

Inquiry into community safety in regional and rural communities

Legal Aid NSW submission to
NSW Parliament Legislative
Assembly Committee on Law and
Safety

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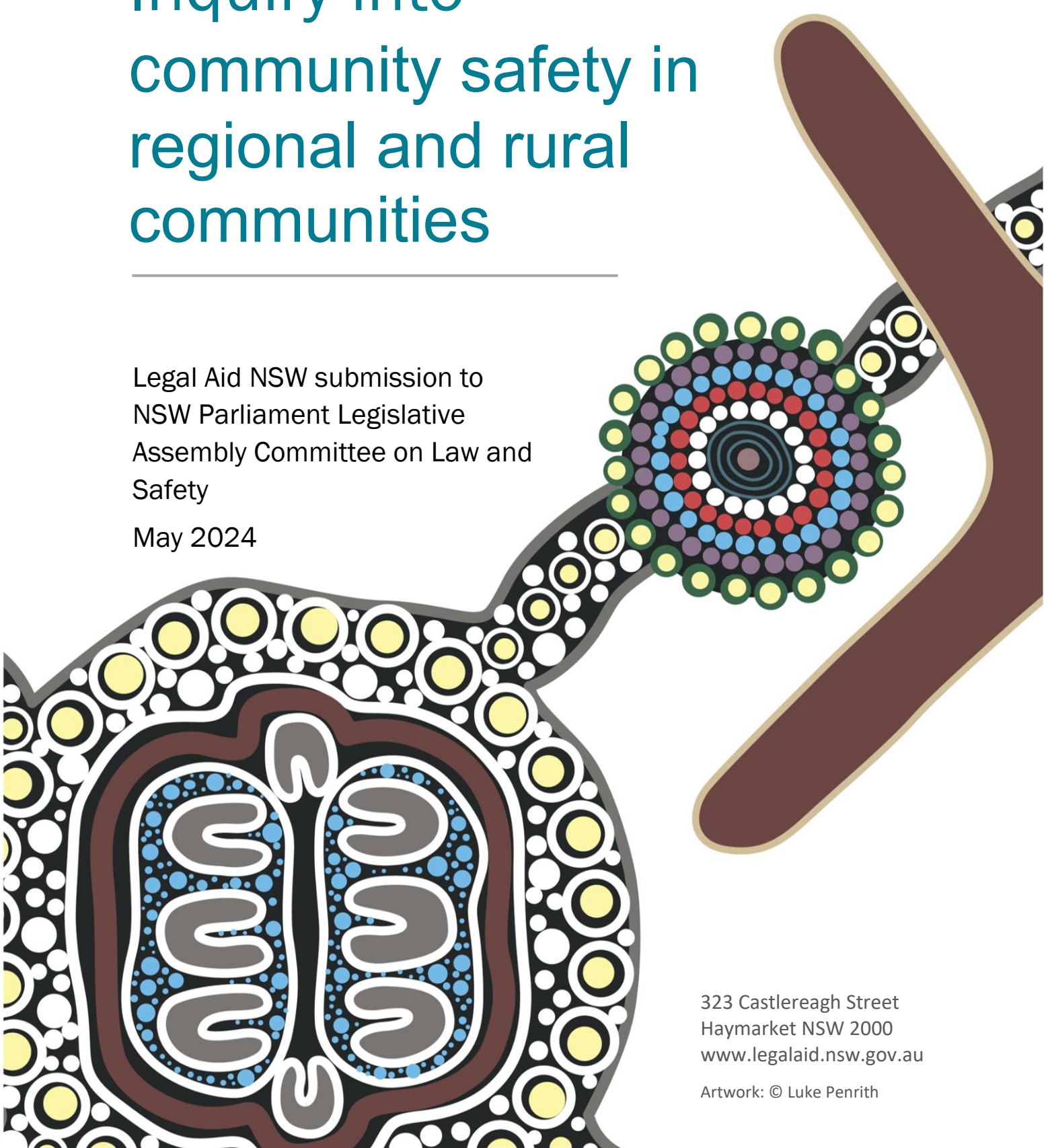


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Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

1. About Legal Aid NSW

Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Family Law Division provides services in Commonwealth family law and state child protection law. Specialist services focus on the provision of family dispute resolution services, family violence services, services to Aboriginal families and the early triaging of clients with legal problems.

Legal Aid NSW provides duty services at all Family and Federal Circuit Court registries and circuit locations through the Family Advocacy and Support Services, all six specialist Children's Courts, and in some Local Courts alongside the Apprehended Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdictions.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners, older people experiencing elder abuse and communities impacted by disasters.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

2. Executive summary

The adolescent brain is structurally different to that of a mature adult, particularly in the area devoted to impulse control and decision-making. Adolescents engage in increased risk-taking, have poor impulse control and poor planning skills by virtue of the physical structures of their still-growing brains
Royal Commission into the Detention and Protection of Children in the Northern Territory¹

Legal Aid NSW welcomes the opportunity to provide a submission to the Legislative Assembly Committee on Law and Safety *Inquiry into community safety in regional and rural communities*.

Legal Aid NSW assists many children and young people² with legal matters. Our Criminal Law Division provides specialised advice and representation to children involved in criminal cases in NSW. Through our Family Law Division, Legal Aid NSW provides specialist advice and representation for children in care and protection cases before the Children's Court of NSW (**Children's Court**). Our Children's Civil Law Service provides a targeted and holistic legal service to children identified as having complex needs, particularly those in out of home care (**OOHC**).³ Legal Aid NSW is therefore uniquely placed to provide input on law reform and policy proposals concerning children across NSW.

Based on our extensive practical experience advocating for children, including those in regional and rural communities, we consider that there is a need to develop and implement alternative, therapeutic approaches to dealing with children in the criminal justice system (**CJS**), which better recognise their vulnerability and support their rehabilitation and reintegration into the community. It is essential that any approach recognises and responds to the broader social context in which children in contact with the CJS live, and involves an educational, medical, psychological, social and cultural response, rather than a purely justice-based approach. In our experience this will always lead to better outcomes for children and cost savings for the government.

Addressing the factors associated with youth crime

The drivers and factors associated with youth crime are complex and often co-exist and compound each other. This submission explores how disadvantage, trauma, disabilities, mental health conditions, substance abuse issues, inadequate early intervention, educational disengagement and OOHC experience, all interact and contribute to youth crime. We provide recommendations on how to address these factors, including:

- ensuring the various local community services take a collaborative and holistic approach towards supporting children and families in their local areas
- increasing housing stability for children and disadvantaged families
- ensuring children who exhibit, or are at risk of developing severe emotional and behavioural disturbances are appropriately assessed and/or supported

¹ Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, 17 November 2017, Vol. 1, p. 133, footnotes 135-6.

² Referred to in this submission as 'children'.

³ **OOHC** is defined as overnight care for children who are unable to live with their families due to child safety concerns and includes foster care, placements with relatives or kin, placements made for the purpose of providing respite for parents and/or carers and residential care (Australian Institute of Health and Welfare, *Child Protection Australia 2020-2021*, Web Report. 15 June 2022, p 43).

- providing disadvantaged children with disability with support accessing and navigating the NDIS
- increasing access to youth mental health services in regional areas
- increasing the NSW Government's investment in early intervention in the child protection system, including increasing the availability of intensive family support and access to independent socio-legal advocacy services
- ensuring children in OOHC are supported to regulate their behaviour in a non-criminalising way and ensuring NSW Police Force (**NSWPF**) and the OOHC sector are provided with regular training on the *Joint protocol to reduce the contact of young people in residential care with the criminal justice system*
- ensuring children in OOHC receive high quality casework services
- ensuring schools have the capacity to provide adjustments and individualised learning supports to assist children at risk of disengaging from education
- increasing the availability of affordable pro-social activities for children in regional communities
- increasing the availability of community-based drug and alcohol support services and expanding the Rural and Residential Adolescent and Other Drug Rehabilitation Service, and
- ensuring Aboriginal children are not overpoliced and that Aboriginal youth mentorship programs form part of the NSW Government's response to youth crime in regional communities.

The criminal justice system

For many children, involvement in the CJS may not be an appropriate response to problematic behaviour as it further damages and disadvantages already traumatised and vulnerable children and has little deterrent effect.⁵ This submission discusses the problematic nature and detrimental effect of prosecuting children. We discuss how:

1. Arresting and detaining children, even for short periods of time, can lead to further criminalisation. To address this issue, we recommend legislative amendment to specifically state that the arrest of children should be a measure of last resort.
2. The imposition of unlawful and inappropriate bail conditions regularly leads to a cascade of unnecessary arrest and interaction with the CJS. To address this issue, we recommend NSWPF be required to consider a person's age when making a bail determination, and that they receive additional training on imposing appropriate bail conditions and policing breaches of bail.
3. It is common for children to be remanded in custody due to a lack of appropriate housing. To address this issue, we recommend increased bail support services, particularly in regional areas.
4. Specialist Children's Courts are not available in many regional areas, leading to poorer outcomes for young offenders in these regions.
5. Raising the minimum age of criminal responsibility is an important tool in protecting the rights and wellbeing of young children and diverting them away from the CJS.

The importance of diversion

We emphasise and demonstrate the importance and positive impact of diversion with reference to relevant case studies and effective programs. We also address the limitations of taking a punitive approach with an emphasis on detention, monitoring and control to offending by vulnerable children and outline the benefits of trauma-informed approaches that focus on diversion, rehabilitation, reintegration and reconciliation, and meaningfully address the root causes of offending behaviour.

⁵ Royal Australian College of Physicians, Submission to the Council of Attorneys General Working Group, *Age of Criminal Responsibility* (February 2020), 3.

We discuss the various diversionary options available in regional areas, including Youth Justice Conferences under the *Young Offenders Act 1997* (NSW), Youth on Track, BackTrack, the Youth Koori Court, and the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW). However, we note that many of these options are limited in regional communities, and there is inconsistent use of diversions across various NSWPF Local Area Commands. We recommend expansion of many of these services in regional areas, and the development of additional diversionary options, including a youth and drug and alcohol diversionary program or court.

Related matters

Lastly, we raise concerns about the recently enacted section 22C of the *Bail Act 2013* (NSW). This section will make it more difficult for some children to get bail, increasing their time in custody, which is a known contributor to future offending.

Legislative Assembly Committee inquiry into the adequacy of youth diversionary programs in New South Wales

The NSW Legislative Assembly Committee on Law and Safety has previously conducted an inquiry into the adequacy of youth diversionary programs in New South Wales (the *NSW Youth Diversion Inquiry*). The inquiry considered diversionary options at every stage of a child's life: early intervention options; pre-court diversion options; pre-sentence diversion; and post-conviction diversion.

The inquiry's final report was released in 2018.⁶ It found young offenders' access to diversionary options varies across NSW with those who commit offences in regional areas being less likely to be diverted from the CJS than those in the Greater Sydney area. It also found Aboriginal children in custody are far more likely to be from non-metropolitan areas than non-Aboriginal children.

The inquiry made multiple recommendations to improve the diversion of children away from the CJS. Many of these recommendations are still outstanding. Some of these recommendations are discussed in this submission.

⁶ NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018) vi, 272.

Recommendations

Recommendation 1

- The Department of Communities and Justice should establish regular 'community services roundtables' in each regional area to increase connection, communication and collaboration between the various community service providers.

Recommendation 2

- The Department of Communities and Justice should create and regularly update community directories for each region providing information and contact details for available services. The directories should be published and distributed to regularly visited government and community service offices across the regions.

Recommendation 3

- The NSW Government should adapt the use of 'Youth Action Style' meetings to the child protection context. Such meetings should occur at an early stage and involve interagency collaboration with the aim of keeping families together.

Recommendation 4

- The NSW Government should increase long-term financial investment in early intervention support (including increasing the availability of intensive family support) to prevent more children entering the out-of-home care system.

Recommendation 5

- The Department of Communities and Justice should continue to develop improved communication and referral pathways between its Housing and Child Protection divisions, in a way that facilitates information sharing⁷ and encourages collaboration between the two divisions in situations where homelessness, or a lack of appropriate housing, is a risk factor identified by Child Protection.

Recommendation 6

- The Rent Choice Youth program should be expanded to ensure it has the capacity to provide assistance to all eligible children.

Recommendation 7

- The NSW Government should increase the supply of social housing specifically available for children under the age of 18.

⁷ Including information needed to satisfy housing eligibility requirements, to be given 'priority status', or to access programs such as Staying Home, Leaving Violence.

Recommendation 8

- a) The NSW Government should increase supports in regional communities to assist women and children to leave domestic violence.
- b) The Department of Communities and Justice should explore options to enhance capacity and staff retention in regional offices to enable appropriate support and intervention is available when children are at risk of significant harm.

Recommendation 9

- The NSW Government should review their child health and development screening programs to identify opportunities for expansion to improve early diagnosis of disabilities, particularly for children in regional areas.

Recommendation 10

- The NSW Government should develop a memorandum of understanding between the Child Protection, Youth Justice, legal assistance, education and health systems to increase collaboration and improve the integration of assessment and support across these systems for children who exhibit, or are at risk of developing severe emotional and behavioural disturbances. This memorandum of understanding should also reinforce existing precautions around information sharing and include clear guidance around what information may be shared.

Recommendation 11

- The NSW Government should re-establish the Integrated Service Response (or a similar service) for children with disability and complex needs in NSW to assist them to get access to available supports, and to ensure coordination and accountability of service providers.

Recommendation 12

- The Child and Adolescent Mental Health Service should be expanded to ensure it has capacity to provide timely services to all eligible children.

Recommendation 13

- The Department of Communities and Justice⁸ should fund ongoing training to ensure that all residential out-of-home care staff, and frontline NSW Police Force officers, receive training on the *Joint protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system*.⁹

⁸ DCJ are responsible for the implementation of the *Joint Protocol*.

⁹ Legal Aid NSW continues to be involved in the development of the training material delivered to residential OOHC services and the NSW Police Force as part of the implementation of the *Joint Protocol*. Legal Aid NSW is also a representative on the State-wide Steering Committee that oversees the implementation of the *Joint Protocol*, and the Operational Issues Group that considers individual cases of non-compliance with the *Joint Protocol*.

Recommendation 14

- The inquiry should examine the United Kingdom's response to the overrepresentation of children in out-of-home care in the criminal justice system, and consider whether to adopt some of these measures in NSW.

Recommendation 15

- The Department of Communities and Justice Metropolitan Intensive Support Service (or a service with equivalent qualifications and expertise) should be expanded to regional locations across NSW. This service should provide intensive casework for children in residential OOHC with complex needs who are experiencing placement instability or ongoing criminalisation.

Recommendation 16

- Additional funding should be provided to support the expansion of the Elver Program so that it has the capacity to provide early intervention and treatment to all eligible children in OOHC.

Recommendation 17

- The NSW Government should invest in the trial of an independent advocacy service for children and young people with OOHC experience, including children in regional NSW, within Legal Aid NSW.

Recommendation 18

- The NSW Department of Education should identify and implement measures to build the capacity of schools to provide additional adjustments¹⁰ and more individualised learning supports to assist children at risk of disengaging from education.

Recommendation 19

- The NSW Department of Education should provide for the attendance of an Education Liaison Officer at every specialist Children's Court criminal list day across NSW.

Recommendation 20

- The NSW Police Force and the NSW Department of Education should review their existing Memorandum of Understanding in relation to information sharing, to ensure it complies with legislative limits on information sharing.

¹⁰ In line with the requirements of the *Disability Standards for Education 2005*.

Recommendation 21

- The NSW Government should develop and implement a policy between the Department of Communities and Justice and the NSW Department of Education which specifically seeks to maximise school engagement of children in out-of-home care.

Recommendation 22

- The NSW Government should undertake a review of prosocial activities available to children in regional areas, and increase their availability.

Recommendation 23

- Regular recreational activities, hobbies, sport or other forms of community engagement should form part of the care plan of each child residing in residential out of home care.

Recommendation 24

- The NSW Government should increase the availability of community-based youth drug and alcohol services in regional areas.

Recommendation 25

- The Rural Residential Adolescent Alcohol and Other Drug Rehabilitation Service should be expanded to:
 - provide services for children with drug or alcohol issues *before* contact with the criminal justice system occurs
 - include both inpatient and outpatient services
 - increase the number of beds available and
 - include additional residential rehabilitation facilities, particularly in regional areas.

Recommendation 26

- Aboriginal youth mentorship programs should form part of the NSW Government's response to youth crime.

Recommendation 27

- a) The Department of Communities and Justice should employ local Aboriginal mentors at each local DCJ Child Protection office and ensure all Aboriginal children in residential OOHC are able to access an Aboriginal mentor.
- b) These Aboriginal mentors should oversee the development and revision of individualised cultural plans to ensure they are of a high-quality, up-to-date, and are designed by the children and their families or mob.

Recommendation 28

- The NSW Government should amend the *Children's Criminal Proceedings Act 1987* (NSW) to explicitly state that arrest should be a measure of last resort.

Recommendation 29

- The NSW Government should adopt recommendation 13 of the NSW Legislative Assembly inquiry into the adequacy of youth diversionary programs in NSW:
 - That officers of the NSW Police Force and courts that hear juvenile criminal matters receive thorough training in the setting of bail conditions for young people under 18 years, to promote the diversion of young people wherever possible.¹¹

Recommendation 30

- The NSW Government should adopt recommendation 15 of the NSW Legislative Assembly inquiry into the adequacy of youth diversionary programs in NSW:
 - That officers of the NSW Police Force receive thorough training concerning the policing of suspected bail breaches by young people under 18 years, to avoid unnecessary arrests and detention.¹²

Recommendation 31

- The NSW Government should adopt recommendation 16 of the NSW Legislative Assembly inquiry into the adequacy of youth diversionary programs in NSW:
 - That the NSW Government should consider whether the *Bail Act 2013* (NSW) should be amended to specifically provide that police officers must have regard to a person's age in deciding what action to take for breach of bail.¹³

Recommendation 32

- The Committee should examine whether section 28 of the *Bail Act 2013* (NSW) is operating as intended and preventing children from being held in custody once bail has been granted or make recommendations for the operation and effect of this section to be examined in greater detail.

Recommendation 33

- The NSW Government should increase the number of bail support services and emergency accommodation services available to children across NSW. There should be a particular focus on regional areas, services for Aboriginal children and services for children with complex needs and substantial offending histories.¹⁴

¹¹ NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018) recommendation 13.

