



Royal Commission into the Protection and Detention of Children in the Northern Territory

Statement

Name: Russell Goldflam
Address: 77 Hartley Street, Alice Springs NT 0870
Date: 24 November 2016

1. This statement made by me accurately sets out the evidence that I am prepared to give to the Royal Commission into the Protection and Detention of Children in the Northern Territory. The views and opinions expressed in this statement are mine, and this statement is made in a personal capacity.
2. This statement is true and correct to the best of my knowledge and belief.
3. This statement has been prepared on the basis that the Commission will issue a Notice to Produce under s 2(3A) of the *Royal Commissions Act 1902* (Cth) for the production of a signed copy.

Experience and expertise

4. Since 1981 I have lived and worked predominantly in Alice Springs. From 1981 to 1984, and then from 1986 to 1991, I worked at the Institute for Aboriginal Development. From 1993 to 1995 I studied law, and was admitted to practice in 1997. Since April 1997 I have been employed by the Northern Territory Legal Aid Commission (NTLAC), and as the Principal Legal Officer of its Alice Springs office since 2001. I have been President of the Criminal Lawyers Association of the Northern Territory (CLANT) since 2011. I also hold the following positions:
 - Member, People's Alcohol Action Coalition, Alice Springs (from 2001)
 - White Ribbon Ambassador (from 2006)
 - Associate, Indigenous Law Centre, University of New South Wales (from 2013)
 - NTLAC Commissioner (from 2014)
 - Member, Northern Territory Law Reform Committee (from 2015)
5. As the President of and a spokesperson for CLANT, I have been prominently involved in public debate on a range of criminal justice issues, including youth justice. Previously, my involvement in youth justice issues has included active membership of Central Australian Youth Justice (CAYJ) and Defence for Children International Australia (DCI-A); and as President of the Board of the agency which runs the Alice Springs youth refuge (ASYASS). Although I am no longer actively involved with these agencies, they all still exist.
6. My 19 years as a legal aid lawyer have included practice in both youth justice (acting for child defendants) and child protection (acting for respondent parents) matters, in both first instance and appellate proceedings.

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7. Annexed hereto and marked 'A' is my Curriculum Vitae.

Involvement in policy and law reform

8. I have been and continue to be involved in assisting or advising the NT Government on the development of policy and practice through my current membership of and participation in the following bodies:
- CLANT, which makes submissions on criminal justice policy issues. Annexed hereto and marked 'B' is an email I sent to the Secretariat of the Royal Commission on 16 August 2016 listing the submissions, articles and notices I have posted on the CLANT website that I consider are relevant to this Royal Commission.
 - NTLAC, which makes submissions on legal policy issues
 - Making Justice Work, an NGO coalition which advocates on justice issues
 - Northern Territory Jurisdictional Forum, comprising legal service providers and NT and Commonwealth funding agencies
 - Criminal Justice Forum, comprising stakeholder agency heads
 - Northern Territory Law Reform Committee
 - Alice Springs Local Reference Group, Safety is Everyone's Right (NT Domestic and Family Violence Reduction Strategy)
 - Territory Families Legal Services Forum
 - Court Users Forums
 - Youth Detention Provisions Legislative Review Working Group (Working Group) (see below)
9. In spite or perhaps because of my membership of so many bodies, my experience of contributing to policy and practice has often been frustrating and dispiriting.
10. For example, I refer to the Working Group, which, was established to advise the Northern Territory Government specifically on amendments to provisions of the *Youth Justice Act* regarding youth detention, including the use of restraint devices. Annexed hereto and marked 'C' are the draft Terms of Reference.
11. As far as I am aware, the Working Group has never met. I have not been informed of the reason for this.
12. In March 2016 I was appointed as the NTLAC nominee to the Working Group. In April 2016, without consultation with the Working Group, a Bill comprising significant amendments to the *Youth Justice Act* regarding the use of restraint devices was introduced in the Legislative Assembly. Shortly before the Bill was passed on 25 May 2016, I provided comments on the Bill to the Working Group Secretariat and Convenor (the Commissioner for Corrections), and requested that my comments be circulated to the Working Group. In essence, I advocated for a clear statement in the Bill that restraints only be permitted when reasonably necessary for a lawful purpose. I noted in my comments that the Bill had been introduced without consultation with the Working Group or, as far as I was aware, any stakeholders.
13. The Bill was enacted without the safeguard I recommended. I was invited by the Department of Correctional Services to revise my comments following the passage of the Bill. I revised my comments to be suggestions of amendment to the *Youth*

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Justice Act and again noted the lack of consultation on the recent amendments. None of my comments were, so far as I am aware, circulated to the Working Group.

