



LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY

Social Policy Scrutiny Committee

**Inquiry into the Youth Justice
and Related Legislation
Amendment Bill 2019**

July 2019

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Chair's Preface

This reports details the Committee's findings regarding its examination of the Youth Justice and Related Legislation Amendment Bill 2019. Amending the *Youth Justice Act 2005*, the Youth Justice Regulations 2006, the *Bail Act 1982*, the Bail Regulations 1983 and the *Police Administration Act 1978*, the Bill aims to implement the intention and direction of a further 11 recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory.

The Committee received 26 submissions to its inquiry. While all of the submissions received were generally supportive of the intent of the Bill in delivering reforms to the Territory's youth justice system, a number of concerns were raised regarding the extent to which the proposed amendments fully implement the Royal Commission's recommendations.

The Committee has recommended that the Assembly pass the Bill with the proposed legislative amendments as set out in recommendations 2, 3, 5, 6 and 7. Recommendations 2, 3 and 6 go to ensuring that the Bill is unambiguous and drafted in a sufficiently clear and precise manner; in particular section 8A (Presumption in favour of bail for youths) of the *Bail Act 1982* and Regulation 2A of the Bail Regulations 1983.

Consistent with equivalent legislation elsewhere in Australia, recommendations 5 and 7 propose amendments to sections 49 and 50 of the *Youth Justice Act 2005* to ensure transparency and accountability of the youth justice system while protecting the rights and liberties of young people in the determination of criminal matters against them.

As set out in recommendation 4, given the concerns raised with the approach taken regarding amendments to section 137 of the *Police Administration Act 1978* which seek to implement Royal Commission recommendation 25.03(2), the Committee has proposed that the Government review the operation of this section and present a report to the Legislative Assembly as soon as practicable after the end of its first year of operation.

On behalf of the Committee, I would like to thank all those who provided submissions or appeared before the Committee. Their advice and commentary was particularly insightful and of great assistance to the Committee in its examination of the Bill. The Committee also thanks Territory Families for their advice. I also thank my fellow Committee members for their bipartisan commitment to the legislative review process.



Ms Ngaree Ah Kit MLA

Chair

Committee Members

	Ms Ngaree Ah Kit MLA Member for Karama	
	Party:	Territory Labor
	Parliamentary Position:	Acting Deputy Speaker
	Committee Membership	
	Standing:	Standing Orders and Members' Interests, House
	Sessional:	Social Policy Scrutiny
	Select:	Estimates
	Chair:	Social Policy Scrutiny
	Mrs Robyn Lambley MLA Member for Araluen	
	Party:	Independent
	Parliamentary Position:	Acting Deputy Speaker
	Committee Membership	
	Standing:	Standing Orders and Members' Interests
	Sessional:	Social Policy Scrutiny
	Deputy Chair:	Social Policy Scrutiny
	Mrs Lia Finocchiaro MLA Member for Spillett	
	Party:	Country Liberals
	Parliamentary Position:	Deputy Leader of the Opposition, Opposition Whip
	Committee Membership	
	Standing:	Privileges
	Sessional:	Social Policy Scrutiny, Economic Policy Scrutiny
	Mr Chansey Paech MLA Member for Namatjira	
	Party:	Territory Labor
	Parliamentary Position:	Deputy Speaker
	Committee Membership	
	Standing:	House, Privileges
	Sessional:	Social Policy Scrutiny
	Mrs Kate Worden MLA Member for Sanderson	
	Party:	Territory Labor
	Parliamentary Position:	Government Whip
	Committee Membership	
	Standing:	Public Accounts, Standing Orders and Members Interest
	Sessional:	Social Policy Scrutiny, Economic Policy Scrutiny
	Select:	Estimates
Chair:	Estimates	
On 17 June 2019 Member for Katherine, Ms Sandra Nelson MLA, was discharged from the Committee and replaced by Member for Sanderson, Mrs Kate Worden MLA.		

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Acknowledgements

The Committee acknowledges the individuals and organisations that provided written submissions or oral evidence at public hearings.

Acronyms and Abbreviations

ALA	Australian Lawyers Alliance
ARC	Australian Red Cross
ARTK	Australia's Right to Know Coalition of Media Companies
AMSANT	Aboriginal Medical Services Alliance of the Northern Territory
Beijing Rules	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
CAAC	Central Australian Aboriginal Congress
CAYJ	Central Australian Youth Justice
CF	CREATE Foundation
CG	Children's Ground
CLA	Civil Liberties of Australia Inc.
CLANT	Criminal Lawyers Association of the Northern Territory
CRC	Convention on the Rights of the Child
DCLS	Darwin Community Legal Service
DDHS	Danila Dilba Health Service
DPC	Darwin Press Club
HRLC	Human Rights Law Centre
ICNT	Information Commissioner of the Northern Territory
ICCPR	International Covenant on Civil and Political Rights
JSS	Jesuit Social Services
LAAC	Legislative Amendment Advisory Committee
LSNT	Law Society of the Northern Territory
NAAJA	North Australian Aboriginal Justice Agency
NTADC	Northern Territory Anti-Discrimination Commission

NTCOSS	Northern Territory Council of Social Service
NTLAC	Northern Territory Legal Aid Commission
NTPS	Northern Territory Police Service
NTSGAC	Northern Territory Stolen Generations Aboriginal Corporation
OCC	Office of the Children's Commissioner Northern Territory
Royal Commission	Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory
SGGCD	Strong Grandmother's Group of the Central Desert
TCAC	Tangentyere Council Aboriginal Corporation

Terms of Reference

Sessional Order 13

Establishment of Scrutiny Committees

- (1) Standing Order 178 is suspended.
- (2) The Assembly appoints the following scrutiny committees:
 - (a) The Social Policy Scrutiny Committee
 - (b) The Economic Policy Scrutiny Committee
- (3) The Membership of the scrutiny committees will be three Government Members and one Opposition Member nominated to the Speaker in writing by the respective Whip and one non-party aligned Member to be appointed by motion.
- (4) The functions of the scrutiny committees shall be to inquire and report on:
 - (a) any matter within its subject area referred to it:
 - (i) by the Assembly;
 - (ii) by a Minister; or
 - (iii) on its own motion.
 - (b) any bill referred to it by the Assembly;
 - (c) in relation to any bill referred by the Assembly:
 - (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals, including whether the bill:
 - (A) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
 - (B) is consistent with principles of natural justice; and
 - (C) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
 - (D) does not reverse the onus of proof in criminal proceedings without adequate justification; and
 - (E) confers powers to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
 - (F) provides appropriate protection against self-incrimination; and
 - (G) does not adversely affect rights and liberties, or impose obligations, retrospectively; and

- (H) does not confer immunity from proceeding or prosecution without adequate justification; and
 - (I) provides for the compulsory acquisition of property only with fair compensation; and
 - (J) has sufficient regard to Aboriginal tradition; and
 - (K) is unambiguous and drafted in a sufficiently clear and precise way.
- (iv) whether the bill has sufficient regard to the institution of Parliament, including whether the bill:
- (A) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
 - (B) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and
 - (C) authorises the amendment of an Act only by another Act.
- (5) The Committee will elect a Government Member as Chair.
- (6) Each Committee will provide an annual report on its activities to the Assembly.

Adopted 24 August 2017

Recommendations

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Youth Justice and Related Legislation Amendment Bill 2019 with the proposed amendments set out in recommendations 2, 3, 5, 6, and 7.

Recommendation 2

The Committee recommends that proposed regulation 2A of the Bail Regulations 1983 be amended to include section 130(3A) of the *Criminal Code Act 1983*.

Recommendation 3

The Committee recommends that proposed section 8A of the *Bail Act 1982* be amended to clarify that the presumption in favour of bail for youths is subject to consideration of the matters mentioned in sections 24 and 24A.

Recommendation 4

The Committee recommends that the Government review the operation of proposed section 137 of the *Police Administration Act 1978* and present a report to the Legislative Assembly as soon as practicable after the end of its first year of operation.

Recommendation 5

The Committee recommends that proposed section 49 of the *Youth Justice Act 2005* be amended to provide that if proceedings relate to an offence or alleged offence, a genuine representative of the news media may be present.

Recommendation 6

The Committee recommends that proposed section 50(2)(b) of the *Youth Justice Act 2005* be amended by inserting the word 'the' before the second instance of the word 'youth'.

Recommendation 7

The Committee recommends that proposed section 50(7) of the *Youth Justice Act 2005* be amended to provide that:

(7) In this section

particulars likely to lead to the identification, in relation to a person, include the following particulars:

- (a) the name of the person
- (b) the names of –
 - (i) any relative of the person; or
 - (ii) any other person having the care of the person; or
 - (iii) in addition to subparagraphs (i) and (ii), in the case of an Aboriginal person, a member of the Aboriginal community of the person;

- (c) the name or address of any place of residence of the person, or the locality in which the residence is situated;
- (d) the name or address of any place of education, training or employment attended by the person, or the locality in which the place is situated.

1 Introduction

Introduction of the Bill

- 1.1 The Youth Justice and Related Legislation Amendment Bill 2019 (the Bill) was introduced into the Legislative Assembly by the Minister for Territory Families, the Hon Dale Wakefield MLA, on 20 March 2019. The Assembly subsequently referred the Bill to the Social Policy Scrutiny Committee for inquiry and report by 20 June 2019.¹ On 9 May 2019 the Assembly agreed to extend the report date to 6 August 2019.²

Conduct of the Inquiry

- 1.2 On 22 March 2019 the Committee called for submissions by 17 April 2019. The call for submissions was advertised via the Legislative Assembly website, Facebook, Twitter feed and email subscription service. In addition, the Committee directly contacted a number of individuals and organisations.
- 1.3 As noted in Appendix 2, the Committee received 26 submissions to its inquiry. The Committee held a public briefing with departmental representatives from Territory Families on Monday, 1 April 2019 and public hearings with 21 witnesses in Darwin on Thursday, 30 May 2019.

Outcome of Committee's Consideration

- 1.4 Sessional order 13(4)(c) requires that the Committee after examining the Bill determine:
- (i) whether the Assembly should pass the bill;
 - (ii) whether the Assembly should amend the bill;
 - (iii) whether the bill has sufficient regard to the rights and liberties of individuals; and
 - (iv) whether the bill has sufficient regard to the institution of Parliament.
- 1.5 Following examination of the Bill, and consideration of the evidence received, the Committee is of the view that the Legislative Assembly should pass the Bill with proposed amendments as set out in recommendations 2, 3, 5, 6, and 7.

Recommendation 1

The Committee recommends that the Legislative Assembly pass the Youth Justice and Related Legislation Amendment Bill 2019 with the proposed amendments set out in recommendations 2, 3, 5, 6, and 7.

¹ Hon Dale Wakefield MLA, Minister for Territory Families, *Daily Hansard - Day 5 – 20 March 2019*, <http://www.territorystories.nt.gov.au/jspui/handle/10070/306552>, pp.9-12

² Daily Hansard, Day 3 – Thursday 9 May 2019, <http://www.territorystories.nt.gov.au/jspui/handle/10070/307365>, p. 38

Report Structure

- 1.6 Chapter 2 provides an overview of the policy objectives of the Bill and the purpose of the Bill as contained in the Explanatory Statement.
- 1.7 Chapter 3 considers the main issues raised in evidence received.

2 Overview of the Bill

Background to the Bill

2.1 On 17 November 2017, the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory delivered its report to the Commonwealth and Northern Territory Governments. Of the 227 recommendations handed down by the Royal Commission the Government noted that ten were for action by others (primarily the Commonwealth Government), 91 were supported in principle and 126 were supported in full.³

2.2 In responding to the Royal Commission's recommendations the Government noted that it had:

grouped the recommendations of the Royal Commission into work programs to provide a holistic and coordinated response to the challenges raised by the Royal Commission.

The Northern Territory Government will work towards implementing the recommendations identified as *Supported* as specified by the Royal Commission. The Northern Territory Government will undertake further consultation with key stakeholders and planning to implement the intent and direction of recommendations identified as *Supported in Principle*.⁴

2.3 In April 2018, the Minister for Territory Families, the Hon Dale Wakefield MLA, released the Government's five-year implementation plan *Safe, Thriving and Connected: Generational Change for Children and Families 2018 – 2023*⁵ which details:

the Northern Territory Government's plan to implement reforms to better support children, young people and families experiencing vulnerability and to deliver the recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory.⁶

The Government released its first progress report in November 2018 which noted that of the recommendations that relate to action by the Government, 33 were complete, 47 were well progressed, 122 were underway, and 16 were not yet started.⁷

³ Reform Management Office, *Response to the 227 Recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Northern Territory Government, Darwin, March 2018, <https://nacchocommunique.files.wordpress.com/2018/03/download-nt-government-responses-to-227-ntrc-recommendations.pdf>

⁴ Reform Management Office, *Response to the 227 Recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Northern Territory Government, Darwin, March 2018, <https://nacchocommunique.files.wordpress.com/2018/03/download-nt-government-responses-to-227-ntrc-recommendations.pdf>, p.1

⁵ Wakefield, Dale, Hon (Minister for Territory Families), *Royal Commission Implementation Plan Released: Record Investment for Child Protection & Youth Justice*, Media Statement, Northern Territory Government, Darwin, 20 April 2018, <http://newsroom.nt.gov.au/mediaRelease/25505>, p.1

⁶ Reform Management Office, *Safe, Thriving and Connected: Generational Change for Children and Families 2018 – 2023*, Northern Territory Government, Darwin, November 2018, https://rmo.nt.gov.au/_data/assets/pdf_file/0005/498173/Safe.-Thriving-and-Connected-Implementation-Plan-Web.pdf, p.1

⁷ Reform Management Office, *Safe, Thriving and Connected: Generational Change for Children and Families 2018 – 2023, First Progress Report*, Northern Territory Government, Darwin, November 2018, https://rmo.nt.gov.au/_data/assets/pdf_file/0010/596647/Safe-Thriving-and-Connected-First-Progress-Report-November-2018.pdf, pp.1-2

2.4 In presenting the Bill, Minister Wakefield advised the Assembly that the Bill:

represents this Government's next steps in reforming our youth justice system. This Bill makes more comprehensive and detailed amendments to the *Youth Justice Act*. In doing so, this Bill implements a further 11 recommendations of the Royal Commission and complements the investments made by this Government to improve youth outreach and re-engagement services, diversion programs, bail support services and accommodation. This approach has the greatest chance of bringing about a significant reduction in youth crime which in turn will promote greater safety for our communities.

