuse may also be a means of dealing with the often difficult realities of life, including neglect, boredom and hunger.<sup>237</sup>

Children and young people are negatively impacted when they live in households with family members who misuse alcohol and other drugs. When a parent has substance abuse issues, their children and young people are more likely to develop behavioural and emotional problems, perform more poorly in school and be victims of child maltreatment.<sup>238</sup>

When children and young people have parents who drink heavily, smoke or take illicit drugs they are more likely to engage in such behaviours themselves resulting in intergenerational patterns of substance related harms and misuse.<sup>239</sup>

The Australian Medical Association (AMA):

*believes that substance dependence and behavioural addictions are serious health conditions, with high mortality and disability. Those who are impacted should be treated like other patients with serious illness and be offered the best available treatments and supports to recovery.*<sup>240</sup>

Substance misuse is not confined to one particular class or group of people in Australian society, and various factors can affect the prevalence of substance use, including remoteness, socio-economic status and employment.<sup>241</sup>

Substance misuse is more prevalent among Aboriginal people than non-Aboriginal people.<sup>242</sup> The high prevalence of substance misuse among Aboriginal people is also a result of the cultural stress, grief, trauma, separation and disadvantage that Aboriginal people disproportionately experience.<sup>243</sup>

## Alcohol

Alcohol-related harm across Australia is estimated to cost \$36 billion a year.<sup>244</sup>

Alcohol misuse and related harm is one of the most challenging issues confronting Australia. These challenges are not limited to Aboriginal communities, or even the Northern Territory, but confront every demographic in Australian cities and towns.<sup>245</sup>

Alcohol is a major contributor to many different social and health problems, including social disorder, family breakdown and violence, child neglect, loss and diversion of income and high levels of incarceration.<sup>246</sup>

In 2015–16, there were 9,124 alcohol-related presentations to the emergency departments of Northern Territory hospitals,<sup>247</sup> and on average the Northern Territory Police attend 22,500 incidents of domestic violence per year, with 53% of these incidents directly related to alcohol.<sup>248</sup>

The Northern Territory had the second highest proportion of non-Aboriginal adults at risk of

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long-term harm from excessive consumption of alcohol over the period 2011 to 13, at 24.9%.<sup>249</sup> It also had the highest percentage of Aboriginal adults abstaining from alcohol, at 50.5%, compared to only 15.4% of non-Aboriginal adults abstaining from alcohol.<sup>250</sup> However, Aboriginal people who do drink are more likely to do so at levels that are risky.<sup>251</sup>

Alcohol misuse is often associated with violence and decreased levels of safety in family environments and this may play out in increased interactions with law enforcement for both perpetrators of violence and their families.

The Commission heard that children and young people will often leave home environments affected by alcohol misuse and violence, which often finds them spending time roaming the streets.<sup>252</sup> For some children and young people engaged with the youth justice system this can result in breaches of bail conditions, such as curfews. Further, during these unsupervised times, children and young people often engage in antisocial behaviour.

Alcohol misuse is a multi-casual phenomenon and any response must take a holistic approach. Policies must address the underlying social determinants of alcohol misuse, including the effects of social deprivation, poverty, lack of education, and intergenerational and contemporary trauma.

The policies must consider the particular circumstances of the community and include measures focussed on harm reduction, supply reduction and demand reduction.<sup>253</sup> The AMA 'supports a major change in funding priorities from policing and prosecution of substance users to interventions that avoid or reduce use, promote resilience and reduce societal harms'.<sup>254</sup>

Underpinning all effective interventions should be an understanding that first and foremost alcohol misuse is a health issue and the primary consideration is the social and emotional wellbeing of the particular community and individuals.

The AMA also:

*supports responses to substance dependence and behavioural addictions that also address underlying causes, or exacerbating factors, such as social isolation, lack of early childhood interventions and support, exclusion, poverty, discrimination, criminalisation, poor education, inadequate health resources and mental health issues.*<sup>255</sup>

## Alcohol management in the Northern Territory

One of the most contentious areas of public policy in recent times has been attempts to limit or control the supply of alcohol into Aboriginal communities in the Northern Territory.

A common response to alcohol misuse is the imposition of restrictions, often in the form of complete bans, over specific geographic areas. Evidence has previously indicated that blanket alcohol bans are less effective than tailored responses to alcohol misuse that are driven by communities.<sup>256</sup>

Prior to 2007, some Aboriginal communities in the Northern Territory had some success in responses they developed to alcohol misuse varying from complete alcohol bans, to restrictions on carriage limits, bans on takeaways and restricted operating hours for licensed venues.<sup>257</sup>

The Northern Territory Emergency Response, the Intervention, over-rode these initiatives in 2007 with the introduction of blanket bans on alcohol in prescribed Aboriginal communities.

Negative consequences of imposed blanket alcohol bans can include increased drinking in unsafe environments, the movement of people from communities into larger towns where alcohol is more readily available and the criminalisation of individuals for non-compliance with the bans.<sup>258</sup>

Arguably a more damaging impact of the Intervention measures, such as blanket alcohol bans, was the stigmatising and disempowering effects they had on Aboriginal communities in the Northern Territory.<sup>259</sup>

In 2012, the *Stronger Futures in the Northern Territory Act 2012* (Cth) introduced a modified version of alcohol restrictions that began during the Intervention. The Act introduced prohibitions on the possession, supply and consumption of alcohol, creating 'Alcohol Protected Areas', increasing the number of dry communities in the Northern Territory.<sup>260</sup>

The Act introduced legislative provisions for Alcohol Management Plans that were designed to localise alcohol management arrangements in communities. One feature distinguishing the Stronger Futures program from restrictions created under the Intervention is that the responsible Commonwealth Minister must consult with communities prior to making determinations regarding alcohol restrictions over certain areas.<sup>261</sup>

Since the introduction of the Act, policy arrangements have been changed to reduce the emphasis on Commonwealth approval of these plans, and plans to implement community-supported actions to reduce alcohol-related harm can now be approved

directly by the relevant Northern Territory Minister.<sup>262</sup> The Commonwealth Government in a submission to the Commission noted that two statutory reviews have found:

- The Act has largely been effective when assessed against its objective.
- There have been some positive changes in alcohol consumption, including a decrease in wholesale alcohol supply between 2007 and 2014.
- However, given data limitations, it could not be identified whether the observed changes were directly caused by the measures to tackle alcohol abuse, or impacted by other legislative and policy measures implemented around the same time.<sup>263</sup>

A lack of policy continuity from the Northern Territory Government has hindered progress in tackling the issue of alcohol misuse.

The Banned Drinkers Register was introduced in 2011 and aimed to fight alcohol-related crime and antisocial behaviour. It prevented the purchase, possession and consumption of alcohol to those on the register. The scheme saw a 6.3% reduction in alcohol-related assaults in major centres, excluding domestic violence, in its first year of operation.<sup>264</sup>

With a change of government in 2012, the scheme was abolished, removing barriers to the supply of alcohol.<sup>265</sup> In 2013, Alcohol Protection Orders were introduced which could be issued by police to an adult arrested, summonsed or served with a notice to appear in court in respect of certain offences where alcohol was a factor, with breaches of the orders possibly resulting in large fines or jail time.<sup>266</sup>

The Alcohol Mandatory Treatment Tribunal was established under the *Alcohol Mandatory Treatment Act* (NT). This provided that if an adult was taken into police protective custody for being drunk in public three or more times in two months, the person could be ordered to undergo alcohol rehabilitation, which could include up to three months in a secure residential treatment facility.<sup>267</sup>

As with Alcohol Protection Orders, concerns were raised about the *Alcohol Mandatory Treatment Act* criminalising public drunkenness. The AMA has expressed concern that this change in approach had the effect of criminalising the consumption of alcohol:

*'The whole thing is meant to be a health pathway, and it's funny that the path leads to criminality if people don't abide by it. This is about illness and addiction; it's not about crimes, other than the fact that some people do commit crimes. But the ordinary courts of law can handle those; we already have laws for those.'*<sup>268</sup>

The *Alcohol Mandatory Treatment Act* and *Alcohol Protection Order Act* (NT) were subsequently repealed on 1 September 2017 by the *Alcohol Harm Reduction Act 2017* (NT), which also re-established the Banned Drinkers Register.<sup>269</sup>

At the time of finalising this report, the Northern Territory's Expert Panel conducting the

Alcohol Policies and Legislation Review had just handed their recommendations to the Northern Territory Government.

The Expert Panel's final report noted that the Northern Territory needs a '*comprehensive, coordinated and sustained approach to reducing alcohol related harm*'.<sup>270</sup> The report recommended an Alcohol Harm Reduction Framework which focuses on the following key themes:

- a long-term and coordinated whole-of-government approach
- development of a more appropriate liquor regulation framework
- harm minimisation initiatives (including a sustained education program on the harmful effects of alcohol and promotion of the National Health and Medical Research Council's safe drinking guidelines), and
- harm management initiatives.<sup>271</sup>

Some of the key recommendations of the report include the need for a complete rewrite of the current *Liquor Act* (NT), the need for a stronger governance framework, the reintroduction of Therapeutic Courts, and improved data collection, linkages and sharing across government and non-government agencies.<sup>272</sup>

## ***Illicit drugs***

In 2016, people living in the Northern Territory reported the highest illicit drug use in the country with about one in five over the age of 14 reporting that they had used an illicit drug in the 12 months prior to the survey.<sup>273</sup> The most commonly used illicit drug in the Northern Territory is cannabis.<sup>274</sup>

The Northern Territory recorded a higher use of cannabis than any other jurisdiction.<sup>275</sup> In the Northern Territory, 74% of illicit drug arrests and 74.8% of illicit drug seizures related to cannabis, the highest proportion reported by any state or territory in 2015–16.<sup>276</sup>

The Commission was told that the drug 'ice' is becoming an increasing problem in the Northern Territory. Aboriginal Peak Organisations Northern Territory (APO NT) noted that youth justice lawyers from the North Australian Aboriginal Justice Agency (NAAJA) have reported an escalation in ice-related offending by children and young people in Darwin.<sup>277</sup>

Drug use can impact children and young people when they themselves are using drugs, or when someone in their family is using drugs.

If a family member is using illicit drugs children and young people may be exposed to violence, family breakdown, child neglect and experience a family member losing their job or diverting their income to pay for illicit drugs.<sup>278</sup> The impacts of domestic violence, crime and assaults as a result of illicit drug use may be felt more deeply in small remote Aboriginal communities.<sup>279</sup>

Children and young people who take illicit drugs are at risk of poor physical and mental health,

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and blood-borne viruses.<sup>280</sup> Studies in the Northern Territory have found that some of the poorest and youngest users of cannabis were spending the majority of their income on drugs, or resorting to harassment, violence and threats of suicide.<sup>281</sup>

Throughout the Commission, stories were heard from children and young people who ended up on a path to youth detention as a result of illicit drug use. One young witness stated: *'I was on a good path and started falling off because peer pressure ... getting caught up using drugs. And yes started getting locked up.'*<sup>282</sup>

In 2016, 118 children and young people out of a school population of 33,000 were suspended from school as a result of drugs.<sup>283</sup> Children and young people using illicit drugs are less likely to be able to engage fully in education and those who are suspended or excluded from school have been shown to be at greater risk of early school leaving and engaging in or becoming the victims of crime.<sup>284</sup>

## ***Volatile substances***

Volatile substance use refers to the practice of deliberately inhaling a volatile substance for the purpose of intoxication.<sup>285</sup> There are hundreds of household, medical and industrial products such as petrol, lighter fuels, glue and paint containing chemical compounds which can be intoxicating when ingested. These volatile substances give off fumes or vapours which are quickly absorbed through the lungs into the bloodstream and are spread to the brain and other organs. Within minutes the user experiences intoxication, with symptoms similar to those caused by drinking alcohol.

Volatile substance use commonly occurs in children and young people in poor and marginalised groups.<sup>286</sup> The availability, legality and low cost of these products make them a very attractive alternative for substance users. Children and young people use volatile substances as a way of relieving boredom, to stop hunger pains and to cope with emotional distress.<sup>287</sup>

Petrol sniffing has been a major source of illness, death and social dysfunction in Aboriginal communities for some time.<sup>288</sup> Volatile substance misuse has been linked to property crime and violence, a range of physical and mental health problems and suicide among children and young people.<sup>289</sup>

In an effort to reduce the petrol sniffing crisis in remote Aboriginal communities across the Northern Territory, Western Australia, South Australia and Queensland, a low-aromatic fuel was introduced as a substitute to regular petrol.<sup>290</sup> Low-aromatic fuel contains almost no lead and has only very low levels of aromatics which give the 'high' sought by petrol sniffers.<sup>291</sup> In Central Australia, in the Northern Territory, there has been a dramatic reduction in petrol sniffing since the introduction of low-aromatic fuel. In 1985, approximately 2,000 Aboriginal children and young people alone were sniffing petrol, which represented 10% of all the Aboriginal children and young people in the region, and in 2006 after the voluntary rollout of low-aromatic fuel, the number of Aboriginal people sniffing petrol fell to approximately 600.<sup>292</sup>

The *Volatile Substance Abuse Prevention Act* (NT) was introduced in 2006 with the aim of providing police with more clearly defined and appropriate powers for responding to volatile substance

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misuse.<sup>293</sup> These powers include the seizure and disposal of volatile substances, relocation of persons abusing volatile substances to safe places, and the ordering of treatment programs, among other things.<sup>294</sup> Volatile substance misuse poses a number of challenges for police services as volatile substances are readily available, their inhalation is not illegal and users are usually young and from marginalised backgrounds.

The Commission has been informed of the success of the Mount Theo Outstation Program run by the Warlpiri Youth Development Aboriginal Corporation and had the opportunity to meet with Warlpiri Elders to discuss the factors leading to its success.

The program is a successful community-led youth diversion and development program which takes at-risk Warlpiri young people to the remote Mount Theo Outstation to provide ‘care, healing, respite and rehabilitation’ with a cultural approach.<sup>295</sup> The program was established in 1993 to address the petrol-sniffing epidemic at Yuendumu and provides children and young people with a stable, supportive and positive environment to re-engage with culture, health, education and family relationships.<sup>296</sup>

## Gambling

Research has identified an association between gambling problems and family violence.<sup>297</sup>

Professor Muriel Bamblett told the Commission that as co-chair of the 2010 BOI many of the remote communities and town camps she visited identified ‘the three “G’s”, *grog, ganga and gambling, as being key contributors to child neglect and abuse and family violence*’.<sup>298</sup> This was the experience of the Commission during its visits to Aboriginal communities.

The NIITF noted that in regional and remote communities that do not have access to sanctioned gaming activities, organised card games are a popular and important social event.<sup>299</sup> However, it noted that community gambling leads to the neglect of many Aboriginal children, with the risk increasing when card games are associated with the consumption of alcohol and cannabis.<sup>300</sup>

The 2015 *Northern Territory Gambling Prevalence and Wellbeing Survey Report* noted that from 2005 to 2015 annual gambling participation had decreased significantly across all Northern Territory regions, for most activities.<sup>301</sup> Aboriginal people had a significantly higher prevalence of problem gambling, moderate risk gambling and low risk gambling, compared with non-Aboriginal people.<sup>302</sup> Approximately 13% of adults in the Northern Territory experienced at least one negative consequence because of another person’s gambling in the year before the survey. Experiencing a negative consequence because of another person’s gambling was higher for Aboriginal respondents, at 28%.<sup>303</sup>

## Family violence

All children and young people have the right to live in a safe and secure environment. Unfortunately, as well as being one of the most important protective sources, family can also be a source of harm through child abuse, neglect or family violence.<sup>304</sup>

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Physical safety, supportive relationships and positive social norms are protective factors for the wellbeing of all children. By contrast, dangerous and stressful environments, relationships that involve conflict and violence, and harsh or neglectful parenting are risk factors for child abuse and neglect.

*[Redacted] is an unsafe and violent community. There are a lot of young girls that give away their bodies to older men in [redacted]. It is too easy to find drugs and alcohol. That's why [redacted] and I have always been very strict at home.<sup>305</sup>*

Vulnerable witness CM

Many children and young people who come into contact with the youth justice and child protection systems have been exposed to family violence and abuse, including sexual abuse.

The Little Children are Sacred report noted that in the Northern Territory, governments, health and welfare professionals and others had been aware of the sexual abuse of children for some time and that this reflected a historical, present and continuing social dysfunction.<sup>306</sup>

The BOI report noted that:

*In the Northern Territory, an effective system for protecting children and promoting their wellbeing would draw upon an understanding of why child maltreatment occurs, the effects it is likely to have and what can be done to prevent, or ameliorate harm to children. It would also recognise the factors that promote wellbeing and resilience, as enhancing these will be crucial to the promotion of child wellbeing. These understandings would drive the planning of community-based supports and services that can identify targets and strategies for prevention, assist with identifying family needs and risks and harms for children, and offer the most effective therapeutic and treatment options.<sup>307</sup>*

The Commission was told that the Northern Territory has some of the highest rates of domestic and family violence in the world.<sup>308</sup>

In 2014, the Australian Bureau of Statistics reported that in the Northern Territory there were 4,287 victims of assaults related to family and domestic violence.<sup>309</sup> At a rate of 1,749 victims per 100,000 people, this represented the highest rate in Australia.<sup>310</sup>

Aboriginal women and their children experience family violence at disproportionate rates in the Northern Territory.<sup>311</sup> The Commission was told that many women living in remote Aboriginal communities have no options for leaving violent relationships due to a lack of safe housing and community and family pressure to return to violent partners.<sup>312</sup>

Organisations working with families affected by domestic and family violence have observed a clear pathway from childhood experiences of domestic and family violence and trauma to contact with the child protection and youth justice systems.<sup>313</sup>

Many young people involved in the youth justice system in the Northern Territory come from homes affected by poverty, alcohol abuse, violence and dysfunctional relationships. Many of the children and young people who are charged with offences are victims themselves.

The Commission heard that in areas known for community and family violence, very young children are commonly found on the streets late at night in part because they feel unsafe within their family homes. The Commission has also heard from some communities that children and young people often associate home with violence and hunger, which leads to them leaving the home environment.<sup>314</sup>

## FURTHER ISSUES

There are some additional issues that were raised with the Commission that were not fully examined during the inquiry. However, the Commission feels that some of these issues warrant further attention and recommends that the Northern Territory Government consider the following:

### **1. How cooperation between Northern Territory government and non-government organisations in cross-border jurisdictions on child protection matters can be improved.**

The Commission recommends that a review consider any barriers to information sharing and investigation into kinship placements in Western Australia, South Australia and Queensland and propose solutions to address such barriers, including the value of Memoranda of Understanding to further collaboration. The review must give due consideration to Articles 9 and 10 of the CRC.

The Commission notes that recommendation 215 of the Child Protection Systems Royal Commission Report: *The Life They Deserve* (the Nyland report) recommended that:

*a working group should be established to promote collaborative practice between the South Australian, Western Australian and Northern Territory child protection agencies in the tri-border region, including working towards an across-border legislative scheme for child protection in the three jurisdictions.*<sup>315</sup>

### **2. How to improve access to high quality education for children in remote communities, especially secondary students.**

The Commission suggests that a review assess the availability and practicability of schooling in remote communities. The review should also consider the benefit

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of teaching in language and make recommendations in accordance with Article 26 of the Universal Declaration of Human Rights, Article 28(1)(e) of the CRC, as well as Articles 14 and 15 of the Universal Declaration on the Rights of Indigenous Peoples (the Declaration).

### 3. Cultural practices and human rights

The Commission understands that some communities in the Northern Territory have ceremonies marking adulthood involving young men under the age of 18. The Commission respects that these ceremonies are sensitive and culturally significant, but is aware of several incidences that required the hospitalisation of boys, one as young as 11 years old.

The Commission notes that the Northern Territory Department of Health provide advice to primary health care providers on steps that can be taken to work with senior Aboriginal men in their communities to minimise the health risks involved.<sup>316</sup>

However, from a human rights perspective there are several considerations to be made. First, at Article 24(3) of the CRC, this issue is addressed and says:

*States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.*

But Articles 11 and 12 of the Declaration respectively articulate the rights to:

*... practise and revitalize their cultural traditions and customs.  
... manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies.*

When an activity becomes the subject of contest between two sets of conflicting rights along the lines outlined above, it important that the most vulnerable are heard and protected in reaching a balance between these different and competing rights.

*Sometimes the process of getting the balance between competing rights is the best indicator of a functional self-determining community or society. It is how these discussions and debates are facilitated, conducted and agreed that will mark the strength of a community.<sup>317</sup>*

Therefore, this is an issue that requires an in-depth, culturally sensitive discussion to take place where these competing rights are fully understood, where male children's voices and their advocates are heard together with the appropriate male Elders and ceremonial leaders.

Given the sensitivity of these matters the Commission recommends the Northern, Central, Tiwi and Anindilyakwa Land Councils jointly convene a forum of male

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children and their advocates, male Elders and ceremonial leaders to review any ceremonial practice to ensure it is not detrimental to the health of male children, making it compliant with Article 24(3) of the CRC.

In the meantime, the Northern Territory Department of Health should continue to provide assistance and advice as requested by ceremonial leaders.

### **RECOMMENDATION 3.1**

**The Northern Territory Government conduct a review into:**

- a. improving cooperation between Northern Territory government and non-government organisations in cross-border jurisdictions on child protection matters, and**
- b. improving access to high quality education for children in remote communities, especially secondary students.**

### **RECOMMENDATION 3.2**

**The Northern, Central, Tiwi and Anindilyakwa Land Councils jointly convene a forum of male children and their advocates, male Elders and ceremonial leaders to review any ceremonial practice which affects the health of male children to ensure compliance with Article 24(3) of the *United Nations Convention on the Rights of the Child*.**



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# 4

## CHALLENGES FOR ABORIGINAL PEOPLE IN THE NORTHERN TERRITORY



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# CHALLENGES FOR ABORIGINAL PEOPLE IN THE NORTHERN TERRITORY

## INTRODUCTION

Aboriginal people in the Northern Territory have had a fraught relationship with government since colonisation and have lived through various iterations of policy such as absorption, assimilation and protectionism. Contemporary challenges in relation to Aboriginal child welfare cannot be fully understood without an appreciation of the historical context of policies that have sought to control and intervene in Aboriginal family life.

From the early days of settlement, laws such as the *Northern Territory Aboriginals Act 1910 (SA)*, the *Aboriginals Ordinance 1911 (Cth)*, the *Aboriginals Ordinance 1918 (Cth)* and the *Welfare Ordinance 1953 (Cth)* collectively controlled the movement of Aboriginal peoples across various locations such as reserves, homes, missions and compounds established throughout the Northern Territory. The Kahlin Compound, the Bungalow and later the Retta Dixon home are examples of such places where conditions were cramped, food was scarce or sour, and diseases were prevalent.<sup>1</sup>

These laws controlled every aspect of Aboriginal peoples' lives, including whom Aboriginal women could marry,<sup>2</sup> and made it an offence not to comply with directions such as remaining on a reserve or resisting removal.<sup>3</sup> Aboriginal young people who refused to stay at assigned missions were subsequently deemed 'unmanageable' and often sent to juvenile detention centres in the southern states.<sup>4</sup>

Legislation such as the *Northern Territory Aboriginals Act* made the position of Chief Protector of Aborigines the legal guardian of every Aboriginal and 'half-caste' child under the age of 18.<sup>5</sup>

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These powers were extended when the Commonwealth took control of the Northern Territory from South Australia in 1911,<sup>6</sup> and gave the Chief Protector further powers to assume the 'care, custody or control of any aboriginal or half-caste if in his opinion it is necessary or desirable ... for him to do so'.<sup>7</sup> This included the ability to 'enter premises where the aboriginal or half-caste is or is supposed to be and take him into custody'.<sup>8</sup>

The *Aboriginals Ordinance 1918* facilitated the removal of Aboriginal people at the request of non-Aboriginal people, with the permission of the Chief Protector:

*A protector may if he thinks fit give authority in writing to any person so desiring it for the removal of any aboriginal, or any female half-caste, or any half-caste male child under the age of eighteen years from one district to another, or from any reserve or aboriginal institution to another reserve or aboriginal institution, or to any place beyond the Northern Territory.*<sup>9</sup>

The remarks of then Chief Protector, Professor Walter Baldwin Spencer, in 1912 emphasised the imperative behind such practices, as outlined in the Human Rights and Equal Opportunity Commission's *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Bringing them Home report):

*No half-caste children should be allowed to remain in any native camp, but they should all be withdrawn and placed on stations. So far as practicable, this plan is now being adopted. In some cases, when the child is very young, it must of necessity be accompanied by its mother, but in other cases, even though it may seem cruel to separate the mother and child, it is better to do so when the mother is living, as is usually the case, in a native camp.*<sup>10</sup>

While these laws and practices are historical, they have left a long-term legacy among Aboriginal communities. The destabilisation of the social and cultural lives of Aboriginal families through the control and separation of children has undermined successive generations of Aboriginal people.

*Aboriginal families and communities in the Northern Territory over a period of more than a hundred years had their role, capacity and responsibility for caring for their own children systematically eroded. The scale of intervention into the lives and functioning of Aboriginal families from the time of the 1909 Northern Territory Aboriginals Act through to the 1983 Community Welfare Act was enormous. All Aboriginal children were deemed wards of the state through the Welfare Act. The orthodoxy of the day was to break up Aboriginal families.*<sup>11</sup>

This history of control has resulted in chronic disadvantage being experienced by Aboriginal people in terms of health, mental health, disability, employment, housing and education. It remains a significant contributing factor to overrepresentation in both the child protection and youth justice systems.

The *Review of the Northern Territory Youth Detention System Report* conducted by Michael Vita highlighted that many children and young people coming into contact with the justice system were 'from homes where poverty, alcohol abuse, violence and dysfunctional relationships are the norm'.<sup>12</sup>

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If long-term reductions in the rate of engagement with the youth justice and child protection systems are to be achieved, these broader challenges must be addressed. As one witness stated to the Commission:

*'I have known a lot of people who have gone into youth detention. They usually have ended up in trouble with the law because there has been drug and alcohol misuse in their family, they have been abused, some have been the victims of paedophilia and some have been bullied ... I think that the way to stop people going into youth detention is to make sure that the youth get help for these kinds of problems early, before they start having problems with the police.'*<sup>13</sup>

The Chief Executive Officer of Danila Dilba Health Service told the Commission the current youth justice and child protection frameworks have failed to recognise the *'... disadvantage of Aboriginal children, young people and that of their families and communities, leading to [the] overwhelming high rates of contact with youth justice and child protection systems.'*<sup>14</sup>

## LOSS OF AUTONOMY

*Much government policy in Indigenous affairs reflects the failure to apply even the most rudimentary principles of social science to understanding why there are so many social problems and what should be done to reverse them. Understanding concepts like learned helplessness, locus of control, self-fulfilling prophecies and attribution theory, for example, would undoubtedly assist in devising better policy.*

*In 'Why Warriors Lie Down and Die', Richard Trudgen drew attention to the pernicious effects of 'learned helplessness' amongst the Aboriginal people of Arnhem Land. It is a concept well understood in psychology and encompasses research which shows that when people repeatedly experience unpleasant events over which they have no control, they will not only experience trauma, but will come to act as if they believe that it is not possible to exercise control over any situation and that whatever they do is largely futile. As a result, they will be passive even in the face of harmful or damaging circumstances which it is actually possible to change.*

*Similarly, research on black American students has shown that those who experience discrimination and powerlessness are more likely to attribute their successes – or failures – to outside forces than those who do not; they exhibit what is called an 'external locus of control' which is, in turn, related to poorer academic performance and poorer health care. There is no reason to believe that results would be different for Indigenous Australians.*

*Coming to accept that others control your life and that nothing you can do will really make much difference is already a crippling combination of attitudes. Add to it the well-known effect of the 'self-fulfilling prophecy' and you have a recipe for the social disorder evident in varying degrees in many Indigenous communities. A self-fulfilling prophecy occurs when expectations about an individual's behaviour cause that person*

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*to act in ways which confirm the expectations. The phenomenon has been measured in many situations and it is clear that minority groups in any society are the most vulnerable to such effects, especially if the expectations are negative and constantly repeated ...*

*Dependency is an inevitable by-product of learned helplessness; many Indigenous people are now so accustomed to having things done to them and for them, rather than being active participants, that they have lost their sense of mastery, competence and self-respect.<sup>15</sup>*

Loss of autonomy and the disempowerment of Aboriginal people have been key features in a history of control.<sup>16</sup> They have continued through policy initiatives of both the Commonwealth and Northern Territory Governments during the relevant period; through the Northern Territory Emergency Response (the Intervention), the abolition of the Community Development Employment Projects scheme and local government reforms.

*The devastating effects [of the Intervention] have compounded over the years and include disempowerment of communities and undermining of local autonomy by seizure of community assets, takeover of community organisations and programmes, and installation of government business managers ...<sup>17</sup>*

Historically, significant policy decisions in the Northern Territory have been made with little or no engagement with Aboriginal people, resulting in poor outcomes, wasted resources and disempowerment.<sup>18</sup> The Commission was often told the community knows what is best for their children and young people, not the 'bureaucrats in Darwin and Canberra'.<sup>19</sup>

Lack of engagement with Aboriginal families appears to have led to the distrust and suspicion that exists between Aboriginal people and child welfare agencies. This distrust extends to members of the Aboriginal community not seeking help or notifying agencies of existing abuse or neglect.

Families should provide strength and guidance, but are often left feeling powerless and compliant when confronted with the authority of governments when it comes to the fate of their children.

## ONGOING EXPERIENCES OF RACISM AND DISCRIMINATORY TREATMENT

The Commission was told Aboriginal people in the Northern Territory continue to experience racial discrimination both in their everyday lives and dealings with government. In evidence before the Commission many people strongly expressed a perception of discrimination on the basis of Aboriginality with respect to both the youth justice and child protection systems.<sup>20</sup>

Racial discrimination affects children and young people differently from adults and in significantly more damaging ways. Young people are forming their understanding of themselves and their self-worth and figuring out how they relate to others. Racial discrimination influences the way children and young people perceive the world and how others are going to treat them. It is increasingly recognised as a key determinant of health. Children and young people are extremely

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vulnerable to the harmful effects of racism, which has the capacity to negatively affect their mental stability and development.<sup>21</sup>

Strong correlations have been drawn between race-based discrimination and negative child health and wellbeing outcomes, such as anxiety, depression, substance abuse issues and criminal offending behaviour.<sup>22</sup>

## EVERYDAY EXPERIENCES OF RACIAL DISCRIMINATION BY ABORIGINAL PEOPLE

The *Racial Discrimination Act 1975* (Cth) gives effect to Australia's international human rights commitments and promotes equality between people of different backgrounds. It protects people across Australia from unfair treatment on the basis of their race, colour, descent, or national or ethnic origin in different areas of public life.<sup>23</sup> It makes racial vilification unlawful.

However, discrimination remains prevalent for Aboriginal people nationally. For example:

- the Australian Bureau of Statistics reported in 2016 that 34% of Aboriginal people recorded feeling they had been treated unfairly at least once in the previous 12 months because they were of Aboriginal origin,<sup>24</sup> and
- the 2016 *Australian Reconciliation Barometer Survey* found Aboriginal Australians are significantly more likely to experience racial prejudice than non-Aboriginal Australians, with 18% of the general community indicating they had experienced at least one form of racial prejudice in the past six months compared with 46% of Aboriginal respondents.<sup>25</sup>

Reconciliation Australia, which conducts and publishes the *Australian Reconciliation Barometer Survey*, states the 'significant gap' in the experience of racial prejudice 'underlines a key stumbling block in the relationship and impediment to reconciliation'.<sup>26</sup>

In relation to attitudes towards reconciliation in the Northern Territory, the 2016 *Australian Reconciliation Barometer Survey* also found:

- Territorians are most likely, out of people from each state and territory, to view the relationship between Aboriginal and non-Aboriginal people as very important.
- However, the Northern Territory had the lowest level of trust nationally, with 31% of the general community in the Northern Territory feeling there is very low trust for Aboriginal people and 33% believing Aboriginal people have very low trust for other Australians.<sup>27</sup>

The United Nations Special Rapporteur on Indigenous Issues noted in her report to the United Nations Human Rights Council in September 2017:

*The Special Rapporteur found deeply disturbing the numerous reports on the prevalence of racism against Aboriginal and Torres Strait Islander Peoples. Racism manifests itself in different ways, ranging from public stereotyped portrayals as violent*

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*criminals, welfare profiteers and poor parents, to discrimination in the administration of justice. Aboriginal doctors and patients informed the Special Rapporteur about their experiences of racism within the medical sector and their reluctance to seek services from mainstream medical providers. Institutional racism has been identified in the National Aboriginal and Torres Strait Islander Health Plan (2013–2023) and its implementation plan as a significant barrier in the delivery of health care. Support for Aboriginal and Torres Strait Islander managed medical services is indispensable for improving health indicators and overcoming disadvantage. Greater cultural awareness raising among non-indigenous medical professionals is also required.*

*There are also more subtle elements of racism stemming from the failure to recognize the legacy of two centuries of systemic marginalization. The mainstream education system contains inadequate components on Aboriginal and Torres Strait Islander history and the impact of colonization. The non-recognition of the socioeconomic exclusion and the impact of intergenerational trauma on indigenous peoples continue to undermine reconciliation efforts. In order to truly recognize the situation of Aboriginal and Torres Strait Islanders today, there needs to be much greater public awareness of their perspectives on history and the consequences of past policies and legislation, including the long-term damage and rupture of social bonds caused by the forced removal and institutionalization of their children.<sup>28</sup>*

## SYSTEMIC DISCRIMINATION THROUGH THE APPLICATION OF LAWS

Over the past 20 years, a number of Northern Territory and Commonwealth laws have disproportionately impacted Aboriginal people in the Northern Territory. Most commonly, this occurs through laws that appear to apply equally to all citizens, as they do not make distinctions based on race.

