**“Avoiding the Black Hole” – Why the Custody Notification Service is such an important development for Aboriginal people in police custody in the Northern Territory.**



**Stephen Karpeles**

**June 2022**

**ABSTRACT**

Last year marked the 30th anniversary of the final report from the Royal Commission into Aboriginal Deaths in Custody (“RCAIDIC”). While much of the commentary has rightly focused on the failure of state and territory governments to implement many of its recommendations, this paper will look at one area where much-needed reform has occurred: police custody. In particular, the paper will focus on the Custody Notification Service (“CNS”) which commenced in the Northern Territory (“NT”) in July 2019. The paper will discuss the significance of the CNS for Aboriginal people when they are taken into police custody in the NT by contrasting their lack of rights with their interstate counterparts. The paper will highlight some of the positive changes the CNS has brought to police culture and relations between Aboriginal people and the police, and the impact it has had, particularly for vulnerable people in police custody. While acknowledging the service’s limitations the paper will argue the CNS must remain an integral part of the custody process in the NT to avoid Aboriginal people disappearing into ‘the black hole’.

**Part 1: The Black Hole**

According to the Collins online dictionary a ‘black hole’ has two meanings. In astronomy it is a region of space having a gravitational field so intense that “nothing can escape”[[1]](#footnote-1). There is also an informal use of the term for a place where lost items apparently “disappear without trace”[[2]](#footnote-2). Both are apposite to describe the situation of an Aboriginal person in police custody in the Northern Territory.

This article paints a bleak picture of the rights of a person in police custody in the Northern Territory by contrasting those rights, or lack thereof, with people in custody across Australia. The article will show that despite having the highest proportion of Aboriginal and Torres Strait Islanders in Australia[[3]](#footnote-3) and incarcerating them at a greater rate than any other jurisdiction[[4]](#footnote-4), the NT provides the least statutory protections for Aboriginal people in police custody. This fact serves to highlight the importance of the Custody Notification Service (“CNS”) in the NT. The paper will review the structure and operation of the service and comment on its future, concluding that in the arid landscape of rights in police custody in the NT, the CNS is imperative.

1. **Getting sucked in – Power of arrest**

The gravitational pull of police custody is stronger in the NT than in other jurisdictions, due largely to the passage of amending laws that over the past 30 years have increasingly funnelled Aboriginal people into police custody by making it easier for police to arrest them. Their situation is often summed up succinctly, if not eloquently, in the daily refrain of our clients - “*I’ve been locked up for fuck all*”.

1. **Protective custody**

While the power to take a person into police custody, for their own safety, due to their intoxication is not unique to the NT, what is unique to the NT, as well as South Australia and the ACT, is the absence of any requirement for the apprehending officer to actively pursue alternatives to custody after loading them into the paddy van. In other jurisdictions (excluding Victoria which doesn’t have a protective custody power), there is a legislated requirement to consider alternatives to police custody. In Queensland, police must take such a person directly to a sober-up shelter. In NSW, people are to be taken into protective custody “temporarily”, unless there is no one suitable to care for them or they are behaving, or likely to behave, in such a violent manner that it is not practical to have another person care for them[[5]](#footnote-5). In WA, officers must, as soon as reasonably practicable after apprehension, release the person into the care of another, unless it is impracticable to do so[[6]](#footnote-6). In Tasmania, police are only permitted to continue to hold the person in custody if they have made reasonable inquiries to find a place of safety or a responsible person to care for them[[7]](#footnote-7).

In New South Wales and Western Australia, there is a requirement for police to notify the Aboriginal Legal Service when they detain an Aboriginal person in protective custody, and in South Australia[[8]](#footnote-8) and the ACT, the person in protective custody has the right to speak to a lawyer, family or friend. No such right exists for Aboriginal people in the NT – they simply disappear into a police cell until an officer decides they are sober and releases them.

In other jurisdictions the exercise of the power is limited to situations where the person is so intoxicated they are a risk to their own, or others’ safety, or are likely to damage property. In the NT, police can also take a person into protective custody because the person might intimidate, alarm, or cause substantial annoyance, or are likely to commit any offence. Ironically, this did include the offence of drinking in a public place[[9]](#footnote-9) for which there was no power of arrest after the NT implemented the RCIADIC recommendation to abolish the offence of public drunkenness. However, in 2019 a new Liquor Act was introduced which changed the classification of drinking in a public place from an offence to a contravention of the section,[[10]](#footnote-10) which has ended this absurdity at least.

With such wide powers, and no requirement to consider alternatives after the initial apprehension, it is little wonder NT police cells are full of intoxicated Aboriginal people. In 2017-2018 there were 10,261 Aboriginal people apprehended for protective custody[[11]](#footnote-11). The total number of Aboriginal people arrested by police that year for any other reason was 16,860. It is an extraordinary number of people spending the night in a police cell for the sin of drinking to great excess, particularly when there is no independent review or legal advice available after their apprehension. By contrast, the number of non-indigenous people taken into protective custody for the same period was 294[[12]](#footnote-12). A review of coronial inquests over the past two decades in the Northern Territory shows that the great majority of Aboriginal people dying in police custody were in protective custody at the time.

