Jesuit Social Services
Building a Just Society

Social Policy Scrutiny Committee
GPO Box 3721
Darwin NT 0801
Email: spsc@nt.gov.au

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To the Chair and members of the Social Policy Scrutiny Committee,

Thank you for the opportunity to provide feedback on the Youth Justice and Related Legislation Amendment Bill 2019. This is an important piece of legislation that progresses a significant number of recommendations called for by the *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Royal Commission).

The Royal Commission was our opportunity, as a community, to draw a line in the sand, and commit to a youth justice system that helps rather than harms children and families. This Bill takes important steps towards that vision, and provides a stepping stone towards the development of a single Act for vulnerable children and young people, to which the Northern Territory Government has committed.[1]

The reforms set out in the Bill are the result of significant of consultation and negotiation by the members of the Legislative Amendment Advisory Committee (LAAC), of which Jesuit Social Services is a member.

The LAAC was established in March 2017 as a consultative working group to guide legislative reforms in response to the Royal Commission. Bringing together representatives from key government agencies and the community and legal sectors, the LAAC membership has contributed technical expertise and a grounded understanding of how these reforms are likely to play out in the lives of the children and families for whom we a seeking to make change.

This consultative approach to the development of the Bill is consistent with the Northern Territory Government's commitment to a collaborative approach to the implementation of the Royal Commission's reforms, articulated in *Safe, Thriving and Connected*.[2]

[1] Northern Territory Government (2018) *Safe, Thriving and Connected: Generational Change for Children and Families 2018-2023* (online) (p.25)
[22] See Chief Minister's Foreword and Statement of Commitment, *Safe, Thriving and Connected: Generational Change for Children and Families 2018-2023* (online)

As a member of the LAAC, Jesuit Social Services can attest to the robust and productive debate that has informed this Bill. In this context, we note that, while there are a number of changes in this Bill to which we give our full support, there are also some that we believe do not go far enough.

This submission outlines those reforms that we support and those where we believe the Northern Territory can and should do more.

Key areas of progress

Jesuit Social Services supports the following reforms articulated in the Bill, which together, will strengthen protections and see better outcomes for children and young people in trouble, and the community as a whole:

- Safeguarding children and young people against unnecessary arrest by **confirming that arrest should only ever be a measure of last resort**.[3]

- The introduction of **youth-specific criteria to inform bail applications and conditions**, and the shift to a **presumption in favour of bail** for youth for certain offences, so that vulnerable children and young people are not punished and remanded in detention due to a lack of supports and circumstances beyond their control.[4]

- Strengthening of children and young people's right to privacy through the introduction of **closed Courts for youth matters** and **preventing the publication of information that identifies a youth** being dealt with by the Youth Court, to protect vulnerable children and young people against the harms of public labelling.[5,6]

- Providing for **earlier access to legal assistance** and ensuring children and young people are **provided with information** about their rights in a manner and language that they understand.[7]

[3] See Clause 19 amending 123 of the *Police Administration Act* and Clause 25 amending section 16 of the *Youth Justice Act*, confirming in legislation guidelines in the Police General Order.
[4] See Clauses 3 to 17 amending the *Bail Act* and *Bail Regulations,* responding to recommendation 25.19(1,2,3 and 5) of the Royal Commission, noting that failure of this Bill to fully repeal the offence of breach of bail discussed on pages 6 and 7 below.
[5] See Clause 33 amending sections 49 and 50 of the *Youth Justice Act*, responding to recommendation 25.25 of the Royal Commission.
[6] See Jesuit Social Services' media release in support of closed Courts here (29 March 2019).
[7] See Clause 20 amending section 135(2) of the *Police Administration Act* (noting this could be further strengthened, as discussed on page 10 below) and Clauses 24 and 26 amending Sections 15 and 18 of the *Youth Justice Act*, responding to recommendations 25.4 and 25.6 of the Royal Commission.

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Areas for further change

1. Raise the age of criminal responsibility

The Northern Territory Government has committed to raising the age of criminal responsibility and prior to this Bill being introduced to Parliament, members of the LAAC believed that this important reform would be included in this stage of the legislative reform process.

Currently, in the Northern Territory, and across Australia, the minimum age of criminal responsibility is 10 years old. This means a primary school-aged child can be brought before the court, sentenced and sent to jail, rather than receiving support they need to stay strong, happy and out of trouble, with their families, in their community.

These laws are not in line with what we know about children's development. Extensive research shows that children rarely develop the social, emotional, and intellectual maturity needed to be held criminally responsible before the age of 14 years of age – and sometimes much later. We know that children and adolescents are more prone to risk-taking behaviour, are less able to regulate their emotions, and more susceptible to peer and environmental influences.[8]

We also know that the children most likely to come into contact with the police are the ones facing the toughest circumstances – circumstances that are often outside their control. They are more likely to be known to child protection, be developmentally vulnerable, have a disability or mental health issues. They are also more likely to be disengaged from school and have problems with alcohol or drugs.