Examples include:

- mandatory sentencing laws associated with property offences for adults and young people<sup>29</sup>
- removal of people from public spaces under local council by-laws, such as the ‘long-grassers’ in Darwin<sup>30</sup>
- paperless arrest laws that enable police to lock up people without charge for up to four hours<sup>31</sup>
- welfare card trials<sup>32</sup> conducted in areas of predominately Aboriginal populations,<sup>33</sup> and
- reforms to bail legislation creating new offences for breach of bail.<sup>34</sup>

A disproportionate impact on Aboriginal people does not of itself make a law discriminatory. The Australian Human Rights Commission has noted determining whether a law breaches section 10(1) of the *Racial Discrimination Act* involves the following questions:

- Is a relevant right affected by the law in question?
- Does the law prevent or limit the enjoyment of that right for persons of a particular race relative to others?
- Is the limitation legitimate because it is intended to achieve a valid, non-discriminatory purpose?<sup>35</sup>

An assessment of the legitimacy of a limitation on a right is objective. A lack of discriminatory intent is

not sufficient to make any limitation of rights justifiable. The limitation will not be legitimate if its impact is disproportionate to the purpose or benefit claimed.

## Mandatory sentencing laws

Mandatory sentencing laws were introduced in the Northern Territory in 1997. These laws removed judicial discretion in sentencing young people and adults found guilty of certain offences, mostly non-violent property offences. Young people aged 17 and adults aged 18 and over found guilty of certain property offences were subject to a mandatory minimum term of imprisonment of 14 days for a first offence, 90 days for a second offence and one year for a third property offence. Those aged 15 or 16 convicted of a specified property offence and with at least one prior conviction for such an offence were subject to detention for a minimum of 28 days.

The Human Rights and Equal Opportunity Commission described these laws as:

*... the antithesis of social justice. They displace concerns about the impact of contact of Indigenous young people with criminal justice processes as well as the underlying causes of the behaviour that leads to offending. They are inconsistent with best practice standards for criminal justice process and breach Australia's international human rights obligations.<sup>36</sup>*

Concerns about mandatory sentencing laws included that they were arbitrary, not proportionate to the crime, without regard to the circumstances of young offenders and removed any ability of courts to review sentences.

The Australian Human Rights Commission considered the laws in breach of the *Racial Discrimination Act* as their disproportionate impact was not capable of being justified and they targeted particular property offences generally committed by people of lower socio-economic backgrounds.<sup>37</sup>

## The Intervention

The legislation that enabled the Intervention directly discriminated against Aboriginal people in the Northern Territory. The Intervention involved a suite of measures with a broad aim to protect children and women from violence in Aboriginal communities. While the need for protective measures and action was not disputed, the method for achieving these aims was intensely contested.

The Intervention involved the blanket application of a range of measures to discrete Aboriginal communities in the Northern Territory regardless of need and with no assessment of the individual challenges and strengths within these different communities.

Much attention on the Intervention focused on the introduction of a Basics Card for welfare recipients – quarantining welfare payments to be spent only at particular shops on certain items – and the

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blanket banning of alcohol and pornography in specified Aboriginal communities.

However, the Intervention legislation involved a number of provisions that directly discriminated against Aboriginal people in the Northern Territory, including by:

- compulsorily acquiring Aboriginal land in townships, with compensation in some circumstances<sup>38</sup>
- suspending the 'future act' provisions of the *Native Title Act 1993* (Cth) over this land
- taking control of Aboriginal town camps, with the option of vesting all rights, titles and interests in town camps in the Commonwealth merely by giving notice
- removing the ability of courts to take cultural factors into account in criminal sentencing processes for all crimes, not just those related to the overall purpose of addressing family violence, and
- giving the Commonwealth Minister for Indigenous Affairs the power to override the decision-making of Aboriginal community councils and associations, including with respect to service delivery and management of funds.<sup>39</sup>

The underpinning legislation 'deemed' these and other measures to be 'special measures'; non-discriminatory measures to advance the rights of affected Aboriginal people. The Australian Human Rights Commission and various United Nations human rights mechanisms have disputed this characterisation as inappropriate and wrong in law.<sup>40</sup>

To ensure the Commonwealth Government had the certainty to undertake these actions without legal impediments, the Intervention legislation removed the application of the *Racial Discrimination Act* and the *Anti-Discrimination Act* (NT) to the Northern Territory.

The discriminatory treatment of Aboriginal people in the Northern Territory under these laws has been widely condemned.

The former United Nations Special Rapporteur on Indigenous Issues observed in 2010:

*The NTER [Northern Territory Emergency Response] programme, however, in several key aspects limits the capacity of indigenous individuals and communities to control or participate in decisions affecting their own lives, property and cultural development, and it does so in a way that in effect discriminates on the basis of race, thereby raising serious human rights concerns ...*

*The NTER, however, has an overtly interventionist architecture, with measures that undermine indigenous self-determination, limit control over property, inhibit cultural integrity and restrict individual autonomy ...*

*Being racially discriminatory on their face, the rights-impairing aspects of the NTER measures should be presumed to be illegitimate. That presumption might possibly be overcome only if there is a strong showing that the measures are proportional and necessary in regard to a valid objective, and that adequate consultations have been*

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*undertaken ... no such consultations preceded enactment of the NTER programme, and, apart from that, the discriminatory measures cannot be viewed in the considered opinion of the Special Rapporteur, as proportional or necessary to the stated objectives of the NTER, valid as those objectives are.<sup>41</sup>*

The independent panel appointed by the Commonwealth Government to review the operation of the Intervention noted the significance of the removal of protections associated with the Racial Discrimination Act in Aboriginal communities:

*Experiences of racial discrimination and humiliation as a result of the NTER were told with such passion and such regularity that the Board felt compelled to advise the Minister for Indigenous Affairs during the course of the Review that such widespread Aboriginal hostility to the Australian Government's actions should be regarded as a matter for serious concern.*

*There is intense hurt and anger at being isolated on the basis of race and subjected to collective measures that would never be applied to other Australians. The Intervention was received with a sense of betrayal and disbelief. Resistance to its imposition undercut the potential effectiveness of its substantive measures.<sup>42</sup>*

The Commission heard during its community meetings there is a lasting legacy from the Intervention, with suspicion about measures imposed without the full engagement and participation of Aboriginal communities.

## INSTITUTIONAL RACISM

Institutional racism has been described as the:

*process by which people from ethnic minorities are systematically discriminated against by a range of public and private bodies. If the result or outcome of established laws, customs or practices is racially discriminatory, then institutional racism can be said to have occurred.<sup>43</sup>*

Institutional racism operates 'irrespective of the intent of the individuals who carry out the activities of the institution'.<sup>44</sup>

It often arises due to an organisational failure to understand the impact of, or appropriately ensure compliance with, policies and procedures affecting particular people, such as the many Aboriginal children and young people who are the subject of this inquiry. For example, the Commission heard evidence from witnesses about the use of racist language directed towards Aboriginal detainees both by staff members and other detainees in the Northern Territory's detention centres.<sup>45</sup>

The *Systemic Racism as a Factor in the Over-representation of Aboriginal People in the Victorian Criminal Justice System* report identifies institutional racism as the most insidious form of racism because of the difficulty of quantification.<sup>46</sup>

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In evidence before the Commission, the Victorian Aboriginal Children's Commissioner, Andrew Jackomos, identified the basis on which he had reached his opinion that institutional racism had infected the policy and practices of the Victorian child protection system:

*'When 91 per cent of Aboriginal children are placed with non-Aboriginal carers, as identified in the Productivity Commission's report on Government services, when there's a failure to comply with the Aboriginal child placement principle and the disregard of potential Koori kin, a failure to comply with the cultural safety plan requirements as set out in legislation, when there's a lack of management accountability in ensuring compliance with Aboriginal child placement requirements, when there's a failure to develop a diverse workforce and a total lack of Aboriginal employment at executive levels, where our children make up 22 per cent, when key data involving Aboriginal children in out of home care has been kept from the Aboriginal community in the past, when there's a failure to ensure proper levels of counselling and health needs for Aboriginal children in out of home care, when it is culturally safe (sic) for Aboriginal workers and executives, when there's lower levels of funding to ACCOs [Aboriginal Community Controlled Organisations] for family services than provided to non-Aboriginal organisations, when there is a lack of identification of Aboriginal children in a timely manner, when I see de-identification of children, when I see racist attitudes of child protection staff, this helps me form that view of institutional racism and bias.'*<sup>47</sup>

The evidence of Mr Jackomos is not to be understood as a list of criteria needed to establish institutional racism but a range of factors he is aware of that support the proposition that Aboriginal children and families are discriminated against in a manner that has become normalised.

A feature of the normalisation of such behaviour is the extent to which it appears to be pervasive in all levels, from front-line caseworkers through to executive-level staff:

*There was also a strongly held belief that racism within the criminal justice system feeds off, and in turn feeds, racism within other parts of the social system. This view is supported by some compelling statistical evidence demonstrating that continued overrepresentation of Koori people in the criminal justice system occurs at every stage, and on a scale not explicable simply by reference to criminogenic factors alone.'*<sup>48</sup>

A 2009 care plan for an Aboriginal child prepared by the Department of Children and Families stated, *'the parent's culture tended to be more of the drug-alcohol culture, not Aboriginal culture.'*<sup>49</sup>

The Commission heard evidence about legislation and policies guiding the youth justice system in the Northern Territory contributing to the high rates of detention for Aboriginal children and young people.

Between 2011–12 and 2015–16, the number of breach of bail offences per year for Aboriginal young males increased. This contrasts with declining breaches of bail for non-Aboriginal male young people.<sup>50</sup> Evidence before the Commission raised concerns

about bail conditions that do not, in their terms, recognise the housing difficulties faced by many young Aboriginal alleged offenders when consideration is given to home life and support systems.<sup>51</sup> Heightened policing such as operations specifically targeting young people on bail has also been raised as a concern.<sup>52</sup>

As suggested by Danila Dilba Health Service, the *'degree of over-representation in the Northern Territory Youth Justice system is a reflection both of underlying risk factors that give rise to offending and reoffending and to the structure and operation of the NT youth justice system'*.<sup>53</sup>

The North Australian Aboriginal Justice Agency (NAAJA) told the Commission that underlying causal factors *'in combination with operation of the laws, policies and practices of that system ... predisposed Aboriginal youth to be arrested, held in custody and to receive sentences of detention'*.<sup>54</sup>

The Commission heard the use of police discretion in diversion, cautioning, arrest and charging; bail decisions and available sentencing options; a lack of diversionary programs; and high rates of children and young people held on remand have all exacerbated the detention rates of Aboriginal children and young people.<sup>55</sup> This is discussed in detail in Chapter 26 (Other youth justice and detention models).

The number of Aboriginal children apprehended by police in the Northern Territory in 2011 was 702. In 2015, it was 1,766. The number of non-Aboriginal children apprehended has increased only modestly: from 277 in 2011 to 334 in 2015.<sup>56</sup>

The National Aboriginal and Torres Strait Islander Legal Services (NATSILS) raised access to justice – including the unmet legal need for civil and family law services – as *'a major issue that leads to involvement with child protection systems and experiences of violence'*.<sup>57</sup>

The *'A Safer Northern Territory through Correctional Interventions'* - Report of the Review of the Northern Territory Department of Correctional Services (Hamburger report) made the observation that the overrepresentation of Aboriginal children and young people was not reflected in the staff profile, policies or procedures of the Northern Territory Department of Correctional Services.<sup>58</sup>

This view is supported by Danila Dilba Health Service, who noted the majority of Territory Families staff members *'are non-Aboriginal and many of the allied service workers ... are young white females, who in cultural terms are least appropriate to work in this context'*.<sup>59</sup>

The Commission heard compelling evidence about the number of children and young people involved in both the child protection and youth justice systems, referred to as the *'crossover'* population. This evidence suggests children and young people in child protection are also overrepresented in youth justice, as discussed in Chapter 35 (The crossover of care and detention).

This crossover has been described as *'care-criminalisation'* or a *'care-to-crime pathway or pipeline or nexus'*.<sup>60</sup>

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*'From Legal Aid's [NSW] experience, we conducted some research into our high service users. So they would be the frequent flyers of people who utilise Legal Aid services, and we found that 80 per cent of those users of Legal Aid services were young people under the age of 19. And, worryingly, almost all of them had some time, had spent some time, in juvenile detention, and almost half of them had been in out-of-home care. What it meant was that we, as an organisation, decided that there had to be a better response to this group of young people....*

*There seemed to be a more frequent interaction in the criminal justice system for these children in residential care and there was certainly an interaction in terms of the challenging behaviours that they exhibited and the responses from the residential care workers and their use of police as a behaviour management tool, and we identified that that was a key pathway for young people in the care and protection system into the criminal justice system.'*<sup>61</sup>

## INTERGENERATIONAL IMPACT OF TRAUMA

The health and wellbeing of Aboriginal children and young people today is impacted by the traumas Aboriginal people have suffered since colonisation, including dispossession of land, massacres, exposure to introduced diseases, incarceration, changes in nutrition, extreme legislative control of every aspect of life, fragmentation and dislocation of family through the forced removal of children, racism and discrimination.<sup>62</sup>

Psychological trauma is the response of the mind and nervous system to a life-threatening experience that is so distressing it leaves a person unable to come to terms with it.<sup>63</sup> Trauma experienced in childhood becomes embedded in the personality and physical, emotional, physiological, mental and intellectual development of the child or young person.<sup>64</sup> Trauma can be experienced at both a personal and collective level.<sup>65</sup>

It is widely understood that the effects of trauma can be transmitted across generations,<sup>66</sup> hence the terms 'intergenerational trauma' or 'transgenerational trauma'.

Initial trauma suffered by one generation creates 'a situation where, tragically, their own children and grandchildren are exposed to more violence.'<sup>67</sup> Some children and young people experience early life trauma from exposure to family violence, abuse, and alcohol and drug misuse. These are both causes and effects of intergenerational trauma.

Historical trauma is normalised within a culture as it becomes deeply rooted within the collective and is passed from generation to generation through the same mechanisms that transmit culture.<sup>68</sup> Trauma can be passed on through parenting practices, behavioural problems, violence, harmful substance use and mental health issues.<sup>69</sup> The Bringing them Home report said, 'the actions of the past resonate in the present and will continue to do so in the future.'<sup>70</sup> This cycle has led to government responses that further compound the trauma Aboriginal people experience. The Intervention was a government policy that reignited:

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*... for most people, memories and experiences of trauma that had been experienced by their families and communities for generations, and by themselves. Many people thought that the days in which governments would act in this way had passed, that their democratic rights as Australian citizens were secure.<sup>71</sup>*

Childhood exposure to trauma, including intergenerational trauma, can have severe and long-lasting effects.<sup>72</sup> Early life exposure to trauma can affect brain development, which is discussed in Chapter 3 (Context and challenges). There is significant research that experiences of trauma – particularly in early childhood – can affect long-term health outcomes, emotional and behavioural responses, relationships and cognition. *‘Childhood trauma including abuse and neglect, is probably ... [the] single most important public health challenge, a challenge that has the potential to be largely resolved by appropriate prevention and intervention.’<sup>73</sup>*

Children and young people who experience trauma may live in a heightened state of watchfulness and engage in high-risk behaviours and activities that result in increased engagement with the youth justice system. Children and young people who have been exposed to trauma often engage in self-destructive behaviours including aggression and violence, substance misuse, criminal acts, sexual promiscuity, inactive lifestyles and suicide.<sup>74</sup> They are likely to have an impaired ability to learn and concentrate, develop trusting, reciprocal relationships, regulate behaviour and utilise self-soothing or calming strategies.<sup>75</sup>

*My mother passed away when I was five or six years old. [REDACTED] I never really had a relationship with my father and haven't seen or heard of him at all since 2012.*

*When I first got in trouble as a kid, I would drink. I was addicted to ganja by the time I was 14 or 15. I tried sniffing petrol when I was young for about a fortnight ... I didn't know what I was doing. I did some bad things, like stealing from the community store and stealing cars.<sup>76</sup>*

Vulnerable witness AU

Without appropriate supports to overcome trauma, children and young people are likely to resort to other coping mechanisms, like drug and alcohol addiction and other antisocial behaviour.<sup>77</sup> Many children and young people in the youth justice system present as violent or oppositional and these behaviours are often the cause of their interaction with the system. However, for many, the underlying cause of these behaviours is grief associated with living through traumatic experiences.<sup>78</sup>

David Cole, the founder of the Balunu Foundation, told the Commission the effects of intergenerational trauma were seen in most of the children and young people who take part in Balunu's programs:

*'a lot of the issues are complex, but they're directly linked to the past suffering that's occurred to Indigenous people. That passed through the families and unaddressed, has resulted in the kids we deal with today ... And what we are dealing with now is what I call the lost generation, the children who don't understand the trauma, the pain and*

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*the issues that they confront, why they have to endure it, and amongst all that pain and suffering far too many are turning to substance abuse to escape and self-medicate and far too many are turning to suicide to escape that pain once and for all. So it's a combination of all these issues ... the drugs and alcohol are just self-medication. They're not the cause. It's the underlying trauma and issues and the family disruptions and problems that are resulting in most of the kids ending up in the space that they're in.*<sup>79</sup>

The Aboriginal Medical Services Alliance Northern Territory (AMSANT) suggests the most complex issues in Aboriginal communities can be better understood through the lens of historical and intergenerational trauma:<sup>80</sup>

*The legacy of the violence on the colonial frontier, followed by the extreme deprivation suffered by Aboriginal families through at least the first half of the twentieth century (characterised by malnutrition, poverty, and high rates of physical disease and emotional stress) is in part carried by children and young people today.*<sup>81</sup>

*'So after one or two generations of this toxic stress we do start to see changes in the genetic material... that then starts to explain the intergenerational nature of disadvantage, the intergenerational nature of the way we react to aggression, the intergenerational nature of violence. Once we start to see these changes [to] genetic material, then the child, as he or she grows up, becomes so much more vulnerable to those sorts of problems later in life.'*<sup>82</sup>

In addition to the traumatic experience of the forced removal of Aboriginal children from their families, their subsequent placement in institutions meant many Aboriginal people did not learn appropriate parenting skills.<sup>83</sup> A circularity is created when early generations of children are removed from their families, where they would learn parenting skills embedded in their culture, resulting in future generations having their children and young people removed from their families because of poor parenting.<sup>84</sup>

*Children who have not been appropriately parented are poorly prepared for the challenges of the world. The more experienced the mother the better parenting she can provide. Aboriginal women have children at a younger age; these mothers are less experienced at parenting and their children perform poorly at school. They are more likely to be incarcerated, and if girls, to have a teenage pregnancy.*<sup>85</sup>

*You don't just get taken away from your family out of the blue and expect to adapt. It's just human. It's the normal way to want to be with family.*<sup>86</sup>

A parent with a childhood experience of trauma 'is more likely to struggle to provide a safe and nurturing environment for their child'.<sup>87</sup>

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*Child abuse, neglect and socio-economic disadvantage are symptoms of underlying pain and suffering. If this generation of children and young people are to have a different experience from their parents and grandparents, we must act to acknowledge and address their healing needs. Unless children and young people are able to heal from their own experience of trauma, many will go on to create a traumatic environment for their own children and the cycle of intergenerational trauma will continue.*<sup>88</sup>

The impact of intergenerational trauma is acknowledged by the Commonwealth Government in a number of programs – including the Aboriginal and Torres Strait Islander Healing Foundation, and the Social and Emotional Wellbeing Program – that undertake activities to support the Stolen Generations and address trauma in Aboriginal and Torres Strait Islander communities.<sup>89</sup> One such program, the Department of Social Services’ Intensive Family Support Service, has been shown to effect decreases in the neglect of children’s physical care and emotional development following improvements to parental supervision.<sup>90</sup>

## UNDERSTANDING THE KEY PROTECTIVE CAPACITY OF ABORIGINAL CULTURE, FAMILY AND KINSHIP

The maintenance and expression of Aboriginal cultures has the potential to be one of the most significant protective factors to address the challenges identified throughout this Inquiry.

Protective factors are attributes or conditions occurring at individual, family or community levels, or in the wider society, that moderate risk or hardship and promote healthy development and wellbeing.<sup>91</sup>

Aboriginal people commonly identify Aboriginal cultural concepts such as connection to land, culture, spirituality, ancestry, family and community as protective factors. These can serve as ‘sources of resilience and can moderate the impact of stressful circumstances on social and emotional wellbeing at an individual, family and community level’.<sup>92</sup> These factors can be a special reservoir of strength and recovery when Aboriginal people are faced with adversity.<sup>93</sup>

Historically, the central importance of culture in the wellbeing of Aboriginal people in the Northern Territory was compromised by colonial social policy,<sup>94</sup> the legacy of which continues today.

### The importance of culture

Aboriginal peoples in Australia make up the oldest continuous cultures in the world.<sup>95</sup> Culture encompasses the ideas, values, beliefs and shared understandings that allow members of a society to interact with one another in recognised and accepted customs.<sup>96</sup>

*Culture is the whole complex of relationships, knowledge, languages, social institutions, beliefs, values and ethical rules that bind a people together and give the collective and its individual members a sense of who they are and where they belong.*<sup>97</sup>

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For many Aboriginal families and communities, engaging in traditional practices and reclaiming a sense of cultural identity is vital to alleviating Aboriginal disadvantage.<sup>98</sup>

Culture provides a strong sense of self, community, belonging and pride. It is premised on individuals being engaged with their community and compels senior figures to present as good role models for the younger generation.

Cultural practices help Aboriginal children and young people grow and contribute actively to their families, community and society. Through the kinship system, children and young people have a network of support that encourages safety and happiness.

The Australian Institute of Family Studies identified four key themes on the positives of culture in raising Aboriginal children and young people in its paper, *Strengths of Australian Aboriginal cultural practices in family life and child rearing*:

1. **Socially inclusive approaches to raising children** – ensuring the wellbeing and safety of children and young people is a shared responsibility has been shown to help improve family functioning and build strength in communities.
2. **Self-sufficiency and independence** help children and young people develop the necessary skills to cope with life’s challenges as they progress to adulthood.
3. **Elderly family members** provide crucial support to families in raising children and young people and contribute to family functioning.
4. **Engagement in spiritual and/or religious practices** has positive effects on individuals and families.<sup>99</sup>

Aboriginal culture can play a critical role in preventing crime and promoting rehabilitation, improving the child protection system and reducing the prevalence of neglect and abuse among Aboriginal children and young people. During the relevant period, the child protection and detention systems continued to undervalue the protective role culture could play in institutions where Aboriginal children and young people are overrepresented, as discussed in Chapter 18 (Culture in detention).

There is no single homogenous Aboriginal culture in the Northern Territory or across Australia,<sup>100</sup> but many groupings, languages, kinships and tribes. Remote communities have individual local cultures,<sup>101</sup> where activities such as hunting, ceremony and initiation are practised, kinship relationships are observed and Aboriginal languages are spoken.

Growing up in the Northern Territory, children and young people become connected with their culture in a range of ways including:

- being taught and guided by Elders
- learning about and participating in language, dance and song
- observing their proper role and obligations in family and kinship relationships
- participating in ceremonies, and
- meeting the expectations and responsibilities of adulthood when they reach certain milestones.<sup>102</sup>

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For all Aboriginal communities in Australia, culture frames a sense of identity that relates to being the First Peoples of Australia,<sup>103</sup> enhances a deep sense of belonging and involves a spiritual and emotional relationship to the land.<sup>104</sup>

The *United Nations Convention on the Rights of the Child* (CRC) provides:

*In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.*<sup>105</sup>

Aboriginal people attain their sense of identity and, in turn, emotional and social wellbeing through connection to culture. The development and maintenance of a connection to culture is a core component of holistic health and a protective factor against antisocial behaviour.<sup>106</sup>

Connection to culture refers to the capacity and opportunity for Aboriginal children and young people to maintain and develop a healthy, strong relationship to their Aboriginality.<sup>107</sup> In this context, connecting an Aboriginal child or young person to the relationships with their land and kin is not just a 'factor' to be considered but intrinsic to their best interests.<sup>108</sup>

The indivisible link between connection to culture and relationships with other Aboriginal people has been described by Mr Jackomos:

*'For us culture is about our family networks, our Elders, our ancestors. It's about our relationships, our languages, our dance, our ceremonies, our heritage. Culture is about our spiritual connection to our lands, our waters. It is in the way we pass on stories and knowledge to our babies, our children; it is how our children embrace our knowledge to create their future. Culture is how we greet each other and look for connection. It is about all the parts that bind us together. It is the similarities in our songlines.'*<sup>109</sup>

When an Aboriginal child or young person's connection to their culture is interrupted, disrupted or lost, their health, wellbeing and sense of identity suffer.

Family and community risk losing important knowledge when children are removed. Many Aboriginal societies, particularly in remote areas of Australia, have strong oral traditions. Relationships are of utmost importance as cultural knowledge is passed from generation to generation orally and through experience and observation.<sup>110</sup>

A strong cultural identity contributes to the resilience of children and young people and cultural attachment is linked to improved wellbeing and socio-economic outcomes.<sup>111</sup> Research has shown that *'increased connection to culture seems directly related to a strengthened sense of positive identity, self-confidence and hope for the future, particularly for young people and descendants of the Stolen Generations'*.<sup>112</sup>

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Children in out of home care are sometimes taken from their communities into larger unfamiliar towns and families, putting them at risk of losing connection with their own family and culture.<sup>113</sup> Aboriginal children and young people who grow up knowing and understanding their own cultural practices face an obvious challenge when they enter mainstream environments where different cultural norms prevail.<sup>114</sup>

When these children or young people are separated from their culture and community by going into detention or being taken into out of home care, they risk losing their identity and sense of self.<sup>115</sup> This may have long-term psychological effects and result in further engagement in antisocial behaviours.

Maintaining connection to culture allows Aboriginal communities to be directly involved and responsible for the care of their children and young people before, during and after their engagement in the youth justice or child protection systems.

## Family and kinship

Family can be a source of strength for children and young people. A sense of belonging to family can be a protective factor against some of the negative influences a child or young person may experience.

The CRC describes the family as *'the fundamental group of society and the natural environment for the growth and wellbeing of all its members and particularly children'*.<sup>116</sup> Family is the biggest influence on a child's development and *'is the main way that a child learns, and is guided through life'*.<sup>117</sup>

Family and community are critical for the care, nurture, development and protection of children and young people.<sup>118</sup> Family functioning, parenting and access to social and family supports all contribute to the health and wellbeing of children and young people.<sup>119</sup>

Ideally, a family environment should expose a child or young person to supportive family structures, positive temperaments, secure attachments during early childhood and a special and constructive relationship with an adult.<sup>120</sup>

The Commission heard evidence on the importance of family to Aboriginal communities in the Northern Territory:

*'Kinship care is about our obligation for the well-being of the child, so that the child is still in the family. That is part of our kinship obligations. To look after the child of your sister or your brother if they cannot look after the child.'*

*If the child was in the community and their mother or father could not care for them, it would fall to the Elders, the grandparents, to decide who they should go with; for example the other aunties.'*<sup>121</sup>

Kinship in the non-Aboriginal context is defined as the relationship between members of the same family.<sup>122</sup> In Anglo-Australian society, those who are classified as kin are often limited to *'small family*

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groups: the genealogically related nuclear family,<sup>123</sup> though a wider group of cousins and second cousins and even more extended kin may be recognised.

Aboriginal concepts of family and kinship are radically different and far more extensive and far more complex than most Western ideas of family.<sup>124</sup> The Aboriginal kinship system determines how people relate to each other, their roles, responsibilities and obligations to one another, ceremonial business and land.<sup>125</sup> It can determine marriages, ceremonial relationships, funeral roles and behavioural patterns with other kin.<sup>126</sup>

All Aboriginal kinship systems extend beyond the immediate family. Everyone within the linguistic group, and sometimes neighbouring groups, are categorised as a relative.<sup>127</sup> In Aboriginal society there is usually not:

*'... just one mother or one father or one grandfather or one aunty. All those families are related to that one child. And that child ... get[s] looked after by all of those families ... And all of us in the family are responsible for that one child.'*<sup>128</sup>

Kinship is concerned with notions of 'family' and who counts as a relation, both close and distant.<sup>129</sup> It has always been central to the functioning of traditional and contemporary Aboriginal societies.<sup>130</sup> Kinship relationships have survived despite many changes in Aboriginal societies since colonisation. They remain very significant for Aboriginal groups in the Northern Territory and around Australia in remote communities and urbanised regions.<sup>131</sup>

## Language

The Northern Territory is home to the majority of Aboriginal language speakers in Australia,<sup>132</sup> with more than 100 Aboriginal languages and dialects.<sup>133</sup> Approximately 35,000 Aboriginal people across the Northern Territory speak an Aboriginal language at home.<sup>134</sup>

In 2016, English was the only language spoken at home for only 30.4% of the Aboriginal population in the Northern Territory. The most common Aboriginal languages spoken were Djambarrpuyngu, Warlpiri, Tiwi, Murrinh-Patha and Kriol.<sup>135</sup>

Language is integral in affirming and maintaining Aboriginal people's wellbeing, self-esteem, strong sense of identity, and connection with their land:

*'Every day I work in child welfare and I see the importance and I see the effects of bringing children back to their culture and knowing their language and experiencing their Aboriginality. In Victoria, where invasion hit the most, coming up here and seeing language—seeing people enjoying the language and talking their language, to me was ... I was so jealous, and every day in Victoria we are trying to give culture back to a lot of children who have been placed in non-Aboriginal care away from their [families] and the thing they starve most is to know who they are and where they come from. And so I think if the Northern Territory doesn't recognise that its Aboriginal people are its greatest ... [asset] and the fact that you've got such a strong cultural base here in the Northern Territory, and you need to build on, and invest in it, and grow it,*

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*I think would be a wasted opportunity if we build a child protection system that makes Aboriginal communities become more non-Aboriginal, rather than build on what has been, you know, for 60,000 years.*<sup>136</sup>

Evidence provided to the Commission suggests throughout the 2007 Board of Inquiry which produced the *Ampe Akelyernemane Meke Mekarle 'Little Children are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse*, 'language was really, really important and people had to understand the concepts and then translate them into language to fully, properly understand'.<sup>137</sup>

The Commission heard extensively during community consultations and public hearings about difficulties with language associated with the youth justice sector, particularly in interactions with police and within youth detention facilities. Language is so diverse in the Northern Territory the Commission has been made aware of an initiative of the Aboriginal Interpreter Service to improve the communication of cautions to Aboriginal people. Two types of police cautions have been translated into 21 Aboriginal languages, delivered through an application displayed on a device, so people can better understand the caution.<sup>138</sup>

There are always going to be challenges for legal practitioners getting instructions from, and communicating outcomes to, their clients because of the extensive language barrier in the Northern Territory. The Commission has heard of children and young people going into detention saying they do not know what happened or why they were there.

The Commission heard evidence Aboriginal children and young people were occasionally issued directives by staff members in youth detention centres to stop speaking their Aboriginal language.<sup>139</sup>

*'Our language is important because it helps, it identifies our self, and it helps us to communicate with the people back home. So the language is important. The culture, you have to have knowledge to how you approach things then when you go back to community. I was just saying it's like if you break something, you have to answer to the community, not just one individual person. Back in our home, it's like if we break something, we're back to court. We face the whole tribe. So, we have to have that awareness and our language at all times.'*<sup>140</sup>

The Commission also heard sworn evidence from former Youth Justice Executive Director Salli Cohen of a directive being issued from the Northern Territory Department of Education that children and young people should not speak in Aboriginal language in the classroom – see Chapter 16 (Education in detention).<sup>141</sup> The Northern Territory Government denies such a directive was issued.