**(ii) Paperless arrest**

Unique to the Northern Territory, pursuant to Division 4AA of the *Police Administration Act,* the police have the power to arrest a person, without a warrant, if the officer believes on reasonable grounds that they have committed **or were about to commit** an ‘infringement notice offence’. An ‘infringement notice offence’ is defined to include a range of offences for which an on-the-spot fine can be issued under the *Summary Offences Act*, the *Liquor Act*, and the *Misuse of Drugs Act*. Jonathon Hunyor[[13]](#footnote-13)colourfully summarised some of the offences as “as failing to keep a front yard clean; singing an obscene song; abandoning a refrigerator or ice chest (considered particularly serious if it contains beer); playing a musical instrument so as to annoy; and the popular leaving dead animals in a public place. More to the point it also includes offences such as consuming liquor within a public restricted area or behaving in a disorderly; offensive conduct; using profane language and attempting to re-enter a licensed premises within 12 hours of being removed”. In other jurisdictions, these offences do not ordinarily enliven the power of arrest but instead result in the issuing of infringement notices. Once arrested, these powers permit police to hold people in custody for up to 4 hours, or until they are sober, without notifying anyone while they decide whether to release them or issue them with an infringement notice. This led the Coroner to recommend the Division’s repeal[[14]](#footnote-14) lest “more and more disadvantaged Aboriginal people (be put at) risk of dying in custody, and unnecessarily so.”[[15]](#footnote-15) It also lead NAAJA to challenge the validity of the legislation in the High Court for essentially conveying judicial-like powers on police. The majority, however, disagreed and construed the laws as being subject to the common law, if not s137 of the *Police Administration Act*, which requires the person to be brought before a court *as soon as practicable* within that 4 hour time period[[16]](#footnote-16).

In 2017-2018 almost 3000 Aboriginal people were arrested under the ‘paperless arrests’ powers.

1. **Arrest without a warrant**

To arrest a person without a warrant in the Northern Territory, all that is required is the reasonable belief by the arresting that an offence has, is, *or is about to* commit an offence[[17]](#footnote-17). Unlike in most other jurisdictions[[18]](#footnote-18), there is no statutory requirement for an arresting officer in the NT to consider alternatives to arrest. While the *Youth Justice Act* retains the requirement that “a youth should only be **kept** in custody for an offence (whether on arrest, in remand or under sentence) as a last resort and for the shortest appropriate period of time”[[19]](#footnote-19), it does not specifically apply at the time of arrest. Figures referred to below suggest arrests of youths has dramatically increased in the last 12 months. In our experience, s4(c) is having little to no impact on the time a youth is being kept in police custody, largely due to delays in the completion of police files for charging and difficulty in locating responsible adults for the youths.

1. **Time stops**

It has been theorised that time stands still in black holes[[20]](#footnote-20).

The common law requires that an arrest must be carried out for the purpose of charging, if necessary, and taking the person before a justice or court as soon as reasonably practicable. It is not to enable further investigating and questioning[[21]](#footnote-21). This fundamental principle was confirmed by the High Court in 2019[[22]](#footnote-22). The duty to take an arrested person before a Justice as soon as reasonably practicable is so “that the law enforcement processes … be transferred as quickly as possible from the executive level to the objective and uncommitted judicial level”[[23]](#footnote-23). The principle has been eroded by the legislature in every jurisdiction in Australia, to enable police to arrest and detain for further investigation, but usually, as the High Court suggested in *Williams,* with safeguards “which might ameliorate the risk of unconscionable pressure being applied to persons under interrogation while they are kept in custody”[[24]](#footnote-24). The primary safeguard is to place a limit on the time a person can be held in custody for an investigation. Victoria, Tasmania and the NT[[25]](#footnote-25) are the only places not to place any express time limit. In New South Wales, police can only hold a person, child or adult, for a maximum of six hours without charge, beginning from the time of arrest which can be extended once by an authorised officer[[26]](#footnote-26). In South Australia, both adults and children can be held for up to four hours unless police get an extension of up to eight hours from a magistrate or judge[[27]](#footnote-27). In Queensland, a police officer can detain children and adults for a ‘reasonable’ time for investigation or questioning not exceeding eight hours. A judge or magistrate can grant an extension of the custody period for a reasonable time of no more than eight hours[[28]](#footnote-28). For a Commonwealth offence other than terrorism, a person who is Aboriginal or appears to be under 18 cannot be held for longer than two hours unless granted an extension by a Judge[[29]](#footnote-29). In Western Australia, the period is 6 hours unless authorised by a senior officer, and 12 hours unless authorised by a Magistrate[[30]](#footnote-30).

In response to the finding by the 2018 Royal Commission into Youth Detention and Child Protection that youths were being kept in police custody at the Watch House “for unreasonably long periods of time”[[31]](#footnote-31) and the recommendation that the law be amended to impose a time limit of 4 hours unless a further extension of four hours be authorised by a Judge[[32]](#footnote-32), the NT legislated to permit a youth to be detained for up to 24 hours by police and for further periods of 4 hours as authorised by a Judge[[33]](#footnote-33).

1. **There is no escape**

According to NASA, once you enter a black hole you won’t be seen again[[34]](#footnote-34).

Like most jurisdictions, the Bail Act has become the political ‘plaything’ of the government, a lever to pull when it needs to appear tough on crime. A lever that only travels in one direction. This knee-jerk response to the politics of the moment was most starkly on display in May last year when the NT government, ignoring the findings of the 2017 Royal Commission into Youth Detention and Child Protection[[35]](#footnote-35) and the views of a united NGO[[36]](#footnote-36) and legal sector, legislated to make it harder for youths to get bail than for adults[[37]](#footnote-37). The amended Youth Justice Act now requires police to oppose bail for pretty much any offence committed by a youth[[38]](#footnote-38), regardless of their criminal history (or absence of one), their age, or any other relevant subjective or objective consideration. If the youth is on bail at the time of committing the offence, or if they breach certain conditions of their bail where the breach is not trivial or technical, they are not granted bail unless fitted with an electronic monitoring device (the modern day ball and chain) and unless they reside at a secure bail supported accommodation which is only available in two locations in the NT and doesn’t take females, or unless exceptional circumstances apply[[39]](#footnote-39).