The design of this Bill has been informed by cross-jurisdictional analysis of Australian, State and Territory legislation and expert advice from key stakeholders to ensure the intent and direction of the recommendations [of the Royal Commission] are given proper effect.⁸

Purpose of the Bill

This Bill amends the *Youth Justice Act 2005*, the Youth Justice Regulations 2006, the *Bail Act 1982*, the Bail Regulations 1983 and the *Police Administration Act 1978*. As noted in the Explanatory Statement, the Bill aims to implement the intention and direction of a further 11 recommendations of the Royal Commission into the Protection and Detention of Children in the Northern Territory.⁹ Key changes include:

- making youth diversion more accessible to young people by removing legislative barriers to its use, whilst maintaining police discretion to divert a youth in the case of serious offences;
- confirming arrest as a measure of last resort to align with the Government's reform direction of promoting therapeutic approaches;
- reducing the time young people spend in police custody;
- ensuring earlier access to legal assistance for young people to safeguard their rights;
- improving the application of bail for young people, ensuring appropriate youth-specific consideration are given to bail options and decriminalising breach of bail conditions as an offence;
- improving young people's understanding of their rights when in detention to enhance the Government's compliance with international obligations;
- protecting children and young people's right to privacy to avoid harm being caused to them by undue publicity or labelling;
- ensuring consistency for children and young people commencing legal proceedings.¹⁰

⁸ Daily Hansard, Day 5 – 20 March 2019 Final, <http://www.territorystories.nt.gov.au/jspui/handle/10070/306552>, p. 10

⁹ Territory Families, *Opening Statement – Public Briefing – 1 April 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, pp.4-7; see also Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations*, 17 November 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>

¹⁰ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.1

3 Examination of the Bill

Introduction

- 3.1 All of the submissions received were generally supportive of the intent of the Bill in delivering reforms as set out in the recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (Royal Commission).¹¹ However, a number of concerns were raised regarding the extent to which the proposed amendments fully implement the Royal Commission's recommendations. For reference, Appendix 1 sets out the Royal Commission recommendations that correspond to proposed amendments to the legislation identified as particular issues of concern by submitters.
- 3.2 The Committee notes that there was a significant level of agreement amongst submitters as to the key issues of concern with the proposed legislation. The following discussion considers these matters and the subsequent advice provided to the Committee by Territory Families (the Department).

Amendment of Bail Act 1982 and Bail Regulations 1983

- 3.3 The Bill makes a number of amendments to the *Bail Act 1982* (NT) and associated regulations to improve the application of bail for young people and give effect to Royal Commission recommendation 25.19. While submitters welcomed the proposed amendments, concern was raised regarding the extent to which the Bill complies with subsections (1), (2) and (4) of this recommendation.

Presumption in favour of bail for youths

- 3.4 Clause 8 of the Bill amends the *Bail Act 1982* to provide that section 8 'Presumption in favour of bail for certain offences' no longer applies if the person accused of the offence is a youth. Clause 9 then inserts proposed section 8A, 'Presumption in favour of bail for youths' which provides that a youth is entitled to be granted bail, unless '(a) the offence the youth has been accused of is a prescribed offence' as set out in proposed Regulation 2A, and '(b) the youth presents an ongoing and serious risk to the community'. As noted in the Explanatory Statement:

the list of offences set out in the new Regulation 2A contains all relevant offences listed in Schedule 2 and 3 of the *Sentencing Act 1995* which carry a maximum penalty of ten years or more that can apply to a youth.¹²

- 3.5 Proposed section 8A(1) seeks to implement Royal Commission recommendation 25.19(1) which called for the *Bail Act 1982* to be amended to provide that a youth should not be denied bail unless:

¹¹ Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations*, 17 November 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>

¹² Explanatory Statement, Youth Justice and Related Legislation Amendment Bill (Serial 85), <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.5

- a. charged with a serious offence and a sentence of detention is probable if convicted,
- b. they present a serious risk to public safety,
- c. there is a serious risk of the youth committing a serious offence while on bail, or
- d. they have previously failed to appear without reasonable excuse.¹³

3.6 The North Australian Aboriginal Justice Agency (NAAJA) expressed concern that the prescribed offences are included in the Regulations rather than being legislated within the *Bail Act 1982*:

By including the prescribed offences in Regulations, the Executive can easily amend these regulations at any point in the future, without the scrutiny of Parliament. This affords no protection for youth against the Executive expanding the grounds for which youth will be denied the presumption in favour of bail and provides little certainty and continuity in the law. This is again a perverse outcome given that presumptions with respect to adults are contained within the primary legislation, which ensures that it has been scrutinised by the Parliament and provides certainty and continuity in the law.¹⁴

3.7 However, as the Department pointed out, the approach taken in the Bill:

enables greater flexibility to reflect amendments across the statute books and for the prescribed offences to remain current. For example, as the *Sentencing Act* is amended the Bail Regulations can be more easily updated. The general approach to the structure of legislation means that legal policy requirements are included in the Act, with more detail and guidance about how the legal policy requirement is implemented contained in the Regulations.¹⁵

3.8 The Committee also sought clarification as to why section 130(3B) of the *Criminal Code Act 1983* relating to sexual intercourse or gross indecency by a provider of services to a mentally ill or handicapped child under 10 years has been included as a prescribed offence, but section 130(3A) which relates to the same offence regarding a person under the age of 16 years is not included given that it carries a penalty of 20 years imprisonment. The Department advised that:

There is complexity in these offences because they relate to a disability service provider. If a young person were to commit these offences they would need to be employed as a service provider. Based on the submissions received we are reviewing the list of 'prescribed offences' and intend to include section 130(3A) as a prescribed offence.¹⁶

3.9 The Northern Territory Legal Aid Commission (NTLAC) questioned the inclusion of a number of the offences in proposed Regulation 2A noting that:

depending on the circumstances of the defendant and the alleged offence, it is not necessarily probable that a sentence of actual detention would be imposed on conviction.¹⁷

¹³ Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations*, 17 November 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>, p.43

¹⁴ North Australian Aboriginal Justice Agency (NAAJA), Submission 2, p.5

¹⁵ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.1

¹⁶ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.2

¹⁷ Northern Territory Legal Aid Commission, Submission 21, p.3

Danila Dilba Health Service (DDHS) also expressed the view that in making a determination as to the grant of bail, consideration should be given to the circumstances and seriousness of the offending.¹⁸

- 3.10 In response to these concerns the Department advised that, as is currently the case in relation to section 8 of the *Bail Act 1982*, section 24 'Criteria to be considered in bail applications' will still apply when considering bail applications for children and young people.¹⁹ In accordance with Royal Commission recommendation 25.19(1) it is noted that these criteria include the probability of a sentence of detention; the nature and seriousness of the offence; the risk of the person committing an offence while on bail; and any previous failure to appear in Court.
- 3.11 As highlighted in its response to the Committee's written questions, the Department further advised that it was currently considering amending clause 9 to provide that proposed section 8A(1)(a) applies unless the offence the youth has been accused of is a prescribed offence; 'or' instead of 'and' (b) the youth presents an ongoing and serious risk to the community.²⁰
- 3.12 Apart from conforming with the wording of Royal Commission recommendation 25.19(1), the Department advised that the additional amendment sought to further clarify the operation of proposed section 8A:

In relation to the presumption in favour of bail, it is important to note that this Bill proposed to introduce a presumption in favour of bail for young people, but that presumption was the starting point for a decision-maker. Following the arrival at the presumption, that it was or was not in favour of bail, the decision-maker still had to take into account current section 24 of the *Bail Act* and proposed new section 24A of the *Bail Act* which is the youth-specific considerations to be taken into account as to whether or not a young person should be granted bail.

In defining the presumption, the use of the word 'and' was to say that the young person would receive the presumption unless they committed a prescribed offence 'and' were a risk to the community. The flow-on effect was then to take into account the 24A and 24 considerations, which quite clearly say regardless of the offence, if the young person does present a serious risk to the community, they should not receive bail.

In essence, the use of the word 'and' was creating some unnecessary angst within the community in relation to the fact that people who were a serious risk might receive bail, when quite clearly the 24 and 24A considerations would suggest they would not.

It became a slightly circular argument, acknowledging that a presumption is the starting point and not the end point of the decision. In the interests of clarity and to remove that angst, the use of the word 'or' creates that greater clarity without changing the fact that there is a presumption as a starting point and that a person who is a serious risk to the community, more likely than not and in the discretion of the authorised officer or court, would not receive bail.²¹

¹⁸ Danila Dilba Health Service, Submission 17, pp.9-10

¹⁹ Territory Families, Responses to Written Questions – 29 May 2019, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.2

²⁰ Territory Families, Responses to Written Questions – 29 May 2019, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.1

²¹ Committee Transcript, Public Hearing, 30 May 2019, opp.79-80

Committee's Comments

- 3.13 The Committee is satisfied with the Department's response regarding inclusion of the prescribed offences in the Regulations rather than the Act and notes that, pursuant to clause (g) of the terms of reference of the Public Accounts Committee, all subordinate legislation is subject to scrutiny by the Parliament.²² The Committee also acknowledges the Department's advice regarding inclusion of section 130(3A) of the *Criminal Code Act 1983* as a prescribed offence and has therefore recommended that proposed Regulation 2A be amended accordingly.
- 3.14 While satisfied with the Department's explanation regarding the operation of proposed section 8A, as evident from the concerns raised by the NT Legal Aid Commission and Danila Dilba Health Service, the Committee does not consider that this clause is drafted in a sufficiently clear and precise manner. Whereas the existing section 8 makes it clear that the presumption in favour of bail is subject to consideration of the matters mentioned in section 24, as drafted section 8A makes no mention of the fact that the proposed presumption in favour of bail for youths is subject to consideration of the matters mentioned in both sections 24 and 24A. To avoid any ambiguity the Committee is of the view that proposed section 8A of the *Bail Act 1982* should be amended to clarify its intended operation.

Recommendation 2

The Committee recommends that proposed regulation 2A of the Bail Regulations 1983 be amended to include section 130(3A) of the *Criminal Code Act 1983*.

Recommendation 3

The Committee recommends that proposed section 8A of the *Bail Act 1982* be amended to clarify that the presumption in favour of bail for youths is subject to consideration of the matters mentioned in sections 24 and 24A.

Criteria to be considered in bail applications for youths

- 3.15 In addition to the general criteria that Police and the Court must take into consideration when making a bail determination as set out in section 24 of the *Bail Act 1982*, clause 11 of the Bill introduces a new section 24A which provides additional criteria that 'an authorised member and a court must, to the extent practicable' also take into consideration in respect of bail applications for youth:

These youth-specific criteria have been modelled on sections 3A and 3B of the *Bail Act 1977* (Vic) and reflect the complex needs of young offenders which must be taken into account when making bail determinations.²³

²² Legislative Assembly of the Northern Territory, *Thirteenth Assembly – Sessional Orders – As adopted 20 March 2018*, <https://parliament.nt.gov.au/business/standing-and-sessional-orders>, pp.12-13

²³ Explanatory Statement, Youth Justice and Related Legislation Amendment Bill (Serial 85), <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.3

- 3.16 The inclusion of this provision was welcomed by submitters. As noted by DDHS, the youth-specific criteria are consistent with Royal Commission recommendation 25.19(2) which called for the *Bail Act 1982* to be amended to:

require that when imposing bail conditions the police and courts take into consideration:

- a. the age, maturity and circumstances of the young person, including their home environment, and
- b. the capacity of the young person to comply with the conditions.²⁴

However, in responding to the Committee's written questions, the Department advised that it was currently considering amending proposed section 24A(2) to provide that:

an authorised officer '*may*' and a court '*must*', to the extent practicable, take into consideration the list of criteria to be considered in bail applications for youth.²⁵

- 3.17 During the public hearing a number of witnesses raised concerns that the possible amendment foreshadowed by the Department would effectively establish different approaches in relation to police bail and court bail which would not be in the best interests of the offender or the wider community. As Ms Fiona Kepert (Lawyer: NT Legal Aid Commission) pointed out:

In relation to bail, we know that detention is harmful, not rehabilitative, even in the short term such as the watch house. That is why it is so important that the police get it right because they make the first decision in relation to bail. To remove or change the considerations that the court would have ... as opposed to the police ... is concerning ...

If you want to get the benefit of not institutionalising young people or locking them up, you have to get the decision right in the first place, particularly for people who come from remote communities. I say remote, but even Katherine and Tennant Creek are places where, if you do not get bail, you are then moved a long way away.