Research has previously indicated teachers specialising in English as a second language have improved learning outcomes for Aboriginal children and young people. Additionally, the *Stronger Futures in the Northern Territory* framework made a commitment to ensure teachers have the skills required to teach children and young people who speak English as a second language.<sup>142</sup>



## ENDNOTES

- <sup>1</sup> Exh.024.008, Human Rights and Equal Opportunity Commission, 1997, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, 1997, tendered 13 October 2016, pp. 115-117, 123-124.
- <sup>2</sup> *Aboriginals Ordinance 1918* (Cth) s 45.
- <sup>3</sup> *Aboriginals Ordinance 1918* (Cth) s 16(2).
- <sup>4</sup> Exh.024.008, Human Rights and Equal Opportunity Commission, 1997, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, 1997, tendered 13 October 2016, p. 125.
- <sup>5</sup> *Northern Territory Aboriginals Act 1910* (SA) s 9.
- <sup>6</sup> Pursuant to the *Northern Territory Acceptance Act 1910* (Cth).
- <sup>7</sup> *Aboriginals Ordinance 1918* (Cth) s 6(1).
- <sup>8</sup> *Aboriginals Ordinance 1918* (Cth) s 6(1).
- <sup>9</sup> *Aboriginals Ordinance 1918* (Cth) s 15(1).
- <sup>10</sup> Exh.024.008, Human Rights and Equal Opportunity Commission, 1997, *Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, 1997, tendered 13 October 2016, p. 115.
- <sup>11</sup> Secretariat of National Aboriginal and Islander Child Care, Ngadluk Ngartunnaitya – *Developing a just and sustainable child protection system in the Northern Territory* [website], SNAICC Conference, Adelaide, Session 12, p. 3, <<http://www.snaicc.org.au/wp-content/uploads/2016/01/02182.pdf>>, accessed 25 October 2017, citing T. Austin, 1993, *I can picture the old home so clearly: The Commonwealth and 'Half-Caste' youth in the Northern Territory 1911–1939*, Aboriginal Studies Press, Canberra.
- <sup>12</sup> Exh.024.024, *Review of the Northern Territory Youth Detention System: Report*, January 2015, tendered 13 October 2016, p. 11.
- <sup>13</sup> Exh.145.001, Statement of AG, 25 November 2016, tendered 24 March 2017, paras 97-98.
- <sup>14</sup> Exh.115.001, Statement of Olga Havnen, 16 February 2017, tendered 21 March 2017, para. 15.
- <sup>15</sup> Lawrence, C, 2008, 'Us and Them: Breaking Down the Barriers', *Fullbright Conference: Healthy People Prosperous Country*, 11 July 2008, pp. 13-15, <<https://www.lowitja.org.au/sites/default/files/docs/Carmen-Lawrence-Fullbright-lecture-July-2008.doc>>, accessed 6 September 2017.
- <sup>16</sup> Submission, Aboriginal Peak Organisations Northern Territory, 31 July 2017, p. 105.
- <sup>17</sup> Submission, Intervention Rollback Action Group, 30 July 2017, p. 1.
- <sup>18</sup> Submission, Central Land Council, March 2017, p. 2.
- <sup>19</sup> Community meeting, Tiwi Islands, 17 October 2016.
- <sup>20</sup> See, for example: Submission, Telling it like it is: Aboriginal perspectives on race and race relations – Project Research Team, 7 December 2016, pp. 2-5; Submission, Aboriginal Peak Organisations Northern Territory, 31 July 2017, pp. 59-62; Transcript, Leonard de Souza, 22 March 2017, p. 1655: lines 1-5; Transcript, Eliza Tobin and Greg Harmer, 24 March 2017, p. 1783: lines 3-21.
- <sup>21</sup> Priest, N, Perry, R, Paradies, Y, Ferdinand, A & Kelaher, M, 2014, *Mental health impacts of racism and attitudes to diversity in Victorian schools*, Melbourne, p. 2.
- <sup>22</sup> Priest, N, Perry, R, Paradies, Y, Ferdinand, A & Kelaher, M, 2014, *Mental health impacts of racism and attitudes to diversity in Victorian schools*, Melbourne, p. 3.
- <sup>23</sup> *Racial Discrimination Act 1975* (Cth) s 9.
- <sup>24</sup> Australian Bureau of Statistics, 'National Aboriginal and Torres Strait Islander Social Survey, 2014–15' [website], 28 April 2016, <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4714.0>>, accessed 11 August 2017.
- <sup>25</sup> Reconciliation Australia, *2016 Australian Reconciliation Barometer*, 2016, Canberra, p. 17.
- <sup>26</sup> Reconciliation Australia, *2016 Australian Reconciliation Barometer*, 2016, Canberra, p. 17.
- <sup>27</sup> Reconciliation Australia, *2016 Australian Reconciliation Barometer*, 2016, Canberra, pp. 25-26.
- <sup>28</sup> Tauli-Corpuz, V, *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia*, UN Doc: A/HRC/36/46/Add.2, paras 30-31.
- <sup>29</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, 2000, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission, Sydney, Chapter 5.
- <sup>30</sup> For an overview of issues relating to the treatment of 'long-grassers' in Darwin see: Holmes, C & McRae-Williams, E, 2008, *Being undesirable: law, health and life in Darwin's Long Grass: An investigation into the influx of Indigenous 'visitors' to Darwin's Long Grass from remote NT communities – Phase 2*, National Drug Law Research Fund, Hobart.
- <sup>31</sup> In December 2014, amendments to the *Police Administration Act* (NT) that provide for 'paperless arrest' commenced. Section 133AB of the Act allows the police, without a warrant, to detain a person in custody for up to four hours if they suspect that person has committed, or is about to commit, an 'infringement notice offence'.
- <sup>32</sup> It is noted the Commonwealth Government states welfare quarantining programs are not applied on the basis of race or cultural factors in Submission, Commonwealth Government, Response to Notice of Adverse Material 46. Rather, participation in the programs is based on objective criteria.
- <sup>33</sup> For an overview of recent welfare card trials, including the Healthy Welfare Card introduced in 2015 and the Basics Card introduced under the Northern Territory Emergency Response see Aboriginal and Torres Strait Islander Social Justice Commissioner, 2015, *Social Justice and Native Title Report 2015*, Australian Human Rights Commission, Sydney, Chapter 2: Welfare.
- <sup>34</sup> *Bail Amendment Act 2011* (NT) inserted ss 37A-37D creating the offence of breach of bail with maximum penalty of 200 penalty units or two years imprisonment.
- <sup>35</sup> Australian Human Rights Commission, *Draft Guidelines for ensuring income management measures are compliant with the Racial*

- Discrimination Act* (2009), p. 15.
- <sup>36</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, 2000, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission, Sydney, p. 109.
- <sup>37</sup> For an overview of the Australian Human Rights Commission's analysis of mandatory sentencing laws in the Northern Territory and Western Australia see Human Rights and Equal Opportunity Commission, Submission to the United Nations Human Rights Committee, June 2000, available online at: [https://www.humanrights.gov.au/sites/default/files/content/pdf/social\\_justice/submissions\\_un\\_hr\\_committee/5\\_mandatory\\_sentencing.pdf](https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/submissions_un_hr_committee/5_mandatory_sentencing.pdf).
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- <sup>39</sup> *Northern Territory National Emergency Response Act 2007* (Cth). For a comprehensive analysis of the discriminatory elements of the Northern Territory Emergency Response see Aboriginal and Torres Strait Islander Social Justice Commissioner, 2008, *Social Justice Report 2007*, 'Chapter 3: The Northern Territory 'Emergency Response' intervention – A human rights analysis', Human Rights and Equal Opportunity Commission, Sydney; Anaya, J, 2010, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Addendum, 'Situation of indigenous peoples in Australia', UN Doc: A/HRC/15/37/Add.4.
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## HUMAN RIGHTS



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# HUMAN RIGHTS

## INTRODUCTION

All children and young people have the right to be safe, to be treated humanely, and to grow up in an environment where they can develop to their maximum potential. Aboriginal children and young people also have the right to practise their culture and the right to receive special protection measures to address the specific vulnerabilities they face.

The Commission is tasked with identifying whether during the relevant period the treatment of children and young people detained at youth detention facilities in the Northern Territory may have been inconsistent with or contrary to a human right or freedom that is:

- embodied in a law of the Commonwealth or of the Northern Territory, and
- recognised by an international instrument.

The Commission is also tasked with identifying recommendations to reform the systems and processes in the Northern Territory so that these circumstances do not recur in the future.

## The relationship between Australian law and international treaties

The identification of international instruments embodied in domestic legislation involves an understanding of the relationship between treaties and Australian law, and the manner in which a treaty obligation may be embodied in domestic law.

Treaties entered into by Australia do not form part of the enforceable domestic law of Australia unless domestic legislation gives effect to the treaty or particular obligations within it. In *State of Victoria v Commonwealth of Australia* (1996) 187 CLR 416, five Justices of the High Court said:

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*...as matters stand in Australia, and as they stood in 1900, the conduct of external affairs by the Executive may produce agreements which the Executive wishes to translate into the domestic or municipal legal order. To do so, it must procure the passage of legislation implementing those agreements if it wishes to create individual rights and obligations or change existing rights and obligations under that legal order.<sup>1</sup>*

A treaty may be given domestic effect by direct incorporation of international instruments into an Australian statute. However it is also possible for a statute to give effect to Australia's international treaty obligations indirectly, in substance or by reference. A statute need not expressly refer to a treaty or international instrument to give effect to the international obligation.

A number of international treaty provisions are given direct or indirect effect in relevant laws of the Commonwealth or the Northern Territory. However, even where an international instrument has not been directly or indirectly incorporated into legislation, it may be relevant to questions of statutory interpretation. In *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 Mason CJ and Deane J stated that:

*It is accepted that a statute is to be interpreted and applied, as far as its language permits, so that it is in conformity and not in conflict with the established rules of international law ... So expressed, the principle is no more than a canon of construction and does not import the terms of the treaty or convention into our municipal law as a source of individual rights and obligations.<sup>2</sup>*

By operation of sections 15AB(1) and (2)(d) of the *Acts Interpretation Act 1901* (Cth), treaties or other international instruments actually mentioned in a Commonwealth statute may be used to confirm the ordinary meaning of the text or to resolve a relevant ambiguity.

The breadth of the Commission's terms of reference does not limit it to consideration of treaties and international instruments that are formally binding upon Australia as a matter of international law. The Commission has considered many relevant treaties and international instruments and has considered the extent to which those treaties or instruments are broadly 'embodied' in statutes of the Northern Territory or the Commonwealth.

## A HUMAN RIGHTS-BASED APPROACH TO THE NORTHERN TERRITORY'S YOUTH JUSTICE AND CHILD PROTECTION SYSTEMS

The Commission has also been asked to identify measures to prevent the recurrence of inappropriate treatment of children and young people detained at the relevant facilities. Given that the Commission has found critical failures to protect human rights in the youth justice and child protection systems, it should be unsurprising that the Commission has concluded that protecting human rights must be an integral part of the reform efforts in the Northern Territory.

Many submissions to the Commission have recommended that the Northern Territory Government adopt a human rights-based approach to youth justice and child protection issues. The submission

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from the Northern Territory Council of Social Service argued that:

*Human rights-based approaches are about turning human rights from purely legal instruments into effective policies, practices, and practical realities. Human rights principles and standards provide guidance about what should be done to achieve freedom and dignity for all. A human rights-based approach emphasises how human rights are achieved.<sup>3</sup>*

Other submissions from organisations such as the Australian Psychological Society,<sup>4</sup> Amnesty International<sup>5</sup> and UNICEF Australia<sup>6</sup> supported this approach.

Embedding human rights protections across law, policy and practice is a complex undertaking. The United Nations Committee on the Rights of the Child has noted:

*A child rights-based approach to child caregiving and protection requires a paradigm shift towards respecting and promoting the human dignity and the physical and psychological integrity of children as rights-bearing individuals rather than perceiving them primarily as 'victims'.<sup>7</sup>*

The Commission notes that the United Nations Committee on the Rights of the Child concluded in 2012 that 'the juvenile justice system of [Australia] still requires substantial reforms for it to conform to international standards'.<sup>8</sup>

Similarly, a range of human rights concerns about the operation of child protection systems in Australia were identified in the Committee on the Rights of the Child's Concluding Observations on Australia in 2012. The Committee indicated its 'deep' concern about:

*Widespread reports of inadequacies and abuse occurring in the State party's system of out-of-home care, including:*

- (a) Inappropriate placements of children;*
- (b) Inadequate screening, training, support and assessment of care givers;*
- (c) Shortage of care options; poorly supported home-based carers and mental health issues exacerbated by, (or caused in) care;*
- (d) Poorer outcomes for young people in care than for the general population in terms of health, education, wellbeing and development;*
- (e) Abuse and neglect of children in care;*
- (f) Inadequate preparation provided to children leaving care when they turn 18;*
- (g) Aboriginal and Torres Strait Islander children who are often placed outside their communities, and in that context, the need for more Aboriginal care providers.<sup>9</sup>*

All of these issues were also raised with the Commission. The Secretariat of National Aboriginal and Islander Child Care (SNAICC),<sup>10</sup> UNICEF Australia<sup>11</sup> and the CREATE Foundation<sup>12</sup> noted particular difficulties with recruiting, assessing and supporting kinship and foster carers. The Royal Australasian College of Physicians (Northern Territory Committee)<sup>13</sup> and UNICEF Australia<sup>14</sup> commented on the poor health and educational outcomes for children and young people. The North Australian Aboriginal Justice Agency (NAAJA) highlighted the inadequate support young people receive when leaving care.<sup>15</sup>

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To prevent the abuse of human rights in the future, it is essential to incorporate consideration of human rights into the policy development, service delivery and the legislative framework for the youth justice and child protection systems in the Northern Territory.

The Commission observes that human rights are to be read in light of certain fundamental principles:<sup>16</sup>

- **Universality** – everyone has human rights and fundamental freedoms. They are the birth right of all human beings.<sup>17</sup>
- **Inalienability** – human rights cannot be traded or given up. Everyone retains human rights throughout their lifetime by virtue of the fact of their humanity.<sup>18</sup>
- **Indivisibility** – human rights are interdependent and interrelated, such that the violation of one right affects the exercise of other rights.<sup>19</sup>
- **Non-discrimination and equality** – all people have human rights, irrespective of race, sex, religion, national origin or any other trait.<sup>20</sup>
- **General application across political systems** – the internal mechanisms of a country, such as its system of government, cannot be used to justify failure to comply with human rights. In particular, countries that are federated cannot avoid responsibility for human rights by stating that responsibility for violations sits with a provincial/sub-national government (such as a state or territory government) rather than the national government.<sup>21</sup>

These fundamental principles inform the Commission’s approach to human rights-based reforms.

The treaties and international instruments of most relevance to this Commission include:

- *The United Nations Convention on the Rights of the Child (CRC)*
- *The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration)*
- *The Convention on the Elimination of All Forms of Racial Discrimination (CERD)*, and
- *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT).*

## United Nations Convention on the Rights of the Child

The CRC is the most widely ratified human rights treaty in the world. It was ratified by Australia in December 1990. It recognises that while children and young people have the same basic human rights as adults, they also require special protections due to their vulnerability. In 54 articles it sets out the full range of human rights that are necessary for the basic development of children and young people. A summary of the most relevant provisions of the CRC to the work of the Commission is set out below.

Article 2: All rights in the CRC apply to all children without discrimination of any kind.

Article 3: The best interests of the child shall be the primary consideration in all matters.

Article 6: Every child has the inherent right to life, survival and development.

Article 9: A child shall only be separated from his or her parent(s) when it is in the best interests of the child and determined by a judicial review.

Article 12: Every child has the right to express her/his views in all matters affecting him/her, and to have her/his views considered in accordance with her/his age and maturity.

Article 16: A child shall be protected from arbitrary or unlawful interference with her/his privacy, family, correspondence, and unlawful attacks on her/his reputation.

Article 18: Parent(s) have the primary responsibility for the upbringing and development of their child. Appropriate assistance should be given to parent(s) when they require support to raise their children.

Article 19: All measures are to be taken to protect a child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. Preventative programs should be established as well as treatment programs for victims.

Article 20: Special protection and assistance are to be given to all children who are deprived of their family environment with particular regard given to their cultural backgrounds and continuity of their care.

Article 25: Requiring regular reviews of out of home care placements.

Article 28: Setting out the child's right to education.

Article 30: All children have the right to use the language, customs and religion of their family.

Article 34: Children should be protected from all forms of sexual exploitation and sexual abuse.

Article 37: No children should be subject to torture, sentenced to the death penalty or suffer other cruel or degrading treatment or punishment. Arresting, detaining and imprisonment of children should only occur as a last resort and for the shortest time possible. They must be treated with respect and in a way commensurate with their age and maturity, and be able to maintain contact with their family. Children must not be put in prison with adults.

Article 39: Rehabilitative care should be provided for child victims of torture, maltreatment or exploitation.

Article 40: A child accused or guilty of breaking the law must be treated with dignity and respect. They have the right to legal assistance and a fair trial that takes account of their age. Governments must set a minimum age for children to be tried in a criminal court and manage a justice system that enables children who have been in conflict with the law to reintegrate into society.

The obligations to protect the rights of children and young people who are detained in the youth justice system are supplemented by rules and guidelines developed by the United Nations. The following instruments are internationally recognised standards for the treatment of children and young people detained in youth justice facilities, which provide guidance as to how Australia's binding treaty obligations can be met:

- *Rules for the Protection of Juveniles Deprived of their Liberty* (Havana Rules) – These Rules apply to custodial settings, as well as police stations where children are held in custody. The rules cover conditions necessary for children under arrest or awaiting trial, the management of youth facilities (admission, registration, movement and transfer; classification and placement; physical environment and accommodation; education, vocational training and work; recreation; religion; medical care; notification of illness, injury and death; limitations of physical restraint and the use of force; inspection and complaints; return to the community), and selection, recruitment, training and management of personnel.
- *Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules) – These Rules are divided into six parts: fundamental principles; investigation and prosecution; adjudication and disposition; non-institutional treatment; institutional treatment; and research, planning, policy formulation and evaluation.
- *Guidelines for Action on Children in the Criminal Justice System* (Vienna Guidelines) – These Guidelines aim to provide a framework for implementing the CRC in the context of youth justice, as well as how to use and apply other relevant United Nations standards in youth justice.
- *Guidelines for the Prevention of Juvenile Delinquency* (Riyadh Guidelines) – These Guidelines cover fundamental principles; socialisation processes (family, education, community, mass media); social policy; legislation and justice administration.

The Committee on the Rights of the Child in General Comment No 10 has endorsed the integration of these standards, particularly the Beijing Rules, Havana Rules and the Riyadh Guidelines, into all policies on youth justice.

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## Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The CAT was ratified by Australia on 8 August 1989.<sup>22</sup> It prohibits torture and other acts of cruel, inhuman and degrading treatment.<sup>23</sup>

Australia has obligations under the CAT to monitor and prevent all acts of torture, cruel, inhuman or degrading treatment that occurs with the acquiescence of the State. These prohibitions are also contained in Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 37 of the CRC.

Under CAT, Australia is obliged to:

- prevent torture (Article 2)
- prevent other acts of cruel, inhuman or degrading treatment or punishment (Article 16)
- ensure that education and information regarding the prohibition against torture and other cruel, inhuman or degrading treatment or punishment are explicitly included in the training of all people involved in the arrest, custody, interrogation, detention or imprisonment of any individual (Article 10), and
- regularly review interrogation rules, instructions, methods and practices to prevent torture (Article 11).

These commitments are directly applicable to children and young people in the care of the state. They amount to positive obligations upon Australia to find and prevent causes of torture, cruel, inhuman or degrading treatment and punishment.

Torture is defined in Article 1 of the CAT:

*the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.*

The *Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010* (Cth) enacts the offence of torture in the Criminal Code.

CAT also prohibits other cruel, inhuman and degrading treatment or punishment that falls short of the legal definition of torture.

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As the Australian Human Rights Commission notes:

*What constitutes “cruel, inhuman and degrading treatment or punishment” is not strictly defined in international human rights law. The Australian Government has defined what it considers to be “cruel or inhuman treatment or punishment” in s 5 of the Migration Act 1958 (Cth) to include an act or omission by which*

- (a) severe pain or suffering, whether physical or mental, is intentionally inflicted on a person; or*
- (b) pain or suffering, whether physical or mental, is intentionally inflicted on a person so long as, in all the circumstances, the act or omission could reasonably be regarded as cruel or inhuman in nature.*

*The UN Human Rights Committee considers it unnecessary to exhaustively list or “draw up sharp distinctions” between different kinds of punishment or treatment, rather “the distinctions depend on the nature, purpose and severity of the treatment applied”. The Committee also offers little guidance in its jurisprudence; when finding there has been a breach the Committee rarely explains into which category of cruel, inhuman or degrading the conduct falls. Whether the treatment or punishment meets the threshold will depend on the individual circumstances of the case in question. While a question of degree, inhuman or degrading treatment will be severe. The Committee has, for example, noted that “for punishment to be degrading, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty”.<sup>24</sup>*

The United Nations Committee Against Torture’s General Comment on Article 2 of CAT states:

*In practice the definitional threshold between cruel, inhuman or degrading treatment or punishment and torture is not clear. The conditions that give rise to cruel, inhuman or degrading treatment or punishment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent cruel, inhuman or degrading treatment or punishment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention.<sup>25</sup>*

Of relevance to this Commission, the Concluding Observations of the United Nations Committee Against Torture in November 2014 included concerns about Aboriginal people continuing to be disproportionately affected by incarceration and the serious impact that this has on Aboriginal young people and women.<sup>26</sup> Concerns about inadequately funded legal services for Aboriginal people were also raised.<sup>27</sup> The Committee recommended that:

*The State party should increase its efforts to address the overrepresentation of indigenous people in prisons, in particular its underlying causes. It should also review mandatory sentencing laws with a view to abolishing them, giving judges the necessary discretion to determine relevant individual circumstances. The State party should also guarantee that adequately funded, specific, qualified and free-of-charge legal and interpretation services are provided from the outset of deprivation of liberty.<sup>28</sup>*

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## Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Australia is currently considering ratifying the OPCAT.<sup>29</sup> This is a separate treaty that supplements State parties' obligations under the CAT.

Ratifying the OPCAT would not establish substantive legal obligations in addition to those that Australia is already bound to meet under the CAT, the ICCPR and the CRC. However, it specifies minimum standards for independent inspection mechanisms, introducing a greater level of transparency and accountability for the treatment of people who are deprived of their liberty in detention facilities.

The OPCAT specifically focuses on detention and closed environments, where a person may be deprived of liberty, which is defined as:

*any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.*<sup>30</sup>

This includes youth detention centres, police lock-ups and police stations, court custody centres and holding cells, transport vehicles for young people detained or arrested or any other person travelling to or from a place of detention, involuntary psychiatric unit placement, secure care facility and young people in statutory out of home care.<sup>31</sup>

The Commission received numerous submissions recommending prompt ratification of the OPCAT.<sup>32</sup>

On 9 February 2017, the Minister for Foreign Affairs, the Hon. Julie Bishop MP, and the Attorney-General, Senator the Hon. George Brandis QC, announced that Australia will ratify OPCAT by December 2017.<sup>33</sup> The Government indicated that independent monitoring would be undertaken by a network of Australian inspectorates that would be coordinated by the Commonwealth Ombudsman.<sup>34</sup>

Ratification of OPCAT and the introduction of a system of inspection mechanisms will directly address concerns raised by the Commission about lack of accountability and transparency in youth detention facilities in the Northern Territory.

The Attorney-General noted:

*OPCAT is primarily about prevention and it's about oversight so it creates mechanisms where by problems can be anticipated before they arise and if they emerge they can be dealt with more swiftly. Had the OPCAT been operational at the time the events of the Don Dale Youth Detention Centre in Northern Territory emerged, then it may well be, that either they wouldn't have happened at all or they would have been arrested at a much earlier time.*<sup>35</sup>

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## United Nations Declaration on the Rights of Indigenous Peoples

The Declaration provides a set of minimum standards for the survival, dignity, security and wellbeing of Indigenous Peoples.<sup>36</sup>

The Declaration has 46 substantive articles comprising overarching principles including: life, integrity and security; cultural, spiritual and linguistic identity; education; information and labour rights; participatory, development and other economic and social rights; land, territories and resources rights; and Indigenous institutions.

Pivotal to the Declaration are the principles of self-determination, participation in decision-making, underpinned by free, prior and informed consent and good faith, respect for and protection of culture, and equality and non-discrimination.

The Declaration includes specific references to the rights of Indigenous children and young people in some of its provisions, the most relevant of which are set out below.

### Paragraph 13:

*Recognizing in particular* the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and wellbeing of their children, consistent with the rights of the child.

### Article 14:

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

### Article 21:

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
2. States shall take effective measures and, where appropriate, special measures to

ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22:

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.
2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

## Convention on the Elimination of All Forms of Racial Discrimination

The CERD was ratified by Australia on 30 September 1975. Article 1 of the CERD states:

*In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*

Specific racial discrimination provisions for children and young people are provided in Article 2 of the CRC, which states:

1. *States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.*
2. *States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.*

While Article 2 of the CRC deals with racial discrimination in relation to children and young people, Article 2(2) of the CERD contains a positive obligation on States to take action to ensure that minority racial groups are guaranteed the enjoyment of human rights and fundamental freedoms.<sup>37</sup>

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# IMPLEMENTING A HUMAN RIGHTS-BASED APPROACH TO LAW, POLICY AND PRACTICE

The Commission concludes that it is essential that the Northern Territory strengthens the mechanisms available to it to ensure that its treatment of children and young people is informed by the human rights treaty obligations of Australia and other relevant international instruments.

The Australian Human Rights Commission has explained that while:

*human rights principles and standards provide guidance about what should be done to achieve freedom and dignity for all ... A human rights-based approach emphasises how human rights are achieved ... Human rights-based approaches are about turning human rights from purely legal instruments into effective policies, practices and practical realities.*<sup>38</sup>

## Key elements of a human rights-based approach<sup>39</sup>

### 1. Participation

Everyone has the right to participate in decisions that affect them. Participation must be active, free and meaningful, and give attention to accessibility issues, including access to information in a form and language that can be understood.

For children and young people:

- Article 12 of the CRC provides that children who are capable of forming their own views have a right to express those views freely in all matters affecting them. This means that:
  - due weight should be given to the views in accordance with the age and maturity of the child, and
  - children should be afforded natural justice in any judicial or administrative proceedings that affect them, participating either directly or through a representative where appropriate.
- In all matters, the best interests of the child must be a primary consideration. The views of the child are an integral component of establishing what their best interests are in a particular situation (Article 3, CRC).
- Government should respect the rights, responsibilities and duties that parents, extended family members and the community have towards children.

For Aboriginal people:

- Government should respect the right to participate in decisions that affect their rights as a fundamental feature of the enjoyment of human rights across a range of human rights treaties and instruments, including the ICCPR, the CERD, the Declaration and the CRC.

## **2. Accountability**

Accountability requires the effective monitoring of compliance with human rights standards and the achievement of human rights goals, as well as effective remedies for human rights breaches. For accountability to be effective, there must be appropriate laws, policies, institutions, administrative procedures and mechanisms of redress in order to secure human rights.

To effectively monitor compliance and achieve human rights goals, human rights indicators must be developed and used.

## **3. Non-discrimination and equality**

A human rights-based approach means that all forms of discrimination are prohibited and that measures are taken to address the consequences of discrimination where it occurs.

For children and young people, this involves:

- recognising the special vulnerability they face, and
- ensuring that approaches are focused on rehabilitation and tailored to their circumstances, stage of development and maturity.

For Aboriginal people, this involves:

- governments adopting special measures to ensure economic and social conditions are continually improved, with specific attention to the rights and special needs of children and young people, and
- recognising the distinct cultural characteristics of Aboriginal people, by ensuring they are not prevented from exercising their culture and also by providing culturally appropriate options.

Achieving non-discrimination and equality in socio-economic conditions is a long-term effort. For this reason, realising economic, social and cultural rights is guided by the principle of progressive realisation. This means that governments must show that they have applied the maximum number of available resources to addressing inequality and that they are making progressive improvements over time. This is demonstrated through the use of targets and benchmarks to guide action and to monitor progress over time.

#### 4. Empowerment

Everyone is entitled to claim and exercise their rights and freedoms. Individuals and communities need to be able to understand their rights and to participate fully in the development of policy and practices that affect their lives.

For children and young people, and Aboriginal people, this involves:

- providing access to information in a manner they can understand, and
- the existence of accessible processes for remedying any breaches of human rights.

#### 5. Legality

A human rights-based approach requires that:

- the law recognises human rights and freedoms as legally enforceable entitlements, and
- domestic law is consistent with human rights principles.

## KEY HUMAN RIGHTS STANDARDS IN THE OPERATION OF YOUTH JUSTICE SYSTEMS

The Commission identifies the following as key standards that must be upheld:

- Children and young people should be protected from torture and other cruel, inhuman and degrading treatment.
- Deprivation of liberty, including arrest, detention and imprisonment, should be used only as a measure of last resort and for the shortest appropriate period of time.
- Every child or young person deprived of liberty should be treated with humanity and respect for the inherent dignity of the human person.
- Every child or young person in detention has a right to health and education.
- Detained children and young people should be separated from adults, except in exceptional circumstances.
- A child or young person deprived of their liberty has the right to maintain contact with their family through correspondence and visits.
- Detained children and young people should have access to legal assistance.
- Children who have been accused of committing a crime but not tried or sentenced should be separated from convicted persons.
- Alternatives to detention should be made available.
- Sentences for young people must be proportionate.
- Children and young people have a right to privacy in the youth justice system.

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## KEY HUMAN RIGHTS STANDARDS TO GUIDE DECISION-MAKING IN THE CHILD PROTECTION SYSTEM

The Northern Territory Government must also ensure that human rights standards guide the operation of the child protection system.

The following reflect human rights standards:

- Children must not be separated from their parents against their will:
  - A child should only be separated from their parents if a competent authority determines, subject to judicial review, that such separation is, in accordance with applicable laws and procedures, necessary for the best interests of the child.
  - The circumstances that would justify removal include abuse or neglect.
  - All interested parties must be given an opportunity to participate in proceedings to determine removal and make their views known. This includes affected young people.
- Children have a right to express their views in all matters that affect them:
  - The views of the child should be given due weight in accordance with their age and maturity.
  - A child must be given the opportunity to be heard in any judicial or administrative proceeding affecting them, either directly, or through a representative or an appropriate body.
  - Children have a right to information as a prerequisite for participation.
  - Child protection legislation should include a legal obligation to ascertain the child's views and give them due weight in all decision-making.
- Young people have a right to privacy in child protection matters:
  - The identity of young people should not be disclosed to the media or in other reporting of child abuse or related issues.
- Parents or legal guardians have the primary responsibility for the upbringing of children:
  - The State must take appropriate steps to help parents fulfil their responsibilities. If parents cannot manage their responsibilities, the State must step in to secure the child's rights and needs.
  - Measures should be taken and programs developed to provide families with the opportunity to learn about parental roles and obligations in child development and child care, promoting positive parent–child relationships, sensitising parents to the problems of children and young persons, and encouraging their involvement in family and community-based activities.<sup>40</sup>
- Governments have an obligation to protect children from violence and abuse:
  - This includes '*physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child*'.<sup>41</sup>
  - The obligation to protect children from violence and abuse requires governments to take appropriate legislative, administrative, social and educational measures. This includes social programs to assist children in need of protection, as well as programs '*for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment ... and, as appropriate, for judicial involvement*'.<sup>42</sup>

- Governments must provide special protection to children who are deprived, temporarily or permanently, of their family environment:
  - While it may be in the child’s best interests to be removed from their parents, the State should seek to place the child with their wider family before looking for alternatives.
  - Decision-makers should consider both the desirability of continuity in a child’s upbringing and the child’s ethnic, religious, cultural and linguistic background.
- The best interests of the child must be the paramount consideration in adoption decisions:
  - The adoption of a child should only occur based on judicial consideration of legislative provisions.
  - Consideration must be given to options for care by parents, relatives and legal guardians.
- Children and young people have the right to enjoy their own culture, to profess and practise their own religion, and to use their own language.

A rights-based approach to child protection is both preventive and remedial in focus. It requires an overarching focus on ensuring the safety and protection of children by making sure their best interests are met. The importance of prevention and early intervention, including following the Aboriginal Child Placement Principle as a preventative approach, is discussed in Chapter 38 (Early support) and Chapter 31 (Engagement in child protection).

## ACCOUNTABILITY, MONITORING PROCESSES AND EDUCATION

Ensuring clear monitoring and inspection processes for detention conditions is a critical component of the requirement to prevent torture, and cruel, inhuman and degrading treatment. This requirement is provided for in the CRC, the CAT and the ICCPR.

Chapter 40 (A Commission for Children and Young People) discusses the importance of inspection and monitoring processes for places of detention and makes recommendations for ensuring appropriate oversight in the Northern Territory.

The dissemination of information, awareness-raising and training in human rights is an integral part of a human rights approach. Human rights education is a way of protecting human rights and can provide adults and children with a basis for building a culture of respect for human rights.

