

# NORTHERN TERRITORY LEGAL AID COMMISSION

## SUBMISSION TO SOCIAL POLICY SCRUTINY COMMITTEE

### ***YOUTH JUSTICE AND RELATED LEGISLATION AMENDMENT BILL 2019***

#### INTRODUCTION

1. The Northern Territory Legal Aid Commission (NTLAC) and the North Australian Justice Agency (NAAJA) between them provide legal representation to almost all children and young people in the Northern Territory who are arrested, detained and/or charged by police; and who are prosecuted, remanded, tried and/or sentenced in the Youth Justice Court. NTLAC provides a specialist service to clients in the Youth Justice Court with a dedicated team comprising a youth justice lawyer and a social worker in both Darwin and Alice Springs. NTLAC lawyers also appear for clients in the Youth Justice Court at Katherine and Tennant Creek. In addition, NTLAC's civil law section provides and arranges legal assistance, advice and representation to young people with potential civil claims arising from their contact with the criminal justice system. In the course of delivering these services, NTLAC officers frequently appear in the Youth Justice Court, and visit young people in youth detention centres. In addition, we collaborate closely with both government and non-government agencies that deliver youth services.

#### THE ROYAL COMMISSION

2. NTLAC and clients participated in the Royal Commission into the Protection and Detention of Children in the NT (The Royal Commission) in a number of ways. NTLAC client information was required to be produced to the Royal Commission, clients gave evidence, officers gave evidence, and NTLAC made a submission to the Royal Commission.
3. NTLAC has also made a significant contribution to youth justice reform since the Royal Commission. NTLAC has actively participated in consultations conducted by the Northern Territory government in relation to the implementation of the Royal Commission's recommendations, including membership since its inception of the Legislative Amendment Advisory Committee (LAAC) convened by the CEO of the Department of Territory Families.
4. Having acted for hundreds of children and young people who have been through the criminal justice system in the Northern Territory in recent years, NTLAC shares the commonly expressed view that the youth justice system is broken. Having participated closely in the Royal Commission and the consequential reform program, NTLAC is strongly of the view that the Royal Commission has comprehensively and accurately identified why and how the youth justice system is broken, and that the Royal Commission's carefully detailed "roadmap" – its 227 recommendations – provides a unique opportunity to fix that broken system. The roadmap is firmly based on national and international principles and standards for the administration of youth justice as established by numerous instruments, including the *Convention on the Rights of the Child*, the *Beijing Rules*, the *International Convention on Civil and Political Rights* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, as well as by youth justice statutes in other Australian jurisdictions. Just as importantly, the

roadmap is rigorously evidence-based: the Royal Commission's extensive hearings provided an unprecedented opportunity to inquire into the practices, procedures and experiences of all participants in the Northern Territory youth justice system.

5. In summary, NTLAC accepts and embraces both the findings and recommendations of the Royal Commission, and is strongly of the view that this broken system must be fixed and can be fixed, but only if all of the recommendations are fully implemented.

#### THE BILL

6. NTLAC submits that the *Youth Justice and Related Legislation Amendment Bill 2019* (the Bill) is an important step along the journey charted by the Royal Commission's roadmap. Not only does the Bill give substantial effect to several key recommendations of the Royal Commission, but the Northern Territory Government is to be commended for having consulted with stakeholders and the community in developing the Bill.
7. Nevertheless, in some instances the Bill deviates from the Royal Commission's roadmap. NTLAC submits that this jeopardises the success of the ambitious but necessary reform agenda, and that the Bill should be amended to align with the Royal Commission's recommendations, which were designed as an interdependent package of measures, and will not be effective if they are implemented in a piecemeal or partial manner. This is not to say that they can or should all be implemented at the same time. NTLAC supports the phased approach to reform as set out in the Government's *Safe, Thriving and Connected* implementation plan, although, as submitted below, it is submitted that the reform process should be accelerated.
8. NTLAC generally supports the substance of the submissions to the Committee prepared by the Danila Dilba Health Service, the Human Rights Law Centre (HRLC), Jesuit Social Services (JSS) and the Northern Territory Council of Social Service (NTCOSS), which NTLAC has had the opportunity to read. Accordingly, it is unnecessary to here set out in detail the rationale for all the specific amendments that NTLAC submits should be made to the Bill: NTLAC considers that it would be of only limited assistance to the Committee to repeat the same points made by other stakeholders with whom we agree. On the other hand, we submit that in considering the weight to attach to each submission it receives, the Committee should have regard to the breadth of support for that submission from other stakeholders. For example, we note that a strong common theme amongst the submissions referred to above is that the Bill should be amended by implementing the Royal Commission's clear recommendations in relation to the age of criminal responsibility.
9. While supporting most aspects of the Bill, NTLAC submits that the following provisions of the Bill should be amended, for the reasons set out in detail in the stakeholder submissions referred to above:

