

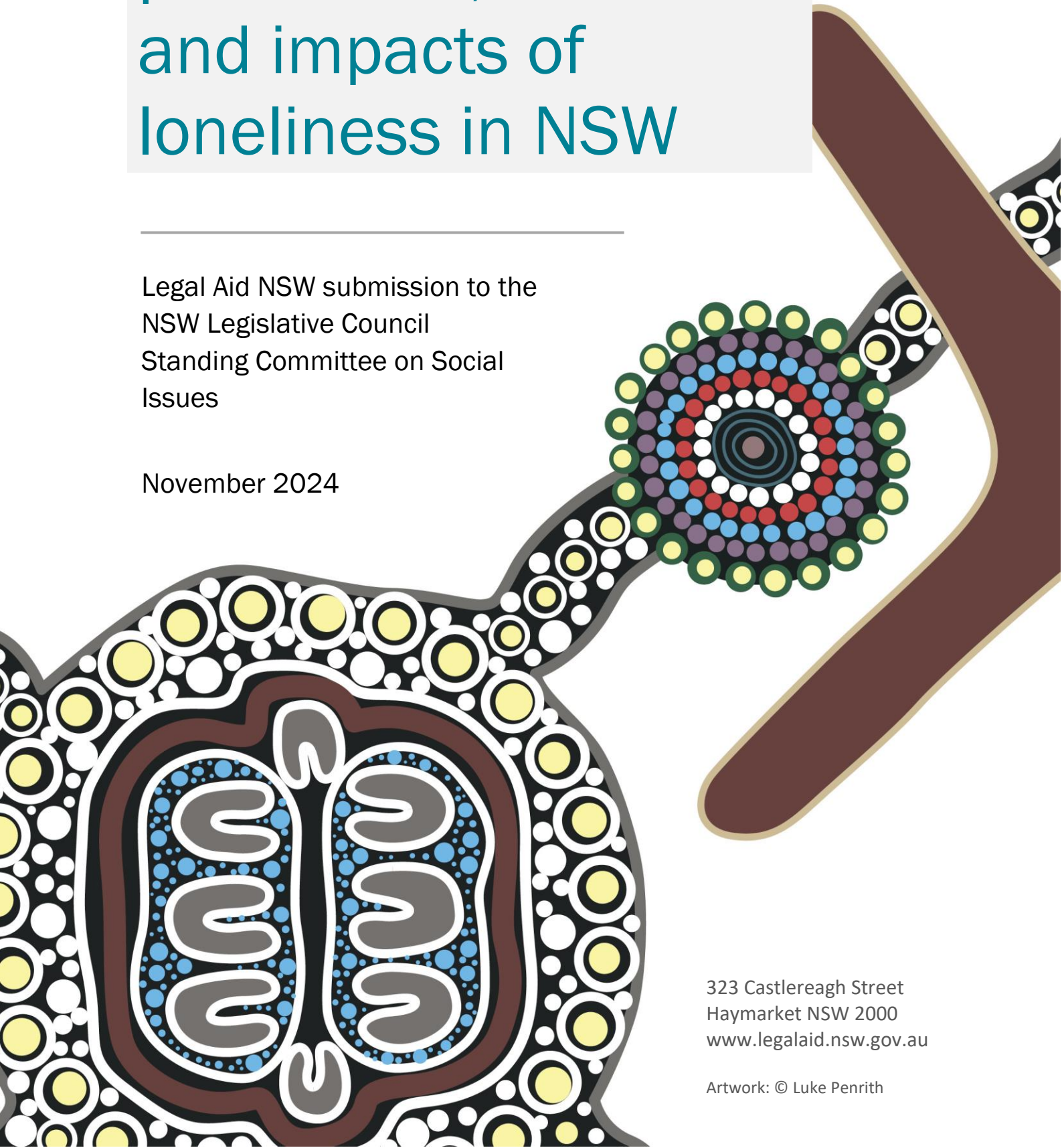
Inquiry into the prevalence, causes and impacts of loneliness in NSW

Legal Aid NSW submission to the
NSW Legislative Council
Standing Committee on Social
Issues

November 2024

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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.

About Legal Aid NSW

The 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.

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 and Torres Strait Islander 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 jurisdiction.

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 and Torres Strait Islander communities, children, refugees, prisoners and older people experiencing elder abuse.

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.

1. Executive summary

Legal Aid NSW welcomes the opportunity to provide a submission to the NSW Legislative Council Standing Committee on Social Issues' inquiry into the prevalence, causes and impacts of loneliness in NSW.

Legal Aid NSW provides legal services to a wide range of individuals, many of whom experience one or more vulnerabilities. Many of our clients have mental health conditions, substance abuse issues, disabilities, histories of trauma and neglect as well as histories of homelessness and transience. We work closely with victim/survivors of domestic and family violence as well as Aboriginal and Torres Strait Islander clients.

Our clients often lack social supports enjoyed by other members of the community, and their vulnerabilities and personal histories can make finding and maintaining any supports and social connections more challenging. As a result, many of our clients are at a higher risk of social isolation and loneliness.

Their isolation and loneliness are further exacerbated by their experiences with the various public sector systems with which they regularly engage – namely, the criminal justice, health, education and child protection systems. Our clients' limited capacity to navigate these systems and effectively advocate on their own behalf often leads to their unique needs being unmet, pushing them further to the fringe.

Our submission focuses on certain groups of clients who are particularly at risk of loneliness and social isolation – namely, children, prisoners, high risk offenders, people with disability and/or mental health conditions, and economically disadvantaged people. We make a number of recommendations targeted at improving these cohorts' social supports and opportunities for social interaction, particularly in the context of their placement in out-of-home care, youth detention or imprisonment.

While the implementation of some of these recommendations will carry associated costs, it is important to recognise that social isolation and loneliness carry costs not only for the individual, but also for the community as a whole. We therefore submit that the implementation of these recommendations would result in clear social and economic benefits.

Recommendations

Recommendation 1

- a) Care plans for children residing in residential out-of-home care should include details of recreational activities, hobbies, sport or other forms of community engagement which the child will be supported to attend.
- b) Adequate funding should be set aside to ensure financial constraints do not prevent children from taking part in such activities.

Recommendation 2

- a) The Department of Communities and Justice should place a greater emphasis on ensuring that all Aboriginal and Torres Strait Islander children in out-of-home care have high-quality, up-to-date, and individualised cultural plans that are designed in collaboration with the children and their families or mob.
- b) The Department of Communities and Justice should investigate options to increase the availability and accessibility of Aboriginal and Torres Strait Islander mentors for all Aboriginal and Torres Strait Islander children in out-of-home care, particularly those in residential out-of-home care.
- c) The Department of Communities and Justice should put processes in place to ensure children's claims of Aboriginality are properly investigated, and children are supported to obtain their confirmation of Aboriginality.

Recommendation 3

- a) The Department of Communities and Justice should put in place procedures to regularly review out-of-home care placement options for siblings who are not placed together.
- b) The Department of Communities and Justice should ensure that staff are trained on the *Placement of Siblings in Out-of-Home-Care Policy (2015)* and adequately resourced to facilitate ongoing siblings contact when siblings are unable to be placed together.

Recommendation 4

The NSW Government should partially implement recommendation 9 of the Family is Culture report and establish a new, independent child protection commission, or increase the funding and regulatory functions of the Office of the Children's Guardian and the Ombudsman.

Such an oversight body should have the following functions:

- Reviewing the circumstances of an individual child or group of children in out-of-home care.
- Monitoring the implementation of the Aboriginal Case Management Policy and the Aboriginal Case Management Rules and Practice Guidance.
- Conducting inquiries into systemic issues in the child protection system, either on its own motion or at the request of the NSW Government.
- Conducting the new qualitative case file review program.
- Monitoring the implementation of the Joint Protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system.
- Providing information, education and training to stakeholders and the community about the operation of the child protection system.

Recommendation 5

The NSW Government should adopt a range of strategies to improve access to visits and contact between children in youth detention and their families. These strategies should include:

- increasing availability of phones and other communication devices
- improving availability of public transport to youth detention centres, and
- having regard to detainees' need for in-person visits when making future decisions regarding the size and location of youth detention centres.

Recommendation 6

The use of solitary confinement in relation to children should be abolished.

Recommendation 7

The NSW Government should raise the minimum age of criminal responsibility to 14 years.

Recommendation 8

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 9

- a) The NSW Department of Education and the non-government school sector should work together to identify and implement measures to build the capacity of schools to provide adjustments for students in line with the requirements of the *Disability Standards for Education 2005* (Cth).
- b) The NSW Department of Education should develop guidelines, regulations, rules and policies to ensure adjustments are appropriately used and that schools comply with obligations under the *Disability Standards for Education 2005* (Cth).

Recommendation 10

The NSW Department of Education should:

- a) review regulations, rules and policies regarding exclusionary discipline to minimise its use, and
- b) provide greater resources, support and professional development to teachers to reduce the use of suspension and expulsion to manage student behaviour.

Recommendation 11

- a) Corrective Services NSW should provide prisoners on remand additional support to transition to the prison environment, gain access to funds, and set up their phone system in order to make personal phone calls.
- b) Corrective Services NSW should review its policies and operational considerations to facilitate greater access to employment opportunities as well as programs for prisoners on remand.

Recommendation 12

- a) Corrective Services NSW should amend part 5.2 of the *Overarching Policy for Inmate Classification and Placement* to specifically include reference to the proximity of the correctional centre to the inmate's Country.
- b) Corrective Services NSW should amend the *Overarching Policy for Inmate Classification and Placement* to place a greater emphasis on ensuring Aboriginal and Torres Strait Islander prisoners remain connected to Country and kin when making placement decisions.
- c) Corrective Services NSW classification staff should be provided with training on the importance of connection to Country and kin for Aboriginal and Torres Strait Islander people. If not already undertaken, this training should form part of wider cultural competency training for Corrective Services NSW staff.

- d) To ensure compliance, Corrective Services NSW classification staff should be required to undergo regular refresher training on all classification and placement policies.

Recommendation 13

Corrective Services NSW and Justice Health should review their policies on managing and supporting prisoners with disability. The policies should mandate regular reviews of prisoners who require disability supports to ensure those supports are provided as soon as possible after the prisoner's reception into custody, and that the supports remain fit for purpose.

