



**Submission to Legal and Constitutional Affairs References  
Committee: Australia's youth justice and incarceration  
system**

October 2024

## Foreword

The Northern Territory Council of Social Services (NTCOSS) welcomes the opportunity to provide a submission to the Legal and Constitutional Affairs Committee on Australia's Youth Justice and Incarceration System.

NTCOSS is the peak body for the Northern Territory (NT) Community and Social Services Sector and is a voice for people affected by social and economic disadvantage and inequality. NTCOSS membership is made up of community managed, non-government, not for profit organisations, which work in social and community service delivery, sector development and advocacy. NTCOSS represents members across the NT, including Aboriginal community controlled organisations (ACCOs), and organisations based in regional and remote areas.

NTCOSS recognises the specialist knowledge of members and external stakeholders with expertise in matters relating to this submission. In particular we support the submissions made by the following peak body, ACCO and specialist legal services:

- Association of Alcohol and Other Drug Agencies NT (AADANT)
- Northern Australian Aboriginal Justice Agency (NAAJA)
- Katherine Women's Information and Legal Service (KWILS)

NTCOSS has also made a submission with the Network of Councils of Social Service.

While this document uses the term 'Aboriginal', we respectfully acknowledge that Torres Strait Islander peoples are First Nations people living in the Territory. Therefore, strategies, services and outcomes relating to 'Aboriginal' Territorians should be read to include both Aboriginal and Torres Strait Islander Territorians.

NTCOSS acknowledges that we live and work on what always was, and always will be, Aboriginal land. We pay our respects to Aboriginal cultures and country, and to Elders both past and present.



## Summary and Recommendations

Since 2020 child prison populations in the NT have increased significantly which has overwhelmingly impacted Aboriginal and Torres Strait Islander communities who are over-represented at every point of contact with the justice system.<sup>1</sup> The rates of young people in detention in the NT are the highest in the country and most of these young people identify as Aboriginal or Torres Strait Islander. In the NT, 43 percent of the population aged 10-17 years old are Aboriginal, but 94 percent of this age group in detention are Aboriginal.<sup>2</sup>

There is extensive existing evidence relating to the terms of this inquiry, previously provided in Royal Commissions, inquiries, reviews, submissions and reports relating to youth justice and incarceration over the last decade.

In recognition of the extensive existing evidence and the large number of submissions this inquiry will receive, NTCOSS will address these terms of inquiry only to highlight NT-related particularities in the following areas:

- a) the outcomes and impacts of youth incarceration in jurisdictions across Australia;
- b) the over-incarceration of First Nations children;
- c) the degree of compliance and non-compliance by state, territory and federal prisons and detention centres with the human rights of children and young people in detention.

In consideration of the evidence relating to the terms of inquiry, NTCOSS makes the following recommendations regarding youth justice and incarceration in Australia:

1. Prevention, early intervention, and diversionary responses linked to culturally-safe and trauma-responsive services including education, health and community services should be prioritised and expanded.
2. In Aboriginal and Torres Strait Islander communities, the planning, design and implementation of prevention, early intervention and diversionary responses should be community-led.
3. The minimum age of criminal responsibility must be raised to at least 14 years and there must be no 'carve outs' to this legislation, even for serious offences.
4. Doli incapax – fails to safeguard children, is applied inconsistently and results in discriminatory practices.

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<sup>1</sup> Justice Reform Initiative, *State of Incarceration: Insights into Imprisonment in NT* (2022), [6 JRI Insights NT FINAL-7.pdf \(nationbuilder.com\)](#)

<sup>2</sup> Australian Institute of Health and Welfare, *Youth justice in Australia 2021-22* (2023) <https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2021-22/contents/state-and-territory-fact-sheets/northern-territory>

## a) the outcomes and impacts of youth incarceration in jurisdictions across Australia

The negative outcomes and impacts of youth incarceration on the development of children in the NT are well documented.<sup>3</sup> As argued in the NT Royal Commission's report, the deterrent value of incarceration for children and young people is 'far outweighed by its detrimental impacts'.<sup>4</sup> The Commissioners found that for pre-teens and young teenagers, 'the harsh consequences of separation ... from parents/carers, siblings and extended family; the inevitable association with older children with more serious offending histories; that youth detention can interrupt the normal pattern of 'aging out' of criminal behaviour; and the lack of evidence in support of positive outcomes as a result of time spent in detention are all results of detention that are counter-productive to younger children engaging sustainably in rehabilitation efforts and reducing recidivism'.<sup>5</sup>