14. In October 2016, I was consulted by the recently elected Northern Territory Government about further amendments to these provisions. I continued to advocate in similar terms. On 25 October 2016, the *Youth Justice Legislation Amendment Bill 2016* was introduced. It addresses some of the issues I raised, but in my view still fails to unequivocally provide that restraints can only be used when reasonably necessary for a lawful purpose.
15. By way of further example, on 2 October 2014, on behalf of CLANT I was one of 11 signatories to a statement (annexed hereto and marked 'D') calling for, among other things, an Independent Custodial Inspector. On 2 June 2015, CLANT endorsed a statement issued by the Making Justice Work Coalition (annexed hereto and marked 'E') renewing that call. On 30 May 2016, I wrote on behalf of CLANT to the National Children's Commissioner (annexed hereto and marked 'F') urging the immediate ratification of the Optional Protocol to the Convention Against Torture (OPCAT), which would provide a mechanism for independent oversight of youth detention facilities in the Northern Territory. The associated Bill then before the Northern Territory was however allowed to lapse.
16. I welcome the indication that has been provided by the recently elected Northern Territory government that an Independent Custodial Inspectorate will be established.
17. Although the Northern Territory government has only been recently elected, it has already taken significant steps to consult with stakeholders, including NGOs, regarding youth justice and child protection issues. This is also welcome.

Interaction with government service providers

18. Over the last ten years I have maintained cordial and productive relationships with both current Commissioner of Corrections Mark Payne and his predecessor Ken Middlebrook, as well as with executive staff of the NT Department of Children and Families (now Territory Families).
19. Remoteness from Darwin (known colloquially as "Berrimah Line") has long been an impediment to strengthening those relationships for people such as myself who are not based in Darwin, although in recent years the availability of improved video-conferencing has enabled more effective participation by remotely located attendees at Darwin meetings.
20. I strongly believe that a key to effective collaboration between service providers such as NTLAC, and government agencies such as Correctional Services and Territory Families, is for senior managers to regularly meet in a structured setting. For example, the NT Jurisdictional Forum, the Criminal Justice Forum and the Territory Families Legal Services Forum, all of which have been established comparatively recently, are effective, practical and businesslike. Importantly, they have enhanced working relationships between participants who might not have otherwise become familiar with one another.

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21. I also commend the Department of the Attorney-General and Justice, which follows a well-established consultation process in relation to forthcoming legislation, except when, as regrettably happens on occasion, legislation is hurriedly introduced. One such example was the *Bail Amendment Bill 2016* (Serial 173), which would, had it been enacted, have created a presumption against bail for both adults and youths charged with a broad range of property offences.

Changes since 2005

22. I refer to the following changes in laws and policies or practices since 2005 that have impacted on youth detention outcomes:
- The *Youth Justice Act* (YJA) came into force on 1 August 2006. It replaced the "welfare" model of the *Juvenile Justice Act (1983 – 2002)* with a "justice" model, giving primacy to the principle of holding a youth accountable for their offending.
 - The YJA makes detailed provision for periodic detention (Part 6 Division 9), but in practice this disposition has hardly been used, if at all. Similarly, alternative detention orders (Part 6 Division 8), which are similar to adult home detention and community custody orders, are rarely used.
 - Part 6A provides for family responsibility orders. As far as I am aware, they are very rarely made.
 - Over the last few years, the availability and use of electronic monitoring devices has substantially increased, and they are now on occasion being imposed as a bail condition for youths.
23. Notwithstanding these alternatives to detention, the rate of Northern Territory youth detention increased from 12 per 100,000 to 18 per 100,000 in the five years to 2013. During this period, the equivalent national rate declined from 4 to 3.5 per 100,000. In my view, the Northern Territory trend is to a significant extent the result of demographic factors which are largely beyond the control of law, policy and practice. Annexed hereto and marked 'G' is a table showing the population profile of the NT. Accordingly, when setting justice targets, projected population changes should be taken into account. No useful purpose would be served by setting unachievable targets.
24. On 16 May 2011, amendments to the *Bail Act* (NT) commenced establishing the offence of breaching bail, punishable by imprisonment (or, in the case of children, detention). I believe that this has resulted in many children being apprehended and detained. For example, in *ND v Heath* [2016] NTSC 58, a decision delivered by Riley AJ on 18 November 2016 in the Supreme Court of the Northern Territory at Alice Springs, an appeal was dismissed against a sentence of two days detention (time already served) imposed on a 14 year old boy for breaching bail by entering a shopping centre he had been ordered not to enter, and where he had previously committed property offences.
25. 75% of the Northern Territory youth detainees are on remand. In my view it was unnecessary and counter-productive to make breaching bail an offence. The court

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rarely sentences youths to more than a nominal period of detention for the offence of breaching bail. However, many youth detainees are on remand because they breached their bail conditions, often by re-offending.