Recommendation 14

- a) Corrective Services NSW should support prisoners who do not speak English to access an interpreter, soon after their reception into custody, to assist them with setting up their phone account to make contact with family members and other supports.
- b) Corrective Services NSW should provide prisoners who do not speak English ongoing, free-of-charge access to interpreters to assist them to navigate the correctional system and to access services available to all prisoners.

Recommendation 15

- a) Corrective Services NSW should amend part 3.2 of the *Inmate Request for Review (Appeal) of Classification and Placement* policy to remove the right to decline a request for a review by a transgender inmate who is not housed in accordance with their identified gender.
- b) Corrective Services NSW should amend part 3.2 of the *Classification and Placement of Transgender and Intersex Inmates* policy to require consideration of the impact of the decision not to place the inmate in a prison of their identified gender on the prisoner's mental health.

Recommendation 16

Corrective Services NSW should act on the Inspector of Custodial Services' findings and recommendations in its 2022 report regarding the management of prisoners in the High Risk Management Correctional Centre.

Recommendation 17

- a) Isolation practices should only be used on prisoners in exceptional circumstances when all other means of mitigating risk to the prisoner and others, including appropriate medical interventions, have been exhausted.
- b) Segregation should only be used on prisoners as a last resort and only for the shortest period of time.

Recommendation 18

- a) The NSW Government should provide additional resources to Corrective Services NSW to enhance prisoners' access to tablets and reduce wait times.
- b) Corrective Services NSW should review the current prices for prisoners' calls and explore lower-cost options.
- c) Corrective Services NSW should investigate options and strategies to facilitate greater access between incarcerated mothers and their children.

- d) The NSW Government should review the availability of public transport to correctional facilities and establish services where none exist or where existing services are inadequate.

Recommendation 19

- a) Corrective Services NSW should ensure that the conditions attached to an extended supervision order, as well as policies and procedures employed to facilitate compliance, recognise and support offenders' individual needs, family and kinship connections, and in relation to Aboriginal and Torres Strait Islander offenders, their connection to Country.
- b) In the interest of transparency, Corrective Services NSW policies and procedures for managing high risk offenders should be made publicly available.

Recommendation 20

The NSW Government should decriminalise simple possession.

2. Children¹

Legal Aid NSW assists children in a variety of legal matters. We provide specialist advice and representation to children involved in the criminal justice system, as well as in care and protection proceedings before the Children's Court of NSW (**Children's Court**). Our Children's Civil Law Service provides a targeted and holistic multi-disciplinary service to children identified as having complex needs, particularly those in out-of-home care (**OOHC**).² The service currently only operates in Sydney and Dubbo.³ Due to limited funding the Children's Civil Law Service has strict eligibility criteria.⁴

Legal Aid NSW has also recently been funded to provide a multi-disciplinary legal service through its Family Law Division focusing on children who have experienced OOHC. This new service will be the only one of its kind in Australia and will work closely with other parts of Legal Aid NSW that already provide critical support to children in OOHC, in order to address well-known gaps and problems regarding their care and life trajectory.

Through our extensive work with children, we have identified the following groups of children as being at greatest risk of social isolation and loneliness:

- Children in OOHC.
- Children in youth detention.
- Children disengaged from education.

To address their experience of social isolation and loneliness, it is necessary to consider their needs and circumstances and identify features of the OOHC, youth justice and education systems which do not adequately respond to those needs nor take into consideration their circumstances.

2.1 Children in OOHC

¹ This submission uses the term 'child/children', rather than 'young person' to refer to a person below 18 years of age. Under the United Nations Convention on the Rights of the Child (**CRC**), a child is defined as a person below 18 years. We consider that taking a children's human rights approach requires different language to be used when talking about children, particularly those who come into contact with criminal justice systems.

² 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) 43.

³ 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.

⁴ 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).

Children unable to remain at home due to safety or welfare concerns are often placed in OOHC.⁵ 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).⁶

In our experience, children in OOHC face unique challenges that make forming social and community connections more difficult, putting them at higher risk of loneliness and isolation compared with other children. Children in OOHC have typically been exposed to traumatic experiences,⁷ and many have mental health problems, developmental delays and/or disabilities. Children in OOHC face the transition to adulthood at a younger age than children living with their families, without family support. Care leavers often encounter “difficulty in initiating and maintaining stable, loving relationships” due to growing up without a nurturing and secure environment⁸ and “past experiences of fear, intimidation, humiliation and abuse endured by the care leaver as a child”.⁹ They are at increased risk of involvement in the criminal justice system,¹⁰ and have significantly poorer educational outcomes than their peers.¹¹

The experience of OOHC therefore has “a lifelong impact that echoes not only through their lives but also those of future generations”.¹²

2.1.1. Children in residential OOHC

According to the NSW Child Safe Standards for Permanent Care, children in OOHC are entitled to ongoing relationships with family, people of significance, friends and community.¹³ A range of practical considerations such as availability of appropriate

⁵ The Department of Communities and Justice (**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.

⁶ 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.

⁷ 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).

⁸ Senate Community Affairs References Committee, Parliament of Australia, *Forgotten Australians* (Final Report, August 2004) 145–6.

⁹ *Ibid.*

¹⁰ A Gerard, et al, ‘I’m not getting out of bed!’ The criminalisation of young people in residential care (2019) 52(1) *Australian & New Zealand Journal of Criminology* 76, 93.

¹¹ 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); Susan Baidawi et al, *Care Criminalisation of Children with Disability in Child Protection Systems. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Research Report May 2023) 61; Association of Children’s Welfare Agencies, *Educational engagement of children and young people in care in NSW* (Report, October 2017).

¹² K Royds et al, ‘Agenda for Change: Ensuring a safe and supportive out-of-home care system for children and young people in New South Wales’ (2023) *Centre for excellence in therapeutic care* 5.

¹³ Office of the Children’s Guardian (NSW Government), *NSW Child Safe Standards for Permanent Care* (NSW Government Standards, 2015) 10.

placements and their location, financial considerations such as funding available to facilitate contact with family and friends, as well as engagement in social activities, can stand in the way of children maintaining such relationships.

We have assisted many children in residential OOHC who are socially isolated and are not engaged with family, peers or their local community. In some situations, children in residential OOHC are permitted to stay at home and play video games for large portions of the day rather than being supported to engage in education, recreational activities or sport.¹⁴

The Children's Court decision of *Hughes* [2022] NSWChC 4 (***Hughes case***) explores these issues:

Case note: *Hughes* [2022] NSWChC 4

The *Hughes* case involved two young brothers who were placed in OOHC after the death of their father and the imprisonment of their mother. They were separated from their younger twin siblings.

The Department of Communities and Justice (**DCJ**) contracted Lifestyle Solutions to provide care for the brothers, however, Lifestyle Solutions sub-contracted some of the care to another provider, Connecting Families. Both brothers' behaviour, school attendance and overall wellbeing deteriorated in this placement.

After their entry into residential OOHC, the children's school principal advised DCJ that the children's school attendance had "significantly declined" and that most absences were unexplained, despite the school making efforts to reach out to the residential OOHC provider.

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."¹⁵

The judgement notes there was evidence before the court that the children were regularly dropped off by staff late in the mornings and collected up to 45 minutes late in the afternoons¹⁶ and that the children were reluctant to attend school as they felt cold and had not been provided with winter school uniforms.¹⁷ The court commented "It is both shocking and unacceptable that children in care of the State are too cold to go to school because they do not have a winter uniform."¹⁸

Children's Court also commented "There is no evidence of swimming lessons, taking the children to the movies or bowling or to watch a game of football. There is no

¹⁴ 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).

¹⁵ *Finn, Lincoln, Marina and Blake Hughes* [2022] NSWChC 4 94.

¹⁶ *Ibid* 75.

¹⁷ *Ibid* 78.

¹⁸ *Ibid* 81.

evidence of engaging the children in any fun activities or any activities which might bring them some joy.”¹⁹

The court noted this occurred despite Lifestyle Solutions being paid approximately \$18,096.45 per week (\$1,292.60 per day per child) to look after the children.²⁰ The judgement pointed to evidence that Lifestyle Solutions had allocated a budget of just \$80 per week (or \$11.43 per day)²¹ for both groceries *and* activities for the children.

Recommendation 1

- a) Care plans for children residing in residential out-of-home care should include details of recreational activities, hobbies, sport or other forms of community engagement which the child will be supported to attend.
- b) Adequate funding should be set aside to ensure financial constraints do not prevent children from taking part in such activities.

2.1.2 Aboriginal and Torres Strait Islander children in OOHC

Aboriginal and Torres Strait Islander children across all age groups are significantly more likely to receive child protection services than non-Indigenous children,²² due to a complex range of factors, including the legacy of the Stolen Generations, intergenerational trauma, and cultural assumptions about child-rearing.²³ In their 2020 report, Colvin and McFrath highlighted that the specific needs of Aboriginal and Torres Strait Islander children in OOHC remain unmet, noting a shortage of Aboriginal and Torres Strait Islander workers in the sector.²⁴

We have observed that many Aboriginal and Torres Strait Islander children in residential OOHC are disconnected from their culture, lack access to Aboriginal and Torres Strait Islander mentors and workers, and are often moved off Country due to limited placement options. The *Family is Culture* report emphasises that for Aboriginal and Torres Strait Islander people, connection to family, community, culture, and Country is essential to one’s sense of identity, belonging, and wellbeing.²⁵

Some of our clients in OOHC also face challenges in obtaining confirmation of their Aboriginality, which is necessary for access to Aboriginal housing, identified employment opportunities, and other services. This is often because they are not

¹⁹ Ibid 116.

²⁰ Ibid 104.

²¹ Ibid 106.

²² Australian Institute of Health and Welfare, *Child Protection Australia 2020-2021*, (Report, 15 June 2022) 17. 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.

²³ Philip Mendes, Bernadette Saunders and Susan Baidawi ‘The experiences of Indigenous young people transitioning from out of home care in Victoria, Australia’ in Varda R Mann-Feder & Martin Goyette (eds), *Leaving care and the transition to adulthood: International contributions to theory, research, and practice* (New York: Oxford University Press, 2019) 149–171; Human Rights and Equal Opportunity Commission (HREOC), *Bringing them home: Report of the national inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (Report, April 1997).

²⁴ 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).

²⁵ Megan Davis, *Family is Culture: Independent Review of Aboriginal Children and Young People in Out-of-home care* (Review Report, 2019) 321.

recognised by their Aboriginal or Torres Strait Islander communities, having been separated from them by the State.