Article 42 of the CRC requires:

*States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.*

In its Concluding Observations on Australia in 2012, the United Nations Committee on the Rights of the Child expressed concern that:

*the awareness and knowledge of the Convention continues to be limited amongst children, professionals working with or for children, and the general public.<sup>43</sup>*

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Ensuring the provision of adequate and age-appropriate information is a key component of a human rights-based approach.

Education about human rights should be incorporated into school programs run in youth detention centres. Information on human rights should also be included in the induction packages given to children and young people when they enter youth detention centres or are placed in out of home care.

Human rights training should be included in all staff training programs, with ongoing supervision and performance appraisals to measure how staff members implement human rights principles and provisions in their daily work.

A number of submissions promoted human rights training for all staff members. For example, the Aboriginal Medical Services Alliance Northern Territory submitted that:

*compulsory, systematic cultural awareness and responsiveness education be provided to all organisations within child protection and youth justice systems in order to transform existing cultures of discrimination and neglect within these institutions.<sup>44</sup>*

The Australian Red Cross emphasised the importance of:

*education and training of police, child protection workers, prison officers, housing officers and others, who have contact with children.<sup>45</sup>*

UNICEF Australia suggested:

*that the Northern Territory Government provide dedicated funding for specialist, on-going training for all relevant personnel involved in the administration of the youth justice and child protection system on the meaning and application of a rights-based approach to working with children in conflict with the law, including the best interests of the child as a primary consideration.<sup>46</sup>*

## LEGISLATIVE FRAMEWORKS FOR THE IMPLEMENTATION OF HUMAN RIGHTS

Article 4 of CRC requires that:

*States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention...*

There are two main methods adopted to ensure that human rights are appropriately considered in legislation. These are:

- comprehensive protection of human rights through, for example, a Human Rights Act or a Charter of Rights, and/or

- 
- a human rights impact assessment process, such as parliamentary scrutiny of human rights.

In its Concluding Observations on Australia (2012), the United Nations Committee on the Rights of the Child stated:

*the Committee remains concerned that there continues to be no comprehensive Child Rights Act at the national level giving full and direct effect to the Convention in the State party's national law, and that only two states have passed such legislation. In this context, the Committee further notes that due to the State party's federal system, the absence of such legislation has resulted in fragmentation and inconsistencies in the implementation of child rights across its territory, with children in similar situations being subject to variations in the fulfilment of their rights depending on the state or territory in which they reside.<sup>47</sup>*

At the Commonwealth level, there is no comprehensive protection of human rights in legislation. Instead, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) requires that every Bill contains a Statement of Compatibility with Human Rights and is examined by the Parliamentary Joint Committee on Human Rights to determine whether it is compatible with Australia's human rights obligations.<sup>48</sup> The Committee assesses each Bill against the seven human rights treaties to which Australia is a party, including the CRC. It reports to both Houses of Parliament, identifying Bills where there are human rights concerns and suggests proposals for reform.

Bringing legislation and practice into full conformity with human rights standards was also reinforced in submissions made to the Commission. For example, UNICEF Australia recommended that:

*the Northern Territory Government introduce into all relevant youth justice legislation a specific reference to the Convention on the Rights of the Child, and include a requirement that decision-makers at every level ... take into account the best interests of the child as a primary consideration.<sup>49</sup>*

The Northern Territory Council of Social Service suggested that:

*NT and Australian governments design legislation and, support and fund practice and policy in NT youth detention and child protection systems, in line with the seven international human rights treaties Australia has signed and ratified.*

*NT and Australian governments design legislation, and support and fund practice and policy in NT youth detention and child protection systems, in line with the non-legally binding document, the United Nations Declaration on the Rights of Indigenous Peoples.<sup>50</sup>*

The Australian Capital Territory and Victoria have human rights legislation (the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic)). This legislation makes it unlawful for a public authority to act in a way that is incompatible with a human right, or to fail to give proper consideration to a relevant human right in decision-making.<sup>51</sup>

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In its submission to the Commission, the Human Rights Law Centre stated that:

*[a] Human Rights Act, modelled on legislation in Victoria and the ACT, should be implemented in the Northern Territory.<sup>52</sup>*

UNICEF Australia's submission to the Commission recommended that:

*[t]he Northern Territory Government introduce a human rights act and provide the resources to ensure that all children in contact with youth justice and child protection services in particular, are provided with full information on their rights.<sup>53</sup>*

To protect and improve human rights and freedoms in the Northern Territory, the Northern Territory Government should give some consideration to following the Australian Capital Territory and Victoria in conducting community consultations via an independent committee in relation to enacting a Human Rights Act.

## CONCLUSION

Based on the information before the Commission, in adopting a human rights-based approach in the Northern Territory there needs to be a focus on:

1. facilitating the engagement and participation of those most affected by the operation of the youth detention and child protection systems, namely, Aboriginal people, children and young people, see Chapter 7 (Community engagement)
2. ensuring that targeted programs are in place, with benchmarks and targets for addressing the social and economic disparities experienced by Aboriginal people in the Northern Territory that contribute to the high rates of involvement of children and young people in the youth justice and child protection systems, see Chapter 3 (Context and challenges)
3. clearly articulating human rights standards for the operation of the youth justice system, including the treatment of detainees and conditions at detention facilities
4. understanding human rights standards to guide decision-making in the child protection system
5. implementing appropriate data collection and performance indicators across both systems, see Chapter 41 (Data and information-sharing)
6. introducing robust accountability and monitoring processes to ensure compliance with human rights, see Chapter 40 (A Commission for Children and Young People)
7. ensuring a program of education about human rights is included in introductory material given to children and young people when they enter the youth detention system in a form and language that can be readily understood and is incorporated into the school program in detention centres, and
8. adopting legislative frameworks for the implementation of human rights.

Throughout this report, findings are made about the consistency of actions in the Northern Territory relating to human rights. Recommendations have also been made to ensure that the Northern Territory Government complies with human rights in the future.

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The Commission's recommendations throughout the report are designed to address specific failures in the youth justice and child protection systems, and to comply with the human rights standards. The challenges for implementing a human rights-based approach in the Northern Territory require actions from both the Northern Territory and Commonwealth Governments.



## ENDNOTES

- <sup>1</sup> *State of Victoria v Commonwealth of Australia* (1996) 187 CLR 416 at 481 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); See also *Povey v Qantas Airways Ltd* (2005) 79 ALR 1215 at [12] 'entry into the international agreement can create no rights in Australian domestic law without there being legislation giving effect to those rights'.
- <sup>2</sup> *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287.
- <sup>3</sup> Submission, Northern Territory Council of Social Service, October 2016, p. 12.
- <sup>4</sup> Submission, Australian Psychological Society, 20 December 2016, p. 7.
- <sup>5</sup> Submission, Amnesty International, 28 October 2016, p. 5.
- <sup>6</sup> Submission, UNICEF Australia, 29 November 2016, p. 7.
- <sup>7</sup> Committee on the Rights of the Child, April 2011, *General Comment No 13: The right of the child to freedom from all forms of violence*, Fiftieth session, CRC/C/GC/13, para. 3(b).
- <sup>8</sup> Committee on the Rights of the Child, 2012, *Concluding Observations on Australia*, the Committee on the Rights of the Child, Sixtieth session, CRC/C/AUS/CO/4, para. 82.
- <sup>9</sup> Committee on the Rights of the Child, 2012, *Concluding Observations on Australia*, the Committee on the Rights of the Child, Sixtieth session, CRC/C/AUS/CO/4, para. 51.
- <sup>10</sup> Submission, Secretariat of National Aboriginal and Islander Child Care, February 2017, p. 13.
- <sup>11</sup> Submission, UNICEF Australia, 29 November 2016, p. 16.
- <sup>12</sup> Submission, CREATE Foundation, January 2017, p. 7.
- <sup>13</sup> Submission, Royal Australasian College of Physicians, December 2016, p. 3.
- <sup>14</sup> Submission, UNICEF Australia, 29 November 2016, p. 34.
- <sup>15</sup> Submission, North Australian Aboriginal Justice Agency Throughcare – Contribution to the Aboriginal Peak Organisations Northern Territory, February 2017, p. 5.
- <sup>16</sup> United Nations Human Rights Office of the High Commission, 'What are human rights?' [website], undated, <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>, accessed 21 June 2017.
- <sup>17</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights, 25 June 1993, A/Conf.157/23 (1993).
- <sup>18</sup> United Nations Human Rights Office of the High Commission, 'What are human rights?' [website], undated, <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>, accessed 21 June 2017.
- <sup>19</sup> Vienna Declaration and Programme of Action, World Conference on Human Rights, 25 June 1993, A/Conf.157/23 (1993).
- <sup>20</sup> United Nations Human Rights Office of the High Commission, 'What are human rights?' [website], undated, <<http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>>, accessed 21 June 2017.
- <sup>21</sup> Provisions to this effect exist in many international human rights treaties and are reflected in Article 27 of the Vienna Convention on the Law of Treaties, acceded to by Australia on 14 June 1974.
- <sup>22</sup> Exh.005.003, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, tendered 11 October 2016.
- <sup>23</sup> The CAT also prohibits other cruel, inhuman and degrading treatment or punishment that falls short of the legal definition of torture. The UN Human Rights Committee considers it unnecessary to exhaustively list or 'draw up sharp distinctions' between different kinds of punishment or treatment, rather 'the distinctions depend on the nature, purpose and severity of the treatment applied'. The Committee's General Comment on Article 2 of CAT states '*In practice the definitional threshold between cruel, inhuman or degrading treatment or punishment and torture is not clear. The conditions that give rise to cruel, inhuman or degrading treatment or punishment frequently facilitate torture and therefore the measures required to prevent torture must be applied to prevent cruel, inhuman or degrading treatment or punishment. Accordingly, the Committee has considered the prohibition of ill-treatment to be likewise non-derogable under the Convention.*' (General Comment No. 2, 24 January 2008, CAT/C/GC/2.).
- <sup>24</sup> Vuolanne v Finland, Communication No. 265/1987, UN Doc Supp No. 40 (A/44/40) at 311 (1989), para. 9.2; Australian Human Rights Commission, 2017, *OPCAT in Australia – Consultation Paper*, Sydney, paras 48-51.
- <sup>25</sup> United Nations Committee Against Torture, General Comment No. 2, CAT/C/GC/2, 24 January 2008, para. 3; see also paras 8-11.
- <sup>26</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Concluding observations on the combined fourth and fifth periodic reports of Australia CAT/C/AUS/CO/4-5, 23 December 2014, p. 4.
- <sup>27</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Concluding observations on the combined fourth and fifth periodic reports of Australia CAT/C/AUS/CO/4-5, 23 December 2014, p. 4.
- <sup>28</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Concluding observations on the combined fourth and fifth periodic reports of Australia CAT/C/AUS/CO/4-5, 23 December 2014, p. 4.
- <sup>29</sup> Exh.009.001, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, tendered 11 October 2016.
- <sup>30</sup> Exh.009.001, Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 18 December 2002, tendered 11 October 2016, Article 4 (2).
- <sup>31</sup> Naylor, B, Debeljak, J & Mackay, A, 2014, 'Implementing human rights in closed environments', *Law in Context*, 31, p. 1; Community Visitor Program, 2016, *NT Community Visitor Program Annual Report 2015/2016*, p. 15, 29.
- <sup>32</sup> For example, Submission, Association for the Prevention of Torture, 28 October 2016, p. 1; Submission, Human Rights Law Centre, 28 October 2016, p. 17; Submission, Amnesty International, 28 October 2016, p. 5; Submission, Jesuit Social Services, October 2016, p. 30; Submission, North Australian Aboriginal Justice Agency, Detention, July 2017, p. 142; Submission, Australian Red Cross, December 2016, p. 9; Submission, Royal Australasian College of Physicians, October 2016, pp. 7-8; Submission, Northern Territory

- Council of Social Service, October 2016, p. 16; Submission, Change The Record, 4 November 2016, p. 5.
- <sup>33</sup> Minister for Foreign Affairs, *Improving oversight and conditions in detention* [media release], 9 February 2017, <[http://foreignminister.gov.au/releases/Pages/2017/jb\\_mr\\_170209.aspx?w=tb1CaGpkPX%2FISOK%2Bg9ZKEg%3D%3D](http://foreignminister.gov.au/releases/Pages/2017/jb_mr_170209.aspx?w=tb1CaGpkPX%2FISOK%2Bg9ZKEg%3D%3D)>, accessed 23 June 2017.
- <sup>34</sup> Minister for Foreign Affairs, *Improving oversight and conditions in detention* [media release], 9 February 2017, <[http://foreignminister.gov.au/releases/Pages/2017/jb\\_mr\\_170209.aspx?w=tb1CaGpkPX%2FISOK%2Bg9ZKEg%3D%3D](http://foreignminister.gov.au/releases/Pages/2017/jb_mr_170209.aspx?w=tb1CaGpkPX%2FISOK%2Bg9ZKEg%3D%3D)>, accessed 23 June 2017.
- <sup>35</sup> Attorney-General for Australia, *Joint doorstep interview* [media], National Museum of Australia, Canberra, 9 February 2017, <<https://www.attorneygeneral.gov.au/transcripts/Pages/2017/FirstQuarter/Joint-doorstop-interview.aspx>>, accessed 25 October 2017.
- <sup>36</sup> Mokhiber, 4 November 2006, *Declaration a historic document, out of a historic process*, Panel Presentation, New York, quoted in Australian Human Rights Commission, 'Questions and answers on the UN Declaration on the Rights of Indigenous Peoples' [website], 2009, <<https://www.humanrights.gov.au/publications/questions-and-answers-un-declaration-rights-indigenous-peoples-2009>>, accessed 25 October 2017.
- <sup>37</sup> Australian Human Rights Commission, 2016, *Federal Discrimination Law*, Sydney, p. 63.
- <sup>38</sup> Australian Human Rights Commission, 'Human rights based approaches' [website], undated, <<https://www.humanrights.gov.au/human-rights-based-approaches>>, accessed 27 July 2017.
- <sup>39</sup> Australian Human Rights Commission, 'Human rights based approaches' [website], undated, <<https://www.humanrights.gov.au/human-rights-based-approaches>>, accessed 27 July 2017.
- <sup>40</sup> Exh.006.004, Guidelines for the Prevent of Juvenile Delinquency ('Riyadh Guidelines'), 14 December 1990, tendered 11 October 2016, para. 16.
- <sup>41</sup> Exh.005.002, Convention on the Rights of the Child, 20 November 1989, tendered 11 October 2016, Article 19.1.
- <sup>42</sup> Exh.005.002, Convention on the Rights of the Child, 20 November 1989, tendered 11 October 2016, Article 19.2.
- <sup>43</sup> Committee on the Rights of the Child, 2012, *Concluding Observations on Australia*, the Committee on the Rights of the Child, Sixtieth session, CRC/C/AUS/CO/4, para. 23.
- <sup>44</sup> Submission, Aboriginal Medical Services Alliance Northern Territory, 26 April 2017, p. 15.
- <sup>45</sup> Submission, Australian Red Cross, 20 December 2016, p. 1.
- <sup>46</sup> Submission, UNICEF Australia, 29 November 2016, p. 13.
- <sup>47</sup> Committee on the Rights of the Child, 2012, *Concluding Observations on Australia*, the Committee on the Rights of the Child, Sixtieth session, CRC/C/AUS/CO/4, para 11.
- <sup>48</sup> *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8(1)-(5).
- <sup>49</sup> Submission, UNICEF Australia, 29 November 2016, pp. 12-13.
- <sup>50</sup> Submission, Northern Territory Council of Social Service, October 2016, p. 16.
- <sup>51</sup> *Human Rights Act 2004* (ACT) s 40B, and *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38.
- <sup>52</sup> Submission, Human Rights Law Centre, 20 December 2016, p. 4.
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## FUNDING AND EXPENDITURE



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# FUNDING AND EXPENDITURE

## INTRODUCTION

Significant funds are invested each year in the Northern Territory to address risks of harm to children and young people and the underlying issues known to increase vulnerability: poverty, overcrowded housing, mental illness, gambling, alcohol and substance abuse issues, and domestic violence in the family unit. This chapter examines revenue sources and expenditure across those programs relating to youth justice and child protection in the Northern Territory. A consistent theme presented to the Commission at public meetings, in submissions and from witnesses at formal hearings was that a lack of funding meant measures to address issues relating to the child protection and youth justice systems could not be properly addressed. However having reviewed financial data, to the extent that such data was available to the Commission, the Commission considers that the underlying problem is not the level of overall funding, but that Commonwealth and Northern Territory Government investment is not rigorously tracked, monitored or evaluated to ensure that it is appropriately distributed and directed.

The Northern Territory receives significant funding through numerous sources but the cumulative benefit of the various agreements and programs to the people of the Northern Territory is not readily apparent. Indeed, notwithstanding the significant<sup>1</sup> ongoing commitment to financial investment, there has been limited progress in ‘closing the gap’.

Knowing where expenditure is directed is a basic requirement for assessing community needs and planning service delivery in a coordinated and resource-efficient manner, which is addressed further in Chapter 38 (Early support). The Commission is concerned that government funds during the relevant period were directed to programs without reference to the existence of other programs, their target locations or outcomes. Without a coordinated approach the current uncertainty about the total level of government expenditure and which programs are working to protect children and support families will continue.

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## THE FUNDING CONTEXT

The States and Territories are responsible for child protection and youth justice under Australia's federal system of government. However, Commonwealth funding in the Northern Territory is significant in this context for two reasons.

First, the Northern Territory depends heavily on Commonwealth funding, with approximately 68% of all funding for expenditure coming from the Commonwealth in 2017-18. Goods and Services Tax (GST) receipts in the 2017–18 financial year comprised 47% of the Northern Territory's budget.<sup>2</sup> A further 21% of the Northern Territory's budget is provided by the Commonwealth as special purpose payments, that is funding tied to a variety of national partnerships and agreements between the Commonwealth and Northern Territory Governments.<sup>3</sup>

Secondly, the Commonwealth recognises that *'it has a role in supporting State and Territory governments and the non-government sector in their efforts to protect Australia's children and young people and improving outcomes for Aboriginal and Torres Strait Islander people'*.<sup>4</sup> The Commonwealth Government has entered into range of agreements with the Northern Territory Government through which it either funds services delivered by the Northern Territory Government, or directly funds non-government organisations to deliver services.

In order to understand government expenditure in this area, the Commission sought from the Commonwealth and Northern Territory Governments a list of all services provided or funded in the Northern Territory by either government that targeted communities, families or children who had been identified as being vulnerable, with specific emphasis on risk factors known to underpin child abuse and neglect.

A review of the information provided to the Commission in response to this request is set out in Chapter 38 (Early support). It became apparent to the Commission in communications with the Commonwealth and Northern Territory Governments that neither maintained a centralised list of child protection or youth justice services.<sup>5</sup> The Commonwealth Government gave evidence that, *'[a]t the Commonwealth level, policy responsibility for program delivery [was] spread across numerous departments, according to their portfolio responsibilities'*<sup>6</sup> and that:

*'[t]he Commonwealth [was] not in a position to easily provide such information, as it does not have a central repository or record of all programs or services, and associated funding, provided specifically for or in the Northern Territory.'*<sup>7</sup>

The Commonwealth Government invested significant effort<sup>8</sup> in compiling a list of funded services and activities, though it noted that:

*... because of the very large numbers of Commonwealth programs and grants, the multiple sources of information, and the limited timeframe in which the Commonwealth has been required to provide the data, [it could not] be absolutely satisfied that the data is accurate or complete [and] ... there are lines of programs or funding that were unable to be identified in the available time.'*<sup>9</sup>

The difficulty expressed by the Commonwealth and Northern Territory Governments in providing data (discussed in more detail in Chapter 38 (Early support)) highlights a broader systemic problem

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of determining what and where services are being delivered under particular programs, and the success or otherwise of those programs. In this context, publications of organisations such as the Australian National Audit Office, the Productivity Commission and the Commonwealth Parliamentary Library as well as various internal evaluations conducted on a regular basis by Commonwealth departments assisted the Commission significantly in the task of analysing Commonwealth expenditure in the Northern Territory. Notwithstanding the availability of this material, gaps exist in the understanding of the Commonwealth's activities in the Northern Territory. The Commission's research has not been able to identify any equivalent, publicly available analysis of Northern Territory expenditure by any agency, either internal or otherwise.

## COMMONWEALTH FUNDING TO THE NORTHERN TERRITORY

The principal sources of Commonwealth funding to the Northern Territory of interest to the Commission are:

1. GST revenue which is provided to the Northern Territory as general revenue assistance (that is, for expenditure at the Northern Territory's discretion)
2. tied funding to the Northern Territory Government by way of special purpose payments under bilateral agreements or national partnership agreements such as the National Partnership Agreement on Northern Territory Remote Aboriginal Investment and the National Partnership Agreement on Remote Housing, and
3. direct payments by the Commonwealth Government to third parties for services in the Northern Territory, either by funding services delivered by non-government organisations or through Commonwealth programs, such as the Indigenous Advancement Strategy and funding programs managed through the Department of Social Services.

### **GST revenue**

GST revenue is the largest single fiscal transfer from the Commonwealth to the Northern Territory, representing just under half of the Northern Territory's total revenue. In 2017–18, the Northern Territory is expected to receive \$2.9 billion in GST revenue out of a total budget of \$6.2 billion.<sup>10</sup>

GST distribution aims to equalise the fiscal capacity of the states and territories to provide services at a basic standard. As the most recent GST Distribution Review<sup>11</sup> notes:

*On average, States spend more on providing services per Indigenous person than per non-Indigenous person, especially in areas such as health, justice and welfare and housing, which are increasing as a proportion of State budgets. It follows that (all else being equal) States with a higher proportion of Indigenous people than average will be assessed as having higher service costs overall and will be given a higher than average proportion of GST revenue.<sup>12</sup>*

In relative terms, the Northern Territory receives a significantly larger transfer<sup>13</sup> than the other states and territories due to its significantly higher Aboriginal and remote populations. The Northern Territory is assessed as having the lowest fiscal capacity in Australia, and a slightly below-average

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capacity to raise own-source revenue. Northern Territory Budget Paper No. 2, 2017–18 notes that:

*The major drivers of the Territory's above-average service delivery costs are its small and sparsely distributed population (a significant proportion of which resides in remote areas), a relatively large Aboriginal population, isolation from major supply centres in the eastern states and the lack of economies of scale in service delivery and central administration...On the revenue side, while the Territory is assessed as having above-average capacity to raise mining revenue and payroll tax, it has below-average capacity to raise all other types of revenues due to its relatively small tax base compared to other jurisdictions.*<sup>14</sup>

There are several reasons why average service provision costs are higher for Aboriginal people. Two demographic factors relevant to the Northern Territory context are remoteness and disability. In the Northern Territory, 80% of the Aboriginal population lives remotely or very remotely<sup>15</sup> and remoteness coincides with poorer outcomes across education, home ownership, overcrowding and access to services.<sup>16</sup> Furthermore, over the 2012–13 period, Aboriginal Australians were 1.7 times more likely to suffer from disability when compared to non-Aboriginal Australians.<sup>17</sup>

The proportion of a state or territory's Aboriginal population – referred to as *indigeneity* – can increase the relative amount of GST funding the state or territory receives because it has '*historically been the biggest influence on the GST distribution on the expense side*',<sup>18</sup> influencing approximately half of the total GST redistribution. The Northern Territory received between 50-60% of the GST redistribution between 2008 and 2012.<sup>19</sup>

The Commonwealth Grants Commission (CGC) assesses GST distributions. Commonwealth Government funding for state or territory government services provided to Aboriginal populations is generally included in CGC assessments and equalised over time.<sup>20</sup> However, above average spending is required to overcome Aboriginal disadvantage.<sup>21</sup> Consequently, payments from the National Partnership on Closing the Gap in the Northern Territory were excluded from these assessments in 2012,<sup>22</sup> a practice that appears to have continued during the writing of this report.<sup>23</sup>

## National partnership agreements and bilateral agreements

The Northern Territory Government receives tied funding from the Commonwealth through a range of vehicles including national partnership agreements, project agreements and implementation plans and specific purpose payments.<sup>24</sup> Tied Commonwealth funding will contribute an estimated \$1.3 billion or 22% of the Northern Territory Government's total revenue in 2017–18, compared to \$1.4 billion in 2016–17. The lower expected revenue in 2017–18 is primarily attributed to reductions in other Commonwealth revenue.

Agreements and other arrangements under the auspices of the Intergovernmental Agreement on Federal Financial Relations provide the majority of tied Commonwealth funding to the Northern Territory. As an agreement between the Commonwealth, state and territory governments, it aims to: *provid[e] the States with increased flexibility in the way they deliver services to the Australian people, clarify the roles and responsibilities of each level of government and improve the accountability for the achievement of outcomes.*<sup>25</sup>

The Northern Territory has approximately 58 national partnership agreements and project

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agreements in place. It is expected to receive \$538.3 million in 2016–17<sup>26</sup> and \$565.8 million in 2017–18<sup>27</sup> under these agreements alone.<sup>28</sup> In 2015–16, the Northern Territory Government received approximately \$411 million in Commonwealth Government payments and approximately \$1.4 billion in total tied Commonwealth funding. Those with particular relevance to the Commission’s Terms of Reference are discussed below.

## ***National partnership agreements on Stronger Futures and Northern Territory Remote Aboriginal Investment***

The National Partnership Agreement on Stronger Futures in the Northern Territory (Stronger Futures) commenced in the 2012–13 financial year. It was intended to be a 10-year arrangement totalling \$3.4 billion to continue funding some of the measures from the Northern Territory National Emergency Response Intervention 2007–12 (the Intervention). Stronger Futures aimed to improve Aboriginal outcomes by funding programs for children and families, education, jobs, community safety, health, housing and land and governance and leaders.<sup>29</sup> Specific funding supported programs targeting alcohol abuse, improving municipal and essential services and transforming the Alice Springs town camp.<sup>30</sup>

The Commonwealth and Northern Territory Governments renegotiated Stronger Futures in 2014, consolidating its programs into three areas: children and schooling, remote area strategies, and community safety. This resulted in a ‘rebadging’ of Stronger Futures as the National Partnership Agreement on Northern Territory Remote Aboriginal Investment (NTRAI) from 2015–16 onwards.<sup>31</sup> Under the NTRAI, the Northern Territory will receive up to \$1.0287 billion between 2015–16 and 2021–22, including approximately \$42.6 million for non-government schools. Eight Northern Territory Government departments are directly engaged in delivering activities under the agreement. The Commonwealth is expected to provide \$159 million in national partnership payments in 2017–18.<sup>32</sup>

Under the NTRAI, the Commonwealth and Northern Territory Governments agree to be jointly responsible for ensuring their respective funded initiatives ‘are complementary and do not duplicate each other’.<sup>33</sup> Under While the NTRAI and the supplementary implementation plans do not provide any detail on how this coordination is to take place, the Commission understands that a joint steering committee between Commonwealth and Northern Territory Government members exists in relation to the housing component of the NTRAI, which coordinates program management and responsibilities between the two governments and ensures duplication does not occur. However, in many community meetings the Commission heard that coordination is not apparent at a community level.

## ***National Partnership Agreement on Remote Housing***

The National Partnership Agreement on Remote Housing (NPARH) aims to:

*facilitate significant reform in the provision of housing for Indigenous people in remote communities and to address overcrowding, homelessness, poor housing conditions and severe housing shortages in these communities.*<sup>34</sup>

In 2016, the NPARH replaced the National Partnership Agreement on Remote Indigenous Housing (NPARIH).<sup>35</sup> The NPARIH was planned as a 10-year (2008 to 2018) \$2 billion agreement between

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the Northern Territory Government and Commonwealth Government, comprising \$1.7 billion in funding commitments from the Commonwealth Government and \$240 million from the Northern Territory Government. The Commonwealth Government would provide an additional \$77 million from other funding sources.<sup>36</sup>

## Direct payments by the Commonwealth Government

The Commonwealth makes a range of payments to the Northern Territory Government and non-government organisations for specific purposes. Some of these are discussed below.

### *Department of Social Services funding*

In evidence before the Commission, the Commonwealth Department of Social Services identified a number of programs delivered in the Northern Territory and relevant to the Commission's Terms of Reference.<sup>37</sup> Under these programs \$304.3 million has been committed nationally, and has been or will be allocated between 2012 and 2021, depending on funding agreements.

Eighteen non-government organisations in the Northern Territory receive funding under the programs and some organisations receive funding under more than one program. The three largest programs, worth a total of \$289.6 million, are either national programs or cover jurisdictions in addition to the Northern Territory. The Commonwealth Government could not identify the Northern Territory funding components of these programs within the relevant time constraints required to submit information to the Commission.<sup>38</sup>

Nine programs identified by the Department of Social Services funding are set out below, and covered in more detail in Chapter 32 (Entry into the child protection system). The CfC FP, CaPS and HIPPY programs do not involve any Aboriginal Community Controlled Organisations in service delivery.<sup>39</sup> The remainder of the programs are delivered through a mix of Aboriginal and non-Aboriginal organisations. None of the programs the Department of Social Services delivers appear to be provided under a national framework or strategy, which could increase the risk of duplication with programs funded by the Northern Territory Government in particular. A range of early intervention and early childhood programs are also delivered under the IAS and through Northern Territory Government programs.

#### **1. Personal Helpers and Mentors Program (PHaMs)**

PHaMs aims to improve the independence, participation and lifetime wellbeing of people severely affected by mental illness. By building personal resilience and support networks, PHaMs assists people to manage sustainably the impacts of their illness in order to increase:

- access to appropriate support services at the right time
- personal capacity, confidence and self-reliance; and
- their ability to manage daily activities and community participation, both social and economic.

There are plans underway to bring PHaMs within the remit of the National Disability Insurance Scheme. PHaMs is a national program, with an estimated \$245 million spent over 2014-2016.<sup>40</sup>

## **2. Reconnect**

Reconnect is a community-based early intervention and prevention program for young people aged 12 to 18 (or 12 to 21 for newly arrived youth) who are homeless or at risk of homelessness, and their families. Reconnect aims to break the cycle of homelessness by providing counselling, group work, mediation, specialised mental health assistance and practical support to the whole family. An estimated \$2.97 million spent over 2014-2016.

## **3. Transition to Independent Living Allowance**

TILA is a payment of up to \$1,500 to help young people meet the costs of transitioning to independent living, and is available to young people aged 15 to 25 who are leaving or have left formal out-of-home care. TILA payments in the Northern Territory totalled \$60,600 between 2014 and 2016.

## **4. Building Safe Communities for Women**

The Department of Social Services funds organisations that create sustainable practices to reduce violence against women and children and support those affected. The funded organisations work to improve stakeholder engagement between non-government organisations, local government, local businesses, schools, police, health services and the broader community. A variety of projects aim to raise awareness and change attitudes and behaviours, including digital communication strategies, video clips, local events and community workshops. Approximately \$430,000 was expended over 2014-15 under this program.

## **5. Intensive Family Support Services (IFSS)**

Under IFSS, organisations provide intensive support to parents and caregivers of children where child neglect is a concern. State and territory government child protection authorities refer families to IFSS and Child Protection Income Management. IFSS provides practical parenting education and support to parents and caregivers in their communities and homes, to help them improve the health, safety and wellbeing of their children. It works with families to identify existing strengths and support networks and develop a plan of action. IFSS covers sites in South Australia and the Northern Territory, and approximately \$17.27 million was spent under IFSS over 2014-2016.

## **6. Home Interaction Program for Parents and Youngsters (HIPPY)**

HIPPY is a two-year parenting support and early learning program for families with children aged four to five years. The program empowers parents and caregivers to be their child's first teacher by guiding them through a structured curriculum of learning

activities. HIPPY is a national program, with an estimated \$27.38 million spent over 2014-2016.

## **7. Children and Parenting Support Service (CaPSS)**

CaPSS uses an early intervention and prevention approach to assist children from birth to 12 years old, and their families. CaPSS improves children's outcomes by providing supported and community playgroups; school readiness programs; parenting skills courses; home visiting; peer support groups; and online information resources about children's development and parenting. Some CaPSS programs also support families affected by violence or substance misuse. Approximately \$2 million was expended over 2014-16 under this program.

## **8. Communities for Children Facilitating Partners (CfC FP)**

CfC FP is a place-based model of investment that facilitates a whole-of-community approach to supporting early childhood development and wellbeing for children from birth to 12 years old. The Department of Social Services funds a facilitating partner at each site, which then funds other organisations (community partners) to provide services identified as priorities in their local communities. This program follows a similar model to the Stronger Communities for Children program, discussed later in this chapter. Approximately \$8 million was expended over 2014-16 under this program.

## **9. National Disability Advocacy Program**

This program helps people with a disability access effective disability advocacy that promotes, protects and ensures their full and equal enjoyment of all human rights, and enables their participation in the community. Approximately \$1.23 million was expended over 2014-16 under this program.

