THE LAW SOCIETY
OF NEW SOUTH WALES

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30 May 2018

Ms Elspeth Dyer
Committee Manager
Legislative Assembly
Committee on Law and Safety
Parliament House
6 Macquarie Street
Sydney NSW 2000

By email: lawsafety@parliament.nsw.gov.au

Dear Ms Dyer,

Committee on Law and Safety – Inquiry into the adequacy of youth diversionary programs in NSW – 10 May 2018

The Law Society gave evidence to the Committee on Law and Safety ("Committee") on 10 May 2018 at a public hearing in relation to the Inquiry into the adequacy of youth diversionary programs in NSW ("Inquiry"). I appeared on behalf of the Law Society as a witness, together with Jane Irwin, member of the Children's Legal Issues Committee.

Two of the Committee's questions were taken on notice by the Law Society at the public hearing. On 15 May 2018, the Committee wrote separately to the Law Society requesting responses to three additional questions. The Law Society's responses are set out below.

A. Questions on notice

1. **At page [58] of the transcript of the Inquiry dated 10 May 2018, Mr Edmond Atalla asked:**

   Turning to the subject of the Youth Koori Court that you mentioned, we have heard about its success. Is there any data that can give us a direct comparison for 100 Indigenous people that appear before the Youth Koori Court, how many of those – how much percentage – end up in a detention centre versus 100 Indigenous people.

   The Law Society is not aware of whether the type of statistical collection and analysis, which the Committee member refers to, has been conducted in relation to the Youth Koori Court.

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We commend to you a research report *Youth Koori Court: review of Parramatta Pilot Project,* released in May 2018 by Western Sydney University, which found that the young people who engaged with the Youth Koori Court were less likely to end up in detention. The research report found that of the 33 young people involved in the study each spent on average 25 days in custody during their Youth Koori Court period, compared to 57 days in custody in the equivalent period beforehand.[1]

2. **At page [61] of the transcript of the Inquiry dated 10 May 2018, Ms Jenny Leong asked:**

   I am happy if you want to take this question on notice. Given the interest of the Committee has been focused on the STMP program, you mentioned that the program involves excessive police contact before them being charged with an offence. It would be appreciated if you could give the Committee some case studies or examples how you believe as a society your members have experienced this.

   We note that due to confidentiality and ethical considerations the Law Society is currently unable to provide case studies from its members. However, the Law Society refers to the de-identified case studies in the report *Policing Young People in NSW: a study of the Suspect Targeting Management Plan*[2] by the Youth Justice Coalition and the Public Interest Advocacy Centre and notes that these examples are representative of some members' experiences with clients on the Suspect Targeting Management Plan program.

B. Additional questions

1. **You have argued for the adoption of the Victorian Education Justice Initiative in NSW (submission 26, Law Society, p 13).**

   - **What led you to make this recommendation?**

   In the Law Society's submission, we referred to research that increasing a person's education attainment level is the most effective way to reduce the risk factors associated with criminal behaviour.[3] We also note that education is a protective factor for children. We are concerned about reports that there are high numbers of children coming before the NSW Children's Court who are disengaged from formal education.

   The Law Society recommends the adoption of the Victorian Education Justice Initiative ("EJI") in NSW because we are of the view that having an officer from the NSW Department of Education based at the Children's Court may assist children re-engage with education and training programs.

   The Law Society is also aware of positive evaluations of the EJI. We note that the Victoria Institute report *Education at the Heart of the Children's Court: Evaluation of the Education Justice Initiative: Final Report* concluded that the EJI fulfils a vital service

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[1] Western Sydney University, *Youth Koori Court: Review of Parramatta Pilot Project,* May 2018, 17, available at: https://www.westernsydney.edu.au/__data/assets/pdf_file/0008/1394918/YKC_review_Oct_24_v2.pdf

[2] Youth Justice Coalition, *Policing Young People in NSW: A Study of Suspect Targeting Management Plan,* 25 October 2017, 20-24, available at: https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf.