It must be said that there is some judicial oversight of police refusal of bail in the Northern Territory. Called a ‘bail review’ it is convened by a police Sergeant and presided over by a Local Court Judge who is required by legislation to hear from the applicant[[40]](#footnote-40) and to take into account their interests[[41]](#footnote-41). Prior to the CNS, it was conducted predominantly in the absence of any legal representative or legal advice for the applicant. Since the CNS commenced we have endeavored to provide advice and information to applicants about the various considerations and have assisted them to develop bail proposals. However, we are not funded to appear on bail reviews for the applicant. Our clients have, from time to time, told us they did not get to speak to the Judge. To ensure some semblance of procedural fairness we frequently ask Sergeants to ensure our clients are permitted to speak to the reviewing Judge and have been laughed at or told that Judges rarely speak to applicants. If true, it is concerning, to say the least. To rely on a police officer, who has a vested interest in ensuring the remand of troublesome youths and adults and no legal duty of candour to the court, to provide a fair summary of the alleged offending and the circumstances of the applicant is highly problematic, to say the least.

1. **Noone knows you’re there**

**Family**

Police are only required to disclose if a person is in their custody on request from a lawyer representing the person, (it is not clear how the lawyer will be engaged to make that request without speaking to the person first), or their partner, child or parent, and only with the permission of the person in custody[[42]](#footnote-42). In the author’s experience, this provision is often interpreted or applied by officers as a prohibition on disclosing any information to anyone about a person in custody, except in the limited circumstances provided. When regard is had to the very different and extended notions of family amongst Aboriginal and Torres Strait Islanders in the NT, it significantly restricts the flow of information to those who might be worried about a family member or loved one in police custody. This provision might be justifiable as a means of preserving privacy, but it does nothing to enhance trust between the Aboriginal community and the police, which was a fundamental concern of the RCIADIC.

**Access to lawyer?**

Prior to the CNS, when an Aboriginal person was arrested in the NT, the closest they came to being informed about their right to speak to a lawyer was if they were being held under s137 of the Police Administration Act for further investigation. Pursuant to section 140 of the same Act, the officer is required to inform the person in their custody that they;

(b) *may* **communicate** with or attempt to communicate with a **friend or relative** *to inform the friend or relative of the person's whereabouts.*

It is the only jurisdiction in Australia that does not specifically require police to inform the person in their custody, under investigation, that they may confer with a lawyer. In Queensland, Police are required to notify the Aboriginal Legal Service (“ALS”) if they intend to interview an Aboriginal suspect in their custody and inform the suspect of this[[43]](#footnote-43) and cannot interview the suspect unless they have given them the opportunity to speak to a support person[[44]](#footnote-44). In NSW there is a similar requirement to notify the ALS[[45]](#footnote-45) and not to interview an Aboriginal suspect unless police have informed the suspect they may communicatewith a lawyer and permit them to do so if they wish[[46]](#footnote-46). Similar rights exist in Western Australia.[[47]](#footnote-47)In the ACT, if the police intend to question an Aboriginal suspect, they must notify the ALS[[48]](#footnote-48) and are not permitted to question the suspect unless the suspect has had the opportunity to speak to them (or 2 hours have elapsed)[[49]](#footnote-49) and police cannot interview the suspect unless they have an ‘interview friend’ present[[50]](#footnote-50). In South Australia, where the suspect is apprehended on suspicion of committing an offence, they “are entitled to have a solicitor, friends or relative… present during an interrogation or investigation”[[51]](#footnote-51) and where that person is Aboriginal, police are required to contact the CNS and allow the person to communicate with staff from that legal service. In Victoria police are required to notify the Victorian ALS if they take an Aboriginal suspect into custody,[[52]](#footnote-52) and, before any questioning of the suspect, must inform them of their right to communicate with a lawyer and permit them the opportunity and facilities to have that communication[[53]](#footnote-53). In Tasmania, before any questioning can commence, an officer must inform the suspect of their right to communicate with a lawyer and to facilitate this communication if the suspect so requests[[54]](#footnote-54).

**Access to an interpreter**

According to ABS data from 2016 the NT has the highest proportion of people who speak a language other than English at home[[55]](#footnote-55), yet it is the only jurisdiction where police questioning an Aboriginal and/or Torres Strait Islander person, do not have a legislative obligation to arrange for the services of an interpreter ‘where a person’s English is insufficient to enable them to understand the questioning or speak with reasonable fluency.’[[56]](#footnote-56) Despite the availability of a recorded caution in 18 different languages[[57]](#footnote-57), our experience at the CNS is that the recorded caution in language is seldom used.

1. **Black, very black**

In 2018-2019, 7655 Aboriginal people were *apprehended* and taken into protective custody in the Northern Territory. The number of non-indigenous people taken into protective custody for the same period was 272. While the NT police do not release data on the number of non-Aboriginal people *arrested* and taken into custody, as distinct from apprehended for protective custody, a visit to any watch house, or the cells under the courthouse in the NT will confirm the vast majority of those in police custody are black.