26. On 22 September 2005, the *Bail Amendment (Repeat Offenders) Act (2005)* commenced. It therefore came into force shortly before the commencement of the period the subject of this Royal Commission. It is worth noting, however, because it substantially expanded the range of circumstances in which a presumption against bail applies.
27. The Northern Territory's mandatory sentencing laws introduced in 2013 apply to all adults and to those children who are sentenced under the *Sentencing Act* in the Supreme Court. These laws have contributed to the unacceptably high rates of imprisonment in the Northern Territory.
28. In 2007, the Northern Territory Emergency Response ('the Intervention') commenced, leading to the establishment of 18 new police stations with over 50 additional police based in remote communities. Over the ensuing three years, the number of NT youth traffic and vehicle convictions doubled. I believe that this was due in large part to the increased policing, coupled with the fact that many traffic offences are excluded from the youth diversion scheme.
29. A very significant change in law, policy and practice has been the highly effective measures taken to combat petrol sniffing, by way of the roll-out of Opal low aromatic fuel, the commencement of the *Volatile Substance Abuse Prevention Act 2005* in February 2006, and the continuing work of the Central Australian Youth Link Up Service (CAYLUS). Consequently, I am informed that petrol sniffing has reduced by 90% in Central Australia over the last ten years. Nevertheless, inhalant abuse (glue, deodorant etc) continues to be a significant problem, and CAYLUS works with retailers to restrict the availability of specific products as problems associated with their use are identified.
30. As is well known, domestic and family violence is at epidemic levels in Central Australia. As a result, children are exposed to domestic and family violence. As yet the effects of this are only partially understood. I commend the submission to the Royal Commission by Central Australian Aboriginal Congress dated 1 November 2016, and in particular the discussion therein of Congress's early childhood programs and the challenges of addressing intergenerational trauma. Tangentyere Council has recently commenced a Safe Families Program, which includes a Children's Safe House and Families Safe Houses.
31. I welcome the recent announcement that responsibility for the youth justice system, including youth detention, has been transferred from the Department of Correctional Services to the Department of Territory Families.
32. I refer to the following changes in laws and policies or practices since 2005 that have impacted on child protection outcomes. I have not generally practiced in this jurisdiction over the last decade, and my understanding of this area is accordingly comparatively limited.

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- a. The *Care and Protection of Children Act* (CPCA) commenced in 2008, replacing the *Community Welfare Act*.
- b. Since the CPCA came into force, there has been a substantial increase in the number of protection orders made until a child turns 18. On the one hand, this may promote security and stability for the children concerned. On the other hand, it indicates that children taken into care are less likely to ever be reunified with their birth families. It has also reduced judicial oversight of case management by Territory Families.
- c. In recent years, Territory Families appears to have ceased or at least restricted its previous practice of arranging to bring remotely located parents of children the subject of protection applications to court. The CPCA does not require personal service of process on parents. Postal services to residents of town camps and remote communities are unreliable. Many parents do not read English. Public transport services from remote communities are very limited. Consequently, a higher proportion of applications are undefended. Undefended applications are routinely granted by the court.
- d. The issue of Practice Direction No. 1 of 2015 by the Local Court has required parties, including respondent parents, to file and serve more formal pleadings than was previously the case, making it more difficult for parents to comply with and engage in the court process.
- e. Although Chapter 2 Part 2.1 Division 6 and section 127 of the CPCA establishes a scheme for resolving care and protection matters by mediation, it appears that this scheme is only sparingly used, in part because no associated regulations have been prescribed.
- f. Over the last ten years, there has been a striking increase in care and protection matters in the Darwin Local Court (from 43 in 2005 to 456 in 2015, an increase of over 1000%). During the same period, applications in Alice Springs and Katherine have increased by about 100%, and have declined over the last three years.

Significant issues

33. Many young people in the Northern Territory live in circumstances of high risk of exposure to trauma, violence and substance abuse, overcrowded and poor quality accommodation, low school attendance and poverty. These circumstances are highly criminogenic, and accordingly, there are high rates of anti-social behaviour and offending by young people. As is widely acknowledged, this is a serious problem. A key issue that arises is the design and implementation of a fair and effective response, and in particular, how to achieve a balanced mix of a welfare approach (care and protect the child) with a justice approach (control the child).

