



YOUTH JUSTICE AND RELATED LEGISLATION
AMENDMENT BILL 2019

Submission to the Social Policy Scrutiny Committee

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Freedom. Respect. Equality. Dignity. **Action.**

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About this submission

The Human Rights Law Centre (HRLC) is a member of the Legislative Amendment Advisory Committee (LAAC) formed to assist the Northern Territory Government identify legislative and judicial barriers and solutions to implementing reforms to Youth Justice and the Care and Protection Systems and to co-design legislative reforms. The following submission builds on consultations and contributions as part of the LAAC that have played a significant role in the drafting of the current bill presently before the Committee.

The reforms proposed by the current bill implement key recommendations from the Royal Commission into Protection and Detention of Children in the Northern Territory (the “**Royal Commission**”) and consider best practice nationally and internationally. In summary, the HRLC supports the majority of these amendments, however where there is divergence on scope or drafting we have identified appropriate reforms. Where there has been no specific comment on a proposed amendment, those are by implication fully supported.

In considering the proposed reforms we implore the Committee to ensure consistency and respect for the UN *Convention on the Rights of the Child*, *UN Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)*¹ and other minimum child’s rights standards.

Recommendations

Act/Provision Amended:	Position:	Recommendation:
Bail Act 1982 (NT)		
S 3 amended	Support	
S 3B inserted	Support	
S 4 amended	Support	
S 7A amended	Support	
S 8 amended	Support	
S 8A inserted	Support	
S 12 inserted	Support	
S 24A inserted	Support	
S 28 amended	Support	
S 37A and s 37B replaced	Amend	Amend s.37B to exempt a child or young person from the offence of breach of bail, including breach of bail conditions AND breach of bail undertaking.
S 38	Support	
Part 9, Division 5 inserted	Support	

¹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”), see specifically Rule 17.

Act/Provision Amended:	Position:	Recommendation:
<i>Bail Regulations 1983 (NT)</i>		
Regs 2A and 2B inserted	Support	
<i>Police Administration Act 1978 (NT)</i>		
S 123 amended	Support	Support in principle, note comments on QLD provisions.
S 135 amended	Support	
S 137 amended	Amend	Amend s.137 of the <i>Police Administration Act</i> to ensure a four hour limit on police custody and that any extension of time must be approved by a judicial officer.
<i>Youth Justice Act 2005 (NT)</i>		
S 5 amended	Support	
S 15 amended	Support	
S 16 replaced	Support	Support in principle, note comments on QLD provisions.
S 18 amended	Support	
S 27 replaced	Support	
S 38 amended	Support	
S 38A inserted	Support	
S 39 amended	Support	
S 42A inserted	Support	
S 43 amended	Support	
S 49 and 50 repeal and insert	Support	Support in principle, note comments on s.50 to 'venue of the court', 'other party' and 'a witness'.
S 53 amended	Support	
S 61 amended	Support	
S 64 replaced	Support	
S 83	Additional Amendment	The <i>Youth Justice Act</i> , s.83 be amended to insert a new provision to ensure that the Court may not order a youth serve a term of detention or imprisonment if the youth is less than 14 years of age unless:

Act/Provision Amended:	Position:	Recommendation:
		(a) The youth has been found guilty of a serious violent or sexual offence; and (b) The youth presents an ongoing and serious risk to the community.
S 123 amended	Support	
S 140L amended	Support	
S 150 amended	Support	
S 161 amended	Support	
S 215B amended	Support	
Youth Justice Regulations 2006 (NT)		
Reg 3 replaced	Support	
3A inserted	Amend	Amend 'prescribed offences' to remove (g) relating to <i>Traffic Act</i> offences.
Reg 31	Support	
Reg 73	Support	
Criminal Code Act 1983 (NT)		
S 38 (Immature age)	Additional Amendment	Amend s.38(1) to raise the age of criminal responsibility from 10 years.
S 43AP (Children under 10)	Additional Amendment	Amend s.43AP to raise the age of criminal responsibility from 10 years.
S 43AQ (Children over 10 but under 14)	Additional Amendment	Amend s.43AQ to reflect the age of criminal responsibility from 10 years.