So, if we have a situation where police are looking at different considerations and a young person does not get bail, they then come to court and, based on those other considerations, they are an appropriate vehicle to receive bail. There is a significant cost to get these young people back to where they come from, and there is significant dislocation because you have already moved them so far. So, that is why it is particularly important at that early stage when police are making a decision.²⁶

- 3.18 In response, the Department clarified that:

The proposed new section 24A widens the range of criteria that need to be taken into account in consideration of bail. Whilst it is appropriate for the Court to be compelled to step through each criteria, it may not be practical for a police officer to compulsorily step through each criteria even "to the extent practicable" as this may result in unnecessary legal challenge to procedural matters that take

²⁴ Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations*, 17 November 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>, p.43

²⁵ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.1

²⁶ Committee Transcript, Public Hearing, 30 May 2019, p.51; see also comments made by NAAJA, p.22 and DDHS, p.42

resources and attention away from responses that hold young people accountable and change behaviour.²⁷

Committee's Comments

- 3.19 The Committee understands that the potential amendment to proposed section 24A(2) is in response to operational concerns raised by the NT Police Service. As the Bill was developed over a 16 month period in collaboration with the Legislative Amendment Advisory Committee (LAAC), which includes representatives from the NT Police Service and the Department of the Attorney-General and Justice which is responsible for the administration of the *Bail Act 1982*, the Committee finds it concerning that issues regarding proposed section 24A did not come to light earlier.
- 3.20 The Committee is also concerned that the submission received from the Commissioner of Police did not raise the issue and expressed the view that “the Legislative Assembly should pass the Bill.”²⁸ The Committee further notes that representatives from the NT Police Service declined the Committee’s invitation to appear at the public hearing which would have provided an opportunity for concerns regarding the operationalisation of this provision to be aired and discussed.
- 3.21 The Department advised that proposed section 24A is modelled on sections 3A and 3B of the *Bail Act 1977* (Vic). However, in contrast to the Victorian legislation, the Bill provides that the Police and a Court must take into account the criteria listed ‘to the extent practicable.’²⁹ Given the inclusion of this phrase, and in light of Royal Commission recommendation 25.19(2), the Committee questions the need to implement the additional amendment and the extent to which section 24A as drafted would give rise to legal challenges to procedural matters as suggested by the Department.

Offence to breach bail

- 3.22 Clause 13 of the Bill replaces section 37B, ‘Offence to breach bail’, of the *Bail Act 1982*. As noted in the Explanatory Statement, in doing so the new section 37B:

separates the offence of breach of bail undertaking and breach of bail condition into two distinct subsections. Section 37B(1) provides the offence of breach of bail undertaking. A bail undertaking is a written promise that the person granted bail will appear in Court to answer a charge on a certain date and, if breached, results in a warrant being issued for that person’s arrest.

Section 37B(2) provides the offence of breach of bail condition. Bail conditions relate to all other requirements upon a person granted bail, and if breached, also results in a warrant being issued for that person’s arrest. However, subsection (4) provides that this offence will no longer apply to young people.³⁰

²⁷ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.1

²⁸ Northern Territory Police Service, Submission 22, p.1-2

²⁹ *Bail Act 1977* (Vic), s. 3B(1)

³⁰ Explanatory Statement, Youth Justice and Related Legislation Amendment Bill (Serial 85), <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.4

- 3.23 In briefing the Committee on the proposed amendments to the *Bail Act 1982*, Mr Brent Warren (General Manager Youth Justice, Territory Families) advised the Committee that:

Under these amendments police will continue to have the power to arrest and hold a young person who breaches their bail conditions and existing court processes will enable the young person's original charge to be heard earlier or for the bail to be reconsidered. These amendments to the *Bail Act* implement Royal Commission recommendation 25.19.³¹

- 3.24 While decriminalisation of the offence of breach of bail conditions was welcomed, concern was raised by the majority of submitters that since the Bill does not repeal the offence of breach of bail undertaking it fails to fully comply with Royal Commission recommendation 25.19(4). Supported by the Government, this recommendation proposed that children and young people should be excluded from the operation of section 37B in its entirety.³²

- 3.25 The Northern Territory Council of Social Service (NTCOSS) expressed the view that:

There is a lack of evidence to support retaining the offence to breach bail undertaking, and accordingly no logical reason for distinguishing between bail conditions and undertaking in relation to young people.³³

- 3.26 As the Human Rights Law Centre (HRLC) pointed out:

It must be acknowledged that unlike adults, children have less control and agency over their lives and many are reliant on parents or guardians for accommodation, transport, and assistance in meeting court or legal obligations.³⁴

- 3.27 Similarly, the Aboriginal Medical Services Alliance of the Northern Territory (AMSANT), advised the Committee that:

We welcome the removal of the offence of breach of bail conditions. These reforms will work to reduce the high remand rates, which currently sit around 77%, and to reduce pressures on both youth detention centres.

However, it is AMSANT's position that criminalising breach of bail undertaking is counterproductive and not in line with the intention of Recommendation 25.19 of the Royal Commission. In instances where a young person breaches their bail undertaking, the focus should be on engaging that young person, their family, carers or relevant service providers to ensure that adequate supports are put in place to ensure the young person's compliance with the bail undertaking.³⁵

- 3.28 In briefing the Committee on the Bill, Mr Warren advised that the proposed amendment is consistent with equivalent legislation in Queensland and Victoria.³⁶ In

³¹ Committee Transcript, Public Briefing, 1 April 2019, p.3

³² Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, Findings and Recommendations, 17 November 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>, p.43; Reform Management Office, Response to the 227 Recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Northern Territory Government, Darwin, March 2018, <https://nacchocommunique.files.wordpress.com/2018/03/download-nt-government-responses-to-227-ntrc-recommendations.pdf>, p.15

³³ NTCOSS, Submission 12, p.3

³⁴ HRLC, Submission 13, p.15

³⁵ AMSANT, Submission 11, p.2

³⁶ Committee Transcript, Public Briefing, 1 April 2019, p.3; see also *Bail Act 1980* (QLD), ss29(1) & 33; *Bail Act 1977* (Vic), s30A

response to the Committee's questions regarding the concerns raised in submissions, the Department further advised that:

Repealing the offence of breach of bail undertaking was given due consideration as part of the amendments to the *Bail Act 1982*. Members of the Legislative Amendment Advisory committee external to Government consistently raised their preference to remove breach of bail undertaking as an offence.

On balance, it was considered that consequences for failing to appear at court needed to remain as part of the current system.

Repealing this offence in the absence of any new policy response would create significant operational challenges for Police and courts to effectively manage young people through the current youth justice system.³⁷

Committee's Comments

3.29 While acknowledging the concerns raised by submitters, the Committee is satisfied with the Department's response and notes the comments made by the Minister in presenting the Bill:

This Bill aims to improve outcomes for young people currently in, or at risk of entering, the youth justice system, whilst also considering the safety of our community. Holding young people to account so that they learn lessons and change their behaviour must be the primary outcome of a youth justice system. Without a system that holds young people to account and programs designed to change their behaviour, young people are not likely to stop offending.³⁸

Amendment of Police Administration Act 1978

3.30 The Bill makes a number of amendments to the *Police Administration Act 1978*. Submissions were generally supportive of proposed amendments to section 123 'Arrest without warrant by members of Police Force' and section 135 'Disclosure of names'. However, as detailed below, significant concern was raised by the majority of submitters regarding proposed amendments to section 137 'Time for bringing person before court generally'.

Time for bringing person before court generally

3.31 Section 137 of the *Police Administration Act 1978* currently provides that where a person is taken into lawful custody and is not granted bail they must be brought before a court 'as soon as practicable after being taken into custody'. Noting that children and young people were being held in police custody for unreasonably long periods, the Royal Commission recommended that a time limit be legislated and proposed that:

Provision be made in either the *Police Administration Act* (NT) or the *Youth Justice Act* (NT) that children and young people may be held in custody without

³⁷ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.1

³⁸ Daily Hansard, *Day 5 – 20 March 2019*, <http://www.territorystories.nt.gov.au/jspui/handle/10070/306552>, p.9

charge for no longer than four hours. Any extension up to a further four hours may only be granted by a Judge.³⁹

3.32 Clause 21 of the Bill seeks to implement the intent of this recommendation by amending section 137 of the *Police Administration Act 1978* to provide that where a young person is taken into custody:

(a) every 4 hours for a period of up to 24 hours a member of the Police force holding the rank of Senior Sergeant or a higher rank must review and record the necessity of holding the youth for the purposes of enabling the youth to be questioned or investigations to be carried out; and

(b) at the expiry of the 24 hour period, the member may:

(i) apply to a Local Court Judge to hold the youth for an additional period of up to 4 hours; and

(ii) make subsequent applications to a Local Court Judge for the holding of the youth for each 4 hour period.

3.33 Concern was raised by a number of submitters that the proposed amendment to section 137 fails to fully implement Royal Commission recommendation 25.03(2) as outlined above. While acknowledging that the proposed amendment is a significant improvement on the current provision which simply refers to a 'reasonable period', concern was raised in respect of the length of time a young person may be held in police custody without charge and who may approve the continued police custody of young people.

3.34 For example, the Northern Territory Anti-Discrimination Commission (NTADC) submitted that:

The Bill introduces a time frame which is narrower and more precise than the current 'reasonable period'. However, the time period allowed in the Bill far exceeds that in the Royal Commission Report recommendation. The Bill provides for the detention of a young person for 24 hours before Police have to apply to a Local Court judge for additional 4 hour periods.

The 4 hour recommended period makes its way into the Bill only in the form that a police officer of rank of Senior Sergeant or above must review and record the necessity of holding the youth for the purpose of enabling the youth to be questioned or investigations to be carried out.

This is not the implementation of the Royal Commission recommendation and whilst providing some checks and balances does not bring external scrutiny to the harmful practice of detaining children and young people in police watch houses until after 24 hours. It far exceeds the time period for young people being detained in other jurisdictions in Australia such as Queensland, NSW and South Australia.⁴⁰

3.35 Noting that section 137 has "long been the subject of judicial criticism",⁴¹ NTLAC pointed out that:

³⁹ Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Volume 2B*, 17 November 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>, p.237

⁴⁰ Northern Territory Anti-Discrimination Commission, Submission 15, pp.4-5

⁴¹ NTLAC, Submission 21, p.6

the *Crimes Act 1914* (Cth) fixes a maximum period of detention of 2 hours for a person who appears to be under 18. Similarly, every other Australian jurisdiction (except Victoria) sets strict time limits for police to detain persons who have been arrested but not yet charged, without the authorisation of a court ...

By contrast, the Bill authorises police to detain children and young people for up to 24 hours without judicial oversight and approval. This is not only completely out of step with Australian standards, but it flies in the face of the alarming picture painted by the Royal Commission of the actual experience of children and young people in watch house detention in the Northern Territory, as graphically described in Volume 2B of the Commission's Final Report ... As the Royal Commission observed, section 4(c) of the *Youth Justice Act* establishes the principle that a youth should only be kept in custody on arrest "as a last resort and for the shortest appropriate period of time." It is submitted that Clause 21 of the Bill fails to support that principle.⁴²

- 3.36 While supporting the introduction of a legislated time limit for the length of time young people can be held in police custody without charge, the Office of the Children's Commissioner Northern Territory (OCC) questioned whether it was appropriate for Senior Sergeants to approve the continued custody of young people.

The OCC considers the proposed four hour period appropriate and consistent with other Australian jurisdictions. Additionally, the OCC acknowledges the necessity of extending that period in certain circumstances. However, it is the OCC's submission that the process of approval by a Senior Sergeant for four extensions up to 24 hours does not provide sufficient oversight or accountability in relation to young people being held in police custody. Instead, approval should be required from the relevant Superintendent.

As is reflected in section 4(c) of the *Youth Justice Act* and rule 10.2 of the *Beijing Rules*, young people held in police custody should be kept in police custody for the shortest possible period. Interstate, extensions can typically only be granted by judicial officers. The division between the people responsible for investigating the alleged offence (the police) and those responsible for approving the continued custody (the judiciary) is designed to create accountability and oversight in relation to young people being held without charge. If those responsible for investigating the alleged offence and those responsible for approving continued custody are the same person(s), there is no meaningful oversight or accountability. That is likely to commonly be the case if Senior Sergeants are able to approve the continued police custody of young people.

By requiring the relevant Superintendent's approval for each four hour extension up to 24 hours, as opposed to a Senior Sergeant, more robust oversight and accountability would be achieved.⁴³

- 3.37 As highlighted in the NTLAC submission, with the exception of Victoria and the ACT, equivalent legislation in other jurisdictions provide maximum initial investigation periods ranging from two to eight hours. Upon application to a judicial officer, or a Commissioned Police Officer in the case of Tasmania, extensions may be granted for periods ranging from an additional four to eight hours.⁴⁴ In the case of Western Australia the initial investigation period of six hours may be extended for a further six

⁴² NTLAC, Submission 21, pp.6-7

⁴³ Office of the Children's Commissioner Northern Territory, Submission 9, p.2

⁴⁴ *Crimes Act 1914* (Cth), ss 23C, 23D, 23DA; *Police Powers and Responsibilities Act 2000* (Qld), ss 403, 405, 406; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), ss 115, 118; *Crimes Act 1958* (Vic), s 464A; *Crimes Act 1900* (ACT), s 212; *Criminal Law (Detention and Interrogation) Act 1995* (Tas), s 4; *Summary Offences Act 1953* (SA), s 78

hours by a Senior Police Officer and further extensions of up to an additional eight hours may be granted by a judicial officer on more than one occasion.⁴⁵

- 3.38 However, as noted by the Department, it needs to be acknowledged that the aforementioned time limits are subject to 'carve out' provisions'.⁴⁶ That is, in determining how much of an investigation period has elapsed certain factors are not taken into account. Similar to the factors that are currently taken into consideration when determining what is a 'reasonable period' pursuant to section 138 of the *Police Administration Act 1978*, these lists of matters that can effectively 'stop the clock' can be quite extensive.⁴⁷ As the Committee heard, under existing provisions,

section 137 and 138 of the *Police Administration Act* set out an exhaustive list of reasons for why police might need to detain someone before charge. A couple of examples might be that a young person is tired and needs to rest. It might be that there is a requirement to travel from one place to another. It might be a requirement to undertake forensic sampling and the other common example is time taken for the appropriate investigating officers to arrive to take carriage. If you can appreciate in a remote setting in particular, there is often a need for detectives to come from an urban centre.⁴⁸

- 3.39 The Department further advised that the unique operational context of the Northern Territory requires a different approach to the timeframes that other jurisdictions may have:

We have attempted to keep this Bill very simple with a clear timeframe, the 24 hours. ... There is a need to balance the fact that police might be exercising these powers in very remote settings, they might be challenged particularly in the wet season in the Top End by weather and geography that means that it is not easy to actually move a young person from one area to another so by building in a reasonable timeframe before there is a requirement for judicial overview that creates some operational space for them to move.⁴⁹