[3] Law Society of NSW, *Inquiry into the adequacy of youth diversionary programs in NSW,* 20 February 2018, 12, available at: https://www.parliament.nsw.gov.au/ladocs/submissions/59993/Submission%2026.pdf

within the Children's Court and has substantial value for young people and their families.[4] Of the group of 103 young people who the EJI made contact with, 68 became 'full clients' of the EJI and as of 30 June 2015, 75 per cent had been re-engaged with education.[5]

When interviewed about the EJI the former President of the Melbourne Children's Court Judge Couzens made the following comments:

> I don't talk about expenditure, I talk about investments. I think everyone knows from the publicity that appears from time to time, the cost of incarcerating either adults or children is huge. So the more you can do, particularly with young people, to rehabilitate them, the fewer will graduate into adult crime and the less the community will have to pay, it's simple.[6]
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> ...
>
> I can't speak highly enough of the importance of this program, not just for Koorie children, but for all children who come before the Court because almost without exception they're either totally or partly disengaged from education. ... I strongly believe that education is arguably the most important form of rehabilitation.[7]
>
> ...
>
> We've been crying out for this presence for as long as I can remember, it's so crucial.[8]

Moreover, the 2017 Victorian Ombudsman's report *Investigation into Victorian government school expulsions* described the EJI as a successful effort to re-engage students and reduce expulsions.[9]

We continue to support the adoption of the EJI in NSW, and we note that Judge Johnstone, President of the NSW Children's Court, has also endorsed the initiative as an "innovative demonstration of diversionary processes in parallel with court processes" that "would be of significant benefit to children and young people in NSW."[10]

2. You support increasing the age of criminal responsibility from 10 years, to 12 or 13 years.

- **Given that there have been cases of extremely serious offending by children under the age of 12, how do your recommendations sit with other considerations like community safety and the prevention of vigilante activity in such cases? (submission 26, Law Society, p 6).**

We acknowledge that the criminal justice system must draw a balancing act between the rights of the individual against the rights of the community. In our submission, we noted that our recommendation to increase the age of criminal responsibility for children is influenced by:

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[4] The Victoria Institute, *Education at the Heart of the Children's Court: Evaluation of the Education Justice Initiative: Final Report,* 2017, 55, available at: https://www.vu.edu.au/sites/default/files/victoria-institute/pdfs/Education-at-the-Heart-of-the-Children%27s-Court-Final-Report-web.pdf
[5] Ibid vii.
[6] Ibid 48.
[7] Ibid viii.
[8] Ibid 43.
[9] Victorian Ombudsman, *Investigation into Victorian government school expulsions,* 2017, 88, available at: https://www.ombudsman.vic.gov.au/getattachment/57d918ec-fee0-48e0-a55e-87d0262d3c27
[10] Children's Court of NSW, *Updates in the Children's Court Jurisdiction,* 24 February 2018, 9, available at: https://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0020/28541/CLS-conference-Judge-Johnstone-presentation-2018.pdf

1. the need to align Australian law with international good practice; and
2. the scientific evidence regarding a child's brain development on their ability to understand the consequences of their actions.

For children under the age of 12 or 13, we submit that many of the concerns regarding a young offender's ongoing risk to community safety can be addressed through targeted interventions focusing on the child's criminogenic needs (such as cognitive impairment, mental illness and social and welfare concerns). In terms of the actual risk posed to the community, we refer to research indicating that across Australia "very serious offences (such as homicide and sexual offences) are rarely perpetrated by juveniles".[11] In our experience in NSW, the frequency of children under 13 committing "very serious offences" is virtually non-existent.

