



# Expenditure on Children in the Northern Territory

Productivity Commission

24 July 2019

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 28 June 2019 are:

- Mr Arthur Moses SC, President
- President-elect, (vacant)
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Ross Drinnan, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## About the Law Society Northern Territory

The Law Society Northern Territory is the peak body for the legal profession in the Northern Territory.

The Society represents more than 550 lawyers in the Northern Territory encompassing practitioners from private practice, government and the legal assistance sector.

The Society represents the interests of the legal profession to government, the media, the business and general community, and to other professional organisations.

The Society's mission includes facilitating and improving the delivery of legal services, advocating for fair and just laws and preserving the integrity of the justice system. The Society engages with government, the Courts and other Territory and national bodies to advocate for law reform that is evidence based, for the benefit of the broader community, and addresses legal needs.

The Society is governed by a Council of 16 members of the profession and its work is supported by the valuable contribution of more than 50 of its members through the work of the Society's 12 committees.

## Acknowledgement

The Law Council is grateful for the assistance of its Indigenous Legal Issues Committee, its Indigenous Incarceration Working Group and its Family Law Section in the preparation of this submission.

This is a joint submission of the Law Council of Australia and Law Society Northern Territory.

## Introduction

1. The Law Council and the Law Society Northern Territory (**LSNT**), welcomes the opportunity to provide a submission to the Productivity Commission regarding its Issues Paper on *Expenditure on Children in the Northern Territory (Issues Paper)*.
2. The Law Council and LSNT welcome this study noting that it implements a recommendation of the Royal Commission into the Protection and Detention of Children in the Northern Territory (**NT Royal Commission**).<sup>1</sup> Rather than providing a detailed response to each of the questions in the Issues Paper, the Law Council and LSNT wish to raise some high level points that may guide the Productivity Commission's study. In particular, it makes comments regarding the study's scope and provides some suggested guiding principles and issues for consideration regarding funding decisions and frameworks. Where relevant, the Law Council draws on its [Justice Project](#), which was a national review into the state of access to justice in Australia, focusing on groups experiencing significant disadvantage, including children and young people.

## Scope of the Inquiry

### Consideration of youth justice spending

3. The Issues Paper recognises that policing and youth justice interventions are 'clearly relevant to the prevention of harm' despite 'not typically' being classified as children and family services.<sup>2</sup> It also notes that 'it is common for family services to be provided alongside community services and it is often not clear where one ends and the other begins'.<sup>3</sup> However it concludes that:

*it will be necessary to contain the scope of services that are most relevant to preventing harm to children...expenditure on youth justice services...is not likely to be in scope.*<sup>4</sup>

4. In the Law Council and LSNT's view, a lack of consideration of youth justice spending would be a significant oversight. There are three reasons for this assessment.
5. Firstly, child protection responses and services are closely intertwined with youth justice services. An analysis of both is necessary to understand the 'pathways' that children take through the system, and to assess the effectiveness of child protection services in delivering substantive outcomes for children. Children in out of home care have high levels of contact with the criminal justice system, leading to youth detention and 'the almost inevitable progression to the adult corrections system'.<sup>5</sup> The Australian Law Reform Commission (**ALRC**) has acknowledged that 'the links between these systems is so strong that child removal into out-of-home care and juvenile detention could be considered as key drivers of adult incarceration'.<sup>6</sup> The

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<sup>1</sup> *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017) Vol 1, 237.

<sup>2</sup> Productivity Commission, *Expenditure on Children in the Northern Territory* (Issues Paper, May 2019) 5.

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*

<sup>5</sup> Katherine McFarlane, 'From Care to Custody: Young women in out-of-home care in the criminal justice system' (2010) *Current Issues in Criminal Justice* 22(2) 348.