Key child rights principles under international law

The Northern Territory is required under international law to comply with a number of key child rights principles including:

- In all actions concerning children, the best interests of the child shall be a primary consideration.²
- States shall seek to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings (diversion), whenever appropriate.³

² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('CROC') art 3.

³ CROC art 40(3); see also United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), see specifically Rule 11.

- States shall implement legislation and practices which are in the best interests of the child and which protect children from all forms of physical or mental violence, injury, abuse, neglect, maltreatment or exploitation.⁴
- Every child alleged as, or accused of, or found guilty of an offence shall be treated in a manner which takes into account the desirability of promoting the child's reintegration and assuming a constructive role in society.⁵
- Every child alleged as, or accused of an offence shall have his or her privacy fully respected at all stages of proceedings.⁶
- The arrest and detention of a child should be only as a measure of last resort and for the shortest possible period of time.⁷
- Every child deprived of liberty shall be treated with humanity and respect for their inherent dignity and in a manner which takes into account the needs of their age.⁸
- No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.⁹
- The unique status of children deprived of liberty requires 'higher standards and broader safeguards for the prevention of torture and ill-treatment.'¹⁰
- If detained, the essential aim should be rehabilitation and children should be accorded age-appropriate treatment.¹¹

Child and youth offending is decreasing

Only a very small proportion of children in the Northern Territory come into contact with police or with the formal youth justice system as offenders.

Contrary to media reporting and outspoken public figures, there has been a significant decrease in offending by children aged 10-17 over the last 10 years. From 2008–09 to 2017-18, the NT child offender rate decreased by 52%.¹² Despite this decrease, youth detention rates in the NT have continued to remain relatively stable.¹³ Inappropriate and punitive laws and policies are contributing to this, particularly those relating to the age of criminal responsibility, bail, diversion and policing powers.

⁴ CROC art 19.

⁵ CROC art 40(1).

⁶ CROC art 40(2)(b)(vii).

⁷ CROC art 37(b).

⁸ CROC art 37(c); See also *International Convention on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR') art 7 and art 10; and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987) ('CAT') art 2.

⁹ CROC art 37(a); See also ICCPR art 7 and art 10 and CAT.

¹⁰ Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc A/HRC/28/68 (5 March 2015), para 16.

¹¹ ICCPR art 10.

¹² From 5,457 to 2,816 offenders per 100,000. See further Australian Bureau of Statistics 2019, *Recorded Crime - Offenders, 2017-18, State and Territory Profiles, Northern Territory*, table 20.

¹³ Over the 4-year period June 2014 to June 2018, the Northern Territory consistently had the highest rate of young people in detention on an average night each quarter (11–22 per 10,000 aged 10–17), while Victoria (1.2–2.2 per 10,000), South Australia (2.0–3.1 per 10,000), and Tasmania (1.2–2.4 per 10,000) consistently had the lowest.

Raising the age of criminal responsibility

[Omission of amendments that would have raised the age of criminal responsibility]

The Northern Territory Government committed to raise the age of criminal responsibility and prior to this bill being presented, members of the LAAC believed that this important reform would be included in this stage of the legislative reform process. We have not been provided a cogent explanation for its omission.

Raising the age of criminal responsibility was a cornerstone recommendation of the Royal Commission. It is the Human Rights Law Centre's position that the age of criminal responsibility should be raised to 14 years. We note that the Royal Commission recommended raising the age to 12, with children under 14 not subject to imprisonment save for exceptional circumstances.

The age of criminal responsibility in the Northern Territory is 10 years. This is the age at which a child can be investigated for an offence, arrested by police, charged and locked up in a youth prison. The age of criminal responsibility is legislated through a conclusive presumption that a child under the age of 10 years is incapable of committing an offence.¹⁴

Where a child is over the age of 10 but under 14, there is an old, common law rebuttable presumption that the child lacks the capacity to be criminally responsible for his or her acts, known as 'doli incapax' (incapable of crime). In order to rebut the presumption, it must be proved that at the time of an offence the child either "knows that his or her conduct is wrong"¹⁵ or "had the capacity to know."¹⁶

This archaic presumption routinely fails to safeguard children. It is applied inconsistently and it can be very difficult for children to access expert evidence, particularly children in regional and remote areas.¹⁷ Importantly, the presumption does not reflect contemporary medical knowledge of childhood brain development, social science, long term health effects or human rights law.

