



THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: CLC/CLIC/IIC/HRC:BMcd270924

27 September 2024

Dr James Popple
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Law Council of Australia
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By email: Ashna.Taneja@lawcouncil.au

Dear Dr Popple,

Senate Inquiry into Australia's youth justice and incarceration system

Thank you for the opportunity to provide input to inform a Law Council of Australia submission to the Senate Legal and Constitutional Affairs References Committee, regarding their Inquiry into Australia's youth justice and incarceration system (**Senate Inquiry**). We support measures to improve youth justice, and the wellbeing of children and young people, and offer the following comments for your consideration in developing a submission to the Senate Inquiry.

Inquiry into community safety in regional and rural communities

We advise that the NSW Legislative Assembly is currently conducting an Inquiry into community safety in regional and rural communities (**Legislative Assembly Inquiry**), which has a focus on children and young people who may interact with the criminal justice system. Our submission to the Legislative Assembly Inquiry, dated 30 May 2024, provided comment on several items that are also relevant to the Terms of Reference for the Senate Inquiry, including:

- The urgent need for meaningful action to be taken to meet requirements under the National Agreement on Closing the Gap.
- Evidence-based approaches to supporting young people who may interact with the criminal justice system, such as investment in communities, early intervention, strengthening school capabilities, investing in out-of-home care reform, bail reform and reform of the *Young Offenders Act 1997* (NSW), including increased diversionary measures.
- Detail about early intervention programs available in NSW, and on bail support and accommodation initiatives.

We **enclose** this submission for your consideration in developing the Law Council's submission to the Senate Inquiry.

Scope for national leadership

Further, while issues related to youth justice and incarceration fall largely within the remit of the states and territories, we agree that there remains scope for the Commonwealth Government to provide national leadership, and take action in ways relevant to the Terms of Reference for the Senate Inquiry.

In our view, this includes implementing recommendations in respect of youth justice and incarceration contained in recent reports, including recommendations contained in Volume 8 of the Final Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, and recommendations contained in the Australian Law Reform Commission report, *'Help way earlier!' How Australia can transform child justice to improve safety and wellbeing*, such as:

- Australian Governments establishing a National Taskforce for reform of child justice systems
- The Australian Government establishing a Ministerial Council for Child Wellbeing
- The Australian Government legislating a National Children's Act, as well as a Human Rights Act, incorporating the Convention on the Rights of the Child.

We also consider there to be a significant role for the Commonwealth Government to play, particularly in respect of addressing the overincarceration of Aboriginal and Torres Strait Islander children, through comprehensive and ongoing investment in National Aboriginal and Torres Strait Islander Legal Services (**NATSILS**), and other evidence-based front-end approaches to supporting children and young people, including effective educational supports, cultural safety, and family and community support services. In our view, the content, findings, and recommendations provided in the Final Report of the Independent Review of the National Legal Assistance Partnership 2020-25 continue to be a source of substantial evidence of the need for, and value of, such investment.

There may also be value in the Commonwealth Government facilitating and promoting information sharing across jurisdictions about effective services and early intervention initiatives that work to prevent and reduce youth contact with the criminal justice system, and measures implemented to support NATSILS, and associated Aboriginal community controlled therapeutic service providers, to thrive, including methods to achieve staff retention in regional, rural and remote areas.

Action to ensure compliance with international obligations

In our view, the Commonwealth Government is well placed to take meaningful action to ensure compliance with international obligations related to youth justice and incarceration, including obligations under the international instruments highlighted below for the Law Council's consideration.

Convention on the Rights of the Child (**CRC**)

In supporting just outcomes for Australia's youth, including in the incarceration system, we consider it essential that the Commonwealth Government ensures compliance with obligations under the CRC. We consider meaningful commitment to Article 37 of the CRC to be a priority in respect of ensuring just outcomes for children and young people interacting with the criminal justice system.

Solitary confinement and other degrading treatment

Article 37(a) provides that ‘no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.’ In 2019, the UN Committee on the Rights of the Child published a general comment on children’s rights in the child justice system which noted that:

Disciplinary measures in violation of article 37 of the Convention must be strictly forbidden, including corporal punishment, placement in a dark cell, solitary confinement or any other punishment that may compromise the physical or mental health or well-being of the child concerned...¹

The UN Committee on the Rights of the Child further confirmed that ‘solitary confinement should not be used for a child.’²

We are concerned that continuing practices in some Australian youth detention facilities, including the use of solitary confinement,³ are in violation of our obligations under Article 37 of the CRC. While no jurisdiction uses the term ‘solitary confinement’ in youth justice legislation, authorised forms of isolation including ‘separation’,⁴ ‘segregation’,⁵ and ‘confinement’⁶ may in practice amount to solitary confinement as defined by international law.⁷ We note the finding of the Disability Royal Commission that ‘too often decisions that lead to the isolation of children are not made lawfully’.⁸

We would support Commonwealth action and leadership in respect of this issue, including consideration of the development of national minimum standards for youth detention facilities that include a prohibition on disciplinary measures in violation of article 37 of the CRC, and better defining and regulating the use of practices that may amount to solitary confinement.

Detention as a last resort

Article 37(b) provides that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

We are concerned that recent developments in criminal law reform and policy demonstrate a departure from this principle. For example, the *Bail and Crimes Amendment Act 2024* (NSW), assented to in May 2024, made amendments to the *Bail Act 2013* (NSW) that limited grants of bail for young persons charged with certain offences. The amendments introduced a more stringent test for bail of young people in certain circumstances than applies to adults. In our view, the amendments significantly risk the incarceration of children and young people who would not otherwise have been incarcerated, and are inconsistent with the Article 37 of the

¹ Committee on the Rights of the Child, General Comment No. 24 (2019) on children’s rights in the child justice system, *United Nations*, 18 September 2019, [95(g)].

² Committee on the Rights of the Child, General Comment No. 24 (2019) on children’s rights in the child justice system, *United Nations*, 18 September 2019, [95(h)].

³ Child Death Review Board, Chapter 3 of the [Annual Report 2022-23: A report on the operations and systemic findings of the Queensland Child Death Review Board](#), March 2024.

⁴ See for example section 16, *Children (Detention Centres) Act 1987* (NSW)

⁵ See for example section 19, *Children (Detention Centres) Act 1987* (NSW)

⁶ See for example section 21(d), *Children (Detention Centres) Act 1987* (NSW) (Punishments for misbehaviour).

⁷ United Nations Office on Drugs and Crime, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, General Assembly resolution 70/175, annex, adopted on 17 December 2015, rule 44.

⁸ *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, October 2023) Vol 8 Volume 8, 8.

CRC and the principle of using detention as a last resort.⁹ We also note with concern propositions to remove 'detention as a last resort' for young people in Queensland.¹⁰

In our view, commitment to Article 37(b) and ensuring that the arrest, detention or imprisonment of a child is only used as a measure of last resort is essential to protecting the human rights and wellbeing of children in Australia, and would support consideration of action by the Commonwealth Government to ensure national compliance.

Minimum age of criminal responsibility

In their 2019 General Comment, the UN Committee on the Rights of the Child noted that:

Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. **States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age.** (emphasis added)¹¹

We are concerned that Australia is not one of the more than 50 State parties who raised the minimum age following ratification of the Convention, and is yet to adopt the Committee's recommendation to increase the minimum age of criminal responsibility to at least 14 years of age, five years on from publication of the General Comment.

In NSW, the minimum age of criminal responsibility is 10 years of age pursuant to section 5 of the *Children (Criminal Proceedings) Act 1987* (NSW). We note that most children aged 10-13 years that are charged are charged with non-violent offences, and are concerned that significant injustice occurs as a result, including disproportionately adverse outcomes for Aboriginal and Torres Strait Islander children and children living in regional, rural and remote locations. The Bureau of Crime Statistics and Research recently published a paper, 'The involvement of young people aged 10 to 13 years in the NSW Criminal Justice System',¹² which highlighted such concerns, finding that:

- 41.3 percent of young people aged under 14 years who were legally proceeded against by police at least once in 2023 were Aboriginal.
- The rate of legal proceedings against young people under 14 years of age was more than three times as high in regional/remote/very remote areas compared with major cities.

We continue to support raising the minimum age of criminal responsibility to 14 years.

Optional Protocol to the Convention against Torture (OPCAT)

The Law Society remains concerned that, notwithstanding the Commonwealth Government's ratification of OPCAT in 2017, a number of states, including NSW, have not yet designated a

⁹ Law Society of NSW [Open letter to Members of the Legislative Council](#), *Bail and Crimes Amendment Bill*, 20 March 2024.