<sup>6</sup> Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2018) 485.

cohort of children in the child protection system in the Northern Territory (NT) feeds directly into its numbers in youth detention. For example, research commissioned by the NT Royal Commission demonstrated that the majority of children in the NT, (75 per cent of Aboriginal and Torres Strait Islander children and 60 per cent of non-Aboriginal children), who had been found guilty of an offence had previously been reported to child protection.<sup>7</sup> On this basis the NT Royal Commission commented that ‘the magnitude of this ‘crossover’ figure for Aboriginal children shows the degree of closeness of the association between youth justice and child protection in the NT’.<sup>8</sup>

6. It is therefore short-sighted to limit the Productivity Commission analysis to children and family services. Youth justice information is required to assess the effectiveness of the child protection services that are unable to avert this pathway to detention, and in some cases perpetuate it, as indicated by the ‘care to crime’ drift being attributed in part to systemic issues within child protection.<sup>9</sup> In this regard, concerns have been raised regarding a frequent practice in residential care facilities of ‘relying on police and the justice system in lieu of adequate behavioural management’<sup>10</sup> and a tendency for young people to be charged for relatively minor property damage offences that occur in residential care.<sup>11</sup> In light of these dynamics, consideration of pathways from child protection to youth detention should be factored into funding decisions, oversight models and long-term reviews of NT services.
7. Secondly, in order to understand the funding landscape, and ‘how’ and where money is being spent, it is necessary to consider the extent of youth justice spending in comparison to spending on children and family services focused on early intervention and prevention strategies. Nationally, and within the NT, governments are spending record amounts on youth justice and police. In 2017-2018 youth detention involved total government spending of over \$509 million,<sup>12</sup> including around \$531,075 per young person in detention-based supervision per year.<sup>13</sup> During Justice Project consultations in the NT, stakeholders identified strong concerns about over-expenditure on imprisonment. For example, they noted that the expense of building Darwin’s ‘super-prison’ had ‘effectively consumed any funding that might have been available for programs to reduce imprisonment’.<sup>14</sup> The Law Council and LSNT is concerned that much of this spending could be better directed to early intervention approaches that address the underlying causes of imprisonment and prevent the need for future youth justice interventions altogether. This includes investment in children and family services that are focused on harm prevention strategies and holistically address dysfunction within families. In this regard the Law Council and LSNT note the early success of justice reinvestment trials, discussed further below.
8. Thirdly, youth justice services and detention centres are inherently and immediately relevant to the prevention of harm for children. The majority are living with disabilities,

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<sup>7</sup> *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017) ch 35, 10.

<sup>8</sup> *Ibid.*

<sup>9</sup> Katherine McFarlane, ‘The faulty child welfare system is the real issue behind our youth justice crisis’, *The Conversation* (online), 13 February 2017 <<https://theconversation.com/the-faulty-child-welfare-system-is-the-real-issue-behind-our-youth-justice-crisis-72217>>.

<sup>10</sup> Katherine McFarlane, ‘From Care to Custody: Young women in out-of-home care in the criminal justice system’ (2010) *Current Issues in Criminal Justice* 22(2) 345, 348.

<sup>11</sup> *Ibid.*

<sup>12</sup> Productivity Commission, *Report on Government Services 2019* (22 January 2019) vol F, ch 17, Table 17 A.8.

<sup>13</sup> Productivity Commission, *Report on Government Services 2019* (22 January 2019) vol F, ch 17, 17.25.

<sup>14</sup> Law Council of Australia, *Justice Project Final Report: Broader Justice System Players* (August 2018) 60.

particularly cognitive impairment, and/or are victims of abuse and neglect.<sup>15</sup> Ensuring that the youth justice system avoids imposing further harm to this highly vulnerable group is critical. Youth justice services, alongside those services and programs focused on earlier prevention of harm, are an important intervention point for children to be provided with the support they require to rehabilitate and become successfully integrated into their communities.<sup>16</sup> Children entering the youth justice system should not be viewed as 'lost causes', rather, this is an opportunity to break harmful cycles in their lives.

9. According to international standards, in the context of youth justice, 'the traditional objectives of criminal justice, such as retribution, must give way to rehabilitation and restorative justice objectives'.<sup>17</sup> However, in the NT context, the youth justice system has been publicly and shamefully revealed to be frequently causing harm to children, rather than serving goals of rehabilitation and reintegration.<sup>18</sup> It is therefore crucial that youth justice spending is properly scrutinised to ensure that the funds are utilised to achieve the intended purposes of youth justice, rather than achieving the opposite through punitive or abusive practices that actively cause harm to children.