The current legal minimum age of criminal responsibility is against medical evidence that children aged 10 to 14 years lack emotional, mental and intellectual maturity. Research shows that children's brains are still developing throughout these formative years where they have limited capacity for reflection before action.¹⁸ Children in grades four, five and six are not at a cognitive level of development where they are able to fully appreciate the criminal nature of their actions or the life-long consequences of criminalisation.¹⁹

Criminalising the behaviour of young and vulnerable children creates a vicious cycle of disadvantage that can entrench children in the criminal justice system.²⁰ Studies show that the younger a child has

¹⁴ *Criminal Code*, s 38(1) & 43AQ

¹⁵ *Criminal Code*, 43AQ.

¹⁶ *Criminal Code*, s38(2).

¹⁷ See O'Brien, W. & Fitz-Gibbon, K. (2017) 'The Minimum Age of Criminal Responsibility in Victoria (Australia): Examining Stakeholders' Views and the Need for Principled Reform', *Youth Justice*, vol. 17, no. 2.

¹⁸ Judge Andrew Becroft, 'From Little Things, Big Things Grow' Emerging Youth Justice Themes in the South Pacific, 5 referring to Sir Peter Gluckman *Improving the Transition: Reducing Social and Psychological Morbidity During Adolescence* (Wellington, Office of the Prime Minister's Science Advisory Committee, 2011), p 24. See also Kelly Richards, 'What makes juvenile offenders different from adult offenders? Trends & Issues in crime and criminal justice' (2011), 4. See further Laurence Steinberg 'Risk Taking in Adolescence: New Perspectives from Brain and Behavioural Science' (2007) 16 *Current Directions in Psychological Science* 55, 56.

¹⁹ *Ibid.*

²⁰ Australian Institute of Health and Welfare 2016. Young people returning to sentenced youth justice supervision 2014–15. Juvenile justice series no. 20. Cat. no. JUV 84. Canberra: AIHW: The younger a person was at the start of their first supervised sentence, the more likely they were to return to sentenced supervision. For those whose first supervised sentence was community-based, 90% of those aged 10-12 at the start of this sentence returned to sentenced supervision, compared with 23% of those aged 16 and just 3% of those aged 17. More staggering were those sentenced to detention as their first supervised sentence, all (100%) those aged 10-12 at the start of

their first contact with the criminal justice system, the higher the chance of future offending.²¹ The Victorian Sentencing Advisory Council recently found that with each one year increase in a child's age at first sentence, there is an 18 per cent reduction in the likelihood of reoffending.²² Children who are forced into contact with the criminal justice system at a young age are less likely to complete their education and find employment and are more likely to die an early death. The current system traps children who would otherwise grow out of the behaviours and benefit from social interventions and support.

The Royal Commission noted the harm caused to children by time in custody.²³ The Australian Medical Association has noted in particular the negative impacts imprisonment has on the health of Aboriginal and Torres Strait Islander peoples.²⁴ Youth imprisonment is associated with higher risks of suicide and depression.²⁵ There is a clear link between wellbeing, mental health and youth detention, given one third of imprisoned children diagnosed with depression only experienced its onset once they were behind bars.²⁶ Imprisoning children impacts on their immediate and future health and should be avoided.

The current minimum age is in breach of international human rights law and is inconsistent with international standards. The median age of criminal responsibility worldwide is 14 years old. The United Nations Committee on the Rights of the Child has consistently said that countries should be working towards a minimum age of 14 years or older.²⁷

The Royal Commission recommended that the Northern Territory raise the age of criminal responsibility.²⁸ Whilst omitted from the current proposed legislative amendments, it is crucial that these reforms be included as a means of preventing the criminalisation of vulnerable children and ensuring 'the number of children brought before the courts is reduced.'²⁹ This single reform would have profound and long-lasting positive impacts on the wellbeing of children in the Northern Territory, particularly Aboriginal children.

this sentence returned to some type of sentenced supervision before they turned 18. This rate of return decreased with age, to around 80% of those 14 and 15, 56% of those 16 and 17% of those 17.