Criminalisation of children is also expensive and ineffective in preventing further crime. In the NT, the cost of youth imprisonment is more than four times the cost of community supervision.<sup>6</sup>

Despite the overwhelming evidence that 'tough on crime' approaches do not work to reduce the causes of crimes and break the cycle of re-offending,<sup>7</sup> successive NT governments adhere to these policies. This has a disproportionate effect on Aboriginal Territorians but it affects the entire NT population who live with the impacts of increased offending and recidivism. 7 out of 10 respondents to a 2022 survey of NT residents stated they would prefer addressing the causes of crime and breaking the cycle of reoffending, compared to more prison sentences and more police.<sup>8</sup>

## b) the over-incarceration of First Nations children;

The failures to address the issues facing Aboriginal children, young people and families in the NT over many decades has had catastrophic impact, including the over-incarceration of Aboriginal children and young people.

The reasons for the over-incarceration of Aboriginal young people in the NT are well documented and driven by poverty, homelessness, domestic, family and sexual violence, over-representation in out of home care and intergenerational trauma. Further, the earlier a child

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<sup>3</sup> Justice Reform Initiative, *State of Incarceration: Insights into Imprisonment in NT* and Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations (2017)*, [Findings and Recommendations \(royalcommission.gov.au\)](https://royalcommission.gov.au/Findings-and-Recommendations)

<sup>4</sup> Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, November 2017, Vol.2B, 419.

<sup>5</sup> Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, Vol.2B, 419.

<sup>6</sup> The Insight Centre (2023) *Smarter Justice - A better way of doing justice in the Northern Territory* <https://theinsightcentre.com.au/wp-content/uploads/2023/04/TIC-Smarter-Justice-V3-FINAL.pdf>

<sup>7</sup> The Insight Centre (2023) *Smarter Justice - A better way of doing justice in the Northern Territory*

<sup>8</sup> The Insight Centre (2023) *Smarter Justice - A better way of doing justice in the Northern Territory*

comes into contact with the justice system the more likely they are to become long-term offenders.<sup>9</sup>

However, this over representation is also driven by living in remote and very remote areas, which encompasses all of the NT outside of Darwin. For instance, in remote areas, the challenges and impacts of violence against women and children can be more complex to address. Even more so in very remote areas. Providing effective services responses to support adult victims and perpetrators, and the children in these families, is a unique and complex challenge. The complexities of living remotely extend to supported bail accommodation, access to alcohol and other drug facilities and access to health care. Please see the submissions by our colleagues at KWILS and AADANT for more detail.

In the NT, there are significant gaps in support and help for First Nations children to prevent, intervene early and divert them from the justice system. As outlined in the submissions made by our colleagues at NAAJA and KWILS:

- Help for young people is needed way earlier – in education, health, housing, family supports, youth support.
- Diversion is not well funded, used or understood in the NT, and is not used as a priority by police or courts.
- Young people spend long periods of time on remand, yet very few are given a term of youth detention when their matter is determined.
- NT bails laws are excessively punitive.
- Very often young people in detention centres have experiences with DFSV and its associated trauma, and supports are not available to address this.
- Court mandated rehabilitation programs do not have enough places, staff are not appropriately trained, programs are often not high quality
- There are gaps and a need for Aboriginal kinship carers, Aboriginal mentors and Aboriginal-led programs to support at-risk young people without family support networks.

### c) the degree of compliance and non-compliance by state, territory and federal prisons and detention centres with the human rights of children and young people in detention

The degree of non-compliance in NT prison and detention centres with the human rights of children and young people in detention is well documented.<sup>10</sup> This month, regressive changes are due to be made in NT law that will increase non-compliance with human rights. The recently

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<sup>9</sup> See Central Australian Aboriginal Congress, *Submission to the NT Royal Commission into Youth Detention* (2016) [Congress-Submission-to-NT-Royal-Commission-FINAL-as-submitted-1-November-2016.pdf](https://caac.org.au) (caac.org.au), Justice Reform Initiative, *Children, Youth Justice and Alternatives to Incarceration in Australia* (2024), [https://assets.nationbuilder.com/justicereforminitiative/pages/441/attachments/original/1720409799/JRI\\_YOUTH\\_JUSTICE\\_JUNE\\_2024.pdf?1720409799](https://assets.nationbuilder.com/justicereforminitiative/pages/441/attachments/original/1720409799/JRI_YOUTH_JUSTICE_JUNE_2024.pdf?1720409799) and Australian Institute of Health and Welfare (December 2023) *Youth detention population in Australia 2023* and Australian Institute of Health and Welfare (March 2024) *Youth Justice* and Behrendt et al. (2009), cited in O'Brien (2021) *'Racial Profiling, Surveillance and Over-Policing: The Over-Incarceration of Young First Nations Males in Australia'* *Soc. Sci.* 2021, 10(2), 68.