We are also aware of instances where DCJ did not investigate or acknowledge a child's claim of Aboriginality. This issue was also highlighted in the *Family is Culture* report, where stakeholders observed that child protection workers sometimes disregard a child's Aboriginality based on skin colour, thereby sidestepping specific requirements for Aboriginal and Torres Strait Islander children in care.²⁶ This happens despite section 32 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), which mandates that DCJ must determine whether a child in contact with the child protection system is Aboriginal or Torres Strait Islander.

The *Family is Culture* report recommends that regulations be developed, in consultation with relevant Aboriginal and Torres Strait Islander community groups, to address the identification and "de-identification" of children in contact with the child protection system as Aboriginal or Torres Strait Islander, for inclusion in the *Children and Young Persons (Care and Protection) Regulation 2012* (NSW). Legal Aid NSW supports this recommendation and understands that its implementation by the NSW Government is forthcoming.

Recommendation 2

- a) The Department of Communities and Justice should place a greater emphasis on ensuring that all Aboriginal and Torres Strait Islander children in out-of-home care have high-quality, up-to-date, and individualised cultural plans that are designed in collaboration with the children and their families or mob.
- b) The Department of Communities and Justice should investigate options to increase the availability and accessibility of Aboriginal and Torres Strait Islander mentors for all Aboriginal and Torres Strait Islander children in out-of-home care, particularly those in residential out-of-home care.
- c) The Department of Communities and Justice should put processes in place to ensure children's claims of Aboriginality are properly investigated, and children are supported to obtain their confirmation of Aboriginality.

2.1.3 Insufficient family contact

Maintaining contact with family is a human right²⁷ and is defined as one of the principles in section 9 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW).²⁸ Research shows that strong sibling bonds in childhood contribute to higher levels of social support, self-esteem, and stable adult relationships.²⁹ Studies also indicate that separating siblings increases the risk of placement breakdown and is linked to higher emotional and behavioural challenges due to the lack of secure attachment.³⁰

²⁶ Megan Davis, *Family is Culture: Independent Review of Aboriginal Children and Young People in Out-of-home care* (Review Report, 2019) 259.

²⁷ *United Nations Convention on the Rights of the Child* art 9(3).

²⁸ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(2)(f).

²⁹ Joseph McDowall, *Sibling Placement and Contact in Out-of-Home Care* (CREATE Report, 2015).

³⁰ Stephen Rock et al, *Understanding foster placement instability for looked after children: A systematic review and narrative synthesis of quantitative and qualitative evidence* (2013) 45(1) *The British Journal of Social Work* 177, 203.

Despite these findings, children in OOHC often have limited contact with family members, including siblings, aunts, uncles, and cousins. Many are placed separately from their siblings, despite the importance of these relationships for their socio-emotional development and well-being.

While DCJ policy mandates placing siblings together or, if not possible, maintaining regular contact when separated, this does not correspond with the experience of many of our clients.³¹

Recommendation 3

- a) The Department of Communities and Justice should put in place procedures to regularly review out-of-home care placement options for siblings who are not placed together.
- b) The Department of Communities and Justice should ensure that staff are trained on the *Placement of Siblings in Out-of-Home-Care Policy* (2015) and adequately resourced to facilitate ongoing siblings contact when siblings are unable to be placed together.

2.1.4 Greater oversight of the OOHC system

To ensure that the OOHC system operates in a way that supports children's development and maximises their future outcomes, it is vital that the agencies tasked with their care operate in a transparent manner and are held accountable for their decisions. Historically, OOHC services were managed by DCJ staff, but following the Special Commission of Inquiry into Child Protection Services in NSW, the provision of these services gradually shifted to the non-government sector. Now, most OOHC services, including all residential services, are delivered by designated agencies, raising concerns about accountability.

The *Family is Culture* report highlights a critical need for enhanced oversight and accountability within the child protection system, stating:

One enduring and consistent theme [is] the absence of public accountability among those who hold power to make decisions... Given the importance of the caseworker's role, the rights that a caseworker can affect and the powers the caseworker can exercise, it is injudicious that there are so few accountability mechanisms for DCJ staff... existing oversight mechanisms in place to oversee the OOHC sector lack effectiveness, transparency, independent oversight and coordination.³²

See also Rachel M Hiller and Michelle C St Clair, The emotional and behavioural symptom trajectories of children in long-term out-of-home care in an English local authority (2018) 81 *Child Abuse & Neglect* 106,117.

³¹ Department of Family and Community Services (NSW), *Placement of Siblings in Out-of-Home-Care Policy* (FACS Policy, January 2015). See also Department of Family and Community Services (NSW), *Permanency Support Program: Rules and Practice Guidance* (Practice Guide, 30 June 2019). DCJ policy also states that when siblings are separated the child's caseworker should develop a sibling contact plan.

³² Megan Davis, *Family is Culture: Independent Review of Aboriginal Children and Young People in Out-of-home care* (Review Report, 2019) 93.

In light of these findings, the report recommends establishing an independent child protection commission, a recommendation we largely support.

Recommendation 4

The NSW Government should partially implement recommendation 9 of the *Family is Culture* report and establish a new, independent child protection commission, or increase the funding and regulatory functions of the Office of the Children's Guardian and the Ombudsman.

Such an oversight body should have the following functions:

- Reviewing the circumstances of an individual child or group of children in out-of-home care.
- Monitoring the implementation of the Aboriginal Case Management Policy and the Aboriginal Case Management Rules and Practice Guidance.
- Conducting inquiries into systemic issues in the child protection system, either on its own motion or at the request of the NSW Government.
- Conducting the new qualitative case file review program.
- Monitoring the implementation of the Joint Protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system.
- Providing information, education and training to stakeholders and the community about the operation of the child protection system.³³

2.2 Children in youth detention

Children in youth detention have been removed from their family and support networks. Aboriginal and Torres Strait Islander children are often moved off-Country. By virtue of their detention, they are socially isolated and often experience loneliness.

2.2.1 Access to visits and phone contact

While children are entitled to receive visits from approved friends and family while in detention, the capacity of family and friends from regional and remote communities to visit children in detention is often very limited as Youth Justice Centres are often located a significant distance from their communities. Children from Broken Hill, for example, are usually flown to Orana Youth Justice Centre in Dubbo. To drive from Broken Hill to Dubbo takes over seven hours, making family visits rare.

Even when children are detained at centres located close to friends and family, people often find it hard to visit due to a lack of public transport available to Youth Justice Centres. Further, family and friends can be prevented from visiting or having contact with children in youth detention if they are deemed unsuitable. A person with a criminal history is more likely to be deemed unsuitable. This can have a significant impact on Aboriginal and Torres Strait Islander children in detention whose family members and

³³ This recommendation has been adopted from Megan Davis, *Family is Culture: Independent Review of Aboriginal Children and Young People in Out-of-home care* (Review Report, 2019) XXXIX Recommendation 9.

friends are more likely to have a criminal history as a result of decades of over-policing of Aboriginal and Torres Strait Islander communities.

Further, children in detention can also find it difficult to make contact with their family and friends by phone or videocall. There are often restricted time periods in which to use the phone, and there may be a queue to make a call, thus inhibiting contact with support systems.

Recommendation 5

The NSW Government should adopt a range of strategies to improve access to visits and contact between children in youth detention and their families. These strategies should include:

- increasing availability of phones and other communication devices
- improving availability of public transport to youth detention centres, and
- having regard to detainees' need for in-person visits when making future decisions regarding the size and location of youth detention centres.

2.2.2 Use of isolation and segregation practices in youth detention

In our experience, many children are placed in isolation and segregation while in youth detention due to safety concerns. Children can be subject to confinement as punishment for misbehaviour for up to 12 hours (under the age of 16) and 24 hours (over the age of 16).³⁴

Research demonstrates that solitary confinement can have a significant negative impact on the wellbeing of children,³⁵ and multiple inquiries have recommended that the use of solitary confinement in relation to children should be abolished.³⁶ We support this recommendation.

Recommendation 6

The use of solitary confinement in relation to children should be abolished.

2.2.3 Girls in youth detention

Loneliness is exacerbated for girls in custody. Incarcerated children are segregated by gender and there are significantly fewer Youth Justice Centres that can accommodate girls. This means girls in detention are regularly:

- moved further from their communities to a Youth Justice Centre that can accommodate them, or

³⁴ *Children (Detention Centres) Act 1987* (NSW) s 21(1)(d).

³⁵ Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final report* (Vol. 1-4). Australian Government (2017) Vol 2A, 286. The United Nations Special Rapporteur has concluded that any solitary confinement of a child or young person violates the *International Covenant on Civil and Political Rights* and the *Convention against Torture* and should be abolished.

³⁶ *Royal Commission into the Protection and Detention of Children in the Northern Territory – Findings and Recommendations* (2017) recommendation 14.1.9.

- kept close to family in a Youth Justice Centre that caters for boys and that has no other girls present. In this situation girls are kept isolated from boys.

2.2.4 Impact of detention on young children

The harmful impacts of detention are particularly felt by the youngest children. Not only is the physical experience of detention more arduous for young children who are separated from their families through crucial developmental periods, but their detention may have lasting physiological and psychological impacts. Research suggests that isolation in a detention setting poses a risk of inducing permanent impairment to a child's developing prefrontal cortex, which is the part of the brain responsible for impulse control.³⁷ Research also notes that the inadequacy of youth detention facilities places children and young people's overall health, safety and wellbeing at serious risk.³⁸ Even a short stay for 24 hours or less could pose a risk to the child's overall wellbeing.

The Royal Commission into the Protection and Detention of Children in the Northern Territory (**Commission**) explored the psychological effects on children under the age of 14 in detention. The Commission found that staff were not adequately trained and lacked an understanding of the detention centre's rules and responsibilities.³⁹ It noted that children were subject to verbal and physical abuse and racist remarks, restricted family contact, isolation for extended periods, and conditions that fall short of Australian and international standards and guidelines.⁴⁰ The Commission concluded that a multitude of youth detention centres currently in use in Australia are unfit for accommodating or rehabilitating children.⁴¹

2.2.5 Minimum age of criminal responsibility

The presumption of *doli incapax* provides that children under the age of 14 years are presumed to be incapable of committing a crime due to a lack of understanding of the difference between right and wrong. However, the prosecution is able to hold the child under the age of 14 criminally responsible, if they present relevant evidence to rebut this presumption. A hearing usually takes place to determine whether or not the child is *doli incapax*. Adjournments to allow parties to prepare for this hearing vary in time but can take months. Children who are not released on bail are held in youth detention during this time period.