¹⁰ Eden Gillespie, 'Queensland to ditch detention as last resort approach to youth crime', *The Guardian*, 26 March 2024.

¹¹ Committee on the Rights of the Child, General Comment No. 24 (2019) on children's rights in the child justice system, *United Nations*, 18 September 2019, [22].

¹² BOCSAR, ['The involvement of young people aged 10 to 13 years in the NSW criminal justice system'](#), 14 August 2024.

National Preventive Mechanism (**NPM**). NPMs undertake functions that, in our view, are particularly relevant to youth justice outcomes, including to examine the treatment of, and conditions experienced by, incarcerated children and young people, and to identify processes that may lead to harm or torture.

The Australian Human Rights Commission recommended that “Governments resource NPMs sufficiently to allow them to effectively fulfil their OPCAT functions, including the outward-facing functions contained in the ‘preventive package.’” However, we understand that a key obstacle for a number of states, including NSW, to progressing this issue is a continued lack of an intergovernmental agreement on funding.¹³

We also note with concern the related decision of the UN Subcommittee on the Prevention of Torture to suspend its visit to Australia in 2022, following NSW resistance to facilitating the Subcommittee’s access to places of detention.¹⁴

In light of these issues, we would support Commonwealth commitment to an appropriate share of funding to ensure that States move forward on implementing the OPCAT without further delay, including to avoid, among other things, another UN Subcommittee inspection being suspended.

We appreciate the opportunity to provide input with respect to the Terms of Reference for the Senate Inquiry and look forward to further opportunities to assist as this work progresses. If you have any questions in relation to this letter, please contact Claudia Daly, Policy Lawyer on (02) 9926 0233 or by email: claudia.daly@lawsociety.com.au.

Yours sincerely,



Brett McGrath
President

Encl.

¹³ Australian Human Rights Commission, [Road Map to OPCAT Compliance](#), 17 October 2022, p. 12, citing the following references at footnote 26: The Hon. Mark Speakman. Budget Estimates 2021 Questions Taken on Notice Portfolio Committee No. 5 – Legal Affairs (26 March 2021), Question 14, 35; The Hon. Elise Archer. House of Assembly Estimates Committee B. (8 September 2021), 25; Jack Latimore. “Deaths in custody oversight missing as government deadline passes.” The Sydney Morning Herald (20 January 2022); Parliament of Victoria Legislative Council Legal and Social Issues Committee. Inquiry into Victoria’s criminal justice system Volume 2 (March 2022), 630; The Hon. Leanne Linnard. Queensland Parliament. Record of Proceedings (26 May 2022), 1479.

¹⁴ OHCHR, [‘UN torture prevention body suspends visit to Australia citing lack of co-operation’](#), 23 October 2022.



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30 May 2024

Mr Edmond Atalla MP
Committee Chair
Legislative Assembly Committee on Law and Safety
Parliament of New South Wales
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By webform

Dear Mr Atalla,

Inquiry into community safety in regional and rural communities

Thank you for the opportunity to contribute to the Inquiry into community safety in regional and rural communities. We note and commend the focus on the systemic factors contributing to youth crime in rural, regional and remote (RRR) areas. Our submission is informed by the Law Society's Children's Legal Issues, Indigenous Issues, Criminal Law and Rural Issues Committees.

General comments

The Law Society is cognisant that there are genuine concerns in regional areas in relation to youth offending behaviours. We commend the Inquiry's consideration of the underlying drivers of this behaviour, and on early intervention, diversionary and therapeutic responses. We urge the Inquiry to explore and identify opportunities to invest in community-led and culturally-appropriate family and community-building approaches. In particular, Government responses to community safety in RRR areas must be developed and delivered consistently with the requirements of the National Agreement on Closing the Gap (**National Agreement**) (with urgent focus on the priority reform areas). In this regard, we note the view of the Productivity Commission in its 2024 Study Report that:

Governments have not fully grasped the scale of change required to their systems, culture, operations and ways of working to deliver the unprecedented shift they have committed to in the Agreement. Without this shift, the objective of the Agreement – to overcome the entrenched inequality faced by too many Aboriginal and Torres Strait Islander people so that their life outcomes are equal to all Australians – is unlikely to be achieved.¹

We note that the 2022-2024 NSW Closing the Gap Implementation Plan (**Implementation Plan**) will soon be coming to a close. Relevant to this Inquiry, the Government, in partnership with Aboriginal communities, has the opportunity now to build into the next Closing the Gap

¹ Productivity Commission, *Review of the National Agreement on Closing the Gap Study Report*, January 2024, Vol 1,17, <https://www.pc.gov.au/inquiries/completed/closing-the-gap-review/report/closing-the-gap-review-report.pdf>.

Implementation Plan tailored actions to address targets 1-7, and 11-13. A sophisticated and nuanced approach is required to effectively address those targets. We suggest that if governments succeed in developing and delivering effective responses under the National Agreement, benefits will accrue not just to Aboriginal and Torres Strait Islander children and families, but also to vulnerable children and families in the wider community.

Given the complexities involved, it is not possible to canvas in detail in one submission the full range of concerns, as well as all the appropriate and evidence-based responses. We note that there is already a significant amount of scholarship addressing in greater detail many of the issues facing those children who eventually find themselves in contact with the criminal justice system.² In this submission, the Law Society attempts to highlight the most pressing concerns within our remit.

Challenging behaviour in young people, some of which may constitute offending behaviour, may be a response to adverse economic, social, health, and educational environments in some local communities. This may reflect policies of long-term underinvestment in local social, educational and therapeutic supports, services and infrastructure – factors over which young people in the community have little control. Other factors might include personal, family or community trauma (including family and domestic violence and intergenerational trauma), and other unmet mental and physical health needs. Addressing these drivers requires long-term, whole of government investment into family capacity building, as well as the broader economic and social wellbeing of local communities.

Youth offending in RRR areas may also be exacerbated by the legal, policy and practice settings that can increase young people's contact with the criminal justice system, including policy and practice decisions around the use of penalty notices, diversion and bail. The long-term criminogenic effects of incarceration underscore the need to invest in early intervention measures to divert at-risk young people from detention, and to consider policing approaches and the laws and procedures around bail, diversion and remand. Reviewing approaches to minor offending behaviour, including approaches to fines, will also assist in reducing criminal behaviour and youth detention.

Targeted approaches are required for vulnerable groups that are over-represented in the criminal justice system, including children and young people in out-of-home care (OOHC), and Aboriginal and Torres Strait Islander young people. Schools are a major source of social capital and child protection. School attendance is a major preventive factor for offending by young people. Investing in resourcing schools to provide evidence based, tailored and intensive supports for children and young people with complex high needs to engage and stay in schools should be a priority in this regard. As discussed later in this submission, evaluation studies of schools like the Clontarf Academies have demonstrated a positive return on investment, even when considered simply on a quantitative, financial basis.

While many of these drivers are also experienced in urban locations, they may be more pronounced in certain RRR areas, particularly those where the level of resourcing does not

² See, for example, Children's Court of NSW Resource Handbook, *Crossover kids*, last updated May 2023, https://www.judcom.nsw.gov.au/publications/benchbks/children/cpm_cross-over_kids.html; Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017) 74, 486-489, https://www.alrc.gov.au/wp-content/uploads/2019/08/final_report_133_amended1.pdf; NSW Bureau of Crime Statistics and Research, *Offending over the Life Course: Contact with the NSW Criminal Justice System between Age 10 and Age 33* (Issue Paper No 132, April 2018) <https://www.bocsar.nsw.gov.au/Publications/BB/2018-Report-Offending-over-the-life-course-BB132.pdf>; *Family is Culture: Independent Review of Aboriginal Children and Young People in OOHC* (Review Report, October 2019), <https://dcj.nsw.gov.au/documents/children-and-families/family-is-culture/family-is-culture-review-report.pdf>.

meet local needs. Noting that general crime rates vary across NSW regions,³ we suggest many of the drivers of youth crime are similarly place-based. It is crucial that solutions to these issues are place-based, community-focused and community led.

Our comments in respect of the terms of reference (a) – (f) are set out below.

a) the drivers of youth crime across regional and rural NSW, particularly since the COVID pandemic

We note there is a plethora of existing literature relevant to this term of reference, and by way of example note the Children's Court of NSW Resource Handbook. This provides, among other information, data on the socio-economic circumstances of young offenders, via *The Young People in Custody Health Survey* undertaken in 2003, 2009, and again in 2015, in collaboration with the Justice Health and Forensic Mental Health Network (JH&FMHN). It provides a physical and mental health profile of the Youth Justice NSW custodial population, with data gathered through face-to-face interviews, physical, mental health and cognitive assessments and pathology testing.⁴ The results of this survey illustrate the significant unmet health, educational and socio-economic needs faced by young people in the criminal justice system.