¹² Ibid, recommendation 15.

¹³ Ibid, recommendation 16.

¹⁴ This recommendation is consistent with recommendation 12 of the *Youth Diversion Inquiry*.

Recommendation 34

- Specialist Children’s Court circuits should be rolled out across NSW.

Recommendation 35

- The NSW Government should raise the minimum age of criminal responsibility to 14 years of age, without exception, and explore alternatives to prosecuting young children including through the provision of holistic wraparound services and supports.

Recommendation 36

- The NSW Government should support the Legal Aid NSW Aboriginal Field Officer program to expand to all regional areas with high Aboriginal populations, particularly to areas where the Aboriginal Legal Service (NSW/ACT) has a limited presence.

Recommendation 37

- The NSW Government should finalise the review of the *Young Offenders Act 1997* and publish its findings.

Recommendation 38

- a) The NSW Government should expand Youth on Track’s eligibility criteria to enable it to provide services to children who have previously been subject to a supervised order.
- b) The NSW Government should expand Youth on Track to additional regional locations.

Recommendation 39

The Committee should review the success of BackTrack and the Tracker Network and consider supporting its expansion to additional regional areas.

Recommendation 40

- The Youth Koori Court should be expanded to additional regional areas with high populations of Aboriginal children and high rates of youth crime.¹⁵

Recommendation 41

- The NSW Government should consider supporting the expansion of the Legal Aid NSW Children’s Civil Law Service to additional regional areas across NSW.

¹⁵ This recommendation is consistent with recommendation 51 of the *Youth Diversion Inquiry*, which recommended that the NSW Government further expand the Youth Koori Court, particularly to regional areas of NSW.

Recommendation 42

- The Adolescent Court and Community Team Program should be expanded to enable every child coming before the Children's Court to receive an assessment, if required.

Recommendation 43

- The Committee should consider recommending the reinstatement of a NSW Youth Drug and Alcohol Court.

Recommendation 44

- In the absence of reinstating the Youth Drug and Alcohol Court, consideration should be given to expanding and adapting MERIT's eligibility criteria to make it available for children.

3. The importance of collaborative and holistic support

A recent survey of frontline service delivery programs in the Moree area, conducted by Justice Reinvest (in partnership with Legal Aid NSW) showed a strong consensus among participants that the service system in Moree is siloed, and that this leads to fragmented support.²⁵ Whilst there are multiple services available in Moree, survey results indicated that all of these services operated separately of each other, and that families do not understand what supports are available to them.

In our experience this issue is not confined to Moree. Many of the families and children we assist need holistic support, but the service sector in many regional areas is siloed and relies on those in need knowing which services are available and seeking out their assistance, instead of being referred to the services or proactively offered assistance.

We acknowledge that when resources are already stretched thin, organisations' capacity to engage in activities that foster collaboration may be limited. However greater collaboration and coordination among existing services would achieve better outcomes for many families. For example, it would allow service providers and organisations in regional areas to work together to provide appropriate referrals and wraparound support to those in need, in a way that is not possible by any one service provider alone. This could be achieved by holding monthly roundtables where service providers can meet, exchange information on their respective services and identify opportunities for linkages.

Recommendation 1

- The Department of Communities and Justice should establish regular 'community services roundtables' in each regional area to increase connection, communication and collaboration between the various community service providers.

Consideration should also be given to establishing and maintaining community directories in each regional area to help inform families and the community about services that are available.

Recommendation 2

- The Department of Communities and Justice should create and regularly update community directories for each region providing information and contact details for available services. The directories should be published and distributed to regularly visited government and community service offices across the regions.

Youth Action Meetings

Legal Aid NSW generally supports the use of Youth Action Meetings (**YAMs**). YAMS are monthly forums that are led by the NSWPF and involve government (Department of Communities and Justice (**DCJ**), Department of Education (**DoE**), NSW Health) and non-government agencies and services. The meetings identify vulnerable children who are at-risk of offending or victimisation. They develop strategies with tangible outcomes to ensure children are referred to the right services and receive the support they need to address their issues.

While these meetings are a recent development in many local areas, they have been operating for some time in some locations. While YAMS involve a multiagency approach, they are a crisis driven response and only occur once a child has come to the notice of NSWPF. In our

²⁵ T Hagerty and S Cochrane, *Frontline Services Survey: Data on the youth and families service sector in Moree* (Justice Reinvest Report: December 2023).

view, children and families should be referred to YAMs, or a similar service, prior to a child displaying concerning behaviours, as means of early intervention and support.

Legal Aid NSW has recommended the use of the multiagency YAM style model in a child protection context in multiple previous submissions on the NSW child protection system.²⁶ We consider that there would be significant benefit in adopting the YAM model to suit a child protection context where a family is considered at risk of child removal or in need of support. The development of an action plan with clear goals, coordination around the availability of services, and accountability of various agencies in the provision of these services, is an efficient and effective way to engage with vulnerable families at an early stage to keep them together and safe.

Recommendation 3

- The NSW Government should adapt the use of 'Youth Action Style' meetings to the child protection context. Such meetings should occur at an early stage and involve interagency collaboration with the aim of keeping families together.

²⁶ Legal Aid NSW, Submission to the Department of Family and Community Services, *Shaping a Better Child Protection System: Discussion Paper* (November 2017). Also see Legal Aid NSW, Submission to the Parliamentary Joint Committee on Children and Young People, *Inquiry into the child protection and social services system* (December 2020).

4. The drivers of youth crime

*Criminal offending by adolescents is a result of a complex interaction of societal, familial and biological factors and this is particularly the case in relation to children with experience of out of home care, where a history of trauma and abuse compound these risk factors.*²⁷

- A Gerard, A McGrath & K McFarlane

The reasons children come into contact with the CJS are varied and complex and are not something that a single agency can tackle alone. Research consistently demonstrates that the children in our justice system are most often Aboriginal, those with disability, and those who are involved in child protection systems.²⁸ In our experience children involved with the CJS have often experienced violence, abuse, neglect, disability, homelessness and drug or alcohol misuse, and may have family members who are part of the CJS, thereby normalising their own potentially criminal behaviour.

Many of the factors contributing to youth crime coexist and have a compounding effect. For example, a history of disadvantage, early complex trauma, racism and disabilities that result in behavioural issues can result in both educational disengagement and school exclusion, and place significant pressure on families and result in the breakdown of OOHc foster placements if insufficient supports are provided for the children and carers. In turn, these are known risk factors contributing to youth crime.

The below case note illustrates the coexisting, interconnected and compounding nature of many of the drivers of youth crime.

Case Note- Re Neil [2021] NSWSC 446

'Neil' (a pseudonym), a 13 year old Aboriginal boy with complex needs, was represented by Legal Aid NSW in the secure care²⁹ proceedings in the NSW Supreme Court.

Neil was in youth justice detention for various offences at the time the order for secure care was made.³⁰

Background

In 2009, soon after Neil's birth, DoCS (as DCJ then was) removed Neil from the care of his mother and placed him in the care of JB.³¹ It is unclear if JB was relative of Neil's. This care arrangement was informal and there were no care orders in place. Due to the informal nature of the placement, JB received very limited support from DCJ.

Neil remained living with JB until he was 4 years old, when JB was deemed unable to care for him. As a result, in April 2014 DCJ formally intervened, and the Children's Court made a final order allocating parental responsibility for Neil to the Minister.

By the time DCJ formally intervened they had received 8 "risk of significant harm" and "non-risk of significant harm" reports in relation to JB's capacity to care for Neil.³² After being removed from JB's care Neil was placed back with his mother for a brief period however this placement quickly broke down. Since then, Neil has had no contact with his mother or his five maternal half siblings.³³

²⁷ Gerard, A., McGrath, A., Colvin, E., & McFarlane, K. (2019). 'I'm not getting out of bed!' The criminalisation of young people in residential care. *Australian & New Zealand Journal of Criminology*, 52(1), 76-93.

²⁸ Susan Baidawi & Alex R. Piquero, 'Neurodisability among children at the nexus of the child welfare and youth justice system', (2021), vol 50(4), *Journal of Youth & Adolescence*, 803-819.

²⁹ Secure care is where a child, usually a child already residing in OOHc, is detained and restrained in a secure facility for "protective" purposes, by order of the Supreme Court. Children residing in secure care have extremely complex needs and are usually deemed by the Supreme Court of NSW to be at extreme risk of serious injury or death if they remain in the community. These children usually have a combination of complex mental health and disability needs and are provided with intensive specialist treatment during their time in secure care.

³⁰ *Re Neil [2021] NSWSC 446*, 2.

³¹ *Ibid*, 5.

³² *Ibid*, 5.

³³ *Ibid*, 6.

Over the next three years, when Neil was aged between 7 and 9, he moved through 12 placements with authorised carers, each of which broke down for reasons relating to Neil's complex needs.³⁴ During this time DCJ received approximately 21 risk of significant harm and non-risk of significant harm reports about Neil. These included reports of Neil being violent, absconding, exhibiting sexualised behaviours, using drugs, and being held in police custody.³⁵

In 2017 when Neil was 8 years of age, he disengaged from school and did not return.³⁶

In 2020 Neil entered a residential OOH placement with a funded service provider called Safe Places. This placement eventually broke down. The court noted:

Neil has an extensive history of contact with law enforcement. His frequent absconding and Safe Places' inability to prevent him from leaving that placement have often brought him into contact with police and led to his arrest for breach of bail...³⁷

Between October 2018 and February 2021, Neil was remanded [in custody] 30 times for various periods at different Youth Justice Centres. His criminal history includes common assault, aggravated assault, destroying or damaging property, breaching bail, larceny, drink driving and theft. One of the more recent incidents involved a police pursuit of Neil in a vehicle with others and the vehicle crashing, putting himself and others at very serious risk of harm.³⁸

Neil has experienced significant trauma and dislocation in his life from the numerous care placements and attempts with specialist community based residential providers. His mental health diagnoses and trauma manifest in severe emotional and behavioural dysregulation, with bursts of physical violence that impacts his functioning while in care, in the community, in school and in managing interpersonal relationships.

Neil was aged between 9 and 12 years old during this period.

In its judgement the Court noted Neil had a history of drug abuse, that he suffered from multiple mental health issues and that he had been involuntarily admitted to a mental health unit. The judgement notes Neil had been diagnosed with post-traumatic stress disorder, complex developmental trauma, sensory processing difficulties, chronic generalised anxiety disorder, attention deficit disorder, oppositional defiant disorder, nicotine addiction, sleep disorders, pacification-related over-empowerment syndrome and pragmatic speech difficulties. He also attempted serious self-harm on occasion.³⁹ There did not appear to be evidence that Neil was engaged in appropriate treatment prior to his entry into secure care.

The Court granted the secure care order and found detaining Neil in a secure care facility was necessary to protect him.⁴⁰

4.1 Early intervention and support for families

Early intervention is a key factor in diverting young people from the criminal justice system. Wherever possible, funds should be used to address the underlying causes of offending before it occurs rather than reacting afterwards.

*NSW Youth Diversion Inquiry*⁴¹

Families and children who come to the attention of DCJ for child protection concerns often have multi-layered and complex issues, including issues in relation to housing, health, education, police contact, and contact with the CJS. Early intervention is key to tackling these issues before they escalate. The success of early intervention work is dependent on access

³⁴ Ibid, 8.

³⁵ Ibid, 11.

³⁶ Ibid, 15.

³⁷ Ibid, 12.

³⁸ Ibid, 14.

³⁹ Ibid, 17.

⁴⁰ Ibid, 29.

⁴¹ NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018).

to a range of quality services. In our experience, when agencies such as DCJ, NSW Health, DoE, NSWPF and Legal Aid NSW work collaboratively at an early stage, children and their families experience better outcomes.

Unfortunately, there are often inadequate resources put in place at an early stage to support children and their families.⁴² Despite over a decade of reviews and inquiries recommending changes, the NSW child protection system continues to be heavily weighted towards providing a crisis driven response to child protection issues, rather than focusing on early intervention. This is particularly evident in regional areas, where DCJ is often understaffed, leading to lower rates of intervention.⁴³ Efforts to invest in and scale up the early intervention aspect of child protection practice, including reforms associated with Closing the Gap, need to be accelerated.

We are aware of a number of services providing early intervention, culturally appropriate, evidence-based intensive family support services that can provide appropriate support to families and children with complex needs. In our view, continued and additional investment in services targeted at supporting families in the early years of children's lives offers better value for the taxpayer, and will provide better outcomes for the child and family as a whole. Unfortunately, through our work representing children in criminal proceedings before the Children's Court, we do see many children in OOHC coming into contact with the CJS. As we outline in more detail below, a significant body of research confirms that there is an overrepresentation of children with OOHC experience in contact with the CJS.

Recommendation 4

- The NSW Government should increase long-term financial investment in early intervention support (including increasing the availability of intensive family support) to prevent more children entering the out-of-home care system.

In 2023 Legal Aid NSW, the Aboriginal Legal Service (NSW/ACT) and DCJ entered into an agreement to ensure families involved in care and protection matters, wherever they are in NSW, are referred for early, independent legal advice. The agreement is called the Legal Assistance for Families Partnership Agreement (**LAFPA**).

While this service is producing promising results, there is currently insufficient resources to meet demand for services. This is particularly evident in certain regional areas, where shortages of lawyers who can provide legal advice and representation under the LAFPA agreement may lead to some families missing out.

4.2 Social and economic disadvantage

There is a direct correlation between criminality and entrenched social and economic disadvantage.⁴⁴ Disadvantage is about more than income and is an interrelated set of barriers to full social and economic participation in society.⁴⁵ Unemployment can be one such barrier, and is often interlinked with other factors, including lack of mental health care, substance

⁴² Since 2019 alternative dispute resolution (including family group conferences) become mandatory before child removal occurs (except when there are exceptional circumstances). While we support these reforms, we have little anecdotal or other evidence of the reforms' success. Information on how family group conferences are being utilised by DCJ is lacking and attendance of legal representatives is discouraged. Further, family group conferences do not include interagency collaboration. Therefore, they are unable to provide a holistic wrap around service, and should therefore be one of many tools used at an early stage to support families to remain together.

⁴³ Based on Legal Aid NSW's observations.

⁴⁴ Council of Attorneys-General Age of Criminal Responsibility Working Group, *DRAFT Final Report* (2020), finding 7.

⁴⁵ McLachlan, R., Gilfillan, G. and Gordon, J. *Deep and Persistent Disadvantage in Australia* (Productivity Commission Staff Working Paper, Canberra, 2013). Also see Australian Bureau of Statistics, *Socio-Economic Advantage and Disadvantage: Census of Population and Housing: Reflecting Australia - Stories from the Census 2016* (2017.0, 2018).

misuse, and homelessness. When combined and left unaddressed, these factors can have a compounding effect, resulting in deep and persistent intergenerational disadvantage.⁴⁶

Organisations such as the Centre for Policy Development have undertaken research into the relationship between disadvantage and the CJS, and concluded that the CJS compounds existing disadvantage, creates additional disadvantage, and traps a growing number of Australians, their families and communities in cycles of disadvantage.⁴⁷

Unstable and overcrowded housing

Legal Aid NSW has observed that unstable housing, and overcrowding are issues in many regional areas.⁴⁸ These issues were exacerbated by the COVID-19 pandemic and have not improved.

Some children live in very overcrowded homes. It is not uncommon for our clients to live with multiple family members (extended and immediate) in no more than two-to-three-bedroom houses with no personal or private places. Overcrowded housing can mean children do not want to return home and remain out until late in the evening, increasing their chances of involvement with the CJS.

Safe and secure housing is an essential element of supporting children and reducing the drivers of youth crime. If children and families do not have safe and secure housing, it can be difficult for them to connect and engage effectively with services and can often impact their school attendance.

This not only impacts on children but the adults that care for them. If the adults are unable to provide a safe place for children to live, they are at risk of being the subject of child protection intervention. We have observed that unsafe and unstable housing is a regular factor in child removal decisions. The *Family is Culture Report* also expressed concern that a lack of appropriate housing may act as an impediment to restoration, and recommended that DCJ develop a memorandum of understanding between its Housing and Child Protection divisions that allows enhanced collaboration and information sharing.⁵⁰ Greater collaboration between local community services (discussed above) would also provide an opportunity to improve housing stability.⁵¹

Recommendation 5

- The Department of Communities and Justice should continue to develop improved communication and referral pathways between its Housing and Child Protection divisions, in a way that facilitates information sharing⁵² and encourages collaboration between the two divisions in situations where homelessness, or a lack of appropriate housing, is a risk factor identified by Child Protection.

Youth Homelessness

⁴⁶ McLachlan, R., Gilfillan, G. and Gordon, J. *Deep and Persistent Disadvantage in Australia* (Productivity Commission Staff Working Paper, Canberra, 2013) 94.

⁴⁷ Centre for Policy Development, *Partners in Crime: the relationship between disadvantage and Australia's criminal justice systems* (Report, December 2020) 6.

⁴⁸ Including Dubbo, Bourke, Brewarrina, Walgett, and Lightning Ridge.

⁵⁰ Professor Megan Davis, *Family is Culture: Independent Review of Aboriginal Children and Young People in Out-of-home care* (Review Report, 2019), 359.

⁵¹ We acknowledge the introduction of new priority housing categories for situations where housing is needed to support the restoration of a child, or to help prevent children from entering OOH, which have enabled greater information sharing between Housing and Child Protection. We encourage DCJ continue to develop formal communication and referral pathways between these two divisions.

⁵² Including information needed to satisfy housing eligibility requirements, to be given 'priority status', or to access programs such as Staying Home, Leaving Violence.

Youth homelessness is also a major problem in some regional areas. DCJ can be reluctant to intervene and provide care for children once they are above a certain age. If their home environment is not safe, older children may make the decision to leave regardless of whether they have alternative accommodation available.

Without stable housing children are at increased risk of experiencing social and family isolation, financial disadvantage and poor mental and physical health, and are less likely to engage in treatment. Children experiencing homelessness need stable housing before they can engage effectively with other services.

We support DCJ's Rent Choice Youth Program, which assists children and young people aged between 16 and 24 to find a home and pay rent and provides support work aimed at achieving work and study goals. To be eligible the child must be studying, working or looking for work and the rent must be affordable.