²¹ Ibid and AIHW (2013) *Young People Aged 10 – 14 in the Youth Justice System, 2011-2012*, AIHW, Canberra.

²² Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria*, (December 2016), 26

²³ Commonwealth, *Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report* (November 2017), Volume 1, Chapter 27, 28.

²⁴ Australian Medical Association (2012) "The justice system and public health", available at <https://ama.com.au/position-statement/health-and-criminal-justice-system-2012>.

²⁵ Commonwealth, *Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory*, (November 2017).

²⁶ Holman, B. & Ziedenberg, J. (2006) *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Justice Policy Institute, Washington DC.

²⁷ Committee on the Rights of the Child, General Comment No. 10 *Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/ GC/10 (25 April 2007), paras 32–33.

²⁸ Commonwealth, *Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory*, (November 2017), recommendation 27.1.

²⁹ Commonwealth, *Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory*, (November 2017), Chapter 27, 417.

Recommendation:

The *Criminal Code Act*, ss38(1), 43AP and 43 AQ be amended to raise the age of criminal responsibility from 10.

The Human Rights Law Centre submits that the age of criminal responsibility should be raised to 14 years. In the alternative the *Youth Justice Act*, s.83 be amended to insert a provision to ensure that the Court may not order a youth serve a term of detention or imprisonment if the youth is less than 14 years of age unless:

- (a) The youth has been found guilty of a serious violent or sexual offence; and
- (b) The youth presents an ongoing and serious risk to the community.

Diversion and alternative approaches to young offenders

[Clauses 23, 28 through to 32 inclusive and 36 amending the *Youth Justice Act*; Clause 44 amending the *Youth Justice Regulations*]

Diversion offers a cheaper and more effective way of dealing with youth offending. It addresses the causes of unacceptable conduct and not merely the consequences of it. There is a vast array of alternatives that can be captured by the term ‘diversion’, but those best known in the Northern Territory include police cautions and warnings, individualised diversion programs and youth justice conferences.

Research confirms that once a child enters the formal criminal justice system, they are more likely to return, particularly if they are detained.³⁰ In contrast, diversion pathways, which operate outside the formal court system, are effective in helping children get back on track and reduce the risks of further offending.³¹ Diversionary mechanisms are intended to avoid the stigmatisation or contamination associated with involvement in the formal criminal justice system and can create better opportunities to identify family, behavioural and health problems contributing to offending behaviour.

In the Northern Territory, diversion is specifically legislated into the youth justice system through Part 3 of the YJA. The provisions create an explicit presumption in favour of diversion as the primary means for dealing with youth offending, subject to a number of exceptions.³² Instead of charging a young person believed to have committed an offence, police officers must consider diversionary options, set out in section 39(2) of the YJA. This practice is said to be consistent with the principle in section 4(q): “unless

³⁰ Sentencing Advisory Council, *Reoffending by Children and Young People in Victoria* (2016), 4, 52.

³¹ Carney J, Northern Territory Government, *Review of the Northern Territory Youth Justice System: Report* (2011), 94-96. See further Kaye McLaren, *Alternative Actions That Work: A Review of the Research on Police Warnings and Alternative Action* (2011) Police Youth Services Group, New Zealand Police. Note that this report provides a review of research into NZ police warnings and diversionary practices but also international models. It identifies 23 principles, starting with overarching principles, followed by principles that relate to the various stages of the youth diversion process. These principles have then been distilled into 11 key findings, outlined in the report.