### **Consideration of future commitments and forward planning**

10. On 1 March 2018, the NT Government agreed to 'accept the intent and direction of all 227 Royal Commission recommendations' and announced that it would invest \$229.6 million over five years to implement them.<sup>19</sup> Of particular note is the commitment to raise the minimum age of criminal responsibility (**MACR**) to 12 years. In its implementation plan, the NT Government classifies raising the MACR as a phase two commitment, for full delivery within three years.<sup>20</sup> Raising the MACR must be accompanied by the implementation of alternative programs and services to replace current criminal justice and detention-based responses. Intensive, holistic and coordinated services and programs will be required, particularly for this age bracket. In light of the NT Government's commitment and the fast approaching timeframe to implement it, the Productivity Commission should consider the need for appropriate programs and policy settings to facilitate this change, including assessing any potential gaps that may arise.

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<sup>15</sup> See, eg, NSW Health and NSW Juvenile Justice *2015 Young People in Custody Health Survey: Key Findings for All Young People* (2016); Carol Bower et al, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia' (2018) 8 *British Medical Journal Open* 1; McCausland, and Baldry, "I feel like I failed him by ringing the police": Criminalising disability in Australia' (2017) *Punishment & Society*, 19(3) 290-309; Amnesty International, *A Brighter Tomorrow: Keeping Indigenous Kids in the Community and out of Detention in Australia* (2015) <[http://www.amnesty.org.au/images/uploads/aus/A\\_brighter\\_future\\_National\\_report.pdf](http://www.amnesty.org.au/images/uploads/aus/A_brighter_future_National_report.pdf)>; Australian Institute of Family Studies, 'The intersection between the child protection and youth justice systems' (CFCA Resource Sheet, July 2018) < <https://aifs.gov.au/cfca/publications/intersection-between-child-protection-and-youth-justice-systems/overlap-between-child>>.

<sup>16</sup> See eg Parliament of Victoria, Legislative Council, Legal and Social Issues Committee, *Inquiry into youth justice centres in Victoria* (Final Report) 37. See also, Law Council of Australia, *Justice Project Final Report: Critical Support Services* (August 2018) 9.

<sup>17</sup> See, eg, 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).

<sup>18</sup> See *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Findings and Recommendations, November 2017).

<sup>19</sup> Northern Territory Government, 'Safer Communities: Response to the 227 Recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory' (Media Release, 1 March 2018).

<sup>20</sup> Northern Territory Government, *Safe, Thriving and Connected: Generational Change for Children and Families* (April 2018) 25 <[https://rmo.nt.gov.au/\\_\\_data/assets/pdf\\_file/0005/498173/Safe,-Thriving-and-Connected-Implementation-Plan-Web.pdf](https://rmo.nt.gov.au/__data/assets/pdf_file/0005/498173/Safe,-Thriving-and-Connected-Implementation-Plan-Web.pdf)>.

11. It is also important for the NT Government to be held accountable for the implementation of its initial commitments. It is concerning that the NT Government has delayed implementing key recommendations, including, for example with respect to closing the Don Dale Detention Centre.<sup>21</sup> Further, the amount announced to be spent on juvenile facilities has decreased from \$70 million to \$60 million.<sup>22</sup> The NT Government has also backtracked on initial early reforms. After implementing important changes to the *Youth Justice Act 2005* (NT) to incorporate Royal Commission recommendations, it subsequently rolled back key legislative safeguards, with retrospective application.<sup>23</sup> If the NT Government is not held to account for its commitments, the NT Royal Commission will have been a wasted opportunity.
12. Additionally, and importantly, the Commonwealth Government has its own responsibilities in this space, and must provide funding support to ensure the NT Royal Commission recommendations are met. For example, the Commonwealth is responsible for funding Aboriginal legal services, and also has a role in funding intensive family support services, Aboriginal and mainstream children's services and family law services.<sup>24</sup> The Commonwealth's role in this regard should be delineated by the Productivity Commission, so that it is encouraged to make the substantive contributions required to meet the high levels of need.

### **Consideration of legal assistance services**

13. The legal assistance sector, specifically specialised children's services and Aboriginal legal services, play an essential role in preventing harm to children, and should be included within the scope of the study. Legal services advise families of their rights under the law with respect to child protection and youth justice, and provide an important accountability check on agencies' decision-making. A lack of legal assistance can and does lead to unnecessary child removal.<sup>25</sup> It also results in children and families being exposed to significant harms such as family violence and eviction.<sup>26</sup> However, the Law Council's Justice Project identified a deplorable lack of civil legal services available to assist families to know and exercise their rights concerning such matters, despite ever-growing demand.<sup>27</sup> In 2014, the Productivity Commission recognised these gaps and recommended an urgent interim injection for

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<sup>21</sup> See eg 'the Territory Government has scrapped plans to build a new youth facility' *NT News* (online) 15 March 2018

<<https://www.ntnews.com.au/news/northern-territory/no-timeline-for-don-dale-replacement-claimswakefield/news-story/c1b6febef640764bda7d2d6ba27249e5>>.