Despite the doctrine of *doli incapax*, children as young as 10 are regularly charged with criminal offences and held in Youth Justice Centres. The NSW Bureau of Crime Statistics and Research (**BOCSAR**) recently released data showing that in 2023, NSW Police Force initiated 4,662 legal proceedings against children aged 10 to 13.⁴² Of

³⁷ Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final report* (Vol 1-4) Australian Government (2017) Vol 2A, 286.

³⁸ K Freeman and N Donnelly, (2024) *The involvement of young people aged 10 to 13 years in the NSW criminal justice system* (Bureau Brief No. 171). Sydney: NSW Bureau of Crime Statistics and Research.

³⁹ Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final report* (Vol. 1-4). Australian Government (2017) Vol 2A, 121.

⁴⁰ *Ibid* 159-330.

⁴¹ *Ibid* 101.

⁴² K Freeman and N Donnelly, (2024) *The involvement of young people aged 10 to 13 years in the NSW criminal justice system* (Bureau Brief No. 171). Sydney: NSW Bureau of Crime Statistics and Research, 1.

these prosecutions, 37 percent involved formal court proceedings. Of the 718 finalised matters with known outcomes, over half (53 percent) of the prosecutions were withdrawn by the prosecution,⁴³ and 25 percent resulted in a finding of not guilty of all offences. Only 20 percent of finalised matters resulted in a finding of guilt.

In our experience, it is often the case that by the time the matter is before the court for a hearing, these children have been arrested and spent time in custody on remand. This occurs before a determination has been made by the court about whether they are capable of participating in the criminal justice system, or forming a criminal intent at all.

This highlights a failure in the way the presumption of *doli incapax* is operating in practice and highlights the urgent need to raise the minimum age of criminal responsibility (and detention) to at least 14.

Recommendation 7

The NSW Government should raise the minimum age of criminal responsibility to 14 years.

2.3 Children disengaged from education

Schools present a focal point of social connection for children. As such, disengagement from education can have consequences for a child's physical and mental health, as well as negative impacts on their social connections. For children who come from disadvantaged backgrounds, education is fundamentally important to break cycles of disadvantage.

Exclusion from education can be a precursor to poor future outcomes, including social isolation⁴⁴ and involvement in the criminal justice system. Legal Aid NSW frequently assists children charged with criminal offences who have been regularly excluded from school due to suspensions for behavioural problems that stem from complex trauma, mental health conditions and/or intellectual disabilities.

Through our practice experience, we have identified two cohorts of children who are at greater risk of school disengagement: children in OOHC and children with disability. In our view, recognising and responding to these children's unique needs will inevitably lead to better school engagement.

2.3.1 Children in OOHC

⁴³ In our experience, the withdrawal of offences often occurs on the day of the hearing, once a prosecutor has reviewed the brief and determined that they do not have evidence to rebut the presumption of *doli incapax*.

⁴⁴ The Victoria Institute, *Education at the Heart of the Children's Court Evaluation of the Education Justice Initiative* (Final Report, December 2015) 2.

Children in OOHC have significantly poorer educational outcomes than their peers.⁴⁵ 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.⁴⁶

NSW policy states that the principal of the school must ensure that all students in OOHC enrolled in the school have a personalised learning and support plan.⁴⁷ However, unlike a similar Victorian policy,⁴⁸ the NSW policy does not address school exclusion or disengagement from education. In our view this omission should be rectified.

Recommendation 8

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.

2.3.2 Children with disability

Children with disability are overrepresented among children disengaged from education.

Legal Aid NSW assists clients with matters arising from the treatment of students with disability by schools, including schools failing to make adjustments or provide support to assist students with disability to meaningfully participate in their education. We consider this is often due to factors including:

- a lack of consultation with parents and carers of children with disability in order to identify adjustments that could be made under the *Disability Discrimination Act 1992* (Cth) (**Disability Discrimination Act**) and the *Disability Standards for Education 2005* (Cth) (**Education Standards**)⁴⁹
- a need for improved understanding of specific disabilities, and obligations under discrimination law and the Education Standards, and
- inadequate resourcing to support schools to provide specialised and tailored learning support.

⁴⁵ 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.

⁴⁶ Association of Children's Welfare Agencies, *Educational engagement of children and young people in care in NSW* (Report, October 2017).

⁴⁷ 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 and the accompanying Out-of-Home Care in Government Schools Personalised Learning and Support Planning Procedures*. 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 the Department of Education 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).

⁴⁸ Victoria State Government, *Out-of-Home Care Education Commitment* (Partnering Agreement, July 2018).

⁴⁹ Under the *Disability Standards for Education 2005* (**Education Standards**), schools are required to provide 'reasonable adjustments' to ensure that students with disability can access and participate in education on the same basis as students without disability.

Often by the time issues are resolved and adjustments or support are provided, the child has lost many months of education. This can lead to social isolation and school refusal, which can adversely impact the child's ability to fully participate in social and economic opportunities as an adult.

The NSW youth diversion inquiry found one of the factors that may contribute to disengagement and exclusion from school is a lack of specialised and tailored learning support in schools.⁵⁰ 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 story*⁵¹

Legal Aid NSW represented Brian, a 13-year-old Aboriginal child who resides in residential OOH. Brian had a diagnosis of foetal alcohol spectrum disorder (**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.

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 has provided Brian with additional individualised supports to maximise his learning potential. Brian is engaging well and recently received a 'student of the month' award.

Legal Aid NSW supports children with disability being able to attend school and participate on an equal basis with others, and to maximise their learning, social connection and life opportunities. To enable this to occur, we recommend the development of guidelines to ensure adjustments⁵² and support are both available and appropriately used, and that schools comply with their obligations under the Education Standards. Further, we support greater and more flexible use of adjustments, as well as better guidance and transparency around the use of adjustments. Existing complaint processes for when requests for adjustments are refused should also be streamlined.

Recommendation 9

- a) The NSW Department of Education and the non-government school sector should work together to identify and implement measures to build the capacity of schools to provide adjustments for students in line with the requirements of the *Disability Standards for Education 2005*.

⁵⁰ 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.

⁵¹ All client stories in this submission have been de-identified.

⁵² This submission uses the phrase "adjustments" rather than "reasonable adjustments". From our observation, this seems to be the more acceptable term in the disability community and is reflected in the recommendations of the Disability Royal Commission to remove the requirement of "reasonableness" from the legislation.

- b) The NSW Department of Education should develop guidelines, regulations, rules and policies to ensure adjustments are appropriately used and that schools comply with obligations under the *Disability Standards for Education 2005* (Cth).⁵³

2.3.3 School exclusion

Adjustments and specialised support are a crucial tool to enable many children with disability to comfortably and meaningfully engage in education. Conversely, a failure to appropriately support students with disability may create or exacerbate challenging behaviours, and lead to students being excluded from school.

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 the child 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.⁵⁴ The behaviour of students with disabilities such as autism spectrum disorder (**ASD**) or attention deficit hyperactivity disorder (**ADHD**) can also be framed as 'bad behaviour' with suspensions and exclusion often seen as the only option, even though more appropriate and less restrictive alternatives may be available.

Suspending children breaches the trust between the child and the school and disrupts the child's routine, making it more likely they will disengage in the future. This trust and routine are particularly important for children with disability. A recent NSW Legislative Council inquiry found that the inappropriate use of exclusionary discipline such as suspension and expulsion of students with disability can have long term impacts on various aspects of their lives, including in employment, social life, accessing housing and health services.⁵⁵

The impacts of exclusionary discipline are often greater on children from regional and remote areas, where there is often only one public school. These children may be offered distance education, however for reasons that they were unable to successfully engage with a mainstream school (for example, due to disability and/or disadvantage) they are even less likely to be able to successfully engage with distance education.

Recommendation 10

The NSW Department of Education should:

⁵³ This recommendation was adopted from recommendation 7.3 of the Disability Royal Commission Report, Volume 7- Inclusive education, employment and housing (published on 29 September 2023).

⁵⁴ Chris Cunneen, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Research Report, Comparative Youth Penalty Project, University of New South Wales, 2017) 10.

⁵⁵ NSW Legislative Council- Portfolio Committee No. 3, *Children and young people with disability in NSW educational settings* (Inquiry Report, August 2024) Report 52, recommendation 4.

- a) review regulations, rules and policies regarding exclusionary discipline to minimise its use,⁵⁶ and
- b) provide greater resources, support and professional development to teachers to reduce the use of suspension and expulsion to manage student behaviour.⁵⁷

3. Prisoners

Research has found a correlation between social exclusion and psychosocial issues such as drug and alcohol addiction,⁵⁸ antisocial behaviours and a lack of self-regulation.⁵⁹ People with relatively low levels of social belonging are more likely to commit crimes and act aggressively.⁶⁰ Social isolation is a key risk factor linked to a higher likelihood of radicalisation and terrorist violence.⁶¹ Loneliness and social isolation can therefore lead to contact with the criminal justice system and imprisonment, leading to further isolation from the community and any supports.

The NSW prison population continues to grow. In June 2024 the adult custodial population was 12,917, up from 12,279 in June 2023 and 12,091 in December 2023.⁶²

As the largest single legal service provider to prisoners in NSW, Legal Aid NSW is well placed to comment on the impact of loneliness and related issues affecting prisoners in NSW:

- In 2020-21, the Criminal Law Division provided over 224,000 in-house legal services (excluding information services) to prisoners, about two-thirds of which were provided by the in-house practice.
- We deliver a wide range of civil law services to people in custody through the Prisoners Civil Law Service and the Mental Health Advocacy Service.
- Our regional and specialist civil lawyers work across NSW advising on a range of civil law issues, including housing, debts, fines, immigration, discrimination, social security and various statutory entitlements, National Disability Insurance Scheme (**NDIS**), consumer protection, powers of attorney, freedom of information, complaints concerning agencies and service providers, and access to health care in custody.

A 2022 study analysed several forms of loneliness found in prisons and beyond, from the visceral, immediate sense of being physically alone and separated from loved ones to the ethical or existential experience of abandonment and hopelessness.⁶³ The study

⁵⁶ This recommendation has been adopted from the Disability Royal Commission Report, Volume 7- Inclusive education, employment and housing (published on 29 September 2023), recommendation 7.2.