Recent statistics on serious crime amongst youth in regional NSW indicate increases in motor vehicle theft (188% increase from 2019-2023), break-ins and other property crime, and non-domestic assault on residential or school premises (31% increase from 2019-2023).⁵ In 2022-2023, fare evasion was the most common principal offence for youth offenders in NSW, with 7,443 offenders, representing 41% of offenders.⁶ The drivers of these types of youth crimes include poverty, social disengagement, and unaddressed physical and mental health needs, including trauma arising from environmental factors, and aggravated by inappropriate criminal justice responses.

Some of these drivers are explored further below.

Economic hardship

It has long been reported that economic hardship, together with associated disadvantage, in respect of access to adequate housing, healthcare, education and employment opportunities experienced by a young person's family, increase the likelihood of contact with the criminal justice system.⁷ Studies have also found an association between crime and socio-economic disadvantage, an association that is particularly pronounced for women and children.⁸ The effects of poverty may be inter-generational.

³ NSW Bureau of Crime Statistics and Research, *Crime in Regional and Rural NSW in 2023: Trends and Patterns*, Crime and Justice Statistics Bureau Brief Number 169, March 2024, 19, <https://www.bocsar.nsw.gov.au/Publications/BB/BB169-Report-Crime-in-Regional-and-Rural-NSW-2023.pdf>.

⁴ Children's Court of NSW Resource Handbook, *Socio-economic circumstances of young offenders — 2015 young people in custody health survey fact sheet: key findings for all young people*, last reviewed May 2023, https://www.judcom.nsw.gov.au/publications/benchbks/children/cm_socioeconomic_circumstances.html.

⁵ *Ibid.*, 2.

⁶ Australian Bureau of Statistics, *Recorded Crime – Offenders*, reference period 2022-23 financial year, <https://www.abs.gov.au/statistics/people/crime-and-justice/recorded-crime-offenders/latest-release#new-south-wales>.

⁷ Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, 2013, 13.

⁸ *Ibid.*, 14, citing the submission of Sister Inside to the Inquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia, which stated that "any attempt to divert women and children from the juvenile justice and criminal justice systems must address the fundamental issue of poverty."

Economic hardship is also a barrier to meaningful activities that support young people's wellbeing. While some RRR locations offer sports programs through Youth Command and PCYC facilities, many communities lack affordable, accessible, and culturally appropriate, sport and recreational activities for young people. Police-led programs and venues such as PCYCs may not be appropriate venues for young people in communities with adverse experiences of policing, in particular for Aboriginal and Torres Strait Islander young people. This, together with a lack of access to affordable therapeutic supports and mental health services, can lead to disengagement amongst young people, and drive challenging behaviour. There is a need for investment in, and support for, alternative culturally safe and community-led wraparound youth services.

Adequate and sustainable housing

Statistical data suggests that rental and property prices in NSW, which surged during and after the COVID-19 pandemic, have eased less in regional areas than in urban areas.⁹ The NSW Government has recognised that rising interest rates, cost of living pressures and a shortage of rental homes in regional NSW continue to drive high levels of homelessness and housing instability in many areas.¹⁰

The impact of this housing crisis is most acute for those facing economic hardship. Children and young people may also come into contact with the care and protection system because of housing instability and homelessness, which has flow-on effects, including on education engagement outcomes. Housing instability also has a broader impact on young people, through disruption to education and social networks, which can lead to social disengagement – all predictors of contact with the criminal justice system.

Safety, trauma and mental health

Young people who experience mental health issues,¹¹ or who are exposed to trauma through drug or alcohol dependency,¹² domestic and family violence,¹³ child sexual abuse,¹⁴ family breakup or other social stressors – and who do not receive appropriate service sector support – may be vulnerable to having contact with the criminal justice system. Inter-generational trauma and persistent experiences of discrimination may be a compounding factor in Aboriginal and Torres Strait Islander communities.¹⁵ These issues may also be associated with homelessness, or the young person feeling unsafe spending time at home.

For young people who have already had contact with the justice system, the continuing lack of appropriate health support is exacerbated by a lack of JH&FMHN services, both

⁹ National Housing Finance and Investment Corporation, *State of the Nation's Housing 2022-2023*, 2023, 12, https://www.housingaustralia.gov.au/sites/default/files/2023-03/state_of_the_nations_housing_report_2022-23.pdf.

¹⁰ NSW Government media release, '2024 Street Count shows the housing and rental crisis deepening across regional NSW', 10 May 2024, <https://www.nsw.gov.au/media-releases/regional-housing-and-rental-crisis-deepening#:~:text=The%20NSW%20Government%20is%20working,drive%20homelessness%20and%20street%20sleeping>.

¹¹ Children's Court of NSW Resource Handbook, above n4.

¹² Bugmy Bar Book, 'Early Exposure to Alcohol and Other Drug Abuse', 2019, 7, <https://bugmybarbook.org.au/wp-content/uploads/2023/07/BBB-Exposure-to-AOD-chapter.pdf>.

¹³ Bugmy Bar Book, 'Childhood Exposure to Domestic and Family Violence', 2019, 8, <https://bugmybarbook.org.au/wp-content/uploads/2023/07/BBB-Childhood-Exposure-to-DFV-chapter.pdf>.

¹⁴ Bugmy Bar Book, 'Childhood Sexual Abuse', 2023, 11, <https://bugmybarbook.org.au/wp-content/uploads/2024/03/BBB-Childhood-Sexual-Abuse-chapter.pdf>.

¹⁵ Bugmy Bar Book, 'Aboriginal and Torres Strait Islander Stolen Generations and Descendants', 2020, 7, <https://bugmybarbook.org.au/wp-content/uploads/2023/07/BBB-Stolen-Generations-chapter.pdf>.

attached to courts and as part of reintegration services.¹⁶ Our members report that there are resourcing shortages also within the JH&FMHN, particularly in respect of the lack of appropriately qualified clinicians to deal with children presenting with a range of interrelated issues, and a lack of professionals available to make diagnoses for certain conditions, including FASD.

These factors suggest a significant need for investment in RRR health, mental health and social support services for young people.

Interrupted school attendance

The Australian Law Reform Commission noted the long-established link between lower levels of educational attainment and entry into the criminal justice system, an association that was recognised by the Royal Commission into Aboriginal Deaths in Custody, which over 30 years ago made a number of recommendations that continue to be relevant, including in relation to education, employment and economic opportunities for Aboriginal people.¹⁷ There is also research suggesting that school exclusion is a predictor of adverse behavioural outcomes, including contact with the criminal justice system.¹⁸ For example, the 2015 NSW Young People in Custody Health Survey indicated that 93.8% of surveyed participants had been suspended from school on at least one occasion, and 78.1% had been suspended three or more times.¹⁹

The risk of school exclusion is higher for young people facing socio-economic disadvantage or other forms of vulnerability, including those in OOHC, those experiencing trauma or disability, and Aboriginal and Torres Strait Islander people.²⁰ Exclusion may exacerbate those issues, and other factors associated with entry into the criminal system, such as poor employment outcomes, poor health and well-being, marginalisation, time spent unsupervised and increased association with anti-social peers.²¹

Our members are aware of cases in areas such as Moree where school exclusion is overused, with some students being subject to rolling 20 day exclusions. While it is imperative to ensure safety on school premises, such policies of overuse speak to the absence of alternative behavioural or therapeutic options for managing significantly challenging or criminal student behaviour.

Contact with the OOHC system

Aboriginal children and young people are, for myriad reasons outside of their control,

¹⁶ Such as the Justice Health Community reintegration team:

<https://www.health.nsw.gov.au/mentalhealth/resources/Factsheets/mh-community-integration.PDF>

¹⁷ Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, December 2017) 63 [2.31] referring to Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, recs 289-319.

¹⁸ Bugmy Bar Book, 'Interrupted School Attendance and Suspension', 9, <https://bugmybarbook.org.au/wp-content/uploads/2024/03/BBB-School-Attendance-and-Suspension-chapter.pdf>.

¹⁹ Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, *2015 Young People in Custody Health Survey: Full Report*, November 2017, 15, <https://www.nsw.gov.au/legal-and-justice/youth-justice/about/research/custody-health-survey/2015-ypichs-full-report>.

²⁰ Youth Affairs Council Victoria, *Out of Sight, Out of Mind? Exclusion and Inclusion of Students in Victorian Schools, Final Report*, 2016, 8. In 2022, Aboriginal students comprised 9.0% of all government school student enrolments but approximately a quarter of all students suspended: NSW Department of Education, *2022 Suspensions and Expulsions*, https://data.cese.nsw.gov.au/data/dataset/suspensions-and-expulsions-in-nsw-government-schools/resource/0cffdeec-b3d6-4963-add5-dd63231175ca?inner_span=True.