## ***The Indigenous Advancement Strategy***

In September 2013, the Department of the Prime Minister and Cabinet assumed responsibility for the majority of Commonwealth Government-funded Aboriginal-specific policy and programs. Twenty-seven programs covering 150 distinct activities and approximately 3,000 funding agreements were moved to the Department of the Prime Minister and Cabinet.<sup>41</sup>

In July 2014, the Commonwealth Government established the Indigenous Advancement Strategy (IAS), consolidating the various items, activities and sub-activities transferred to the Department of the Prime Minister and Cabinet. The IAS is based on three assumptions:<sup>42</sup>

1. education positively affects the future success of individuals, families and communities and children who go to school have better life outcomes
2. employment, economic development and social participation improve the lives of families and communities, and Aboriginal and Torres Strait Islander people need suitable conditions and incentives so they can participate in the economy and broader society, and
3. growing up in a healthy and safe home and community is essential for families to thrive and reach their full potential and, in particular, it is essential to address high rates of violence against women and children.

The IAS is effectively a grants program. Any organisation or individual, including Commonwealth, state and territory government departments, can apply for funding. In considering proposals for grant funding, the Department of the Prime Minister and Cabinet can:<sup>43</sup>

- invite applications through a grant round or similar process
- directly approach an organisation and
- respond to community-led proposals.

The 2014–15 Commonwealth Budget allocated \$4.9 billion to the strategy over the four years to 2018–19, for ‘grant funding processes and administered procurement activities that address the objectives of the IAS’.<sup>44</sup>

The Commission heard that as of May 2017, the IAS is funding activities in the Northern Territory worth \$696 million, representing a quarter of its total national funding. The Aboriginal population in the Northern Territory represents 10 per cent of the Australian Aboriginal population.<sup>45</sup>

There were 134 grants to the Northern Territory Government and a further 884 grants to non-government organisations through the IAS between 2014 and 2017.<sup>46</sup> It is not possible to determine from the information provided how many of those programs are ongoing, nor their levels of annual funding, where services are being delivered or the expected program outcomes. However, it appears from the material available that the majority of the activities funded under the IAS have not been evaluated against the IAS intended outcomes, though they all function within a performance reporting framework.

Various organisations are delivering a range of programs specific to early childhood under the IAS, to the value of approximately \$177 million over 2.5 years. This includes funding for facilitated playgroups, crèches, childcare services and preschools, and for parent and family support.<sup>47</sup>

In the 2015–16 financial year, the Commonwealth Government gave a total of \$36.7 million to the Northern Territory Government and \$318 million to non-government organisations under the IAS.

Funding for the Northern Territory Government under the IAS increased from \$22.1 million to \$36.7 million between 2014 and 2016, while funding to the non-government sector increased from \$293.7 million to \$318 million.<sup>48</sup>

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An initial round of grant funding was held in September 2014, resulting in a total grant allocation of approximately \$1 billion for around 1,000 organisations to deliver 1,350 projects across Australia. During this process and the subsequent design and delivery of the IAS, the Commonwealth Government received broad criticism for its lack of engagement with Aboriginal communities and service providers on the ground.<sup>49</sup> The Department of the Prime Minister and Cabinet accepted that greater engagement was necessary, and indicated that the Department would take steps to broaden engagement, communication and consultation with stakeholders.<sup>50</sup> This grants process received strong criticism from the Australian National Audit Office (ANAO)<sup>51</sup> in its determination as to whether the Department of the Prime Minister and Cabinet had ‘effectively established and implemented the Indigenous Advancement Strategy to achieve the outcomes desired by government’.

The ANAO found that:

*PM&C’s grants administration processes fell short of the standard required to effectively manage a billion dollars of Commonwealth resources. The basis by which projects were recommended to the Minister was not clear and as a result, limited assurance is available that the projects funded support the department’s desired outcomes. Further, the department did not:*

- assess applications in a manner that was consistent with the guidelines and the department’s public statements
- meet some of its obligations under the Commonwealth Grants Rules and Guidelines
- keep records of key decisions; or
- establish performance targets for all funded projects.<sup>52</sup>

The ANAO further found that:

*The performance framework and measures established for the Strategy do not provide sufficient information to make assessments about program performance and progress towards achievement of the program outcomes. The monitoring systems inhibit the department’s ability to effectively verify, analyse or report on program performance. The department has commenced some evaluations of individual projects delivered under the Strategy but has not planned its evaluation approach after 2016–17.<sup>53</sup>*

The Commission heard evidence from the Commonwealth that strong Aboriginal-managed or Aboriginal-led organisations – and good workforce strategies to build capability – generally equated with progress,<sup>54</sup> and that:

*The intention of IAS though is to work with communities and through the process of the funding cycle that’s built in of community application for funding, to gradually shift to much more of a bottom-up community focus ... it’s on the public record that the Federal Government’s intent is that over time we will move to fund principally only Indigenous organisations.<sup>55</sup>*

However, the Commission heard that administrative costs for the IAS are significant. The 2015–16 Commonwealth Budget anticipated the cost of administering the IAS to be \$279 million, down from \$311.1 million in 2014–15.<sup>56</sup>

The move under the IAS to a competitive tender process raised concerns that such a model

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disadvantaged Aboriginal corporations, and that it did not recognise the enhanced outcomes of service delivery by Aboriginal organisations.<sup>57</sup>

## Other Commonwealth Funding Sources

### *Payments made under the Aboriginal Benefits Account (ABA)*

The ABA<sup>58</sup> is funded by the Commonwealth Government using consolidated revenue. It receives statutory royalty equivalent monies from appropriations, determined by the value of royalties generated from mining on Aboriginal land in the Northern Territory.<sup>59</sup> ABA makes payments under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), including for one-off, non-recurrent grant funding proposals designed to benefit Aboriginal people living in the Northern Territory.<sup>60</sup> Payments under the ABA are a significant source of revenue for Northern Territory Land Councils. Other non-government organisations can also receive ABA grants. In the 2015–16 financial year, total grants of \$77.9 million were made under the ABA.

### *Payments made by other Commonwealth agencies*

The Northern Territory Government and non-government organisations receive funding from a range of other Commonwealth departments to deliver services in the Northern Territory. Those departments include the Attorney-General's Department, Department of Health, Department of Infrastructure and Regional Development, Department of Industry, Innovation and Science, Department of the Environment and Energy, Department of Agriculture and Water Resources and Department of Communications.<sup>61</sup>

## *Outcomes and evaluation of current programs in the Northern Territory*

As a consequence of the extensive funding detailed above, across Australia remote Aboriginal communities are contending with dozens of different programs delivered by a myriad of government agencies and contracted service providers. For example, state government data released in 2014 for Jigalong community in Western Australia indicated 90 services and programs for a community of only 350 people.<sup>62</sup> In the Northern Territory, an attempt to map the level of governance and engagement in Galiwin'ku community in 2010 found that 211 agencies represented by 614 personnel visited this single community of 2,290 residents.<sup>63</sup> The Commission has been unable to determine whether there has been substantive change in service delivery in the Northern Territory since that time.

While most of these programs can be expected to be operating in accordance with public finance accountability standards, there continues to be only limited progress in 'closing the gap' that these programs were set up to achieve. Aboriginal social, health and economic outcomes have been persistently poor in the Northern Territory. This was starkly illustrated in 2012–2014 in the snapshot of results from the Productivity Commission's 2013–14 assessment of state and territory performance against the Closing the Gap targets.<sup>64</sup>

Most activities have a limited evidence base, and there are insufficient links between service outputs and strategy outcomes. Further, consultation and engagement with affected Aboriginal communities has generally been absent at all levels of program design and service implementation and there has

been limited focus on building the capacity of Aboriginal communities in the child protection sector. There has been an emphasis on delivering services to Aboriginal communities, rather than with or by Aboriginal communities.

The Commission notes the evidence of the Commonwealth that it is the Commonwealth Government's intent to 'fund principally only Indigenous organisations'<sup>65</sup> to perform indigenous service delivery and that the Commonwealth was trying to do the business of delivering services differently with the implementation of community development initiatives such as the *Stronger Communities for Children* program.<sup>66</sup>

In respect of the Northern Territory Government services, the Commission sought details and copies of any evaluations conducted or planned in relation to the outcomes of the services detailed there. No information was provided. Therefore, the Commission has been unable to make any assessment of Northern Territory Government evaluation procedures or their effectiveness.

*In the Indigenous area, more than any other, there has been a huge gap between policy intent and policy execution, with numerous examples of well-intentioned policies and programs which have failed to produce their intended results because of serious flaws in implementation and delivery.*<sup>67</sup>

Commonwealth Department of Finance,  
Strategic Review of Indigenous Expenditure, 2010

## INTER-GOVERNMENTAL COORDINATION

*Currently there is little coordination between the funding and services invested in the Northern Territory child protection and youth justice systems by the Commonwealth Government and those delivered by the Northern Territory Government.*<sup>68</sup>

Ken Davies, Chief Executive Officer,  
Department of Territory Families

*A major problem for the delivery of these programs in the Northern Territory is that there is insufficient and often no, coordination between the programs already offered by the Northern Territory and the Commonwealth governments. I doubt that anyone could identify all of the programs offered, let alone assess whether they are effective. The coordination between them is poor and services are delivered in a siloed rather than comprehensive way.*<sup>69</sup>

Colleen Gwynne, Northern Territory Children's Commissioner

Funding arrangements in the Northern Territory appear to be characterised by a lack of coordination between the Northern Territory and Commonwealth Governments, and within each government. In respect of Northern Territory Government programs and activities, the Commission was unable to identify overarching strategies or frameworks in relation to child protection, youth justice or early intervention that are guiding Northern Territory Government expenditure. This information was expressly sought by the Commission. Further analysis of information provided by

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the Northern Territory Government around activities relating to early support and prevention is in Chapter 38 (Early support). However the Commission cannot identify whether any Northern Territory Government Strategy guided funding allocations either across or within Northern Territory Government departments in relation to any of the activities identified by the Northern Territory in the funding of services information they provided to the Commission.<sup>70</sup>

Constant change in funding arrangements creates difficulty and complexity when tracking funding decisions and the objectives of service delivery over time. It also means that service providers who receive or seek funding are operating on a changeable, unstable strategic foundation.<sup>71</sup> The Commission heard from Professor Sven Silburn of the Menzies School of Health Research that:

*'I think in practical terms, this sector has been bedevilled by policy churn, by changes of governments, by short-term funding contracts for many of the non-government and community sector services that are supporting families and that there – it's absolutely essential that there – be long-term policy and funding certainty as a prerequisite for any improvement. You need that if you're going to build effective strategic partnerships that properly include Aboriginal community and NGO sectors and both the NT and Australian Government services. The fragmentation in this area of service delivery has actually been working very contrary to the interests of children and families. There has to be a more cohesive and coordinated approach.'*<sup>72</sup>

This state of affairs appears to have existed in the Northern Territory over the entirety of the Commission's relevant period. The 2010 Strategic Review of Indigenous Expenditure found that:

**The current set of Indigenous-specific programs across the Commonwealth is unduly complex and confusing.** *There are too many programs, sometimes with poorly articulated objectives and an excess of red tape. In some cases, program logic is weak, with little evidence of any real, testable strategy for change or methodology for reform. In other cases, underlying assumptions are flawed or unrealistic, especially in regard to the scale and timing of investment needed to drive lasting change. Too often, programs offer little more than temporary respite from the worst of the symptoms they are designed to treat, or are able to assist only a small proportion of those eligible.*<sup>73</sup>

[...]

*Program management and service delivery remains fragmented rather than coordinated, with weak linkages even within agencies, let alone across them. The multitude of separate disconnected programs runs contrary to the need for flexibility of service delivery, most obviously in remote locations, and creates a surfeit of unnecessary red tape. Communication between agencies is too often poor, even where their responsibilities and interests are closely related. **Significant efficiencies could be gained by pooling expertise and coordinating efforts** in areas where individual agencies are currently 'doing their own thing' (as in the planning and provision of staff housing in remote parts of the country, governance and leadership programs, and contracting).<sup>74</sup> (Emphasis in original)*

The Australian National Audit Office has noted that:

*The overarching delivery framework for Indigenous programs is complex and dispersed.*

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*The total number of programs is high, for example, the Strategic Review of Indigenous Expenditure, undertaken in 2009, identified 232 separate funding items, worth \$3.5 billion in 2008-09. This expenditure was delivered by over 50 government departments with most of the programs identified having expenditure less than \$5 million per annum. In 2010, over 100 separate commitments in support of the Closing the Gap initiative were funded by the Australian Government. Analysis of Australian Government Portfolio Budget Statements for 2010-11 indicated that across all portfolios there were over 100 different Indigenous-related objectives and over 200 related deliverables and indicators that could be identified. It is very difficult to assess whether the existing level of expenditure is sufficient to remediate the level of disadvantage or to accurately determine whether existing investments are making real progress in 'closing the gap'. It is not possible to assess the impact and effectiveness of this resource allocation and determine whether reported expenditure is in fact 'value for money'.<sup>75</sup>*

The Northern Territory Remote Services Coordinator-General noted that:

*By February 2012 little had changed. Members of the Local Reference Group (LRG) reported that multiple agencies were acting in virtual competition for children to attend their service, with many programs delivered by staff not resident in the community and commuting from Darwin at great expense.<sup>76</sup>*

*[...]*

*[N]umerous NFP organisations are funded by Commonwealth Government agencies through [Department of Families, Housing, Community Services and Indigenous Affairs, Department of Health and Ageing and Department of Education, Employment and Workplace Relations] and NT Government departments through [Department of Education and Training, Department of Children and Families and Department of Health] with little apparent coordination, high levels of duplication of effort and at considerable expense.<sup>77</sup>*

These issues directly relate to the Commission's concerns regarding the lack of progress made despite the level of funding allocated. The amalgamation of numerous Aboriginal-related programs into the Department of the Prime Minister and Cabinet provides opportunities for strategic engagement and coordinated service design and a platform to initiate an integrated approach. However, structured decision-making does not appear to have occurred thus far. Evaluation of program outcomes, as opposed to outputs, has not been a built-in component of service delivery in the Northern Territory. Accordingly, in Chapter 38 (Early Support), the Commission recommends that the Northern Territory and Commonwealth Governments establish a Joint Coordinating Funding Framework through which investments in child protection and youth justice services would be agreed and allocated, in consultation with Aboriginal community controlled organisations, the NGO sector and local communities.

## NEW STANDARDS OF EVIDENCE

Each of the agencies delivering programs in the Northern Territory have their own policies and program objectives and maintain measures and narratives of effectiveness, consistent with the public-sector standards of performance and accountability. Each operates under public finance rules to ensure that money is not misappropriated and that the program performs to its stated outcomes. Yet, as identified earlier in this chapter, while so many programs are operating and succeeding in terms

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of meeting public finance standards, there has been only limited progress in ‘closing the gap’ these programs were set up achieve.

In addition to the ‘business as usual’ reporting against accountability frameworks, each program is subject to a multitude of evaluations. Altman and Russell recorded 98 evaluation reports throughout the Intervention (2007–2012).<sup>78</sup> The sheer number of programs per capita compromises the quality of these evaluations, as noted by Professor Deborah Cobb-Clark:

*At any one time, there is likely to be a myriad of interventions affecting the Indigenous population. This means that it is very difficult to evaluate any single program in a particular Indigenous community because a multitude of programs are being delivered simultaneously. If another Indigenous community is used as the counterfactual, it is certainly the case that the ‘control’ group is also treated – just with a different set of policies and programs. Therefore, standard evaluation techniques provide only an estimate of the marginal difference between one set of interventions and another set, many (indeed most) of which overlap. This is almost never the estimate we want, and in some cases, may not be interesting at all.<sup>79</sup>*

The Northern Territory National Emergency Response Intervention evaluation report in 2011 acknowledged this attribution problem.

*The number of simultaneous activities (many unrelated to the Intervention), the long lag time between actions and outcomes, and the short duration of the Intervention mean it is rarely possible to attribute outcomes to individual measures.<sup>80</sup>*

Using a place-based approach will remove one barrier to the availability of reliable evidence that can be used to make decisions about resource allocation, service delivery and knowledge development. But it will raise new challenges for routinely collecting data and attributing cause and effect in evaluation studies.

Improving the standard of evidence will require reform in the public finance methods used to collect it. Routine accountability measures will need to continue, but generally be streamlined and made to comply with the ‘collect once, use often’ principle. Local and regional performance should also be monitored and assessed in terms of negotiated local priorities, strategies and services. The establishment of a central database that identifies what services are available by location and nature (onsite, outreach or as needed) is a critical step towards mapping needs and planning the delivery of services.

## CONCLUSION

The Commonwealth and Northern Territory Governments need to improve transparency of funding and service delivery for child protection and youth justice-related programs significantly.

The absence of a clear co-ordination framework for funding in relation to the numerous child protection and youth justice services, currently delivered under various intergovernmental agreements or directly by the Northern Territory Government itself, is another significant issue.

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### **Recommendation 6.1**

**The Productivity Commission undertake a review and audit of Commonwealth expenditure in the Northern Territory in the area of family and children's services relevant to the prevention of harm to children. The review should address co-ordination of programs, funding agreements and selection of service providers, service outputs and evaluations.**



## ENDNOTES

- <sup>1</sup> Total Indigenous-related government expenditure over the 2015/16 year in the Northern Territory was \$5.028 billion. See: Table W.1, SCRGSP (Steering Committee for the Review of Government Service Provision) 2017, *2017 Indigenous Expenditure Report*, Productivity Commission, Canberra [website], October 2017, <<https://www.pc.gov.au>>, accessed 2 November 2017.
- <sup>2</sup> Northern Territory Government, *Budget Overview – 2017-18*, p. 2, [website], April 2017, <<https://budget.nt.gov.au>>, accessed 31 October 2017.
- <sup>3</sup> Northern Territory Opposition, *Submission to the Productivity Commission on Horizontal Fiscal Equalisation*, Submission No 31, [website], 30 June 2017, <<https://www.pc.gov.au>>, accessed 31 October 2017.
- <sup>4</sup> Exh.578.000, Statement of Andrew Tongue, 15 June 2017, tendered 26 June 2017, para 5.
- <sup>5</sup> Exh.578.000, Statement of Andrew Tongue, 15 June 2017, tendered 26 June 2017, para 6; Exh.585.000, Statement of Roslyn Baxter, 15 June 2017, tendered 26 June 2017, para 63; Transcript, Andrew Tongue, 26 June 2017, p. 4992, line: 21 – 38.
- <sup>6</sup> Exh.578.000, Statement of Andrew Tongue, 15 June 2017, tendered 26 June 2017, para. 6.
- <sup>7</sup> Exh.585.000, Statement of Roslyn Baxter, 15 June 2017, tendered 26 June 2017, para. 63.
- <sup>8</sup> Transcript, Andrew Tongue, 26 June 2017, p. 4992, line: 25 – 26.
- <sup>9</sup> Exh.578.000, Statement of Andrew Tongue, 15 June 2017, tendered 26 June 2017, para. 10.
- <sup>10</sup> Northern Territory Government, Budget Paper No. 2, *Budget Strategy and Outlook 2017 – 18*, Table 6.2 [website], April 2017, <<https://budget.nt.gov.au>>, accessed 31 October 2017.
- <sup>11</sup> GST Distribution Review, *GST Distribution Review Final Report* [website], October 2012 <[www.gstdistributionreview.gov.au](http://www.gstdistributionreview.gov.au)>, accessed 31 October 2017.
- <sup>12</sup> GST Distribution Review, *GST Distribution Review Final Report*, Chapter 10 [website], October 2012 <[www.gstdistributionreview.gov.au](http://www.gstdistributionreview.gov.au)>, accessed 31 October 2017.
- <sup>13</sup> Commonwealth Grants Commission, *Report on GST Revenue Sharing Relativities, 2017 Update*, Table 1, pp. 2, 14, [website], <<https://cgc.gov.au>>, accessed 31 October 2017; Transcript, Andrew Tongue, 26 June 2017, p. 4993, line: 11 – 26. Commonwealth payments more generally also account for a proportionately higher component of the Northern Territory's revenue relative to the other States and Territories. In 2015/16, the Commonwealth payments accounted for 72.5% of Northern Territory compared to a median of 44%. See Northern Territory Government, Budget Paper No. 2, *Budget Strategy and Outlook 2017 – 18*, Table 6.2 [website], April 2017, <<https://budget.nt.gov.au>>, accessed 31 October 2017.
- <sup>14</sup> Northern Territory Government, Budget Paper No. 2, *Budget Strategy and Outlook 2017 – 18*, p. 62 [website], April 2017, <<https://budget.nt.gov.au>>, accessed 31 October 2017.
- <sup>15</sup> Productivity Commission, Steering Committee for the Review of Government Service Provision, *Indigenous Expenditure Report 2014*, p. 54 [website] <<https://www.pc.gov.au>>, accessed 31 October 2017.
- <sup>16</sup> Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2014*, 5.23, [website], <<http://www.pc.gov.au>>, accessed 31 October 2017.
- <sup>17</sup> Australian Human Rights Commission, *Social Justice and Native Title Report 2015*, p. 108, [website], <<http://www.humanrights.gov.au/about/publications/>>, accessed 31 October 2017.
- <sup>18</sup> GST Distribution Review, *GST Distribution Review Final Report*, Chapter 10 [website], October 2012 <[www.gstdistributionreview.gov.au](http://www.gstdistributionreview.gov.au)>, accessed 31 October 2017.
- <sup>19</sup> GST Distribution Review, *GST Distribution Review Final Report*, Chapter 10, Table 10.1 [website], October 2012 <[www.gstdistributionreview.gov.au](http://www.gstdistributionreview.gov.au)>, accessed 31 October 2017.
- <sup>20</sup> GST Distribution Review, *GST Distribution Review Final Report*, Chapter 10 [website], October 2012 <[www.gstdistributionreview.gov.au](http://www.gstdistributionreview.gov.au)>, accessed 31 October 2017.
- <sup>21</sup> GST Distribution Review, *GST Distribution Review Final Report*, Chapter 10 [website], October 2012 <[www.gstdistributionreview.gov.au](http://www.gstdistributionreview.gov.au)>, accessed 31 October 2017.
- <sup>22</sup> GST Distribution Review, *GST Distribution Review Final Report*, Chapter 10 [website], October 2012 <[www.gstdistributionreview.gov.au](http://www.gstdistributionreview.gov.au)>, accessed 31 October 2017.
- <sup>23</sup> Commonwealth Grants Commission, *Report on GST Revenue Sharing Relativities, 2017 Update*, p. 54, [website], <<https://cgc.gov.au>>, accessed 31 October 2017.
- <sup>24</sup> Northern Territory Government, Budget Paper No. 2, *Budget Strategy and Outlook 2017 – 18*, Table 6.2 [website], April 2017, <<https://budget.nt.gov.au>>, accessed 31 October 2017.
- <sup>25</sup> Council on Federal Financial Relations, *Intergovernmental Agreement on Federal Financial Relations*, [website], 2011, <[http://www.federalfinancialrelations.gov.au/content/intergovernmental\\_agreements.aspx](http://www.federalfinancialrelations.gov.au/content/intergovernmental_agreements.aspx)>, accessed 31 October 2017.
- <sup>26</sup> Figures for 2016–17 are incomplete and could not be provided by the Commonwealth due to the timing of the Commission hearings.
- <sup>27</sup> Northern Territory Government, Budget Paper No. 2, *Budget Strategy and Outlook 2017 – 18*, p. 67 [website], April 2017, <<https://budget.nt.gov.au>>, accessed 31 October 2017.
- <sup>28</sup> Exh.587.000, Appendix 1 to Statement of Andrew Tongue, 21 June 2017, tendered 26 June 2017.
- <sup>29</sup> Department of Social Services, *Stronger Futures in the Northern Territory*, [website], July 2012 <[https://www.dss.gov.au/sites/default/files/documents/09\\_2012/stronger-futures-booklet-jul2012.pdf](https://www.dss.gov.au/sites/default/files/documents/09_2012/stronger-futures-booklet-jul2012.pdf)>, accessed 31 October 2017.
- <sup>30</sup> Exh.587.000, Appendix 1 to Statement of Andrew Tongue, 21 June 2017, tendered 26 June 2017 at Sheet 2.
- <sup>31</sup> Northern Territory Government, Budget Paper No. 2, *Budget Strategy and Outlook 2017 – 18*, p. 72 [website], April 2017, <<https://budget.nt.gov.au>>, accessed 31 October 2017.
- <sup>32</sup> Northern Territory Government, Budget Paper No. 2, *Budget Strategy and Outlook 2017 – 18*, p. 73 [website], April 2017, <<https://budget.nt.gov.au>>, accessed 31 October 2017.

- <sup>33</sup> Exh.595.000, Council on Federal Financial Relations, 'National Partnerships – Community Services', *National Partnership on Northern Territory Remote Aboriginal Investment*, Council on Federal Financial Relations, tendered 26 June 2017, para 18(b).
- <sup>34</sup> Northern Territory Government, Budget Paper No. 2, *Budget Strategy and Outlook 2017 – 18*, p. 71 [website], April 2017, <<https://budget.nt.gov.au>>, accessed 31 October 2017.
- <sup>35</sup> Exh.578.000, Statement of Andrew Tongue, 15 June 2017, tendered 26 June 2017, para 14.2.
- <sup>36</sup> Australian National Audit Office, *Implementation of the National Partnership Agreement on Remote Indigenous Housing in the Northern Territory*, Report No. 12 of 2011–12, p. 16 [website], <<http://www.anao.gov.au>>, accessed 31 October 2017.
- <sup>37</sup> Exh.580.000A, Revised and Updated Appendix 1 Spreadsheet to the Statement of Andrew Tongue, tendered 6 November 2017, Sheet 5, Specified Area Funding non-NTG.
- <sup>38</sup> Exh.578.000, Statement of Andrew Tongue, 15 June 2017, tendered 26 June 2017, para. 7.
- <sup>39</sup> Exh.580.000A, Revised and Updated Appendix 1 Spreadsheet to the Statement of Andrew Tongue, tendered 6 November 2017, Sheet 5, Specified Area Funding non-NTG, rows 1786 – 1788.
- <sup>40</sup> Exh.1218.000, Northern Territory Funding of Services Index, 11 August 2017, tendered 6 November 2017: In 2015–16, block funding of \$123 million was provided to organisations to deliver PHaMs services for people with severe mental illness. PHaMs providers will continue to be funded until 30 June 2019 (or until the NDIS transition is complete - details of when transition will be completed in each state are in the relevant bilateral agreements), to ensure services for PHaMs participants during the transition period.
- <sup>41</sup> Exh.593.000, Australian National Audit Office, 2017, *Indigenous Advancement Strategy*, Report No 35 of 2016–17, Australian National Audit Office, Canberra, tendered 26 June 2017, p. 8, para 11.
- <sup>42</sup> Department of the Prime Minister and Cabinet, *Indigenous Advancement Strategy*, [website], <<https://www.pmc.gov.au/Indigenous-affairs/Indigenous-advancement-strategy>>, accessed 31 October 2017.
- <sup>43</sup> Department of the Prime Minister and Cabinet, *Funding under the IAS*, [website], <<https://www.pmc.gov.au/Indigenous-affairs/grants-and-funding/funding-under-ias>>, accessed 31 October 2017.
- <sup>44</sup> Department of the Prime Minister and Cabinet, *Funding under the IAS*, [website], <<https://www.pmc.gov.au/Indigenous-affairs/grants-and-funding/funding-under-ias>>, accessed 31 October 2017.
- <sup>45</sup> Exh.578.000, Statement of Andrew Tongue, 15 June 2017, tendered 26 June 2017, para. 15.
- <sup>46</sup> Exh.580.000A, Revised and Updated Appendix 1 Spreadsheet to the Statement of Andrew Tongue, tendered 6 November 2017, Sheets 4, Specified Area Funding to NTG and 5, Specified Area Funding non-NTG.
- <sup>47</sup> Exh.578.000, Statement of Andrew Tongue, 15 June 2017, tendered 26 June 2017, para. 16.
- <sup>48</sup> Exh.580.000A, Revised and Updated Appendix 1 Spreadsheet to the Statement of Andrew Tongue, tendered 6 November 2017, Sheet 1 – Overview of PM&C Funding; figures are rounded to the nearest 0.05 million.
- <sup>49</sup> Parliament of Australia, Senate Finance and Public Administration References Committee, *Commonwealth Indigenous Advancement Strategy Tendering Processes Report* [website], March 2016, pp. 14–16, <[www.aph.gov.au](http://www.aph.gov.au)>, accessed 31 October 2017.
- <sup>50</sup> Parliament of Australia, Senate Finance and Public Administration References Committee, *Commonwealth Indigenous Advancement Strategy Tendering Processes Report* [website], March 2016, pp. 14–16, <[www.aph.gov.au](http://www.aph.gov.au)>, accessed 31 October 2017.
- <sup>51</sup> Exh.593.000, Australian National Audit Office, 2017, *Indigenous Advancement Strategy*, Report No 35 of 2016–17, Australian National Audit Office, Canberra, tendered 26 June 2017.
- <sup>52</sup> Exh.593.000, Australian National Audit Office, 2017, *Indigenous Advancement Strategy*, Report No 35 of 2016–17, Australian National Audit Office, Canberra, tendered 26 June 2017, p. 8, para 10.
- <sup>53</sup> Exh.593.000, Australian National Audit Office, 2017, *Indigenous Advancement Strategy*, Report No 35 of 2016–17, Australian National Audit Office, Canberra, tendered 26 June 2017, p. 8, para 11.
- <sup>54</sup> Transcript, Andrew Tongue, 26 June 2017, p. 4996: lines 28 – 30.
- <sup>55</sup> Transcript, Andrew Tongue, 26 June 2017, p. 4997: lines 35 – 39.
- <sup>56</sup> Dr John Gardiner-Garden, Australian Parliamentary Library, *Budget Review 2015–16 Index, Indigenous Affairs*, para 1 [website], <[www.aph.gov.au](http://www.aph.gov.au)>, accessed 31 October 2017.
- <sup>57</sup> Parliament of Australia, Senate Finance and Public Administration References Committee, *Commonwealth Indigenous Advancement Strategy Tendering Processes Report* [website], March 2016, p. 21, <[www.aph.gov.au](http://www.aph.gov.au)>, accessed 31 October 2017.
- <sup>58</sup> The ABA is a special account for the purposes of the *Public Governance, Performance and Accountability Act 2013* (Cth).
- <sup>59</sup> Department of the Prime Minister and Cabinet, *Aboriginal Benefits Account Section 64(4) Beneficial Grant Guidelines* [website], December 2016, <[www.pmc.gov.au](http://www.pmc.gov.au)>, accessed 31 October 2017.
- <sup>60</sup> Department of the Prime Minister and Cabinet, *Aboriginals Benefit Account Section 64(4) Beneficial Grant Guidelines* [website], December 2016, <[www.pmc.gov.au](http://www.pmc.gov.au)>, accessed 31 October 2017.
- <sup>61</sup> Exh.580.000A, Revised and Updated Appendix 1 Spreadsheet to the Statement of Andrew Tongue, tendered 6 November 2017, Sheet 5, Specified Area Funding non-NTG.
- <sup>62</sup> WADPC (Western Australia Department of the Premier and Cabinet), 2014, *Location Based Expenditure Review*. A review of all social, economic participation and community services expenditure delivered in Roebourne and outlying communities of Cheeditha and Mingullatharndo; Jigalong and the Martu Communities of Punmu, Parngurr and Kunawarritji. Perth: Government of Western Australia., p.7 <http://www.daa.wa.gov.au/globalassets/pdf-files/remote-comms-reform/location-based-expenditure-review.pdf>, accessed 31 October 2017.
- <sup>63</sup> Exh.1181.001, Langford Consulting, 2011, *Governance and Engagement Map Galiwin'ku*, Canberra: Commonwealth of Australia, tendered 3 November 2017.
- <sup>64</sup> Productivity Commission, *National Indigenous Reform Agreement: Performance Assessment 2013-14*, p. 181, Figure A.8 [website], 2

- December 2015, <[www.pc.gov.au](http://www.pc.gov.au)>, accessed 31 October 2017.
- <sup>65</sup> Transcript, Andrew Tongue, 26 June 2017, p. 4997: lines 35 – 39.
- <sup>66</sup> Exh.578.000, Statement of Andrew Tongue, 15 June 2017, tendered 26 June 2017, para 16.1.
- <sup>67</sup> Department of Finance, *Strategic Review of Indigenous Expenditure*, p. 11, para F.2 [website], February 2010, <<https://www.finance.gov.au>>, accessed 31 October 2017.
- <sup>68</sup> Exh.424.000, Statement of Ken Davies, 17 March 2017, tendered 12 May 2017, para 34J.
- <sup>69</sup> Exh.520.000, Statement of Colleen Gwynne, 29 May 2017, tendered 19 June 2017, para 68.
- <sup>70</sup> Exh.1218.000, Northern Territory Funding of Services Index, 11 August 2017, tendered 6 November 2017.
- <sup>71</sup> The Commission heard evidence from numerous witnesses to this effect, see for example: Transcript, Muriel Bamblett, 12 October 2017, p. 212: lines 25-28; Transcript, Antoinette Carroll, 13 December 2016, p. 775: line 46 – p.776: line 8 and p.776: lines 16-23; Transcript, Jonathon Hunyor, 20 March 2017, p. 1474: line 40 – p.1475: line 5; Transcript, Olga Havnen, 21 March 2017, p. 1579, lines 15-33; Exh.079.001, Statement of Barrie Clew, 16 February 2017, tendered 15 March 2017, para 215.; Transcript, Patricia Anderson, 12 October 2016, p. 178: lines 6-19 and lines 28-30.
- <sup>72</sup> Transcript, Sven Silburn, 19 June 2017, p. 4395: lines 14-23.
- <sup>73</sup> Department of Finance, *Strategic Review of Indigenous Expenditure*, p. 11, para F.6 [website], February 2010, <<https://www.finance.gov.au>>, accessed 31 October 2017.
- <sup>74</sup> Department of Finance, *Strategic Review of Indigenous Expenditure*, p. 13, para F.13 [website], February 2010, <<https://www.finance.gov.au>>, accessed 31 October 2017.
- <sup>75</sup> Northern Territory Government, *Office of the Northern Territory Coordinator-General for Remote Services Report: June 2011 to August 2012*, p. 67 [website], September 2012, <[www.territorystories.nt.gov.au](http://www.territorystories.nt.gov.au)>, accessed 31 October 2017, citing at p. 67 ANAO Capacity Development for Indigenous Service Delivery, Report 26, 2011-12, at p. 55.
- <sup>76</sup> Northern Territory Government, *Office of the Northern Territory Coordinator-General for Remote Services Report: June 2011 to August 2012*, p. 67 [website], September 2012, <[www.territorystories.nt.gov.au](http://www.territorystories.nt.gov.au)>, accessed 31 October 2017, citing at p. 67 ANAO Capacity Development for Indigenous Service Delivery, Report 26, 2011-12, at p. 53.
- <sup>77</sup> Northern Territory Government, *Office of the Northern Territory Coordinator-General for Remote Services Report: June 2011 to August 2012*, p. 67 [website], September 2012, <[www.territorystories.nt.gov.au](http://www.territorystories.nt.gov.au)>, accessed 31 October 2017, citing ANAO Capacity Development for Indigenous Service Delivery, Report 26, 2011-12, at p. 53.
- <sup>78</sup> Altman, J, and Russell, S, 2012, 'Too much Dreaming: Evaluations of the Northern Territory National Emergency Response Intervention 2007–2012', *Evidence Base*, vol. 3, p. 8.
- <sup>79</sup> Cobb-Clark, D, 2009, 'The Case for Making Public Policy Evaluations Public' in *Strengthening Evidence-based Policy in the Australian Federation: Roundtable Proceedings*, Productivity Commission, Canberra, p. 86 <<http://www.pc.gov.au/research/supporting/better-indigenous-policies/07-better-indigenous-policies-chapter5.pdf>>, accessed 31 October 2017.
- <sup>80</sup> Department of Families Housing Community Services and Indigenous Affairs, *Northern Territory Emergency Response Evaluation Report 2011*, p. 3 [website], 5 November 2011, <<http://apo.org.au/node/27172>>, accessed 31 October 2017.