- 3.40 While the Committee understands that judicial officers or Local Court Judges are generally unavailable after 10.00 pm,⁵⁰ clarification was sought regarding the OCC's suggestion that to avoid any conflict of interest it would be preferable if the relevant Superintendent rather than Senior Sergeants were responsible for approving the continued custody of young people. Apart from pointing out that the Senior Sergeant will not necessarily be the investigating officer, Mr Luke Twyford (Executive Director Strategy, Policy and Performance: Territory Families) advised the Committee that:

In making an approval a Senior Sergeant would be required to record that approval in writing and would therefore be open to scrutiny, transparency and challenge around their decision-making. ... I would suggest that there would not be conflicts of interest in that process and it would be incumbent upon any Senior Sergeant who did have a conflict, to therefore not put themselves in that position

⁴⁵ *Criminal Investigation Act 2006* (WA), s 140

⁴⁶ Committee Transcript, Public Hearing, 30 May 2019, p.67

⁴⁷ *Crimes Act 1914* (Cth), s 23C(7); *Police Powers and Responsibilities Act 2000* (Qld), s 404; *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), s 117; *Criminal Law (Detention and Interrogation) Act 1995* (Tas), s 4(4); *Summary Offences Act 1953* (SA), s 78(2A); *Criminal Investigation Act 2006* (WA), s. 141

⁴⁸ Committee Transcript, Public Hearing, 30 May 2019, p.71

⁴⁹ Committee Transcript, Public Hearing, 30 May 2019, p.67

⁵⁰ OCC, Submission 9, p.2

and to escalate that decision or to have another Senior Sergeant make that decision.⁵¹

Mr Brent Warren (General Manager Youth Justice: Territory Families) further noted that:

in relation to the designation of a Senior Sergeant as the reviewing officer. That is quite consistent with the police structures in the Northern Territory where a Senior Sergeant is the operational senior officer running operations in the Top End and in Central Australia and is consistent with decisions they are making around other aspects of custody. It fits into that framework operationally quite well.⁵²

Committee's Comments

- 3.41 While satisfied that the proposed amendment to section 137 of the *Police Administration Act 1978* implements the intent of Royal Commission recommendation 25.03(2), the Committee acknowledges the range of concerns raised in submissions regarding the approach taken in the drafting of this provision.
- 3.42 Taking into consideration the unique operational realities of the Northern Territory, the Bill favours a 24 hour time limit before review by a judicial officer is required, rather than setting a lower time limit and including 'carve out' provisions as is the case in equivalent legislation elsewhere in Australia.
- 3.43 While the Committee notes the Department's comment that "the proposed amendment has been workshopped at length",⁵³ the extent to which this approach is the most appropriate in the context of the Territory is yet to be tested. Similarly, the extent to which the designation of a Senior Sergeant as the reviewing officer, as opposed to the relevant Superintendent, will result in sufficient oversight and accountability remains to be seen.
- 3.44 For these reasons, and taking into account the findings of the Royal Commission, the Committee considers that it would be prudent for the Government to review the operation of this section as soon as practicable after the end of its first year of operation and present a report to the Legislative Assembly.

Recommendation 4

The Committee recommends that the Government review the operation of proposed section 137 of the *Police Administration Act 1978* and present a report to the Legislative Assembly as soon as practicable after the end of its first year of operation.

Amendment of Youth Justice Act 2005 and Youth Justice Regulations 2006

- 3.45 The proposed amendments to the *Youth Justice Act 2005* and associated Regulations were generally supported by submitters. As discussed below, a number

⁵¹ Committee Transcript, Public Hearing, 30 May 2019, p.67

⁵² Committee Transcript, Public Hearing, 30 May 2019, p.67

⁵³ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.3

of suggestions were, however, made as to how provisions in the Bill could be improved to more adequately reflect the intent and direction of the Royal Commission's recommendations, safeguard the rights and liberties of young people, and support accountability and transparency of the youth justice system.

Explanations by police officers

- 3.46 Clause 24 of the Bill amends section 15 of the *Youth Justice Act 2005* in relation to the factors that police officers must take into consideration when explaining information to young people. As noted in the Explanatory Statement:

Subclause(2) introduces a new subsection (1A) which requires that, if the youth appears to have insufficient English language skills to understand the explanation, a police officer must take reasonable efforts to obtain a qualified interpreter for the purpose of explaining information to young people. This amendment recognises that many youth experience language barriers when interacting with the police and the importance of young people knowing their rights during these interactions.⁵⁴

- 3.47 While generally supportive of the proposed amendment NAAJA suggested that the Bill include a requirement that:

a child is always asked if they want an interpreter, and that reasonable efforts must be made if the youth indicates they require an interpreter. Currently, this clause only requires a Police officer to make a decision on a youth's apparent ability to communicate in English. Amending this clause would mitigate the risk that a Police officer incorrectly determines whether a youth requires an interpreter.⁵⁵

- 3.48 In response, the Department advised the Committee that:

This provision has been drafted so that Police are responsible for providing an interpreter when a young person does not have sufficient English. It does not prevent a Police officer from asking a young person whether they want or need an interpreter. Stipulating in legislation what question a Police officer must ask a youth in every occasion would introduce a level of procedural compliance that is not necessary. Furthermore, it could create opportunity for legal challenge of non-compliance with procedural matters and therefore creates unnecessary administrative burden.

The proposed amendments encourage Police to make further inquiries if they have any doubt about a young person's level of understanding, which is guided by the case of *R v Anunga* (1976) 11 ALR 412 (The Anunga Rules).⁵⁶

- 3.49 Concern was also raised that the Bill does not go far enough when it comes to ensuring that young people have access to interpreters. As noted by the Northern Territory Stolen Generations Aboriginal Corporation (NTSGAC), "Aboriginal children should always have access to an interpreter in their own language to understand."⁵⁷ The Darwin Community Legal Service (DCLS) expressed a similar view:

⁵⁴ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.7

⁵⁵ NAAJA, Submission 2, p.6

⁵⁶ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.4

⁵⁷ Northern Territory Stolen Generations Aboriginal Corporation, Submission 4, p.1

Interpreters should be provided to all children who have contact with the justice system. The provision of interpreters in their own language for Aboriginal children is integral to understanding.⁵⁸

DDHS suggested that section 15 should be further amended to “*require* that an interpreter is provided if the child or young person indicates they want one”⁵⁹ rather than only requiring that a Police officer make reasonable efforts to obtain one.

3.50 However, as the Department pointed out that:

Including reference to the use of interpreters by Police is a new and important improvement in the legislation. The wording for this provision was developed in consultation with appropriate agencies to make sure that it would work in practice. For example, this takes into account the availability of interpreters and also recognises the significant progress of Government to record explanations of police cautions in languages that can be played to people in custody.⁶⁰

Committee’s Comments

3.51 The Committee is satisfied with the Department’s response and notes that, as guidelines for the conduct of Police when interrogating Aboriginal persons, the ‘Anunga Rules’ require that:

- where necessary, an interpreter should be present,
- care should be taken in administering the caution to ensure there is a proper understanding,
- leading questions should be avoided,
- even after an apparently frank and free confession is obtained, police should continue to investigate the matter to find proof of the commission of offences from other sources.⁶¹

Furthermore, the Committee understands that Northern Territory courts have excluded evidence of interrogations, on the basis of non-compliance with the ‘Anunga Rules’.⁶²

Arrest as last resort

3.52 In accordance with Article 37(b) of the *Convention on the Rights of the Child*,⁶³ Principle 4(b) of the *Youth Justice Act 2005* provides that ‘a youth should only be kept in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time’. Section 16 of the Act (Guidelines in relation to arrest of youths) then provides that the Commissioner of Police may, by general orders issued under the *Police Administration Act 1987*, issue guidelines in relation to the arrest of youths and the subsequent investigation of

⁵⁸ Darwin Community Legal Service (DCLS), Submission 3, p.1

⁵⁹ DDHS, Submission 17, p.14

⁶⁰ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.4

⁶¹ McCrimmon, L., “The Uniform Evidence Act and the Anunga Guidelines: Accommodation or Annihilation?”, *Northern Territory Law Journal*, Vol. 2(2), 2011, p.3

⁶² McCrimmon, L., “The Uniform Evidence Act and the Anunga Guidelines: Accommodation or Annihilation?”, *Northern Territory Law Journal*, Vol. 2(2), 2011, pp. 3-4

⁶³ Office of the High Commissioner (United Nations Human Rights), *Convention on the Rights of the Child*, 20 November 1989, <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>, p.10

offences committed or believed to have been committed by youths. As noted in the Explanatory Statement, these orders “govern the exercise of the discretion to arrest for children, young people and adults, providing that arrest should be used as a last resort.”⁶⁴

- 3.53 Acknowledging that children and young people “are more vulnerable than adults and require further protections and safeguards to prevent unnecessary arrest”,⁶⁵ and noting that the Royal Commission found that the Police did not always comply with the requirement to use arrest as a measure of last resort,⁶⁶ clause 25 of the Bill replaces section 16 under the heading ‘Arrest as last resort’:

This section requires that a police officer may only arrest a youth as an action of last resort. Police are guided by factors set out in section 22 of the *Youth Justice Act 2005* as to whether or not it is appropriate to charge a youth or issue the youth with a summons.⁶⁷

- 3.54 In briefing the Committee on the Bill, the Department noted that the proposed amendment to section 16 “aligns with other jurisdictions such as New Zealand and Queensland which have specific provisions around arrest powers in relation to children”⁶⁸ and was a ‘key change’ when it came to police practice and reducing the number of young people taken into police custody:

enshrining arrest as the action of last resort when police are responding to crime. That was already established in their General Orders but is now being lifted to legislation to make sure it is given premier status.⁶⁹

- 3.55 The proposed amendment to section 16 was overwhelmingly supported by submitters. For example, NAAJA noted that:

We view that it is necessary that police powers of arrest are legislated and not remain a practice of procedure under issued General Orders of the Commissioner of Police of the Northern Territory. NAAJA has continued to advocate and raise concerns with NT Police on the inappropriate arrest of Aboriginal youth and non-compliance of General Orders in this respect.⁷⁰

- 3.56 Similarly, DDHS pointed out that:

The amendment is consistent with Australia’s obligations under international law. ... Evidence shows that the experience of arrest can be particularly traumatising for a child or young person and should only be exercised as a last resort. Arrest itself has a high likelihood of exacerbating the underlying causes of offending and facilitate further, more serious offending as a child or young person becomes further enmeshed in the system.

⁶⁴ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.7

⁶⁵ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.7

⁶⁶ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.7; see also Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Volume 2B*, 17 November 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>, p.230

⁶⁷ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.7

⁶⁸ Committee Transcript, Public Briefing, 1 April 2019, p.4

⁶⁹ Committee Transcript, Public Briefing, 1 April 2019, p.12

⁷⁰ NAAJA, Submission 2, p.9

The Royal Commission found that police sometimes fail to comply with the requirement to use arrest only as a last resort. Evidence to the Royal Commission suggested that police (both Top End and Central Australia), often pay little regard to the factors set out at 14.1-14.5 of the *Police General Orders*. Police routinely exercise their discretion to arrest rather than use the less restrictive options available under section 22 of the *Youth Justice Act* such as summons, notice to attend or by engaging less intrusive means like contacting a parent or guardian.

The proposed amendment is essential to ensure that police powers of arrest are exercised consistent with international law.⁷¹

3.57 However, in responding to the Committee's written questions, the Department advised that it was currently considering further amendments to the Bill to "remove clause 25, and not amending section 16 of the *Youth Justice Act 2005*."⁷² The Committee heard that members of the LAAC were advised of this development at an out of session meeting the day prior to the public hearing.⁷³ During the public hearing Mr Russell Goldflam (Lawyer: NTLAC) advised the Committee that:

in relation to the – I do not think it is too strong a term to use – bombshell that was dropped on us yesterday afternoon when there was an indication given that the clause in the Bill which would provide the *Youth Justice Act* be amended to require that police only arrest children as a last resort might be abandoned.

The Royal Commission did not, in terms, recommend that provision be introduced into the *Youth Justice Act*. The Royal Commission recommended in recommendation 25.2 that Northern Territory Police undergo training every two years to reinforce their obligations under the *Police Administration Act*, the *Youth Justice Act* and Police General Order, in relation to the exercise of their discretion to arrest children and young people.

We were flabbergasted to be told yesterday afternoon that this apparently radical new provision cannot or may not be able to go ahead because it is too confusing. The fact is that the General Orders that police are obliged to comply with already state that arrest must be used as a last resort. The *Youth Justice Act* already states that children must only be kept in custody as a last resort, and indeed the international conventions to which Australia is a signatory say that as well, and I am talking about the Convention on the Rights of the Child. Article 37(b) of that convention requires that state parties, of which Australia is one, shall ensure that arrest is a last resort.

The Royal Commission did not in turn say pass a law saying arrest should be a last resort. It is quite clear when you look at their report that it was their belief, as it was many of ours, that arrest was already a measure of last resort under Northern Territory law, and this part of the Bill has only been introduced to consolidate that rather than to change it.⁷⁴

3.58 By way of clarification Ms Seranie Gamble (Director Law Reform: Territory Families) informed the Committee that:

We have conflated what is in policy into legislation, but only as it applies to young people, which has led to an operational issue around how this plays out in practice. It also has to be read in line with section 4 of the *Youth Justice Act*, which is an overarching principle about young people being in custody as a

⁷¹ DDHS, Submission 17, pp.13-14

⁷² Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.1

⁷³ Committee Transcript, Public Hearing, 30 May 2019, p.76

⁷⁴ Committee Transcript, Public Hearing, 30 May 2019, p.48

measure of last resort and has led to some uncertainty around arrest and being placed into a custodial facility as an action of last resort.⁷⁵

3.59 Mr Brent Warren (General Manager Youth Justice: Territory Families) further explained that:

A couple of examples where there might have been some confusion from some quarters is in relation to police doing their first response, their first intervention out in the field. In the community, they might be called to an incident, or they might happen across an incident occurring, they need to step in and intervene and use their powers, in some cases, to make people safe, whilst they figure out what has been occurring and what to do next.⁷⁶

In an extreme case that might mean that they actually have to intervene in violence that is actually happening in front of them and that would mean that they have to use their powers to actually put hands on people and stop and detain them on the side of the road whilst they establish what to do next. That means that they are arresting someone on the side of the road.