<sup>22</sup> Minister for Territory Families, 'Budget 2019: Investing in the Territory's Youth Detention Centres' (Media Release, 30 May 2019); Northern Territory Government, 'Safer Communities: Response to the 227 Recommendations of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory' (Media Release, 1 March 2018).

<sup>23</sup> See eg, Lorena Allam and Helen Davidson, 'NT to pass new youth justice laws that contradict Don Dale findings' *The Guardian* (Online) 21 March 2019 <<https://www.theguardian.com/australia-news/2019/mar/21/nt-to-pass-new-youth-justice-laws-that-contradict-don-dale-findings>>.

<sup>24</sup> See eg, Prime Minister and Cabinet, *Closing the Gap 2008-2018* (2018) Chapter 7 <<https://ctgreport.pmc.gov.au/introduction>>; Council of Australian Governments, *National Framework for Protecting Australia's Children 2009-2020* (April 2009) <<https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business?HTML>>.

<sup>25</sup> Law Council of Australia, *Justice Project Final Report: Aboriginal and Torres Strait Islander Peoples* (August 2018) 50.

<sup>26</sup> See eg Law Council of Australia, *Justice Project Final Report: People who Experience Family Violence* (August 2018).

<sup>27</sup> Law Council of Australia, *Justice Project Final Report: People Experiencing Economic Disadvantage* (August 2018) 22-29.

\$200 million per annum in legal assistance services for civil matters alone.<sup>28</sup> This has not been realised.

14. In particular, specialist legal support for children, including Aboriginal and Torres Strait Islander children, is essential to preventing harm to children. Currently, in the NT, there is no comprehensive, specialist legal service for children and young people.<sup>29</sup> There does not appear to be any movement towards establishing a specialist children's legal service (beyond the services provided already by the NT Legal Aid Commission and the North Australian Aboriginal Justice Agency).<sup>30</sup> Access to these services for children is critical given their limited independence and life experience, limited knowledge of the law, difficulties identifying legal problems and the systemic barriers created by an adult legal system – as recognised by the Committee on the Rights of the Child<sup>31</sup> and United Nations Office of the High Commissioner for Human Rights.<sup>32</sup>
15. Specialist children's legal assistance services play a fundamental role in ensuring diversionary and rehabilitative responses to youth offending.<sup>33</sup> They also enable young people to have a voice in fundamental decisions which will affect them, including family and child protection matters.<sup>34</sup> The Justice Project emphasised the need for greater investment in such specialist services as a matter of priority.<sup>35</sup> Particularly, it noted the need for Aboriginal-controlled children's legal services, as Aboriginal children make up 94 per cent of detainees in youth detention<sup>36</sup> (at times, reportedly 100 per cent),<sup>37</sup> and 89 per cent of children in out of home care.<sup>38</sup> These are clear and significant gaps for children within the NT, and they are worthy of consideration by the Productivity Commission.
16. The Law Council and LSNT further note that Aboriginal legal services which are capable of providing culturally safe support to families are also struggling to meet demand. For example, some Aboriginal Family Violence Prevention Legal Services have reported having to turn away 30 to 40 per cent of women seeking assistance due to lack of resources.<sup>39</sup> Additionally, Aboriginal and Torres Strait Islander Legal Services (**ATSILS**) are not resourced to meet existing need in relation to child protection, which can lead to Aboriginal families receiving little or no legal advice or representation despite the serious consequences associated with these matters.<sup>40</sup> This is a worrying

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<sup>28</sup> Productivity Commission, *Access to Justice Arrangements* (Report No 72, September 2014), 30-31.

<sup>29</sup> Justice Project consultations (Darwin, March 2017) North Australian Aboriginal Justice Agency, Darwin Community Legal Service.

<sup>30</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (August 2018) 31.

<sup>31</sup> Committee on the Rights of the Child, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 34th sess, UN Doc CRC/GC/2003/5 (27 November 2003) [24].

<sup>32</sup> United Nations Office of the High Commissioner for Human Rights, *Access to justice for children*, UN Doc A/HRC/25/35, 13.

