



Commissioner for Children and Young People
Western Australia

All enquiries

Telephone: (08) 6213 2221
Email: trish.heath@ccyp.wa.gov.au
Our reference: 17/2196

Mr Tony Hassall
Acting Commissioner
Strategic Policy Development
Department of Corrective Services
Locked Bag 22
CLOISTERS SQUARE 6850

Dear Acting Commissioner

Young People in the Justice System: A Review of the *Young Offenders Act 1994*

Thank you for the opportunity to comment on the above review. My approach to this submission involves firstly providing general comments regarding youth justice reform followed by specific comments regarding the issues and recommendations included in the Department of Corrective Services' Issues Paper.

As Commissioner for Children and Young People in Western Australia I have a statutory responsibility to monitor and promote the wellbeing of all children and young people under the age of 18 years. In undertaking these responsibilities, I must give priority to Aboriginal children and young people and those who are vulnerable or disadvantaged for any reason. I must also have regard for the United Nations Convention on the Rights of the Child (the Convention). Children and young people in the youth justice system are a priority area of work for my office.

Since the establishment of the role of the Commissioner for Children and Young People, my office has spoken openly about the issues faced by children and young people in the justice system.

In June 2016, I released a five-year strategic plan, *Our Approach and Priorities 2016-2020* outlining three key platforms that the work of my office will align to in the years ahead. One of these platforms is the promotion of the rights, voices and contributions of children and young people. I support the participation of children and young people at all levels of the reform process as well as supporting their participation in police and court processes in the event they have contact with the criminal justice system. Article 12 of the Convention provides for children to participate and to express their views including the right to participate and express views in judicial and administrative proceedings. I urge the Department of Corrective Services to consult with children and young people and their families, particularly Aboriginal children and young people on

Caring for the future growing up today

specific issues related to the review the Young Offenders Act 1994 (the YOA). Resources to support the participation of children and young people in decision making processes can be downloaded from my website at www.ccyp.wa.gov.au.

Last year, my office undertook a consultation with 92 young people in the youth justice system to hear their views about why young people get into trouble with the law and what support and assistance they need to help them develop positive behaviours and navigate away from criminal behaviour.¹ Two-thirds of these young people were Aboriginal. Overwhelmingly the young people who participated in this consultation indicated that serious dysfunction at home, disengagement from school and the broader community, and personal struggles with mental health or alcohol and drug use, underpinned much of their involvement in crime. Consultation participants highlighted the importance of respectful, trusting and long-term mentoring relationships, with professionals, including youth justice workers and police, as crucial to exploring and sustaining behavioural changes, participating in education and employment, and to building a more positive future.

What is clear from the work of my office over the last decade is that programs that divert young people away from the justice system or that address underlying causes of offending are crucial to addressing the high rate of detention of young people in WA. A successful approach to youth justice issues must involve addressing the underlying causes of offending behaviour as well as the provision of diversionary programs, and addressing the offending behaviour itself. The approach must also consider culturally appropriate programs and meaningful community engagement so that communities can more effectively own and address the offending and underlying causes. For more information on the work of my office in youth justice including a policy brief, an issues paper and submissions to relevant committees and inquiries please visit www.ccyp.wa.gov.au/out-work/resources/youth-justice .

Youth justice represents complex social policy issues which requires whole-of-government collaboration combined with community consultation and participation. The youth justice system needs to work with human service agencies including child protection, police, courts, schools, out-of-home care providers and the health system (including mental health, drugs and alcohol) as well as working with families, communities and young people. This collaboration needs to be reflected across policy platforms and needs to include information sharing and training.

Importantly, the fundamentals of youth justice as outlined in the principles of the *Young Offenders Act 1994* need to be further embedded in all policy and program development to guide the way the system responds to children and young people that provides the following:

- that the distinction between young offenders and adult offenders be maintained
- that detention is always a last resort, with a focus on prevention, diversion and rehabilitation

¹ Commissioner for Children and Young People (2016) Speaking Out About Youth Justice. Commissioner for Children and Young People WA.

- provides flexibility to cater for the age, maturity and cultural needs of the individual
- supports the development of social responsibility and provides the support, opportunities and skills to reintegrate into the community in a positive way
- strengthens the role of the family to care for and support the young people in their care.