Most children who come into contact with the justice system at a young age do so for low level offending, and most will grow out of offending. Yet the earlier a child is sentenced, the more likely they are to continue to offend into adolescence and beyond.[9] We also know, that even a short time in detention has damaging consequences for children in both the short and long term.[10]

[8] Richard, K. (2011), 'What makes juvenile offenders different from adult offenders?' *Trends and Issues in Crime and Criminal Justice,* no.409, Australian Institute of Criminology, p.3

[9] See for example Royal Commission into the Protection and Detention of Children in the Northern Territory (2017), Exh.3954.001, *10 characteristics of a good youth justice system*, by Judge Harding and Becroft, 12 February 2013, tendered 12 May 2017, p.3; Holman, B. and Ziedenberg, J. (2006) *The dangers of detention: the impact of incarcerating youth in detention and other secure facilities*, A Justice Policy Institute Report, p.6; and Sentencing Advisory Council (2016) Reoffending by Children and Young People in Victoria (online).

[10] Holman, B. and Ziedenberg, J. (2006), p.6; Lynch, M., Buckman, J. and Krenske, L. 2003 'Youth justice: Criminal trajectories', Trends and Issues in Crime and Criminal Justice, no. 265, p.2.

Criminalising the behaviour of these children is not the answer. It fails to address the circumstances contributing to their behaviour and instead traps them in a harmful system that perpetuates a cycle of disadvantage and reoffending.

Raising the age of criminal responsibility opens the door for a more effective approach: stepping in early with therapeutic and restorative responses, and working with families and communities to give this small group of children the extra support, care and guidance they need to thrive.

While the Royal Commission recommended that the age of criminal responsibility be raised to 12 years of age, we note that this remains below the average age internationally, which is 14 years. 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.[11]

We urge the Northern Territory Parliament to raise the age of criminal responsibility to at least 14 years, to bring the Territory into line international standards and lead the way nationally on implementing this important reform.

Recommendation 1: That changes to the age of criminal responsibility be included in this round of reform. Specifically, we recommend that:

- the *Criminal Code Act,* sub-sections 38(1), 43AP and 43AQ be amended to raise the age of criminal responsibility, and that
- in line with recommendation 27.1 of the Royal Commission, section 83 of the *Youth Justice Act* be amended to insert a provision that ensures the Court may not order a young person under the age of 14 serve a term of detention or imprisonment, unless the young person has been found guilty of a serious violent or sexual offence, and the young person presents and ongoing and serious risk to the community.

[11] Committee on the Rights of the Child, General Comment No. 10 Children's rights in juvenile justice, 44th session, UN Doc CRC/C/GC/10 (25 April 2007), paragraphs 32–33.

2. Ensure an upper limit on the time that a child or young person can be held in police custody

Part 4 Amendment of *Police Administration Act* 1978: **Clause 21** amending Section 137
Part 5 Amendment of *Youth Justice Act* 2005: **Clause 27** amending section 27, subsections 5-7

The absence of legislative restrictions on the time that a child or young person can be held in police custody was a matter of significant concern for the Royal Commission and puts the Northern Territory out of step with other jurisdictions, including South Australia, Queensland, New South Wales and the Commonwealth.[12]

The proposed amendments to section 137 of the *Police Administration Act* are inconsistent with recommendation 25.3 of the Royal Commission, which expressly sought to limit the time for which a child or young person can be held without charge for the purpose of investigation, and ensure that any extension is subject to judicial oversight.

Specifically, the recommendation states 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."*[13] In contrast, the present amendments allow a child or young person to be detained without charge for up to 24 hours without judicial review, and provides no consequences for non-compliance by police with this amendment (under s137(5), failure to comply is "not unlawful").

Further, while Jesuit Social Services supports in-principle the repeal of section 27 of *Youth Justice Act*[14], we are concerned that subsections (5)(6)(7) effectively lessen the existing provisions by failing to specify a limit on the extension of time that can be granted by a Judge before a child or young person is brought before the Court.

Taken together with section 137 of the *Police Administration Act*, the changes as currently proposed place no upper limit on the period for which a young person can be held in police custody. Given the evidence presented to the Commission that many children have spent extended periods in police custody (some for more than two days), this is of deep concern.[15]

[12] See Chapter 25, Volume 2B, p.236.
[13] Section 137 of the *Police Administration Act* and Section 27 of the *Youth Justice Act*.
[14] Which under current legislation requires that a child or young person only be brought before a Court within seven days.
[15] Chapter 25, Volume 2B, p.234.