<sup>33</sup> Western Australia Commissioner for Children and Young People, *Submission to the Law Council's Justice Project* (2017).

<sup>34</sup> Office of the Guardian for Children and Young People South Australia, *Submission to the Law Council's Justice Project* (2017).

<sup>35</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (August 2018) 89.

<sup>36</sup> *Royal Commission into the Protection and Detention of Children in the Northern Territory*, (Interim Report, 2017) 9.

<sup>37</sup> 'Data reveals 100 percent of youth detained in NT were Aboriginal' (online), ABC Radio National, 27 June 2018.

<sup>38</sup> *Royal Commission into the Protection and Detention of Children in the Northern Territory*, (Interim Report, 2017) 10.

<sup>39</sup> Email from National Family Violence Prevention Legal Service to Law Council of Australia, 15 May 2018.

<sup>40</sup> Chris Cunneen, Fiona Allison and Melanie Schwartz, 'Access to Justice for Aboriginal People in the Northern Territory' (2014) *Australian Journal of Social Issues* 49(2), 219-240,229; National Aboriginal and Torres Strait Islander Legal Service Submission No 13 to Senate Standing Committees on Finance and Public Administration, *Access to Legal Assistance Services*, April 2015 4 [3.2].

gap, noting that the Justice Project heard strong concerns amongst legal services that in some cases, child removal was occurring in dubious circumstances and when parents had not been afforded procedural fairness including a right to be heard.<sup>41</sup>

17. Additionally, the Law Council and LSNT consider that the Productivity Commission could usefully review the funding mechanisms and sourcing of legal representatives for children who are the subject of child protection applications. The Law Council and LSNT have been advised of NT-based concerns about a lack of specialist training required for legal representatives to be appointed by the Solicitor for the Northern Territory to represent children in these matters. The Law Council and LSNT are further informed of concerns regarding the desirability of Territory Families overseeing the contracting and funding of these solicitors, noting that other jurisdictions administer this through Legal Aid Commissions (**LACs**). Further, the Law Council and LSNT understands that it is difficult for the NT LAC (**NTLAC**) to compete with remuneration rates provided by the Solicitor for the Northern Territory to private practitioners. The Productivity Commission could usefully discuss these issues with NTLAC and other key stakeholders including the broader legal profession.

### Justice Impact Tests

18. Another mechanism which the Law Council and LSNT consider worth exploring in the context of better managing demands on justice and legal services is the Justice Impact Test. The Justice Project explored the manner in which changes to laws and policies regularly have an unanticipated downstream impact upon legal services. Nationally the rate of children receiving child protection services, rose by approximately 20 per cent from 2012 to 2016.<sup>42</sup> These rises correspond with sharp increases in demand for legal aid in relation to child protection issues, without a sufficient corresponding increase in legal assistance or courts funding.<sup>43</sup>
19. In light of common dynamics such as these, the Justice Project recommended the introduction of a Justice Impact Test model such as that employed in the United Kingdom.<sup>44</sup> This type of mechanism would require government to consider actively the downstream effect of new legislation or policy on the justice system ahead of cabinet approval, and account for any detrimental consequences. It would also introduce an 'agency accountability' principle - meaning that there is a presumption that the policy-owning department will meet any additional costs flowing to the justice system from its proposals.<sup>45</sup> Justice Impact Tests would enable smoother administrative processes and policy roll-outs because potential consequences are better anticipated and accounted for by government. This results in savings on downstream cost.<sup>46</sup> Justice Impact Tests can also ensure that key legal and government stakeholders are consulted about potential changes that affect their work-flow. This allows for both the early identification of problems and preparation time for stakeholders to meet additional demand resulting from any proposed changes.<sup>47</sup>

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<sup>41</sup> Law Council of Australia, *Justice Project Final Report: Aboriginal and Torres Strait Islander Peoples* (August 2018) 42.

<sup>42</sup> Australian Institute of Health and Welfare, *Child Protection Australia 2015-2016* (2017) 17.

<sup>43</sup> See, eg, Mary Anne Noone, 'Challenges Facing the Australian Legal Aid System' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Hart Publishing, 2017) 32.

<sup>44</sup> Law Council of Australia, *Justice Project: Recommendations and Priorities* (August 2018) 13.

<sup>45</sup> United Kingdom Ministry of Justice, *Guidance: Justice impact test* (November 2016) <<https://www.gov.uk/government/publications/justice-impact-test>>.