²¹ Bugmy Bar Book, 'Interrupted School Attendance and Suspension', above n18, 2-3.

overrepresented in the OOHC system.²² Young people in OOHC are in turn overrepresented in the NSW criminal justice system. In 2020-21, of the 9,275 children who were under youth justice supervision in Australia, 53% had interacted with the child protection system in the preceding five years,²³ including:

- 48% having been the subject of an investigated notification;
- 23% having received a care and protection order; and
- 21% being in OOHC.²⁴

Research shows that children in OOHC tend to interact with the youth justice system at an earlier age²⁵ and are more likely to experience remand than other children in the youth justice system.²⁶ Additionally, adults who experienced OOHC as a child continue to be overrepresented in the incarcerated population.²⁷

The reasons for the overrepresentation of children in OOHC in the criminal justice system have been considered by several studies.²⁸ Trauma may be a driver of this outcome, noting that, generally, children enter the care and protection system for reasons such as abuse and neglect, which are factors that also increase the likelihood of a person's involvement in the criminal justice system.

Other research focuses on 'care criminalisation', a term referring to the way in which the care and protection and criminal justice systems themselves contribute to the overrepresentation. Care providers may involve police more routinely, and the children themselves may be subject to higher levels of police scrutiny. Children in OOHC, particularly those in residential care, are more commonly arrested for minor matters that do not warrant a police response, and progress more quickly to the criminal justice system, often for breach of bail conditions arising from police over-scrutiny.²⁹ Our members report that police in RRR areas are not necessarily aware of key governing instruments, such as the *Joint Protocol to reduce the contact of young people in residential OOHC with the criminal justice system*.³⁰ This Protocol was prepared by the NSW Ombudsman, in consultation with stakeholders including NSW Police, Legal Aid NSW, Impact Youth Services, St Saviours, Uniting Care Burnside and Marist Youth Care

Policing approaches

Anecdotally, our members report that there can also be a culture of over-policing, for example, placing young people who are in families known to the local police under

²² David Tune, *Independent Review of Out of Home Care in New South Wales* (Final Report, 25 November 2020) 12-13, <https://www.acwa.asn.au/wp-content/uploads/2018/06/TUNE-REPORT-indepth-review-out-of-home-care-in-nsw.pdf>; *Family is Culture: Independent Review of Aboriginal Children and Young People in OOHC*, above n2, 40-47.

²³ Australian Institute of Health and Welfare, *Young people under youth justice supervision and their interaction with the child protection system 2020-21*, 2022 7, <https://www.aihw.gov.au/getmedia/e4f440c3-abb0-4547-a12b-081a5a77908b/aihw-csi-29-young-people-under-youth-justice-supervision2020-21.pdf?v=20230605170043&inline=true>.

²⁴ *Ibid.*, 13.

²⁵ Australian Institute of Health and Welfare, above n23, 10; K McFarlane, 'Care-criminalisation: The involvement of children in out-of-home care in New South Wales criminal justice system' (2018) 51(3) *Australian and New Zealand Journal of Criminology* 412, 425.

²⁶ K McFarlane, above n25, 414.

²⁷ M Remond et al. 'Intergenerational incarceration in New South Wales: Characteristics of people in prison experiencing parental imprisonment' (2023) *Australian Institute of Criminology*, 663.

²⁸ J Shaw, 'Policy, practice and perceptions: Exploring the criminalisation of children's home residents in England' (2016) 16(2) *Youth Justice*, 147; E Stanley, 'From care to custody: Trajectories of children in post-war New Zealand' (2017) 17(1), *Youth Justice* 57.

²⁹ K McFarlane, above n25.

³⁰ Department of Communities and Justice, *Joint Protocol to reduce the contact of young people in residential OOHC with the criminal justice system*, July 2019, <https://www.facs.nsw.gov.au/download?file=585726>.

greater police scrutiny. These issues can be compounded by a lack of experience and/or training amongst junior police officers. Inexperience can also manifest in inappropriate responses to challenging or minor criminal behaviour, and charges that are subsequently dropped in court. In responses to domestic and family violence, inexperience can result in misidentification of perpetrators and the inappropriate use of Apprehended Violence Orders (**AVOs**), with adverse consequences for young people and their families, including the removal of children into care.

Our members report there is widespread misunderstanding and misapplication amongst police officers of fundamental principles such as those of applying the least restrictive form of sanction,³¹ using detention as a last resort,³² and instituting criminal proceedings only where there is no alternative and appropriate means of dealing with the matter.³³ There is also misunderstanding of the presumption of *doli incapax*.

The pivotal nature of day-to-day policing decisions and interactions with young people cannot be overstated. The interface with police (and other penalty notice issuing authorities) is generally the first contact young people have with the criminal justice system. As Hogg and Quilter note:

the role of the criminal justice system cannot be disentangled from the complex dynamics that sustain and compound high levels of disadvantage and in turn contribute directly to high levels of victimisation in many [Aboriginal and Torres Strait Islander] communities.³⁴

Fines

Fines have become the most common means by which children come into contact with the NSW criminal justice system.³⁵ We note scholarship in respect of the hidden punitiveness of fines (which include, in NSW, penalty notices) focusing on the NSW system of linking fines to drivers' licence suspension and disqualification, whether or not the issue of road safety was the subject of the initial fine, as a case study. Quilter and Hogg write that:

The impacts on some communities are particularly harsh. The NSWLAC inquiry (2013: 10-17) found that vulnerable groups (economically and socially disadvantaged sectors of the community), those living in regional, rural and remote areas, Aboriginal communities and young people were most impacted.³⁶

An independent review of the practices around issuing fines to children in NSW during the COVID-19 pandemic found that fines issued during the pandemic were too high for children to pay, unevenly issued, and disproportionately affected socio-economically disadvantaged and vulnerable children, including Aboriginal and Torres Strait Islander

³¹ *Young Offenders Act 1997* (NSW) s 7(a).

³² Convention of the Rights of the Child art 37.

³³ *Young Offenders Act 1997* (NSW) s 7(c).

³⁴ R Hogg and J Quilter, Submission 87 to the Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (ALRC Report No 133, December 2017).

³⁵ J Quilter et al, *Children and Covid-19 Fines in NSW: Impacts and Lessons for the Future use of Penalty Notices*, 2024, 5,

<https://lawsocietynsw.sharepoint.com/sites/MPR/Shared%20Documents/Forms/AllItems.aspx?id=%2Fsites%2FMPR%2FShared%20Documents%2FGeneral%2FAAA%20MEDIA%20RELEASES%2F2024%2F5%2E%20May%2FCHILDREN%20AND%20COVID%20FINES%20IN%20NSW%2Epdf&parent=%2Fsites%2FMPR%2FShared%20Documents%2FGeneral%2FAAA%20MEDIA%20RELEASES%2F2024%2F5%2E%20May>.

³⁶ J Quilter & R Hogg, 'The hidden punitiveness of fines' (2018) 7 (3) *International Journal for Crime, Justice and Social Democracy* 10-40, 22-23.

children.³⁷

The experience of our members is consistent with the report's findings suggesting that, in a post COVID-environment, fines in NSW are often beyond a young person's capacity to pay, particularly in disadvantaged communities and in RRR areas. In that context, the issuance of fines to young people increases financial hardship for the young person and/or their family. Difficulties navigating the payment and court election systems can pose barriers for young people paying fines on time, or at all.³⁸ Our members have found that the 'snowball' effect of unpaid fines can create further financial stress, and lead to more serious offending and, in some cases, incarceration.

Our members also report instances in RRR locations of police issuing fines without due regard to less punitive alternatives such as informal warnings or cautions, and with little regard for the young person's financial status or vulnerability. This includes issuing fines for fare evasion and unlicensed driving, without due regard to the young person's remote location and the lack of alternative transport options.

Unmet legal need

The drivers discussed above may create, and be further heightened by, unmet legal need. Without access to local legal advice and representation, civil law, criminal law and other legal problems can escalate and drive criminal behaviour. Lack of access to legal services can also delay court proceedings if legal aid representatives need to travel from urban areas.

Our members report a longstanding shortage of legal assistance services in RRR areas, including legal aid, to identify and address young people's unmet legal needs. We understand from our members that maintaining adequate staffing levels in regional Aboriginal Legal Services (NSW/ACT) offices is a persistent issue.