Recommendation 2.1: That Clause 21 be amended to bring the changes to section 137 of the *Police Administration Act* into line with recommendation 25.3 of the Royal Commission, specifying that children and young people may be held in custody without charge for no longer than four hours and that any extension up to a further four hours may only be granted by a Judge.

Recommendation 2.2: That Clauses 21 and 27 amending the *Police Administration Act* and *Youth Justice Act* be revised to specify an upper limit on the length of time a child or young person can be held in police custody.

3. Fully repeal the offence of breach of bail for children and young people

Part 2 Amendment of *Bail Act 1982*: **Clause 13** replacing Section 37B

Jesuit Social Services welcomes the proposed amendments that repeal the offence of breach of bail conditions, but is concerned that they do not extend to decriminalising breach of bail undertaking (failure to attend court). Consistent with recommendation 25.19 of the Royal Commission, we recommend that children and young people are wholly excluded from section 37B of the *Bail Act* (NT).[16]

By criminalising behaviour that is not, of itself, criminal (such as residing at a prescribed address, or being with a family member who is not listed in the bail conditions), the offence of breach of bail is more often than not, counterproductive.[17] In evidence to the Royal Commission, Northern Territory Police noted that the introduction of the offence of breach of bail in 2011 has not reduced reoffending[18] – suggesting the current laws are not advancing their intended goal of improving community safety.[19]

[16] See Recommendation 25.19, Chapter 25, Volume 2B, p.298.
[17] See discussion in Chapter 25, Volume 2B, pp.292-295.
[18] See Exh.052.001; Exh.756.001. Statement of Ian Lea, 14 June 2017, tendered 20 July 2017, para. 11; transcript, Antoinette Carroll, 15 March 2017, p.1164: lines 31-33, cited in Chapter 25, Volume 2B, p.293.
[19] This is in line with the literature that shows no evidence that enforcing breach of bail (through arrest and detention) leads to decreased offending children and young people (see for example Vignaendra, S, Moffatt, S, Weatherburn, D & Heller, E, 'Recent Trends in Legal Proceedings for Breach of Bail, Juvenile Remand and Crime' (May 2009), *BOCSAR Bulletin* No.128).

The offence has, however, been a major contributor to the escalating rates of remand[20] and subjected children unnecessarily to the harms of detention – noting that many children many children detained for breach of bail are subsequently found not guilty of the original charge.[21] The weight of this law is felt disproportionately by younger Aboriginal children.[22] It is critical that we do all that we can to keep children and young people out for detention.

According to the figures provided by Territory Families to the Social Policy Scrutiny Committee, approximately three quarters children currently in detention are being held there on remand, awaiting an appearance in Court. In 2017-18, the percentage of young people held unsentenced in detention reached as high as 92 per cent.[23] The introduction of the offence of breach of bail has also contributed to the rising volume of matters being heard by the Youth Court.[24]

Repealing the offence of breach of bail for children and young people creates the opportunity for agencies to respond more effectively to the circumstances surrounding a breach (for example, addressing a young person's housing or transportation needs), rather than mandating a one-size-fits-all, punitive response.[25]

We note that repealing the offence does not prevent police involvement if a breach involves offending behaviour, nor does it prevent the Court considering whether or not that young person should have their bail revoked.

Recommendation 3.1: That Clause 13 be amended to wholly exclude children and young people from the offence of breach of bail under section 37B of the *Bail Act*, including breach of bail condition and breach of bail undertaking (failure to attend court).

[20] Royal Commission, Chapter 25, Volume 2B, p.292.
[21] Ibid, p.293.
[22] Ibid, p.292.
[23] Figure for an average night in the March Quarter 2018, Australian Institute of Health and Welfare (AIHW) Youth Justice report.
[24] Court Statistics for Criminal Justice Forum, to December 2018.
[25] Examples cited by Territory Families in the Committee's public briefing included a young person who can no longer stay in their bailed address because they are no longer safe there, or a young person who is engaging in work, education or sport and because of that commitment is delayed in getting back to where they are supposed to be (see page 9 of the transcript from the hearing, 1 April 2019, online).

4. Review the list of offences that are not automatically divertible ('prescribed offences')

Part 6 Amendment of *Youth Justice Regulations*: **Clause 44** replacing Regulation 3

Jesuit Social Services strongly supports changes in the Bill to remove barriers to diversion, in line with recommendations 25.9, 25.10 and 25.13 of the Royal Commission.[26] These changes will see more children and young people benefit from diversionary approaches, in turn improving community safety by reducing the number of children and young people who return to the criminal justice system.

We are concerned, however, 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).[27] We recommend the proposed list of prescribed offences at 3A (g) be amended to align with the Royal Commission.