<sup>10</sup> See Justice Reform Initiative, *State of Incarceration: Insights into Imprisonment in NT* (2022), Royal Commission and Board of Inquiry Into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations*.



elected NT government has indicated an intention to lower the age of criminal responsibility back to 10 years of age and re-introduce spit hoods in NT youth detention centres.

Our colleagues at NAAJA advise that young people in detention in the NT experience:

- Very high use of Electronic Monitoring Devices.
- Use of police dogs when approaching young people.
- Young people being transported in paddy wagons for long periods.
- Young people kept in police watch houses for extended periods.
- Use of restraints and solitary confinement on young people inside detention.
- Isolation of young people who are at risk of self-harm or suicide.
- Young people are often not given access to time outside due to staffing shortages.
- Limited access to education.

## Recommendations

In consideration of the extensive evidence relating to the terms of reference addressed above, NTCOSS recommends:

**1. Prevention, early intervention, and diversionary responses linked to culturally safe and trauma-responsive services including education, health and community services should be prioritised and expanded.**

- The social and community sector provides a wide range of services and supports, including child and family services, domestic, family and sexual violence services, disability services, alcohol and other drug services and mental health services. These services must be adequately funded, and workforce strategies developed to ensure they can recruit and retain high quality staff.
- Increased support for children experiencing vulnerability throughout their schooling. Engagement with school is a protective factor against poor health outcomes, poverty and engaging in youth offending,<sup>11</sup> providing a significant opportunity for positive interventions for children identified as at risk.
- The criminal justice system has both short- and long-term negative impacts, and reduced opportunities for family and community support to assist in improving child wellbeing and behaviour. A continuum of responses is necessary for children and young people who engage in harmful or inappropriate behaviour, ranging from early community-based family support with lower risk cases, to assessment, intervention and intensive work for children demonstrating the highest risk and needs.<sup>12</sup>

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<sup>11</sup> Hancock K and Zubrick S, *Children and young people at risk of disengagement from school*, 2015, for the Commissioner for Children and Young People WA, found at <https://www.cyp.wa.gov.au/media/1422/reportededucation-children-at-risk-of-disengaging-from-school-literature-review.pdf>,

<sup>12</sup> Hackett S, Branigan P and Holmes D, *Operational framework for children and young people displaying harmful sexual behaviours*, 2015, second edition, London NSPCC

- Comprehensive, community-based, culturally appropriate, intensive family support services must be universally available across urban, regional and remote communities.<sup>13</sup>
  - Therapeutic, multi-disciplinary approaches have been shown to reduce recidivism, and have a sustained reduction in behavioural problems and emotional difficulties in young people.<sup>14</sup>
  - The impact of Fetal Alcohol Spectrum Disorder on prevention, early intervention and diversion must be closely considered - please see the submission by our colleagues at AADANT.
  - As recommended by the Aboriginal Medical Service Alliance of the NT, any programs and responses must be adapted to the 'specific social and cultural context of young Aboriginal people' and services must address all issues holistically.<sup>15</sup>
- 2. In Aboriginal and Torres Strait Islander communities, the planning, design and implementation of prevention, early intervention and diversionary responses should be community-led.**
- Raising the age of criminal responsibility will assist in addressing the overrepresentation of Aboriginal and Torres Strait Islander children in the justice system, and with investment and support, will provide greater opportunities to enable and empower Aboriginal families, communities, and organisations to support children in culturally safe and appropriate ways.
  - As stated by Change the Record, policy solutions must be 'underpinned by the principle of self-determination, respect for Aboriginal and Torres Strait Islander people's culture and identity, and recognition of the history of dispossession and trauma experienced by many communities'.<sup>16</sup>

While NTCOSS believes detention should only be used as a last resort, in the event that children and young people are detained, it should be under the following conditions:

- 3. The minimum age of criminal responsibility must be raised to at least 14 years and there must be no 'carve outs' to this legislation, even for serious offences.**
- In keeping with contemporary evidence and understanding of child and adolescent brain development, the minimum age of criminal responsibility should be increased to at least 14 years across Australia, for all offences.
  - The current minimum age of criminal responsibility at 12 years of age in the NT (this is expected to be reduced to 10 years during the week of 15 October 2024) has a disproportionate impact on Aboriginal and Torres Strait Islander children.
  - Detention or imprisonment of children and young people should be used only as a measure of last resort and only occur for the shortest appropriate period.