What we wanted to do is make sure that there was a distinction between what police do tactically when they go out and keep people safe in the community and deal with incidents that are in front of them versus the investigative process and the custody processes that they apply for kids who might go into a watch house setting.⁷⁷

Committee's Comments

3.60 In briefing the Committee on the Bill the Department advised that the proposed section 16 represented a 'key change' when it came to police practice and reducing the number of young people taken into police custody. As such, while noting the Department's explanation as to why it was now considering removing clause 25 and not amending section 16 of the *Youth Justice Act 2005*, the Committee finds it particularly concerning that this matter was not resolved during the 16 month consultation period leading up to the introduction of the Bill.

3.61 Moreover, the Committee notes that it was not raised as an issue of concern in the submission from the Commissioner of Police, Mr Reece Kershaw APM.⁷⁸ Indeed, Commissioner Kershaw not only endorsed the Bill but specifically noted that it would:

minimise the use of custody and ensure it is imposed as a last resort and for the shortest appropriate period of time. This is consistent with the principle set out in the *Convention on the Rights of the Child* that no child is deprived of their liberty unlawfully or arbitrarily, and that detention of a child is only used as a measure of last resort and for the shortest appropriate period of time.⁷⁹

3.62 In light of Commissioner Kershaw's comments and given that representatives from NT Police declined the Committee's invitation to appear at the public hearing, the Committee is also concerned that it did not have an opportunity to thoroughly explore the legal implications and operational challenges the Department has since advised the proposed new section 16, 'Arrest as last resort', may have for Police.

⁷⁵ Committee Transcript, Public Hearing, 30 May 2019, p.77

⁷⁶ Committee Transcript, Public Hearing, 30 May 2019, p.77

⁷⁷ Committee Transcript, Public Hearing, 30 May 2019, p.77

⁷⁸ Northern Territory Police Service, Submission 22, p.1

⁷⁹ Northern Territory Police Service, Submission 22, p.1

Interview of youth

3.63 Clause 26 of the Bill amends section 18 of the *Youth Justice Act 2005* which provides for the requirement in relation to Police interviews of young people. Prior to interviewing a young person or causing them to do anything in connection with the investigation of the offence, proposed section 18(1A) requires that the Police officer must do the following:

- (a) inform the youth of the youth's ability to access legal advice and representation;
- (b) provide the youth with access to legal advice and representation in a place and a manner that allows the youth privacy;
- (c) inform the youth of the youth's ability to contact a friend, relative, a responsible adult in respect of the youth or other support person who must be present while the officer interviews the youth or the youth does the act.

Section (1B) further provides that if a youth exercises their right to silence, which may be communicated through legal representation, Police must not interview the youth.

3.64 The proposed amendment to section 18 was supported and welcomed by submitters. As NAAJA pointed out:

We view that it is necessary that police procedures in the interrogation and interview of youths are legislated and not remain a practice of procedure under issued General Orders of the Commissioner of Police of the Northern Territory.

Aboriginal youth when interviewed by police are vulnerable by reason of their age, background, language, health and reasons of disability, intellectual disability disorders. NAAJA has continued to advocate and raise concerns with NT Police on the appropriate questioning of Aboriginal youth and non-compliance of General Orders in this respect.⁸⁰

3.65 However, DDHS and NTLAC raised concerns as to the extent to which the proposed amendment fully implements Royal Commission recommendation 25.4. DDHS suggested that:

proposed s 18(1A) be made more prescriptive, *requiring* that youths must not be interviewed until they have sought and *obtained* legal advice as per Recommendation 25.4 of the Royal Commission. We recommend that s18 (1A)(b) be amended to include: "*inform the lawyer and give the lawyer the opportunity to speak to the youth on request by the lawyer or the youth.*" We support the amendment in s18(1A)(c) which requires that a support person must be present during the interview.⁸¹

3.66 Ms Fiona Kepert (Lawyer: NT Legal Aid Commission) advised the Committee that there were a range of benefits from ensuring that a young person obtains legal advice and support prior to being questioned:

We address things like risks of suicide, and we can ask them if there are other family members they want contacted to reassure them that someone knows where they are. You might demystify the process ... you can help them to understand what will happen next, how long this will take and reduce the trauma ... It may also lead to better cooperation with young people. They might be on the phone saying I do not have to do this, I know my rights. You can explain in

⁸⁰ NAAJA, Submission 2, p.9

⁸¹ DDHS, Submission 17, p.14; NTLAC, Submission 21, p.3

what circumstances they do or do not have to do that and that results in a better dialogue with police.⁸²

Ms Kepert further advised the Committee that at times:

I have had police call and say, look, we have a young person here they said they did not want to speak to a lawyer but we think they should. It is a good practice and should be legislated for.⁸³

3.67 In response, the Department noted that the wording of this section reflects the practicality that legal advice may not necessarily be available.⁸⁴ The Committee also sought clarification in situations where a young person may initially state that they want to access legal representation and then change their mind due to the time they had been held in custody. Mr Brent Warren (General Manager Youth Justice: Territory Families) subsequently advised the Committee that:

In practical terms, if the police went ahead and conducted that interview, there is an obligation on them to actually step out the fact that the child had changed their mind and they would have to demonstrate what it was that changed the child's mind.

I would suggest that if it was the duration of time, if they had been in custody for a long period, which would be a factor that mitigated against that being an admissible interview later on. They are potentially exposing themselves to challenge.

I think the other component to this outside the legal advice, is to recognise that young people have to have a responsible adult with them. If a young person, 15 years was to be interviewed, they could not be interviewed unless they had a responsible adult, be that a parent, relative or at worse case it could be someone from the Register of Appropriate Support Persons or it could potentially be a Territory Families staff member. There would always be an adult, in an impartial position, to help protect their rights.⁸⁵

Committee's Comments

3.68 The Committee is satisfied with the Department's response. To ensure greater accountability and transparency, the Committee understands that, in accordance with proposed section 18(4), clause 44 of the Bill amends regulation 3 of the Youth Justice Regulations 2006 to require that police officers must keep a record of the steps taken to comply with their powers under section 18 when interviewing young people.⁸⁶

3.69 In addition to the above, the Committee notes that the proposed amendment to section 135 of the *Police Administration Act 1978* regarding 'Disclosure of Names' removes the requirement for Police to obtain consent of the person being held in custody prior to disclosing their name and location to a legal practitioner. As highlighted in the Explanatory Statement:

⁸² Committee Transcript, Public Hearing, 30 May 2019, p.52

⁸³ Committee Transcript, Public Hearing, 30 May 2019, p.53

⁸⁴ Committee Transcript, Public Hearing, 30 May 2019, p.69

⁸⁵ Committee Transcript, Public Hearing, 30 May 2019, p.70

⁸⁶ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.14

The effect of this amendment is to ensure that legal services are immediately notified whenever a youth is brought into police custody. This amendment aims to move towards a Custody Notification Service.⁸⁷

Youth to be brought to court promptly

3.70 Section 27 of the *Youth Justice Act 2005* currently provides that where a youth is charged with an offence and is not released from custody they must be brought before the Court as soon as practicable and within 7 days after arrest, or immediately released. Given that the Royal Commission found that children and young people were being held in police custody for unreasonable periods of time, the Bill replaces this section to:

limit the time young people spend in custody awaiting an appearance by prescribing explicit time limits ... The new subsection (1) requires that a youth must be brought before the Court as soon as practicable and within 24 hours of their charge or on the next business day after their charge.⁸⁸

3.71 Proposed subsection (3) provides that a youth should be immediately released from police custody if they are not brought before the Court within these timeframes. However, proposed subsection (4) provides that this timeframe may be extended on application to a Local Court Judge. NTCOSS, Jesuit Social Services (JSS) and Children's Ground (CG), raised concerns that since the Bill does not specify an upper limit on the extension of time that can be granted by a Judge it effectively lessens existing provisions.⁸⁹

3.72 However, as highlighted in the Explanatory Statement:

Subsection (6) provides that a Judge may grant the extension of time if the Judge is satisfied that there are circumstances beyond the control of the person in whose custody the youth is, that prevents them from bring the youth before the Court. This can include emergency situations or a natural disaster, riotous conduct in a remote community where the youth is located. There is a non-exhaustive list of examples included in a note in subsection (6).⁹⁰

3.73 The Department further advised the Committee that:

the "24 hour or the next business day" test would be a relevant consideration by the Judge in allowing any extension of time. The operational impact of proposing an upper limit could place impracticable limits on the circumstances outside the control of the Police, as listed in the Bill. The Bill in its current form has been designed to achieve operational requirements that allows some flexibility around complex circumstances that cannot be prescribed in legislation.⁹¹

⁸⁷ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.6

⁸⁸ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.8

⁸⁹ NTCOSS, Submission 12, p.4; Jesuit Social Services (JSS), Submission 18, p.5; Children's Ground (CG), Submission 24, pp.4-5

⁹⁰ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.9

⁹¹ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.5

Committee's Comments

- 3.74 The Committee is satisfied with the Department's response and notes that proposed subsection 27(7) further provides that if a Judge grants an extension of time, 'the Judge must make orders in relation to when and how the youth must be brought before the Court.'

Proceedings to be in closed court

- 3.75 As is the case in Victoria, Western Australia, Queensland and the Commonwealth,⁹² section 49 of the *Youth Justice Act 2005* currently adheres to an open court policy providing that, unless it appears to the Court that justice will be best served by closing the Court, criminal proceedings against a youth must be held in open court.
- 3.76 To avoid the potential stigmatisation and detrimental effects of labelling young people as criminal or delinquent and the 'naming and shaming' of young people, clause 33 of the Bill gives effect to Royal Commission recommendation 25.25 by replacing section 49 to provide that all proceedings involving young people will be in a closed court with the court retaining a discretion to publish all or part of a proceeding upon application.
- 3.77 While there was strong support for this amendment, concerns were nevertheless raised regarding the extent to which it supported accountability and transparency of the youth justice system. As the Darwin Press Club (DPC) pointed out:

The principle of open justice dates back more than a century and has been repeatedly held to be a fundamental feature of the courts in Australia. There are real concerns that if court proceedings are not held in public, the administration of justice may be corrupted. The media is the link between the courts and the public. It is the Press Club's committee's view that the Bill as presented improperly and unnecessarily severs that link and removes a crucial pillar or scrutiny from the youth justice sector at a time when such scrutiny is more needed than ever.⁹³

- 3.78 Relevantly, Article 14(1) of the *International Covenant on Civil and Political Rights* provides that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law should be made public except where the interests of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.⁹⁴

⁹² see for example: *Children, Youth and Families Act 2005* (Vic), s 523; *Children's Court Western Australia Act 1988* (WA), s 31; *Children's Court Act 1992* (Qld), s 20; *Judiciary Act 1903* (Cth), s 77RD; *Federal Court of Australia Act 1976* (Cth), s 378AE; *Family Law Act 1975* (Cth), s 97

⁹³ Darwin Press Club, Submission 1, p.2

⁹⁴ Office of the High Commissioner (United Nations Human Rights), *International Covenant on Civil and Political Rights*, 16 December 1966, <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, p.8

3.79 Acknowledging the need to find a balance that addresses each of the imperatives highlighted in Article 14, the Information Commissioner of the Northern Territory (ICNT) submitted that it is:

important for members of the community to have confidence in youth justice processes. Appropriate reporting on the work of the Court and the substance of individual cases is a significant aspect of accountability to the public.⁹⁵

3.80 In a similar vein, Australia's Right to Know Coalition of Media Companies (ARTK) expressed the view that:

the proposed section has the most adverse impact upon open justice and is inhibitive of freedom of speech. We are of the view that the current section 49 should be adapted to allow for the interests of open justice and public interest news reporting to be accommodated, as well as safeguarding the interests of youths involved in criminal proceedings ... We hope the Northern Territory can strike a balance between the interests of open justice, public interest news reporting and youths involved in criminal proceedings.⁹⁶

3.81 As summarised in Appendix 2, while it is not uncommon for court proceedings relating to young people to be closed to the public, all other jurisdictions in Australia with the exception of Tasmania incorporate specific provisions which permit representatives of the media to be present unless the Court directs otherwise. In contrast to equivalent legislation elsewhere, proposed section 49(3) only provides that any person, other than those listed in section 49(2), may seek the leave of the Court to attend the proceedings. As noted by OCC, in respect of the media:

that application will be decided on by the judge after hearing submissions from relevant parties. If the media is granted leave to be in the court room, they are permitted to publish details of the proceedings, provided the publication contains no child-identifying information except in emergency situations. It is the submission of the OCC that these provisions strike an appropriate balance between maximising the prospects of a young person's rehabilitation while maintaining accountability in the court room.⁹⁷

3.82 However, as ARTK pointed out:

It is onerous for representatives of the media to have to make an application on each occasion to be permitted to be present in children's court proceedings. With the introduction of an identification restriction such as that proposed in the new section 50, the media's right to report on children's court proceedings would not be unconstrained. Media representatives are well aware of what they are prohibited from publishing by virtue of statutory restrictions on publication, which would provide sufficient protection for youths involved in criminal proceedings.⁹⁸

3.83 Following introduction of the Bill, concerns regarding the absence of provisions permitting media representatives to be present during criminal court proceedings in relation to young people was the subject of a number of articles in the NT News. On March 28, the NT News quoted the Minister for Territory Families, the Hon Dale Wakefield, as stating that she would be open to a model similar to that operating in New South Wales and Victoria "or one in which journalists could enrol on a register

⁹⁵ Information Commissioner of the Northern Territory, Submission 8, p.3

⁹⁶ Australia's Right to Know Coalition of Media Companies, Submission 7, pp.3 & 5

⁹⁷ OCC, Submission 9, p.2

⁹⁸ ARTK, Submission 7, p.3

which would allow them entry into the youth court.”⁹⁹ In responding to the Committee’s written questions, the Department noted that:

Territory Families can advise that we have been asked to prepare possible amendments to the Bill to enable an accredited member of the press to be listed in the proposed subsection 49(2) without the need to seek leave to be present.¹⁰⁰

Committee’s Comments

- 3.84 As advised by Mr Luke Twyford (Executive Director Strategy, Policy and Performance: Territory Families), proposed section 49 is modelled on section 24 of the *Youth Court Act 1993* (SA).¹⁰¹ In contrast to the Bill, the Committee notes that section 24(f)(ii) of that Act provides that if the proceedings relate to an offence or an alleged offence ‘a genuine representative of the news media’ is permitted to be present in the Court.
- 3.85 Taking into consideration the Department’s advice, equivalent provisions elsewhere in Australia, and the provisions set out in proposed section 50 regarding ‘Restriction of publication’, the Committee is of the view that in the interests of transparency and accountability proposed section 49 should be amended to provide that a media representative may be present for criminal proceedings without the need to seek the leave of the Court.