**Part 2: CNS history**

Which brings us back to the Royal Commission into Aboriginal Deaths in Custody. It was established in 1987 by the Hawke Labour Government in response to the growing mistrust, suspicion, and disquiet amongst Aboriginals about police conduct in watch houses and stations, where Aboriginal people were dying in custody at an alarming rate. The Royal Commission ran for 5 years and was a broad ranging and comprehensive. It examined the social, cultural and legal factors contributing to Aboriginal and Torres Strait Islander deaths in custody. The final report highlighted the “massive” over-representation of Aboriginal people in custody, and the risks they face in police custody, through inadequate physical and mental health screening, language barriers, and lack of access to competent and culturally appropriate legal advice[[58]](#footnote-58). The Commissioners handed down 339 recommendations. One of those recommendations was for the police to negotiate local protocol agreements with the Aboriginal community to address the procedures and rules for the interaction between the two, including to require mandatory notification of Aboriginal Legal Services when police take an Aboriginal person into their custody[[59]](#footnote-59). This was to ensure independent scrutiny of police conduct during the time the person remained in their custody and to ensure the person was kept safe and was being looked after appropriately. It was also designed to ensure “Aboriginal people received legal advice in a culturally sensitive manner at the earliest possible opportunity in order to prevent them from acquiescing to police demands in a way which could jeopardise subsequent court proceedings”[[60]](#footnote-60). Local agreements were negotiated but they were inconsistent, and not all were mandatory. The least amount of progress on these Local Protocol agreements was in WA and the NT, which had by far the highest rates of Aboriginal deaths in custody between 2002 and 2013 (when there was publicly available data on this)[[61]](#footnote-61). In the Northern Territory the relevant police general order[[62]](#footnote-62) encouraged Custody Sergeants to negotiate local protocol agreements with the ALS but in practice, the only arrangements in place were for the police to contact the ALS on an after-hours mobile number if requested to do so by the person in custody (remembering that in the NT those in custody are not informed of their right to speak to a lawyer or legal service).

**Uptake**

The Commissioners also recommended that in jurisdictions where legislation, standing

orders or instructions do not already provide, appropriate steps be taken to make it

mandatory for Aboriginal Legal Services to be notified upon the arrest or detention of

any Aboriginal person[[63]](#footnote-63). However, the requirement to make mandatory a notification of an arrest is futile without an appropriately funded service to respond to the notifications.

The first dedicated custody notification service was established in 2000 in the NSW and the ACT by ALS NSW[[64]](#footnote-64) where the requirement to notify the service was enshrined in regulation. It remained the only such service for almost two decades. In 2016 the then Commonwealth Minister for Indigenous Affairs, Nigel Scullion, offered funding to commence custody notification services across the various jurisdictions but it wasn’t until the Australian Law Reform Commission (“ALRC”) “Pathways to Justice” Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples handed down its final report in late 2017 that governments in other jurisdictions took up the offer. The ALRC report recommended the “Commonwealth, state and territory governments should introduce a statutory requirement for police to contact an Aboriginal and Torres Strait Islander legal service, or equivalent service, as soon as possible after an Aboriginal and Torres Strait Islander person is detained in custody for any reason—including for protective reasons. A maximum period within which the notification must occur should be prescribed.”[[65]](#footnote-65)

In the Northern Territory it took another Royal Commission, inquiring into Youth Detention and Child Protection (2017) in the Northern Territory, to specifically recommend a CNS in the NT, as well as the offer of financial support from the Commonwealth, before the NT government acquiesced. Importantly, the Commissioners also recommended, “the Northern Territory Government commit to resource(ing) the custody notification scheme following the initial three-year funding from the Commonwealth”[[66]](#footnote-66).

**Different models**

In NSW and the ACT, police are required by regulation to notify the ALS when they take a person into custody.[[67]](#footnote-67) While there is no express requirement to facilitate communication with between the CNS and the person in custody, the police cannot interview the Aboriginal person in their custody unless they have spoken to a representative from the ALS[[68]](#footnote-68). In Western Australia, a CNS was introduced at the same time as the NT, also by regulation requiring notification of the ALS. The regulation implicitly, if not explicitly, requires that an ALS representative be permitted to speak to the person in custody,[[69]](#footnote-69) and, like NSW, requires the police to permit the person in custody to communicate with a lawyer if they intend to interview them[[70]](#footnote-70). In Victoria, there is a legislated requirement to notify the ALS[[71]](#footnote-71). South Australia amended their regulation in 2021 to require prompt notification of the ALS when an Aboriginal person is taken into police custody. However, their regulation also requires police “to allow an ALS representative to speak by telephone to, or visit, (or both) the Aboriginal or Torres Strait Islander person for a reasonable period” and stipulates that failure to comply with the requirement may result in disciplinary proceedings against the relevant officer. There is no requirement to notify ALS upon arrest of Aboriginal people in Tasmania. In Queensland, there is a requirement to notify the ALS only if police intend to question the person in their custody[[72]](#footnote-72). In those jurisdictions where there exists a requirement to notify, it is not limited only to those people in custody for new offences or warrants. It also includes those people in ‘protective custody’.