3. **The President of the Children's Court has advocated for a power to refer a child in the criminal justice system to the care and protection system (submission 19, President, Children's Court, pp 14-15).**

   - **Do you have any comment?**
   - **Should the care and crime jurisdictions of the Children's Court be merged?**

   We do not believe that the crime and care jurisdictions of the Children's Court should be merged. A former Senior Children's Magistrate, Rod Blackmore, wrote about the criticism of the old *Child Welfare Act 1939* (NSW) and the merging of care and criminal matters, because "children thought to be 'neglected' or 'uncontrollable' were dealt with by Children's Courts in almost indistinguishable ways from offenders and the powers of the court almost coincided to the point of absurdity."[12] We also note the views of Dr Kath McFarlane that, historically, where the care and crime jurisdictions were merged in NSW, children in need of care and protection were regarded as criminals,[13] and that this perspective prevailed for many years.[14] We also refer to Dr McFarlane's observations about how "the criminalising effect of being detained in gaol-like institutions undoubtedly had a profound psychological impact on many children who had never committed an offence."[15] It is our view that cases relating to children in need of care (which are civil proceedings) should, in the vast majority of cases, be separated from those relating to children who are alleged to have committed offences.

   However, we do see merit in scrutinising the problem identified by Judge Johnstone, that is, that children and young people in need of care and protection are overrepresented in the Juvenile Justice system, and these issues are often connected. For example, young offenders who have nowhere to live are at greater risk of being bail refused for welfare reasons and being detained in Juvenile Justice centres. As such, Juvenile Justice centres may be being used as a quasi-care placement. Section 28(5) of the *Bail Act 2013* (NSW) ("the Bail Act") attempts to address this problem to some degree by compelling the relevant Government Department to assist in finding accommodation for a young person who is homeless and in custody because of an allegation of offending.

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[11] Kelly Richards, 'What Makes Juvenile Offenders Different from Adult Offenders?' (Trends and Issues in Crime and Criminal Justice No 409, Australian Institute of Criminology, February 2011) 3.
[12] Rod Blackmore, 'The Children's Court and Community Welfare in NSW,' 1989, Longman Cheshire, Melbourne, 105.
[13] Kath McFarlane, *'Care-criminalisation': the involvement of children in out of home care in the NSW criminal justice system* (unpublished thesis), 2016, available at: http://www.unsworks.unsw.edu.au/primolibrary/libweb/action/dlDisplay.do?vid=UNSWORKS&docId=unsworks38185
[14] Ibid 42 – 55.
[15] Ibid 50.

In those matters where young people are accused of serious offences and there are valid bail concerns, the options available to mitigate those bail concerns by the imposition of bail conditions become seriously compromised when a young person is homeless. Despite section 28(5) of the Bail Act, in the experience of our members, without appropriate funding to services and resources for homeless children and young people, this problem continues.

We understand that Judge Johnstone discusses the option of a "secure welfare power" in extreme cases "where a child or young person is putting themselves or others at risk and requires intensive care".[16] We believe that it is preferable that these children are placed in a secure welfare facility, rather than a Juvenile Justice centre. However, we caution that protections must be built into the legislation to ensure that this only applies to the most extreme cases of alleged offending and risk.

We also note Judge Johnstone's submissions that relate to a power to divert a child or young person from the criminal courts to the care courts in similar terms as section 74K of the *Court Procedures Act 2004* (ACT).[17] On the face of it, this appears to be a power to divert those appropriate cases from the criminal jurisdiction to the care jurisdiction where the primary issue in terms of the alleged offending relates to the welfare of the child or young person. We see merit in adopting a diversionary option in these circumstances, where the Children's Court has the power to dismiss the offence and divert the child or young person from the criminal court to the care jurisdiction.

Should you have any questions or require further information, please contact Amelia Jenner, Policy Lawyer on (02) 9926 0275 or email amelia.jenner@lawsociety.com.au.

Yours sincerely,

Doug Humphreys OAM
President

[16] Children's Court of NSW, *Inquiry into the adequacy of Youth Diversionary Programs in NSW,* 8 February 2018, 15, available at: https://www.parliament.nsw.gov.au/committees/DBAssets/InquirySubmission/Body/59799/Submission%2019.pdf.
[17] Ibid.