In addition the most pressing issues for attention by the youth justice system include:

- reducing the over-representation of Aboriginal young people in the system through effective, culturally appropriate, diversion programs
- addressing the underlying causes of poverty, disadvantage and family dysfunction that lead children into contact with the youth justice system
- adopting trauma informed approaches and provision of effective mental health care to children and young people who have contact with the youth justice system. Evidence shows that 80% of children and young people in detention have experienced multiple traumatic stressors² indicating that any response to children and young people in contact with the criminal justice system needs to consider this trauma.

I acknowledge that there has been a gradual decline in the rates of young people who are on community based supervision as well as detention including a recent shift in the incidence of young people in detention compared to on remand.³ However, Western Australia still has the second highest incidence of young people in detention (both sentenced and on remand) in Australia behind the Northern Territory and third highest incidence of young people on remand.⁴ What these statistics reveal is that although numbers of young people who have contact with the justice system have declined (most likely due to a reduction in crime) the level of over representation of Aboriginal young people in the justice system has increased.⁵ This provides further evidence that Western Australia's approach to youth justice needs to focus on culturally appropriate diversionary programs and integrated community based and community owned strategies that address the underlying causes of offending by Aboriginal young people.

I also echo the views of WA Chief Justice Wayne Martin that "the best way of keeping the community safe is by addressing the causes of crime – drug use, mental illness, homelessness and disadvantage."⁶

A 2010 report on effective practice in youth justice commissioned by the NSW Justice Minister⁷ outlined a number of principles of effective practice in this area. This report may provide guidance to the review team. These principles include:

² The Royal Australasian College of Physicians (2011) "The Health and Well-being of Incarcerated Adolescents". Sydney.

³ Australian Institute of Health and Welfare (2017) Youth justice in Australia 2015-16, Bulletin 139, March 2017, Commonwealth Government, Canberra, p 17.

⁴ Ibid at 12

⁵ Australian Institute of Health and Welfare (2017) Youth justice in Australia 2015-16, Bulletin 139, March 2017, Commonwealth Government, Canberra, p 18.

⁶ Wynne, E (2016), 'WA Chief Justice Wayne Martin speaks out on state's incarceration numbers', ABC News 3 May 2016, www.abc.net.au/news/2016-05-03/wa-chief-justice-wayne-martin-speaks-out-on-incarceration-rates/7379064.

- A system based on evidence. Essentially, tough on crime approaches are not effective in preventing crime. Effective youth justice systems are those which ensure legislation and policy "is guided by scientific research and cost-benefit analyses rather than by political convenience"⁸.
- A system that avoids detention and emphasises community based programs. The evidence suggests that many of those young people who are in detention could be treated safely and more effectively outside of custody. Therefore, responses to youth offending should emphasise community-based programs rather than detention. According to the NSW report "effective juvenile justice systems should set guidelines to reduce the population of juveniles in custody"⁹.
- A system that takes a comprehensive approach to services and supports. This includes primary, secondary and tertiary prevention programs to address emerging as well as established juvenile offending behaviour. This needs to take an ecological approach that includes interventions at various settings such as school, family and community. In instances where detention is required, individual tailored therapy in detention as well as post release is needed to reduce recidivism.
- A system that is culturally appropriate and importantly, tailored to local communities that involve these communities in design and implementation.

While this review focusses on the legislative provisions set out in the YOA the actual implementation of the legislation at a practical level is critical to the success of the legislation. I understand that the Youth Justice area has been under considerable reform in the last few years in an attempt to improve the youth justice system at an operational level and that this process remains ongoing.

Young people involved in my consultation identified a number of factors relating to Youth Justice Services and the role of staff that they believed would support them to address their criminal behaviour and other issues that were negatively influencing their lives. For a few young people, the inflexibility of the youth justice system was a significant challenge and they explained that it was too difficult to meet the required obligations.

"When I was on curfew, I was one minute late. And boy yeah, I walked around the corner, and the cops was sitting there, boy yeah. I got locked up and went straight back to Banksia. I was one minute late! I was coming home! It was one minute! I was one minute home! They didn't give me time to get into my house." 17 year-old male

"People break their curfews, they break, some people they just break it for fun, but if you have a curfew and one of your nans or something is sick then what are you supposed to do? You gotta stay back." 16 year-old male

⁷ Noetic Solutions (2010) Review of Effective Practice in Juvenile Justice Report for the New South Wales Minister for Juvenile Justice.
<http://www.juvenile.justice.nsw.gov.au/Documents/Juvenile%20Justice%20Effective%20Practice%20Review%20FINAL.pdf>

⁸ Ibid at 73

⁹ Ibid

A few young people described an all or nothing response to the youth justice system. They reasoned that if they were going to be punished anyway, they should get away with as much as possible.