**Part 3 - The NT experience**

In the NT, the CNS was implemented by regulation in July 2019[[73]](#footnote-73). Since it commenced the service has been operated by NAAJA. The regulation itself was modelled on the NSW equivalent but excludes from its operation those people in custody for ‘paperless arrests’ and ‘protective custody’. There is no requirement, explicitly or implicitly, for police who make the notification to facilitate communication between the person in custody and the NAAJA staff member, nor is there any express requirement for the notification to be made prior to any police questioning. Notwithstanding the requirement from the Commonwealth that the CNS be legislated, the NT Government was opposed to this, citing the extended length of time it takes draft, introduce, debate, assent and gazette legislation. Instead they suggested regulation would be more expedient. This explanation needs to be viewed in light of the *Youth Justice Amendment Act* 2021, referred to previously, which took less than a month from the initial consultation to commencement, which perhaps gives a clearer indication of the government’s priorities.

In its 2017 report, the ALRC noted “A legislative requirement to notify an ATSILS when an Aboriginal and/or Torres Strait Islander person is detained in police custody reflects the importance of this safeguarding measure. It also ensures that the terms of the specific obligation are publicly available and discoverable, and less susceptible to change”[[74]](#footnote-74) Regarding the ambit of the regulation, the NT Police were also opposed to the expansion of the service to cover those in protective custody and paperless arrests, citing the significant number of people who were received into protective custody and the burden it would place on their service to meet this demand. It must be acknowledged that the CNS does place an additional burden on the already strained resources in police stations and watchhouses, but excluding those in custody for paperless arrests and protective custody from the CNS “ is another denial of safeguards.”[[75]](#footnote-75)

**Operational aspects**

In order to effectively operate the CNS, NAAJA and the NT police agreed a Memorandum of Understanding setting out the procedure for notifications. As might be expected with such a significant shift in custodial procedure to a model involving greater scrutiny, there were a number of officers, including Sergeants, who were resistant and openly hostile to the CNS. Ambiguity in the regulation was exploited by some of those officers who declined to facilitate any communication between the CNS staff member and the person in custody or facilitated the notification after the person had been charged, interviewed and remanded in custody by the on-call judge, rendering the notification futile. However, these officers were greatly outnumbered by officers who embraced the scheme and recognised the CNS as an additional layer of protection for persons in their custody and as a means of assisting officers to discharge their duty of care. Throughout the process, NT Police senior officers, extending up to the Commissioner, have been supportive of the CNS and have assisted in implementing procedures to monitor compliance and ensure that instances of failure by police to comply with the regulatory obligation or obligations arising from the MOU are investigated and officers spoken to if a breach has been identified.

To ensure compliance, there is a weekly data exchange between NAAJA and the NT police which acts as an audit. It is far from perfect, due largely to discrepancies in police data. The police are encumbered by an ageing database which is apparently not capable of exporting the required data accurately. There is also a degree of user error from officers in watch houses. Whatever the reason, the ongoing unreliability of the data makes it impossible for NAAJA accurately assess the extent to which police are complying with their obligation to notify. This contrasts with Western Australia where the police and ALSWA are working together to develop a shared database to enable accurate and real time auditing. They also have other rigorous police-led audit processes. As best as we can ascertain, the CNS speak to approximately 85% of people eligible for a notification. Of those we don’t speak to, approximately half decline; some end up at the hospital or speaking to private lawyers. The remainder simply fall into the black hole. The primary reason for this is the wording of the regulation itself which places the onus on the police officer to notify the CNS but not to facilitate communication. Until this is rectified, a significant number of people will not be afforded the benefit and protection of speaking to a CNS staff member.

**NAAJA CNS**

NAAJA’s CNS is led by an Aboriginal CEO, an Aboriginal Principal Legal Officer, and an Aboriginal board. Over 50% of the staff at NAAJA, and in the CNS, are Aboriginal. All the CNS staff have been highly trained in responding to vulnerable people in custody, including trauma awareness training, applied suicide intervention skills and working with interpreters, and are provided with a 200-page manual. Notwithstanding the challenges faced by the design and implementation of the service, it has been a genuine success. For the 12 months from 30 June 2020 to 30 June 2021, the CNS received 8340 notifications and assisted 6939 of those notifications. 743 of those were youths, some as young as 10 years old, including one youth who was so small the police could not fit an electronic monitor around his ankle. Of those spoken to, 1357 disclosed injuries, and 1437 disclosed that they were taking medication at the time, mostly for chronic illnesses. 49 disclosed being pregnant, 58 disclosed that they were breastfeeding mothers. 152 disclosed thoughts or intentions to self-harm. Many required interpreters. But those numbers alone don’t tell the full impact that the CNS can have.

The true worth of the CNS comes from the individual stories[[76]](#footnote-76), of those people who were openly considering suicide and were able to be supported by our staff, of people who were released on bail on compassionate grounds by police after our staff advocated on their behalf, or who were able to express milk for their infants after our staff made arrangements for this to occur, or who were released from custody and taken for a sexual assault examination or taken to domestic violence shelter. Most of these outcomes would not have occurred without access to the CNS. It is difficult to quantify the value of these interventions. What price does one put on reducing trauma and ensuring basic rights and dignity?

**Welfare concerns**

In the Northern Territory the 2012 coronial inquest into the death of *Terrence John Briscoe[[77]](#footnote-77)*was something of a watershed moment for the care and treatment of people in custody police stations. The Coroner found a systematic failure to adequately staff the Alice Springs watch house, a lack of training of staff, failure to audit staff practices, and implement appropriate safety policies. Despite being recommended by the RDIADIC, there were no nurses employed in NT watch houses. The recommendation to do so by the Coroner was adopted by the police and has undoubtedly reduced the number of Aboriginal deaths in police custody. However, watch house nurses are not stationed in all watch houses. Tennant Creek for example doesn’t have one, nor are they available 24 hours a day, with the exceptions of the weekend, when they are.