Significant issues in youth justice

34. Governments have failed to address clearly identified problems in the youth justice system, and to implement solutions clearly identified by the authors of previous reports, including Anderson/Wild, Carney, Vita, Bath, Gwynne and Hamburger.

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35. The child detention system has operated in a state of crisis since at least 2014. There were twelve documented serious incidents including escapes, security breaches, disturbances, property damage and assaults on detention centre staff in the first nine months of that year. Over the previous four years, there had been between four to six such incidents in each calendar year.
36. The youth justice system currently fails to effectively respond to the challenges of dealing with children suffering from cognitive and psychiatric impairments, including FASD and complex trauma.
37. Sections 16 and 23 of the *Youth Justice Act* limit the powers of police to, respectively, arrest and bail youths. Part 3 and section 64 of the *Youth Justice Act* provide respectively for pre- and post-court diversion of youth. In my view, despite these provisions, many youths are unnecessarily arrested, bailed or detained, and charged. This in turn elevates the risk that those youths will be criminalised and enter a cycle of offending and re-offending.

Significant issues in child protection

38. The child protection system has operated in a state of chronic crisis for at least 15 years in Alice Springs, and perhaps throughout the NT. It appears that child protection workers are required to perform their work under crippling caseloads.
39. In my experience, it is often difficult to engage the assistance or support of the child protection system for children who are apparently in need of care and protection. For example, when the Youth Justice Court orders that Territory Families investigate (pursuant to s51 of the *Youth Justice Act*) the circumstances of an offending youth who the court believes is in need of protection, it is not uncommon for the ensuing report to conclude that the child is not in need of care.
40. Even with children the subject of protection orders, from my experience with child clients of my office I have observed that there is often a failure by Territory Families to provide the level of case management required to effectively attend to matters including:
- Implementing plans to arrange for schooling
 - Arranging contact visits with family members
 - Undertaking psychological and cognitive assessments
 - Providing therapeutic supports, including specialised behavioural management supports
41. By the same token, from my experience with clients with children who have been made the subject of protection orders, I have observed that there is often a failure by Territory Families to provide the level of case management required to effectively involve family members in maintaining contact with the child, in participation in making arrangements for the child's care and welfare, and in planning for reunification.

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Issues specific to Central Australia

42. Community-based treatment of substance-abusing youth in Central Australia is highly prized, but very difficult to deliver. Experience has shown that some of the most effective treatment services operate in a remote location, where the clients are unable to either abscond or obtain substances to abuse. This, however, imposes very significant challenges for service providers.
- a. As a case study, I refer to three such programs which have provided supported and supervised accommodation and rehabilitation to children in Central Australia over the last ten years.
 - b. Bush Mob is a reputable Alice Springs based program which is strongly supported by both NGO service providers and government agencies. It is in the process of extending its services to make use of a facility originally constructed for a Department of Correctional Services 'boot camp' program at Loves Creek, east of Alice Springs.
 - c. The Warlpiri Youth Development Corporation program at Mt Theo Outstation is also well-known and widely admired. However, I recently appeared for a youth who had absconded from Mt Theo in circumstances which led to the forced temporary closure of the facility. This is indicative of the fragility of services such as Mt Theo, which operates in an extremely remote location, with limited resources, under difficult conditions.
 - d. The Ilpurla Aboriginal Corporation, which had provided similar services to young offenders over many years, was forced to permanently shut its doors in 2011 after an incident in which children in the care of Ilpurla staff illicitly obtained and sniffed petrol, which caught alight. Two children suffered serious burns. The closure of this service was a severe setback to the delivery of rehabilitation services in Central Australia to young people, several of whom shortly afterwards reoffended and were detained or imprisoned.
43. In my view, there is a high risk of serious adverse events occurring in the course of delivering programs such as these, and accordingly it is imperative that they be provided with substantial support, sufficient funding, access to training, appropriate infrastructure, structured program design, ongoing monitoring and evaluation, and robust governance.
44. There is no specialist youth psychiatrist in the forensic team of the Central Australian Mental Health Service (CAMHS). At present the Forensic Team based at the adult prison is only involved with youth if there is an 'at risk' situation, and the Child and Youth Team is not funded to service children in detention. Getting a cognitive assessment for the purposes of establishing legal capacity is virtually impossible in Central Australia and leads to lengthy waits for such assessments from interstate experts, while children are on bail or remand. This is a particular problem where the child is under 14 years.
45. Trauma experts, who could provide both therapeutic support to children, and evidence to the court about the effects of childhood trauma on the individual child's offending to better inform sentencing and post-sentencing plans, are few and far between. There are limited services for children on the Foetal Alcohol spectrum or

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with behavioural difficulties. Disability Services do not appear to be geared towards behavioural or cognitive disability and, as such, are rarely involved. Despite involvement by Territory Families, Department of Education, Department of Health and police in the early years of a child's life, formal diagnosis is often only undertaken once the child comes into the criminal justice system after turning 10.