<sup>13</sup>APONT and NAAJA, *NGO Alternative Report to the United Nations Committee on the Rights of the Child: Response to the Australian Government's State Report on the United Nations Convention on the Rights of the Child*, 2018, <http://www.naaaja.org.au/wp-content/uploads/2018/11/APONT-NAAJA-Joint-Report-to-the-UN-Committee-on-the-Rights-of-the-Child.pdf>.

<sup>14</sup>Porter M and Nuntavisit L 2016, 'An Evaluation of Multisystemic Therapy with Australian Families', *The Australian and New Zealand Journal of Family Therapy* 37 (4) 443 - 462

<sup>15</sup>Aboriginal Medical Services Alliance NT (AMSANT) 2017, *AMSANT Submission to the Royal Commission into the Protection and Detention of Children in the Northern Territory*, 31.

<sup>16</sup>Change the Record Coalition, *Blueprint for Change: Changing the Record on the disproportionate imprisonment rates, and rates of violence experienced by Aboriginal and Torres Strait Islander people*, 2015, 5.

- The relatively small number of younger children who do offend are arguably the most vulnerable, with evidence suggesting that many children in the justice system have multiple, complex mental health, social and emotional wellbeing needs. It is for this reason that NTCOSS recommends against raising the minimum age of criminal responsibility for certain circumstances only, as children engaging in more serious crimes are likely to be the most vulnerable cohort.
- The Committee on the Rights of the Child strongly recommends that the minimum age of criminal responsibility 'does not allow, by way of exception, the use of a lower age'.<sup>17</sup>

#### 4. **Doli incapax – fails to safeguard children, is applied inconsistently and results in discriminatory practices**

- Doli incapax is an old, common law rebuttable presumption that children lack the capacity to be legally responsible for their acts, however it routinely fails to safeguard children.
- The presumption of doli incapax is inconsistently applied across Australia. The absence of adequate data in the NT presents difficulties in assessing the application of the principle, however the number of young children who are subject to criminal penalties suggests that it is inconsistently or frequently unsuccessfully in this jurisdiction. Furthermore, contrary to common law, the onus to establish doli incapax appears to have become the responsibility of the defence, rather than the responsibility of the prosecution to refute.<sup>18</sup>
- In the NT, this practice means that young defendants are subjected to bail (and often held in remand), and the principle of *doli incapax* is tested by way of contested hearing.<sup>19</sup> The increasing number of young children being charged with breach of bail offences and the relatively small percentage of children held on remand receiving a custodial sentence 'compromises the fundamental objective behind the doctrine of doli incapax and more importantly, the presumption of innocence. The very children who should be protected by the doctrine of doli incapax due to their vulnerabilities are put in custody precisely because they are subject to criminal processes such as bail, despite concerns over their ability to understand the nature and the consequences of not complying the process itself'.<sup>20</sup>
- Raising the minimum age of criminal responsibility to 14 will remove the needs for courts to consider the confusing and complex doli incapax presumption.

<sup>17</sup> United Nations Committee on the Rights of the Child Congress' General Comment No. 24 (201x), replacing General Comment No. 10 (2007) Children's rights in juvenile justice', United Nations Human Rights Office of the High Commissioner.

<sup>18</sup> O'Brien, Wendy and Fitz-Gibbon, Kate, The minimum age of criminal responsibility in Victoria (Australia): examining stakeholders' view and the need for principled reform, *Youth Justice*, 2017, vol. 17, no. 2, 134-152.

<sup>19</sup> Criminal Lawyers Associations of the NT and Ng C, *Applying the Doli Incapax Principle in the Northern Territory: the implications and the way forward*, 2019, <https://clant.org.au/wp-content/uploads/NgPaper.pdf>

<sup>20</sup> Criminal Lawyers Associations of the NT and Ng C, *Applying the Doli Incapax Principle in the Northern Territory: the implications and the way forward*.