⁵⁷ This recommendation has been adopted from the NSW Legislative Council Portfolio Committee No. 3, *Children and young people with disability in NSW educational settings* (Inquiry Report, August 2024) Report 52, recommendation 4.

⁵⁸ Ian Marcus Corbin and Amar Dhand, *Unshared Minds, Decaying Worlds: Towards a Pathology of Chronic Loneliness* (2024) 49 *The Journal of Medicine and Philosophy: A Forum for Bioethics and Philosophy of Medicine* 354, 355.

⁵⁹ Roy F Baumeister and C Nathan DeWall, 'The Inner Dimension of Social Exclusion: Intelligent Thought and Self-Regulation Among Rejected Persons' in Kipling D Williams, Joseph P Forgas and William Von Hippel (eds), *The Social Outcast: Ostracism, Social Exclusion, Rejection, and Bullying* (Taylor & Francis, 2005) 53, 69. As quoted in the Bugmy Bar Book, *Social Exclusion*.

⁶⁰ *Ibid* 69.

⁶¹ Emma Belton, *Understanding the Progression to Violence: Background Characteristics and Risk Factors for Radicalisation to Violent Extremism* (PhD Thesis, University of Queensland, 2023) 111.

⁶² Bureau of Crime Statistics and Research, *New South Wales Custody Statistics* (Quarterly Update: June 2024).

⁶³ Anna Schliehe, Julie Laursen and Ben Crewe, *Loneliness in prison* (2022) 19(6) *European Journal of Criminology* 1595, 1614.

found that many prisoners experience loneliness and that the depth and weight of loneliness in prison can be intense. This accords with our experience.

3.1 Prisoners on remand

New figures released by BOCSAR show that the remand population is now the highest on record,⁶⁴ and is driving the increase in the general prison population. In June 2024, the remand population was 5,763 (up 932 or 19 percent since June 2023, when the remand population was 4,831).⁶⁵

Prisoners on remand have often recently entered custody unexpectedly. Getting access to funds to make phone calls, setting up their phone system and getting family members approved in order for them to make phone contact can take weeks. During this time these prisoners often struggle greatly to transition to the prison environment without outside support from friends and family. Further, due to their remand status, these prisoners are often ineligible to participate in programs or employment, which adds to their social isolation.

We support prisoners on remand being given additional support to transition to the prison environment and to set up their phone system in order to make contact with family and friends in the community. We also support prisoners on remand being able to engage in programs and employment opportunities.

Recommendation 11

- a) Corrective Services NSW should provide prisoners on remand additional support to transition to the prison environment, gain access to funds, and set up their phone system in order to make personal phone calls.
- b) Corrective Services NSW should review its policies and operational considerations to facilitate greater access to employment opportunities as well as programs for prisoners on remand.

3.2 Aboriginal and Torres Strait Islander prisoners

The NSW Aboriginal and Torres Strait Islander adult prison population continues to grow. Figures from June 2024 show:

- the Aboriginal and Torres Strait Islander adult custody population is 4039, up from 3696 in June 2023 and 3727 in December 2023, and
- the number of Aboriginal and Torres Strait Islander adults on remand has also grown significantly (it was 1891 in June 2024, up from 1466 in June 2023 and 1662 in December 2023).⁶⁶

These trends stand in contradiction to the commitments made under the National Agreement on Closing the Gap. Aboriginal and Torres Strait Islander adults make up

⁶⁴ Bureau of Crime Statistics and Research, *New South Wales Custody Statistics* (Quarterly Update: June 2024).

⁶⁵ Ibid.

⁶⁶ Ibid.

3.5 percent of the general population, however Aboriginal and Torres Strait Islander men now account for 31 percent of the adult male prison population, while Aboriginal and Torres Strait Islander women comprise 37.9 percent of the adult female prison population.⁶⁷

Maintaining a connection to both kin and Country is a protective factor for many Aboriginal and Torres Strait Islander people. Despite this, we have observed that many Aboriginal and Torres Strait Islander prisoners are moved off Country and away from their familial supports. This can lead to a damaging disconnection from culture and can create negative outcomes upon release.

Ashan's story

Ashan is an Aboriginal man with an acquired brain injury (ABI), mental health issues and significant childhood trauma.

During his imprisonment, Legal Aid NSW assisted Ashan with securing social housing.

Before prison, Ashan had been residing with his mother, Leonie, on Country in the outskirts of Sydney. Ashan and Leonie were very close, and Leonie was a significant support to Ashan throughout his time in custody.

Ashan was initially placed in a correctional centre that was an hour and a half drive away from where Leonie lived. Despite the distance, Leonie visited Ashan once per week. However, Ashan was then transferred to a regional correctional centre that was a significant distance away from Leonie and Ashan's other support networks. As a low-income family, Leonie lacked the resources to visit Ashan in person when he was moved so she was unable to maintain regular visits.

Leonie wrote to Correctives NSW expressing her concern at Ashan being moved so far away from family and Country. She requested that Ashan be transferred to a Correctional Centre closer to Sydney. Despite her requests, Ashan remained at the regional Correctional Centre.

Ashan felt deeply distressed at being moved so far away from both family and Country.

The Royal Commission into Aboriginal Deaths in Custody (**RCIADIC**) concluded that detainees who have been taken into custody experience distress, isolation, and vulnerability. As such, placing Aboriginal and Torres Strait Islander detainees in cells with other Aboriginal and Torres Strait Islander detainees would be beneficial and help reduce their sense of isolation.⁶⁸

In addition, RCIADIC identified through case studies that solitary confinement causes anxiety for Aboriginal and Torres Strait Islander prisoners and that this needs to be recognised.⁶⁹ The RCIADIC recommended:

⁶⁷ Ibid.

⁶⁸ Department of Prime Minister and Cabinet (Cth), *Review of the implementation of the Royal Commission into Aboriginal Deaths in Custody* (Report, Chapter 7 Prison Safety, August 2018) 280; Australian Government Publishing Service, *Royal Commission into Aboriginal Deaths in Custody. (1991)* (National Report Vol 2.) 33, 114, 119, 122 and 126.

⁶⁹ Ibid

Recommendation 181

That Corrective Services should recognise that it is undesirable in the highest degree that an Aboriginal prisoner should be placed in segregation or isolated detention. In any event, Corrective Services authorities should provide certain minimum standards for segregation including fresh air, lighting, daily exercise, adequate clothing and heating, adequate food, water and sanitation facilities and some access to visitors.

While we understand that Corrective Services NSW has a policy that accords with this recommendation, we are concerned that the policy is not always adhered to. A report recently released by the NSW Ombudsman examined the way in which correctional centres in NSW discipline inmates, and highlighted four case studies of young Aboriginal and Torres Strait Islander prisoners who were improperly confined alone, against recommendations from the RCIADIC and Corrective Services NSW policy.⁷⁰ This is discussed further below at section 3.4.8.

Recommendation 12

- a) Corrective Services NSW should amend part 5.2 of the Overarching Policy for Inmate Classification and Placement to specifically include reference to the proximity of the correctional centre to the inmate's Country.
- b) Corrective Services NSW should amend the Overarching Policy for Inmate Classification and Placement to place a greater emphasis on ensuring Aboriginal and Torres Strait Islander prisoners remain connected to Country and kin when making placement decisions.
- c) Corrective Services NSW classification staff should be provided with training on the importance of connection to Country and kin for Aboriginal and Torres Strait Islander people. If not already undertaken, this training should form part of wider cultural competency training for Corrective Services NSW staff.
- d) To ensure compliance, Corrective Services NSW classification staff should be required to undergo regular refresher training on all classification and placement policies.

3.3 Prisoners with disability and/or health issues

Research and national data confirm that the proportion of people in custody with disability is higher than that of the general population.⁷¹ Rates of intellectual disability, psychosocial disability and acquired brain injury are significantly higher in the prison population than in the general population.⁷² People with disability often have invisible disabilities, which include mental health issues, forms of neurodiversity such as ADHD, dyslexia, autism or significant trauma.

⁷⁰ NSW Ombudsman, *Investigation into Inmate Discipline in NSW Correctional Centres* (Report, 2024).

⁷¹ In 2018 Human Rights Watch reported that almost 50 per cent of Australian prisoners had a disability compared with 18 per cent of the Australian population. The Disability Royal Commission commissioned a report which found that while only 2.9% of people in Australia have an intellectual disability, 15% of people in custody do. That proportion increases to 30 per cent when accounting for borderline intellectual disability.

⁷² Disability Royal Commission, *Final Report* (2023) Vol 8, 35.

Research and national data also confirm that people in custody have a much poorer health profile than the general population.⁷³ Prisoners are a “highly vulnerable patient population whose health needs are often numerous and more complex than the wider community.”⁷⁴ It is common for a person to enter custody with multiple, complex and untreated health issues.

Disabilities and health conditions are very likely underreported because access to assessments, including cognitive assessments, is limited in prison. In addition, it is estimated that there are over 1,000 aged prisoners in custody and this figure continues to increase.⁷⁵

Legal Aid NSW works with people in custody who require disability support. Our lawyers provide specialist NDIS advice, representation to inmates appearing before the State Parole Authority or various courts, as well as representation for forensic patients appearing before the Mental Health Review Tribunal.

Prisoners typically receive healthcare of a lower standard and with more difficulty than the general population, which can further exacerbate the loneliness and isolation that prisoners often experience. Prisoners often experience suboptimal care and delay accessing basic medical care. Common concerns raised by our clients include significant delay in:

- accessing appointments with a nurse, general practitioner, psychiatrist or psychologist
- receiving their prescribed medications, and
- accessing diagnostic tests, facilities or equipment.

We have observed a lack of mental health care in custody for anyone except those who are experiencing an acute episode of a mental illness. This means that issues to do with past trauma, isolation and loneliness are not addressed.

Jett's story

Legal Aid NSW assisted Jett who was serving a sentence of imprisonment.

As a child in youth detention Jett was sexually assaulted by two prison officers. Jett has significant unresolved trauma as a result of this event, and found being in prison again brought up much of this trauma and led to significant distress.

Despite his distress, Jett received limited mental health care while in prison. Jett was prescribed medication for anxiety, however he received no psychological counselling or assistance throughout his nine-year period of imprisonment. This was despite Jett submitting multiple requests for psychological care during this time.

⁷³ See AIHW, *The health of Australia's prisoners* (2015); Anne Grunseit et al, Law and Justice Foundation of New South Wales, *Taking Justice into Custody: The Legal Needs of Prisoners* (2008) 279; Maria Borzycki, Australian Institute of Criminology, *Interventions for prisoners returning to the community* (2005) 34.