³² *Youth Justice Act* (NT) s 39(3).

the public interest requires otherwise, criminal proceedings should not be instituted or continued against a youth if there are alternative means of dealing with the matter.”³³

Whilst on its face the current legislation requires a police officer to divert a young person in many cases, statistics indicate this has not been occurring consistently in practice. In the one year period 2016-17, just 40 per cent of apprehensions by police resulted in a child being offered diversion.³⁴ Further, despite offending rates decreasing, there has been a 125 per cent increase in the number of children being prosecuted through the courts since 2006-07.³⁵

The Royal Commission made a number of recommendations directed at legislative and policy reforms to increase the circumstances and opportunities for diversion.³⁶ The Commission recognised that changes to the legislative framework and internal guidelines were part of essential reforms that could increase diversion opportunities for children which in turn would provide ‘an integral and effective opportunity to intervene early with young offenders to divert them from further offending.’

Overcoming barriers to diversion

The present amendments to the *Youth Justice Act* are designed to increase access to diversion. In particular they remove certain barriers and expand the circumstances in which diversion may be offered by police including a more simplified list of ‘prescribed offences’ where police are not required to divert a youth. In addition, the bill strengthens accountability requirements to ensure that reasons behind a diversion decision are recorded and can be considered by a court on an application to refer to diversion pursuant to s.64.

These amendments implement Royal Commission recommendations 25.9, 25.10, 25.11 and 25.13.

Whilst we commend these amendments in principle the amendments to the *Youth Justice Regulations* specifying certain offences under the *Traffic Act* as ‘prescribed offences’ do not fully reflect what the Royal Commission intended.

Traffic and motor vehicle offences are some of the most commonly committed by young people and historically accounted for the majority of offences for which diversion had previously been offered. In a submission to a review of the NT youth justice system in 2011, the Australian Institute of Criminology stated that 15.4 per cent of offences committed by young people in the NT were traffic and vehicle offences, which was consistent with national trends.³⁷

Removing the 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 qualifications. In relation to more serious driving offences, a diversion program could require completion of a defensive driving course, a

³³ *Firth & Ors v JM* [2015] NTSC 20, 11-12. Section 41(1) of the YJA provides that, if diversion is completed, no criminal investigation or legal proceedings can be commenced or continued against in respect of the offence.

³⁴ Northern Territory, Police, Fire & Emergency Services Annual Report 2016-17, 45.

³⁵ Joe Yick, Statement to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 14 October 2016.

³⁶ *Ibid*, Recommendation 25.7 to 25.14 inclusive.

³⁷ Carney J, Northern Territory Government, Review of the Northern Territory Youth Justice System: Report (2011), 59.

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.

Recommendation:

We commend Clauses 23, 28 through to 32 and 36 in the current bill to amend the *Youth Justice Act* (NT) and *Youth Justice Regulations* (NT).

We submit that Clause 44 relating to ‘prescribed offences’ inserting 3A into the *Youth Justice Regulations* be amended to remove *Traffic Act* offences.

Detention as a last resort

Whilst the number of young people committing offences has been progressively going down, the numbers entering detention have not. On an average night in the June quarter 2018, the rate of children in detention ranged from 2 per 10,000 in Victoria and South Australia to 16 per 10,000 in the NT. The NT consistently had the highest rate on an average night of all Australian jurisdictions.³⁸

It is alarming that the majority of children in detention on any given day are Aboriginal. Whilst Aboriginal children make up 45 per cent of the total Northern Territory youth population aged 10-17 years, they make up 97 per cent of the youth detention population on an average day.³⁹

Harm caused by incarceration

The detention of child must be a last resort, for example where the seriousness of the offending and protection of the community warrant no other alternative. For the vast majority of children who come into contact with the criminal justice, detention is not an appropriate response and can be highly detrimental to the very objects we are trying to achieve – more children succeeding in life, supported by their families and in their communities.

When a child is incarcerated they are removed from their home, family and other social supports into a foreign environment. The loss of liberty, personal identity and support mechanisms that may have been available in the community can place great stress on a child, and can compound mental illness and trauma.⁴⁰ In these circumstances children in detention are particularly vulnerable to victimisation (by adults and other children), stigmatisation by the criminal justice system and negative peer contagion.⁴¹

In particular for Aboriginal children, the social isolation and alienation from family, community and country can be more intense especially for those from remote regions. The flow on effect is also felt through family and community disharmony, reduced opportunities to form positive social, community-based relationships and reduced opportunities to participate in important cultural obligations including initiations and ceremonies.