According to an Aboriginal Medical Services Alliance NT (“AMSANT”) report from 2016 [[78]](#footnote-78) “rates of chronic diseases in Aboriginal people in the NT are at alarming levels”. For example, “rates of treated end-stage kidney disease (are) twenty times higher than in non-Aboriginal people in the NT…death rates from diabetes and renal disease (are) six and nine times higher respectively than in non-Aboriginal people. The mortality rate ratio (death rate in Aboriginal people vs non-Aboriginal people) is highest in the NT compared to any other jurisdiction with a rate ratio of 2.4 (against a national rate ratio of 1.7)”[[79]](#footnote-79). Put simply, many of those in custody in the NT are very unwell, and many experience difficulties communicating with police. So it is perhaps unsurprising that CNS staff frequently speak to Aboriginal people in police custody who disclose medical issues that were unknown to the police or the nurse and are often involved in arranging medication for clients in custody, or basic provisions like tampons, underwear, food, and water.

**Assisting families**

As referred to earlier, there is a legislative restriction on the information police can provide about persons in custody. The information is limited to confirming or denying if the person is in police custody and can only be disclosed on the request of parents, children, partner or lawyer for the person in custody and with the person’s consent. In our experience, this restriction has been broadly interpreted by many police officers, leaving family and friends without information about their loved one. The recent trial of NT police officer Zachary Rolfe for the murder of Kumunjayi Walker highlighted the painful legacy of the many deaths in custody for Aboriginal people, and the continuing suspicion and mistrust they have of police. The restriction on the release of information about people in police custody only fuels that mistrust and suspicion. In recognition of this, the CNS created a telephone service for family or friends to call if they are worried about someone in custody. With the client’s consent, this information has been gratefully received by many family members who were extremely worried about the well-being of the person in custody. The service has frequently advocated for our clients to speak to family members, particularly when they are agitated or upset and in need additional support. By providing family members with information about the criminal justice process and regular updates about the person in custody, the CNS is working towards reducing some of that mistrust.

**Bail**

The service is not funded to provide 24 hour a day access to a lawyer. Of the 6 full time staff, three are lawyers and 3 are Aboriginal client service officers. However, earlier this year, as a result of the COVID 19 lockdown in remote communities, the Local Court ceased sitting in those communities. In a welcome effort to reduce the prejudice to remote community residents arrested and facing removal from their community to a Darwin or Alice Springs prison, an agreement was reached between the Chief Local Court Judge, NT police and NAAJA. Through CNS, NAAJA was able to provide access for Aboriginal people where refused bail in remote communities, with a lawyer to assist them with their bail review. The bail review proceeded via a three-way telephone call, during which time the lawyer made submissions on behalf of the applicant. It was well-received by the Local Court Judges and the police. The extent to which this approach might reduce incarceration is difficult to assess. It does however ensure procedural fairness for the applicant and allows for all the relevant matters under section 24 of the *Bail Act* (NT) to be considered by the on-call Judge. It gives a glimpse of what an appropriately funded CNS could achieve and is very likely to reduce unnecessary incarceration of Aboriginal people, particularly youths.

**Reducing delays at the Local Court**

Prior to the CNS, the morning and early afternoon work of the Local Courts was significantly limited by the blockages caused by limited cells in which to get instructions and delays in police paperwork being handed over to defence lawyers. The CNS alleviates this significantly by providing timely and relevant information to the defence lawyers about the charges, bail proposal, contact details for family members and any likely communication difficulties of the prospective clients, including if an interpreter is required.

**An increasing demand**

Annexure 1 shows that the number of total annual notifications has only increased by a modest amount, since the service commenced. But look a little closer and you see big increases in the number of vulnerable people coming into police custody. Over the past three years the number of people considering self-harm has increased by 50%. The most dramatic increase is the number of notifications for youths, which for the first two years remained largely unchanged. Since the NT government introduced its changes to the *Bail Act* (NT) and *Youth Justice Act* (NT) in May 2021, that number has almost doubled (see Annexure 1). But perhaps the most concerning increase is the number of notifications for youths under the age of 13 which has tripled since the amendments were introduced and is clear evidence of the damage the amendments have wrought.

**The future**

Apart from recent coverage as a funding shortfall loomed, the CNS has not attracted media or political interest in the NT. In a media environment focused on government failure and controversy, it is hardly surprising that the success of the service providing support for Aboriginal people in police custody largely goes unnoticed. Yet this might be to the detriment of service and those it seeks to assist. The funding agreement between NAAJA and the Commonwealth was due to expire on 30 June 2022. Despite numerous meetings with various NT government ministers and senior departmental figures, and the clear recommendation by the Royal Commission into Youth Detention and Child Protection in the NT for the NT government to fund the service, they chose not to. It seems they were more concerned with spending money on measures designed to make it appear tough on crime in response to endless media coverage of property crime, and in the process. Instead it was left to the Commonwealth to throw a last-minute financial lifeline and fund the service for a further 12 months. However, they have made it clear that any future funding must come from the NT government.

What is required for any service to enable retention and development of its staff and the development of collaborative relationships with other agencies and services providers is long-term funding. The CNS is no different[[80]](#footnote-80). So the NT government has a clear choice in the coming 12 months, to fund a service that assists the ever-increasing number of Aboriginal people coming into police custody, or leave them to fall into the black hole.