Unfortunately, we understand this program is often at capacity and rarely accepts new referrals. We support this program's expansion, as well as an overall increase to the supply of social housing properties for families and children across NSW.

Recommendation 6

- The Rent Choice Youth program should be expanded to ensure it has the capacity to provide assistance to all eligible children.

Recommendation 7

- The NSW Government should increase the supply of social housing specifically available for children under the age of 18.

Intergenerational incarceration

Children whose parents are involved in the CJS are more likely to be involved in youth crime. In our experience, the relationship between parental incarceration and youth crime seems to be influenced by more than just the parent's absence from the family unit when they are in custody. Children will often role model behaviours displayed by their parents, even if they are antisocial. The parent's contact with NSWPF, including negative and disrespectful interactions, breed distrust towards police and ultimately "normalise" the cycle of police engagement and incarceration, to the extent that some children ultimately view their own incarceration as a "rite of passage".

Fines

Penalty notices are a common way through which children come into contact with the criminal justice system.⁵³ In NSW, section 53 of the *Fines Act 1996* (**Fines Act**) stipulates that its penalty notice regime applies to children aged 10 years or over at the time they are alleged to have committed the penalty notice offence.⁵⁴

Children are generally financially unable to pay fines issued to them.⁵⁵ If the penalty notice is not paid by the due date, the NSW Fines Commissioner can make an order for the enforcement of the amount payable under a penalty notice.⁵⁶

⁵³ David Brown, Chris Cunneen and Sophie Russell, "It's All about the Benjamins": Infringement Notices and Young People in New South Wales' (2017) 42(4) *Alternative Law Journal* 253, 255.

⁵⁴ *Fines Act 1996* (NSW) s 53.

⁵⁵ NSW Sentencing Council, *The Effectiveness of Fines as a Sentencing Option: Court-imposed fines and penalty notices* (Interim Report, October 2006) 22.

⁵⁶ *Fines Act 1996* (NSW) div 4.

The imposition of fines can be a contributing factor to entrenching long-term disadvantage for children. Children can accrue very serious amounts of fine debt at a time in their lives when they are not fully able to understand the consequences of the resulting debt. Fines also compound pre-existing disadvantage, causing disproportionate detriment to children who are already in vulnerable situations. Children experiencing homelessness and those living in unsafe home environments are particularly susceptible to both being issued fines and facing the additional consequences of their eventual default on those fines.⁵⁷

A recent report into Children and Covid 19 Fines in NSW recommends ending the issuance of penalty notices to children in NSW entirely.⁵⁸ The report outlines that the reasons for this recommendation include that children do not earn enough to pay fixed penalty notice fines, fine amounts are not adjusted to reflect the financial means of disadvantaged recipients, penalty notices are not an effective deterrent when children cannot, and often do not, pay the fines attached to them, fines compound disadvantage, and penalty notices are inconsistent with the juvenile justice objective of diverting children from the criminal justice system.⁵⁹

Since 2009 in NSW, there has been a Work and Development Order (**WDO**) scheme which allows people to pay off their fines by doing unpaid work, undertaking a course or receiving treatment. The eligibility criteria captures people who are experiencing hardship, including children. The scheme offers an alternative method of paying off fines for people who cannot otherwise afford to pay. However, a person needs to engage with an approved WDO sponsor before they can undertake a WDO. This requirement creates barriers for children with limited supports, especially those living in regional areas where there are limited WDO sponsor options.

Exposure to domestic violence

Domestic violence is often learnt behaviour and many of our young clients charged with domestic violence offences before the Children's Court have been exposed to significant domestic violence in their earlier years.

Sometimes these children act out and commit offences against parents who have abused them in the past, and other times they commit offences against the parent whom they have witnessed be repeatedly abused at the hands of another family member.

In many regional areas there are insufficient supports for women and children fleeing domestic violence. Refuges are not always available and therapeutic intervention and supports are often lacking. Early intervention is crucial to preventing trauma in children, which can lead to offending as older children/adults. Legal Aid NSW has observed that despite the significant number of serious domestic violence offences dealt with by regional courts, the rates of early intervention by DCJ in these regions remain low.

Recommendation 8

- c) The NSW Government should increase supports in regional communities to assist women and children to leave domestic violence.
- d) The Department of Communities and Justice should explore options to enhance capacity and staff retention in regional offices to enable appropriate support and intervention is available when children are at risk of significant harm.

4.3 Complex trauma, disabilities and mental health issues

⁵⁷ Julia Quilter, Luke McNamara, Elyse Methven, Grace Bowles, "Children and COVID-19 Fines in NSW" Impacts and lessons for the future use of penalty notices (2024).

⁵⁸ Ibid.

⁵⁹ Ibid.

Disability

Children with disabilities are particularly susceptible to contact with the CJS as they experience trouble with memory, attention, impulse control, communication, difficulties withstanding peer pressure, controlling frustration and anger.⁶⁰

Concerningly, in Legal Aid NSW's experience, there is a high prevalence of children with undiagnosed disabilities being criminalised. This observation is borne out by research. A recent study found that for 29 percent of children with intellectual disability in the CJS, their disability was only diagnosed after they became involved with the CJS.⁶¹ Often these children are in OOHC and have been disengaged from education for many months or years before CJS contact occurs (discussed below). These findings also point to a correlation between experiences of trauma, including abuse and neglect, resulting in contact with the CJS. Indeed, Australian studies indicate that OOHC experience is associated with increased risk of involvement in the criminal justice system.⁶²

One Victorian study found that 30 percent of children in OOHC charged with a criminal offence were not diagnosed with an intellectual disability until after being charged.⁶³ It is common for children to be diagnosed with previously unknown mental health conditions and disabilities only once a medical report is funded by Legal Aid NSW for the purpose of criminal proceedings. This was the case for Allen:

Allen's Story⁶⁴

Allen was a 13 year old Aboriginal boy residing in residential OOHC. He had recently been relocated to an area some four hours away from his country and his family. Allen had behavioural problems which lead to criminal charges. Prior to entering residential OOHC Allen resided with his grandmother who assisted him to obtain a diagnosis of ADHD and PTSD.

Legal Aid NSW was representing Allen on his criminal charges. Legal Aid NSW suspected that Allen suffered from a cognitive impairment and became concerned that Allen did not have capacity to engage in the court proceedings. Legal Aid NSW spoke with Allen's care providers who advised Allen was actually 'quite intelligent'. They also advised he was not currently engaged with a psychologist or other treatment providers.

Due to concerns about Allen's cognitive ability to provide instructions, Legal Aid NSW funded and commissioned a report from a forensic psychologist. The report found Allen was suffering from Foetal Alcohol Spectrum Disorder (**FASD**) which caused 'severe brain dysfunction' and was "functioning at the 6 or 7 year old level in most of the brain domains".

Based on this report the court found Allen was found not fit to engage in court proceedings, and discharged him unconditionally.

Legal Aid NSW shared the forensic psychologist's report with Allen's care providers. The report recommended Allen's NDIS plan be upgraded given his significant disability.

Some months later Allen was charged with further criminal offences. Legal Aid NSW questioned Allen's care providers about whether Allen's NDIS plan had been upgraded. The care provider indicated Allen's NDIS plan had not been upgraded and that they were not aware

⁶⁰ Chris Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) 10.

⁶¹ Susan Baidawi, Rosemary Sheehan, *Cross-over kids: Effective responses to children and young people in the youth justice and statutory child protection systems* (Report to the Criminology Research Advisory Council CRG03/15-16, December 2019).

⁶² Gerard, A., McGrath, A., Colvin, E., & McFarlane, K. (2019). 'I'm not getting out of bed!' The criminalisation of young people in residential care. *Australian & New Zealand Journal of Criminology*, 52(1), 76-93. <https://doi.org/10.1177/0004865818778739>

⁶³ Susan Baidawi and Rosemary Sheehan, *'Cross-over kids': Effective responses to children and young people in the youth justice and statutory child protection systems*, (Final Report to the Australian Institute of Criminology Research Advisory Council, CRG03/15-16, December 2019).

⁶⁴ This case study has been de-identified.

of Allen's cognitive impairment or of the report or recommendations, despite these only being provided a few months earlier.

Legal Aid NSW commissioned an updated report from a psychologist for the court proceedings. The psychologist noted Allen's NDIS plan had not been updated and stated 'If Allen does not receive substantial, intensive, ongoing support from disability services and the NDIS, he will continue to behave in dysfunctional ways in the community... his behaviour may escalate and become more serious'. The report made recommendations for assessments and treatment. Shortly after this report was committed Allen was bail refused on serious break and enter offences.

The timely diagnosis and treatment of disabilities is critical as it not only enables children to receive treatment, it also assists their parents, carers and teachers to provide trauma/disability informed care. Delayed diagnosis increases a child's chances of school exclusion, criminalisation and housing instability and negatively impacts their access to services and supports. Children can be labelled as having 'behavioural issues' for which they can experience punishing responses at home, in school, by the OOHC workforce and NSWPF. This sets up the CJS as the only system responding to these children.

Once diagnosed, children can be linked in with paediatricians and other appropriate specialists. Diagnosis also allows for future planning around education and NDIS involvement to occur. Preventing poor outcomes requires proactive action early and access to therapeutic supports that are not too costly or too far away.

Unfortunately professional supports and diagnostic services are lacking in many regional areas. In Dubbo, for example, there are very few paediatricians meaning there are significant wait times and delayed diagnosis of children. We are aware of creative solutions and partnerships being established with services such as DCJ and non-government health care providers such as the Royal Far West to facilitate increased access to specialist services in regional areas.

Ensuring children with disability are appropriately diagnosed and provided with appropriate supports is not something that a single agency can address alone. A holistic approach involving the DoE, NSW Health and DCJ will more successfully meet the needs of children and their families. We particularly support increased funding for diagnostic services within NSW schools to ensure they are available for children showing problematic behaviours at a much earlier stage.

Despite the need for increased collaboration, we urge caution in relation to the sharing of a child's confidential information without consent. We further acknowledge that some families do not want their children diagnosed due to stigma around disability and distrust of services, government and the health system. This can mean these children are not eligible for NDIS or other supports and adjustments. Legal Aid NSW support the DoE acknowledging this reality and ensuring greater support and adjustments are made for children with undiagnosed disability.

Recommendation 9

- The NSW Government should review their child health and development screening programs to identify opportunities for expansion to improve early diagnosis of disabilities, particularly for children in regional areas.

Recommendation 10

- The NSW Government should develop a memorandum of understanding between the Child Protection, Youth Justice, legal assistance, education and health systems to increase collaboration and improve the integration of assessment and support across these systems for children who exhibit, or are at risk of developing severe emotional and behavioural disturbances. This memorandum of understanding should also reinforce existing precautions around information sharing and include clear guidance around what information may be shared.

Assistance navigating the NDIS and other disability supports

Without a diagnosis, people with disability are not eligible to access many services leaving them without treatment and support. However, difficulty navigating the NDIS can mean that even children who do receive a diagnosis do not ultimately access much needed intervention and treatment. This leads to a situation where some children with significant diagnosis are either not engaged with the NDIS at all or have NDIS plans that do not reflect their level of disability. Further, a lack of service coordination for those who do have NDIS packages, frequently undermines the purposes of support and treatment.

Previously, a multi-agency program known as the Integrated Service Response (**ISR**) assisted services to coordinate wraparound support for a person with disability and complex support needs, where local services were unable to resolve the crisis or complex situation. The ISR was hosted by NSW Health and accepted referrals from specific government agencies including Legal Aid NSW. It operated between mid-2018 and October 2021. Funding of the ISR was discontinued despite advocacy from Legal Aid NSW and other stakeholders. To our knowledge, it has not been replaced, nor has access to potential referral contact points been provided.

NSW Health described the ISR as a time-limited program designed to operate whilst NSW transitioned to the NDIS. It commented that since the rollout of the NDIS in NSW, supports for people with disability have continued to develop and service providers have expanded their range and scope of services.

However, in Legal Aid NSW's experience, there remains a critical need for a similar program to ensure children with complex needs are provided with assistance to access the supports they need and are entitled to receive. This is not necessarily only the case where there is an absence of support, but also where existing services or supports are failing to work in a coordinated way. ISR played an important role in leading and securing agreement from service providers to ensure holistic care.

This has been recognised in other jurisdictions, including the ACT, which has an Integrated Service Response Program. It provides short-term case coordination support for people who have high or complex support needs and funding for people with disability to purchase emergency supports and services from non-government providers.

Recommendation 11

- The NSW Government should re-establish the Integrated Service Response (or a similar service) for children with disability and complex needs in NSW to assist them to get access to available supports, and to ensure coordination and accountability of service providers.

Mental Health

Complex or cumulative trauma in childhood can disrupt the architecture of the developing brain and the effects of this may manifest as risk factors for future contact with the CJS, as

well as lifelong problems in learning, behaviour, and physical and mental health.⁶⁵ Unfortunately Legal Aid NSW has observed a significant shortage of mental health services that assist with trauma, particularly in regional locations.

Headspace operates in some regional areas and, in our experience, provides a good service. However, many children with significant or complex mental health issues are deemed too complex for Headspace and are instead referred to the Child and Adolescent Mental Health Services (**CAMHS**) which is run by NSW Health.

CAMHS has limited capacity and long wait lists. Therefore, there are children who are effectively denied access to either service. Further, we are aware of situations where children have been refused entry due to disengaging with the service on a previous occasion.

Tristan's Story⁶⁶

Legal Aid NSW represents Tristan, who resides in a regional NSW town.

Tristan has suffered from mental health issues for many years. At 12 years of age Tristan was referred to the Child and Adolescent Mental Health Services. At the time, he initially engaged with the service, but then refused to engage.

At 16 year of age Tristan approached the Child and Adolescent Mental Health Services again, seeking assistance for his worsening mental health. The service refuse to accept Tristan on account of his past disengagement.

Recommendation 12

- The Child and Adolescent Mental Health Service should be expanded to ensure it has capacity to provide timely services to all eligible children.

4.4 Out-of-home care experience

Children unable to remain at home due to safety or welfare concerns are often placed in OOHC.⁶⁷ OOHC includes foster care, placements with relatives or kin, respite care, and residential care (which involves children being housed in group-homes and cared for by paid staff).⁶⁸

A history of OOHC, and particularly residential OOHC, features strongly among children involved in the CJS. In 2021-2022, about three percent of children in Australia received child protection services⁶⁹ however, these children made up around half of those appearing on criminal charges before the Children's Court.⁷⁰

⁶⁵ Royal Commission into the Detention and Protection of Children in the Northern Territory, *Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, (Report, 17 November 2017) Vol. 1, 134.

⁶⁶ This case study has been de-identified.

⁶⁷ DCJ is responsible for child protection in NSW. Children in OOHC are generally on care and protection orders made by the Children's Court that confer most or all legal responsibility for their welfare to DCJ. When this occurs parental responsibility for the child is transferred to the Minister of DCJ. See also, Australian Institute of Health and Welfare, *Child Protection Australia 2020-2021* (AIHW Report, 15 June 2022) 43.

⁶⁸ OOHC services were traditionally managed in-house by DCJ staff, however the 2008 *Wood Special Commission of Inquiry into Child Protection Services in NSW* led to a gradual transition in the provision of OOHC services to the non-government sector. Now, the majority of OOHC services, including all residential OOHC services, are provided by the non-government sector. These agencies are referred to as funded service providers. This change has led to issues of quality of care and accountability.

⁶⁹ Australian Institute of Health and Welfare *Child protection Australia* (AIHW Report, 6 June 2023).

⁷⁰ Katherine McFarlane, 'Care-criminalisation: The involvement of children in out-of-home care in the New South Wales criminal justice system' (Research Paper, 51(3) Australian and New Zealand Journal of Criminology, 2018) 412, 421.

Children in OOHC have typically been exposed to traumatic experiences⁷¹ are more likely to be disengaged from education and to have or have had a parent incarcerated. They also experience barriers accessing support services to address trauma, mental health problems, or disabilities.⁷³ However, the experience of OOHC has been found to result in criminalisation above and beyond the influence of these external drivers.⁷⁴ This occurs by way of a 'care-criminalisation' process, whereby children in OOHC are arrested for behaviour that would usually result in a disciplinary response from parents, not a criminal justice response from the NSWPF.

Tao's story is an example of an OOHC provider inappropriately using NSWPF as a behaviour management tool. NSWPF did not take formal action on this occasion.

Tao's Story⁷⁵

Tao is a 15 year old Aboriginal boy with complex trauma and learning disabilities. He resides in a residential OOHC placement. Tao committed an offence against his carers. He was arrested, charged and placed on bail. One of his bail conditions requires him to 'comply with all reasonable directions of his carers'.

Tao and a carer had to visit another city for a medical appointment. A two-bedroom apartment was arranged for them to stay in overnight. The apartment had one large bedroom with a double bed, and one smaller bedroom with a single bed. Tao told his carer he would take the double bed. The carer disagreed and told Tao to take the smaller room. Tao ignored his carer and took the room with the double bed.

The carer contacted NSWPF to report that Tao breached his bail by failing to follow reasonable directions. NSWPF attended and give Tao a formal warning for breaching his bail.

Care-criminalisation was explored in a recent study which found that a common pathway to CJS involvement of children in OOHC is punitive and criminalising responses to behaviours related to disability, mental health issues, complex trauma, or a combination of these.⁷⁶ Another study found a failure to recognise disability, or to factor in the impact of a disability on children's behaviour, or on decisions to involve NSWPF, can result in inappropriate CJS contact.⁷⁷ In our experience this can be exacerbated by a lack of understanding of and responsiveness to these children and their needs by NSWPF.

A recent Australian study revealed that, compared with other children in OOHC, the odds of acquiring criminal charges are elevated in children with neurodisability diagnoses (e.g. ADHD, intellectual disability, learning/communication disorders), as well as those with mental health or behavioural disorders.⁷⁸

⁷¹ Australian Institute of Health and Welfare, *Child protection Australia 2016–17* (AIHW Report, 9 March 2018). Also see D Shantel and Crosby et al., *Examining school attachment, social support, and trauma symptomatology among court-involved, female students* (Journal of Child and Family Studies 26(9)) 2539–2546 and Dr Jo Staines, *Risk, adverse influence and criminalisation: Understanding the over-representation of looked after children in the youth justice system* (Research Paper, 2016).

⁷³ Dr Susan Baidawi et al, *Research Report – Care Criminalisation of Children with Disability in Child Protection Systems* (Research Report for Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, May 2023) 99.