Recommendation 5

The Committee recommends that proposed section 49 of the *Youth Justice Act 2005* be amended to provide that if proceedings relate to an offence or alleged offence, a genuine representative of the news media may be present.

Restriction of publication

- 3.86 Clause 33 also replaces the current section 50 ‘Restriction of publication of proceedings’, by removing “the onus upon the Court to order that information relating to proceedings in the Youth Justice Court must not be published.”¹⁰² While all submitters were supportive of a statutory non-publication regime, a number of concerns were raised regarding the drafting of this section.

Proposed Section 50(1)

- 3.87 Modelled on section 534(1) of the *Children, Youth and Families Act 2005* (Vic), proposed section 50(1) provides that:
- (1) Subject to this section, a person who publishes a report of, or information relating to, proceedings in the Court or proceedings in any other court arising

⁹⁹ Sorensen, H., “Territory Families Minister Dale Wakefield foreshadows youth court backdown”, *NT News*, 28 March 2019, p.1

¹⁰⁰ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.6

¹⁰¹ Committee Transcript, Public Hearing, 30 May 2019, p.80

¹⁰² Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.11

out of proceedings in the Court that contains any particulars likely to lead to the identification of the following is guilty of an offence:

- (a) the particular venue of the Court in which the proceeding was heard;
- (b) the youth or other party to the proceeding;
- (c) a witness in the proceeding.

3.88 NTLAC, ARTK, Human Rights Law Centre (HRLC) and DPC questioned whether these provisions were drafted too broadly. In relation to prohibiting identification of the particular venue of the Court in which the proceeding was heard, the NTLAC expressed the view that it is “unnecessary, not in the public interest and not recommended by the Royal Commission.”¹⁰³ Noting that Victoria is the only jurisdiction which prohibits the identification of the particular venue of the Court, ARTK suggested that:

given the NT does not have a district court, the proceedings could only be held in a Local or Supreme Court venue. Those buildings are well-known to those in the community, particularly in regional communities. In the circumstances, a publication ban of this nature won't achieve the intention.¹⁰⁴

3.89 However, as Mr Peter Shoyer (Information Commissioner of the Northern Territory) pointed out:

In terms of the venue, I think there is a valid point, particularly in relation to a venue which is in a remote Indigenous community where someone is going to be identifiable through the identification of the venue. If the venue is Darwin, it might not be as easy to see that as an identifying feature.¹⁰⁵

3.90 In relation to proposed section (50(1)(b), DPC suggested that:

any statutory non-publication provisions on a child's identity should apply only to a “person who is a child”. This would allow for fair, accurate and complete reports of sentencing exercises involving adult offenders who have relevant youth criminal histories.

The Press Club's committee is also of the view that, on rare occasions, the public interest in knowing an offender's identity outweighs any reasons which would justify prohibiting an offender's identity. For this reason, the committee recommends that any non-publication regime not apply where an offender is committed to the Supreme Court on charges relating to offending which has resulted in death of another person. The Supreme Court ought to also be given the discretionary power to allow for the publication of an offender's identity in any circumstances it sees fit.¹⁰⁶

3.91 During the public hearing Mr Craig Dunlop (Vice President: Darwin Press Club) further pointed out to the Committee that:

Sometimes young people commit homicides, sometimes they end up serving very long sentences of imprisonment and sometimes they commit offences days before their 18th birthday and are sentenced in a way that is very similar to the way that an adult would be sentenced.

¹⁰³ NTLAC, Submission 21, p.3

¹⁰⁴ ARTK, Submission 7, p.3

¹⁰⁵ Committee Transcript, Public Hearing, 30 May 2019, p.5

¹⁰⁶ DPC, Submission 1, p.4

In cases such as that, particularly the Supreme Court has been more willing to overturn non-publication orders made by the Youth Justice Court and allow for the publication of that person's name because the courts, in instances such as that, realise that those kind of young offenders really do not have very good prospects of rehabilitation, or they may pose a real danger to the public on their release. The public's right to know really does overcome the proper public policy interest that there is in that young person's privacy.¹⁰⁷

3.92 However, as noted by the Department,¹⁰⁸ proposed section 50(2)(b) provides that it is not an offence to publish "a report or information containing particulars of the youth who is the subject of the proceedings with the consent of the youth." Furthermore, pursuant to proposed subsection (3), "a person may apply to the Court for permission to publish the report or information" and (4) the Court may grant permission if it is satisfied that:

- (a) the circumstances giving rise to the application are an emergency; and
- (b) publication is reasonably necessary for the safety of:
 - (i) the youth or a witness in the proceedings; or
 - (ii) any other person in the community.

3.93 With regards to proposed section 50(1)(c), ARTK advised the Committee that Victoria is the only jurisdiction which prohibits identification of any other party to, or witnesses in the proceedings irrespective of whether they are a child or an adult.¹⁰⁹ HRLC also expressed concerns regarding the breadth of the prohibitions noting that:

Whilst we commend the amendments aimed at implementing recommendation 25.25 of the Royal Commission we submit that the restrictions on publication in s50(1) may be too broad. ... The Royal Commission was concerned with protecting the identity of children and young people involved in court proceedings and other vulnerable persons which may include a 'victim' and/or 'child or young person'. We would suggest restricting the categories to vulnerable persons such as 'victim' and/or 'child or young person'.¹¹⁰

However, given the size and nature of the Northern Territory community, Mr Shoyer expressed the view that while it would not necessarily always be the case, there was the possibility that identification of witnesses might well lead to identification of the youth concerned.¹¹¹

3.94 In response to the Committee' questions regarding proposed section 50(1), the Department advised that:

The provision was included to minimise the likelihood of young people being identified. The Northern Territory has a small population and in particular where Youth Court proceedings are held in remote communities the identification of a court venue can inadvertently lead to the identification of a young person. ... subsections 50(1)(b) and (c) will help protect the privacy of young people and witnesses in proceedings.¹¹²

¹⁰⁷ Committee Transcript, Public Hearing, 30 May 2019, pp.8-9

¹⁰⁸ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, pp.6-7

¹⁰⁹ ARTK, Submission 7, p.4 and associated Annexure, pp.5-9

¹¹⁰ HRLC, Submission 13, p.16

¹¹¹ Committee Transcript, Public Hearing, 30 May 2019, p.5

¹¹² Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, pp.6-7

The Committee further notes that section 15A of the *Children (Criminal Proceedings) Act 1987* (NSW) also prohibits publication of information which may identify the youth, witness or any other party that connects them with criminal proceedings if such relate to the person who was a child at the time even if he or she is now an adult.

- 3.95 In addition to the concerns outlined above, NTLAC submitted that the Bill should be amended to include “a provision expressly permitting identifying information in relation to Youth Justice Court matters to be provided to legal service providers”,¹¹³ noting that:

Since the Royal Commission, NTLAC has encountered a hurdle which has impeded it from delivering effective services to parties to child protection proceedings under the *Care and Protection of Children Act* (NT), namely the practice by the Solicitor for the NT, representing Territory Families, founded on its interpretation of s308 of that Act (titled “Confidential information”) of refusing to provide NTLAC and other relevant legal services with unredacted copies of daily court lists in the Family Matters Division of the Local Court.

Without access to the court lists, legal services are prevented from readily identifying current or past clients, and are also unable to identify potential conflicts requiring referral of a client to another service provider. As the Court proceedings are closed, legal services are not able to attend in court on a duty basis to be available to assist unrepresented parties. These factors combined impact on the access that parents have to legal assistance. It would be a concern if the proposed amendments were to unintentionally lead to the same result in youth justice proceedings.¹¹⁴

- 3.96 Noting that “it was not the intention of the Bill to restrict information currently provided to legal representatives to enable young people to access legal assistance”,¹¹⁵ Mr Luke Twyford (Executive Director Strategy, Policy and Performance, Territory Families) advised the Committee that:

The care and protection matters that have been raised, and the concerns drawn on to discuss this Bill, are a known issue. They relate to whether the duty lawyer in the court on the day can be informed of the care and protection proceedings that are on that day, where there is no legal representation already aligned to that family, or whether it is the publication of the full list to all legal service providers who may be interested or able to show up to the courtroom.

It is about finding the balance between finding the whole publication of private matters within the courtroom versus informing only the selected responsible party of those family members who need representation. It is an operational matter, one we are alive to and want to address.¹¹⁶

The Department further noted that, as an operational matter relating to the administration of court processes, it was not something that necessarily needed to be addressed in the statute books.¹¹⁷

¹¹³ NTLAC, Submission 21, p.5

¹¹⁴ NTLAC, Submission 21, pp.4-5

¹¹⁵ Territory Families, Responses to Written Questions – 29 May 2019, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.8

¹¹⁶ Committee Transcript, Public Hearing, 30 May 2019, p.82

¹¹⁷ Committee Transcript, Public Hearing, 30 May 2019, p.82

Committee's Comments

- 3.97 The Committee is satisfied with the Department's response regarding proposed section 50(1). While noting the concerns raised in submissions and the fact that the proposed provisions may be more prescriptive than those applying elsewhere, the Committee is mindful of the size and nature of the Northern Territory community and the need to ensure the privacy of young people and others who may be associated with court proceedings.
- 3.98 The Committee also notes the Department's response to NTLAC's concern regarding the provision of relevant information to legal organisations to ensure that young people have access to legal assistance. As an operational issue that the Department is aware of and is in the process of addressing, the Committee is satisfied that it is not a matter that needs to be addressed in the Bill.
- 3.99 In relation to proposed section 50(2)(b), the Committee identified a minor drafting error. To ensure that the Bill is drafted in a sufficiently clear and precise manner, the Committee is of the view that the Bill should be amended by inserting the word 'the' before the second instance of the word 'youth' in section 50(2)(b).

Recommendation 6

The Committee recommends that proposed section 50(2)(b) of the *Youth Justice Act 2005* be amended by inserting the word 'the' before the second instance of the word 'youth'.

Proposed Section 50(7)

- 3.100 Concern was also raised regarding proposed section 50(7) which lists the particulars that are deemed likely to lead to the identification of a person mentioned in section 50(1). These 'particulars' include the following:
- (a) the name, title, pseudonym or alias of the person;
 - (b) the address of any premises at which the person resides or works, or the locality in which those premises are situated;
 - (c) the address of a school attended by the person or the locality in which the school is situated;
 - (d) the physical description or the style of dress of the person;
 - (e) any employment or occupation engaged in, profession practices or calling pursued, by the person or any official or honorary position held by the person;
 - (f) the relationship of the person to the identified relatives of the person or the association of the person with identified friends or identified business, official or professional acquaintances of the person;
 - (g) the recreation interests or the political, philosophical or religious beliefs or interests of the person;
 - (h) any real or personal property in which the person has an interest or with which the person is otherwise associated.

3.101 ARTK suggested that the ‘particulars’ in this section were:

too prescriptive and may prevent publication of information which would not be objectively likely to lead to the identification of a person. ARTK submits that the proposed section 50(7) should be omitted, and the approach taken in New South Wales of not listing such particulars should instead be adopted.¹¹⁸

3.102 DPC expressed a similar concern, noting that:

The Press Club’s committee is of the view that section 50(7) of the Bill is unnecessarily proscriptive and inherently vague. For example, a report detailing “the physical description of the style of dress of the person” would be prohibited, but this provision does not specify whether it would be an offence to describe a specific item of clothing a person was wearing, whether at the time of an offence or at any other time. All this is despite a person’s style of dress not typically being objectively capable of identifying that person. Section 50(7) would also prohibit detailing a person’s recreational interests and philosophical beliefs, details which would seldom objectively identify any person, but might be in the public interest, for example if a young person had a lawful recreational interest in firearms and went on to use a firearm in the commission of an offence.¹¹⁹

3.103 As is the case in equivalent legislation in the ACT, the Commonwealth, New South Wales, Tasmania and Western Australia,¹²⁰ DPC submitted that:

a phrase such as “any particular likely to lead to the identification of the young person” would provide a preferable objective standard against which a court could judge any alleged breach of a statutory non-publication regime. Such a phrase would allow the media to report in a factually accurate manner while also protecting the anonymity of young offenders.¹²¹

3.104 While DPC further suggested that this would be similar to that provided for in section 6 of the *Sexual Offences (Evidence and Procedure) Act 1983* (NT),¹²² it is noted that section 6 is, in fact, more akin to equivalent provisions in Queensland and South Australia which prohibit publication of the name, address, school, place of employment or any other particulars that may identify a youth to whom the proceedings relate or who is a witness in the proceedings.¹²³

3.105 The Committee notes that proposed section 50(7) replicates section 534(4) of the *Children, Youth and Families Act 2005* (Vic). However, following a review of the *Open Courts Act 2013* (Vic), on 2 May 2019 the Victorian Parliament passed the *Open Courts and Other Acts Amendment Bill 2019* which amended section 534(4) to:

seek greater consistency with the legislation in other jurisdictions (noting section 534(4) is broader than analogous provisions in other jurisdictions), without the removal of the deeming provision entirely.¹²⁴

¹¹⁸ ARTK, Submission 7, p.4

¹¹⁹ DPC, Submission 1, p.6

¹²⁰ *Criminal Code 2002* (ACT), s.712A; *Crimes Act 1914* (Cth), s15YR; *Children (Criminal Proceedings) Act 1987* (NSW), s.10; *Youth Justice Act 1997* (Tas), s30; *Children’s Court of Western Australia Act 1988* (WA), s36

¹²¹ DPC, Submission 1, p.6

¹²² DPC, Submission 1, p.6; Committee Transcript, Public Hearing, 30 May 2019, p.12

¹²³ *Sexual Offences (Evidence and Procedure) Act 1983* (NT), s6; *Youth Justice Act 1992* (Qld), s301 and definition of identifying information in schedule 4; *Young Offenders Act 1993*(SA), s63C

¹²⁴ Parliament of Victoria, Parliamentary Debates (Hansard), Legislative Council Fifty-Ninth Parliament First Session, Thursday 21 March 2019, https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2019/Legislative_Council_2019-03-21.pdf, p.1018

- 3.106 Acknowledging the types of concerns raised by ARTK and DPC, and categorising the amendment of section 534(4) as a reform “to strengthen open justice”,¹²⁵ the second reading speech pointed out that:

The *Children, Youth and Families Act* prohibits the publication of matters which identify a child or other applicable person in a Children’s Court proceeding. The Act deems certain matters as likely to lead to the identification of a person. This includes matters such as the physical description or the style of dress of the child, or their political, philosophical or religious beliefs. This unduly limits reporting on cases by preventing the publication of matters which may not actually identify a person in a particular case.