**Annexure 1**



1. https://www.collinsdictionary.com/dictionary/english/black-hole#:~:text=Black%20holes%20are%20areas%20in,be%20formed%20by%20collapsed%20stars.&text=If%20you%20say%20that%20something,disappeared%20and%20cannot%20be%20recovered. [↑](#footnote-ref-1)
2. Collins online dictionary (n1) [↑](#footnote-ref-2)
3. Australian Bureau of Statistics (31 August 2018). <https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/estimates-aboriginal-and-torres-strait-islander-australians/latest-release#:~:text=States%20and%20territories&text=Aboriginal%20and%20Torres%20Strait%20Islander%20Australians%20comprised%2030%25%20of%20the,of%20any%20state%20or%20territory> [↑](#footnote-ref-3)
4. https://www.theguardian.com/australia-news/2021/jan/22/indigenous-prison-population-continues-to-increase-while-non-indigenous-incarceration-rate-falls [↑](#footnote-ref-4)
5. *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW), s206 [↑](#footnote-ref-5)
6. *Protective Custody Act* (2000) (WA), s12        [↑](#footnote-ref-6)
7. *Police Offences Act* 1935 (TAS), s 4A [↑](#footnote-ref-7)
8. ibid at s7(8) [↑](#footnote-ref-8)
9. Liquor Act (NT) s101U (now repealed) [↑](#footnote-ref-9)
10. Liquor Act 2019 (NT), s171 [↑](#footnote-ref-10)
11. NTPFES Annual Report, 2019-2020 at p181 [↑](#footnote-ref-11)
12. ibid [↑](#footnote-ref-12)
13. Hunyor J, (2015). *Imprison ME NT.* CLANT Bali Conference 2015

*https://clant.org.au/wp-content/uploads/the-bali-conference/2015/Hunyor.pdf* [↑](#footnote-ref-13)
14. Inquest into the death of *Perry Jabanangka Langdon* [2015] NTMC 16 [↑](#footnote-ref-14)
15. Ibid at [90] [↑](#footnote-ref-15)
16. *North Australian Aboriginal Justice Agency v Northern Territory* [2015] HCA 41 at [27] [↑](#footnote-ref-16)
17. *Police Administration Act* (NT), s123 [↑](#footnote-ref-17)
18. Cf *Law Enforcement (Powers and Responsibilities) Act* (NSW), s99; *Police Powers and Responsibilities Act* (QLD), s365(1); *Crimes Act* (Vic), s458-459; *Criminal Code Act* (Tas), s27, *Criminal Investigation Act* (WA),s128, *Crimes Act* (ACT), s212 for adults; and for youths cf *Youth Justice Act* (Tas), 24, [↑](#footnote-ref-18)
19. Youth Justice Act (NT), s4(c) [↑](#footnote-ref-19)
20. Moskowitz, M. (2011, January 28). *For Fully Mature Black Holes Time Stands Still*. https://www.space.com/10702-black-hole-kerr-state-spacetime.html [↑](#footnote-ref-20)
21. *Williams v The Queen* [[1986] HCA 88](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/1986/88.html); (1986) 161 CLR 278 at 292‒294 per Mason and Brennan JJ, 305‒306 per Wilson and Dawson JJ [↑](#footnote-ref-21)
22. *State of New South Wales v Bradford James Robinson* [2019] HCA 46 [↑](#footnote-ref-22)
23. *Heiss v The Queen; Kamm v The Queen* (1992) 2 NTLR 150 per Gallop, Martin and Mildren JJ at 168 [↑](#footnote-ref-23)
24. *Williams v The Queen* (1986) 161 CLR 278 per Mason and Brennan JJ [↑](#footnote-ref-24)
25. See *Police Administration Act* (NT) s137(3) which prescribes a ‘reasonable time’ to enable investigations to be undertaken by police [↑](#footnote-ref-25)
26. *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) s 115 [↑](#footnote-ref-26)
27. *Summary Offences Act* 1953 (SA), s 78(2) [↑](#footnote-ref-27)
28. *Public Powers and Responsibilities Act* 2000 (Qld) ss 403, 404(a), 405. [↑](#footnote-ref-28)
29. *Crimes Act* (Cth), s23C [↑](#footnote-ref-29)
30. *Criminal Investigation Act* (WA), s140 [↑](#footnote-ref-30)
31. Northern Territory, Royal Commission into Youth Detention and Child Protection in the Northern Territory (2017) Volume 2B, p237 [↑](#footnote-ref-31)
32. Recommendation 25.3 [↑](#footnote-ref-32)
33. *Police Administration Act* (NT), s137(4) [↑](#footnote-ref-33)
34. https://www.nasa.gov/mediacast/inside-a-black-hole [↑](#footnote-ref-34)
35. Northern Territory, Royal Commission into Youth Detention and Child Protection in the Northern Territory, Final Report (2017). Findings and Recommendations. [↑](#footnote-ref-35)
36. https://www.sbs.com.au/nitv/article/2021/05/12/outrage-and-protest-controversial-youth-laws-pass-nt-parliament [↑](#footnote-ref-36)
37. *Youth Justice Legislation Amendment Act* 2021 (NT [↑](#footnote-ref-37)
38. *Youth Justice Act* (NT), s22(3). Note a full list offences is found at 2A of the *Bail Regulations* (NT) [↑](#footnote-ref-38)
39. *Bail Act* (NT), s7B [↑](#footnote-ref-39)
40. *Bail Act* (NT), s33(7) [↑](#footnote-ref-40)
41. Ibid s24(1)(b) [↑](#footnote-ref-41)
42. *Police Administration Act* (NT), s135 [↑](#footnote-ref-42)
43. *Police Powers and Responsibilities Act* 2000 (QLD), s420(2) [↑](#footnote-ref-43)
44. Ibid, s420(4) [↑](#footnote-ref-44)
45. *Law Enforcement (Powers and Responsibilities) Regulations* 2016, R37 [↑](#footnote-ref-45)
46. *Law Enforcement (Powers and Responsibilities) Act* (NSW), s123(1) [↑](#footnote-ref-46)
47. *Police Force Regulation* (WA), R703 and *Criminal Investigation Act* (WA), s138(2)&(3) [↑](#footnote-ref-47)
48. *Crimes Act* (Cth), s23H(1) [↑](#footnote-ref-48)
49. Ibid, s23H(1AB) [↑](#footnote-ref-49)
50. Ibid, s23H(2) [↑](#footnote-ref-50)
51. *Summary Offences Act* (SA), s79(1)(b)(i) [↑](#footnote-ref-51)
52. *Crimes Act* (Vic), s464FA [↑](#footnote-ref-52)
53. *Crimes Act* (Vic), s464C(1) [↑](#footnote-ref-53)
54. *Criminal Law (Detention and Interrogation) Act* (Tas), s6 [↑](#footnote-ref-54)
55. https://profile.id.com.au/australia/language?WebID=160&BMID=10 [↑](#footnote-ref-55)
56. [Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133)](https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/) at 10.10 citing L Bartels, ‘Police Interviews with Vulnerable Suspects’ (Research in Practice Report No 21, Australian Institute of Criminology, July 2011) 4 [↑](#footnote-ref-56)
57. https://cmc.nt.gov.au/aboriginal-affairs/aboriginal-interpreter-service/aboriginal-language-police-cautions-aboriginal-interpreter-service [↑](#footnote-ref-57)
58. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, Final Report, (1991) Volume 1 at 1.3 [↑](#footnote-ref-58)
59. Ibid, Volume 5, Recommendation 223 [↑](#footnote-ref-59)
60. [Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133)](https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/) at 14.82 [↑](#footnote-ref-60)
61. Kelly, Tegan (2017). *A statutory duty to notify: A critical analysis of proposal 11.3* at p37; located at https://www.alrc.gov.au/wp-content/uploads/2019/08/116.\_tegan\_kelly.pdf [↑](#footnote-ref-61)
62. NT police general order – Custody and Transport at [314] [↑](#footnote-ref-62)
63. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, Final Report, (1991) Volume 5, Recommendation 224 [↑](#footnote-ref-63)
64. https://www.alsnswact.org.au/what\_is\_cns [↑](#footnote-ref-64)
65. [Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133)](https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/), recommendation 14.3 [↑](#footnote-ref-65)
66. Northern Territory, Royal Commission into Youth Detention and Child Protection in the Northern Territory, Final Report (2017). Findings and Recommendations. Recommendation 25.4 [↑](#footnote-ref-66)
67. #  *Law Enforcement (Powers and Responsibilities) Regulations* (NSW)*, r* 37