Clause	Act/Reg amended	RC rec.	NTLAC submission
13	<i>Bail Act</i> , s37B (offence to breach bail)	25.19(4)	Implement the recommendation in full by excluding children and young people from the operation of s37B, which criminalises breach of bail
17	<i>Bail Regulations</i> , r 2B (prescribed offences)	25.19(1)	The following <i>Criminal Code</i> offences should be removed from the list of offences raising a presumption against bail for children and young people, because, 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: <ul style="list-style-type: none"> <li>• s125B(1) (possession of child abuse material)</li> <li>• s127(1) (sexual intercourse or gross indecency with a child)</li> <li>• s130(3B) (sexual intercourse or gross indecency by provider of services to mentally ill or handicapped child under 10 years)<sup>1</sup></li> <li>• s132 (indecent dealing)</li> <li>• s134 (incest)</li> <li>• s181 (cause serious harm)</li> <li>• s211 (robbery)</li> <li>• s212(1) and (2) (assault with intent to steal aggravated by using a weapon in company)</li> <li>• s189A(1) and (2)(b) (assault police causing serious harm)</li> </ul>
21	<i>Police Administration Act</i> , s137 (time for bringing a person before court)	25.3(2)	Implement the recommendation in full by prohibiting the pre-charge detention of children and young people for longer than four hours without the authority of a court order
26	<i>Youth Justice Act</i> , s 18 (interview of youth)	35.6	Implement the recommendation in full by prohibiting the interview of a child or young person until they have actually obtained legal advice or assistance.
33	<i>Youth Justice Act</i> , s50 (restriction of publication)	25.25	The prohibition on publishing the venue of the court (proposed s50(1)(a)) is unnecessary, not in the public interest, and not recommended by the Royal Commission. Provision should be made to ensure that legal assistance services are given access to Youth Justice Court lists identifying defendants.
44	<i>Youth Justice Regulations</i> , r3A (prescribed offences)	25.9, 25.11	The offences listed above in this column (see Cl. 17) and the <i>Traffic Act</i> offences at sub-reg (g) should be removed from r3A, in accordance with the corresponding Royal Commission recommendations.
–	<i>Criminal Code</i> , s38(1), s43AP, s43AQ (age of responsibility); <i>Youth Justice Act</i> , s83	27.1	The Bill should include provisions raising the age of criminal responsibility to 12, and limiting the circumstances in which children under 14 can be ordered to serve a period of detention, as recommended by the Royal Commission.

<sup>1</sup> Section 130(3B) is not in fact an offence provision. It establishes a circumstance of aggravation for an offence under s130(3A).

10. NTLAC also makes the following additional submissions.

RECOMMENDATION 27.1: RAISING THE AGE

11. During the briefing by Territory Families officers to the Committee in relation to this Bill on 1 April 2019, the Member for Katherine asked why the Bill does not include a provision to raise the age of criminal responsibility. In response, Territory Families explained that this issue will be dealt with at a later phase of the reform program, stating:

The process has been to look at what legislative amendments could be delivered now that align with government's investment, current programs in place and the reforms that are happening on the ground. We have been careful to ensure that the legislation is able to be operationalised and that the reforms are part of a continuous journey.

12. NTLAC submits that the Assembly, and in particular, this Committee of the Assembly, should be provided with a more complete explanation of this aspect of the Bill. That said, Territory Families officers were placed in a very difficult position when the matter was raised without notice by the Member for Katherine, and no criticism is intended of the "on the spot" response that was given.

13. During the intensive LAAC consultations that led to the drafting of the Bill, all NGO 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 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 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 to the Bill and enacted.

RECOMMENDATION 25.25: RESTRICTION OF PUBLICATION

14. The Royal Commission recommended that "Proceedings under the *Youth Justice Act* (NT) should be heard in closed court, similar to child protection proceedings under the *Care and Protection of Children Act* (NT)." Although NTLAC has recommended some relatively minor adjustments to Clause 33, NTLAC readily accepts that the proposed amendments to sections 49 and 50 of the *Youth Justice Act* give full effect to this recommendation.

15. However, 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 list, 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.

16. NTLAC submits that unless Clause 33 is amended by adding to s50 of the *Youth Justice Act* a provision expressly permitting identifying information in relation to Youth Justice Court matters to be provided to legal service providers, a similar problem may arise in the Youth Justice Court.