The Bill will narrow the list of matters deemed likely to identify a person to the name of the person or their relatives and the name, address and locality of their school, home or place of work or training. If the person is Aboriginal, a relative will be defined to include a member of the person’s Aboriginal community.

The media will continue to be prevented from publishing any detail identifying a person whose identity is protected in the circumstances of the individual case.¹²⁶

- 3.107 In light of this amendment and noting that the Bill as drafted was now out of step with equivalent provisions elsewhere in Australia, the Committee sought clarification from the Department as to whether proposed section 50(7) would be reviewed. The Department subsequently advised the Committee that:

Territory Families has been asked to provide advice to Government on amending the current Bill to be consistent with the *Open Courts and Other Acts Amendment Act 2019* (Vic).¹²⁷

These provisions intend to protect the privacy and identity of children and young people in the context of the Northern Territory. The need to include the prohibition of identifying particulars of a young person are important in the context of the Northern territory which is a smaller jurisdiction. The *Open Courts and Other Acts Amendment Act 2019* (Vic) is being considered to determine whether and how the proposed provisions can achieve these outcomes.¹²⁸

Committee’s Comments

- 3.108 While the need for a statutory non-publication regime in relation to information that may identify a youth, witness or other party associated with court proceedings was not disputed by submitters, the Committee acknowledges concerns that proposed section 50(7) is significantly more prescriptive than equivalent provisions elsewhere in Australia and includes particulars that are unlikely to lead to the identification of a person.

- 3.109 In light of the recent amendment to section 534(4) of the *Children, Youth and Families Act 2005* (Vic) which was the basis for the identifying particulars in proposed section 50(7), the Committee notes that the Government has requested Territory Families to

¹²⁵ Parliament of Victoria, Parliamentary Debates (Hansard), Legislative Council Fifty-Ninth Parliament First Session, Thursday 21 March 2019, https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2019/Legislative_Council_2019-03-21.pdf, p.1021

¹²⁶ Parliament of Victoria, Parliamentary Debates (Hansard), Legislative Council Fifty-Ninth Parliament First Session, Thursday 21 March 2019, https://www.parliament.vic.gov.au/images/stories/daily-hansard/Council_2019/Legislative_Council_2019-03-21.pdf, p.1021

¹²⁷ Territory Families, Responses to Written Questions – 29 May 2019, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.7

¹²⁸ Territory Families, Responses to Written Questions – 29 May 2019, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.7

provide advice on amending the Bill to be consistent with the new provisions as set out in the section 13 of the *Open Courts and Other Acts Amendment Act 2019* (Vic).

3.110 The Committee is of the view that the Victorian legislation as amended strikes an appropriate balance between protecting a person's right to privacy, open justice and the freedom of the press to report on details of a court proceeding. Furthermore, the Committee notes that, in contrast to equivalent legislation elsewhere, the new provisions in Victoria also "reflect the special ties of Aboriginal persons to members of their community" which is particularly pertinent to the context of the Northern Territory.

Recommendation 7

The Committee recommends that proposed section 50(7) of the *Youth Justice Act 2005* be amended to provide that:

(7) In this section

***particulars likely to lead to the identification*, in relation to a person, include the following particulars:**

(a) the name of the person

(b) the names of –

(i) any relative of the person; or

(ii) any other person having the care of the person; or

(iii) in addition to subparagraphs (i) and (ii), in the case of an Aboriginal person, a member of the Aboriginal community of the person;

(c) the name or address of any place of residence of the person, or the locality in which the residence is situated;

(d) the name or address of any place of education, training or employment attended by the person, or the locality in which the place is situated.

Prescribed offences

3.111 Pursuant to proposed section 39 of the *Youth Justices Act 2005*, a Police Officer is not required to automatically consider a youth for diversion where they believe on reasonable grounds that the offence they have committed is a 'prescribed offence'. In accordance with amendments to section 38 (Definitions), proposed Regulation 3A provides the list of 'prescribed offences'.

3.112 As noted in the Explanatory Statement changing the references from 'Serious Offences' to 'Prescribed Offences' effectively increases the list of offences that can be automatically diverted.¹²⁹ Moreover, the amendments to sections 38 and 39 of the *Youth Justice Act 2005*:

¹²⁹ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.9

ensure that young people are not excluded from diversion because they have committed minor, non-habitual traffic offences ... some offences under the *Traffic Act 1987* will now qualify for automatic diversion.¹³⁰

3.113 However, a number of submitters expressed the view that the Bill does not give full effect to Royal Commission recommendation 25.11 and called for all offences against Parts (V) and (VI) of the *Traffic Act 1987* to be excluded from the list of prescribed offences. For example, while supporting amendments to the legislation to remove barriers to diversion, JSS noted their concern that:

numerous traffic offences remain 'non-divertible' in this Bill, contrary to recommendation 25.11 of the Royal Commission. Specifically, the Commission recommended that children and young people with offences under Part (V) and Part (VI) of the *Traffic Act* (NT) be eligible for diversion under section 39 of the *Youth Justice Act* (NT). We recommend the proposed list of prescribed offences at 3A(g) be amended to align with the Royal Commission.¹³¹

3.114 Noting that approximately 15 percent of offences committed by young people in the NT are traffic and vehicle offences, HRLC suggested that:

Removing traffic offences from the list of 'prescribed offences' would create a sensible option for many young offenders. It would also ensure capacity to develop and offer more targeted programs that could provide offenders with the information, understanding and skills necessary to develop positive attitudes towards driving and safer driving behaviours.

In some instances, especially for offenders found driving without a licence, diversion could require a youth undertake direct instruction and obtain the necessary driving qualification. In relation to more serious driving offences, a diversion program could require completion of a defensive driving course, a road trauma awareness course and/or drug and alcohol awareness courses and counselling. In such circumstances the response is directly related to the nature of the offence and can lead to interventions that positively influence driver attitudes and behaviour.¹³²

3.115 In light of the concerns raised in submissions, the Committee sought further clarification from the Department and was subsequently advised that:

Currently all offences in the *Traffic Act 1987* are not eligible for diversion. This produces significant inconsistencies and impedes good outcomes. The offences that have been included in the 'prescribed offences' are the more serious offences in the *Traffic Act 1987*.¹³³

Committee's Comments

3.116 In support of the approach taken in the Bill, the Committee notes that the Royal Commission did not actually recommend that all offences under Parts (V) and (VI) of the *Traffic Act 1987* be excluded from the list of prescribed offences for the purposes of diversion. Rather, the Royal Commission acknowledged the support of the NT

¹³⁰ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill (Serial 85)*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.9

¹³¹ Jesuit Social Services, Submission 18, p.8

¹³² HRLC, Submission 13, pp.10-11

¹³³ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.8

Police and Territory Families for “an amendment to the *Youth Justice Act* to remove the exclusion of some traffic offences from diversion”.¹³⁴

3.117 The Royal Commission further noted that it supported the Department’s proposed review of offences for which a young person may be considered for diversion,¹³⁵ and subsequently recommended that:

The references to offences against Part (V) and Part (VI) of the *Traffic Act* (NT) be reviewed with a view to enabling children and young people charged with offences under these provisions to be eligible for diversion under section 39 of the *Youth Justice Act* (NT).¹³⁶

3.118 The Committee also points out that, despite the fact that an alleged offence committed by a youth may be a ‘prescribed offence’, section 39(4) of the *Youth Justice Act 2005* provides that ‘the Commissioner of Police (or the Commissioner’s delegate) may authorise or require a police officer to deal with a youth by Youth Justice Conference or by referring the youth to a diversion program’.

Raising the age of criminal responsibility

3.119 In addition to the concerns addressed above, the majority of submissions received expressed their concern and disappointment that the Bill does not implement Royal Commission recommendation 27.01. This recommendation called on the Government to amend the *Criminal Code Act 1983* and the *Youth Justice Act 2005* to raise the age of criminal responsibility as follows:

Section 38(1) of the *Criminal Code Act* (NT) be amended to provide that the age of criminal responsibility be 12 years.

Section 83 of the *Youth Justice Act* (NT) be amended to add a qualifying condition to section 83(1)(l) that youth under the age of 14 years may not be ordered to serve a time of detention, other than where the youth:

- has been convicted of a serious and violent crime against the person
- presents a serious risk to the community, and
- the sentence is approved by the President of the proposed Children’s Court.¹³⁷

3.120 As noted by NTLAC:

During the intensive LAAC consultations that led to the drafting of the Bill, all NGO [non-government organisation] members supported the inclusion of amendments to implement Royal Commission recommendation 27.1, and accordingly provisions to that effect were drafted for inclusion in the Bill. Detailed information was compiled to ascertain that sufficient programs and services are available to

¹³⁴ Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Volume 2B*, 17 November 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>, p.268

¹³⁵ Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Volume 2B*, 17 November 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>, p.269

¹³⁶ Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Volume 2B*, 17 November 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>, p.277

¹³⁷ Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations*, 17 November 2017, <https://www.royalcommission.gov.au/royal-commission-detention-and-protection-children-northern-territory>, p.46

respond to children under 12 years of age who come into contact with police, in order to establish that these reforms can now be operationalised. Ultimately, however, they were omitted from the Bill introduced to the Legislative Assembly. In the firm view of the NTLAC, these provisions are a key element of the Royal Commission's roadmap, they are strongly supported by the agencies that provide services to children and young people in the Northern Territory, they enjoy considerable support in the broader community, there is no good operational reason to defer them, and they should be reinstated in the Bill and enacted.¹³⁸

3.121 In response to the Committee's written question on this matter, the Department advised as follows:

The Bill is part of a staged approach to reforming the youth justice and child protection systems. The Bill, and the process to develop it, has involved detailed consideration of the operational environment to support effective implementation of the legislative changes. It was determined that the change to age limits is not achievable at this time and needs to be considered as part of the overall system reform for children which will be reflected through the creation of the Single Act for Children by 2021.¹³⁹

3.122 Noting that the age of criminal responsibility is also 10 years in every other Australian jurisdiction, Mr Ken Davies (Chief Executive Officer: Territory Families) further advised the Committee that:

I understand there is broader discussion at COAG [Council of Australian Governments] about raising the age of criminal responsibility. My personal view on this is that this a national issue which needs to be looked at in that context. You need support programs that are properly articulated and evidence based.¹⁴⁰

Committee's Comments

3.123 While acknowledging the views of submitters regarding raising the age of criminal responsibility, the Committee notes that this issue is beyond the scope of the Bill. The Committee also notes the Department's commitment that this issue will be a matter for consideration in the development of the Single Act for Children by 2021.¹⁴¹

¹³⁸ NTLAC, Submission 21, p.4

¹³⁹ Territory Families, *Responses to Written Questions – 29 May 2019*, <https://parliament.nt.gov.au/committees/spsc/85-2019>, p.8

¹⁴⁰ Committee Transcript, Public Hearing, 20 May 2019, p.83

¹⁴¹ Committee Transcript, Public Hearing, 30 May 2019, p.83

Appendix 1: Implementation of Royal Commission Recommendations

The following table sets out the Royal Commission recommendations that correspond to proposed amendments to the legislation identified as issues of concern by submitters.