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COMMUNITY  
ENGAGEMENT



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# COMMUNITY ENGAGEMENT

## INTRODUCTION

In the Northern Territory, there has been structural reduction in the authority and resources Aboriginal people might exercise over matters of importance to their children and young people, families and communities over the past decade. This has had direct consequences for the readiness and capability of governments and communities to improve outcomes for children.

This chapter calls for communities, governments and service providers to make a commitment to the children and young people of the Northern Territory and work together in new ways under a 'shared network governance' framework.

The relationship between governments and the Aboriginal community has been a defining part of the Australian story. It has waxed and waned through many iterations over the last 229 years and has been variously contextualised through eras of colonisation, invasion, settlements, frontier conflicts, exclusion, integration, assimilation, normalisation and reconciliation.

Through these phases, this relationship has been underpinned by many concepts: self-determination, self-management, mainstreaming, rights and responsibilities, shared responsibility and mutual obligation, and 'closing the gap'.

There have been numerous commitments to reset the relationship. This has generally followed an election and a change of government; a catastrophic event such as the death in custody of the young woman in the Swan Valley community; a government-initiated measure like the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC); the Northern Territory Emergency Response (the Intervention); or the establishment and reporting of an inquiry.

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The creation of a government-selected advisory body or consultation process predictably follows, which then predictably dies a natural death at the next election where an incoming government continues the cycle and once more commits to resetting the relationship. This circularity of policy and approach has produced a generation who are both cynical and fatigued.

## RELATIONSHIPS AT THE HEART OF 'SHARED NETWORK GOVERNANCE'

The Commission has been confronted many times by the question: *'What difference will this inquiry make when so many in the past have failed?'*

The Commission's response is that it is confident that better outcome will emerge if there are better relationships between communities and governments, based on their shared commitment to the children and young people of the Northern Territory. This chapter introduces the concept of 'shared network governance' to give expression to a new relationship between local and regional networks of community representatives, government agencies and service providers. Through this relationship, all parties will act together to improve the capacity of all members of the network, ultimately improving the wellbeing of children and young people.

Shared network governance will provide community members with a greater insight into the workings of the formal systems. In turn, governments, public servants and external service providers will learn about the value of sustained engagement, of developing relationships, and of developing a deeper understanding of context in Aboriginal communities and disadvantage.

Core to the relationship is building trust and respect, which takes time. Implementation will and should require patience as well as urgency – urgency because children and young people in the Northern Territory deserve a better life and should not continue to suffer while the 'grown-ups' learn to work together, and patience to take the time to build trust. As the Aboriginal Medical Services Alliance Northern Territory (AMSANT) stated in its submission to this Commission:

*Systems of care, justice, health and child protection which have been developed for Aboriginal people, but not by Aboriginal people, have a long history of perpetuating and exacerbating traumatic experiences.<sup>1</sup>*

The recommendations in this chapter are not novel or ground breaking. Examples of similar changes in the Northern Territory and other jurisdictions are discussed in further detail at the end of this chapter. But, as history shows, it will be revolutionary for the Territory.

The Northern Territory Government has given assurances to both the Commission and its constituents that it will delegate decision-making powers to local communities.<sup>2</sup> The political will is there, the community want to be engaged, and the children and young people need things to change. The time is ripe for the Northern Territory to start leading on child protection, youth justice and Aboriginal affairs nationally.

The Commission is hopeful that a commitment to the wellbeing of children can be an agreed policy issue, no matter who is in power.

*'Aboriginal community control and empowerment should be at the heart of the design*

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*and delivery of services to Aboriginal children and their families.*<sup>3</sup>

The Commission's community consultations consistently told us of the intense frustration people felt in being alienated from decisions affecting their children and young people. Communities did not make the distinction between child protection and youth justice, rather all they saw were strangers coming into their space and taking their children. Their frustration was generally matched by their appetite for taking responsibility as parents, families and communities by participating in the decisions affecting their children and young people. This sentiment was particularly evident at the full meetings of the Central and Northern Land Councils. As the Burnawarra Law and Justice Group stated:

*'The thing we want most from this Commission is our power back. We want to be able to exercise Burnawarra authority over our community. Self-determination is our number one priority. Self-determination is crucial to effective youth policy. It is how we managed to live in harmony and how we managed to survive for such a long time.'*<sup>4</sup>

Despite constant recommendations calling for the inclusion of Aboriginal people and communities,<sup>5</sup> governments have not allowed or empowered Aboriginal people to lead in decision-making. Engagement and consultation are often given lip service but have no practical effect on outcomes.

A system that invests in the participation of Aboriginal families and communities, and strengthens their roles in developing and owning responses to community concerns across primary, secondary and tertiary levels, is urgently needed. Piecemeal and ad hoc approaches are clearly not enough.<sup>6</sup>

Progress gained through the major investment in Aboriginal affairs maintained over many years has been mixed, with generally poor returns to date.<sup>7</sup> The Commission questions how much longer the existing 'high expenditure: low engagement: low results' approach can continue. It is well understood that the combination of under-performing programs, poor coordination across governments and lack of engagement with Aboriginal people in the design and delivery of services is producing continually poor results.<sup>8</sup>

It is time to change the approach.

Evidence presented to the Commission consistently emphasised the need for, and benefits of, greater involvement of Aboriginal people across the spectrum of policy, program design and service delivery.<sup>9</sup> These benefits include:

- Aboriginal people understanding the issues of concern and priority in their local areas and regions
- ensuring 'buy-in' from the local community and culturally appropriate solutions, building community capacity and social capital
- creating culturally sensitive spaces and improving the cultural competence of non-Aboriginal staff members, thereby enhancing Aboriginal engagement
- Aboriginal people using their networks informally to engage people in programs and services who may not otherwise participate, and
- Aboriginal people using their networks to work with agencies in communities.<sup>10</sup>

As the Healing Foundation stated in its submission:

*'It is our belief that government is not best placed to implement or create the environment for change as they are too prone to political processes that do not have a*

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*focus on creating outcomes over the long term.’<sup>11</sup>*

## How?

If it was as simple as passing power and resources to Aboriginal agency, improved outcomes would have emerged in the 1990s during the self-determination policy era and the days of ATSIC. If it was as simple as centralising and controlling all power and resources to government agency, outcomes would have improved in the 2000s through the Intervention.

Governments cannot find all policy solutions from afar, let alone implement them effectively. And Aboriginal leaders cannot solve all problems in their communities alone.

So how to move forward in ways that learn from past mistakes but do not involve lurching into new uncharted territory?

Facilitating shared network governance is not about finding best practice, packaging it into universal policy and then transplanting it uncritically into other places. It is about understanding the conditions of success in one place, then negotiating, applying and testing these in another place, as new solutions are worked out.

Every place has different histories, languages, local responses, and social, political and cultural dynamics. This diversity is not amenable to the roll-out of uniform policies or structures. Rather, it requires a place-based and practice-led approach that can adapt to diversity, adjust to variability between places and negotiate between competing stakeholder interests.

Getting to agreement about the proper way to integrate community engagement into the service system, and then making it work at local, regional and territory level will also require some fundamental reforms to public administration. The intended outcomes will always be tied to the wellbeing of children and young people, but the network must be authorised to be innovative in finding ways to get there.

To instigate a process of shared network governance, an ‘action learning, practice-led’ approach should be adopted. This approach will be based on learning from early actions, adjusting practice in working with children and young people, and continuing to find out and adopt what works best for Aboriginal people in the Northern Territory.

Suitable structures with defined roles will be needed at local, regional and jurisdictional levels. Expectations of performance need to be tailored to the current or developing capability of all parties.

For communities and governments to reform the child protection and youth justice systems, they need to be authorised to change governance systems. This includes the ways priorities are set, and the rules for making decisions and judging results. A clear set of agreed principles and rules must be developed to implement proper engagement and actually set the relationship. However, not everything is debatable, and the parameters of authority need to be clearly understood. Communities cannot override or intervene in certain statutory functions of government. Similarly, there are certain community responsibilities that governments need to respect and step back from.

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It is essential to move beyond arrangements that merely include Aboriginal peoples in matters affecting them. Instead, they must have agency and are capable of effecting change.

This means involving Aboriginal peoples across the full spectrum of decision-making, not after a determination has been made to remove a child from their family or once a young person enters the youth justice system:

*... when [Aboriginal peoples] make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care, and social service provision.<sup>12</sup>*

## A HISTORY OF THE NORTHERN TERRITORY AND ENGAGEMENT WITH ABORIGINAL PEOPLES

The Northern Territory is a special case of governance in Australia. The constitutional history of the Northern Territory can be divided into five broad periods:

- 1825-1863: *The area that will become the Northern Territory is part of the Colony of New South Wales; unsuccessful attempts at settlement are made from the 1820s to the 1840s.*
- 1863-1911: *Government of the Northern Territory by South Australia as part of the province/state.*
- 1911-1947: *Government of the Northern Territory by the Commonwealth following the surrender of the Territory to the Commonwealth by South Australia.*
- 1947-1978: *Continued government of the Northern Territory by the Commonwealth with limited local involvement following the establishment of the Northern Territory Legislative Council (1947) and Legislative Assembly (1974).*
- 1978-present: *Self-government of the Northern Territory with some reserved areas of Commonwealth authority and the continued ability of the Commonwealth to legislate for the Territory under s.122 of the Australian Constitution.<sup>13</sup>*

Under the Australian Constitution, the Commonwealth has powers over the Northern Territory it does not enjoy in other jurisdictions.<sup>14</sup> The Intervention, which is the temporal starting point for the Commission's examination, exemplifies the Commonwealth's capacity to intervene in the Northern Territory in a way that is not possible in most parts of the country. The Northern Territory is highly dependent on Commonwealth government grants and Commonwealth-funded services, such as defence, public administration and Aboriginal affairs.

By 1978, the Commonwealth's policy of self-determination and decentralisation to Aboriginal organisations was already well underway. Governance in Northern Territory communities was firmly embedded at the local level through incorporated associations created under the Commonwealth's *Aboriginal Councils and Associations Act 1976* (Cth) and the *Associations Incorporation Act* (NT).

Many of these organisations were characterised as community councils, responsible for a diverse

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range of mainly Commonwealth government-funded services delivered locally. Together, these organisations and the Land Councils were at the forefront of a highly decentralised, grassroots service system.

The 1980s saw the emergence of another form of community-based governance with the creation of community government councils under local government legislation. The *Local Government Act (NT)* came into force in 1979 and gave communities the ability to tailor 'Community Government Schemes' that set out the area, electoral structure and functions of the community government. What emerged from the introduction of local government legislation can be considered one of the first iterations of a 'place-based' approach. It was remarkably local and very diverse. Councils ranged in size from six to 18 members, and some schemes included residency requirements to stand for council, while others gave voting rights to non-resident traditional landowners.

The number of functions taken on by a Community Government Council was scalable to particular circumstances, recognising that some functions should stay with existing organisations for matters such as housing, pastoral enterprise and community stores. There was debate amongst Aboriginal people about the merits of shifting to a model more directly controlled by the Northern Territory Government under local government legislation. However, in hindsight, it is safe to say the flexibility afforded communities under Community Government Council arrangements, to develop culturally appropriate statutory governance structures, has not been seen in Australian law before or since.<sup>15</sup>

Organisations had to be built from the ground up. This inevitably meant major capacity challenges in communities whose governance foundations had been weakened by decades of external government and church control. Many Aboriginal organisations struggled to attract skilled staff, deliver services at mainstream standards and comply with government funding accountability requirements. Some organisations were overloaded with responsibilities beyond their still-emerging capabilities, a common issue described as 'premature load bearing' in developing world contexts.<sup>16</sup> The small scale of these organisations posed significant risks to sustainability. They were prone to capture by more powerful families or individuals, which led to criticisms of nepotism and a lack of impartiality in service delivery.

In the Northern Territory and other jurisdictions, there was insufficient patience or stable resourcing applied to building governance and management capacity in Aboriginal organisations. Rather, there was escalating public commentary about poor financial management and ongoing policy churn.

All new community organisations proceed through various stages of development to reach sustainability and full effectiveness. These challenges were an entirely predictable result of the emerging response to self-determination policies in Northern Territory communities.

The required timeline is perhaps illustrated by research in Queensland that found it took more than a decade of sustained effort for an Aboriginal council in a remote community to build sufficient local capability to demonstrate effective governance and comparable standards of service provision to mainstream localities.<sup>17</sup>

There were calls for Queensland's Aboriginal councils to be abolished in the 1990s, as they struggled with poor financial management and allegations of nepotism and substandard governance. The Queensland Government instead decided to reform them. These reforms reduced council responsibilities and workload, and enabled the formation of other complementary local

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forms of governance, including community justice groups.

In 1996, the Commonwealth Government announced a special audit of all organisations funded by ATSIC. Aboriginal organisations that had mostly been in existence only a matter of years and were barely emerging from their establishment phase were already being declared a failure, with many commentators urging the abandonment of self-determination policy in its entirety.<sup>18</sup> Despite the hard-won success of many Aboriginal organisations, by the early 2000s self-determination policy had given way to a new approach. The administrative reforms associated with new public management brought a shift to competitive tendering of service delivery and a focus on systematic measurement of outputs and where possible, outcomes.<sup>19</sup> Achieving mainstream standards of service delivery to normalise remote Aboriginal communities was placed ahead of self-determination and community capacity-building.

Normalisation signalled a shift of policy away from a focus on self-determination and towards a focus on the ways in which Aboriginal people's lives are seen to be deficient relative to the mainstream. The resulting 'gap' is measured in terms of variances from the lives and circumstances of mainstream Australia.

The aim of normalisation policies was to eliminate or reduce variances through the provision of services equivalent to those available to the mainstream community. This approach did not acknowledge or encompass the diversity of Aboriginal peoples, places and cultures, with some casting it as a more sophisticated version of assimilation.<sup>20</sup>

This policy shift in Aboriginal and Torres Strait Islander affairs was 'generational', rather than the policy change of a newly elected government.<sup>21</sup> It involved disavowing past policies and branding as 'failures' institutions such as ATSIC and other organisations established under the self-determination policy.

Nationally, combined government expenditure on programs and services to Aboriginal peoples amounts to more than double the rest of the population. In 2012–13 an estimated \$5.6 billion in government funding was allocated to Aboriginal-specific programs. If the total level of servicing is included, by adding per capita shares of mainstream services like health, education and policing, the total figure is just over \$30 billion.<sup>22</sup> An unknown proportion of this expenditure is absorbed internally by government administration.

The reason for the estimated direct expenditure per person being around twice the rate for non-Indigenous Australians, is partly due to the higher cost of providing services in remote locations and the compounding effects of multiple disadvantage.<sup>23</sup>

In 2010, the Department of Finance and Deregulation's *Strategic Review of Indigenous Expenditure* concluded '*this major investment, maintained over many years, has yielded dismally poor returns to date*'.<sup>24</sup> Familiarly, it blamed under-performing programs, poor coordination across governments and significantly, the lack of engagement with Aboriginal people in design and delivery. See Chapter 6 (Funding and Expenditure).

There was yet another re-organisation of administration and funding of Aboriginal affairs in 2013. Many portfolio responsibilities were centralised into the Department of the Prime Minister and Cabinet, over 150 administered items were combined into five program areas and funding was reduced.<sup>25</sup>

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After a year of uncertainty, tenders were let for service delivery, resulting in further resources allocated away from Aboriginal and Torres Strait Islander organisations to mainstream service providers. This is one of the main reasons for the continuation of the ‘high expenditure: low engagement: low results’ model in the Northern Territory.

There have been three major areas of policy development and service delivery that have significantly impacted on engagement with Aboriginal communities in the Northern Territory in the past decade:

### ***The Community Development Employment Projects Scheme (CDEP)***

CDEP has been described both as an exercise of self-determination and a welfare reform measure. Communities collectively made decisions to forego the right to any individual unemployment benefits and pool those payments to provide them with work on projects designed and implemented locally. There was no mandatory requirement or coercion of communities to participate in the CDEP.

Once adopted, the CDEP scheme provided these pooled funds – the equivalent of participants’ welfare entitlements – to community organisations. In return, participants needed to work an average 15 hours per week at award hourly rates, but could work extra hours for extra income. Being classified as ‘in employment’, CDEP workers were entitled to sick leave and annual leave and could accumulate long service leave.

Participants in the CDEP scheme delivered a wide range of meaningful local community services and infrastructure. However, the CDEP did not align with the Intervention and local government reforms. For example, CDEP participants were wage earners, not welfare recipients, and could not be subject to ‘income management’ under the Intervention. Subsequent reforms to the CDEP removed that barrier until it was abolished in mid-2013 – mid-2015.

By 1 July 2015, the Community Development Program (CDP) was established which was focused on ‘work for the dole’. The CDP introduced mandatory work-for-the-dole for all persons aged 18–49 years with full-time capacity, requiring participation of five hours per day, five days per week in work-like activities. Unlike CDEP, participants were not considered ‘in employment’ and, as such, not entitled to sick leave, annual leave or long service leave.

Since the CDP began, nearly 300,000 financial penalties have been applied to CDP participants, which is many times the reported 5,084 job outcomes.<sup>26</sup> It is reasonable to conclude the program is proving more effective in punishing non-compliance than generating employment or contributing to community development.<sup>27</sup>

## **Local government reforms**

By the turn of the millennium, localised development of community governance had generated around 50 remote-area local governments scattered across the Territory. These incorporated most of the remote population, but only about 10% of the land mass.

In 2005, the Commonwealth Minister for Indigenous Affairs described remote communities as ‘cultural museums’<sup>28</sup> and the viability of remote settlements was questioned.

In October 2006, the Northern Territory Government announced a new system of local government

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based on 'municipal councils' in the urban centres and regional 'super shires' across the remainder of the Northern Territory. The minimum size for sustainability was dictated to be 5,000 people. This meant there would be far fewer than the existing remote local governments scattered across the Territory. Unlike the previous generation of community government councils, the shires were not developed by remote-area Aboriginal people, even in some guided way. Instead, they were imposed from Darwin. Seven of the eight shires established offices outside their own boundaries in the urban centres of Darwin, Katherine or Alice Springs.

The shires were effectively urban organisations employing urban managerial staff, often with only service centres in remote areas. Remote-area Aboriginal people had limited capacity to be directly involved in decisions, provide information based on first-hand experience of local conditions and issues, or engage in community policy or initiatives. It was possible to have 'local boards' under the shire councils and in many instances these were established in the areas previously covered by community councils. But they were only advisory and seen as tokenistic by people who were used to the executive power of the community councils. The shires found them hard to administer and keep active.<sup>29</sup>

From 1 January 2014, the shires became 'regional councils' with 63 'local authorities' within them.<sup>30</sup> However, the regional councils decide what powers would be delegated to local authorities and then nominate their membership rather than letting communities elect them. These arrangements fell well short of those enjoyed by the prior community councils.

## The Intervention

Following the *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred": Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (Little Children are Sacred report),<sup>31</sup> the Commonwealth Government characterised the level of child abuse and neglect in the Northern Territory as a 'national emergency'.<sup>32</sup> The Intervention was announced soon after on 21 June 2007.

The Intervention's stated aims were to protect children, make communities safer and build a better future for people living in Aboriginal communities and town camps in the Northern Territory.<sup>33</sup> It comprised a range of simultaneous measures including alcohol restrictions, welfare reforms – including the controversial compulsory income management – school attendance, comprehensive child health checks, pornography restrictions, increased policing, housing and tenancy reform, and acquisition of township leases.<sup>34</sup>

The Intervention initially targeted 73 Aboriginal communities and later expanded to include smaller outstation, homeland, pastoral and town camp communities.<sup>35</sup> The timeframe for the Intervention measures was five years, 2007–2012, with the Government's expressed intention being to 'stabilise', 'normalise' and then 'exit' the target communities.<sup>36</sup> However, it was extended with some modifications until 2022 under the *Stronger Futures in the Northern Territory Act 2012* (Cth).

To implement certain elements of the Intervention, the Commonwealth Government suspended the operation of the *Racial Discrimination Act 1974* (Cth). Aboriginal people saw this as one of the most malevolent features of the Intervention and another example of how governments are able to treat Aboriginal people as though they are outsiders in their own country. Legislation meant to protect

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the most vulnerable people in Australia from the evils of racism was removed in 73 of the most vulnerable communities in this country.

Given its presentation as an emergency ‘intervention’, it is perhaps not surprising that the announced measures did not include a focus on community engagement.<sup>37</sup> Indeed, lack of consultation and a top-down approach to implementation were recurring critiques of the Intervention. These measures were also inconsistent with a recommendation of the Little Children are Sacred report against which the Intervention was initially justified:

*That Aboriginal child sexual abuse in the Northern Territory be designated as an issue of urgent national significance by both the Australian and Northern Territory Governments, and both governments immediately establish a collaborative partnership with a Memorandum of Understanding to specifically address the protection of Aboriginal children from sexual abuse. **It is critical that both governments commit to genuine consultation with Aboriginal peoples in designing initiatives for Aboriginal communities (our emphasis).***<sup>38</sup>

The 2011 evaluation of the Intervention found that while there was community support for additional services such as policing, school nutrition programs, night patrols and more teachers, community-specific measures such as compulsory income management caused ‘widespread disillusionment, resentment and anger in a significant segment of the Aboriginal community’.<sup>39</sup>

The NTER Review Board, appointed by the Commonwealth Government in 2007, noted many community members felt ‘intense hurt and anger’ as a result of the Government’s messaging. This messaging included signage restricting alcohol and pornography, the announcement that child health checks would be mandatory and would include examination for signs of sexual abuse – which was promptly withdrawn in response to objections about both legality and efficacy – and the Commonwealth’s compulsory five-year leases over townships.<sup>40</sup>

Many Aboriginal people, especially men, felt large signs regarding bans on alcohol and pornography were a government ‘shame job’.<sup>41</sup>

Compulsory income management was one of the most controversial elements of the Intervention. Under the Cape York Welfare Reform trial in Queensland, a Family Responsibilities Commission comprising community Elders decided which individuals would have their income managed. In contrast, the Intervention model involved a blanket imposition of income management on all individuals receiving specified welfare benefits in the targeted Aboriginal communities.

Under the scheme, a proportion of each individual’s Centrelink payments was ‘quarantined’ for expenditure on priority purposes such as food, rent and household goods. The intention was to restrict the scope for expenditure on things such as alcohol, cigarettes and gambling. A ‘basics card’ was introduced as a tool for implementing income management. A basics card can only be used in certain stores for priority purposes.

A 2014 evaluation of the new income management scheme found no evidence of income management having met the intended outcomes. Rather than promoting independence and building skills and capabilities, the scheme appears to have encouraged increasing dependence on the welfare system.<sup>42</sup>

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Not only has income management failed to bring about intended community-level changes, the process of its imposition had a deeply disempowering effect on Aboriginal communities. The 2011 NTER Evaluation concluded:

*The compulsory nature of income management and its blanket imposition—in combination with other changes, such as local government reform, shire amalgamation and loss of local councils; changes to the Community Development Employment Projects (CDEP) program; the loss of the permit system; and changes in land tenure – are likely to have contributed to people’s feeling of a loss of freedom, empowerment and community control. This may have resulted in a generalised lack of engagement in many of the Welfare reform and employment programs and initiatives introduced under the NTER and [Northern Territory National Partnership Agreement].<sup>43</sup>*

The Intervention occurred around the same time as the abolition of community councils to make way for the ‘super shires’. This further reinforced a sense of oppression and highlighted the complete exclusion of Aboriginal communities from any share of control over, or meaningful engagement in, the policies and services that shape community life.

*The Intervention exemplifies an attempt by government to tackle child abuse and neglect and improve community safety through a series of centrally determined top-down measures, with little involvement of the targeted communities or Aboriginal organisations in either program design or delivery.*

Far from increased effort to engage with Aboriginal peoples, basic consultation with Aboriginal communities and organisations about these changes was cursory at best.

## THE CASE FOR ENGAGEMENT

Policies and programs achieve better outcomes when those who are the intended beneficiaries are directly involved in their design, implementation and monitoring. There is much evidence that supports this understanding.

On the first day of the Commission’s public hearings, Senior Counsel Assisting tendered a list of 53 reports with some relevance to the subject matter covered in the Commission’s Terms of Reference. Forty-five of these reports were produced in the last 10 years. Two landmark reports – the *Royal Commission into Aboriginal Deaths in Custody: National Report* (RCIADIC) and *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Bringing them Home report), are now more than 20 years old.<sup>44</sup> The RCIADIC examined the cases of 99 Aboriginal people who died between 1 January 1980 and 31 May 1989, investigating the social, cultural and legal issues underlying their deaths and making 339 recommendations.<sup>45</sup> It is a telling mark on any notion of social and cultural progress that many of those underlying issues and recommendations remain relevant and unresolved today. A stark illustration of the persistence of the harmful social conditions imposed on children and young people in the Northern Territory is recommendation 62 of that report:

*... the problems affecting Aboriginal juveniles are so widespread and have such potentially disastrous repercussions for the future that there is an urgent need for governments and Aboriginal organisations to negotiate together to devise strategies*

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*designed to reduce the rate at which Aboriginal juveniles are involved in the welfare and criminal justice systems and, in particular, to reduce the rate at which Aboriginal juveniles are separated from their families and communities, whether by being declared to be in need of care, detained, imprisoned or otherwise.*<sup>46</sup>

The evidence gathered by the Commission suggests those 'disastrous repercussions' have now come to pass.

Successive governments have failed to adequately implement the recommendations made by the RCIADIC and other key reports and inquiries since, and consequently, children and young people in the Northern Territory are involved in the child protection and youth justice systems in much higher numbers than ever before.

The many reports and reviews produced since the RCIADIC have identified the same underlying drivers for the involvement of children and young people, particularly Aboriginal children and young people, in the child protection and youth justice systems. The majority of these reviews and reports have identified the pressing need for improved engagement with Aboriginal communities. The Secretariat of National Aboriginal and Islander Child Care (SNAICC) notes:

*Numerous reports and inquiries in Australia consistently confirm a lack of robust community governance and meaningful Aboriginal and Torres Strait Islander community participation as major contributors to past failures of Government policy and a call for the development of community-controlled children and family services.*<sup>47</sup>

Aboriginal peoples have repeatedly called for more direct engagement in decisions and activities that shape their lives and futures. And at least in policy statements, governments have long recognised that the 'partnerships' or engagement needed for more effective policy and programs go beyond consultation or advice and require that Aboriginal communities engage from a position of empowerment and self-determination.

While there will continue to be situations when advisory and consultative arrangements are appropriate, engagement implies that Aboriginal peoples should be substantive decision makers. This means that beyond just including Aboriginal peoples in matters that affect them, they must have agency in those forums and be capable of effecting change.<sup>48</sup>

Although much remains to be done in the endeavour to find and design ways of implementing effective mutual engagement, the evidence and the policy basis for the goal of doing so are clear, both internationally and in Australia.

## The human rights perspective

From a human rights perspective, the case for greater engagement of Aboriginal peoples in responding to the Northern Territory's child protection and youth justice challenges is unequivocal.

Such engagement is founded on the universal right to self-determination. Self-determination emerged as a key concept in international law in the era of human rights development and decolonisation following the Second World War. The *International Covenant on Civil and Political Rights* in 1966 originally defined the principle of self-determination as the right of a people to 'freely determine their political status and freely pursue their economic, social and cultural development'.<sup>49</sup> It has become

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central to Indigenous rights narratives in recent decades, culminating in its central place in the *United Nations Declaration of the Rights of Indigenous Peoples* (the Declaration).

The manifestation of the right to self-determination has been widely contested in Aboriginal and Torres Strait Islander policy in Australia since the 1970s. However, its central place in the aspirations of Aboriginal and Torres Strait Islander peoples has remained undiminished.

The recommendations of the landmark RCIADIC in 1991 reinforced the principle of self-determination as a necessary underpinning of service delivery for Aboriginal and Torres Strait Islander peoples:

*Principles of self-determination should be applied to the design and implementation of all policies and programs affecting Aboriginal people, that there should be maximum devolution of power to Aboriginal communities and organisations to determine their own priorities for funding allocations, and that such organisations should, as a matter of preference be the vehicles through which programs are delivered.*<sup>50</sup>

This recommendation was accepted by all Australian governments. The first guiding principle in the Council of Australian Governments' (COAG) 1992 *National Commitment to improved outcomes in the delivery of programs and services for Aboriginal Peoples and Torres Strait Islanders* (National Commitment) was 'empowerment, self-determination and self-management by Aboriginal peoples and Torres Strait Islanders'.<sup>51</sup>

The Little Children are Sacred report, which precipitated the Intervention, identified the extent to which previous approaches had 'disempowered, confused, overwhelmed and disillusioned' Aboriginal people.<sup>52</sup> At the core of the report's 97 recommendations was the critical need for greater participation of Aboriginal people in decisions that affect them.