⁷⁴ Justice Health and Forensic Mental Health Network, *Overview of our Network* (Web Page, October 2024).

⁷⁵ Based on the Disability Royal Commission's terms of reference, the term 'people with disability' is defined as people with any kind of impairment, whether existing at birth or acquired through illness, accident or the ageing process, including cognitive impairment and physical, sensory, intellectual and psycho-social disability (including mental health issues): *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Interim Report, October 2020) 557.

People with a hearing impairment, particularly those who are Aboriginal and Torres Strait Islander, experience higher rates of imprisonment than other Australians.⁷⁶ Prisoners with hearing impairments, when not provided with appropriate care and equipment, are particularly susceptible to experiencing social isolation and loneliness in prison.

Duy's story

Duy is a client from a culturally and linguistically diverse background who entered custody on remand in May 2019. Duy speaks limited English and is profoundly deaf. Duy needed an interpreter for most interactions to communicate at a basic level.

After entering custody, Duy began lodging 'self-referral request for health review' forms asking to see a doctor about his hearing loss. Duy needed hearing aids to:

- communicate safely and effectively in the prison environment to hear his name being called in his wing or unit, and to understand instructions/directions
- communicate with his criminal lawyer during AVLs
- participate in, and understand, court proceedings via AVL, including his trial in September 2021
- use telephones in prison
- communicate with health staff (Justice Health records confirm these difficulties), and
- engage in psychiatric assessment (a Psychiatric Report notes "there were some limitations as [Duy] is hard of hearing and did not have hearing aids, complicating an AVL assessment with an interpreter").

Duy requested help to obtain hearing aids 29 times between entering custody in 2019 and his release in September 2021. His criminal lawyer made five of those requests on his behalf in writing. Only one of those written legal requests was acknowledged on his medical file. A clinical notation in December 2019 confirmed that Duy was on an ENT (Ear Nose and Throat) waiting list for a hearing check at hospital and that he had already been waiting for 46 days.

Documents obtained by Legal Aid NSW showed no record of contact with an assistive technology provider such as EnableNSW and there was no evidence of steps taken to secure a medical clearance.

Throughout this period, Duy complained to health staff in writing, saying things like "pod officer call my name but I cannot hear it. My cell guy help me hearing call my name" and "when I went to the court I cannot hear what's a judge say". [sic]

When Duy was moved to another Correctional Centre in early 2020, a Clinical Nurse Specialist wrote: "Patient has limited English and I used Google translate."

Following Duy's and Legal Aid NSW's persistent advocacy, Duy received his hearing aids just prior to his release and removal to his home country in September 2021. This

⁷⁶ It is theorised that may be caused by hearing loss impacting on an individual's education, and importantly on their language and behaviour development, all factors which can then become part of a complex pattern of behaviours in individuals, sometimes including social dislocation and high levels of unemployment, which may contribute to higher levels of engagement with the criminal justice system: *Hear Us – Inquiry into Hearing Health in Australia* 41 [4.22].

occurred more than two years after Justice Health and Corrective Services NSW became aware of his disability-related needs.

Duy's case raises issues with the policies and practices designed to support people with disability in custody, which warrant further review. Corrective Services NSW maintains a disability policy which applies to people in custody with both physical and other kinds of disabilities.⁷⁷ Under that policy, the Statewide Disability Service (a branch of Corrective Services NSW) undertakes to supply equipment to assist with program participation and general living.⁷⁸ In Duy's case, it took more than two years to secure the equipment Duy needed to meet his general living needs.

Many prisoners leave custody in poorer physical and mental condition than when they arrived. This can negatively impact their emotional resilience, engagement with services, employment prospects and access to housing, and can increase the likelihood of substance abuse. Each of these factors – alone or in combination – places them at risk of social isolation upon their release into the community. Effective health interventions in prison are therefore vital for rehabilitation and social reintegration.

Recommendation 13

Corrective Services NSW and Justice Health should review their policies on managing and supporting prisoners with disability. The policies should mandate regular reviews of prisoners who require disability supports to ensure those supports are provided as soon as possible after the prisoner's reception into custody, and that the supports remain fit for purpose.

3.4 Non-English-speaking prisoners

Non-English-speaking inmates experience significant isolation in prison due to language barriers. Many spend months in prison with no access to interpreters, often being unable to communicate with anyone. These individuals not only struggle to converse with fellow inmates but also face substantial challenges navigating the phone system to connect with family members overseas.

Tomas's story

Tomas is a foreign national who does not speak English. He is currently in custody on remand awaiting trial at a NSW correctional centre.

Tomas feels isolated as he is unable to communicate with other inmates or Corrective Services NSW staff. His lack of English language skills has limited his job opportunities in custody. He has been unable to get a dictionary or reading materials in his native language. Tomas has had no visitors other than his lawyers.

⁷⁷ Corrective Services NSW, *Custodial Operations Policy and Procedures (COPP)*, 6.9 *Inmates with disabilities* (Web Page, 16 December 2017) <<https://correctiveservices.dcj.nsw.gov.au/csnew-home/correctional-centres/custodial-operations-policyand-procedures-copp.html>>.

⁷⁸ Ibid.

Tomas receives very limited assistance from Correctives Services NSW staff with prison processes, as a result of which he has not been able to access some services.

Tomas is unable to call his family due to the cost of overseas calls. Tomas earns \$30 per week from his prison job to spend on personal items, entertainment packages and phone calls. Each international phone call costs over \$10.

Due to the language barrier, Tomas's family have been unable to navigate the Just Connect system to enable them to book a video call with him.

Pablo's story

Pablo, a foreign national, was arrested upon arriving in Australia on drug trafficking charges. Pablo was bail refused and placed in prison.

With limited English proficiency, Pablo struggled to communicate with those around him in prison.

Legal Aid NSW became involved in Pablo's matter, and his assigned lawyer arranged for an interpreter to assist in a video conference. This allowed the lawyer to obtain instructions regarding Pablo's situation. During the meeting, Pablo repeatedly expressed his gratitude for finally being able to communicate with another person (through an interpreter). He shared that his time in prison had been extremely isolating due to his inability to speak English. He spoke about not being able to advocate for himself, or to navigate the various systems in prisons.

Recommendation 14

- a) Corrective Services NSW should support prisoners who do not speak English to access an interpreter, soon after their reception into custody, to assist them with setting up their phone account to make contact with family members and other supports.
- b) Corrective Services NSW should provide prisoners who do not speak English ongoing, free-of-charge access to interpreters to assist them to navigate the correctional system and to access services available to all prisoners.

3.5 Transgender prisoners

The *Classification and Placement of Transgender Inmates* policy and the *Custodial Operations Policy and Procedures 3.8 – Transgender and Intersex Inmates* (COPP 3.8) provide that a person received into custody must be managed as the gender with which they identify at the time of their incarceration. This often does not occur, meaning transgender prisoners are placed in segregation or not housed in accordance with their identified gender, leading to them being ostracised and abused.

Joanne's story

Joanne is a transgender woman in her 60s who is currently in custody at a NSW Correctional Centre. Joanne was frail and has several health issues, including a recent cancer diagnosis.

Joanne plead guilty to offences in early 2022. Because her entry into custody was expected, Legal Aid NSW wrote to the Classification and Case Management Branch of Corrective Services NSW prior to her sentence date to request that Joanne be classified and placed in a female correctional centre, in accordance with her gender of identification. The letter expressed the view that placing Joanne in a male correctional centre would place her at high risk of sexual and/or physical assaults, and likely cause a significant deterioration of her mental health.

After her sentence Joanne was placed in a male prison. Shortly afterwards Legal Aid NSW received an email from a psychologist who had seen Joanne. This email stated that the psychologist believed that “she is best placed in a female facility where her risk from other inmates could be minimised (as opposed to the reverse)”. Despite this, as at September 2024 Joanne remains housed with the male prison population.

Joanne continues to feel very distressed about being in a male prison and feels socially isolated and unsafe.

Recommendation 15

- a) Corrective Services NSW should amend part 3.2 of the *Inmate Request for Review (Appeal) of Classification and Placement* policy to remove the right to decline a request for a review by a transgender inmate who is not housed in accordance with their identified gender.
- b) Corrective Services NSW should amend part 3.2 of the *Classification and Placement of Transgender and Intersex Inmates* policy to require consideration of the impact of the decision not to place the inmate in a prison of their identified gender on the prisoner’s mental health.

3.6 High risk prisoners

The High Risk Management Correctional Centre (**HRMCC**) within Goulburn Correctional Complex was established in 2001 to house both sentenced and unsentenced inmates deemed to require the highest level of security. Inmates at the HRMCC are typically classified by the Commissioner of Corrective Services NSW as posing a particular risk to national security, or the overall order and security of the facility.

As a result of their security classifications, along with additional security designations, the inmates are subject to very restrictive conditions, including prolonged periods confined to their cells (sometimes up to 23 hours a day), limitations on the number of individuals they can associate with, and restrictions on participating in programs and activities. As a result, these inmates often have very limited contact with other inmates or correctional staff.

Rex’s story

Rex is a prisoner at Goulburn’s HRMCC (area 1). He has been classified by Corrective Services NSW as a national security interest due to his charges.

As a result of his classification, Rex is kept in conditions that amount to solitary confinement. He is unable to socialise with almost all other inmates and gets very little socialisation time. Rex spends his days in his cell alone and is for the most part only able to communicate with Corrective Services NSW staff.

The United Nations Human Rights Committee has raised concerns about prisoners spending extended periods alone in their cells, highlighting this is incompatible with obligations contained in the *International Covenant on Civil and Political Rights*.⁷⁹ Both the *Mandela Rules* and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment stipulate that solitary confinement should be used only as an exceptional measure, implemented as a last resort and for the shortest duration necessary, with minimal deprivation involved.⁸⁰

A report by the Inspector of Custodial Services examining conditions at the HRMCC revealed that inmates could go two weeks without access to an external exercise yard if they had few approved associations or were rarely selected by other inmates.⁸¹ The Inspector recommended that Corrective Services NSW reevaluate their practices to ensure all inmates have equitable opportunities for outdoor exercise and social interactions.