³⁸ Australian Institute of Health and Welfare, *Youth Detention Population in Australia* (2018), 15.

³⁹ Australian Institute of Health and Welfare, *Northern Territory: youth justice supervision in 2016-17*. Further <https://territoryfamilies.nt.gov.au/youth-justice/youth-detention-census>.

⁴⁰ Royal Australian and New Zealand College of Psychiatrists submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory (2017).

⁴¹ Kelly Richards, Australian Institute of Criminology, *Trends & issues in crime and criminal justice* No.409, *What makes juvenile offenders different from adult offenders?* (2011), 7.

In addition, the removal of a child from their community and positive social networks can serve to reinforce negative behavior and increase the influence of peers in the detention facility. It is accepted, for example that prisons are ‘universities of crime’ that enable offenders to create and maintain criminal networks, learn and improve offending techniques and strategies.⁴² So rather than assisting a child to develop in socially responsible ways and address their needs, incarceration itself can increase the likelihood of offending.⁴³

The overuse of incarceration as a response to child offending is counterproductive to a child’s rehabilitation and ultimately the broader interests of the Northern Territory community.

Ensuring arrest is a last resort

[Part 4, Clause 19 amending s.123 of the *Police Administration Act* and Part 5, Clause 25 amending the *Youth Justice Act*.]

An essential principle underpinning the youth justice system is that a child or young person should only be kept in custody (whether on arrest, on remand or under sentence) as a last resort and for ‘the shortest appropriate period of time’.⁴⁴ The present bill seeks to amend the *Police Administration Act* and the *Youth Justice Act* to strengthen and to operationalise this principle and impose legislative safeguards.

The Royal Commission found that Northern Territory Police at times failed to comply with the principle to use arrest only as a last resort.⁴⁵ These amendments try to remedy this situation by ensuring the general (broad) power to arrest a person without warrant is made subject to youth justice principles.

In determining whether the present amendments go far enough, the Committee should consider the operation of specific provisions in Queensland pertaining to the power of arrest without warrant. In particular, Queensland’s *Youth Justice Act* (s.13) (YJA) requires police to apply youth specific considerations or meet pre-conditions to the use of the general power of arrest under the *Police Powers and Responsibilities Act*— see s.365(1) & (3). The Queensland YJA provisions (Part 2, Division 1) create a legislative scheme in which general policing powers are subject to specific youth justice principles. The first aspect of the scheme (s.11) codifies the requirement for police to consider alternatives to court proceedings, the second (s.12) preferences proceeding by summons or notice to attend and the third (s.13) limits the power of arrest to certain circumstances (as a last resort). In addition s.380 of *Police Powers and Responsibilities Act* imposes a positive duty on police to release an arrested child or discontinue an arrest where certain considerations are met.

Noting police overuse the power to arrest without warrant on children in the Northern Territory, the Committee may wish to consider amendments in line with the Queensland provisions and legislative scheme.

⁴² Ibid 6.

⁴³ Ibid, 7.

⁴⁴ s4(c) Youth Justice Act NT. Further Article 37(b) of the United Nations Convention on the Rights of the Child (CRC), ratified by Australia in 1990, provides that State parties ‘shall ensure’ that the arrest and detention of a child is used only as a measure of last resort and for the shortest appropriate period of time.

⁴⁵ Commonwealth, Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory, (November 2017), Chapter 25, 230.

Recommendation:

We commend Clause 19 amending s.123 of the *Police Administration Act* and Part 5, Clause 25 amending s.16 of the *Youth Justice Act*.