⁷⁴ For example see N Carr & S McAlister, *The double-bind: Looked after children, care leavers and criminal justice* (Research paper, 2016) and P Mendes & P Snow (eds), *Young people transitioning from out-of-home care: International research, policy and practice* (London: Palgrave Macmillan UK) 3–21, J Shaw J, *Policy, practice and perceptions: Exploring the criminalisation of children's home residents in England* (Youth Justice 16(2) 2016) 147–161 and J Staines *Risk, adverse influence and criminalisation: Understanding the over-representation of looked after children in the youth justice system* (London: Prison Reform Trust 2016) and E Stanley, *From care to custody: Trajectories of children in post-war New Zealand*. (Youth Justice 17(1), 2017) 57–72.

⁷⁵ This case study has been de-identified.

⁷⁶ Dr Susan Baidawi et al, *Research Report – Care Criminalisation of Children with Disability in Child Protection Systems* (Research Report for Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, May 2023) 99.

⁷⁷ Alison Gerard, *'I'm not getting out of bed!' The criminalisation of young people in residential care* (Research Paper, Vol. 52 (1), Australian & New Zealand Journal of Criminology, 2019) 76-93.

⁷⁸ Susan Baidawi and Alex R. Piquero, *Neurodisability among children at the nexus of the child welfare and youth justice system* (Research Paper, Vol. 50 (4), Journal of Youth & Adolescence, 2021) 803- 819. Also see Susan Baidawi and Rosemary Sheehan, *'Cross-over kids': Effective responses to children and young people in the youth justice and statutory child protection systems*, (Final Report to the Australian Institute of Criminology Research Advisory Council, CRG03/15-16, December 2019) and Susan

Ali's story is an example of a child in OOHC with a severe disability that had gone undiagnosed. Ali was charged with multiple offences against carers and was detained in youth detention. The detrimental effects of detaining young children is discussed below at Part 5.

Ali's Story⁷⁹

Ali is a 12-year-old Aboriginal boy residing in residential OOHC. He has not attended school for over a year. Ali had a traumatic childhood and both of his parents are in custody for a serious crime.

Ali was arrested by NSWPF and charged with intimidation of an OOHC carer. This involved threats to 'kick' the worker. Ali spent a night in detention before being released on bail by the court. Within hours Ali was arrested again for pushing the same worker and damaging the windscreen of a staff car. Ali was refused bail and spent 10 days in custody.

Legal Aid NSW arranged for a psychological assessment. Ali was diagnosed with FASD and assessed as having the cognitive ability of an eight year old. He was found to be unfit to engage in court proceedings and the charges against him were dismissed.

Children, particularly those with disability, should be supported to regulate behaviour in residential OOHC in non-criminalising ways that support the child and ensure the safety of other residents and staff. Instead of punishment, the focus should be on obtaining detailed assessments, preparing effective care teams, and securing specialist therapeutic placements together with culturally appropriate supports and environments. Efforts should also be directed towards ensuring placement stability, enhanced matching of co-residents, increased staffing, reduced staff rotation, and staff disability expertise.

The presence of NSWPF can have a harmful impact on children with complex trauma and can escalate the situation. The involvement of NSWPF should always be a last resort, reserved for situations where a child poses an immediate risk to themselves, staff or other children.

Aboriginal children in OOHC

Aboriginal children across all age groups are significantly more likely to receive child protection services compared to non-Aboriginal children.⁸⁰ Colvin, Gerard and McFrath, in their 2020 report⁸¹ found that Aboriginal children in OOHC have specific needs that are currently unmet, and that there is a shortage of Aboriginal workers in the OOHC sector.

In our experience, many Aboriginal children in residential OOHC are disconnected from culture, have limited engagement with Aboriginal mentors and OOHC workers, and have been moved off Country for reasons around placement availability. The safety and wellbeing of Aboriginal children in OOHC depends on maintaining and developing connections to family, community, culture, and Country.

The Joint protocol to reduce the contact of young people in residential care with the criminal justice system

Legal Aid NSW worked closely with the NSW Ombudsman's Office and other agencies to develop a state-wide protocol around the involvement of NSWPF by service providers in relation to the behaviour of children living in residential OOHC services. The *Joint protocol to*

Baidawi and Rosemary Sheehan, 'Maltreatment and delinquency: examining the contexts of offending amongst child protection-involved children', (Research Paper, Vol. 50 (7), British Journal of Social Work, 2020) 2191-2211.

⁷⁹ This case study has been de-identified.

⁸⁰ Despite making up just six percent of the general Australian population, Aboriginal or Torres Strait Islander children made up 42.2 percent of children in OOHC. This was an increase of 2.2 percentage points since 2019- Australian Institute of Health and Welfare, *Child Protection Australia 2020-2021*, (Report, 15 June 2022) 17.

⁸¹ Emma Colvin, Alison Gerard, Andrew McGrath, *Children in out-of-home care and the criminal justice system: A mixed-method study* (Report to the Criminology Research Advisory Council Grant: CRG 22/16-17, September 2020).

reduce the contact of young people in residential care with the criminal justice system (**Joint Protocol**), which commenced in 2016, is the result of this work.⁸²

The Joint Protocol⁸³ is a partnership between DCJ, funded service providers and the NSWPF and provides DCJ Child Protection, Youth Justice, NSWPF and residential OOHC staff with directions on how to respond to children who may exhibit difficult, complex, or offending behaviours and prevent their unnecessary criminalisation.

Under the Joint Protocol, the onus is on OOHC providers to minimise the use of NSWPF where there is a behaviour management issue with a child. Instead of contacting NSWPF they are encouraged to look at the child's behaviour management and support plan to see if the issue can be resolved in another way. If NSWPF are called, they are required to take a staged approach, including consideration of taking no formal action, or diversion under the *Young Offenders Act 1997* (NSW).

The Joint Protocol has improved the overrepresentation of children in OOHC in the CJS in many locations, however there is still work to be done in other areas. A recent study found that despite the Joint Protocol, children in OOHC continue to be inappropriately criminalised for behaviours that occur in the OOHC environment.⁸⁴ This is consistent with our observations.

In our experience, knowledge of the Joint Protocol is limited in certain regional areas. This is likely impacting its effectiveness. In Coffs Harbour, it was not until 2021, when training was rolled out for local NSWPF officers and OOHC workers, that Legal Aid NSW observed a reduction in children in OOHC being charged inappropriately with crimes related to the OOHC environment they live in.

We recommend additional training around the Joint Protocol for both NSWPF and the OOHC workforce, with a particular focus on regional NSW locations.⁸⁵

Recommendation 13

- The Department of Communities and Justice⁸⁶ should fund ongoing training to ensure that all residential out-of-home care staff, and frontline NSW Police Force officers, receive training on the *Joint protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system*.⁸⁷

A recent Australian study looked to the United Kingdom (**UK**) for ways Australia can address care-criminalisation.⁸⁸ A range of measures introduced in the UK resulted in a significant decline in care-criminalisation.

⁸² NSW Ombudsman, *Joint Protocol to Reduce the Contact of Young People in Residential Out of Home Care with the Criminal Justice System* (NSW Government Protocol, 2019).

⁸³ We note that QLD produced a similar protocol and practice guidelines in 2018 titled: *Joint protocol to reduce the contact of young people in residential out of home care with the criminal justice system* and the associated *Practice Guidelines Reducing Preventable Police Call-outs to Residential Care Services Guide 1*. In 2019 NT produced the *Protocol for Police Contact with Children Living in Therapeutic Residential Care* and then VIC in 2020 released the: *Framework to reduce criminalisation of young people in residential care*. No other Australian states or territories have produced similar protocols to date.

⁸⁴ Emma Colvin, Alison Gerard, Andrew McGrath, *Children in out-of-home care and the criminal justice system: A mixed-method study* (Report to the Criminology Research Advisory Council Grant: CRG 22/16–17 September 2020) 27.

⁸⁵ This is consistent with recommendation 24 of the NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018) vi, 272.

⁸⁶ DCJ are responsible for the implementation of the *Joint Protocol*.

⁸⁷ Legal Aid NSW continues to be involved in the development of the training material delivered to residential OOHC services and the NSW Police Force as part of the implementation of the *Joint Protocol*. Legal Aid NSW is also a representative on the State-wide Steering Committee that oversees the implementation of the *Joint Protocol*, and the Operational Issues Group that considers individual cases of non-compliance with the *Joint Protocol*.

⁸⁸ Emma Colvin, Alison Gerard, Andrew McGrath, *Children in out-of-home care and the criminal justice system: A mixed-method study* (Report to the Criminology Research Advisory Council Grant: CRG 22/16–17 September 2020).

An important aspect of the UK model is a focus on building the skills of the residential OOHC workforce. Carers were trained in social pedagogy and were taught skills that they could deploy to better manage situations and de-escalate conflict.⁸⁹ We note there is no minimum qualification for OOHC workers in NSW.

The UK model also involved greater oversight and accountability when children in care were criminalised. Individual cases of children in OOHC who are still being criminalised are monitored, reviewed and reflected upon by a multi-agency panel.⁹⁰ This oversight and reflective practice is not present in NSW.

Recommendation 14

- The inquiry should examine the United Kingdom's response to the overrepresentation of children in out-of-home care in the criminal justice system, and consider whether to adopt some of these measures in NSW.

Quality of casework

A child's experience in OOHC is significantly influenced by their caseworker's approach to their work. It is crucial that caseworkers are suitably qualified and resourced to enable them to best support the children they case manage.

Legal Aid NSW has observed the quality of casework a child receives is often determined by where they reside, with children in Sydney generally receiving higher quality case management compared to children in regional areas. This is likely due to greater staffing levels in Sydney.

Children with complex needs require very high-quality casework. The DCJ Intensive Support Service (**Metro ISS**) is an example of a service that provides high quality, intensive, holistic, wraparound casework, to vulnerable children with extremely complex needs. Metro ISS is a Sydney based service and case management is only transferred to them once a child has reached a point of crisis where a secure care application is imminent.

Legal Aid NSW considers that this level of casework should be provided to all children with complex needs who are experiencing ongoing criminalisation, not just children entering secure care. We support the establishment of a service similar to the Metro ISS in regional locations (or the establishment of a service with equivalent qualifications and expertise) to case manage children with particularly complex needs, especially those being criminalised.

Recommendation 15

- The Department of Communities and Justice Metropolitan Intensive Support Service (or a service with equivalent qualifications and expertise) should be expanded to regional locations across NSW. This service should provide intensive casework for children in residential OOHC with complex needs who are experiencing placement instability or ongoing criminalisation.

The Elver Program

Legal Aid NSW also supports an expansion of the Elver Program. The Elver Program provides evidence informed therapeutic services to children in OOHC in NSW with histories of trauma, disrupted attachments and other adverse consequences resulting from abuse and neglect. It

⁸⁹ Social pedagogy is a holistic approach towards children's experiential learning. It is about constantly creating and providing opportunities for learning through interaction with children, joint activities, being in a relationship and connection to others. It is concerned with holistic learning, wellbeing and happiness, empowerment and relationships.

⁹⁰ Emma Colvin, Alison Gerard, Andrew McGrath, *Children in out-of-home care and the criminal justice system: A mixed-method study* (Report to the Criminology Research Advisory Council Grant: CRG 22/16–17 September 2020) 51.

is a specialist, multi-disciplinary trauma treatment service that includes assessment, clinical formulation, and targeted interventions and is delivered by DCJ Child Protection in partnership with NSW Health.

We have observed the Elver program is underutilised, with many eligible children in OOHC not engaged. Further, it is often not until a crisis has occurred that children are referred. We recommend expansion and greater use of this program to ensure eligible children receive appropriate intervention at an earlier stage.

Recommendation 16

- Additional funding should be provided to support the expansion of the Elver Program so that it has the capacity to provide early intervention and treatment to all eligible children in OOHC.

Independent advocacy services for children in OOHC

Experts in the field have identified that ‘children, young people and families are not receiving the safety and support they desperately need to heal, recover and thrive’⁹¹ in OOHC in NSW and that the experience of OOHC has ‘a lifelong impact that echoes not only through their lives but also those of future generations’.⁹² The NSW OOHC system has recently been described as ‘in crisis’.⁹³ While significant effort is being invested in systems reform, there is a need for vulnerable children at the centre of the system to be able to access independent legal and casework support to advocate for a care experience that supports them to achieve positive life outcomes.

Children with OOHC experience are at greater risk of negative life outcomes than their peers in the general population,⁹⁴ are overrepresented in the criminal justice system⁹⁵ and have higher rates of reoffending.⁹⁶ The overrepresentation of Aboriginal children in OOHC is also well documented.⁹⁷ It is well established that intervening early presents the greatest opportunity to positively impact a child’s development, wellbeing and life trajectory.⁹⁸ Extensive research has found that ‘early intervention can be effective in achieving significant reductions in crime involvement, child maltreatment and substance abuse, and improvements in educational performance, employment, child and young behaviour, and income,’⁹⁹ and produce significant financial savings for individuals and the wider community.¹⁰⁰ There is also ‘mounting evidence that early intervention is a more cost effective strategy than more conventional approaches to reducing crime’.¹⁰¹ Further, research also suggests that ‘early

⁹¹ Royds, K., Buratti, S., Tucci, J. & Macnamara, N. (2023). Agenda for Change: Ensuring a safe and supportive out-of-home care system for children and young people in New South Wales, *Centre for excellence in therapeutic care*, p.5. CETC - Agenda for Change: Ensuring a safe and supportive out-of-home care system for children and young people in New South Wales - CETC

⁹² Ibid.

⁹³ Ibid and for example: Children robbed of their future amid failures to protect NSW's most vulnerable, *Sydney Morning Herald*, September 17, 2023. [NSW child protection system failures costing taxpayers billions \(smh.com.au\)](https://www.smh.com.au/nsw-child-protection-system-failures-costing-taxpayers-billions-20230917)

⁹⁴ Cashmore & Paxman, 2006; Fernandez, 2009; Nathanson & Tzioumi, 2007; Octoman, McLean & Sleep, 2014; Osborn & Bromfield, 2007; Sawyer, Carbone, Searle & Robinson 2007; Tarren-Sweeny, 2008; Townsend 2012; Vimpani, Boland, Barr & Marshall, 2012) in *Pathways of Care Longitudinal Study: Outcomes of children and Young People in Out-of-Home Care, POCLS Objectives and Strategy Research Agenda 2022-2023*, p. 12

⁹⁵ See for example: McFarlane, K. (2018). Care-criminalisation: The involvement of children in out-of-home care in the New South Wales criminal justice system. *Australian & New Zealand Journal of Criminology*, 51(3), 412-433. [Care-criminalisation: The involvement of children in out-of-home care in the New South Wales criminal justice system - Kath McFarlane, 2018 \(sagepub.com\)](https://doi.org/10.1177/0004865818778739)

⁹⁶ Gerard, A., McGrath, A., Colvin, E., & McFarlane, K. (2019). 'I'm not getting out of bed!' The criminalisation of young people in residential care. *Australian & New Zealand Journal of Criminology*, 52(1), 76-93. <https://doi.org/10.1177/0004865818778739>

⁹⁷ See the [Independent Review of Aboriginal Children and Young People in OOHC: Independent Review of Aboriginal Children and Young People in Out-of-Home Care \(OOHC\) and the Family is Culture Progress Report, February 2024.](#)

⁹⁸ FACS NSW, (2014) Better lives for vulnerable teens. [Better lives for vulnerable teens - FACS review Summary paper | Family & Community Services \(nsw.gov.au\)](#)

⁹⁹ Ibid.

¹⁰⁰ Australian Institute of Criminology, Cost effectiveness of early intervention, AICrime Reduction Matters, No. 54, 2007, p. 1. [Cost effectiveness of early intervention | Australian Institute of Criminology \(aic.gov.au\)](https://www.aic.gov.au/cost-effectiveness-of-early-intervention)

¹⁰¹ Ibid.

cross-agency support for children in contact with the care and protection system could prevent involvement with the CJS.¹⁰²

While there is a Charter of Rights for 7 to 12 year old and 13 to 17 year old children in OOHC in NSW as well as a Care Leavers' Charter of Rights,¹⁰³ in practice, there are significant barriers to vulnerable children in OOHC being able to advocate to have their fundamental needs met and their rights upheld. Relevantly, research indicates that one of the essential elements of therapeutic foster care is 'the authentic participation of children in decision making processes that are about them'.¹⁰⁴

We consider that there is a need for a culturally competent holistic wrap-around service for children in OOHC to resolve socio-legal problems that impact on their safety, fundamental needs and rights while in and leaving OOHC.¹⁰⁵ Legal Aid NSW is well placed to develop a service model to fill this existing gap in human and legal service solutions available to meet the needs of vulnerable children in OOHC. Our statewide service footprint means that we have the family, civil and criminal law expertise as well as the geographic reach to support children in OOHC to have their needs met in care, and to address underlying issues that can drive contact with the CJS.

Recommendation 17

- The NSW Government should invest in the trial of an independent advocacy service for children and young people with OOHC experience, including children in regional NSW, within Legal Aid NSW.

4.5 Disengagement and exclusion from education

For children who come from disadvantaged backgrounds, education is fundamentally important to break cycles of disadvantage. Conversely, exclusion from education can be a precursor to poor future outcomes.¹⁰⁶ There is a strong link between disengagement from school and youth offending.¹⁰⁷ We regularly assist children charged with criminal offences who have been disengaged from school for multiple years.

The *NSW Youth Diversion Inquiry* found one of the factors that may be contributing to disengagement and exclusion from school is a lack of specialised and tailored learning support in schools.¹⁰⁸ This aligns with our experience and insights gleaned from representing our young clients. Interestingly, many of our clients in youth detention do well in custodial schools, where more individualised support is available. Brian's story is an example of this.

Brian's Story¹⁰⁹

Legal Aid NSW represented Brian, a 13-year-old Aboriginal child who resides in residential OOHC. Brian had a diagnosis of FASD.

Brian had been disengaged from school for some time and last attended school in year five. Before disengaging from school Brian had been suspended for behavioural issues.