<sup>46</sup> See the discussion in Law Council of Australia, *Justice Project: Governments and Policymakers* (August 2018) 14-25.

<sup>47</sup> *Ibid.*

## Funding principles

20. The Law Council's Justice Project explored a range of considerations that are relevant to policy implementation, service effectiveness and funding. Key points are discussed below.

### Whole-of-government, coordinated and multi-disciplinary models

21. The Justice Project emphasised the importance of whole-of-government approaches across multiple portfolios to ensure appropriate coordination and effective implementation of policies on a macro level (for example, the Justice Impact Test model discussed above). Whole-of-government responses can address the pathways that children may take through various systems, along with the underlying social factors associated with preventing harm to children (including causes of family violence, substance abuse, imprisonment and poverty) in a less fragmented, more efficient manner.
22. Similarly, the Project highlighted the need for targeted, multi-agency, multidisciplinary programs and protocols to ensure appropriate frontline responses for people and groups with complex and intersecting needs.
23. An example of one such approach is justice reinvestment. Both the ALRC and the Justice Project highlighted the early success of justice reinvestment models, recommending that they be expanded across Australian jurisdictions.<sup>48</sup> Justice reinvestment reallocates resources that would otherwise be spent on prisons and reinvest them in programs and services that address the underlying causes of crime.
24. The first major trial of justice reinvestment in Australia is the Maranguka project in Bourke, NSW. The Maranguka project applies place-based, community-driven strategies, utilising a 'Collective Impact' framework, which enables service providers and community members to work collaboratively to achieve shared goals developed by the Aboriginal community in Bourke.<sup>49</sup> A KPMG report, analysing the early results in Bourke, found a gross economic impact of \$3.1 million in 2017.<sup>50</sup> It reports that two-thirds of this impact provides relief to the justice system itself and a further third is a broader economic impact on the region. If half of the results achieved in 2017 are sustained, according to KPMG, Bourke could deliver an additional economic impact of \$7 million over the next five years.<sup>51</sup> Other key early findings include a 23 per cent reduction in police-recorded incidence of domestic violence and comparable drops in rates of reoffending and a 31 per cent increase in year 12 student retention rates and a 38 per cent reduction in charges across the top five juvenile offence categories.<sup>52</sup> While these are early findings, the results to date suggest that models of this kind are able to deliver clear economic benefits, alongside substantive positive results for communities.
25. Another example of whole-of-government models is precedents concerning the development of joint protocols for responding to challenging behaviour in out of home

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<sup>48</sup> Law Council of Australia, *Justice Project Final Report: Recommendations and Priorities* (2018); Australian Law Reform Commission, *Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, 2018) 14.

<sup>49</sup> Submission by Just Reinvest NSW to the Justice Project (2017).

<sup>50</sup> KPMG, *Maranguka Justice Reinvestment Project: Impact Assessment* (November 2018) 6.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

care environments.<sup>53</sup> One is the NSW Joint Protocol to reduce the contact of young people in residential out of home care with the criminal justice system between the NSW Police Force, Family and Community Services, Association of Children's Welfare Agencies and Aboriginal Child, Family and Community Care State Secretariat.<sup>54</sup>

### Long-term, sustainable funding models

26. The Justice Project emphasised the importance of long-term, predictable and sustainable policy and funding frameworks as important enabling factors which support continuity of services and staff, and therefore trusted relationships with marginalised clients.<sup>55</sup> Ongoing funding for successful pilots and community-led initiatives is also needed, to avoid losing community goodwill when projects suddenly terminate.<sup>56</sup>

### Independent funding for community-controlled services

27. The Justice Project found that many Aboriginal and Torres Strait Islander people may not seek help where services are not appropriate to the local community, or where services do not take into account matters that are important and specific to them.<sup>57</sup> Aboriginal community-controlled organisations are generally the most suitable providers for Aboriginal communities, as they are trusted, culturally safe, accessible, and capable of addressing the unique disadvantage experienced by many Aboriginal and Torres Strait Islander peoples.<sup>58</sup> They also ensure the implementation of place-based, tailored solutions and provide local employment.

28. It is essential that community-controlled organisations are supported to do the work that is required, with a degree of independence, and with respect for their expertise on matters affecting their communities.