Recommendation		Government Response	Bill Clause and Section Amended
25.03	<ol style="list-style-type: none"> 1. The Northern Territory Government ensure all police cells are made suitable for detaining children. 2. Provision be made in either the <i>Police Administration Act</i> (NT) or the <i>Youth Justice Act</i> (NT) that children and young people may be held in custody without charge for no longer than four hours. Any extension up to a further four hours may only be granted by a Judge. 	Supported in principle	Cl.13: s137 <i>Police Administration Act</i>
25.06(1)	<ol style="list-style-type: none"> 1. The <i>Youth Justice Act</i> (NT) be amended to provide that a child or young person must not be interviewed by police: <ol style="list-style-type: none"> a. until they have sought and obtained legal advice and assistance, or b. after exercising their right to silence. 	Supported	Cl.18: s18 <i>Youth Justice Act</i>
25.09	The definition of the 'serious offences' that exclude a young person from eligibility for diversion be reviewed, with a view to removing preclusion from diversion for less serious offending.	Supported	Cl.44: Reg 3A Youth Justice Regulations
25.11	The references to offences against Part (V) and Part (VI) of the <i>Traffic Act</i> (NT) be reviewed with a view to enabling children and young people charged with offences under these provisions to be eligible for diversion under section 39 of the <i>Youth Justice Act</i> (NT).	Supported	Cl.44: Reg 3A Youth Justice Regulations
25.19 (1) and (4)	<p>The <i>Bail Act</i> (NT) be amended:</p> <ol style="list-style-type: none"> 1. to provide that a youth should not be denied bail unless: <ol style="list-style-type: none"> a. charged with a serious offence and a sentence of detention is probable if convicted b. they present a serious risk to public safety c. there is a serious risk of the youth committing a serious offence while on bail, or d. they have previously failed to appear without a reasonable excuse. 2. to require that when imposing bail conditions the police and courts take into consideration: <ol style="list-style-type: none"> a. the age, maturity and circumstances of the young person, including their home environment, and b. the capacity of the young person to comply with the conditions. 4. to exclude children and young people from the operation of section 37B (offence to breach bail). 	Supported	Cl.9: s 8A <i>Bail Act</i> ; Cl17: Reg 2A Bail Regulations Cl.11: s24A <i>Bail Act</i> Cl.13: s37B <i>Bail Act</i>
25.25	Proceedings under the <i>Youth Justice Act</i> (NT) should be heard in closed court, similar to child protection proceedings under the <i>Care and Protection of Children Act</i> (NT). The court should retain a discretion to publish all or part of a proceeding upon application.	Supported	Cl.33: ss 49 & 50 <i>Youth Justice Act</i>

Appendix 2: Jurisdictional Comparison – open vs closed court proceedings

Jurisdiction	Legislative Provisions
NT Bill	<p>Youth Justice Act 2005 <u>Proposed amendment to s49 Proceedings to be in closed court</u> ss(1) provides that the Court must be closed to the public for proceedings under this Act against a youth. ss(3) provides that persons other than those prescribed in ss(2) (i.e. legal representative, responsible adult, nominated support person, representative of the Agency, witnesses, victim and nominated support person, interpreter) may seek the leave of the Court to attend the proceedings.</p>
Commonwealth	<p>Judiciary Act 1903; Federal Court of Australia Act 1976, Family Law Act 1975 In accordance with Article 14 of the International Covenant on Civil and Political Rights, the Commonwealth adheres to an open court policy. However, courts are empowered to make suppression or non-publication orders. For example, as provided for in s77RD of the <i>Judiciary Act</i>, s37AE of the <i>Federal Court of Australia Act</i> and s97 of the <i>Family Law Act</i>, in deciding whether to make a suppression order or non-publication order, the court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.</p>
Queensland	<p>Childrens Court Act 1992 <u>s20: Who may be present at a proceeding</u> Court is closed to the public unless it is hearing and determining a charge for an indictable offence. For a criminal proceeding against a child a representative of the mass media is permitted unless the court determines that the person's presence would be prejudicial to the interests of the child.</p>
New South Wales	<p>Children (Criminal Proceedings) Act 1987 and Criminal Procedures Act 1986 <u>s10 Exclusion of general public from criminal proceedings</u> While closed to the public, ss(1)(b) of the <i>Children (Criminal Proceedings) Act</i> provides that media representatives may be present, unless the court directs otherwise. Subsection (3A) further provides that hearings for prescribed sexual offences are to be held in-camera. However, in conjunction with s291C of the <i>Criminal Procedures Act</i> the court may make arrangements to allow media representatives to view or hear the evidence while it is given, or to view or hear a record of the evidence, as long as the media are not present during the in-camera proceedings.</p>
Victoria	<p>Children, Youth and Families Act 2005 <u>s523 Proceedings to be heard in open court</u> Subject to subsection (2) proceedings of the court are open to the public. Subsection (2) provides that the court may, on application of a party or of any other person who has a direct interest in the proceeding or without any such application (a) order that the whole or any part of a proceeding be heard in closed court; or (b) order that only persons or classes of persons specified by it may be present during the whole or any part of a proceeding.</p>
Australian Capital Territory	<p>Court Procedures Act 2004 <u>s72 Court proceedings involving children or young people not open to public</u> While court is closed to the public, a media representative may be present for criminal proceedings.</p>

Jurisdiction	Legislative Provisions
<p>Tasmania</p>	<p><i>Youth Justice Act 1997</i> <u>s30: Persons who may be present in Court</u> The court is closed to the public. However, ss(1)(n) provides that 'any other person may be present if the court considers that the interests of justice require that person's presence'.</p>
<p>South Australia</p>	<p><i>Youth Court Act 1994</i> <u>s24 Persons who may be present in Court</u> Court is closed to the public. However, if the proceedings relate to an offence or alleged offence a representative of the news media may be present.</p>
<p>Western Australia</p>	<p><i>Children's Court of Western Australia Act 1988</i> <u>s31 Exclusion of persons from hearing</u> While Children's Court proceedings are open to the public, ss(1) provides that the court may exclude any person from the courtroom or place of hearing as it considers appropriate.</p>

Appendix 3: Submissions Received

Submissions Received

1. Darwin Press Club
2. North Australian Aboriginal Justice Agency
3. Darwin Community Legal Service
4. Northern Territory Stolen Generation Aboriginal Corporation
5. Central Australian Aboriginal Congress
6. Australian Lawyers Alliance
7. Australia's Right to Know Coalition of Media Companies
8. Information Commissioner of the Northern Territory
9. Office of the Children's Commissioner Northern Territory
10. Law Society NT
11. Aboriginal Medical Services Alliance NT
12. Northern Territory Council of Social Service
13. Human Rights Law Centre
14. CREATE Foundation
15. Northern Territory Anti-Discrimination Commission
16. Australian Red Cross
17. Danila Dilba Health Service
18. Jesuit Social Services
19. Criminal Lawyers Association of the Northern Territory
20. Tangentyere Council Aboriginal Corporation
21. Northern Territory Legal Aid Commission
22. Northern Territory Police Service
23. Central Australian Youth Justice
24. Children's Ground
25. Strong Grandmother's Group of the Central Desert
26. Civil Liberties Australia Inc.

Note

Copies of submissions are available at: <https://parliament.nt.gov.au/committees/spsc/85-2019>

Appendix 4: Public Briefing and Public Hearings

Public Briefing – 1 April 2019

Territory Families

- Brent Warren: General Manager Youth Justice
- Kelly Cooper: Senior Director Youth Justice Programs
- Luke Twyford: Executive Director Strategy, Policy and Performance
- Seranie Gamble: Director Law Reform

Public Hearing – 30 May 2019

- Peter Shoyer: Information Commissioner of the Northern Territory
- Craig Dunlop: Vice President, Darwin Press Club
- Aislinn Hegarty: NT State Coordinator, Create Foundation
- Colleen Gwynne: Children’s Commissioner of the Northern Territory
- David Woodroffe: Principal Legal Officer, North Australia Aboriginal Justice Agency
- John Adams: General Manager NT, Jesuit Social Services
- Elle Jackson: Manager – Darwin, Jesuit Social Services
- Shahleena Musk: Senior Lawyer Aboriginal and Torres Strait Islander Rights Unit, Human Rights Law Centre
- Rodger Williams: Deputy Chief Executive Officer, Danila Dilba Health Service
- Joy McLaughlin: Senior Policy Officer Strategy and Reform, Danila Dilba Health Service
- Tess Kelly: Policy Officer, Danila Dilba Health Service
- Jahmayne Coolwell: Social Worker, Danila Dilba Health Service
- Fiona Kepert: Lawyer, Northern Territory Legal Aid Commission
- Russell Goldflam: Lawyer, Northern Territory Legal Aid Commission
- Marty Aust: President, Criminal Lawyers Association of the Northern Territory
- Andrew Walder: Access to Education Manager, Tangentyere Council Aboriginal Corporation
- Adrian Scholtes: Chair, Central Australian Youth Justice
- Ken Davies: Chief Executive Officer, Territory Families
- Brent Warren: General Manager Youth Justice, Territory Families
- Luke Twyford: Executive Director Strategy, Policy and Performance, Territory Families
- Seranie Gamble: Director Law Reform, Territory Families

Note

Copies of hearing transcripts and tabled papers are available at:

<https://parliament.nt.gov.au/committees/spsc/85-2019>

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Childrens Court of Western Australia Act 1998 (WA)

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Dissenting Report by Mrs Lambley

Dissenting Report

From Robyn Lambley, Member for Araluen

Deputy Chair of the NT Parliament Social Policy Scrutiny Committee 8th July 2019

The Social Policy Scrutiny Committee was invited to scrutinise the Youth Justice and Related

Legislation Amendment Bill 2019 by the NT Legislative Assembly in March 2019.

This Bill attempts to address some of the reforms recommended by the Royal Commission into the Protection and Detention of Children in the NT. The Government advised that this Bill attempts to implement 11 Royal Commission recommendations.

The clunky and incongruent way in which this legislation has been written, made scrutinising this Bill extremely difficult. It would have been more efficient and coherent to bring all the relevant legislative reforms from the Royal Commission into one Bill. Not knowing what Royal Commission recommendations the Government will legislate to implement in the future meant that scrutinising this Bill was without a clear legislative context.

Whilst there was broad general support for the Bill from the 26 groups and individuals that made submissions to the Social Policy Scrutiny Committee process, these were almost exclusively from stakeholders within the Youth Justice, legal and human rights sectors. A more meaningful scrutiny process would have actively sort feedback from a broader and more balanced range of Territorians, from those who are less vocal, less resourced and less powerful, for example victims of crime and general citizens. The Scrutiny Committees were designed to “open up the Parliament to the people”.

Whilst in the real world, Territorians are continuing to suffer the considerable personal and financial impact of youth crime, it is difficult to justify how easing the consequences for youth offenders is a solution (as proposed in this Bill). The latest riot at the Don Dale Youth Detention Centre on 6th July 2019 is more evidence of the need for reform coupled with the absolute need for serious youth offenders to be incarcerated. This Bill does not reflect reality.

The Department of Territory Families were unable to provide clear information of how a larger number of challenging juvenile offenders will be managed in the community, as opposed to being held in detention.

Territorians need to understand how the Government intends to weaken the consequences for youth crime and simultaneously keep the community safe. The way in which this Bill has been introduced and explained provides no insight as to how the Government will balance these critical interests.

In good faith I cannot support the recommendations made by the Social Policy Scrutiny Committee Report in relation to the Youth Justice and Related Legislation Amendment Bill 2019.

In good faith I cannot support the process used by the Social Policy Scrutiny Committee to scrutinise the Youth Justice and Related Legislation Amendment Bill 2019.

I will not be supporting this Bill in Parliament.



**Robyn Lambley MLA
Member for Araluen**

Dissenting Report by Mrs Finocchiaro

Dissenting Report by Mrs Finocchiaro

I provide this dissenting report on the basis that I oppose the principles that underpin *Youth Justice and Related Legislation Amendment Bill 2019*, which is completely offender-focused and does not reflect community concerns over the youth crime crisis that we are experiencing.

The Bill places the rights of youth offenders above the rights of victims, families and businesses that have—for too long—suffered the financial and emotional consequences of failed policies concerning youth offending.

The Bill also further diminishes the already insufficient provisions under the *Youth Justice Act 2005* for providing accountability and consequences for youth offenders—particularly repeat offenders.

The Minister for Territory Families tabled her explanatory statement in the Legislative Assembly when introducing the Bill. It clearly states under the section regarding proposed changes to provisions around ‘Presumption in Favour of Bail’ ‘that a youth who is in custody is always entitled to bail unless they are charged with a prescribed offence and there is an ongoing and serious risk to the community.’¹ In my view, this policy position reflects a Government that is out of touch with the expectations of the community. The Minister in her second reading speech went on to highlight that the Bill would ‘hold[] young people to account so that they learn lessons and change their behaviour’ only to later outline that ‘Breach of Bail Condition’ would no longer be an offence.² Both of the above provisions in my view erode consequences from the current law which is the opposite outcome that the Government should be striving to achieve.

The Bill also would see all court proceedings involving youth closed to the media and the public. The principal that ‘[n]ot only must Justice be done; it must also be seen to be done’, must be preserved to ensure open and transparent administration of justice.³

Additionally, the Social Policy Scrutiny Committee (SPSC) public hearings and public submissions uncovered various issues and operational concerns, some of which may hamper police’s operational ability, which is a risk that I am not willing to take. Of great concern is the apparent disconnect between Territory Families and the Northern Territory Police in the development of this Bill. The SPSC received a submission from the Police Commissioner largely supporting the Bill and Northern Territory Police deferred any questions for it to Territory Families to answer during the scrutiny process. In questioning Territory Families, SPSC was advised that the Government took 16 months to develop the Bill and yet, at the final stages of the SPSC process, Territory Families advised that there were operational policing concerns relating to “Arrest as last resort” and “Matters to be taken into consideration” when considering bail. These last minute concerns make me question the efficacy of inter-agency collaboration, and highlights the need for greater public input from Northern Territory Police on the potential unintended consequences and operational impact of this Bill. I raised this with Territory Families directly at the time of the public hearing.

The lack of consultation by Government with police, the business and the wider community on this Bill was evident throughout the Committee process, but it is clear from public feedback I have received in response to the Bill that Territorians are concerned that the Bill erodes consequences and does not provide any measures to address the offending that is causing so much harm in our community.

Given the misguided intention of this Bill and the flaws that are evident in the legislation, I must dissent from the Committee report. Even if this Bill could be supported on principle—which it cannot—the issues outlined above add to the conclusion that this legislation should not be enacted into law.



Lia Finocchiaro MLA, Member for Spillett

¹ Explanatory Statement, *Youth Justice and Related Legislation Amendment Bill 2019*, 3

² Second Reading Speech, *Youth Justice and Related Legislation Amendment Bill 2019* (20 March 2019), 9.

³ *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 (Lord Hewart CJ).