Additionally, the Inspector discovered that inmates at the HRMCC who were not on regular medication or did not have chronic conditions were not consistently reviewed by health staff. The Inspector urged that this issue be addressed, given the known effects of prolonged isolation on mental health. Regular mental health assessments are essential for inmates in HRMCC Areas 1 and 2, particularly those who cannot associate with other inmates due to the assessed risk they pose to themselves or others, or because of lockdowns.

Recommendation 16

Corrective Services NSW should act on the Inspector of Custodial Services' findings and recommendations in its 2022 report regarding the management of prisoners in the High Risk Management Correctional Centre.

3.7 Use of isolation and segregation practices

Inmates are placed in isolation and segregation for various reasons, including when necessary to ensure the safety of others, maintain the security of a correctional facility, or uphold order and discipline within the facility.⁸²

⁷⁹ Human Rights Committee, General Comment 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 44th session (10 March 1992) [6].

⁸⁰ United Nations Standard Minimum Rules for the Treatment of Prisoners, GA Res 70/175, UN Doc A/RES/70/175 (8 January 2016, adopted 17 December 2015) rule 45; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 21st General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Annual Report, 10 November 2011) 39–50. The CPT was created under the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* to monitor the treatment of prisoners in Council of Europe nations and to recommend measures to strengthen protections from torture or other inhuman or degrading treatment.

⁸¹ The Inspection of Goulburn Correctional Centre and the *High Risk Management Correctional Centre Report* (Report, June 2022).

⁸² *Crimes (Administration of Sentences) Act 1999* (NSW) s 10(1).

Isolation and segregation can have negative impacts on the mental health and welfare of prisoners.⁸³ Stewart et al emphasise the distress caused by isolation:

Isolation practices may bear similarities, or be perceived as similar, to solitary confinement, with psychological consequences especially damaging for people with preexisting mental illness. The absence of meaningful social contact, environmental stimuli and engagement in purposeful activities through solitary confinement increases the likelihood of severe psychological distress and adverse outcomes post-release.⁸⁴

In 2007, the World Health Organization (**WHO**) found that rates of self-harm and suicide are higher in solitary confinement:

Three main factors are inherent in all solitary confinement regimes: social isolation, reduced activity and environmental input, and loss of autonomy and control over almost all aspects of daily life. Each of these factors is potentially distressing. Together they create a potent and toxic mix ... Levels of self-harm and suicide, which are already much higher among prisoners than in the general population, rise even further in segregation units.⁸⁵

Recommendation 17

- a) Isolation practices should only be used on prisoners in exceptional circumstances when all other means of mitigating risk to the prisoner and others, including appropriate medical interventions, have been exhausted.
- b) Segregation should only be used on prisoners as a last resort and only for the shortest period of time.

3.8 Improvements to inmate discipline

Under section 53(1)(b)-(c) of the *Crimes (Administration of Sentences) Act*, the governor or a delegate may impose a penalty on a prisoner who is guilty of correctional centre offence.⁸⁶ Penalties can include up to 56 days of deprivation of privileges (including phone calls or contact visits) and/or confinement to their cell for up to seven days. Confinement and withdrawal of phone calls to family and friends should only be used as a last resort.

As noted above, the NSW Ombudsman recently investigated inmate discipline in NSW correctional centres and found a systemic failure to follow the requirements of the legislation and the relevant policies in relation to inmate discipline, as well as

⁸³ See, eg, World Health Organisation, *Preventing Suicide in Jails and Prisons* (Report, 2007) 16, 28; Alison Liebling, *Suicides in Young Prisoners* (1993) 17 *Death Studies* 381, 393; Paolo Roma et al, *Incremental Conditions of Isolation as a Predictor of Suicide in Prisoners* (2013) 233 *Forensic Science International* 1; Senate Select Committee on Mental Health, Parliament of Australia, *Inquiry into the Provision of Mental Health Services* (First Report, 30 March 2006) [13.108]–[13.110].

⁸⁴ Ashleigh Stewart et al, *The Response To COVID-19 In Prisons Must Consider The Broader Mental Health Impacts For People In Prison* (2020) 54(12) *Australian and New Zealand Journal of Psychiatry*. See also Cameron Stewart et al, 'COVID-19 and Australian Prisons: Human Rights, Risks, and Responses' (2020) *Journal of Bioethical Inquiry*.

⁸⁵ World Health Organisation, *Preparedness, Prevention and Control of COVID-19 in Prisons and Other Places of Detention* (Interim Guidance, 15 March 2020) 28.

⁸⁶ *Crimes (Administration of Sentences) Act 1999* (NSW) ss 53(1)(b)-(c).

'maladministration' at all steps in the disciplinary process.⁸⁷ The Ombudsman also found that there was a lack of evidence to prove prisoner wrongdoing in many of the cases reviewed.

Additionally, in relation to the imposition of penalties, the Ombudsman found the following:

- Some inmates were subject to impermissible penalties, including multiple penalties for the same offence and penalties (such as cell confinement and withdrawal of privileges) that exceed the maximum duration of penalties under the legislation.⁸⁸
- Punishments regularly involved phone and contact visit privileges being revoked, despite these being last-resort penalties.
- Young Aboriginal and Torres Strait Islander inmates are being confined to their cells alone as a form of punishment, in contravention of Policy and contrary to the recommendations of the Royal Commission into Aboriginal Deaths in Custody.
- Corrective Services NSW have a policy that purports to mandate cell confinement for all inmates in certain circumstances, without any regard to individual facts (such as inmate vulnerability or risks).⁸⁹ This impermissibly fetters discretion and may be inconsistent in practice with other policies (such as the policy that young Aboriginal and Torres Strait Islander inmates should not be confined to their cell alone).

These findings are concerning. Prisoners, who are already at high risk of social isolation, should not be subject to further isolation and/or an inability to have contact with family and friends, unless there is clear evidence of an offence, and only if it is determined that no other form of punishment is appropriate.

The Ombudsman recommended that Corrective Services NSW undertake comprehensive reform of the inmate discipline framework and processes. Legal Aid NSW supports such a review.

3.9 Improving access to family and friends

3.9.1 In person contact

In our experience, access to family and friends can be difficult while in custody and can contribute to feelings of social isolation and loneliness.

A 2008 study on the role of loneliness in prison suicide emphasised the importance of visits and contact with family to protect against both suicide and mental health issues:

Protective factors are vital components of the pathway model, especially for prisoners who may be vulnerable and are experiencing prison induced stress. Visits and contact with family, support from inmates, Samaritans, staff and prison visitors are examples of contacts that may be protective, although it is likely that it is perceptions of loneliness and social support that

⁸⁷ NSW Ombudsman, *Investigation into Inmate Discipline in NSW Correctional Centres* (Report, 2024).

⁸⁸ *Crimes (Administration of Sentences) Act 1999* (NSW) s 53(1)(b)-(c).

⁸⁹ As per the policy, a checklist that indicates inmates' vulnerability such as Aboriginal and Torres Strait Islander status or history of self-harm were often left missing, blank or incomplete, with 74% of inmates penalised with cell confinement showing these indicators, and in 48% of cases, required notifications to key personnel when confinement is considered for vulnerable inmates were not recorded.

are most important. It appears that family members are one of the most important forms of support available to prisoners.⁹⁰

In person visits are particularly important for prisoners with children. A 2005 study found that “less frequent face-to-face contact with children during maternal incarceration was associated with mothers’ symptoms of depression, highlighting the importance of current relationship processes for women’s psychological well-being”.⁹¹

Claire’s story

Claire was a single mother with the sole care of two young children.

In April 2021 Claire plead guilty to an offence involving a Centrelink fraud. Claire was unexpectedly sentenced to imprisonment.

Claire had been the victim of domestic violence and there was an ADVO preventing the children’s father from residing with his children. Therefore, while Claire was in custody, her mother, an elderly woman with a physical disability, was required to care for the children.

Claire spent 12 months in custody. During this time her children were unable to visit her in person due to restrictions on in person visits caused by the COVID 19 pandemic.

During this period Claire experienced severe emotional distress at not being able to see her children. This distress was in addition to the loneliness and social isolation she was already feeling in the custodial environment.

3.9.2 Phone contact

In September 2020 amidst the COVID-19 pandemic, Corrective Services NSW began rolling out the use of tablets in prisons. The use of tablets is intended to enhance rehabilitation outcomes, to normalise use of technology, to allow connection to culture and family, community, to promote autonomy and to improve digital literacy.⁹²

The rollout includes two different tablet solutions:

1. Video conference tablets: These are free of charge to prisoners and their families, and are used exclusively for video conferencing which occurs under supervision.⁹³ Video conferences are particularly important for those who are housed too far from family for face-to-face visits to occur.

We strongly support the use of video conference tablets, however we note the following concerns raised by our clients:

⁹⁰ Samantha Brown and Andrew Brown, The Role of Loneliness in Prison Suicide Prevention and Management (2008) 47 *Journal of Offender Rehabilitation* 443.

⁹¹ Julie Poehlmann, Incarcerated Mothers’ Contact with Children, Perceived Family Relationships, and Depressive Symptoms (2005) 19 *Journal of Family Psychology* 350, 355.

⁹² Parliament of NSW, *Use of Tablets in Prisons* (Web Page, 23 October 2024)

<[⁹³ Ibid.](https://www.parliament.nsw.gov.au/lc/papers/pages/qanda-tracking-details.aspx?pk=95057#:~:text=By%20end%20of%202023%20there%20will%20be%20over,tablets%20with%20one%20device%20available%20to%20each%20prisoner.></p></div><div data-bbox=)

- Video conference visits are frequently cancelled by prison staff, and when visits are cancelled, prisoners are required to book the next available appointment, which can be months away.
 - There are many in custody whose family members are elderly and/or unable to use technology, and who are therefore unable to utilise these visits.
 - Due to high demand most prisoners are unable to book video conferences with family and friends more than once per month.
2. In-cell tablets: These are used by prisoners in their cells and have a greater range of functionality that includes audio telephone communication with approved family, friends and legal practitioners.

These tablets play an important function in facilitating greater contact with legal representatives, families and friends and allow those in custody to make calls later in the evening which is so important for those with school aged children and those with partners or family who work and cannot take calls during work hours. It also allows inmates not to have to give up a day's employment in order to access the yard phones if no phone is available at their place of employment.