A focus on diversion should be at the heart of any good youth justice system. Diversion is about creating paths away from the youth justice system, rather than deeper into it. This acknowledges that most children come into contact with the justice system for the first time for low level crimes, and that most will grow out of offending. How we respond when a child gets in trouble has a significant impact on their trajectory into adolescence and beyond.[28]

While early contact with the criminal justice system significantly increases a child's chances of life-long involvement with the justice system,[29] Territory data shows that the vast majority of children who are dealt with *outside* of the formal criminal justice system do not reoffend.[30]

[26] Part 5 Amendment of Youth Justice Act 2005: Clauses 23, 28-32 and 36

[27] Recommendation 25.11.

[28] Richard, K. 2011, 'What makes juvenile offenders different from adult offenders?' *Trends and Issues in Crime and Criminal Justice,* no.409, Australian Institute of Criminology, p.3

[29] See for example Royal Commission into the Protection and Detention of Children in the Northern Territory (2017), Exh.3954.001, *10 characteristics of a good youth justice system*, by Judge Harding and Becroft, 12 February 2013, tendered 12 May 2017, p.3; Holman, B. and Ziedenberg, J. 2006 *The dangers of detention: the impact of incarcerating youth in detention and other secure facilities*, A Justice Policy Institute Report, p.6; and Sentencing Advisory Council (2016) Reoffending by Children and Young People in Victoria (online)

[30] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, Final Report (November 2017), Volume 1, Chapter 27, p.413.

This reflects what we know about what works for young people in trouble: they need the opportunity to learn from their mistakes, repair the harm and access therapeutic support and other programs that respond to the issues underlying their offending behaviour (for example, experiences of trauma, school disengagement, alcohol use, family circumstances). It also reflects the fact that, for children and young people who engage in low-level offending, a warning or a caution may be the most appropriate response.[31]

A culture of diversion, grounded in legislation and supported by well-resourced, community-led programs across the Territory is critical to reducing the number of Aboriginal children and young people caught up in our youth justice system.

Recommendation 4: That Clause 44 specifying the proposed list of 'prescribed offences' under 3A of the *Youth Justice Regulations* be amended to remove traffic offences, in line with recommendation 25.11 of the Royal Commission.

5. Establish a Custody Notification Scheme for the Northern Territory

Part 4 Amendment of *Police Administration Act*: **Clause 20** amending Section 135

Jesuit Social Services strongly supports the changes to Section 135 of the *Police Administration Act* that provide for earlier access to legal assistance for children and young people, but note that this falls short of the establishment of a Territory-wide Custody Notification Scheme (CNS) recommended by the Royal Commission.[32]

It is now almost 30 years since the *Royal Commission into Aboriginal Deaths in Custody* recommended the establishment of CNS to ensure that Aboriginal Legal Services are notified upon the arrest or detention of any Aboriginal person.[33]

[31] See Day, A., Howells, K. and Rickwood, D. (2004) 'Current trends in the rehabilitation of juvenile offenders', Australian Institute of Criminology (online) for a framework for diversion. The evidence suggests that for low-risk offenders (i.e. those unlikely to reoffend), a more 'hands-off' approach, such as a caution, may be more effective, given the risk of stigmatisation and 'contagion'.

[32] Recommendation 25.4.

[33] Recommendation 224, Volume 4 of the Royal Commission into Aboriginal Deaths in Custody, National Report (1991).

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Both NSW and the ACT already have a CNS in place, and WA has committed to establishing one.[34] The schemes provide 24-hour, 7-day a week telephone service available to Aboriginal people detained in custody. CNS lawyers provide legal advice in a culturally sensitive manner, and are trained to detect and respond to issues such as threats of self-harm or suicide, or any injuries sustained during arrest.

While the amendments to Section 153 support timely notification of legal services that a child or a young person has been brought into custody, they fall well short of establishing a comprehensive framework for a Custody Notification Scheme.

The Commonwealth is supportive of a CNS and has offered to work with states and territories to establish a scheme where one isn't already in place.[35]

Jesuit Social Services understands that the Northern Territory Government has discussed the establishment of a Territory-wide scheme with the Commonwealth and local Aboriginal Legal Services, and submits that this should be progressed as a matter of priority.

Recommendation 5: That the Northern Territory work with the Commonwealth to establish a Custody Notification System for the youth and adult justice systems in this jurisdiction.

Jesuit Social Services thanks the Committee again for the opportunity to provide feedback on this important piece of legislation. We commend the significant number of positive reforms contained in this Bill and thank the Committee for their consideration of the opportunities to strengthen it so that our youth justice system can achieve the best possible outcomes for children, families and communities.

If you have any questions about the feedback provided in this submission, please do not hesitate to contact me on (03) 9421 7604 or at Julie.edwards@jss.org.au.

Yours sincerely,

Julie M. Edwards

Julie Edwards
CEO
Jesuit Social Services

[34] 'States urged to back 'life-saving' policy to prevent Indigenous deaths in custody', The Age, 11 October 2017.
[35] Ibid.