Incarceration

The criminogenic effect of incarceration of young people, whether on remand or in youth detention, is well-established. Incarceration leads to disengagement with family and community, the forging of associations with other offenders, and a culture of criminality. It has been noted that 'incarceration fails to meet the developmental ... needs of youth offenders and is limited in its ability to provide appropriate rehabilitation'.³⁹

The trends for youth incarceration in NSW are concerning. In the quarter up to March 2024, 223 young people were in custody, an increase from 172 in the previous quarter. Of those in custody, 169 (75.8%) were on remand. Aboriginal and Torres Strait Islander young people made up 66.4% of those in custody on average.⁴⁰

b) how a whole of government approach can reduce the drivers and root causes of youth crime in regional and rural NSW

Closing the Gap

In our view, actions to meet the requirements of the National Agreement on Closing the Gap are urgent. Failure to address the justice targets alone will continue to compound the life expectancy gap between Aboriginal and Torres Strait Islander peoples and other

³⁷ Ibid., 9.

³⁸ Ibid., 10.

³⁹ Bugmy Bar Book, 'Impacts of Imprisonment and Remand in Custody', 2022, 13, <https://bugmybarbook.org.au/wp-content/uploads/2023/07/BBB-Imprisonment-chapter.pdf>.

⁴⁰ NSW Bureau of Crime Statistics and Research, *Custody Statistics* (last updated May 2024), https://www.bocsar.nsw.gov.au/Pages/bocsar_custody_stats/bocsar_custody_stats.aspx.

Australians. We note, for example, a recent study⁴¹ providing more evidence in respect of an “incarceration gap” within Aboriginal and Torres Strait Islander populations. That is, substantial disparities were observed within Aboriginal and Torres Strait Islander populations across a number of important health and socio-economic markers by incarceration status. The study is evidence of the fact of incarceration itself as a risk factor affecting educational outcomes, labour force participation, and drug and alcohol problems.

Effective responses to the issue of youth crime will be community-led and place-based, as they will need to be tailored not only to existing gaps, but also to build on existing community strengths. Developing and delivering responses requires genuine partnership with Aboriginal communities. We refer again to the need to ensure that any government response to community safety in RRR areas is consistent with the priority reform areas identified in the National Agreement on Closing the Gap, and with the additional priority reform area adopted by NSW in its Implementation Agreement.

Investment in communities

A whole of government approach will require tailored, long-term investment in each RRR community in which the drivers of crime are most evident. We have expressed support for the front-end initiatives recently announced by the Government in respect of strengthening social and well-being support services, as well as a roll-out of justice reinvestment grants as early as June 2024.⁴² Further such initiatives should include:

- investment in services to counteract the effects of economic hardship, such as housing, education, public transport, health services, employment opportunities and technology infrastructure;
- investment in health and social services for young people that are affordable, geographically accessible, safe, inclusive, culturally sensitive and trauma-informed;
- practical skills opportunities, such as driver licensing clinics for young people.

Addressing these issues is a significant undertaking. However, in the experience of our members, even simple, targeted measures can help to alleviate hardship and improve mental health, engagement and social cohesion. Examples of such measures include providing young people with subsidised access to their local public swimming pool, sports facilities or other community venues, free public transport, and, as noted above, support for obtaining driving licenses.

Extending the hours of operation of services for young people beyond standard business hours can also be beneficial. We welcome the recent announcement of better therapeutic supports and measures in the Moree area, noting the importance of their being developed with the Moree community.⁴³ Young people in the Moree area have been advocating for improved support services and safe houses, and for services to operate outside of the usual hours of 9am to 5pm on weekdays.⁴⁴ We strongly suggest that this package be made available to other under-served RRR areas.

The sustainability of investment in community services is also crucial, and must be

⁴¹ S Shepherd et al, ‘Closing the (incarceration) gap: assessing the socio-economic and clinical indicators of indigenous males by lifetime incarceration status’, *BMC Public Health* 20, 710 (2020). <https://doi.org/10.1186/s12889-020-08794-3>.

⁴² NSW, *Parliamentary Debates*, Legislative Assembly, 12 March 2024, page (Michael Daley, Attorney General) <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD1323879322-139003>.

⁴³ Ibid.

⁴⁴ See Moree Youth Forum Report at <https://www.justreinvest.org.au/community/moree/>.

considered in the context of each initiative. For example, programs for vulnerable young people may require relatively long timelines that are more realistic for addressing generational disengagement and service sector dysfunctionality, as well as family disruption and trauma, including inter-generational trauma.

Strengthening school capabilities

Other stakeholders are better placed to comment on this issue, but from a justice perspective, our members observe that schools are a major source of social capital and child protection. As noted earlier, school attendance is a major preventive factor for offending by young people. It is established that interrupted school attendance is a predictor of exposure to the criminal justice system for young people. In our view, there is significant benefit to be gained in investing in school capabilities to provide evidence-based intensive and culturally appropriate support that can assist students to stay engaged with school, and to achieve excellence, including students who attend with complex high needs. Programs such as the Clontarf Foundation⁴⁵ are worthy of mention, notwithstanding that it only provides for boys.

An evaluation of the Clontarf Academies⁴⁶ found:

The overall benefit-cost ratio (BCR) of the program works out at 1.01. In other words, after monetising the above costs and benefits accruing to the economy as a whole, the Clontarf Academies program is essentially operating at break-even point, yielding a small net positive benefit of 1 cent for every \$1 invested [...]

On the other hand, the estimated program benefits are also likely to be understated as the analysis excludes a range of potential benefits that are difficult to monetise. These include potential improvements in wellbeing and health, indirect crime effects and various pro-social flow-on effects for participants and society more broadly. The inclusion of any of these benefits would increase the program's BCR.

The Girls Academy⁴⁷ and Stars Foundation⁴⁸ programs adopt a similar tailored and intensive approach with girls, but are less well funded.

The Parry School for Specific Purposes in Tamworth is another model of education where students may be referred for behavioural, emotional and social needs. Parry utilises a "comprehensive and holistic system which supports student's individual needs".⁴⁹

Investing in OOHC reform

Given the over-representation of young people who have had contact with the OOHC in the criminal justice system, measures that reduce the use of OOHC may assist in reducing youth crime amongst vulnerable young people. The commencement of reforms giving effect to recommendations of the Family is Culture Report 2019 (**FIC Report**), requiring 'active efforts' to prevent children from entering OOHC,⁵⁰ and the Legal Assistance for Families Partnership Agreement are positive steps in reducing OOHC and supporting families to stay together. We understand these initiatives are in the

⁴⁵ Clontarf Foundation, <https://clontarf.org.au/>

⁴⁶ Centre for Education Statistics and Evaluation, *Evaluation of NSW Clontarf Academies Program*, 2016, 46-47, <https://education.nsw.gov.au/content/dam/main-education/about-us/educational-data/cese/evaluation-evidence-bank/2017-evaluation-of-the-nsw-clontarf-academies-program.pdf>

⁴⁷ NSW Department of Education, Kempsey High School Girls Academy, <https://kempsey-h.schools.nsw.gov.au/supporting-our-students/girls-academy.html>

⁴⁸ Stars Foundation, <https://starsfoundation.org.au/about/>.

⁴⁹ NSW Department of Education, *Parry School*, Student health and safety, <https://parry-s.schools.nsw.gov.au/supporting-our-students/student-health-and-safety.html>.

⁵⁰ *Family is Culture: Independent Review of Aboriginal Children and Young People in OOHC*, above n2.

implementation phase. Further, the Law Society has long supported initiatives that facilitate individual and community self-determination, such as the Indigenous list in the Federal Circuit and Family Court of Australia, which aim to empower Aboriginal and Torres Strait Islander families to proactively keep children, who may otherwise be at risk of removal, safe with members of their own family and community.

Equally important are measures aimed specifically at diverting young people in OOHC from the criminal justice system. There are opportunities to replicate small-scale effective models where multi-disciplinary service teams are on-call as first responders to challenging behaviour, providing an alternative to police intervention, and opportunities for legal advice and referrals to appropriate social services. While these models require a short-term intensive response, programs in areas such as Lake Macquarie and Western Sydney have shown promising results.

Bail reform

We also remain concerned about recent amendments to the *Bail Act 2013* (NSW), which create new offences and higher penalties for young people, and which are intended to target young people in RRR areas.⁵¹ It is particularly concerning that these offences represent a more punitive approach than that taken for adults for equivalent offences.⁵² While the Government recognises that ‘the best outcome for everyone is avoiding contact with the criminal justice system in the first place,’⁵³ the reforms are likely to achieve the opposite for as long as they are in force.