**RECOMMENDATION 25.3(2): WATCHHOUSE DETENTION PERIOD**

17. As noted above, NTLAC supports and relies on the detailed submissions of other stakeholders in relation to this issue. In addition, however, NTLAC submits that the Committee should have regard to the history of section 137 of the *Police Administration Act*, which permits police to detain a person for "a reasonable period" for the purpose of questioning or investigation.

18. This provision has long been the subject of judicial criticism (and not just in relation to children and young persons). For example, in a case involving an adult suspect, *R v Cotchilli* (2007) NTSC 52, Mildren J said:

These provisions were introduced into the Act in 1988 to overcome the requirement of the common law that a person who is taken into custody must be brought before a justice as soon as practicable after being arrested and it is not lawful for the police to hold a person arrested for an offence merely for the purpose of questioning: see *Williams v The Queen* (1986) 161 CLR 278.<sup>2</sup>

...

Section 137 is a significant derogation upon the rights of the liberty of the subject and there are no safeguards built into the provisions as recommended by four Justices of the High Court in *Williams v The Queen*: c.f. *Crimes Act 1914* (Cth) s 23C and s 23D where the maximum period of detention is 4 hours, or in the case of Aboriginal persons, 2 hours, unless the time is extended by a Magistrate or Justice of the Peace...<sup>3</sup>

19. NTLAC notes that in addition, the *Crimes Act 1914* (Cth) fixes a maximum period of detention of 2 hours for a person who appears to be under 18.

20. 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, as set out in the following table:

State	Statutory provision	Maximum allowable period of police detention
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<sup>2</sup> *R v Cotchilli* (2007) NTSC 52 at [61]

<sup>3</sup> *R v Cotchilli* (2007) NTSC 52 at [67]

NSW	<i>Law Enforcement (Powers and Responsibilities) Act 2002 ss 114, 115</i>	6 hours
Qld	<i>Police Powers and Responsibilities Act 2000, s 403</i>	8 hours, including up to 4 hours of questioning
SA	<i>Summary Offences Act 1953, s78</i>	4 hours
Tas	<i>Criminal Law (Detention and Interrogation) Act 1995, s4</i>	8 hours, extendable to 12 hours by a commissioned police officer
Vic	<i>Crimes Act 1958, s 464A</i>	"a reasonable time"
WA	<i>Criminal Investigation Act 2006, s 140</i>	6 hours, extendable to 12 hours by a senior police officer
ACT	<i>Crimes Act 1900, s212</i>	No period specified: common law applies, and person must be brought before a court as soon as practicable after arrest

21. 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, commencing at page 232.<sup>4</sup> 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.

#### CONCLUSION: THE NEED FOR URGENCY

22. The Royal Commission's sense of urgency to have Don Dale and the Alice Springs Youth Detention Centre replaced when it published its Final Report on 17 November 2017 was palpable. At the time, the Government appeared to share that sense of urgency. However, both of these critically important projects have recently been shelved. It is now clear that the Alice Springs Youth Detention Centre will continue to operate for years to come, and it is likely that the closure of Don Dale will also be delayed for a substantial period.

23. In these circumstances, NTLAC submits that there is a pressing need to step up the pace of statutory reform, in order to stem the flow of children and young people into detention centres that are harmful, criminogenic and neither designed, built nor fit for purpose.

24. NTLAC submits that these circumstances establish a powerful reason for augmenting the Bill by re-inserting the provisions required to implement recommendation 27.1, the effect of which would be that substantially fewer children under 14 would be sentenced to a period of detention.

25. Territory Families has indicated that it is anticipated that the Bill will be debated and passed in the August 2019 sittings of the Legislative Assembly, with a further period of about six months

<sup>4</sup> Accessed at <https://www.royalcommission.gov.au/sites/default/files/2019-01/rcnt-royal-commission-nt-final-report-volume-2b.pdf>

before the scheduled commencement of the Act. Furthermore, it appears that the next phase of statutory reform will not be completed within the current parliamentary term.

26. Once in force, the provisions in the Bill will result in more children and young people being admitted to bail and to diversionary programs, and less children and young people being remanded in custody and sentenced to detention. With the prospect of the existing detention centres being maintained well into the future, NTLAC submits that it is imperative that the Bill be enacted and commenced as soon as practicable, and in any event, well before the end of the current year.

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On behalf of Suzan Cox QC  
DIRECTOR  
Northern Territory Legal Aid Commission

23 April 2019