¹⁰² Oranga Tamariki Ministry for Children, Youth justice pathways wellbeing indicators and outcomes for young people involved with youth justice, p. 2. [Youth justice pathways | Oranga Tamariki — Ministry for Children](#)

¹⁰³ See: Your rights as a child or young person in care | Communities and Justice (nsw.gov.au)

¹⁰⁴ Mitchell, J., Tucci, J. and Macnamara, N. (2020). What are the Key Elements of Therapeutic Care? In Mitchell, J., Tucci, J. and Tronick, E. (Eds). *The Handbook of Therapeutic Care for Children – Evidence Informed Approaches to Working with Traumatized Children and Adolescents in Foster, Kinship and Adoptive Care*, pp 35-58. Jessica Kingsley, London.

¹⁰⁵ Further detail can be provided on request.

¹⁰⁶ The Victoria Institute, *Education at the Heart of the Children's Court Evaluation of the Education Justice Initiative* (Final Report, December 2015) 2.

¹⁰⁷ NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018) vi, 272.

¹⁰⁸ *Ibid*, vi, 272.

¹⁰⁹ This case study has been de-identified.

Brian began to get in trouble with police shortly after he stopped attending school. Brian is currently bail refused at a youth detention centre.

Since being taken into custody, Brian has been attending the school at the youth detention centre. The school have provided Brian with additional individualised supports to maximise his learning potential. Brian is engaging well and recently received a 'student of the month' award.

Often, by the time issues are resolved and adjustments are provided, the students have already lost months of education. This can lead to social isolation and adversely impact the child's ability to fully participate in social and economic opportunities as an adult.

Diagnosed and undiagnosed disability or complex trauma can be interpreted by schools as problematic behaviour and dealt with through discipline rather than appropriate adjustments and supports. Where the behaviour stems from trauma, mental health conditions and/or disabilities, suspension alone is unlikely to be an effective response to ensure the safety of other staff and students and deter children from certain behaviour. Children with cognitive disabilities are particularly susceptible to school exclusion as they experience trouble with memory, attention, impulse control, communication, difficulties withstanding peer pressure, controlling frustration and anger.¹¹⁰

Long term disengagement can occur after a child is regularly excluded from school due to suspensions. Further, suspending children can breach the trust between them and the school and disrupt the child's routine, making it more likely they will disengage in the future. This trust and routine is particularly important for children with disabilities.

Clay's Story¹¹¹

Legal Aid NSW assisted Clay, an Aboriginal teenager with a diagnosed disability and an agreed behaviour support plan in place.

Clay was suspended for misbehaviour on an occasion when his school was not following the agreed behaviour support plan.

After the period of suspension, the school insisted on a partial attendance plan for several months. Clay preferred a full-time attendance plan because he did not want the other students to think of him as 'different'.

While on the partial attendance plan Clay had significantly more unsupervised free time than other children his age. He began mixing with other people not engaged in school or employment during the day. Clay was charged with criminal offences that were alleged to have occurred during school hours.

In Legal Aid NSW's experience, the exclusion of children with disabilities from schools due to perceived bad behaviour is worse in regional areas where schools may have less experienced staff and are generally less resourced than those in major cities. Additionally, children who disengage from their local public school in regional areas are less likely to have alternative education options available. These children may be given the option to study online, which is often unrealistic for children from disadvantaged communities.

¹¹⁰ Chris Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) 10.

¹¹¹ This case study has been de-identified.

Recommendation 18

- The NSW Department of Education should identify and implement measures to build the capacity of schools to provide additional adjustments¹¹² and more individualised learning supports to assist children at risk of disengaging from education.

Court based initiatives

Legal Aid NSW also supports court-based initiatives to help children appearing before the Children's Court criminal jurisdiction to re-engage with education.

The *A Place to Go (APTG)* is a multi-agency initiative that targets 10 to 17 year olds in the CJS who come before Parramatta Children's Court or have a connection to the Nepean Police Area Command. APTG aims to enhance the wellbeing of children participating in the initiative and decrease the likelihood of reoffending. It does this by ensuring children are supported in accessing holistic, strengths-based wraparound services that meet their immediate and long-term needs. This includes access to a 'key worker' – a single point of contact for the child who can help them navigate the service system – as well as therapeutic, trauma-informed short-term and transitional accommodation for children who are unable to return home (including those in OOHC).

For a period, the APTG initiative included an Education Liaison Officer from the DoE being present on Children's Court criminal list days to assist with school attendance. We understand that, based on the success of the Education Liaison Officer in the APTG initiative, the DoE has funded Education Liaison Officer positions at a limited number of other Children's Courts locations.¹¹³ We support the use of Education Liaison Officers and recommend their expansion to all specialist Children's Court criminal list days across NSW.

Recommendation 19

- The NSW Department of Education should provide for the attendance of an Education Liaison Officer at every specialist Children's Court criminal list day across NSW.

Inappropriate information sharing between NSWPF and the NSW Department of Education

While we support increased collaboration and a multiagency approach to dealing with children disengaged from education, we urge caution in relation to the sharing of personal information without consent. We are concerned that inappropriate information sharing between NSWPF and DoE has the potential to exacerbate educational disengagement.

It is common practice for schools to provide our client's personal information to NSWPF under an informal information sharing agreement, without the child's permission. NSWPF then often attempt to use this information as evidence in court.

School records are commonly served as evidence in matters where the presumption of *doli incapax* applies. Frequently, this evidence is requested, provided and served, seemingly without review and in large quantities.

Informal information sharing takes place under a Memorandum of Understanding between the NSW Department of Education and the NSWPF that was last updated in 2011. However we note such conduct may be in contravention of the *Privacy and Personal Information Protection Act 1998 (NSW)*¹¹⁴ and is unlikely to fall within the exceptions listed in the *Children and Young*

¹¹² In line with the requirements of the *Disability Standards for Education 2005*.

¹¹³ Including Broadmeadow and Surry Hills Children's Courts.

¹¹⁴ *Privacy and Personal Information Protection Act 1998 (NSW)* ss 12 and 18.

Persons (Care and Protection) Act 1998.¹¹⁵ In our view, the disclosure of school records by the DoE to NSWPF may be unlawful when it is purely obtained for the purpose of rebutting *doli incapax* and not for the safety, welfare, or well-being of the child.

The detrimental impact of information-sharing between DoE and NSWPF on the relationship between the child and the school is illustrated in Tom's story.

Tom's Story¹¹⁶

Tom was a year 11 student at a public high school in South Western NSW.

Tom was charged with a historical offence of aggravated sexual assault from when he was 13 years of age. School records including details of attendance, curriculum and teacher's notes were obtained by NSWPF as part of the prosecution brief of evidence.

School teachers attended court to give evidence for the prosecution and were compelled to do so despite defence objection. The prosecution placed particular reliance on evidence from the Physical Education teacher regarding lessons on consent given years earlier and Tom's presence in class that day. Issues were raised about whether the evidence captured Tom's comprehension of the lesson.

Tom stopped attending school while the matter was afoot because he felt like everything he did and said could be used against him by the school. Tom stopped trusting the school and his teachers. He disengaged from football, dropped off the team and began consuming cannabis regularly. Tom had no offences on his record prior to this charge.

Recommendation 20

- The NSW Police Force and the NSW Department of Education should review their existing Memorandum of Understanding in relation to information sharing, to ensure it complies with legislative limits on information sharing.

Out of home care and educational disengagement

Children in OOHC have significantly poorer educational outcomes than their peers.¹¹⁷ A 2017 report found that one in five NSW students in OOHC were absent from school because of ill health, suspension, chronic disengagement or expulsion.¹¹⁸

The Children's Court recently expressed concern at a significant decline in the attendance of two children after their entry into residential OOHC.¹¹⁹ The Children's Court, in its judgment, commented:

The evidence of the neglect of the children including the failure to get them to school and allowing [one of the boys] to play Xbox for more than 12 hours per day raises a concern that the staff are not appropriately qualified or experienced or supervised.¹²⁰

¹¹⁵ *Children and Young Persons (Care and Protection) Act 1998*, ss 245D, 245F and 254

¹¹⁶ This case study has been de-identified.

¹¹⁷ Toni Beauchamp, *Education matters – improving the educational outcomes of children and young people in care* (Centre for Research, Innovation and Advocacy UnitingCare Children Policy Report, October 2015), 2. See also Michelle Lee Townsend, *Are we making the grade? The education of children and young people in out-of-home care* (Southern Cross University PhD thesis, 2011); AIHW, *Educational outcomes for children in care, linking 2013 child protection and NAPLAN data*, (AIHW Report Cat. no. CWS 54, 21 October 2015); Joseph McDowall, *Transitioning from Care in Australia: An Evaluation of CREATE's What's the Plan? Campaign* (CREATE Report Card, 2011).; Sonia Jackson and Claire Cameron, *Final report of the YIPPEE project, young people from a public care background, pathways to further and higher education in five European countries*, (Thomas Coram Research Unit Final Report, 2011).

¹¹⁸ Association of Children's Welfare Agencies, *Educational engagement of children and young people in care in NSW* (Report, October 2017).

¹¹⁹ *Finn, Lincoln, Marina and Blake Hughes [2022]* NSWChC 4 94.

¹²⁰ *Ibid* 94.

This judgement notes there was evidence before the court that the children were regularly dropped off by staff late in the mornings and collected late in the afternoons¹²¹ and that the children were reluctant to attend school as they felt cold and had not been provided with winter school uniforms.¹²² The court commented “It is both shocking and unacceptable that children in the care of the State are too cold to go to school because they do not have a winter uniform.”¹²³

Jahla’s story highlights how OOHC can contribute to instability and disengagement from education. It is also an example of a school applying a discretionary policy¹²⁴ in an inflexible way, resulting in a child’s exclusion from school.

Jahla’s Story¹²⁵

Legal Aid NSW assisted Jahla, an Aboriginal teenager residing in residential OOHC who had been diagnosed with a neurodevelopmental disorder.

Jahla had been disengaged from school for the previous few years due to family/care instability but was trying to enrol in a regional public primary school again.

The school asked to see various documents before accepting the enrolment. This included a Behaviour Support Plan, to enable them to complete a risk assessment.

Jahla’s carer failed to provide the paperwork for several months, resulting in her being unable to attend school for a period of over six months.

The NSW Government has two policies that relate specifically to the education of children in OOHC, namely the *Memorandum of Understanding between NSW Department of Education and Training (Schools) and Department of Human Services NSW, Community Services in relation to Educational Services for Children and Young People in Statutory Out-of-Home Care*¹²⁶ and the accompanying *Out-of-Home Care in Government Schools Personalised Learning and Support Planning Procedures*. These policies state the principal of the school must ensure that all students in OOHC enrolled in the school have a personalised learning and support plan. However, unlike a similar Victorian policy,¹²⁷ the NSW policy does not address school exclusion or disengagement from education. In our view this omission should be rectified, and a policy between DCJ and DoE developed which specifically seeks to maximise school engagement of children in OOHC.

Recommendation 21

- The NSW Government should develop and implement a policy between the Department of Communities and Justice and the NSW Department of Education which specifically seeks to maximise school engagement of children in out-of-home care.

¹²¹ Ibid 4 75.

¹²² Ibid 4 78.

¹²³ Ibid 4 81.

¹²⁴ We note there is no formal requirement for students to provide behaviour support plans prior to enrolment.

¹²⁵ This case study has been de-identified.

¹²⁶ The Memorandum of Understanding states that children in OOHC are entitled to receive learning and educational support whilst attending school and outlines that both DCJ and DoE have a responsibility to coordinate their approaches to ‘educational planning, information sharing, enrolment, engagement or attendance issues and suspension, expulsion, placement, and transition procedures’: NSW Government, *Memorandum of Understanding between NSW Department of Education and Training (Schools) and Department of Human Services NSW, Community Services In Relation to Educational Services for Children and Young People in Statutory Out of Home Care*, (Memorandum of Understanding, March 2011).

¹²⁷ Victoria State Government, *Out-of-Home Care Education Commitment*, (Partnering Agreement, July 2018).

4.6 Boredom

Pro-social, structured and affordable activities that are also available after hours are important to ensure children are occupied and engaged with their wider community.

Through our work, and our clients' instructions, we observe that boredom and a lack of engaging prosocial activities in some regional areas is often a common driver of youth crime. We note that some regional communities have seen positive results after investing in public recreation spaces.

Participants in a recent survey of frontline service delivery programs in Moree (discussed at Part 3) were asked about improvements that would make the largest positive difference for children in Moree.¹²⁸ The most common response was that children in Moree need something to do and that there is a large, unmet need for pro-social, structured and affordable activities for youth, especially outside of business hours and extending beyond sport. Many of the respondents suggested providing a cinema would make a significant difference.

Recommendation 22

- The NSW Government should undertake a review of prosocial activities available to children in regional areas, and increase their availability.

Children in OOHC are also disproportionately affected by a lack of engagement with their local community. This can leave them without a peer group outside of the other children in their residential OOHC placement. We are aware of many situations where children in residential OOHC are permitted to stay at home and play video games for large portions of the day rather than being required to engage in education, recreational activities and sport.¹²⁹

We recommend a greater focus by OOHC providers on ensuring children are engaged in appropriate recreational activities, hobbies, sport or other forms of community engagement.

Recommendation 23

- Regular recreational activities, hobbies, sport or other forms of community engagement should form part of the care plan of each child residing in residential out of home care.

4.7 Substance abuse

A significant proportion of young offenders have substance abuse issues.¹³⁰ Therefore, drug rehabilitation services specifically designed for children, are crucial to reducing CJS contact. However, the *NSW youth diversion inquiry* found there is a lack of youth drug and alcohol rehabilitation services in NSW.¹³¹ This finding is consistent with our experience that services

¹²⁸ T Hagerty and S Cochrane, *Frontline Services Survey: Data on the youth and families service sector in Moree* (Justice Reinvest Report: December 2023).

¹²⁹ We note the recent published decision of *Finn, Lincoln, Marina and Blake Hughes* [2022] NSWChC 4 found that no evidence of two children in OOHC engaging in any fun activities or any activities which might bring them some joy. The court noted evidence before it that showed a budget of just \$80 per week (or \$11.43 per day) for both groceries *and* activities for the children was allocated (despite the funded service provider being paid approximately \$18,096.45 per week (or \$1,292.60 per day per child) to care for the children).

¹³⁰ NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018). Also see D Kenny and P Nelson, *Young Offenders on Community Orders: Health, Welfare and Criminogenic Needs* (Sydney University Press, 2008), which found 26 percent of young offenders had a substance abuse disorder. This study also found children with parents or relatives who abused substances were more likely to inject substances. 45 percent had committed a crime to get drugs or alcohol, and 53 percent reported being affected by substances during the commission of their offence. This study also found that children in OOHC were more likely to have received treatment for substance abuse.

¹³¹ *Ibid* vi 272.

are scarce and often crisis driven. As noted earlier, Legal Aid NSW supports a greater focus on early intervention.

Community based drug and alcohol support

The availability of community-based drug and alcohol support is limited in many regional areas. While some services exist, they are often only accessible to children residing in the Sydney metropolitan area.¹³² We have especially noted a need for more early intervention drug and alcohol outpatient services in regional areas.

*Todd's Story*¹³³

Legal Aid NSW acts for Todd, a 16 year old child from a Albury in Southern NSW. Todd has not attended school for many years.

Despite his age, Todd has been involved with the CJS for many years and has been charged with numerous offences.

Throughout this period Todd has had significant drug addiction issues. However, there are no outpatient rehabilitation services in Albury, and the closest inpatient rehabilitation service is hours away.

Residential rehabilitation is disruptive and requires a child to leave their family and community. Community-based options should be prioritised and made accessible to all children requiring support, allowing them to remain in their community and on Country while receiving treatment.

Recommendation 24

- The NSW Government should increase the availability of community-based youth drug and alcohol services in regional areas.

Residential rehabilitation

Residential rehabilitation programs typically involve up to three months of accommodation, combined with on-site counselling, case management and living skills education. There are currently four youth-specific residential rehabilitation programs across NSW, and one located in the ACT. Junaa Buwa! Centre for Youth Wellbeing, located in Coffs Harbour, and Mac River Centre Residential Rehabilitation Program, located in Dubbo are both funded by Youth Justice and make up the Rural Residential Adolescent Alcohol and Other Drug Rehabilitation Service.

These programs are specially designed for children involved in the Youth Justice system with “a history of significant alcohol and other drug use and offending behaviour”. Therefore, a child arrested for the first time would not be eligible, despite suffering from an entrenched drug addiction.

While the Rural Residential Rehabilitation Service is a promising initiative, it is limited to two small residential rehabilitation facilities, each with a small number of beds. Many of our clients struggle to get accepted into these facilities. Some are denied acceptance because of their complex ‘criminogenic needs’, or due to previous failed attempts and concerns about their commitment.

¹³² The Ted Noffs Foundation provides community-based drug and alcohol services to children at Randwick, Liverpool, Mt Druitt and Penrith. There is also a Salvation Army program called Oasis, which provides drug and alcohol programs to children. Additionally, the Nepean Youth Drug & Alcohol Service provides a service for children in and around the blue mountains who have drug and alcohol issues. Further, Youth Solutions is a service that aims to prevent and reduce drug use and related harm among children in Macarthur and the wider community of New South Wales by providing support services.

¹³³ This case study has been de-identified.

Further, the eligibility requirement for a significant history of drug related offending behaviour means the service is unable to assist children before CJS contact has occurred. By then, their issues may be deeply entrenched difficult to treat.

Recommendation 25

- The Rural Residential Adolescent Alcohol and Other Drug Rehabilitation Service should be expanded to:
 - provide services for children with drug or alcohol issues *before* contact with the criminal justice system occurs
 - include both inpatient and outpatient services
 - increase the number of beds available and
 - include additional residential rehabilitation facilities, particularly in regional areas.

Triple Care Farm is another youth specific residential rehabilitation service. It is run by Mission Australia and located on the NSW south coast. The Program for Adolescent Life Management (**PALM**), run by the Ted Noffs Foundation, has youth specific residential rehabilitation facilities in both Sydney and Canberra.

These programs are also often full and wait lists can be long. It can be difficult to engage with children at a time when they are motivated to deal with their drug issue. If a child agrees to admission to a residential rehabilitation and are then made to wait long periods before entry, they can lose that motivation by the time a spot becomes available.

Additionally, we have observed that many of our young clients referred to residential drug and alcohol services in Sydney and Canberra do not graduate from the programs, and some are exited from the service within 24 to 48 hours. Children who have experienced multiple traumas and have chaotic family histories are often required to conform to strict rules and are asked to leave for minor infractions such as swearing or smoking. One of our clients left a residential rehabilitation placement because he was not allowed to use a PlayStation. He had been diagnosed with ADHD and it was difficult for him to have nothing to do.