Reducing time in police custody

[Clause 21, amending s.137 of the *Police Administration Act* and Clause 27 amending s.27 of the *Youth Justice Act*]

Northern Territory legislation does not limit or stipulate a maximum period for which children and young people can be held in custody. In other jurisdictions, legislation dictates how long a child or adult person can be kept in police custody without charge and creates a mechanism for seeking (judicial) authorisation to extend custody periods. The lack of any legislative time limits was a matter of deep concern to the Royal Commission. In an analysis of records from the Alice Springs watchhouse in one month of 2017, it found three young people aged 12, 13 and 14 were held for over 30 hours.⁴⁶ Another child aged 11 was held in the watch house for 17 hours before being released on bail.⁴⁷

The Commission found that children were being held in police custody in the Watch House for unreasonably long periods and recommended legislative restrictions on the time police would be able to hold a child in custody.⁴⁸ Whilst the current bill introduces a time limit of four hours this can be extended internally on review by a senior sergeant for up to 24 hours and then any further period must be by court order. In summary the current proposal does not truly reflect the Commission's recommendations.

The Royal Commission recommended the legislation specify “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.”⁴⁹ In contrast the present amendments leave the review and decision to authorise an extension of the initial custody period to police members. We submit that any extension beyond the initial four hours should be the subject of judicial review and oversight. Further we would suggest that legislation require a police officer seeking an extension and the judicial officer granting an extension, record the reasons for and factors taken into account, to ensure accountability and transparency. In addition the Committee should consider whether the judicial authorisation to extend the time a person is held in custody is formalised through legal documentation as with issuance of a ‘detention warrant’ as is the case in NSW or ‘court order’ as in QLD.

Lastly the amendment to s.27 of the *Youth Justice Act* strengthens the safeguards sought above and is supported.

⁴⁶ Commonwealth, Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory, (November 2017), Chapter 25, 232.

⁴⁷ Ibid.

⁴⁸ Commonwealth, Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory, (November 2017), Chapter 25, 237; Recommendation 25.3.

⁴⁹ Ibid.

Recommendation:

Clauses 21, amending s.137 of the *Police Administration Act* should be amended to ensure a four hour limit on police custody and that any extension of time must be approved by a judicial officer.

We commend Clause 27 amending s.27 of the *Youth Justice Act*.

Reducing growing remand rates

[Part 2, Clauses 3 to 17 amending the *Bail Act* and *Bail Regulations*]

Most children held in detention in the Northern Territory are not there because they have been sentenced to detention, but because they have been remanded in custody awaiting trial or the resolution of their charges. The most recent statistics show that around 77 per cent of young people in detention in the Northern Territory are on remand, not serving a sentence following a finding of guilt.⁵⁰ Aboriginal and Torres Strait Islander children accounted for 93 per cent of all children on remand or in unsentenced detention on an average day in 2016-17.⁵¹

The evidence before the Royal Commission suggested that the increase in the number of children being held on remand is a consequence of: the introduction of the offence of breach of bail, the imposition of bail conditions unlikely to be adhered to, the lack of programs to support children on bail, and the lack of suitable bail accommodation.⁵²

Since the final report of the Royal Commission there has been significant work by the Northern Territory Government in partnership with key stakeholders to address the last two factors. It is noted that the Northern Territory Government committed \$4.86 million to youth bail support services including bail support accommodation, bail supervision and a bail support and referral line. The present amendments are directed at addressing the first two factors.

As mentioned, the bill seeks to amend the *Bail Act* by introducing youth specific bail considerations for the purpose of making a bail determination and determining bail conditions. It creates a presumption in favour of granting bail for children except in certain circumstances. The bill also removes breach of a bail condition as a criminal offence for children. These amendments to the *Bail Act* are said to implement Royal Commission recommendation 25.19 and have been informed by youth specific bail provisions in other jurisdictions.

These reforms (in addition to amendments sought below) will work to reduce the high remand rates and reduce pressures on both youth detention centres.⁵³ In addition the criteria and considerations a bail authority is required to take into account in any bail determination may ensure appropriate conditions and supports are provided to children.

However whilst we commend the majority of these reforms, the amendments relating to breach of bail do not go far enough. We submit that the Committee give effect to the Commission's recommendation 'to exclude children and young people from the operation of section 37B (offence to breach bail)'. We

⁵⁰ Australian Institute of Health and Welfare, Northern Territory: youth justice supervision in 2016-17, table S109a.