## ***United Nations Declaration on the Rights of Indigenous Peoples***

Adopted by the United Nations General Assembly in 2007 and formally supported by Australia in 2009, the Declaration sets out a number of key principles:

- self-determination
- participation in decision-making
- non-discrimination and equality, and
- rights to culture and identity.<sup>53</sup>

Rather than creating new rights, the Declaration affirms the rights of Aboriginal people already captured under existing human rights obligations to which Australia is a signatory. Importantly, the Declaration identifies that these are the minimum standards necessary for the 'survival, dignity and well-being' of Aboriginal peoples.<sup>54</sup>

Importantly, whilst the Declaration clearly articulates the right of Aboriginal people to be included, it also identifies the duty of governments to consult and cooperate in good faith. Articles 18 and 19 of the Declaration set out the right of Aboriginal people to participate in decision-making and for their free, prior and informed consent to be obtained during these processes.<sup>55</sup>

The rights of Aboriginal people to participate are not limited to consultation phases, as suggested by

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Article 19, but extend to the full spectrum of decision-making, from design to delivery, implementation and evaluation.<sup>56</sup> As set out in the *Social Justice Report 2012*, in order for Aboriginal people to be able to exercise these rights effectively, governments and stakeholders must:

- respect and support Aboriginal representative and decision-making processes and structures
- provide Aboriginal people with complete access to all relevant information in a culturally appropriate manner, including in language
- engage with Aboriginal people and representative organisations in a cooperative and fair manner that is respectful of our needs and priorities
- provide Aboriginal people with adequate timeframes to make a decision, and
- allow Aboriginal people to say no.<sup>57</sup>

The full realisation of these measures would ensure that decisions are informed by Aboriginal aspirations and would position them as key decision-makers in matters that affect their lives, rather than passive recipients of government largesse. The application of these rights is fundamental to the development of effective Aboriginal governance mechanisms, by allowing communities to determine and operationalise their own priorities.<sup>58</sup>

## The public finance perspective

Public finances overwhelmingly dominate the economies of most remote Aboriginal communities, through government expenditure in the form of grants and welfare payments. These return a limited local circulation, mostly through the community store, which is generally externally managed and operated by a government-subsidised agency or a non-government organisation.

Local employment is largely limited to community administration and service delivery positions, with management and professional positions often filled by outsiders. Private sector employment and small enterprise is largely limited to the few settlements located near enclaves of mining investment. Other economic benefits from mining remain primarily shaped by political bargaining regarding the distribution of mining royalties. There is very little internal capital, remittances, personal savings or disposable income against which to leverage economic development in communities.

The relative importance of public finances in Aboriginal communities is greater than in other places in Australia. This applies to the Northern Territory and to outback Australia in general, but is most acutely true for remote communities.<sup>59</sup>

For all the frustrations and opportunities they bring, government policies and expenditure largely define the outside world and economy to remote communities. In this context, government policies, services and payments assume a disproportionate importance and in many ways define the potential for socioeconomic development.

The lack of private sector jobs in remote Australia means jobs funded through public finances such as ranger, early childhood programs and housing construction teams are critical. Engaging in governance, whether through volunteering, sitting fees or paid positions can also be an important pathway for livelihoods.

There is considerable potential for improved returns on investment if public finance managers adopt the central objective of engagement of Aboriginal people in decision-making and program

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implementation. For example, instead of narrowly focusing the performance of a public housing program on the number of houses built, success could be measured in apprenticeships achieved, housing-related enterprises established and casual labouring contracts completed.

At the community level, people can only have meaningful input in public finance decision-making to the extent decision-making powers are devolved. People engage when they have discretionary powers to make and influence decisions.

A comparison can be drawn between the community councils of the past and the local boards/authorities of the super shires. Following the move to super shires, a Central Land Council study demonstrated the disengagement effect by measuring an increased number of meetings cancelled due to the lack of a quorum.<sup>60</sup> People explained they now lacked authority over finances because decision-making powers had been removed to urban centres.

The following comments from community members on the Utju local board exemplify the feelings of exclusion from financial decisions following the changes:

*'It [council] was a body that would sort out all our problems. We use to know how money was spent. Now the money story is gone. We don't know what money is for here.'<sup>61</sup> Sometimes we whisper. All the information is coming from the outside. All the choice comes from outside. There is no community voice in the meeting.'<sup>62</sup>*

## The consumer and community participation perspective

Service providers and governments generally undertake activities that encourage consumer participation in health and other human services for several reasons, including democratic principles and the desire to improve access to, and quality of, care.

In the field of health care, systematic review provides evidence that traditional methods of involving people as consumers of health care and in planning and decision-making about health services contribute to changes in service delivery.

More recently, there is evidence 'patient activation' or engagement as managers of their own health care, as distinct from compliance with prescribed care, has benefits for both health outcomes and care experiences.<sup>63</sup>

Multiple studies have shown patients who become more activated are more likely to engage in preventive behaviour, such as having regular check-ups, screening and immunisation, eating a healthy diet and exercising. They are also more likely to have normal scores for body mass index, blood sugar, blood pressure and cholesterol.<sup>64</sup>

This evidence is consistent with the finding that greater control over the conditions of life is associated with better wellbeing in many dimensions, both for individuals and communities. For example, there is evidence that lack of control and disempowerment are important social determinants of health outcomes, as they are linked to stress and anxiety.<sup>65</sup>

A review conducted for the World Health Organization's Health Evidence Network found there are health benefits of empowerment, both through the process of engaging in empowerment initiatives

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and their impact in improving health and reducing disparities in health outcomes.<sup>66</sup>

*'Empowerment is recognized both as an outcome by itself, and as an intermediate step to long-term health status and disparity outcomes'.<sup>67</sup>*

Outcomes include psychological benefits such as reduction of stress and anxiety, benefits to households and families, and better services such as health, water systems and education, particularly for socially excluded populations.

## The hybrid economy perspective

A core element of the right of Aboriginal people to self-determination is the ability to determine freely the course of their economic development, including balancing engagement with the mainstream economy with traditional and cultural imperatives.

Government policies and programs have had considerable negative effects on Aboriginal peoples' capacity for self-determination in the economic domain. The hybrid economy perspective provides an insight into one of the ways Aboriginal community engagement can contribute to economic development.

Research conducted over several decades on the Northern Territory homeland movement documented how outstation groups made a livelihood from a combination of subsistence production for domestic use; that is, hunting, fishing and gathering, and manufacture of arts and crafts for market exchange, alongside gaining income support from social security payments.<sup>68</sup>

This remarkable economic transformation was based on people refiguring their previously high level of dependence to relative autonomy, based on utilising customary knowledge and specialisations to enhance their wellbeing. The term 'hybrid economy' has been used for this mixing of market and non-market, customary and western production.<sup>69</sup>

The concept embraces Aboriginal economic logics within a capitalist system and acknowledges the significant role Aboriginal values play in shaping conditional engagement with the market economy. There is a need for alternative development pathways, like ranger programs, environmental services and carbon sequestration, based on synergies between Aboriginal and non-Aboriginal economic sectors.

The hybrid economy approach did not preclude a growing engagement with market capitalism where desired and possible, but it was incompatible with the imposed policy logics of a free market. From the mid-2000s, government programming approaches to education, employment and enterprise imagined an upsurge in a remote market economy, when in fact the potential for economic development in remote communities is very limited.

New public management thinking opened up service delivery contracts to competitive tendering, leading to an influx of non-local and usually non-Aboriginal contractors and providers, at the expense of the resourcing of local Aboriginal organisations.<sup>70</sup>

The abolition of the CDEP cut off one of the main forms of support to market and non-market activities. In recent fieldwork in Maningrida, researchers found people are now more deeply impoverished, with a reduction in subsistence and customary harvesting and greater reliance on the

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state. In the *Social Justice and Native Title Report 2016*, the Australian Human Rights Commission noted the need for policy to support existing hybrid economies in remote Australia.<sup>71</sup>

This concept of hybrid economy highlights the importance of engagement and creativity in the development of local economies and the potential for centrally driven government policy to have unintended negative consequences on Aboriginal livelihoods.

## The international development perspective

There is considerable evidence from international development supporting the use of community-driven social funds to improve welfare and rebuild capability. This involves allocating untied funding to communities to resolve their own development plans/projects by drawing on these untied funds, bringing their own resources and accessing existing services and programs.<sup>72</sup>

A range of external support and accountability measures are instituted, but communities are authorised to make decisions over allocations. This approach has been shown to work in the most fractured communities, without any pre-existing governance structures and with depleted populations.<sup>73</sup>

This evidence suggests community control is a necessary but not sufficient condition for development. A challenge arises in this context from failure to account for contestation and bargaining that occurs between different stakeholders and groups within a community.

In international development and in health system reform, the application of political analysis enables a more realistic approach. These approaches assume development takes place in complex political and social settings in which individuals and groups with unequal bargaining power interact within changing rules as they pursue conflicting interests.<sup>74</sup>

The 2017 *World Development Report* focuses specifically on this emerging topic.<sup>75</sup> It proposes three simple principles to guide reform:

- form should follow function – consider the functions that institutions must perform, and then what form institutions should have
- power asymmetries (imbalances) – how to use capacity and where to invest in capacity depends on the relative bargaining powers of participants, and
- rules that guide social and political relationships need to be understood to enhance contestation, change incentives and reshape preferences and beliefs.<sup>76</sup>

The first step to establishing a productive relationship between the community and government is an early discussion to agree on these rules, including who else will be involved and in which negotiations they will take part.

In abiding by the rules, participants make decisions about intervening, investing, consuming, reporting, allocating budgets and so on. They can be formal laws and regulations, including funding allocation policies and the statutory provisions of the youth justice and child protection frameworks. They also include informal rules of transparency, trust and respect that operate in social capital and network governance.

Consultations conducted through the Commission reinforced the widespread commitment to tackling

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community justice issues and helping their children by families, governments, non-government organisations, Aboriginal leaders and children and young people themselves. It is crucial that expected outcomes are agreed on early in the process and that the intended benchmarks of the policy against which effectiveness is ultimately measured are agreed. For the purposes of the Commission, the proposed development outcomes can be expressed as child wellbeing and youth development.

The setting where decisions are implemented is the space in which the community, government and invited groups and participants interact and negotiate aspects of the public domain, their respective rights and responsibilities and their share of public finances. It is the setting in which 'shared network governance' manifests itself.

These settings can be found at the local, regional and state/territory levels. They can be:

- formal: parliaments, courts, intergovernmental organisations or Aboriginal organisations
- informal: community processes of consensus development, discussions after meetings among those representing separate parties, or backroom deals, and
- traditional: council of Elders.

Successful bargaining is determined by the relative power of the community, government and invited participants; by their ability to influence others, control resources, persuade with ideas, create incentives, threaten to withdraw or impose sanctions.

With the implementation of social policy, power is ideally expressed in ways that assist disadvantaged groups to achieve development outcomes. What occurs in practice is much more complex, and power is actually a fundamental enabler of, or barrier against, achieving effectiveness.

Power dynamics in the Northern Territory are clearly skewed to public finances and the statutory powers of the state. This power imbalance must be redressed for Aboriginal groups to enter the bargaining process and measures for the ongoing management of its effects need to be established.

Politics in the bargaining process are more complex than just community and government conflict. Other negative power imbalances will emerge, such as certain groups capturing resources, the exclusion of groups, or politicians and service providers privileging some clients over others. On the supply side, there are also imbalances between different levels of government, between different departments and when vested private capital interests such as mining companies become involved.

Community and government need to invite the right participants into the bargaining process. As has long been observed in other efforts at government coordination, it is important to have departmental officers at the table with the authority to act. Different groups, clans and families have different levels of authority to speak on different topics, and differing authority to represent the interests of others. Thus, who is invited or self-selects to participate from community is critically important. Similarly, Aboriginal organisations, non-government organisations and private sector providers specialise in different areas and represent the interests of different groups.

Power imbalances flow into the bargaining process where, desirably, they are levelled out and lead to improved commitment, coordination and cooperation. What emerges from the bargaining process can then lead to better outcomes and fairer rules.

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According to the World Development Report, when changes are made regarding who can contest decision-making processes, when incentives and accountability to pursue certain goals are aligned and when actors' preferences, ideas and beliefs shift, it is possible to reshape the bargaining process and achieve outcomes with an evolving set of rules. That is, sustainable change is possible.

This international development framework supports an approach that engages Aboriginal communities at every level of decision-making and the development and implementation of policy Territory-wide. It also supports genuine engagement by authorised government officers and key stakeholders in regional and local negotiations. It suggests the need for effective bargaining among these stakeholders to harness the desired changes in rules, incentives, ideas, beliefs and power dynamics for effective shared governance.

## SHARED NETWORK GOVERNANCE

A shared network governance approach is premised on the understanding that no single entity – be it the Northern Territory Government, the Commonwealth Government, Aboriginal community-controlled organisations, non-government organisations or other community representatives – can achieve the major reforms required in the Northern Territory. Such an approach must be a shared endeavour with a common vision and mutual responsibility, accountability and involvement.

The shared network governance proposal involves local and regional networks of community representatives, government agencies and service providers acting together in an agreed manner to improve the capacity of all members, with the ultimate aim of improving the care and wellbeing of children and young people in the Northern Territory.

The term 'shared network governance' is used to describe the forums and rules through which community representatives, service providers and other stakeholders, including government, engage together to improve the coordination and effectiveness of the service system.

The Commission proposes an overarching framework be negotiated between Aboriginal people and the Northern Territory and Commonwealth Governments which has the following key characteristics:

- a commitment to long-term engagement, with a shared vision over short, medium and long-term periods
- agreement on the use of a place-based approach to implementation that varies according to the needs of the local community
- acceptance of the inevitable variation in capability, priorities, strategies and service delivery approaches in different places
- an agreement by governments to delegate necessary decision-making authority to local and regional levels
- capacity to allocate resources to common purposes, and
- tailored accountability frameworks that acknowledge interim outcomes, such as increases in capability and governance, rather than simply focusing on service outputs.

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To instigate a process of shared network governance, an ‘action learning, practice-led’ approach should be adopted. Facilitating shared network governance is not about seeking to identify a single best practice model that can be universally applied and transplanting it uncritically into other places. It is about understanding the conditions of success in one place, then negotiating, applying and testing these conditions in another place as new solutions are worked out.

Subsequent chapters of the report contain recommendations to reform the child protection and youth justice systems in the Northern Territory. The specific responses required in these areas should be integrated with the shared network governance approach.

However, there are some key challenges that must be addressed to implement a shared network governance approach in the Northern Territory.

## Public administration practice

Implementing shared network governance requires reform to public administrative practices.

The current approach of contracting multiple service providers to deliver multiple discrete programs in large and small communities has led inevitably to fragmentation of the service system. The effort to specify what is required and then contract providers to deliver it in measurable units at a given price is appropriate for some kinds of services. For example, the laboratory processing of blood tests is a highly specific service and its conduct is standardised, replicable and itemised.

However, these conditions do not apply to complex human services. For example, keeping women and children safe from family violence while intervening with perpetrators to change their behaviour is a complex undertaking that needs to be tailored to local circumstances and individual needs.

Research has shown that providers of complex human services get poorer results when they focus on itemised outputs and neglect their obligation to work towards broader service goals and community outcomes.<sup>77</sup>

Internationally, the disappointing results of applying standard transactional contracting approaches to components of complex human services<sup>78</sup> have led to a re-examination of practice and the development of new ways of thinking.

The first is reform in the contracting relationship between funder and provider towards longer timeframes and more cooperation, often called ‘relational contracting’. The second is the question of how complex human services can best be governed and managed after the contracts are signed, because successful delivery of services almost always requires collaboration among several providers.

When these insights are applied to the situation of children’s wellbeing in Aboriginal communities in the Northern Territory, it is clear that a shared network governance approach is a suitable way to build community engagement in supporting families and protecting children. One of the essential elements of Aboriginal community engagement in the protection and wellbeing of children is inclusion of community representatives in governance of the local/regional service system. Governance of the network will include community representation, contracted service providers and statutory agencies such as police and Territory Families.

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Properly implemented, a shared network governance approach will enable community priorities, protocols, strengths and needs to guide decision-making about the services needed, how they should be provided and, in some cases, by whom.

It will enable service providers to have confidence their work will strengthen communities and families as the primary providers of nurture, safety, identity and culture for children and young people. It will support the development of effective Aboriginal organisations in local and regional service delivery.

Some of the required reforms to public administration practice and relationships between communities and governments include:

- first, governments need to delegate additional decision-making authority to regional and local level decision-makers to counterbalance the powerful pull of the centre, whether in Darwin or Canberra
- second, those regional/local decision-makers need to have the capacity to share designated resources for common goals horizontally across departmental boundaries and within the community
- third, communities need to consider their priorities, the methods of engagement they prefer or will find acceptable, and how they will be represented
- fourth, local/regional Aboriginal organisations need to be supported and assessed on a level playing field that recognises and measures their unique contributions, including capacity development outcomes
- fifth, service delivery contracts and agreements need to incorporate requirements for agencies to negotiate shared network governance with community representatives and each other, and
- sixth, the service governance task needs to be resourced with both time and money. New models for network governance, such as 'collective impact', emphasise the need to resource and authorise a separate backbone support organisation to manage governance, coordination and data collection functions across service providers.<sup>79</sup> The experience of Primary Care Partnerships in Victoria highlights the value of this approach.<sup>80</sup>

While shared network governance has several challenges, it has many significant advantages. Joint community, government and service provider engagement in service system governance creates a forum for direct mutual accountability for priority-setting, relevant funding decisions and a focus on performance in the interests of children and families.

It is non-negotiable that the community voice is in the room where decisions that matter for the service system are made. All share responsibility for the quality of decision-making and communication.

There will need to be recognition that child protection and youth justice are complex problems. They cannot be solved in advance. These problems can only be solved by participants and practitioners continuing to work on them and making incremental adjustments based on learnings that emerge.

Participants should be authorised to take a wide brief in developing interventions and an adaptive

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approach. Intended outcomes will always be the wellbeing of children and young people but participants must be authorised to be innovative in achieving these outcomes.

## Place-based practice-informed approach

The complexity and uncertainties of youth justice and child protection work require innovation, informed over time by experiences of success and failure. Using funding guidelines to 'rollout' or repackage solutions, seeking to transplant their form from one place to another, is not likely to lead to success.

Instead, a new approach is required, in which forms, structures and processes that are fit for functions in particular contexts and places are negotiated and implemented. Suitable structures with defined roles are needed at local, regional and jurisdictional levels.

Every place has different histories and languages, different local responses and different social, political and cultural dynamics. Each has strengths and capacities along with problems and deficits. This diversity is not amenable to the 'rollout' of uniform policies or structures. Rather, a place-based and practice-led approach can adapt to diversity, adjust to variability between places and negotiate between competing stakeholder interests.

However, place-based approaches will require significant changes in how funding arrangements are managed, and how durable agreements are reached. To negotiate new ways of working, stakeholders need to come together to address the considerable power imbalance arising from the dominance of public finances in Aboriginal affairs. This is most acutely the case in remote Aboriginal communities. The examples discussed at the end of the chapter demonstrate a number of different ways power imbalances can be levelled.

Aboriginal leadership and organisations have a critical role to play in redressing these imbalances. Appropriate Aboriginal leadership and organisations exist at all levels of the governance system; local, regional, Territory and national. They are the institutions and leadership that endure between successive policy rounds. They are the representative structures of Aboriginal self-governance to which powers, functions and resources can be devolved. They provide political counterpoints to government, towards a better-balanced system, and should include local government.

Place-based approaches to youth justice and child protection will work best when managed at the lowest level possible. Functions should be devolved to different levels of the system based on effectiveness and efficiency, and as negotiated. This applies to all levels of governance in Aboriginal affairs, including the Commonwealth, Northern Territory, local government, statutory authorities, non-government organisations, private companies and importantly, the Aboriginal affairs sector.

Within the Aboriginal affairs sector, local, regional and peak organisations need to function together in a broader system of network governance. The exact details of what is done locally, regionally and Territory-wide should not be assumed, but can be negotiated.

In the implementation of reforms, it will be important to accept the politics and competition that exists between different levels of governments and Aboriginal organisations, just as this is accepted between different levels of government and civil society in the mainstream. It will also be important to accept the politics and competition within Aboriginal communities and organisations as the norm, just

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as these realities are accepted in mainstream communities and organisations, rather than applying unexamined presumptions of social cohesiveness.

Agreements should be made which '*adequately mandate institutions to mediate contests and to reach durable agreements*'.<sup>81</sup> These agreements should provide a platform of mutual accountability for youth justice and child protection outcomes and for common principles of working together. The effectiveness of the agreement-making process is at least as important as the emerging forms of agreements.

Reform will also be required in the funding decisions that start with the 'program' and roll it out across jurisdictions. As noted above, significant proportions of available funding for the service system will need to be allocated to places, rather than programs. Careful methods of doing so, for both equity and accountability, will be required. There will be implications for the way government agencies are funded for particular functions or initiatives. These proposed reforms present challenges for public administrators but these challenges are not insurmountable.

Redistribution of current program allocations in accordance with negotiated agreements at local, regional or territory level will be essential to provide resources to address local needs and priorities in a coordinated way. Where there is enough coherence across the local plans/projects in a region and from regional plans/projects to Territory-wide, this might lead to the development of a new program/service. Conversely, where there is no interest in an existing service/program, it can cease operating and funding may be reallocated to locally determined priorities.

It is not possible to design a universal structure that will be effective across such a diverse range of complex places, where the generation of new solutions to tackle child protection and youth justice problems will arise. However, it is possible and essential for local stakeholders to set the informal and formal rules for this negotiation as part of the implementation process.

Some of these rules will be 'top down', for example, statutory child protection and public finance rules. Some will be 'bottom up', for example, meetings chaired by local leaders and the right people being present. Others will be 'horizontal', for example, data sharing and case management. These rules will not prevent problems or conflicts but can enable durable and contestable arrangements to emerge.

Under such rules, all stakeholders with power and/or interest should be represented at the table. At the local level, this would include different community groups, women and men, community managers and service providers, the local police, the nurse, the principal, the child protection worker and other stakeholders. Commonsense meeting protocols for respectful communication can be agreed, such as giving everyone an opportunity to speak and understand, with interpreters as needed, asking people to leave their pre-occupations at the door and ensuring that everyone leaves the discussions with their dignity intact.

Governments need to authorise fully these forums to make decisions. Power must be balanced through agreed procedures and roles. These include levelling arrangements, such as ensuring a forum is conducted in the community or region and chaired by community leaders. The procedures and roles should also include recognition and respect of the representative authority Aboriginal leaders and organisations bring to the table.

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## Funding Aboriginal organisations

Achieving consensus in Aboriginal communities requires Aboriginal leaders to work across a range of competing views, factions and groups, who are often spread across considerable physical distances. While most volunteer their time, they require effective, adequately resourced organisations to be effective in their roles.

Aboriginal leaders and organisations increasingly rely on own-source income, including native title benefits, royalties, compensation and leasing payments. There are also profits from enterprises, especially in the civil works or mining sector.

Critically important is core funding to Aboriginal organisations to allow them to fulfil their representative and governance functions and to build their core capability over reasonable growth trajectories.

However, these roles are not generally recognised in the dominant model for funding services. In this market model, government is positioned as the purchaser of a defined range of service outputs. Tenders by service providers are assessed on their ability to deliver these outputs in a timely way, to a defined quality level and at the most competitive price per unit.

A market model assumes governments know what will work for communities. However, governments acknowledge that in the case of Aboriginal communities, their organisations are better accepted by community members and bring particular knowledge and capabilities to service delivery.<sup>82</sup>

A clear shortcoming of this funding and accountability regime is that it overlooks the inherent value of engaging an Aboriginal community-controlled service provider, either in terms of their greater capacity for meaningful engagement with community members, or the ancillary benefits of increased local Aboriginal employment, strengthened community governance and growing leadership capacity. As the Desert Knowledge Cooperative Research Centre noted:

*Services would benefit from local organisations that are trusted, legitimised, respected and supported by government. The strategic importance of the sector as a whole is unrecognised in the government policy process, and the individual services that comprise the sector are undervalued. It is a complex sector, and with more support could make a wider contribution to the public good.*<sup>83</sup>

Reformed funding modalities should fund, as outputs themselves, Aboriginal organisational capacity building, as well as the enactment of accountability to their constituency. The provision of core funding to Aboriginal community-controlled health organisations, contrary to the market model, is an example of how this might be achieved.

Such reform would ensure a portion of funds are directed towards outputs such as staff development, governance consolidation and systems improvement. The need for this kind of investment is widely acknowledged. It is reflected in the well-known 'balanced scorecard' model, where improvements in internal processes and the learning and growth of the organisation are given equal weight to traditional metrics regarding financial and service delivery performance.<sup>84</sup>

Democratic accountability to constituents, 'downward accountability' and other measures of good governance, also need to be recognised as much as 'upward accountability' to funding providers.<sup>85</sup> To fulfil their representative function, Aboriginal organisations expend considerable resources

pursuing a range of daily informal and formal activities to meet the needs of their constituents and clients, but current reporting arrangements do not generally collect information on this activity.

Conversely, under the current reporting arrangements, it is possible for some Aboriginal organisations to be judged effective in terms of upward accountability requirements, despite their clients and constituents being deeply dissatisfied with their performance. Local policies and activities are needed to operationalise downward accountability, including community reporting, newsletters, public meetings, local radio, grievance mechanisms and open door policies. The cost of such activities needs to be recognised, through some form of core funding and/or built into funded outputs of service provision contracts.

While a balanced scorecard model might reduce funds available for direct service delivery, the value generated by building the capacity of community-controlled Aboriginal organisations will likely more than offset the cost. In fact, over time, a local organisation with growing capability could be expected to exceed the service quality levels achievable by a non-local organisation with tenuous roots in the community.

A growing local organisation may also be able to scale up to deliver multiple services, thereby addressing the current problem of multiple external service providers delivering uncoordinated services with varying degrees of effectiveness.

*A report of the Australian National Audit Office finds that building the role and capacity of Aboriginal and Torres Strait Islander organisations is not only important for effective service delivery, but is an important policy objective in its own right in so far as it promotes local governance, leadership and economic participation, and building social capital for Aboriginal and Torres Strait Islander peoples.<sup>86</sup>*

Where no Aboriginal community-controlled organisation currently exists to take on a service contract, interventions can be framed to grow or create that capability. The inclusion of a funded output related to Aboriginal community capacity-building ensures a non-local organisation is resourced to undertake a skills transfer in the manner envisaged by the Aboriginal Peak Organisations Northern Territory's (APO NT) Partnership Principles.<sup>87</sup>

Currently, government service agreements for non-Aboriginal service providers typically require some form of community engagement or capacity-building, such as establishing a local reference group of Elders. However these activities are often tokenistic as they are identified as a process of engagement rather than as an end point to achieving self-determination.<sup>88</sup>



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Expectations of performance need to be tailored to the current or developing capability of all parties. Aboriginal organisations, like their mainstream counterparts, can fail due to overload of functions or premature load bearing.<sup>89</sup>

All developing organisations have a growth trajectory, with ups and downs, and expectations of output need to be tailored accordingly. This growth trajectory is strongly tied to the functions of an organisation and incremental achievements. Similarly, many external providers need time to develop their capacity to provide culturally safe services and to work effectively with Aboriginal communities.

*A Cost Benefit Analysis of the Murri School Healing Program* conducted by Deloitte Access Economics was commissioned by the Healing Foundation. The Analysis found that as a result of the healing program, there was improved mental health, less contact with child protection and less contact with the justice system.

The total economic benefit attributed to the Murri School is \$6.5 million which is approximately \$28,248 per student compared to the average Aboriginal student in a state school. The largest benefit is the savings from decreasing usage of child protection services, \$17,105, followed by the improvements in mental health, \$4,425.

The benefit cost ratio (BCR) for the healing program at the Murri School was calculated by dividing the benefits per student, \$28,248, by the costs, \$3,190. This results in a BCR of 8.8. This indicates that, on average, for every additional dollar invested in the healing program at the Murri School there is an \$8.85 return in benefits.<sup>90</sup>

## Skills and expertise

Working relationships between Aboriginal communities, organisations, and the outsiders who provide services and programs, are central to Aboriginal affairs across the Northern Territory and these relationships are critical for successful outcomes, and overcoming power imbalances and intercultural complexities.

Trust and respect are central to these relationships, which take time to build. It requires skills in local engagement and capacity development, and the provision of high-quality facilitation, communication, negotiation and technical assistance.

Advanced skills are also needed in harnessing community strengths, unpacking problems, mediating conflict, understanding political developments and applying monitoring and evaluation frameworks.

This approach is more in the realm of development and institutional brokering than service delivery. Rather than simply delivering a program or a service, providers need to first arrive in a place and work out how to proceed. They need to build the relationships central to effective development practice and get a good grounding in local knowledge of culture, histories and governance.

Staff members need to be knowledgeable and skilled in negotiating the 'system' of Aboriginal affairs between complex arrays of stakeholders, where transactions are highly relational. Negotiation is needed between communities and their many competing groups, with government and its many

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departments and conditions and in brokering new collaborations between different sectors and multiple stakeholders.

Much effort is targeted at the capability-building and leadership development of local Aboriginal people and organisations but neglects the competence of visiting outsiders. New recruits often arrive in a community with very limited prior experience. They proceed to work it out through trial and error, as did those who preceded them. They can be strongly confronted by the living conditions they observe and suffer from culture shock and stress. Their practice can be characterised as being ad hoc, reactive and 'stressed out'. Few go the distance, and Aboriginal leaders and communities struggle to cope with the revolving doors of new recruits.

In addition to knowledge and skills, the willingness of outsiders to engage meaningfully with communities and the assumptions they bring to their roles are critical to their capabilities. The Commission learnt of people working in child protection who had little prior knowledge and skills, but earned the trust and respect of children and their families by sheer strength of their attitude and perseverance.

Conversely, there were many examples of experienced workers with the knowledge and skills to be effective, but whose negative approaches prevented any clear progress. The ability to remain open-minded, curious, respectful and patient, often doggedly over long periods, is critical. Accessing these traits and approaches is partly a question of finding the right people. Recruitment methods as well as good management and job design are important.

New problems have emerged with recruitment and retention. The Intervention and super shire councils brought unprecedented remuneration packages for government staff working in remote communities. Where potential employees of Aboriginal and other organisations previously sought an interesting life experience and to make a personal contribution, monetary compensation is now often the primary consideration. Staff turnover has increased, while the time needed to learn the ropes and form trusted relationships remains constant.

As evidenced in the work of the Commission and the reviews that preceded it, tackling child protection and youth justice and coordinating the Aboriginal affairs labyrinth is extraordinarily complicated. Strengthening the knowledge, skills and attitudes of a specialised and highly capable workforce is vitally important. Available training tends to focus on cultural competence, which is necessary, but insufficiently effective in the intercultural spaces of Aboriginal affairs.

The intercultural space arises from the interplay of two systems that are inseparably intertwined. One half of the system is rooted in Aboriginal culture, history and context. The other half is rooted in the conditionality and accountability requirements of public finance transfers of \$30 billion nationally. The administrative space in between is remarkably fractured and complex.

While more than half of Australian universities offer post-graduate qualifications for international development practice overseas, very few offer the equivalent for people seeking to do development work in Aboriginal affairs in Australia. Yet the institutional landscape is generally more complex and outcomes are as elusive as in the most fragile of conflict-ridden contexts overseas.

The human resource gap in the professional workforce in the Northern Territory is inhibiting progress in the child protection and youth justice systems.

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In addition to training, a range of human resource measures are needed, such as employee support, mentoring, information exchange, good practice websites and accreditation. Incentives that reward development workers, along with a supportive working environment, are required to boost retention. Incentives are also needed for Aboriginal people to take up professional careers in Aboriginal affairs, including those who are urban-based.

## Effective engagement in practice

Examples of initiatives that demonstrate the value of community engagement and leadership are provided at the end of this chapter. These initiatives demonstrate the value in communities and the mainstream system sharing power and governance of forums and activities in which participants have defined roles and responsibilities. They are diverse, but share some important characteristics. They are located in most Australian jurisdictions and while many are rural and remote, urban locations are also represented. Some are supported by national or jurisdictional policy and funding programs, some are regional and others local.

However, all promising examples are grounded in the circumstances of a community and a place. Significantly, none of the initiatives discussed at the end of this chapter are purely community-only or the sole product of government intervention, program or service delivery. They are something in between that is inherently interactive and interpersonal. They are local and often idiosyncratic and understanding how they came into existence is important, not the form they take.

Power imbalances inherent to public finance arrangements need to be levelled. Old binaries of 'top down' or 'bottom up' are not sufficient descriptors. What needs to happen is more intertwined; an opening from above needs to interact with engagement from below. There needs to be a focus on the relationships within communities, as well as between the communities and formal systems and government.

Shared network governance can enable service providers and community members to establish a space where cultural knowledge and values, local insights and pooled resources can shape formal child protection, youth justice and other systems in the interests of children and families.

Community members gain greater insight into the working of formal systems. In turn, government, public servants and external service providers learn the value of sustained engagement, developing trusting relationships, and of developing a deeper understanding of context and how to act effectively as brokers to the rest of the service system.

There are no panaceas and some initiatives have limited impact. In a number of youth justice initiatives, community intervention occurs late in the child or young person's journey through the system. This approach is unable to address root causes, though it is informed by awareness and analysis of the contributing factors. The damage caused by withdrawal of support for these activities and by failure to clearly define roles and responsibilities is significant.

## CONCLUSION

Aboriginal affairs in the Northern Territory are conducted in a highly unstable environment; constantly undergoing policy reform, legislative change, realignment of departmental portfolios and new solutions to tackle new conceptualisations of the 'problem'.