Despite these concerns we have observed many success stories from clients attending residential rehabilitation. Corey's story is one example.

Corey's Story¹³⁴

Legal Aid NSW acts for Corey, a 14 year old Aboriginal boy with multiple serious charges (including aggravated robbery) before the Children's Court. Corey had been using drugs for years and had developed a drug addiction, which was contributing to his offending. After a period on a waitlist, Corey was able to obtain a place at a residential rehabilitation facility.

Despite this facility being off Country, Corey flourished in residential rehabilitation and was able to address his drug use. His offending behaviour ceased.

4.8 Overrepresentation of Aboriginal children in the criminal justice system

Aboriginal children are vastly overrepresented in the NSW CJS. Despite Aboriginal people making up just 3.4 percent of the NSW population, Aboriginal children make up 51.5 percent of children in youth detention in NSW and 44.1 percent of children coming before the Children's Court.¹³⁵ This overrepresentation is deeply troubling, however not surprising, given

¹³⁴ This case study has been de-identified.

¹³⁵ NSW Bureau of Crime Statistics and Research, *NSW Criminal Justice Aboriginal Overrepresentation Quarterly Report: Aboriginal Young People* (Quarterly Report, June 2022).

that Aboriginal children are more likely than other children involved with the CJS to be in OOH, disengaged from education, and to suffer a higher degree of overall disadvantage.

Aboriginal children are also less likely to receive the benefit of diversionary options when in contact with the CJS.¹³⁶ In addition to that, policies such as NSWPF's Suspect Target Management Program (**STMP**) have been found to contribute to over policing of Aboriginal communities and to disproportionately target Aboriginal children, increasing their overrepresentation in the CJS.

STMP was operated by NSWPF for many years and only ceased following Law Enforcement Conduct Commission's (**LECC**) investigation, codenamed *Operation Tepito*, which found that NSWPF's use of the STMP III on children for their review period of 15 November 2020 to 28 February 2022 "was, or could be, unreasonable, unjust, oppressive or improperly discriminatory in its effect"¹³⁷ and disproportionately targeted Aboriginal children¹³⁸ LECC further found that STMP "undermined the statutory and common law frameworks designed to minimise the entry of children into the CJS".¹³⁹

LECC concluded the use of the STMP against children met the threshold for agency maladministration.¹⁴⁰ However, as NSWPF announced on 3 October 2023 that they would discontinue the use of the STMP, LECC did not make a formal finding of maladministration.

Legal Aid NSW welcomes the discontinuation of the STMP and we highlight these concluding remarks of this LECC investigation: "The NSW Police Force has a stated priority to 'divert minor offenders and at-risk groups (including children and Aboriginal people) to reduce offending and avoid unnecessary contact with the criminal justice system'. To help achieve this, any replacement program to manage young recidivist offenders should properly engage the NSWPF specialist Youth Officers, and designated Youth Command, to improve policing responses to the children of NSW. In doing so, we hope that the fundamental areas of concern we identified over a protracted period will not continue."¹⁴¹

As the Committee is no doubt aware, Target 11 of the National Agreement on Closing the Gap (**CTG Agreement**) aims to reduce the rate of Aboriginal and Torres Strait Islander children in detention by 30 percent by 2031.¹⁴² Based on the most recent data, this target is not on track to be met in NSW.¹⁴³

Community-based programs tackling Aboriginal children's overrepresentation in the CJS

Legal Aid NSW has observed positive outcomes with the use of Aboriginal youth mentors in the Nowra and Port Kembla area.¹⁴⁴ Mentorship exposes Aboriginal children to positive prosocial role models and can encourage deeper engagement in culture, a known protective factor. We support similar programs being rolled out in regional areas across NSW.

¹³⁶ A recent study showed Aboriginal children are less likely to be diverted by police than non-Aboriginal children, even taking into account other relevant factors- Don Weatherburn and Brendan Thomas, *The influence of Indigenous status on the issue of police cautions* (Journal of Criminology, Vol 56 (2-3), 22 December 2022). Studies have also shown Aboriginal children are more likely to be arrested rather than to receive a court attendance notice and are more likely to have bail refused and to have their matter determined in court compared to non-Aboriginal children- Chris Cunneen, R White and K Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 2015) 154-159.

¹³⁷ Law Enforcement Conduct Commission investigation, *Operation Tepito: An investigation into the use of the NSW Police Force Suspect Targeting Management Plan on children and young people* (Final Report, October 2023) 133.

¹³⁸ Ibid, 134.

¹³⁹ They noted: 'It is arguable that by relying on STMP, police have prioritised policing strategies that tended towards young people experiencing increased interactions with the criminal justice system and an increased likelihood of incarceration'- Ibid, 9.

¹⁴⁰ Ibid, 133.

¹⁴¹ Ibid, 133.

¹⁴² Closing the Gap, *Closing the Gap Targets and Outcomes* (Web Page, 22 May 2024) <https://www.closingthegap.gov.au/national-agreement/targets>.

¹⁴³ NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Justice Aboriginal overrepresentation: Quarterly Update* (Quarterly Report, September 2023).

¹⁴⁴ The Waminda program (in Nowra) and the HeadsUP program (in Port Kembla) both include Aboriginal youth mentoring.

Recommendation 26

- Aboriginal youth mentorship programs should form part of the NSW Government's response to youth crime.

The Maranguka Youth Support Model, in Bourke, is an example of a successful Aboriginal community-led approach to tackling the drivers of youth crime. The Maranguka Youth Support Model involves the use of diversion and wrap around supports for Aboriginal children involved in the CJS. Various service providers come together and collaborate with the aim of achieving positive outcomes for children.

Recommendation 27

- c) The Department of Communities and Justice should employ local Aboriginal mentors at each local DCJ Child Protection office and ensure all Aboriginal children in residential OOHC are able to access an Aboriginal mentor.
- d) These Aboriginal mentors should oversee the development and revision of individualised cultural plans to ensure they are of a high-quality, up-to-date, and are designed by the children and their families or mob.

5. The criminal justice system

...the best criminal justice policies include good welfare, social work, child protection and the use of discretion and diversion where possible

- The United Nations Convention on the Rights of the Child

Any formal contact between children and the CJS is detrimental and risks contributing to a cycle of offending and incarceration. A whole of government approach which seeks to address this issue needs to engage with how the CJS currently operates and facilitates diversion of children. The legislative framework which allows for the arrest, bail, and diversion from detention, as well as existing infrastructure (including Children's Courts and specialist services available for children), needs to be examined to consider whether they are fit for the purpose of reducing youth crime.

5.1 Arrest as a last resort

Any contact with the CJS, even for short periods, or contact via a parent, is associated with poorer outcomes.¹⁴⁵ There is evidence that prosecution of young children is ineffective, harmful, and criminogenic.¹⁴⁶

Section 8(1) of the *Children (Criminal Proceedings) Act 1987* provides that proceedings against children "should not be commenced against a child otherwise than by way of court attendance notice." This section appears to create a presumption that proceedings against children, other than in situations outlined in section 8(2) of the *Children (Criminal Proceedings) Act 1987*, should be commenced without resorting to arrest.

However, this does not accord with our experience. We frequently see NSWPF resorting to their powers of arrest instead of considering alternatives to arrest such as issuing Future Court Attendance Notices (**Future CAN**).¹⁴⁷

Arrest and detention should always be a last resort for children.¹⁴⁸ Research clearly shows that custody serves no deterrent purpose, is criminogenic, and results in potentially devastating effects on children, including by aggravating pre-existing trauma and behavioural issues.¹⁴⁹ Despite this, children across NSW are regularly arrested and held in custody for relatively minor offending and/or minor breaches of bail.

Once arrested, Police officers must make a determination about whether or not the child should be granted bail. In our experience, different Local Area Commands approach consideration of bail for children differently. We have observed many children are refused bail by NSWPF for offences that will not result in a custodial sentence.

¹⁴⁵ Centre for Policy Development, *Partners in Crime: the relationship between disadvantage and Australia's criminal justice systems* (Report, December 2020) 6.

¹⁴⁶ Council of Attorneys-General Age of Criminal Responsibility Working Group, *DRAFT Final Report* (2020), 72. Also see C Meurk, M Steele, L Yap, J Jones, E Heffernan, and S. Davison, *Changing direction: mental health needs of justice-involved young people in Australia* (Kirby Institute research, 2019) and Sentencing Advisory Council, *'Crossover kids': vulnerable children in the youth justice system* (Reports 2 and 3, Sentencing Advisory Council, Melbourne, 2020).

¹⁴⁷ A Future CAN is a piece of paper that includes details of the alleged offence, and states that the accused is required to attend court on a particular day. Being issued with a Future CAN is less traumatic than arrest. Considerations about whether to arrest are set out in section 99 of the *Law Enforcement (Power and Responsibilities) Act 2002 (NSW)*. Also see section 77 of the *Bail Act* for alternatives to arrest when an offender has breached their bail.

¹⁴⁸ Convention on the Rights of the Child, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules') and the *Young Offenders Act 1997 (NSW)*.

¹⁴⁹ See, for example, Janet Killgallon, *Youth Justice NSW, Youth Crime, Youth Justice and Children's Courts in NSW: Early Intervention to Divert Children and Young People from the Criminal Justice System* (2023), ch 3. Also see Royal Australian College of Physicians, *Submission to the Council of Attorneys General Working Group reviewing the Age of Criminal Responsibility* (February 2020), 3 and P Villettaz, G Gilliéron & M Killias, *The effects on re-offending of custodial versus non-custodial sanctions* (Stockholm: Swedish National Council for Crime Prevention, 2014), Dr Katherine McFarlane, *NSW bail laws mean well but are landing homeless kids in prison* (Report, 19 December 2016).

If NSWPF refuse bail a child is still entitled to make an application for bail before the Children's Court. However, after a child is arrested and refused bail by NSWPF it can take as long as 24 hours for them to be brought before the court. During this time, children are initially kept in police custody (generally alongside adult offenders), and then transferred to a youth detention facility.

In our experience, this time in custody, though short, can be incredibly damaging. It also introduces children to antisocial peers, and allows them to experience and visualise the 'ultimate punishment', meaning they are often less fearful of detention in the future.

Legal Aid NSW considers that the *Children (Criminal Proceedings) Act 1987* should be amended to make it clear that, in relation to children, arrest should be a measure of last resort.¹⁵⁰

Recommendation 28

- The NSW Government should amend the *Children's Criminal Proceedings Act 1987* (NSW) to explicitly state that arrest should be a measure of last resort.

5.2 Bail

Legal Aid NSW is concerned that, at times, unnecessary, onerous and inappropriate bail conditions are imposed by NSWPF and some magistrates which in turn can lead to breaches of bail, and contribute to unnecessary arrests of children. Research shows that children are most often remanded for a breach of bail conditions rather than the commission of a new offence.¹⁵¹ A 2011 study of matters in the Parramatta Children's Court found that the majority of remand episodes arose as a result of a breach of bail.¹⁵² It stated:

Children ... were predominantly remanded after they failed to comply with a curfew, were not in the company of a parent or appropriate adult, had associated with a co-offender, failed to report to police, entered an exclusion zone, failed to reside as directed, failed to follow the directions of a parent or guardian or consumed alcohol. Children under 14 years of age were particularly affected by bail breaches: ... it is likely that this is due to the greater number of conditions imposed on them, the greater surveillance and reporting of breaches by both police and carers and the welfare-based nature of conditions which essentially criminalised non-criminal behaviour.¹⁵³

The impact of bail breaches is particularly profound on Aboriginal children, who currently make up over three quarters of the juvenile remand population.¹⁵⁴

The power to impose bail conditions is limited. Section 20A of the *Bail Act 2013* requires a bail condition to be imposed only if the condition:

- is reasonably necessary to address a concern (referred to a 'bail concern') that the child would:
 - fail to appear at any proceedings for the offence
 - commit a serious offence
 - endanger the safety of victims, individuals or the community, or

¹⁵⁰ However we note that any proposed amendment to legislation in relation to arrest as a last resort for children must not have the unintended consequence of displacing the common law principle that arrest be used only as a last resort as it applies to people of all ages.

¹⁵¹ K Wong, B Bailey and D Kenny, *Bail Me Out: NSW Young Offenders and Bail* (2009). Also see S Vignaendra, S Moffat, D Weatherburn and E Heller, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No. 128, 2009).

¹⁵² Katherine McFarlane, *Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system* (2015) 135.

¹⁵³ *Ibid.*

¹⁵⁴ NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics: Quarterly Update* (Quarterly Update, December 2023).

- interfere with witnesses or evidence,¹⁵⁵ and
- is reasonable and proportionate to the offence for which bail is granted
- is appropriate to the bail concern in relation to which it is imposed
- is no more onerous than necessary to address the bail concern
- is reasonably practicable for the accused person to comply with, and
- there are reasonable grounds to believe that the condition is likely to be complied with.

However, our lawyers observe that both NSWPF and the courts often impose bail conditions, such as curfews, place restrictions and daily reporting requirements, which we consider go beyond bail concerns and seem to be aimed at addressing welfare concerns or controlling the child's freedom of movement. The severity of the conditions, coupled with a common lack of understanding of the condition(s) by the child, often lead to minor breaches of bail and repeated short-term detention, in circumstances where their substantive offending is minor and will not result in the child being sentenced to custody.

Immaturity is known to affect multiple areas of cognitive functioning, including impulsivity, reasoning and consequential thinking.¹⁵⁶ When coupled with high rates of additional neurocognitive impairment, trauma and mental health issues,¹⁵⁷ it is unsurprising that children are more likely than adults to breach their bail conditions and be remanded in youth detention. For these reasons, special care should be taken to ensure their bail conditions are no more restrictive than is necessary.

We recommend that the outstanding recommendations for bail reform made by the *NSW Youth Diversion Inquiry* be implemented. These include targeted amendments to the *Bail Act 2013* to ensure that decision-makers have particular regard to a person's age in determining what action to take for a breach of bail, as well as non-legislative changes, including promoting greater diversion of children wherever possible, and increasing bail support services available to children in regional and rural, as well as metro areas. We note that the NSW Government committed to consider these recommendations,¹⁵⁸ but is yet to take any action.

Recommendation 29

- The NSW Government should adopt recommendation 13 of the NSW Legislative Assembly inquiry into the adequacy of youth diversionary programs in NSW:
 - That officers of the NSW Police Force and courts that hear juvenile criminal matters receive thorough training in the setting of bail conditions for young people under 18 years, to promote the diversion of young people wherever possible.¹⁵⁹

Recommendation 30

- The NSW Government should adopt recommendation 15 of the NSW Legislative Assembly inquiry into the adequacy of youth diversionary programs in NSW:

¹⁵⁵ *Bail Act 2013* (NSW), s 17(2).

¹⁵⁶ Chris Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) citing Sentencing Advisory Council, *Sentencing Children and Young People in Victoria* (2012) 11 and Thomas Crofts, *A Brighter Tomorrow: Raise the Age of Criminal Responsibility* (Current Issues in Criminal Justice 123, 27(1), 2015), Enys Delmage, *The Minimum Age of Criminal Responsibility: A Medico-Legal Perspective* (Youth Justice 102, 13(2), 2013).

¹⁵⁷ Commission for Children and Young People, *Our youth, our way: an inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (Summary and recommendations, 2021) 151-154.

¹⁵⁸ NSW Government, *Report of the Legislative Assembly Committee on Law and Safety - Inquiry into the Adequacy of Youth Diversionary Programs in NSW* (NSW Government Response to inquiry, 28 August 2019) 6.

¹⁵⁹ NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018) recommendation 13.

- That officers of the NSW Police Force receive thorough training concerning the policing of suspected bail breaches by young people under 18 years, to avoid unnecessary arrests and detention.¹⁶⁰

Recommendation 31

- The NSW Government should adopt recommendation 16 of the NSW Legislative Assembly inquiry into the adequacy of youth diversionary programs in NSW:
 - That the NSW Government should consider whether the *Bail Act 2013* (NSW) should be amended to specifically provide that police officers must have regard to a person's age in deciding what action to take for breach of bail.¹⁶¹

Remand due to a lack of accommodation

Legal Aid NSW lawyers regularly observe children charged with criminal offences being remanded in custody because of a lack of suitable accommodation.

Section 28 of the *Bail Act 2013* allows a court, in granting bail, to impose a requirement that arrangements be made for the accommodation of the accused person before they are released on bail (an accommodation requirement). Such a requirement can only be made in certain circumstances, including where the accused person is a child. The court responsible for hearing bail proceedings must ensure that, if an accommodation requirement is imposed in respect of a child, the matter is re-listed every two days until the accommodation requirement is complied with. Finding appropriate accommodation is generally the responsibility of either Youth Justice or DCJ.

Whilst the rationale behind this policy was well-intentioned, namely to address the “recurring difficulty” faced by the Children’s Court “when dealing with children whom it wishes to release to bail but who do not have suitable accommodation available”,¹⁶² in practice, it does not impose an obligation on DCJ or Youth Justice to secure the accommodation needed for the child to be actually released on bail.

*Callum’s Story*¹⁶³

Legal Aid NSW acts for Callum, a 13 year old boy charged with minor property damage and breaching an apprehended domestic violence order. The charges related to his mother who he ordinarily resided with. NSWPF arrested Callum.

After Callum’s arrest his mother relinquished care and refused to have him return home. NSWPF refused Callum bail as he effectively became homeless.

The day after his arrest Callum was granted bail by the court. However pursuant to section 28 of the *Bail Act* Callum was unable to be released on bail until suitable accommodation was found. Callum’s matter was relisted every two days over a two-week period. The court and Legal Aid NSW regularly made enquiries about what steps DCJ was taking to secure accommodation for Callum. Legal Aid NSW regularly stressed to DCJ that they should be urgently seeking housing for Callum.

Callum had no criminal history, and the charges were very minor and would not result in a custodial penalty if Callum was convicted. Despite this, DCJ were reluctant to place Callum in an urgent placement and confirmed their preference was for Callum to remain in custody until an appropriate long-term placement could be found.

¹⁶⁰ Ibid, recommendation 15.

¹⁶¹ Ibid, recommendation 16.