 [↑](#footnote-ref-67)
68. *Law Enforcement (Powers and Responsibilities) Act* (NSW), s123(1) [↑](#footnote-ref-68)
69. *Police Force Regulations* (WA), r703 [↑](#footnote-ref-69)
70. *Criminal Investigation Act* (WA), s138 [↑](#footnote-ref-70)
71. *Crimes Act* (Vic), s464FA [↑](#footnote-ref-71)
72. *Police Powers and Responsibilities* (QLD) s420(2) [↑](#footnote-ref-72)
73. *Police Administration Regulations* (NT), R 19B [↑](#footnote-ref-73)
74. [Pathways to Justice–Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report 133)](https://www.alrc.gov.au/publication/pathways-to-justice-inquiry-into-the-incarceration-rate-of-aboriginal-and-torres-strait-islander-peoples-alrc-report-133/), recommendation at 14.86 [↑](#footnote-ref-74)
75. Anthony T & Whittaker W. **Legal and welfare checks should be extended to save Aboriginal lives in custody, *The Conversation.* 27 August 2019. https://theconversation.com/legal-and-welfare-checks-should-be-extended-to-save-aboriginal-lives-in-custody-121814** [↑](#footnote-ref-75)
76. Some of these stories were presented on ABC RN’s Law Report found at https://www.abc.net.au/radionational/programs/lawreport/asset-based-loans-v2/13817072 [↑](#footnote-ref-76)
77. [2012] NTMC 32 [↑](#footnote-ref-77)
78. AMSANT. *Priorities for Aboriginal Primary Health Care in the Northern Territory.* (May 2016) *http://www.amsant.org.au/wp-content/uploads/2018/09/AMSANT-Priorities-for-Aboriginal-PHC-2016\_Final-Draft.pdf* [↑](#footnote-ref-78)
79. AMSANT. *Priorities for Aboriginal Primary Health Care in the Northern Territory.* (May 2016) *http://www.amsant.org.au/wp-content/uploads/2018/09/AMSANT-Priorities-for-Aboriginal-PHC-2016\_Final-Draft.pdf* [↑](#footnote-ref-79)
80. Kelly, Tegan (2017). *A statutory duty to notify: A critical analysis of proposal 11.3* at p36; located at https://www.alrc.gov.au/wp-content/uploads/2019/08/116.\_tegan\_kelly.pdf [↑](#footnote-ref-80)