### Prioritisation of early intervention approaches

29. As discussed above, a disproportionate amount of funding is spent on youth justice and detention. With respect to child protection specifically, there is a strong case for directing funding into early intervention and prevention approaches that aim to strengthen families and maintain cohesion.

30. The types of programs and services worth prioritising include intensive family support programs, parenting programs, early childhood development programs and youth engagement programs. In this regard, the Law Council and LSNT are informed of NT-based concerns regarding the lack of effective parenting programs for families caught in the child protection system. It notes that those services capable of providing in-home care and parenting modelling for children are frequently important, as they incorporate best-practice and support a public health approach. While some NGOs including Save the Children provide this type of program in the NT, the Law Council

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<sup>53</sup> Law Council of Australia, *Justice Project Final Report: Children and Young People* (2018) 57.

<sup>54</sup> NSW Ombudsman, *Joint Protocol to reduce the contact of young people in residential out-of-home-care with the criminal justice system* (2016). See also Law Council of Australia, *Justice Project Final Report: Broader Justice System Players* (2018) 20-1.

<sup>55</sup> Law Council of Australia, *Justice Project Final Report: Legal Services* (2018) 29.

<sup>56</sup> *Ibid.*

<sup>57</sup> Law Council of Australia, *Justice Project Final Report: Aboriginal and Torres Strait Islander Peoples* (2018) 29; Pascoe Pleasance et al, *Reshaping legal assistance services: building on the evidence base* (2014) 126.

<sup>58</sup> Law Council of Australia, *Justice Project Final Report: Aboriginal and Torres Strait Islander Peoples* (2018) 36.

and LSNT understand that there are limitations on the number of families that can be supported.<sup>59</sup>

31. In 2015-2016, child protection involved government spending of \$4.8 billion per annum. Out of this figure, \$800 million in funding was spent on family support services, while \$4 billion was spent on out of home care and child protection services, indicating that the funding focus is weighted towards 'reacting to problems as opposed to solving them'.<sup>60</sup> As the Family Matters coalition observed, 'investment in prevention and early intervention to strengthen families can provide long-term social and economic benefits by interrupting trajectories that lead to adverse adult outcomes'.<sup>61</sup> In light of this, funding models could usefully incorporate a greater focus on spending on prevention, rather than spending at the point of crisis.

### Legal and Court Processes

32. The Law Council and LSNT emphasise the value of mechanisms that enable resolution of matters before they evolve into protracted court proceedings. In this regard, it notes the NT Royal Commission's recommendations to improve complaint and pre-court processes. These include:
- a number of recommendations designed to provide a framework for family group conferences within and outside the court process.<sup>62</sup> Family group conferences provide an opportunity for families to be heard in an impartial environment at an early stage in respect of child protection proceedings. They also enable service providers and experts to communicate expectations to families.
  - recommendations to establish complaints and review mechanisms, including a child-friendly complaints process.<sup>63</sup> Accessible complaints mechanisms enable children and families to be heard in a safe context so that they can raise issues when they arise.
33. While these types of mechanisms may require some upfront cost, they are integral to resolving issues early, before they reach crisis point and become resource intensive, thereby providing overall savings for governments.
34. Similarly, legal assistance funding is essential to ensuring early access to legal advice and representation, which in turn results in early resolution of legal problems and efficiently run court cases, therefore decreasing downstream justice system costs.<sup>64</sup> However, as noted at paragraph 13, both the Productivity Commission and the Law Council's own Justice Project have highlighted the dire and ongoing need for this investment. The Courts and Tribunals chapter of the final report of the Justice Project highlighted how growing numbers of self-represented litigants, in part due to the reduced capacity of legal assistance services to meet demand, are causing enormous

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<sup>59</sup> Save the Children, *Our Work in Australia*, < <https://www.savethechildren.org.au/Our-work/Our-programs/Australia> >.

<sup>60</sup> Secretariat of National Aboriginal and Torres Strait Islander Child Care et al, *Family Matters Report 2017* (2017) 10 <<http://www.familymatters.org.au/wp-content/uploads/2017/11/Family-Matters-Report-2017.pdf>>, citing Productivity Commission, *Report on Government Services 2017* (2017), 16.4, table 16A.1.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.* 53.

<sup>63</sup> *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Findings and Recommendations, November 2017) 58.