¹⁶² NSW, *Parliamentary Debates*, Legislative Assembly, 1 May 2024, The Hon Greg Smith.

¹⁶³ This case study has been de-identified.

Callum's Legal Aid NSW lawyer successfully applied for bail with a condition that Callum be transported to the nearest DCJ office. Once this occurred, DCJ quickly found an emergency placement for Callum.

Legal Aid NSW has observed that at times, there is disagreement between DCJ and Youth Justice about which agency has responsibility for a child in contact with the CJS, which can have negative implications for children on remand, as the case study below illustrates:

Danny's Story¹⁶⁴

Legal Aid NSW acts for Danny, a 17 year old child residing in Albury with significant drug and alcohol and mental health issues. Danny was previously residing in OOHC but had made the decision to 'self-place' recently, meaning he had been couch surfing at various friends' places.

Danny was arrested and charged with criminal offences. Despite being granted bail, Danny was unable to be released until suitable accommodation was found.

Because DCJ have parental responsibility for Danny, Youth Justice suggested that DCJ find Danny suitable accommodation. However, DCJ argued that because Danny is 17 years old, and was previously self-placing, Youth Justice is the appropriate agency to find Danny accommodation. This dispute resulted in Danny spending weeks in custody waiting for an appropriate agency to find him accommodation so that he could be released on bail.

It has been said that detention of children in custody because they are homeless, or otherwise without suitable accommodation, breaches well-established international human rights laws and principles, including the presumption of innocence, the right not to be arbitrarily detained, proportionate sentencing, detention as a last resort for juveniles, and the entitlement of children to special protection.¹⁶⁵ It can lead to further criminalisation of these children, and increase their risk of offending.

The problem of children being held on remand in these circumstances often arises from an inadequate supply of accommodation for homeless children, particularly those with complex needs or challenging behaviour. Increasing the supply of such accommodation is an important component of the policy response to this issue. From a legislative perspective, we would also recommend that the current inquiry investigate whether section 28 of the *Bail Act 2013* has been operating as intended. As highlighted above by our case studies, we have real concerns that the section is not achieving its intended purpose.

Recommendation 32

- The Committee should examine whether section 28 of the *Bail Act 2013* (NSW) is operating as intended and preventing children from being held in custody once bail has been granted or make recommendations for the operation and effect of this section to be examined in greater detail.

The Bail and Accommodation Support Service (**BASS**)¹⁶⁶ is an after-hours support line staffed by Youth Justice. NSWPF can contact the BASS to speak to a bail coordinator before making a bail determination regarding a child. The BASS coordinator will then speak with the child and assess their needs and current circumstances and potentially connect them with

¹⁶⁴ This case study has been de-identified.

¹⁶⁵ See Katherine Boyle, *The More Things Change ...: Bail and the Incarceration of Homeless Young People*, (Current Issues in Criminal Justice, Vol 21 No 1, July 2009) 59 at 68-69, referring to the Universal Declaration of Human Rights, the International Covenant on Civil and Political rights, and the Convention on the Rights of the Child and its associated rules and guidelines, such as the Standard Minimum Rules for the Administration of Juvenile Justice ('the Beijing Rules') and the Guidelines for the Prevention of Juvenile Delinquency ('the Riyadh Guidelines').

¹⁶⁶ This service was previously known as the Bail Assistance Line.

accommodation, transport, case support and other services to help them satisfy the conditions of a bail order. The BASS has funding agreements with several non-government organisations (including Taldumande Youth Services in Northern Sydney) to provide emergency accommodation and support for children.

Legal Aid NSW has seen positive outcomes from the BASS in the Sydney area. However, its impact in regional areas is less obvious. This is likely due to limited support services and emergency accommodation available for children in regional areas.

Recommendation 33

- The NSW Government should increase the number of bail support services and emergency accommodation services available to children across NSW. There should be a particular focus on regional areas, services for Aboriginal children and services for children with complex needs and substantial offending histories.¹⁶⁷

5.3 Specialist Children's Courts

Unlike in the greater Sydney area, many regional areas do not have specialist Children's Courts to hear criminal matters.¹⁶⁸ Instead, in these areas Children's Court matters are heard by Local Court magistrates.

Specialist Children's Court Magistrates have an in-depth understanding of the different legislation that applies to children, as well as specialist skills, training and experience. They are also accustomed to carefully balancing the need to hold children responsible for their actions, whilst also recognising their reduced culpability on account of their age and immaturity. As a result, we often see children appearing before specialist Children's Court magistrates receiving very different, and in our view, more appropriate outcomes than those appearing before Local Court magistrates.

Specialist Children's Court Magistrates also have a more thorough understanding of the discrete services available for children in particular areas. While Legal Aid NSW has been involved in conversations with Local Court magistrates who are interested in understanding what services are available to children in their local areas, long court lists can limit their ability to obtain a deeper understanding of the early intervention and diversionary services available for the comparatively small number of children that come before them.

Recommendation 34

- Specialist Children's Court circuits should be rolled out across NSW.

5.4 The age of criminal responsibility

In Australia, the minimum age of criminal responsibility is just 10 years of age.¹⁶⁹ This is inconsistent with international human rights law. The UN Committee on the Rights of the Child has provided guidance to state parties on an appropriate minimum age of criminal responsibility that complies with the United Nations Convention on the Rights of the Child (UNCRC). In their 2018 General Comment, the UN Committee on the Rights of the Child encouraged state parties to increase their minimum age of criminal responsibility to at least 14 noting the considerable evidence in the fields of child development and neuroscience indicating maturity and the capacity for abstract reasoning is still evolving in children aged 12

¹⁶⁷ This recommendation is consistent with recommendation 12 of the *Youth Diversion Inquiry*.

¹⁶⁸ Children's Court of NSW, *Children's Court Listing and Sitting Arrangements for 2024*, (Accessed on 20 May 2024) <https://childrenscourt.nsw.gov.au/documents/sitting-arrangements/Childrens_Court_Sitting_Arrangements_from_February_2024.pdf>

¹⁶⁹ *Crimes Act 1914* (NSW) s 4M; *Criminal Code Act 1995* (Cth) s 7.1.

to 13 years.¹⁷⁰ They note the evidence suggests the frontal cortex is still developing in younger years and that children under 14 years are unlikely to understand the impact of their actions or comprehend criminal proceedings.¹⁷¹

In 2005,¹⁷² 2012¹⁷³ and again in 2019¹⁷⁴ the United Nations Committee on the Rights of the Child specifically reviewed Australia's compliance with the UNCRC and recommended Australia raise its minimum age of criminal responsibility 'to an internationally acceptable level'.¹⁷⁵ There have been four other recent UN bodies that have recommended raising the minimum age of criminal responsibility, being the United Nations Committee against Torture,¹⁷⁶ the United Nations Special Rapporteur on Rights of Indigenous People¹⁷⁷, United Nations Committee on the Elimination of Racial Discrimination,¹⁷⁸ and the United Nations Global Study on Children Deprived of Liberty.¹⁷⁹

Despite strong comments by multiple UN bodies, NSW is yet to take action on this issue. Legal Aid NSW considers that raising the minimum age of criminal responsibility is an important tool to divert children from the youth justice system and link them to services and supports where relevant. It is also an important tool to address the overrepresentation of Aboriginal children, children with disabilities, and children in OOHC in our CJS.

While Legal Aid NSW strongly supports raising the minimum age of criminal responsibility to 14 years in NSW, we acknowledge that this should not be done in isolation. Adequate supports, programs and alternatives to prosecution that successfully divert children away from the CJS are crucial. Such programs and pathways could be funded through redistribution of the substantial resources currently spent on law enforcement activities, prosecution and punishment.

¹⁷⁰ Human Rights Committee, *United Nations Convention on the Rights of the Child, General comment No. 24 (2019) on children's rights in the child justice system* (UN Doc CRC/C/GC/24, 18 September 2019), 22.

¹⁷¹ *Ibid.*

¹⁷² UN Committee on the Rights of the Child, *Consideration of reports submitted by States Parties Under article 44 of the Convention: Concluding Observations - Australia* (20 October 2005), CRC/C/15/Add.268.

¹⁷³ UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under Article 44 of the Convention – Concluding observations: Australia* (28 August 2012), CRC/C/AUS/CO/4.

¹⁷⁴ UN Committee on the Rights of the Child, *Concluding Observations on the combined fifth and sixth period reports of Australia* (30 September 2019) 48 (a).

¹⁷⁵ *Ibid.*

¹⁷⁶ In late 2022 the United Nations Committee against Torture released its concluding observations on the sixth periodic report of Australia. The report notes the committee is "seriously concerned" about the "very low" age of criminal responsibility in Australia. The report recommends Australia bring its child justice system fully into line with the *United Nations Convention on the Rights of the Child* including by raising the minimum age of criminal responsibility, in accordance with international standards- United Nations Committee against Torture, *Concluding observations on the sixth periodic report of Australia* (United Nations Committee against Torture, 2022) 38(a).

¹⁷⁷ In her 2017 visit to Australia, the United Nations Special Rapporteur on the Rights of Indigenous People noted that the 'incredibly high rate of incarceration of Aboriginal and Torres Strait Islanders, including women and children, is a major human rights concern'. She was particularly concerned about the incarceration of Aboriginal and Torres Strait Islander children for mostly relatively minor non-violent offences and noted "It is completely inappropriate to detain these children in punitive, rather than rehabilitative, conditions. They are essentially being punished for being poor and in most cases, prison will only aggravate the cycle of violence, poverty and crime. I found meeting young children, some only twelve years old, in detention the most disturbing element of my visit". As recommended by the Committee on the Rights of the Child, the Special Rapporteur urged Australia to increase its minimum age of criminal responsibility- Victoria Tauli-Corpuz, *End of Mission Statement by the United Nations Special Rapporteur on the rights of indigenous peoples* (2017), 10.

¹⁷⁸ They noted the higher risk of Aboriginal children being removed from their families and placed in alternative care and expressed its 'deep concern' at the high proportion of Aboriginal children in the criminal justice system, some at a very young age. The Committee was also concerned about the conditions in which these children were held, noting its concerns extended not only to the Northern Territory. The Committee called upon Australia to raise its minimum age of criminal responsibility- United Nations Committee on the Elimination of Racial Discrimination, *Concluding observations on the eighteenth to twentieth periodic reports of Australia* (8 December 2017).

¹⁷⁹ Although not specifically aimed at Australia, the 2019 Report of the Independent Expert leading the United Nations Global Study on children deprived of liberty recommended that States should establish a minimum age of criminal responsibility which shall not be below 14 years of age. The Report also recommended that State Parties should prioritise restorative justice, diversion from judicial proceedings and non-custodial solutions- United Nations, *Report of the Independent Expert leading the United Nations Global study on children deprived of liberty* (2019), 109.

Recommendation 35

- The NSW Government should raise the minimum age of criminal responsibility to 14 years of age, without exception, and explore alternatives to prosecuting young children including through the provision of holistic wraparound services and supports.

5.5 Youth Justice Supervision and the Joint Support Program

Legal Aid NSW wishes to acknowledge the work of both Youth Justice caseworkers and the Joint Support Program in assisting children on supervised orders. A consistent theme in the feedback provided by our staff was that, despite limited resources, Youth Justice staff provide high-quality trauma informed services. Similar sentiments were expressed about the Joint Support Program. These services were seen as providing high quality casework to children involved in the CJS and were described as dedicated to achieving results for the children they assist.

5.6 Aboriginal Community Liaison Officers/Aboriginal Field Officers

The availability of Aboriginal Community Liaison Officers¹⁸⁰ and Aboriginal Field Officers¹⁸¹ (AFOs) greatly assists Aboriginal children appearing before the Children's Court. AFOs have a deep understanding of the local Aboriginal community and can build trust and rapport with clients and communities to increase meaningful engagement with CJS proceedings. For example, AFOs can be instrumental in identifying and arranging an appropriate bail proposal for a child, ensuring they understand and abide by their bail conditions and linking Aboriginal children appearing before court with appropriate services.

Unfortunately, Legal Aid NSW is not currently able to provide AFOs to Aboriginal clients at many regional courts within existing resources. However, due to our statewide service footprint and strong management structure we are well positioned to expand the AFO program to regional courts across the State.

Recommendation 36

- The NSW Government should support the Legal Aid NSW Aboriginal Field Officer program to expand to all regional areas with high Aboriginal populations, particularly to areas where the Aboriginal Legal Service (NSW/ACT) has a limited presence.

¹⁸⁰ Employed by DCJ and located at NSW courts.

¹⁸¹ Employed by Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT).

6. The importance of diversion

Legal Aid NSW considers diversion to be a necessary and appropriate response to most offending by children. While children commit a disproportionate amount of crime, most will not go on to offend throughout adulthood.¹⁸² This general trajectory highlights the importance of a diversionary response.

The costs of community supervision¹⁸³ and detention¹⁸⁴ for children is significant. Diversion provides a “swift and economically efficient response to offending...”.¹⁸⁵ It can also minimise the criminogenic effects of formal CJS contact and provide an opportunity to address underlying risk factors that may cause or contribute to offending behaviour in children.

At present, diversion options for young offenders in New South Wales (NSW) include legislative measures such as those contained in the *Young Offenders Act 1997* (NSW) (YOA), as well as various programs provided across government and non-government organisations. These options are discussed below.

6.1 The Young Offenders Act

NSWPF is usually the first point of contact with the CJS for children who have offended or engaged in anti-social behaviour. The YOA provides options for NSWPF (or a court) to give a warning, caution or refer a child to a youth justice conference as an alternative to court proceedings.

While Legal Aid NSW is of the view that the YOA provides a good legislative framework for the diversion of young offenders in NSW, we are concerned that its scope and implementation have hampered the full realisation of its objectives.

This is most apparent with respect to Aboriginal children, who are statistically less likely to receive the benefit of diversion under the YOA.¹⁸⁶ This is despite one of the express objects of the YOA being to address the overrepresentation of Aboriginal children in the CJS through the use of youth justice conferences, cautions and warnings.¹⁸⁷

As a result of recommendations of the *NSW Youth Diversion Inquiry* the NSW Government undertook a review of the YOA. The results of this review are yet to be publicly released or acted upon. We recommend the results of this review be released and acted on as a matter of priority.

Recommendation 37

- The NSW Government should finalise the review of the *Young Offenders Act 1997* (NSW) and publish its findings.

¹⁸² For example, a 2015 NSW Bureau of Crime Statistics and Research study of a subset of the young offenders' population in NSW across 10 years found that over 42 percent of the cohort had no further contact with the criminal justice system, and just over 17 percent had only one reconviction in the 10 years following their first contact. The study cautioned that “the risk, speed, and frequency of reoffending was not universal and risk factors such as gender, age of first contact, sentence at first contact and Indigenous status all influenced the likelihood of reconviction”- Jason Payne and Don Weatherburn, *Juvenile reoffending: a ten-year retrospective cohort analysis* (Australian Journal of Social Issues 50(4), 2015) 349.

¹⁸³ In 2018-19, the average cost per day for a child subject to community-based supervision in Australia was \$187- Productivity Commission, *Report on Government Services 2020*, Figure 17.9, p. 17.24.

¹⁸⁴ In 2018-19, the average cost per day to keep a child in youth detention in Australia was \$1579- Ibid, figure 17.10, p. 17.26.

¹⁸⁵ Troy Allard, Anna Stewart, April Chrzanowski, James Ogilvie, Dan Birks and Simon Little, *Police diversion of young offenders and Indigenous over-representation* (Trends and Issues in Crime and Criminal Justice No. 390, Australian Institute of Criminology March 2010), 1.

¹⁸⁶ Don Weatherburn and Brendan Thomas, *The influence of Indigenous status on the issue of police cautions* (Journal of Criminology, Vol 56- Issue 2-3, 22 December 2022). See also Clare Ringland and Nadine Smith, *Police Use of Court Alternatives for Young Persons in NSW* (NSW Bureau of Crime Statistics and Research: Crime and Justice Bulletin No 167, January 2013) 10.

¹⁸⁷ *Young Offenders Act 1997* (NSW) s 3.

Only certain offences are eligible to be diverted under the YOA. Currently, there are a number of offences excluded from the YOA. We consider that any offence able to be dealt with summarily should be eligible to be dealt with under the YOA. This includes strictly indictable offences (except serious children's indictable offences), traffic offences, sexual offence matters, drug matters and graffiti offences.

Youth Justice Conferences

Legal Aid NSW strongly supports the use of youth justice conferences (**YJCs**) under the YOA.

YJCs require young offenders to openly acknowledge and talk about their offending behaviour, hear about its consequences, face the victim, and take action to make amends for their behaviour. It can be a confronting and uncomfortable process, but one that can be beneficial and more meaningful for children than a traditional court process. Studies have found:

- both offenders and victims report high levels of satisfaction with the YJC process,¹⁸⁸ and
- YJCs cost about 18 percent less than the average cost of a comparable matter dealt with in the Children's Court.¹⁸⁹

Juvenile Justice NSW is well-placed to organise YJCs, and in our experience generally oversees and conducts conferences well.

Inconsistent use of diversion across regional areas

Our casework experience suggests that there is a variation in the use of diversion by specialist Children's Magistrates and Local Court Magistrates. For example, our lawyers report that the specialist Children's Magistrates are more likely to caution children or refer them to YJCs than regional Local Court Magistrates sitting as a Children's Magistrate. This could be attributable to the different training and experience of the magistrates presiding in these matters (this issue is discussed above at Part 5.3) as well as lack of familiarity with the YOA by legal practitioners in these areas.

We have also observed significant variations in NSWPF diversion across regional Local Area Commands. Different attitudes towards youth diversion among police officers in different locations, including the attitude of the NSWPF Youth Liaison Officer, and Local Area Command management, may explain these differences.

We would encourage the Committee to obtain data and to investigate the use of YOA diversion across regional areas and comment on the consistency, or otherwise, of practices in particular regions.

6.2 Youth on Track

Youth on Track is an early intervention scheme for 10 to 17 year olds that identifies and responds to children at risk of long-term involvement with the CJS. NSWPF and local schools can refer children known to be at medium or high risk of offending to Youth on Track. The child's engagement with the scheme is voluntary.