Reform of the *Young Offenders Act 1997* (NSW)

We also remain concerned that the NSW Government has yet to publish, or act upon, reports on the 2020 or 2023 statutory reviews of the *Young Offenders Act 1997* (NSW) (YOA). The Law Society has suggested amending the YOA to expand the ability of the police and the courts to divert young people from the criminal justice system.⁵⁴

We also support the 2005 recommendation of the NSW Law Reform Commission, that warnings should be available for all offences under the YOA unless specifically excluded by Regulation.⁵⁵ As a minimum, warnings should be available for larceny involving theft from shops.

We also suggest the YOA should expressly state that a young person should not be arrested unless there is no other appropriate way of dealing with them. It should also provide that ‘personal attendance’ at a Youth Justice Conference should include attendance by other means such as audio-visual link – a measure particularly relevant in the RRR context.

Reforming the fines and penalties system

In relation to fines, options for reform include eliminating or reducing fines against young people altogether, or against those aged under 16; eliminating or reducing fines relating to transport; making public transport free for children and young people; simplifying, and

⁵¹ Law Society of NSW, Open letter to Members of the Legislative Council, 20 March 2024, <https://www.lawsociety.com.au/sites/default/files/2024-03/Letter%20to%20Members%20of%20the%20Legislative%20Council%20-%20Bail%20and%20Crimes%20Amendment%20Bill%202024%20-%202020%20March%202024.pdf>

⁵² Inconsistently with the *Children (Criminal Proceedings) Act 1987* (NSW) s 6(e).

⁵³ NSW, *Parliamentary Debates*, Legislative Assembly, 12 March 2024, page (Michael Daley, Attorney General) <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-139003>.

⁵⁴ Law Society of NSW, Letter to NSW Department of Communities and Justice, 4 May 2020.

⁵⁵ NSW Law Reform Commission, *Young Offenders*, Report No 104 (2005), <https://lawreform.nsw.gov.au/documents/Publications/Reports/Report-104.pdf>.

improving the communication of, the payment and enforcement systems;⁵⁶ and making greater use of diversionary measures available under the YOA, such as warnings, cautions, and youth justice conferences.⁵⁷

We suggest that transit officers should be able to issue warnings and cautions under the YOA, subject to them receiving appropriate initial and ongoing training, and only if the current limit on cautions is removed. We also suggest that the YOA should be amended to apply to traffic offences committed by 16 and 17 year old drivers, particularly given the potentially significant impact in RRR areas with limited public transport options.⁵⁸

Amending the YOA to apply to traffic offences would provide the opportunity for diversions in outcome plans for safer driving courses for Aboriginal and Torres Strait Islander young people. Such courses often have a strong evidence basis: for example, under the Maranguka Justice Reinvestment initiative in Bourke, an Aboriginal-run driver licensing program saw a 72% reduction in the number of young people (up to 25 years) proceeded against for driving without a licence from 2015 to 2017.⁵⁹

Access to justice

The issue of access to justice in RRR areas and “postcode injustice” involves longstanding and complex issues that are difficult to canvas entirely within this submission. Sustained investment in legal assistance services, particularly in RRR areas where recreational, educational, therapeutic and support services are lacking, is important to ensure that there is genuine access to justice for disadvantaged and vulnerable young people who come into contact with the criminal justice system. However, there are gaps in the availability of legal assistance, particularly specialist services for children and young people, in RRR areas.⁶⁰ This is a factor of under-investment in legal assistance services, and the long-term inadequacy of legal aid funding for private practitioners, which is particularly problematic in those areas experiencing an overall shortage of lawyers.⁶¹

The adverse outcomes that can flow from a lack of legal assistance can be further compounded by a lack of justice system options in RRR areas, including diversionary options for young people, lack of bail support services and services supporting an exit from detention.

We note that the Independent Review of the National Legal Assistance Partnership 2020-2025 Final Report⁶² was released on 28 May 2024, and many of that report’s findings and recommendations are pertinent to adequate resourcing of the legal assistance sector, including in respect of RRR areas, and ensuring that Aboriginal and Torres Strait Islander legal services are funded consistently with the National Agreement on Closing the Gap.

⁵⁶ See J Quilter et al, above n35, 12.

⁵⁷ Ibid., 28.

⁵⁸ Law Society of NSW, Letter to NSW Department of Communities and Justice, 4 May 2020.

⁵⁹ Just Reinvest, News from Bourke, (Webpage, October 2018) <http://www.justreinvest.org.au/new-evidence-from-bourke/>.

⁶⁰ *Family is Culture: Independent Review of Aboriginal Children and Young People in OOHC*, above n2, 157; Law Council of Australia, *The Justice Project: Rural Regional and Remote Australians* (Final Report, August 2018), 24-41, <https://lawcouncil.au/files/web-pdf/Justice%20Project/Final%20Report/Rural%20Regional%20and%20Remote%20%28RRR%29%20Aust%20ralians%20%28Part%201%29.pdf>.

⁶¹ National Legal Aid, *Justice on the Brink: Stronger Legal Aid for a Better Legal System*, November 2023, 30, <https://www.nationallegalaid.org/resources/justice-on-the-brink/>.

⁶² W Mundy, *Independent Review of the National Legal Assistance Partnership 2020-2025 Final Report*, March 2024, <https://www.ag.gov.au/legal-system/publications/independent-review-national-legal-assistance-partnership-2020-25>.

We suggest that a useful approach would include investment in co-located health justice services which address the relationship between health and drug-related issues and legal need through co-located services. Successful models include both court-based services and reintegration services for young people exiting detention.⁶³

We also suggest that young people across NSW should have access to the specialist Children's Court, or to a Youth Koori Court. There is a need for greater investment in court infrastructure, including AVL facilities, and judicial resourcing to minimise procedural delays and to reduce the time spent on remand, or on bail with potentially problematic conditions. Our members report that, in regional areas that lack a specialised Children's Court (for example in Dubbo), there can be delays of 6 to 12 months for listing matters for hearing. Where specialist courts are available, policing approaches should preference their use, even if a generalist court may be closer.

c) the wraparound and diversionary services available for youth and families in the regions and rural areas and how they can be better matched to individuals, measured, improved and integrated into a coordinated approach to divert youth from crime, having regard to the NSW Government's commitment to working in partnership with Aboriginal people

Noting the criminogenic effects of detention, we support the development of diversionary measures in RRR areas that provide therapeutic, rather than punitive, responses to challenging or criminal behaviour in young people.

Early intervention programs in NSW

The Law Society is aware of a range of evidence-based early intervention programs successfully employed in NSW and other Australian jurisdictions, which aim to divert young people from the criminal justice system. A non-exhaustive list of examples includes:

- **New Street Adolescent Services**, an early intervention program delivered by NSW Health targeted to address harmful sexual behaviours displayed by children aged 10-17 years.⁶⁴ This program has an evidence-informed model of operation that involves working with the entire family unit. A 2014 evaluation of New Street Services by KPMG found that the service had achieved significant outcomes with young people and their families, with positive impacts for both individuals and the child protection system as a whole.⁶⁵ The evaluation included a cost benefit analysis, which identified a 'significant net [economic] benefit attached to the completion of New Street compared to all alternative scenarios'.⁶⁶
- **Youth on Track**, a program delivered by the NSW Department of Communities and Justice, is an early intervention scheme for children aged 10-17 that identifies and responds to young people at risk of long-term involvement with the criminal justice system. Through the program, the Department of Justice funds non-government organisations (Mission Australia, Social Futures and Centacare) to deliver the scheme in six locations across NSW. A 2017 review of Youth on Track prepared by the Cultural & Indigenous Research Centre Australia found that 'Youth on Track is contributing to enhanced social outcomes for many clients. The success of the scheme appears to relate to the application of strong

⁶³ See, for example, the NSW Health Community Integration Team, discussed further below under reference (c).

⁶⁴ NSW Health, *New Street Services* (Webpage, May 2022), <https://www.health.nsw.gov.au/parvan/hsb/Pages/new-street-services.aspx>.

⁶⁵ KPMG, *Evaluation of New Street Adolescent Services Health and Human Services Advisory*, 2014, 2, <https://www.health.nsw.gov.au/parvan/hsb/Documents/new-street-evaluation-report.pdf>.

⁶⁶ Ibid 64.

evidence of 'what works' in interventions to address the individual criminogenic risk factors of the young person.⁶⁷ We understand that there has been a focused effort in changing delivery partners to Aboriginal community-controlled organisations, and we welcome this development in respect of improving outcomes for Aboriginal and Torres Strait Islander children.