They also allow inmates to access library services, various informational materials, paid entertainment content such as movies, music, e-books and games and a self-service kiosk that allows inmates to see their account balances, program schedules and court appearances. A new Learning Management System is currently being trialled at two correctional centres that provides a platform for delivering interactive educational and behaviour change content to inmates.⁹⁴

Access to in-cell tablets varies across correctional centres. On average inmates have access to tablets for 16 hours per day from 3pm to 7am, with telephone calls via the Offender Telephone System available until 10pm.⁹⁵

We recognise the benefits afforded to prisoners through the provision of tablets, especially in terms of enhancing prisoners' ability to have contact with their family. We therefore strongly support the use of in-cell tablets in all NSW correctional centres and recommend the rollout to all prisoners in NSW.

However, we note that the cost of phone calls can be prohibitive for some prisoners and act as a barrier to regular contact with family. Corrective Services NSW covers the cost of three personal local calls per week for unsentenced inmates, and one personal local call per week for sentenced inmates.⁹⁶ The cost to a prisoner of a 10-minute call to a mobile phone number is \$2.60.⁹⁷

⁹⁴ Ibid.

⁹⁵ Ibid. Question asked on 5 June 2023 (session 58-1) and published in Questions & Answers Paper No. 20 and Answer received on 27 June 2023 and published in Questions & Answers Paper No. 35.

⁹⁶ Ibid.

⁹⁷ Ibid.

3.9.3 Improving public transport to prisons

Many prisons are located in regional areas that are difficult to access by public transport. Clarence Correctional Centre, for example, is located 12 kilometres southeast of the regional town of Grafton. It is approximately six hours' drive from Sydney. There is no public transport offered from Grafton (where the train stops) to the prison. The prison's website states:

Grafton train station is located at Crisp Ave, South Grafton, and is part of the NSW TrainLink. The station is 30 minutes' drive to the centre. Grafton is also serviced by Rex airlines and has a fleet of taxis.⁹⁸ (*Emphasis added*).

This means even if family members can get public transport to Grafton, they would either need to walk the 12 kilometres or catch a taxi (which would often be cost prohibitive) to the centre. In effect, many family members are simply unable to visit their loved ones in prison.

Recommendation 18

- a) The NSW Government should provide additional resources to Corrective Services NSW to enhance prisoners' access to tablets and reduce wait times.
- b) Corrective Services NSW should review the current prices for prisoners' calls and explore lower-cost options.
- c) Corrective Services NSW should investigate options and strategies to facilitate greater access between incarcerated mothers and their children.
- d) The NSW Government should review the availability of public transport to correctional facilities and establish services where none exist or where existing services are inadequate.

4. High risk offenders

High risk offenders subject to extended supervision orders (**ESOs**) are deemed to pose a risk of committing further serious offences⁹⁹ and are therefore supervised by Community Corrections after the expiration of their full sentence.¹⁰⁰ Although the high risk offenders scheme was initially designed to capture a small group of offenders, over the years its scope has broadened significantly.¹⁰¹ Marginalised groups, such as Aboriginal and Torres Strait Islander people and those with disabilities, have been increasingly drawn into the scheme.

⁹⁸ Corrective Services NSW, Clarence Correctional Centre (Web Page, 23 October 2024) <<https://correctiveservices.dcj.nsw.gov.au/correctional-centres/find-a-correctional-centre/clarence-correctional-centre.html>>.

⁹⁹ See *Crimes (High Risk Offenders) Act 2006* (NSW) ss 5B-5C. For terrorism related ESOs see *Terrorism (High Risk Offenders) Act 2017* (NSW) ss 20, 34.

¹⁰⁰ *Ibid*.

¹⁰¹ The most recent published annual report of the Serious Offenders Review Council (in 2018) indicates that "serious offenders" within the definition of s 3 *Crimes (Administration of Sentences) Act 1999* (NSW) were 10.6% of all sentenced inmates, totalling 914 persons, presumably at that point in time. It is unclear how many of these offenders could be the subject of a high risk offender application, but it does highlight the potential for a continued growth in the number of high risk offender applications.

Legal Aid NSW's High Risk Offender Unit represents defendants in applications for post-sentence ESOs. As the only agency funded to appear on behalf of high risk offender defendants, Legal Aid NSW has relevant specialist expertise and is often the only stakeholder advocating for the rights of defendants in these matters.¹⁰²

Offenders subject to ESOs can be subject to up to 50 conditions at any given time. These conditions prohibit or limit a wide range of conduct, much of which would otherwise be lawful, and often restrict who they may associate with and where they may reside, which can be far from their family, community, Country and support networks. The conditions are aimed at reducing the risk of future offending¹⁰³ and do not need to have any bearing on the offender's rehabilitation or reintegration needs, cognitive capacity or disabilities.

The punitive nature of ESO conditions makes reintegrating into society particularly challenging, exacerbating social isolation by significantly limiting access to pro-social activities and supports essential for rehabilitation. In our experience, offenders are frequently afraid of breaching their conditions, and thus withdraw further from society to avoid potential further imprisonment.

Research by the Behavioural Insights Unit found that reducing the social isolation felt by high risk offenders may result in better compliance with their orders, enhancing the overall effectiveness of the scheme. Access to pro-social activities, community connections and family support can provide stability and meaning, which in turn can help high risk offenders to comply with their orders.

Recommendation 19

- a) Corrective Services NSW should ensure that the conditions attached to an extended supervision order, as well as policies and procedures employed to facilitate compliance, recognise and support offenders' individual needs, family and kinship connections, and in relation to Aboriginal and Torres Strait Islander offenders, their connection to Country.
- b) In the interest of transparency, Corrective Services NSW policies and procedures for managing high risk offenders should be made publicly available.

5. People with disability and/or mental health conditions

Legal Aid NSW works closely with clients with disability across the full range of our services. We recently launched a new Disability Legal Support Service within our Civil Law Division, offering trauma-informed legal assistance to people with disability, their families, and carers. This service addresses issues related to the NDIS, healthcare in

¹⁰² Legal Aid NSW's High Risk Offender Unit also acts for persons subject to post-sentence applications pursuant to Division 105A of the *Commonwealth Criminal Code Act 1995* (Cth). Some of our concerns in relation to this jurisdiction can be found in our submission to the Independent National Security Legislation Monitor- Legal Aid NSW, submission No 18 to Independent National Security Legislation Monitor, *Division 105A of the Criminal Code* (June 2022) <<https://www.inslm.gov.au/sites/default/files/2022-06/legal-aid-nsw-submission.pdf>>.

¹⁰³ *Wilde v State of New South Wales* [2015] NSWCA 28 [53] (Beazley P, McColl JA and Ward JA).

prisons, housing, and discrimination, and also provides advocacy for clients with social needs.

Legal Aid NSW recognises that people with disability come from diverse cultural backgrounds and have unique needs, priorities, and perspectives shaped by factors such as age, gender, sexual orientation, race, and linguistic background. We acknowledge the wide-ranging diversity in the experiences of people with disability.

While many people with disability face loneliness and social isolation, Legal Aid NSW acknowledges that the introduction of the NDIS funding for social and community participation has made a significant positive difference to many of our clients. Social and community participation is essential to our clients' wellbeing, and, on that basis, we strongly support the continuation of NDIS funding for these purposes.

6. Economically disadvantaged people

Low socioeconomic status can contribute to social isolation.¹⁰⁴ A report by the Social Policy Research Centre at UNSW found that significant portions of vulnerable groups experience social exclusion, with many lacking regular social contact, not participating in community activities, and unable to afford social outings with friends.¹⁰⁵

Disadvantage extends beyond just income and involves a complex set of barriers that hinder full social and economic participation.¹⁰⁶ Unemployment is one such barrier, often intertwined with issues like inadequate mental health care, substance misuse, and homelessness. When these challenges are combined and left unresolved, they can have a cumulative effect, leading to entrenched, intergenerational disadvantage.¹⁰⁷

Research by organisations such as the Centre for Policy Development has explored the relationship between disadvantage and the criminal justice system. Their findings suggest that disadvantaged individuals' involvement in the criminal justice system exacerbates existing disadvantage, creates new obstacles, and traps increasing numbers of Australians, their families, and communities in cycles of hardship.¹⁰⁸

6.1 Criminal convictions

Criminal convictions disproportionately impact economically and socially disadvantaged people as their already limited employment and social opportunities are further reduced upon conviction. The impact of criminal convictions on a person's future outcomes and wellbeing can be wide-ranging and prolonged, in a way that is disproportionate to the

¹⁰⁴ See, eg, Senate Community Affairs Reference Committee, Parliament of Australia, *A Hand Up Not a Hand Out: Renewing the Fight against Poverty* (Report, 2004).

¹⁰⁵ Peter Saunders, Yuvisthi Naidoo and Megan Griffith, *Towards New Indicators of Disadvantage: Material Deprivation and Social Exclusion* (Social Policy Research Centre Report, November 2007) 80.

¹⁰⁶ R McLachlan, et al, *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* (2011.0, 2018).

¹⁰⁷ *Ibid* 94.

¹⁰⁸ Centre for Policy Development, *Partners in Crime: the relationship between disadvantage and Australia's criminal justice systems* (Report, December 2020) 6.

harms caused by the actual conduct.¹⁰⁹ This is particularly apparent for those convicted of drug possession for personal use (“**simple possession**”).

In its final report, the Ice Inquiry noted that:

Contact with the criminal justice system, including having a criminal conviction... is directly associated with adverse impacts on employment, earning prospects, access to housing, access to treatment, relationships and wellbeing. The criminalisation of simple possession is a powerful source of stigma, which has a serious impact on the physical and mental health of people who use drugs, as well as their willingness to seek help.¹¹⁰

In our experience, convictions for drug possession can often lead to loss of employment. Work fulfils more than a transactional economic function in people’s lives. It can provide a sense of belonging, connection and friendship. When people lose their job, they lose a connection to a community that they may have been a part of for many years.

Recommendation 20

The NSW Government should decriminalise simple possession.



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¹⁰⁹ Legal Aid NSW, *Submission to the Special Commission of Inquiry into the Drug ‘Ice’, Issues Paper 2 – Justice* (May 2019); see also Legal Aid NSW, *Submission to NSW Parliament Legislative Council, Inquiry into the provision of drug rehabilitation services in regional, rural and remote NSW* (December 2017) and Legal Aid NSW, *Submission to the NSW Legislative Council Portfolio Committee No. 1 Premier and Finance, Inquiry into the impact of the regulatory framework for cannabis in NSW* (May 2024).

¹¹⁰ D Howard, *Report of the Special Commission of Inquiry into crystal methamphetamine and other amphetamine-type stimulants* (Final Report, 2020) Vol 1a, xxxiv.