⁵¹ Australian Institute of Health and Welfare, Northern Territory: youth justice supervision in 2016-17, table S109a.

⁵² Commonwealth, Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory, (November 2017), Chapter 25, 278.

⁵³ <https://www.abc.net.au/news/2018-07-31/nt-government-warned-youth-detention-crisis-point-alice-springs/10055386>.

note that police would still have the power to arrest where there is a breach of bail condition or failure to attend court.

The introduction of the offence of breach bail (s.37B of the *Bail Act*) in 2011 has led to a significant increase in the arrest of children for conduct that is not, of itself, criminal and contributed to the entrenchment of children in the youth justice and detention systems.⁵⁴ Importantly, the criminalisation of breach of bail has led to the detention of children who would otherwise not be detained but for the offence.⁵⁵ 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.

The statistics reinforce our concerns as we see police apprehending young people more readily and more frequently for breach of bail than ever before. In the 2015-16, 697 children were apprehended for breaching bail, some 343 (49%) of whom were within the age 10-14 years. 662 (95%) of those apprehended were Aboriginal.⁵⁶

Recommendation:

We commend Clauses 3 to 17 amending the *Bail Act* and *Bail Regulations* to the exclusion of reforms to s.37B of the *Bail Act*.

Clause 13 should be amended to exempt a child or youth from the offence of breach of bail, including breach of bail conditions AND breach of bail undertaking.

Preventing the ‘naming and shaming’ of children

[Clause 33, amending ss49 and 50 of the *Youth Justice Act*]

The naming and shaming of alleged, accused or convicted young offender’s breach a child’s right to privacy, undermines attempts at rehabilitation, and can impair a child’s prospects of reintegration. Rather than acting as a deterrent, public shaming increases the likelihood of further offending due to stigmatisation. This is further heightened by the politicisation and distorted media reporting of youth offending and proliferation of social media.

The Royal Commission heard that media reporting and social media posts identifying young offenders can affect their prospects of rehabilitation, sense of identity and connection to the community.⁵⁷

The *United Nations Convention on the Rights of the Child* (CROC) and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985* (the *Beijing Rules*) confirm a young person’s right to privacy at all stages of juvenile justice proceedings.⁵⁸ In addition Rule 8.2 states that ‘no information that may lead to the identification of a juvenile offender shall be published.’ These rules

⁵⁴ Commonwealth, Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory, (November 2017), Chapter 25, 293.

⁵⁵ Ibid.

⁵⁶ Joe Yick, Statement to the Royal Commission into the Protection and Detention of Children in the Northern Territory, 14 October 2016

⁵⁷ Commonwealth, Report of the Royal Commission and Board of Inquiry into the protection and detention of children in the Northern Territory, (November 2017), Chapter 25, 307.

⁵⁸ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘CROC’)

are aimed at avoiding harm to a young person caused by undue publicity or by the process of labelling.⁵⁹

However in the Northern Territory youth court proceedings are open to the public and laws relating to those proceedings permit the naming and shaming of child offenders. The laws in the Northern Territory stand in stark contrast to those in all other jurisdictions which limit access to the court and restrict publication of information that may identify a young offender.

The bill seeks to remedy this situation by mandating that all youth court proceedings involving children are to be held in a closed court and prohibiting the publication of any information likely to lead to the identification of the youth, a witness or a victim.

Whilst we commend the amendments aimed at implementing recommendation 25.25 of the Royal Commission we submit that the restrictions on publication in s.50(1) may be too broad. We are concerned with the breadth of the prohibition in its application to 'venue of the court' (s.50(1)(a)), 'other party' (s.50(1)(b)), 'a witness' (s.50(1)(c)). 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 a 'victim' and/or 'child or young person.'

Recommendation:

We commend Clause 33 amending ss.49 and 50 of the *Youth Justice Act* in principle with amendments to s.50 relating to 'venue of the court', 'other party' and 'a witness'.

⁵⁹ United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), see commentary to Rule 8.