There are a number of other models and programs specifically tailored to meet the needs of Aboriginal and Torres Strait Islander children, including:

- **Safe Aboriginal Youth Patrol Program (SAY)**, a program in Closing the Gap priority locations which provides after-hours transport and drop-in centres for young Aboriginal people who are on the streets late at night. An evaluation of SAY programs in NSW conducted in 2014 found that the model incorporates elements of good practice in early intervention measures. The evaluation noted features of the effective deployment of the model, such as enabling both community governance and community involvement in the delivery of the patrol, and providing welfare support for young people in ways that are culturally safe.⁶⁸ We note that the Government recently announced that this program will be expanded to an additional five locations in NSW.⁶⁹
- **Youth Bail Advocacy Program, Aboriginal Legal Service NSW/ACT (YBAP)**, a program developed in connection with NSW Closing the Gap and the Short-Term Remand Pilots, which provides wraparound support to Aboriginal and Torres Strait Islander children aged 10-17 who have interactions with police at three pilot sites. The YBAP deploys a model involving additional legal advocacy with police focused on diversion and avoiding remand, Aboriginal Youth Officers and specialist youth caseworkers with the Weave Youth and Community Services. The Pilot in South Sydney also involves the establishment of a Support Person Network, alongside the Department of Communities and Justice. The Support Person Network will provide trained, paid support people on a 24/7 roster to assist young people in police custody and enhance early referrals for support.⁷⁰
- **Lives Lived Well**⁷¹ and **Mac River**, residential rehabilitation centres for young people who have entered, or are at risk of entering, the juvenile justice system and have a history of alcohol and other drug use. These services take a holistic approach, including case management addressing mental, physical, social, and inter and intra-personal challenges. At Lives Lived Well, more than 80% of clients are Aboriginal and Torres Strait Islander young people, and there is a similar client profile at Mac River.
- The **Maranguka Justice Reinvestment** project in Bourke is an example of a community-led system of working across communities and sectors and delivering promising results across many domains in young people's lives, including justice, education and health. An impact assessment of the project by KPMG in 2018 found that the project had led to a 38% reduction in charges across the top five

⁶⁷ Circa, *Youth on Track Social Outcomes Evaluation* (April 2017),

<http://www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf>.

⁶⁸ T Cooper et al, *Evaluation of Indigenous Justice programs Project D. Safe Aboriginal Youth Patrol Programs in New South Wales and Northbridge Policy and Juvenile Aid Group in Western Australia*, 2014, 5-6, <https://www.aijp-nightpatrols.org/docs/np-final-report-web.pdf>.

⁶⁹ NSW Premier, Attorney General, Minister for Police and Counter-terrorism, Minister for Regional NSW, Minister for Youth Justice, 'NSW Government takes action to make communities safer and support young people in regions,' media release, 12 March 2024, <https://www.nsw.gov.au/media-releases/nsw-government-takes-action-to-make-communities-safer-and-support-young-people-regions>.

⁷⁰ Aboriginal Legal Service NSW/ACT, *Annual Report, 2022-2023*, 27, https://issuu.com/alsnswact/docs/2023_als_annual_report_single_pages_web?fr=sZDE4OTcyNjIwMzY.

⁷¹ Previously known as Junaa Buwal

juvenile offence categories, among other benefits.⁷²

- The **Tiwi Islands Youth Development and Diversion Unit** offers young people aged 10-17 the opportunity to forgo a criminal record in exchange for agreeing to comply with beneficial voluntary conditions, such as participating in a youth justice conference, issuing apologies to the victim, attending school, and undertaking community service. Qualitative data has showed that this program is useful in reconnecting young people to cultural norms, and the nature of the program was seen to be culturally 'competent' and directly addressing the factors that contribute to offending behaviour, such as substance misuse, boredom and disengagement from work or education.⁷³ Young people who engaged in the program credited it for helping them recognise wrongdoing and adopt strategies to stay out of the criminal justice system.⁷⁴
- **Panyappi Indigenous Youth Mentoring Program** (from South Australia) is an early intervention program targeting Indigenous young people aged between 10 to 18 who are at risk, or are in the early stages, of contact with the youth justice system. The program employs full-time mentors with low caseloads to allow mentors to engage intensively and comprehensively with young people and build voluntary relationships of trust.⁷⁵ These mentors help to facilitate the transition of young people into the community and enable them to move towards independence, by developing or providing them with access to educational, training and recreational services.⁷⁶ An evaluation of the program found the frequency and severity of the offending by participants in the program had significantly decreased, and there were a range of other benefits to participants, including stronger family relationships and better connections with school.⁷⁷

Other successful models provide wrap-around support at strategic points of vulnerability to young people already involved in the criminal justice system. For example, the **Adolescent Community Integration Team** assists young people exiting custody who have significant mental health and/or drug and alcohol issues. Clinicians are co-located with case workers to provide appropriate health, social and legal services to support the young person's re-integration into the community. An important aspect is the inclusion of Aboriginal community-controlled health services. The program has been effective in increasing this cohort's access to health services in the community, increasing engagement with family and community, and supporting mental health and wellbeing.⁷⁸

⁷² KPMG, *Marunguka Justice Reinvestment Project: Impact assessment*, 2018, 22, <https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/resources/files/marunguka-justice-reinvestment-project-kpmg-impact-assessment-final-report.pdf>.

⁷³ B Hedwards et al, *Indigenous youth justice programs evaluation* (Special report, Australian Institute of Criminology, 2014) vii, <https://www.aic.gov.au/sites/default/files/2020-05/Indigenous-Youth-Justice-Programs-Evaluation.pdf>.

⁷⁴ *Ibid.*, 42.

⁷⁵ V Ware, *Mentoring programs for Indigenous youth at risk* (Resource sheet no. 22, Closing the Gap Clearinghouse, Australian Institute of Health and Welfare, 2013) 12, <https://www.aihw.gov.au/getmedia/b1126683-e171-4aa8-82b0-5d9349b83820/ctgc-rs22.pdf.aspx?inline=true>.

⁷⁶ T Calma, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (Australian Human Rights Commission, 2008) 29.

⁷⁷ Just Reinvest, *Examples of promising interventions for reducing offending, in particular Indigenous juvenile offending* (Prepared for the Senate Standing Committee on Legal and Constitutional Affairs: Inquiry into the value of a justice reinvestment approach to criminal justice in Australia) 2013, 5.

⁷⁸ NSW Health, *Strengthening Prevention and Early Intervention: Community Integration Team*, <https://www.health.nsw.gov.au/mentalhealth/resources/Factsheets/mh-community-integration.PDF>.

These programs highlight the importance of tailoring early intervention to the needs of their local communities, for example in being:

- co-designed with the community, with a focus on matching community needs, rather than merely individual needs;
- co-implemented with the community, for example with community involvement in governance;⁷⁹
- focused on community development and the underlying causes of crime, not merely crime prevention;⁸⁰
- multi-disciplinary and cross-agency;
- needs-based, providing therapeutic approaches, including mental health services, youth mentoring and work experience initiatives, and providing essential life skills that promote stability, accomplishment and self-sufficiency;
- geographically accessible;
- available after hours, and during the night, where appropriate;
- inclusive, physically and culturally safe and trauma-informed; and
- sustainably funded with realistic timeframes, for example allowing time for long-term trauma to be addressed.

We note also that the Standing Council of Attorneys General's *Age of Criminal Responsibility Working Group Report* provides a framework for developing diversionary supports and services for children aged between 10 and 13 years.⁸¹ Under the framework:

- initial responses to challenging behaviour, and whether they should involve police, other government agencies and/or community organisations, should be informed by consideration of the immediate safety of the child, any victim and the community, and by the complex needs of the child including their stage of development;
- initial responses may include referrals to medical or other crisis services, as well as longer term services;⁸²
- secondary responses, in considering the child's ongoing needs, should implement 'a holistic therapeutic support model that shifts the focus away from punitive interventions towards needs-based supports.'⁸³

The report suggests jurisdictions consider crisis services or other suitable methodology, to determine whether existing services can provide adequate secondary responses.⁸⁴

Bail support and bail accommodation

Bail procedures and bail support remains an important element in diverting youth from detention, while balancing the risk of harm to the young person and their community. We understand that the lack of bail support in some RRR areas continues to be a driver of incarceration.

The Law Society recognises the importance of supporting all young people on bail appropriately to minimise the risk of breach. Bail support may include linking the young person to local community-based services, connecting them with mentors or cultural

⁷⁹ See for example T Cooper et al, above n68, 3.

⁸⁰ Ibid.

⁸¹ Standing Council of Attorneys General, *Age of Criminal Responsibility Working Group Report*, 2023, <https://www.ag.gov.au/sites/default/files/2023-12/age-of-criminal-responsibility-working-group-report-2023-scag.pdf>.

⁸² Ibid., 38.

⁸³ Ibid., 48.