<sup>64</sup> Law Council of Australia, *Justice Project Final Report: Legal Services* (August 2018) 95.

strain on court resources and are diminishing the overall efficiency of the justice system.<sup>65</sup>

## Oversight

35. The NT Royal Commission found that there was a need for better oversight of Territory Families.<sup>66</sup> The Law Council and LSNT understand that this may extend to the need for improved oversight and transparency regarding funding decisions. In this context, the Law Council and LSNT have been advised of NT-based concerns, regarding:

- how service providers are sourced and briefed. For example, it understands that many services funded by Territory Families can only assist those children and families if the referral is received from Territory Families which may make services inaccessible to those families who wish to help themselves;
- Territory Families' role in providing funding to supervised contact centres has been raised as requiring review, noting that it is the sole body administering funding for contact centres, and that there are very limited options for families (for example, there is only one permanent contact service in Darwin) and no private providers;
- Territory Families' role in retaining and liaising with experts to provide expert parenting assessment reports, noting that NTLAC does not receive funding to provide reports (unlike in other jurisdictions). In this regard it is important to implement the Royal Commission's recommendation to establish and resource a panel of court-appointed experts from whom the court may seek a report, to ensure an independent process;<sup>67</sup> and
- the outsourcing of out of home child service provision, particularly with respect to Aboriginal children. The NT Royal Commission stated that:

*the provision of care for children whom the state has removed from their families is a core function of government and should not be outsourced.*<sup>68</sup>

## Additional factors to consider as part of funding decisions

36. The Law Council and LSNT suggest that certain principles should inform funding, policy and program decisions, including:

- **Service accessibility:** agencies and services can be highly difficult for families and young people to navigate, and especially so for those with complex disadvantage. Simplified, accessible processes are valued in a range of contexts. Accessible services may include those that:
  - employ cultural liaison officers;
  - utilise interpreters and translators;
  - utilise plain English language;
  - accommodate disabilities and/or employ disability workers; and
  - embed welcoming strategies for LGBTI+ people.<sup>69</sup>

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<sup>65</sup> Law Council of Australia, *Justice Project Final Report: Courts and Tribunals* (August 2018).

<sup>66</sup> *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Findings and Recommendations, November 2017) 50, 23, 57.

<sup>67</sup> *Ibid* 52.

<sup>68</sup> *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Final Report, November 2017) Vol 3B, 277.

<sup>69</sup> See Law Council of Australia, *Justice Project Final Report: Legal Services* (August 2018) 6-11.

- *Cultural competence*: community-controlled organisations have cultural safety measures embedded into their service delivery models. It is equally important for generalist services to ensure that staff are trained, that their workplace is diverse, and that cultural protocols and guidelines are implemented. The Law Council and LSNT note concerns raised during the Justice Project that child protection workers often lack the cultural competence or community links required to work effectively within Aboriginal communities,<sup>70</sup> and the NT Royal Commission's own exploration of this theme,<sup>71</sup> affecting high rates of child removal and low rates of kinship placements in the NT.
- *Genuine consultation with Aboriginal and Torres Strait Islander communities*: The right to self-determination includes the right to influence policy development and its implementation.<sup>72</sup> As such, prior to making decisions about funding, it is important for governments to engage in genuine consultation with the affected community.
- *Evidence-based*: Services and programs that are founded on a strong evidence base should be prioritised for funding, alongside funding pathways to enable innovative pilots and community-led initiatives which have demonstrated success to flourish longer-term.<sup>73</sup> Further, services must be sufficiently resourced to develop and implement mechanisms and frameworks to collect and analyse data, and monitor and evaluate their services, with an allocation for this incorporated into broader funding arrangements.<sup>74</sup>

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<sup>70</sup> Law Council of Australia, *Justice Project Final Report: Broader Justice Players* (August 2018) 47.

<sup>71</sup> *Royal Commission into the Protection and Detention of Children in the Northern Territory* (Findings and Recommendations, November 2017) 22.

<sup>72</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/Res/61/295 (13 September 2007); David Roberts, 'Self-determination and the Struggle for Equality' in Colin Bourke, Eleanor Bourke and Bill Edwards (eds) *Aboriginal Australia, An Introductory Reader in Aboriginal Studies*, (University of Queensland Press, 2004) 259.

<sup>73</sup> See Law Council of Australia, *Justice Project Final Report: Legal Services* (August 2018) 29.

<sup>74</sup> See Law Council of Australia, *Justice Project Final Report: Governments and Policymakers* (August 2018) 67.