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This lack of stability is itself problematic for Aboriginal communities and service providers, who must understand and adapt to policy changes and develop the local meanings, relationships and employee arrangements critical to capability-building.

It is clear that centralised top-down policy and program development does not work in the relationship between Aboriginal communities and governments. The difficulties of implementation, in particular of reforms that require changes in the usual business processes of government, such as the use of a place-based approach or the use of funds across programs or portfolios are also clear. As previously noted in the *Social Justice Report 2012*:

*The focus on 'upwards accountability' rather than accountability to community is all too common in Aboriginal and Torres Strait Islander affairs. In these types of major changes government is excluding the very people whose lives are affected by them who basically become bystanders while these reforms occur. Aboriginal and Torres Strait Islander peoples have a right to participate in decision-making which affects us. In the last five years there have been many examples of major policy change in the Northern Territory which have not respected this right.<sup>91</sup>*

There are strong policy and evidence reasons for the engagement of Aboriginal people in the governance of communities and local services, including engagement in the policy, design, conduct and evaluation of efforts to protect children and young people. These reasons are based on human rights - the rights of Aboriginal peoples and of children; on the value of community innovation and creativity in the development of remote Aboriginal economies; on the need for improvement in the effectiveness of public finance methods; on the evidence supporting community and consumer participation in health and health care; and on new thinking in international development research. Lastly, and most importantly, because meaningful engagement with communities is what will deliver better outcomes, support and opportunities for children and young people in the Northern Territory.

How can a new approach be effectively implemented? To achieve the desired child protection and youth justice outcomes, all levels of government – working with communities – must address what is clearly a problem of implementation. Capability deficits exist at multiple points across the system, including government.

Communities, governments and service providers must engage in new ways of working together that lead to overarching reform of the youth justice and child protection systems. There is no magic bullet that can fix the problems of ensuring the safety and wellbeing of children in the Northern Territory. Success will only occur through shared endeavour, shared accountability for outcomes and shared commitment to implementing change.

Implementation of such an approach will need to be consistent with a clear set of principles. For communities and governments to address the protection of children and young people, they need to be authorised to change governance systems, including the ways priorities are set, the rules for decision-making and the criteria by which results are judged. Power imbalances inherent to the dominance of public finances need to be levelled out, and agreement will need to be negotiated locally and/or regionally. Statutory agencies and external service providers will need to be included at the appropriate time.

The recommendations throughout the report are designed to support a process of implementation in which the shared network governance approach is put into practice.

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Four important conditions will need to be met. First, commitment to stay the course of reform will need to be strong. Paradoxically, implementation will and should require patience as well as urgency. Second, variation in the way reforms are implemented and the shape they take will need to be seen as normal, rather than problematic. If the approach is really place-based rather than centrally driven, variation in priorities, strategies and service delivery approaches is inevitable.

Third, the politics and competition inherent to Aboriginal affairs at all levels, must be embraced productively. Individuals and institutions must be mandated to mediate contest, level power imbalances and reach durable agreements. Fourth, there will need to be a commitment to learning from experience. Traditional indicators of trends across regions and communities will always be useful and need to be considered as part of strategic decision-making.

### **Recommendation 7.1**

**The Northern Territory Government and the Commonwealth Government commit to a 'place-based' approach for the implementation of the recommendations of this report in partnership with local communities. The partnership should be built on the principles of mutual respect, shared commitment, shared responsibility and good faith. The location of the 'place' could be a single community, a group of communities or a region.**

### **Recommendation 7.2**

**The purpose of the partnership should be to reach agreement on the strategies, policies and programs needed to provide sustained positive outcomes for children and young people at each 'place'.**

### **Recommendation 7.3**

**The Northern Territory and Commonwealth Government immediately engage with Aboriginal community representatives to negotiate the broad terms for the partnership and its implementation across the Northern Territory built on the following principles:**

- the best interest of the child
- local solutions for local problems
- local decision-making
- the centrality of family and community to the wellbeing of children and young people
- the Northern Territory Government has the ultimate responsibility to ensure the safety and security of all Northern Territory children and young people, and
- shared responsibility and accountability.

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## PROMISING PRACTICE OF COMMUNITY ENGAGEMENT

This chapter made the case for shared network governance in the Northern Territory to empower Aboriginal people and organisations to negotiate, co-design and deliver services to protect children and young people.

The way forward will be incorporating community participation and control at the individual, family and organisational level, in a local or regional network with government agencies and service providers to harness community leadership, engagement and the service delivery capabilities.

The following are some examples of promising practice, both in the Northern Territory and other jurisdictions. Shared network governance will build on these community-driven practices.

### Youth justice and child protection initiatives

#### *Tiwi Islands youth justice conferencing*

Youth justice conferencing has been adopted in various forms in Australian jurisdictions as a way of harnessing family and community involvement in responding to young offenders through a restorative justice process. Youth justice conferencing has been seen as an opportunity to involve Aboriginal and Torres Strait Islander Elders and community members in a cultural response to offending by young people.

In the Northern Territory, the Tiwi Islands Youth Diversion and Development Unit provides culturally appropriate formal and informal diversionary programs for Tiwi young people, focusing on developing participants' attachment to family, community and school.<sup>92</sup> The Tiwi Islands Youth Diversion case management team work with at-risk youth in a traditional manner through Tiwi Skin groups.<sup>93</sup> The program is supported by the Northern Territory Police.<sup>94</sup> It has been operating for over 10 years.<sup>95</sup> Participants are usually first-time offenders who are given the opportunity to participate in a youth justice conference and supported by a range of cultural interventions to address risk factors for offending.<sup>96</sup> The program has resulted in low rates of recidivism.<sup>97</sup> The Northern Territory Legal Aid Commission referred to the program as a 'best practice example' of youth diversion.<sup>98</sup>

A 2014 evaluation of the Tiwi Islands Youth Diversion and Development Unit by the Australian Institute of Criminology found that *'the program was useful in reconnecting young people to cultural norms and ... directly addressed the factors that contribute to offending behaviour, such as substance misuse, boredom and disengagement from work or education'*.<sup>99</sup> The evaluation also found that only 20% of participants had contact with police in the 12 months after commencing the program, which compares favourably with typical reoffending results.<sup>100</sup>

#### *Clean Slate Without Prejudice*

The Clean Slate Without Prejudice (CSWP) project grew out of a desire to address violent crime amongst younger members of the community by fostering better relationships between the Aboriginal and Torres Strait Islander community and the police in Redfern, New South Wales. The centrepiece of this program operates three times a week from the National Centre of Indigenous Excellence, where young people come together with respected members of the local Aboriginal and

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Torres Strait Islander community and the police to do boxing training.

The CSWP program is available to Aboriginal and Torres Strait Islander people who have been granted bail or who are subject to good behaviour bonds. After initial success in 2009, where only one out of 10 participants reoffended,<sup>101</sup> the CSWP program has since expanded and now engages a mixture of young and old, Aboriginal and Torres Strait Islander and non-Indigenous police and community members.

Beyond the physical discipline of the boxing training, program participants agree to a number of behaviour undertakings such as seeking assistance from and working as mentors, and participating in community forums around justice issues. In return, participants have the opportunity to participate in maritime and mentor training which can lead to employment and educational opportunities.

Between 2008 and 2009, there was an 80% decrease in the number of robberies committed by Aboriginal and Torres Strait Islander young people in Redfern.<sup>102</sup> There are better relationships between the Aboriginal and Torres Strait Islander community, young people and police, and better social outcomes including school, employment and wellbeing outcomes.<sup>103</sup>

The involvement of key leaders from both the Aboriginal and Torres Strait Islander community and the police was pivotal in the positive effect the CSWP program has on relationships in the community. This has been important for the broader engagement of police and members of the Aboriginal and Torres Strait Islander community and for acknowledgment of their shared roles in community safety, employment and crime reduction. Speaking about the impact of the program, Aboriginal community leader, Mr Shane Phillips said:

*'The culture of both sides not talking to each other has changed because of the really simple things. The simple thing of having a routine together where we all get up at 5:30am to come here and sweat – everyone is equal and everyone drops their guard.'*<sup>104</sup>

## **Family Group Conferencing**

Family Group Conferencing (FGC) has been used in most Australian child welfare contexts since the early 1990s.<sup>105</sup> FGC encourages partnerships between families and statutory agencies to respond to child welfare concerns in a forum where families are active participants in the decision-making process.<sup>106</sup> Conferences can be used to address welfare concerns once a child has been deemed to be in need of care and protection, in the case planning process and to facilitate court orders around placement.

FGC is an important means of introducing community and family-based approaches to respond to child welfare concerns and to develop a plan of action with authorities. Positive outcomes of FGC include increased uptake of support services, greater satisfaction by families involved in the decision-making process and an increase in the number of alternative family placements identified.<sup>107</sup> However, in Australia these approaches have too often been inconsistently applied, under-funded, under-utilised, not implemented as agreed or used too late in the decision-making process, limiting potential impact on demands on the child protection system.<sup>108</sup>

A trial of FGC was conducted in Alice Springs and received 28 referrals between October 2011 and

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April 2012. This pilot demonstrated the potentially transformative nature of the forum to participant families.<sup>109</sup>

*'It is good for the case workers to come to these meetings to learn more about Aboriginal way so we are putting our two cultures together.'*

*'Before this meeting I never knew I could take my child home. I thought they were with welfare for good.'*

*'This meeting is good. Before I did not know these kids was in so much trouble. Now we are talking.'*<sup>110</sup>

The Commission understands that the FGC process helped to secure reunification plans for a number of families engaged in the process.<sup>111</sup> However, there has not been a sustained commitment to the expansion of this model in the Northern Territory, despite recommendations regarding the need for such a process in *Growing them strong, together – Promoting the Safety and Wellbeing of the Northern Territory's Children – Report of the Board of Inquiry into the Child Protection System in the Northern Territory* in 2010.<sup>112</sup> With adequate funding, the model could be used in the Northern Territory and such interventions could occur much earlier in the decision-making process.

## **Aboriginal Family-Led Decision-Making**

In Victoria, FGC has been developed into the Aboriginal Family-Led Decision-Making (AFLDM) model.

An evaluation of the pilot undertaken by the Rumbalara Aboriginal Co-operative in 2001 demonstrated positive outcomes for those Aboriginal children and families who participated. It found that of the 12 families who participated in 2003, no one had *'progressed further into the child protection system'*.<sup>113</sup> On the basis of the success of this pilot, funding was secured to extend it across the state and it was later expanded into the Family-Led Decision-Making Model (FLDM) which is offered to both Aboriginal and non-Aboriginal families.<sup>114</sup>

The Secretariat for National Aboriginal and Islander Child Care (SNAICC) advised the Commission that Victoria is the only state in the country to *'implement a statewide, culturally specific model of AFLDM in partnership with Aboriginal agencies'*.<sup>115</sup> The AFLDM is identified as the preferred method of decision-making for Aboriginal children<sup>116</sup> and there are now a number of AFLDM initiatives run by Aboriginal community-controlled organisations in Victoria where concerns about a child have been substantiated or a child is the subject of a court protection order.

The Wathaurong Aboriginal Co-operative in Victoria describes AFLDM as offering a new way of working with child protection services and families based on traditional values and decision-making models.<sup>117</sup> In these processes, the responsibility for children is shared by parents and the general community and underpinned by the cultural guidance and expertise of community Elders, who also participate in the program. Aboriginal communities participate in a forum to address concerns identified by child protection agencies and are guided by convenors who facilitate and support attendance at the forums.<sup>118</sup>

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## Care circles and circle sentencing

Care circles are used in New South Wales to offer an alternative pathway to enhanced community input, control and ownership in determining the best interests of Aboriginal children.<sup>119</sup> The circles are a means by which ‘Aboriginal culture and identity may be taken into account’<sup>120</sup> in the child protection system.

Unlike formal adversarial processes of the courtroom, care circles are conducted in the community and attended by the parties and their legal representatives, respected Aboriginal community members and the magistrate. Care circles have synergies with circle sentencing processes used in criminal justice matters that bring together a number of parties from the legal and Aboriginal community as a result of a person’s offending behaviour. These processes also occur in an informal setting but, like care circles, only take place if the matters are deemed appropriate and in instances where a defendant pleads guilty or a finding that a child is in need of care and protection has been made.<sup>121</sup>

Care circles and circle sentencing offer avenues of enhancing the participation of Aboriginal families in decision-making processes. These methods assist to inform decisions around placement, restoration, support options and visitation.

## Suspected Child Abuse and Neglect teams

The Suspected Child Abuse and Neglect (SCAN) teams that have operated in Queensland since 1980 are an example of shared network governance in child protection. These teams are comprised of members of the Department of Communities, Child Safety and Disability Services, Queensland Police, Queensland Health, the Department of Education and Training and, in the case of Aboriginal and Torres Strait Islander communities, also include the ‘recognised entity’—a community organisation with official status in the child protection system.<sup>122</sup> The role of SCAN teams was formalised with the enactment of the *Child Protection Act 1999* (QLD) and their purpose is to enable a coordinated, multi-agency response to children where statutory intervention is required to assess and meet their protection needs.

These examples all rely on the benefits of active engagement by Aboriginal families and communities and indicate that no one model is right for every context. A flexible approach is needed that takes into account the ‘*nature of the issues to be considered, the circumstances of the child and his or her family, the community setting and the resources available*’.<sup>123</sup>

## YOUTH AND CHILD DEVELOPMENT APPROACHES

### Mount Theo program

In 1993, in response to ongoing concerns about the damaging effects of petrol-sniffing on young Warlpiri people, community Elders established a substance abuse rehabilitation program at an outstation 160 kilometres from Yuendumu. Community Elders ran the program at their own expense, supported by local organisations such as the school and shop, but with no initial formal funding. Young people were assisted to reconnect with culture, family, health and education in a culturally supportive remote bush environment. Since 1993, over 500 Warlpiri young people from over 14

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communities have accessed the award-winning Mount Theo program.<sup>124</sup>

Building on its success in rehabilitation, in the early 2000s the Mount Theo program expanded its focus to a youth development program assisting Warlpiri young people. The Warlpiri Youth Development Aboriginal Corporation (WYDAC) now employs 50 staff delivering programs to young people across four Warlpiri communities and the Mount Theo outstation.<sup>125</sup> The WYDAC Board has representation from these four Warlpiri communities. Youth Program Committees in each location collaborate with the Youth Works and Outreach Coordinator to oversee strategic and program management issues. An evaluation found the committees are an effective means for instilling a sense of community control in the program.<sup>126</sup> The Central Land Council (the CLC) submission to the Commission emphasises that in addition to the tangible benefits in youth development, the WYDAC program is:

*'very clearly valued by Aboriginal people for the way it is helping to strengthen culture and give them greater voice and control, factors which in our view are central to achieving the successful outcomes'.<sup>127</sup>*

## **Central Land Council's Community Development Program**

Since 2005, the CLC has taken a community development approach to creating positive social change in Central Australian communities. The CLC's Community Development Program works with Aboriginal traditional owners to plan for the use of compensation benefits from land use agreements – effectively private income. As a result, traditional owners are increasingly applying these funds towards community benefit projects in preference to individual distributions. The CLC's submission notes that Aboriginal people have directed \$62 million to community benefit projects through the community development program in the past decade.<sup>128</sup>

Aboriginal communities have chosen to direct a significant portion of their funds to projects with youth development and diversion objectives. A project from the beginning of this process has been the Warlpiri Education and Training Trust (WETT), which is entirely funded by traditional owners through mining royalty payments from the Granites Gold Mine.<sup>129</sup> Unimpeded by government funding guidelines, the Warlpiri Elders were able to plan and implement a program fully aligned with Warlpiri aspirations and decision-making processes. The program allocates over \$1 million each year and delivers five sub-programs: a youth and media program providing diversionary programs for young people; a secondary school support program to support students attending boarding schools and interstate excursions; a language and culture support program to provide school students with the opportunity to learn from Elders in the classroom and on bush trips; a learning community centre program to support learning centres in four communities; and an early childhood care and development program delivered in partnership with World Vision. Through the program, Aboriginal Elders and community members are able to support the formal education system through complementary activities and by assuming greater responsibility for their children and young people.

## **Murri School**

The Murri School is an Aboriginal and Islander Independent Community School in Brisbane, Queensland. It is Aboriginal and Torres Strait Islander-owned and run and caters for children from preschool to Year 12. Around 95% of students are Aboriginal and Torres Strait Islander and 60% are the subject of a child protection, out of home care or youth justice order.<sup>130</sup>

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The Murri School is an important example in the context of family and child protection for several reasons. It provides a multidisciplinary approach to schooling that is healing and trauma-informed. It supports the family unit as well as the child in a culturally supportive environment. It is producing positive results for children and families.

The school fosters a 'community of care' approach, where children, families and agencies come together to understand and address the impacts of intergenerational trauma through a healing program focused on therapeutic intervention; service coordination and family case work; family camps; cultural and group activities; and (re)connection with educational and sporting activities.<sup>131</sup> The Murri School can be described as a 'wrap-around service', where a bi-cultural healing team of health, family support and cultural experts provide a point of contact and referral to a broader network of education, health, child protection, housing, legal and counselling services.<sup>132</sup>

In addition to improvements in the social and emotional wellbeing of young people, positive results include:

- long-term: improved participation and classroom behaviour, improved functioning, decreased time involved in the child protection system and increased help-seeking behaviours by families
- medium-term: increased referrals and uptake of support services by families, improved coping skills, families prioritising the wellbeing needs of children, and
- short-term: families feel safe and respected; children and families engage with and participate positively in healing activities; improved key stakeholder relationships.<sup>133</sup>

A *Cost Benefit Analysis of the Murri School Healing Program* conducted by Deloitte Access Economics was commissioned by the Healing Foundation.<sup>134</sup> The Analysis found that as a result of the healing program, there was improved mental health, less contact with child protection and less contact with the justice system.

The total economic benefit attributed to the Murri School is \$6.5 million which is approximately \$28,248 per student compared to the average Aboriginal student in a state school. The largest benefit is the savings from decreasing usage of child protection services, \$17,105, followed by the improvements in mental health, \$4,425.

The benefit cost ratio (BCR) for the healing program at the Murri School was calculated by dividing the benefits per student, \$28,248, by the costs, \$3,190. This results in a BCR of 8.8. This indicates that, on average, for every additional dollar invested in the healing program at the Murri School there is an \$8.85 return in benefits.

## COMMUNITY JUSTICE, MEDIATION AND NEGOTIATION INITIATIVES

### Northern Territory Law and Justice Groups

In response to the *Royal Commission into Aboriginal Deaths in Custody: National Report* (the RCIADIC) the Northern Territory Government launched its *Aboriginal Law and Justice Strategy*

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in 1995. Part of this strategy involved facilitating the creation of community-based Law and Justice Groups, initially in Ali Curung, Lajamanu, Yuendumu and Willowra. External facilitators used community planning methods to work with these groups and government and non-government organisations to negotiate Community Law and Justice Plans. The model promoted the devolution of responsibility for law and justice issues from agencies to community organisations, where relevant and appropriate, and incorporated traditional dispute resolution and customary decision-making mechanisms. The participatory planning approach enabled the combination of a whole-of-community and whole-of-government response to addressing law and justice issues. The approach was responsive to community priorities, incorporated community capabilities and ensured clarity of process and appropriate accountability of all actors in the system. Formalised Law and Justice Plans signed off by senior representatives from the different stakeholders created a mandate for agreed measures, which ranged across education, prevention, diversion, intervention, prosecution and crisis response.

Funding for the Law and Justice Groups ceased in 2004, but some initiatives have survived and been reinvigorated at various points in the past decade.<sup>135</sup> The intent was to *'enable community participation in the justice process and provide a space for interaction between Aboriginal and non-Aboriginal laws and law makers.'*<sup>136</sup> Their broad ambit includes *'engagement and participation in the courts, promoting community safety, fostering Aboriginal law and authority structures and acquiring recognition of Aboriginal law from the Anglo-Australian judicial and, to some extent, legislative systems.'*<sup>137</sup>

The Lajamanu Kurdiji Law and Justice Committee re-formed in 2010 with the assistance of the North Australian Aboriginal Justice Agency (NAAJA). The CLC's submission to the Commission provided information about the Kurdiji Group's work, which includes discussing community safety issues; meeting before court sittings to provide crime prevention advice and pre-sentence reports to the court; informal dispute resolution to stop small conflicts escalating; and advocating community views to the licensing commission and police.<sup>138</sup> They have managed to survive without government assistance through the support of organisations such as NAAJA and the CLC and receiving community-controlled mining royalty funds to refurbish office and meeting spaces.

A preliminary analysis regarding trends in Lajamanu's court list revealed promising improvements when the Law and Justice Group took a leading role. Against a backdrop of escalating rates of Aboriginal incarceration across the Northern Territory, from 1996 to 2014, the Lajamanu court list recorded a 50% decline in the overall number of criminal cases, including a 90% decline in dishonesty offences and a 55% decline in assault cases.<sup>139</sup> While further research would be needed to attribute such improvements to the work of the Law and Justice Group, it has been noted that the figures match observations that Lajamanu has become a safer community with the operation of Kurdiji because members of the community feel accountable to the Kurdiji and the Warlpiri authority structures that support its practices.<sup>140</sup>

The CLC submission cited the Law and Justice Groups as an example of the commitment of local communities to resolve disputes, maintain community harmony and provide input and advice to the courts. However, the submission further observed the groups were:

*'[A]n excellent example of the vagaries of government policy. If the de-funding of community justice groups had not occurred in 2003, there would be many more operating law and justice groups today. Instead, the current Northern Territory Government has to re-create this program and start from scratch with more than a decade lost.'*<sup>141</sup>

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The concept of a Law and Justice Plan, pioneered in the late 1990s, was revived in 2012 by Elders from the Northern Territory community of Maningrida, known as the 'Burnawarra'. With assistance from Charles Darwin University, the Burnawarra came together to formulate the *Maningrida Justice Collaboration Agreement*, proposing a new approach where community Elders would take responsibility for justice, law and safety issues in the community, working in concert with the Northern Territory Police, Department of Attorney-General and Justice and other relevant agencies. The Burnawarra Law and Justice Group submitted the Agreement to the Commission with a statement calling for Elders to be empowered and recognised to take the lead in the child protection and youth justice systems.<sup>142</sup>

The *Maningrida Justice Collaboration Agreement* illustrates what an alternative, community-led approach to law and justice might look like. It identifies the Maningrida community as being primarily responsible for resolving justice issues in the community, with involvement of the police and magistrates seen as an option of last resort.<sup>143</sup>

The Agreement is guided by a set of community protocols established to promote community safety and harmony through measures such as baggage checks for those entering the community, curfews for young people, restrictions on card games in communities and rules regarding male and female relations.<sup>144</sup> This emphasises the importance of the safety of women, children and family, indicating that where '*the sacred women's law has been broken, the sacred law of the men has also been breached*'.<sup>145</sup>

Senior law men and women of the Yirritja, Dhuwa and Ngarra groups come together to decide how to respond to particular offences in partnership with a senior member of the Northern Territory Police.<sup>146</sup> The Burnawarra provide leadership and governance to enforce community justice issues in Maningrida and, where appropriate, convene a panel of 10 Maningrida Elders with several vital roles. The panels hear evidence and deliver sentences reached by consensus and provide education to promote awareness, discipline and rehabilitation through traditional and/or western approaches. The panels aim to make fair decisions that prioritise rehabilitation and protect the community from violence and other antisocial behaviours.<sup>147</sup> When options for diversion or alternative correctional services are not appropriate, the Burnawarra work with police to refer the matter to the relevant court.<sup>148</sup>

The roles of the Burnawarra have been carefully constructed in accordance with culture. To guide and support the work of the panels, there are *Dalkarra* and *Djirrijay* who oversee the Burnawarra and appoint new members; a *Djunggay* prosecutor, who is *Yirritja* or *Dhuwa* depending on the moiety of the accused; a mediator who works to achieve consensus between the Burnawarra, the accused and the victim, including their families; and two senior *Djunggay* law men and women from both moieties who facilitate communication and sentence completion between other members of the Burnawarra, the accused and victim.<sup>149</sup>

The Northern Territory's Law and Justice Groups have successful counterparts in other jurisdictions. In Queensland, community justice groups were also set up in the 1990s in response to the RCIADIC recommendation for more community-driven justice initiatives. Unlike in the Northern Territory, funding for Queensland's community justice groups has continued and expanded since the program was established as the *Local Justice Initiatives Program* in 1997. There are currently around 50 community justice groups across remote, regional and urban Aboriginal and Torres Strait Islander communities in Queensland. Following the Cape York Justice Study in 2001, community justice groups were given legislative status, with formal legal roles in providing sentencing advice to courts

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and advising government on alcohol management plans. The role of community justice groups shifted from a flexible focus on crime prevention and local justice initiatives to a more narrowly defined set of functions providing sentencing advice to courts, particularly since the program transferred from the Department of Aboriginal and Torres Strait Islander Policy to the Department of Justice and Attorney-General in 2006. A 2010 evaluation estimated community justice groups had supported about 25% of all Aboriginal and Torres Strait Islander offenders in Queensland in the previous year.<sup>150</sup> The evaluation reported widespread support for the community justice group program amongst Aboriginal and Torres Strait Islander community leaders, community-based service providers and justice system stakeholders including police and court staff.

## ***Community mediation projects in Queensland and the Northern Territory***

In Queensland, the *Mornington Island Restorative Justice Project* is one of several innovations in remote Aboriginal and Torres Strait Islander communities established over the last decade. It is now run by the Junkuri Laka Justice Group. It conducts 160 mediations per year and its work was recognised in 2015 as the national winner of the Australian Crime and Violence Prevention Award. A similar community-based mediation project was established in Aurukun in 2014 and has been strongly embraced by the community as an avenue for peacefully resolving family disputes and breaking the cycle of small disputes escalating into widespread community conflict.

In the Northern Territory, the Yuendumu Mediation and Justice Committee has operated since November 2011 with the support of Commonwealth government funding. Following significant violence and upheaval in Yuendumu in 2010 and 2011, the mediation committee has been credited with reducing conflict and maintaining peace through a community-led peacemaking initiative.<sup>151</sup> A 2014 cost-benefit analysis by the University of Canberra concluded the project '*returned economic benefits that far exceed its economic costs*'.<sup>152</sup>

The Commission received a submission from the East Arnhem Mediation Project, which delivers mediation and restorative conferencing and dispute resolution across East Arnhem from its base in Galiwin'ku.<sup>153</sup> The project aims to empower Elders and community members to positively manage community and law and order issues while helping reduce the current overre s and putting Yolŋu justice processes at the core of its program.<sup>154</sup>

The success of community-run mediation projects at Yuendumu, East Arnhem, Mornington Island and Aurukun illustrates the potential of community-based alternatives to the formal justice system for dealing with social issues and conflict that might otherwise lead to offending. Mediation projects can be useful mechanisms for preventing and de-escalating conflict and diverting minor conflict from police to community-owned dispute resolution processes. These projects empower Elders and community members to respond to conflict and take ownership of local law and justice processes. Mediation projects are most effective when they operate as part of a local network of justice agencies, non-government organisations and community organisations managing community-level family and individual conflict to maintain peace and harmony in the community.

## ***Night patrols***

Night patrols were one of the few community-run services supported under the Northern Territory Emergency Response (the Intervention). Prior to the Intervention, night patrols had been funded in 23 remote Northern Territory communities by the Commonwealth Government, originally through

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the *Community and Development Employment Projects* scheme (the CDEP). Night patrols are aimed at preventing antisocial and violent behaviours through culturally appropriate interventions using conflict resolution and drawing on local knowledge and understanding. Night patrols work preventively through community safety plans, respond to potentially violent situations to prevent escalation and take at-risk persons, such as those who are intoxicated, to safe places. The Intervention provided funding to broaden night patrols to all 73 Intervention communities, which occurred by December 2009.<sup>155</sup>

While night patrols have been highly valued by Aboriginal communities as a community-owned justice response, there has been no comprehensive evaluation of their effectiveness.<sup>156</sup> A 2011 review found building community safety requires a more *'coordinated approach to service delivery at the community level'* and night patrols would be most successful if they established *'effective partnerships with other related community support services (such as police, safe houses, sobering-up shelters and health clinics) at a local level'*.<sup>157</sup> Again, this suggests the need for community-operated services such as night patrols to be supported as equal partners in a place-based shared network governance model instead of operating as isolated services trying to navigate the complexities of an externally managed service system.

## **Justice reinvestment**

The justice reinvestment movement has emerged in recent years as a means to re-orient governments' approach to tackling overrepresentation in the justice system. Under justice reinvestment, funding is reallocated from incarceration to early intervention, prevention and diversionary programs in communities with high rates of offending. The resulting savings are tracked and reinvested into those communities. A leading example is the Maranguka Justice Reinvestment Project in Bourke, New South Wales. This project adopts a *'collective impact'* model<sup>158</sup> to partner the Bourke Aboriginal community with government and non-government agencies to tackle crime, with a particular focus on early childhood and youth crime prevention.

The project was initiated and continues to be driven by Aboriginal community stakeholders. The Bourke Aboriginal Working Party and Bourke Tribal Council are key partners in the project's management, within a shared network governance structure that involves justice agencies, social services, non-government organisations and philanthropic partners. The approach was developed over a period of years, to allow local political contests to play out and legitimacy of the new governance structures to form. Bourke leaders prioritised these local governance processes over any external program demands, which led to a deliberate place-based approach. With time, Bourke leaders turned their attention to how the external service delivery system should align to their priorities, thus establishing their agenda proactively, rather than reactively.

A preliminary assessment of the Maranguka Justice Reinvestment Project in Bourke found two of the five key elements of the collective impact approach had been established: a common agenda to mobilise partners and a backbone organisation to provide project management, coordination, data collection and monitoring.<sup>159</sup> There was also progress towards the other elements: a shared measurement system, mutually reinforcing activities and continuous communication and cooperation. The assessment indicated the project had the potential to have a significant impact on addressing youth crime in Bourke. From a justice reinvestment perspective, it was estimated the annual direct costs of the involvement of young Aboriginal people (including young adults) in the justice system were about \$4 million, while the Maranguka project implementation costs were \$554,800 per

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year.<sup>160</sup> However, the efficacy of the approach will not be clear until the impacts on offending rates are able to be measured and attributed. A Four Corners report<sup>161</sup> in 2016 pointed to promising anecdotal evidence regarding the impact of particular interventions on driving offences and reoffending by domestic violence perpetrators.

## **Negotiation tables**

Throughout the 2000s, the Queensland Government sought to implement a type of shared network governance in remote Aboriginal and Torres Strait Islander communities in the form of multi-party negotiation tables to plan and coordinate responses to pressing community issues. Negotiation tables brought together community leaders with representatives of Queensland and Commonwealth government agencies to develop a community action plan for cooperatively tackling agreed priorities. Their goal was to provide a genuine opportunity for Aboriginal and Torres Strait Islander communities to provide input into government decision-making, underpinned by the *Partnerships Queensland Strategy* for engagement between the Queensland Government and Aboriginal and Torres Strait Islander communities. In some cases, children and youth justice issues were central priorities for negotiation tables. For example, the Torres Strait negotiation table resulted in a justice agreement that expanded court sittings and policing on the outer islands of the Torres Strait as a direct response to concerns raised by community members.

## **Regional Partnership Agreements**

Another variation of the negotiation table approach is the Commonwealth policy of negotiating *Shared Responsibility Agreements (SRAs)* and *Regional Partnership Agreements (RPAs)* in the early 2000s. SRAs were premised on the principle of mutual obligation, where community members and governments outlined what they would contribute to the agreement at the local level. In practice, the process of negotiating SRAs was piecemeal and the quality of community engagement highly variable. Many agreements simply re-packaged existing service and program commitments into the new format. Despite some evidence of their success, SRAs quietly slipped out of the post-Intervention policy landscape, although some were still being signed well into 2008.

RPAs were scaled up versions of SRAs that addressed government investment in Aboriginal communities across a region. Between 2002 and 2010, several RPAs were negotiated across the country, including as part of the Council of Australian Governments (COAG) trials of whole-of-government ways of working in partnership with Aboriginal communities. Some RPAs dealt with specific issues such as employment or land management, while others covered a wide range of domains. Innovative agreements in some regions incorporated the contributions of private sector parties such as mining companies in addition to state and Commonwealth government and Aboriginal community commitments.<sup>162</sup>

Negotiation tables and their resulting place-based agreements have considerable merit for facilitating meaningful participation of Aboriginal communities in decision-making and coordinating government and community efforts through shared network governance. However, generally speaking, efforts to implement this model over the past decade have seldom achieved their potential. A key issue has been that the negotiation processes have taken place during an era when community governance capacity has been progressively eroded. For example, the evaluation of the COAG trials found a key lesson was '*communities and their leaders need to be supported and resourced to enable development of capabilities which will assist in engaging in whole-of-government and community-led solutions*'.<sup>163</sup>

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