⁸⁴ Ibid., 53.

groups, or liaising with the Department of Education about school attendance. We recognise the benefits of Youth Justice's voluntary and flexible Bail Support Program, in tailoring the support needs to the individual child or young person.

The Law Society has also suggested expanding bail accommodation programs, which offer police workable alternatives to incarcerating young detainees. Bail accommodation is particularly effective when used together with therapeutic wrap-around services, such as **A Place to Go**.⁸⁵ Other effective programs include the **Short-Term Remand** pilot programs in the South Sydney and Riverina areas, which have been implemented as part of the Department of Social Services' Youth Justice Domestic and Family Violence Strategy 2019-2022.⁸⁶ These programs divert young people who are involved in domestic and family violence from remand into alternative accommodation.

We welcome the recent announcement of bail accommodation and support services in the Moree area. Notably, these services are to be co-designed with the local community, and include services to link young Aboriginal and Torres Strait Islander people with appropriately skilled Aboriginal organisations, elders, cultural and family supports from their own communities.⁸⁷

Approaches in other jurisdictions

Australia can also look beyond its borders in developing alternatives to incarceration for early adolescent children. In Finland, the youth justice system is premised on the belief that crime is a social problem that cannot be resolved by restricting the liberty of individuals.⁸⁸ Young offender intervention occurs through the child welfare system, which prioritises the best interests of the child.⁸⁹ A wide range of measures are available, depending on the seriousness of the issue, and the underlying problems in the child's life. This may include a series of discussions with the child offender and their family. In cases of greater seriousness, more extensive open care measures may be required, such as economic and social support for the parents, or psychological, psychiatric, substance abuse and educational support programs for the child.⁹⁰

d) staffing levels and workforce issues, including police staffing, in regional and rural areas and how services can be improved to reduce youth crime in these areas

Noting that some areas, such as Moree, Bourke and Walgett, have already increased police resourcing to higher levels, per capita, than in urban areas, a different approach to resourcing is required. In our view, longer term planning is required in respect of considering investment in RRR areas. We suggest that, at a minimum, greater benefits for individuals and communities may be accrued by adequately resourcing those services that ensure that families are safe, healthy and housed, including any necessary crisis services (including after-hours mental health responders, refuges and other safe

⁸⁵ NSW Government, *A Place to Go overview and referrals*, 2022, <https://www.nsw.gov.au/legal-and-justice/youth-justice/programs-and-services/service-providers/program-specifications/a-place-to-go-overview-and-referrals>.

⁸⁶ See Aboriginal Legal Service (NSW/ACT), *Short-term remand: a snapshot*, 2020, https://www.alsnswact.org.au/short_term_remand_snapshot.

⁸⁷ NSW, Parliamentary Debates, Legislative Assembly, 12 March 2024, page (Michael Daley, Attorney General) <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD1323879322-139003>.

⁸⁸ L Abrams, Sif P Jordan and Laura A Montero, 'What is a Juvenile? A Cross-National Comparison of Youth Justice Systems' (2018) 18(2) *Youth Justice*, 119.

⁸⁹ T Lappi-Seppälä, 'Alternatives to Custody for Young Offenders: National Report on Juvenile Justice Trends (Finland)' (2011) *International Juvenile Justice Observatory*, 1-2.

⁹⁰ *Ibid.*, 18.

spaces etc). Further, investment in services that assist individuals and communities to address longer term and ongoing physical and mental health needs, including trauma, is necessary. Once that is achieved, investment in services that assist individuals and communities to build strengths, including services directed at recreation and learning, should be prioritised. We suggest that this approach to investment is likely to reduce the need for additional police resourcing.

We also suggest that it may be beneficial to resource police education programs in respect of the following learning outcomes:

- needs-based, trauma informed, culturally safe responses which are tailored to young people;
- positive engagement with young people, including effective de-escalation techniques;
- familiarity with, and referrals to, local community and service providers that support a therapeutic approaches;
- understand and apply key principles including applying the least restrictive form of sanction, instituting criminal proceedings only as a last resort,⁹¹ and using detention as a last resort;⁹²
- understand and apply charging and detention procedures;⁹³ and
- understand and apply key policy documents, such as the *Joint Protocol to reduce the contact of young people in residential care with the criminal justice system*.⁹⁴

e) recidivism rates in regional and rural areas, and related impacts on the community, services and law enforcement

The underlying factors outlined in our response to reference (a) are also contributing factors to recidivism.

We note that this is an issue that is the subject of much existing scholarship. By way of example, we bring to the Inquiry's attention an article in the Children's Court of NSW Resources Handbook, *The role of holistic approaches in reducing the rate of recidivism for young offenders*,⁹⁵ which provides more information on the drivers discussed briefly above, in the context of addressing recidivism. It is worth setting out the conclusions of this article in full:

There is a real need to promote partnership between individuals, families and communities with the organisations and institutions that work with them. Rather than working and competing against each other, including departmental silos that may exist across State government and their contracted services, we need to promote whole-of-family, whole-of-community and whole-of-government approaches that are equally underpinned by social resilience, social mobility and social inclusion.

A whole-of-family approach provides scope for individuals to be understood in the context of the family, and the various social and welfare needs that may exist within. At the same time, the ability to highlight possible capabilities and strengths that can be utilised in the change process is part of the solution. We need to understand that young offenders are part of a family/care-giving system that may require additional

⁹¹ *Young Offenders Act 1997* (NSW) s 7.

⁹² Convention of the Rights of the Child art 37.

⁹³ In particular Part 2, *Children (Criminal Proceedings) Act 1987* (NSW).

⁹⁴ Department of Communities and Justice, above n30.

<https://www.facs.nsw.gov.au/download?file=585726>.

⁹⁵ Childrens Court of NSW Resources Handbook, J Ravulo, 'The role of holistic approaches in reducing the rate of recidivism for young offenders', [20-1000].

assistance, while at the same time providing supportive engagement with this service. Such young people and their families should also be acknowledged for their resilience, and this needs to be recognised as part of their ability to move beyond difficult situations and create further opportunities to thrive.

A whole-of-community approach provides scope for communities to see themselves as that — sharing a common unity that enables their members to operate and function in a purposeful manner. Being aware of what resources are available to help connect people to one another, while also acknowledging certain gaps and areas of improvement is part of this process. Providing young offenders with a space to be included and feel like they belong and can contribute is part of this approach. This will also promote a sense of social mobility where people can move in and across a physical space while also seeing the potential to move beyond perceived limitations whether they be physical or economic. The ability to traverse beyond their local community and across other areas of the region can also support young people to see beyond their marginality, in turn, providing new opportunities and experiences that can help enforce positive engagement and inclusion with others.

A whole-of-government approach provides scope for departments to move beyond the limitations of red tape and rhetoric. All government departments are created to undertake a certain role and responsibility across civil society, but within each department, a governance structure is created, and a certain way of doing things occurs. The need to uphold legislative frameworks and operations that fall under a certain remit is required, but at the possible sacrifice of working collegially with other cognate departments. In turn, a barrier is created, and resources are expended with a common good in mind, but may fall short of meeting the need of the community in which they are created to service. Therefore, the need to institute connections to working with each other can be part of breaking down these barriers. This includes enhancing working relationships between all departments that have a vested interest in counteracting youth offending and crime, including Police, Education, Health, Juvenile Justice and the Children's Court. Ensuring strategic departmental plans are more inclusive of each other results in a level of social inclusion not just within the statutory agencies, but also across the wider community. Overall, a better scale of economy is enabled and an efficiency to truly meet the social and welfare needs of young offenders and their families.

f) the range of functions being performed by NSW police officers, including mental health assistance and youth welfare, on behalf of other agencies in regional and rural areas, and the supports required to assist police

We agree with the Standing Council of Attorneys General that the most appropriate first response to difficult incidents involving young people is not necessarily a police response.⁹⁶

In many remote locations, however, police officers are the only available first responders, due to a lack of local social support services and referral pathways. In the experience of our members, reliance on police resources in these circumstances can increase criminalised outcomes. As suggested above, our view is that investment in community services and early intervention approaches, rather than in deploying more general duties or specialist police, will likely assist to provide a more appropriate response to the crisis at hand, avoid criminalisation, achieve better outcomes for both young people and their communities, and remove from police the burden of attending those circumstances where police are not the most appropriate first responder.

⁹⁶ Standing Council of Attorneys General, above n81.

Thank you for the opportunity to comment on these issues. The Law Society remains ready to assist in respect of improving outcomes for young people at risk of contact with the criminal justice system and their communities. If you have any questions about this submission, please contact Sue Hunt, Senior Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Brett McGrath', with a stylized, cursive script.

pp.
Brett McGrath
President