Proposed measures

46. I consider that the following measures ought to be adopted by NT Government.
47. In relation to youth justice:
- a. Government and community leaders should desist from the demonisation of "bad youth", as occurred in 2014-2016, and which served to legitimise and encourage the general social stigmatisation and mistreatment of youth. Annexed hereto and marked 'H' is an article I published in July 2015 titled "The Worst of the Worst".
 - b. Effective diversion is a key to preventing, interrupting and ending the offending cycle. Pre-court and post-court youth diversion programs should be reviewed, extended, be subject to independent monitoring and properly resourced.
 - c. To give the 'detention is the last resort' principle practical effect, we need:
 - i. Supported bail accommodation, including services to facilitate the participation of the child in education and, if appropriate, treatment.
 - ii. Properly resourced and well managed community-based programs for sentenced youth
 - iii. Properly resourced and well managed youth and family conferencing programs
 - d. Australia should accede to OPCAT, and the NT should pass OPCAT legislation, to guarantee independent oversight of detention.
 - e. There should also be independent oversight of the administration of community-based bail and sentencing orders imposed on children.
 - f. Large sections of the Indigenous community, including many youths, are alienated and disengaged from the criminal justice system. In my view, authentic engagement including the revival of community courts is not achievable unless s16AA of the *Crimes Act* (Cth), which prohibits any customary law or cultural practice from being considered in assessing the objective seriousness of an offence for sentencing purposes, is repealed.
 - g. The age of criminal responsibility should be raised to 12 years. I do not know how many children under 12 are charged with criminal offences.
 - h. Youth detention centres should be purpose-built. Neither Don Dale nor the Alice Springs Youth Holding Centre is fit for purpose as a detention centre.

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- i. Youth justice services, including court proceedings, should be delivered using a trauma-informed approach.
 - j. The identities of young people charged with offences and appearing before the youth court should be prohibited from publication, so as to minimise the prevalence of media "naming and shaming", which in my view is counter-productive.
 - k. A properly resourced forensic mental youth health service should be established.
 - l. Youth detention workers (as well as other professionals who work in the youth justice system) should be properly trained, qualified, skilled, supervised, supported and remunerated.
 - m. Justice targets should be included in the Closing the Gap government agenda.
48. In relation to child protection:
- a. Mediation, family conferencing and other alternate dispute resolution should be prioritised and resourced.
 - b. Appropriately accredited, trained and skilled child representatives should be appointed in all child protection court proceedings.
 - c. Parents of children the subject of a Child In Need of Protection application should be effectively notified of the application, and offered assistance to travel to attend court.
 - d. Processing of assessments for suitability of proposed kinship carers should be speeded up.
49. In relation to both youth justice and child protection:
- a. The youth justice and child protection courts should be amalgamated, and the delivery of youth justice/child protection services should be integrated.
 - b. Similarly, an integrated case management approach should be implemented, with a single case manager for each child in the system, whether the child is charged with an offence, in need of care and protection, or both.
 - c. In Alice Springs, the amalgamated court should be located separately from the adult courts, and should be fit for purpose.
 - d. Any youth who appears in court charged with an offence who is not supported in court by family should be provided with support by child protection services.
 - e. The focus should be on delivering effective early childhood programs: the die is often cast by the time a child turns four.

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- f. Children under 12 who engage in offending behaviour should be referred to the child protection system, not the criminal justice system.
- g. Children's lives are blighted by early exposure to trauma, which is unavoidable if they grow up in chaotic, violent, drunken households. Removing alcohol-related harm from the mix will not fix all these problems, but unless alcohol-related harm is substantially reduced, attempts to address the other components of family dysfunction will fail. There are highly effective measures available to reduce alcohol-related harm, in particular supply reduction.
50. When innovative measures are implemented, they should be monitored and independently evaluated. Policy and program delivery must be evidence-based.

Signature: 

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Date: 24 NOVEMBER 2016

Witness: 

Name: CARLY INGHES

Date: 24/11/16