The scheme assigns children a caseworker for up to 12 months. Caseworkers administer interventions, including cognitive-behavioural and family interventions. Youth on Track involves multi-agency support including from NSWPF, local schools, community groups and

¹⁸⁸ In a 2012 study by BOCSAR, when asked immediately following the conference, more than 85 percent of offenders and victims reported being 'satisfied' or 'very satisfied' with most aspects of the conference. High levels of satisfaction with conferencing were also reported by victims four months after the conference- Andrew Webber, *Youth Justice Conferences versus Children's Court: A comparison of cost effectiveness* (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 164, 2012).

¹⁸⁹ Andrew Webber, *Youth Justice Conferences versus Children's Court: A comparison of cost effectiveness*, (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 164, 2012).

other stakeholders, to engage children and their families with the aim of providing consistent services without duplication.

Youth on Track operates alongside and after contact with the CJS, but it is only available for children who have never been sentenced to a supervised court order. Further, it is only available in certain locations, namely: Blacktown, Dubbo, Orange, Lake Macquarie, Newcastle, Port Stephens, Coffs Harbour, Grafton, Kempsey, Port Macquarie, Taree, New England (including Armidale, Glen Innes, Tamworth, Tenterfield and Inverell), and the Riverina.

In our experience, Youth on Track is an excellent program which often helps to achieve good outcomes for the children involved. Unfortunately, places are limited, and because it is limited to certain geographical locations, many children who require support miss out. Further, many of our clients are unable to access the program due to their complex needs or having been previously sentenced to a supervised order.

Recommendation 38

- c) The NSW Government should expand Youth on Track's eligibility criteria to enable it to provide services to children who have previously been subject to a supervised order.
- d) The NSW Government should expand Youth on Track to additional regional locations.

6.3 BackTrack and the Tracker Network

"We start with belonging because you can't do anything to help a kid and change their trajectory unless you're giving them something to feel connected to"

- Bernie Shakeshaft, BackTrack founder.

Legal Aid NSW strongly supports BackTrack and the Tracker Network.

The BackTrack program commenced in Armidale in 2006 with the aim of helping disengaged and at-risk children to develop life and work skills to build a better future for themselves and their communities. The program is highly effective. It works to establish a strong connection with its participants and provides them with work ready skills, responsibilities within the community and psychological and educational interventions. While numeracy, literacy and psychological interventions form part of the program, its primary focus is on practical work skills, including helping children gain trade certificates, and increasing self-worth and confidence by giving them responsibilities. Part of this responsibility involves giving each participant a sheep dog to train and care for. The mentorship of previous BackTrack graduates also appears to contribute to the programs' success.

A 2014 evaluation of BackTrack was overwhelmingly positive. The National Drug and Alcohol Research Centre (**NDARC**) measured the impact of the program on the four most common types of teenage crime in Armidale and compared them with rates in Tamworth, a town of similar size in the same region of NSW. Over the seven years from 2006 in Armidale, rates of break and enter, trespass, assault and malicious damage fell by 52 percent. In Tamworth over the same time period there was a 90 percent increase in these same offences.¹⁹⁰ The NDARC estimates that BackTrack has saved an estimated \$3.15 million through increased employment and reduced crime rates. This equates to a return of \$6.78 for every \$1 invested.

¹⁹⁰ UNSW Newsroom, *Community-based program for troubled teens halves crime rates: Juvenile crime rates in the NSW town of Armidale have been halved over the past seven years, thanks to an innovative, community-based skills program aimed at 14- to 17-year-olds* (News Article, UNSW Newsroom, 5 December 2014).

BackTrack is now recognised as a national leader and advocate for disengaged and at-risk children. They mentor services in other regional communities who have adopted similar principles. These other services make up the Tracker Network. The Tracker Network provide similar programs across six locations in NSW.¹⁹¹

BackTrack and the Tracker Network have limited capacity meaning significant numbers of children are unable to access their services. We recommend the Committee review the success of BackTrack and the Tracker Network with a view to potentially recommending its expansion to additional regional areas.

Recommendation 39

The Committee should review the success of BackTrack and the Tracker Network and consider supporting its expansion to additional regional areas.

6.4 Youth Koori Court

The Youth Koori Court (YKC) was established in response to the significant over-representation of Aboriginal children in the CJS. The YKC currently only operates in Parramatta, Surry Hills and Dubbo. It provides an alternative process in the NSW Children's Court for dealing with Aboriginal children who have pled guilty to, or have been found guilty of, a criminal offence.¹⁹²

The YKC has the same powers of the Children's Court, however, with the assistance of elders and other respected people from Aboriginal communities, the YKC seeks to identify risk factors, such as homelessness, disengagement from education, drug and alcohol issues or other health issues, that may be impacting on the child's involvement with the CJS.¹⁹³

An action and support plan is developed with the child to help them to address these risk factors and improve connections with their culture and their community. The implementation of the action and support plan is monitored by the YKC over a period of months and the child is required to come back to court several times. At the end of the process the magistrate sentences the child, taking into consideration the steps they have taken to address their issues.

A 2022 BOCSAR evaluation found statistically significant reductions in sentencing and recidivism outcomes among YKC participants with no prior custodial episodes and those charged with at least one violent or property offence at index court finalisation.¹⁹⁴

Legal Aid NSW considers that the YKC has considerable benefit in diverting and supporting young Aboriginal offenders, and addressing their risk of ongoing involvement with the CJS. In our view, the expansion of the YKC to additional regional locations would positively impact community safety and outcomes for Aboriginal children in contact with the CJS in the additional court locations.

¹⁹¹ Including LeaderLife in Dubbo; Down The Track in Lake Cargelligo; Making Tracks in Broken Hill; RuffTRACK in Hawkesbury River; FlatTrack in Moree; and ShoreTrack in Macksville.

¹⁹² Children's Court of NSW, *Practice Note No 11: Youth Koori Court*, 4.

¹⁹³ *Ibid*, 1.3.

¹⁹⁴ E Ooi and S Rahman, *The impact of the NSW Youth Koori Court on sentencing and re-offending outcomes* (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No. 248, 2022).

Recommendation 40

- The Youth Koori Court should be expanded to additional regional areas with high populations of Aboriginal children and high rates of youth crime.¹⁹⁵

Children's Civil Law Service

Legal Aid NSW's Children's Civil Law Service (**CCLS**) partners with the Aboriginal Legal Service (NSW/ACT) to provide civil law advice and assistance to participants in the YKC. The CCLS is a multi-disciplinary team that provides holistic civil law and youth casework assistance to highly disadvantaged children who are involved with the CJS. The service currently only operates in Sydney and Dubbo.¹⁹⁶ Due to limited funding the CCLS has strict eligibility criteria.¹⁹⁷

Most children who are clients in the CCLS experience a multitude of legal problems that severely impact their day-to-day lives, such as housing, fines, Centrelink and debt issues. A significant part of CCLS casework has involved systems and services advocacy to either prevent a child from being excluded from a service, or to advocate for them when their rights have been infringed.

An evaluation of the CCLS was completed in 2019. It found strong evidence to suggest that the CCLS enhances a range of protective factors for the children they support. The evaluation recommended that Legal Aid NSW review the current and planned resourcing of the CCLS, consider potential unmet need across NSW for children with civil law issues and complex needs and consider how and where to implement and embed the CCLS service model more broadly across NSW.

Since the evaluation, Legal Aid NSW received funding connected to the expansion of the YKC to Dubbo that allowed the CCLS to expand its service there. However, resourcing limitations have prevented its further expansion. Legal Aid NSW is well placed to expand our civil law service offerings to children and young people in other regional areas across NSW, either in connection with expansion of the YKC, or as a standalone service.

The below case study provides an example of supports put in place for children in the YKC. Conrad was assisted to access various supports by Legal Aid NSW's CCLS. These supports were aimed at risk factors identified as impacting on his offending behaviour.

*Conrad's Story*¹⁹⁸

Conrad is a young Aboriginal man who was removed from his family due to concerns around substance abuse, transience and neglect. Conrad and his siblings were placed with his grandparents, but the placement broke down, resulting in the children spending time in foster care, crisis accommodation and residential out-of-home-care. Most of Conrad's placements have broken down because his carers were unable to provide the therapeutic care that his complex needs require.

¹⁹⁵ This recommendation is consistent with recommendation 51 of the *Youth Diversion Inquiry*, which recommended that the NSW Government further expand the Youth Koori Court, particularly to regional areas of NSW.

¹⁹⁶ The Sydney office is made up of a small number of lawyers, paralegals, a social worker and an Aboriginal-identified youth caseworker. The Dubbo office is made up of a lawyer and a youth caseworker.

¹⁹⁷ The CCLS only accepts referrals of young people who meet all of the following criteria:

- Are aged 10-19 years
- Are or have been in the criminal justice system
- Are either:
 - in Youth Koori Court,
 - in out-of-home care (**OOHC**) or have had an OOHC experience, or
 - are homeless or at risk of homelessness, and
- Are linked to Dubbo or Greater Sydney, excluding the Blue Mountains, Hawkesbury and Central Coast
- Consent to the referral
- Have a civil law issue which cannot be easily resolved by another service (due to the nature of the legal issue and/or the circumstances of the young person).

¹⁹⁸ This case study has been de-identified.

Conrad has often had to couch-surf with friends or sleep on the streets, where he has been exposed to further violence and alcohol and drug use. He has also spent time in juvenile detention, which he has indicated was often preferable to sleeping on the street. He has also had interactions with the child protection system as a young parent, with his own child being removed from his care.

Conrad struggles with drug and alcohol issues, as well as mental health issues which included incidents of self-harm. His homelessness has impacted on his education, employment, contact with his child and ability to maintain professional appointments to address his drug use and mental health. His experiences have also engendered a mistrust of welfare agencies.

Conrad was referred to the Youth Koori Court. With the assistance of Legal Aid NSW's Children's Civil Law Service he has been referred to Alcohol and Other Drug (AOD) counselling, as well as mental health services to ensure that he received sufficient support around his mental health and risk of suicide. Legal Aid NSW's Children's Civil Law Service has also provided Conrad with care coordination and facilitated cross agency collaboration between numerous government and non-government agencies working with him. This has included assistance with Conrad's debt, accommodation, Centrelink and family law issues. As Conrad has now commenced seeing an AOD counsellor, the Children's Civil Law Service is helping him to set up a Work and Development Order (WDO) to address his outstanding fine debt.

Recommendation 41

- The NSW Government should consider supporting the expansion of the Legal Aid NSW Children's Civil Law Service to additional regional areas across NSW.

6.5 The Mental Health and Cognitive Impairment Forensic Provisions Act

Many children appearing before the Children's Court suffer from mental health conditions or disabilities that mean they are eligible for diversion under section 14 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)*. This section enables the Children's Court (or Local Court) to divert accused people with certain psychological or cognitive conditions out of the CJS and into treatment.¹⁹⁹

To be eligible for diversion an accused must first establish they have a mental health impairment or cognitive impairment as defined in sections 4 and 5 of the *Mental Health and Cognitive Impairment Forensic Provisions Act 2020 (NSW)*.²⁰⁰ This requires an assessment and report by a suitably qualified professional.

The Adolescent Court and Community Team Program is run by the Justice Health and Forensic Mental Health Network (**Justice Health**) to provide mental health assessments for children coming before the NSW Children's and Local Courts. It aims to identify mental health disorders and where possible, divert children from custody to appropriate services within the community.

Unfortunately, this service is not available at many regional courts, meaning children are not able to provide evidence of their mental health or cognitive impairments. The *NSW Youth Diversion Inquiry* found this is contributing to the low number of children being diverted under the legislation despite many being eligible for diversion. The Inquiry recommended that the Adolescent Court and Community Team Program be made available at every Children's Court across NSW.²⁰¹ It also recommended increased funding for mental health support services to which courts can refer young offenders. With the expansion of audio-visual link technologies it has become less expensive for these services to be made available across NSW.

¹⁹⁹ *Mental Health and Cognitive Impairment Forensic Provisions Act 2020*, s 14.

²⁰⁰ *Ibid*, ss 4 and 5.

²⁰¹ NSW Legislative Assembly Committee on Law and Safety, *The adequacy of youth diversionary programs in New South Wales* (Report no. 2/56 Committee on Law and Safety, 2018).

Recommendation 42

- The Adolescent Court and Community Team Program should be expanded to enable every child coming before the Children's Court to receive an assessment, if required.

This recommendation would have particular benefits for Aboriginal children given data suggests higher rates of mental health disorders among young Aboriginal offenders and lower rates of access to the Adolescent Court and Community Team Program based on the location of the courts in which they appeared.²⁰²

6.6 Youth drug and alcohol diversionary program

The Youth Drug and Alcohol Court (**YDAC**) was discontinued in 2012 after it was found not to be cost effective. One factor that contributed to this finding was the low number of YDAC participants. Clients were not provided with an indicative sentence before commencing the YDAC and hence some participants received longer sentences when they failed to complete the program. By contrast, the NSW Drug Court operates as an alternative to imprisonment and participants will not be penalised with an increased sentence if their participation in the program is inadequate. Further, many changes were made to the NSW Drug Court as it developed, increasing its cost effectiveness.

The report of the *NSW Youth Diversion Inquiry* referred to various stakeholders calling for the reinstatement of the YDAC.²⁰³ Noting the effectiveness of the NSW Drug Court, Legal Aid NSW recommends consideration of reinstatement of a more efficient YDAC in conjunction with increased drug and alcohol services.

Recommendation 43

- The Committee should consider recommending the reinstatement of a NSW Youth Drug and Alcohol Court.

The Magistrates Early Referral into Treatment (**MERIT**) is a program for adults in the Local Court who have issues related to alcohol or other drug use. MERIT provides access to a wide range of alcohol and other drug treatment services for 12 weeks while court matters are adjourned.

As an alternative to a YDAC, we recommend the Committee consider whether MERIT should be made available to children appearing before the Children's Court on criminal charges. This would require adaptation of the program to ensure it is suitable for children.

Recommendation 44

- In the absence of reinstating the Youth Drug and Alcohol Court, consideration should be given to expanding and adapting MERIT's eligibility criteria to make it available for children.

²⁰² Ibid.

²⁰³ Ibid.

7. Any other related matter

7.1 Concerns over the recent *Bail and Crimes Amendment Bill 2024*

Legal Aid NSW is concerned that contrary to its intended purpose, the *Bail and Crimes Amendment Bill 2024 (NSW) (the Bill)* may in fact result in increased offending by children in the long term, as a result of prolonged incarceration and disconnection from family, community and supports. The effect may be particularly felt among children in regional and remote areas who typically spend more time on remand than children from the greater Sydney area.²⁰⁴

The Bill passed Parliament and commenced in March 2024 and made the following legislative changes:

1. It introduced section 22C of the *Bail Act* which provides an additional hurdle to bail for any child between 14 and 18 who is alleged to have committed a “relevant offence” while on bail for another “relevant offence”.²⁰⁵ In these circumstances section 22C states bail must be refused unless the bail authority has a “high degree of confidence” that the child will not commit a serious indictable offence while on bail.
2. It introduces a new offence pursuant to section 154K Crimes Act of “performance crimes” (disseminating material to advertise their involvement in a motor theft offence or break and enter offence). The maximum penalty proposed is 2 years’ imprisonment.

The amendments were announced as part of a broader \$26.2 million package of reforms and initiatives to “support community safety and wellbeing, particularly in regional NSW”. While we welcome some of the funding initiatives and diversionary approaches associated with this announcement, Legal Aid NSW is concerned that the changes to bail laws will disproportionately impact vulnerable children, particularly those who are Aboriginal, without bringing about a reduction in crime rates they seek to target.

Further, we are concerned that the bail reforms breach section 6 of the *Children (Criminal Proceedings) Act 1987 (NSW)* and may also amount to discrimination based on age.²⁰⁶

Section 6 of the *Children (Criminal Proceedings) Act 1987 (NSW)* requires the court, when dealing with a child charged with a criminal offence, to have regard to the principle that children have rights and freedoms before the law equal to those enjoyed by adults, and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them.²⁰⁷

The show cause provisions of the *Bail Act* (that apply to adults) require courts to refuse bail to adult defendants charged with committing serious indictable offences while on bail unless they can show cause why their detention is not justified. There is no statutory prescription on how that test is to be met, and the courts have confirmed that ‘special or exceptional circumstance’ are not required.²⁰⁸

Unlike the show cause requirement, section 22C creates a more challenging test for children requiring a bail authority to refuse bail, unless the bail authority has “a *high degree of confidence*” they will not commit a serious indictable offence while on bail.

²⁰⁴ This is because the Children’s Court has limited sittings in regional areas contributing to delays, something that Legal Aid NSW considers should be rectified as a matter of priority. In addition, children in regional NSW have to wait twice as long as their greater Sydney counterparts to obtain a Youth Justice Background Report, which is often required before sentencing.

²⁰⁵ A serious break and enter, motor theft offence, or a performance crime offence.

²⁰⁶ See *Age Discrimination Act 2004 (Cth)*, s 4.

²⁰⁷ *Children (Criminal Proceedings) Act 1987 (NSW)*, s 6(a).

²⁰⁸ See *DPP (NSW) v Mawad* at [40]–[42]; *Moukhallaletti v DPP (NSW)* at [55]; *R v Ftelianos*, [20]–[22], [25]–[26]; *DPP v Hourigan*, [22].

Section 22C of the Bail Act has already come under criticism from the judiciary. *In R v RB [2024] NSWSC 471* Justice Lonergan opined that the new section 22C “operates in an unfairly discriminatory way upon a section of the community, children aged 14 to under 18, who have been widely and specifically recognised as a group that need support and guidance, not incarceration and disconnection from their family and the community”.²⁰⁹

Contrasting the show cause requirement applied to adults with the requirement under section 22C of a “high degree of confidence”, her Honour opined that section 22C has the effect of “singling out a group of persons, children alleged to have committed certain (as yet unproved) offences, *and* requiring that they satisfy a higher test, of uncertain meaning and application, before they can be released on bail than any other applicants, including adults charged with offences of the same nature in the same situation.” Her Honour concluded at [62] that “these considerations highlight a lack of coherence between the bail court’s obligations to comply with ss 4 and 6 of the *Children (Criminal Proceedings) Act* and the requirements of s 22C, which treats a relevantly charged child’s freedom in a less favourable way than an adult’s freedom in exactly the same circumstances”.²¹⁰

Legal Aid NSW concurs with Justice Lonergan’s observations.



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²⁰⁹ *In R v RB [2024] NSWSC 471* [53].

²¹⁰ *In R v RB [2024] NSWSC 471*.