"Like, if they breach you over curfew or something, that's just gonna leave more kids...to probably go, 'nah stuff ya's, I'm goin' back jail for something, so I may as well do more crime or something cos I'm going back anyway.' So, that's...what I did anyway. Just thought, 'Stuff it, I'm going back [to Banksia Hill]'. " 17 year-old male

Some young people thought they were destined to remain in the justice system because their previous criminal activities prevented them from moving on.

"If I wasn't so young when I started doing crime, it wouldn't be too bad...but I was so young, and I f***ed up, like...I'm always gonna be getting arrested and s**t just because of my name." 15 year-old male

Young people also recounted being wrongfully charged and expressed feeling unjustly treated by the criminal justice system.

"Couple of times I've been caught, I copped it. But times I haven't done it and been charged...like, I got arrested last night for someone saying I stole a bike...I was like, 'bro that wasn't me, I don't even know how to get there'...if they got you on suspicion they can charge you for it...it's not worth fighting the charges. Easier to go to court and get the community service. I've been done...two, three times that I never done." 15 year-old male

In consideration of my statutory role as Commissioner and in view of the above general principles I offer the following comments in relation to the proposals included in the Issues Paper.

Diversion

The guiding principles of the Young Offenders Act include a direction that consideration should be given to non-judicial measures where appropriate.

The advocacy work of my office around youth justice issues has consistently incorporated the following recommendations relevant to diversion:

- Investment in programs that divert children and young people away from the criminal justice system.^{10 11}
- Safe houses in communities across WA where children can go when it is not safe for them to be at home.¹²

¹⁰ Commissioner for Children and Young People 2012, Youth Justice Policy Brief , March, Commissioner for Children and Young People

¹¹ Blagg H 2009, Youth Justice in Western Australia, Commissioner for Children and Young People WA, p.6

- Programs to address the significant over-representation of Aboriginal children and young people in contact with the justice system.¹³
- Investment in effective programs that reduce recidivism.

I understand that since the introduction of the YOA, diversionary strategies have succeeded in reducing the number of children being placed before courts. What they have not done is reduce the rate of Aboriginal children coming into contact with the youth justice system.¹⁴

My office's Youth Justice Report expressed particular concern over¹⁵:

- the weakness of controls and checks on police discretion to arrest and remand children in custody;
- the lack of a consistent commitment to diversion as the primary mechanism for dealing with much youth offending;
- the lack of appropriate diversionary options (particularly in regional and remote areas);
- the defacto 'correctionalisation' of youth justice and consequent separation of young offenders and families from welfare support.

My 2016 consultation with young people in the criminal justice system provides some insight into designing suitable diversionary programs that address underlying issues. This important consultation sought the views of young people as to why they get into trouble with the law and what support and assistance they need to help them develop positive behaviours in order to navigate away from criminal behaviour.¹⁶ I recommend that when designing appropriate programs to divert young people away from the justice system, such programs should not simply aim to avoid custody but should address the underlying issues that lead to offending.

My consultation revealed five clear themes that highlight the factors that influence young people's involvement in criminal behaviour:

- family
- friends
- school and employment
- community
- individual problems, such as drug use.

¹² Commissioner for Children and Young People 2010, Annual Report 2009-2010, Commissioner for Children and Young People, pp.16 and 44

¹³ Letter, Commissioner for Children and Young People to Attorney General, 22 October 2008

¹⁴ Australian Institute of Health and Welfare (2017) Youth justice in Australia 2015-16, Bulletin 139, March 2017, Commonwealth Government, Canberra, p 18.

¹⁵ Blagg, H (2009) Youth Justice in Western Australia. Commissioner for Children and Young People. www.cyp.wa.gov.au p 1.

¹⁶ Commissioner for Children and Young People (2016) Speaking Out About Youth Justice. Commissioner for Children and Young People WA.

My consultation found that offending is often driven by a complex interaction of these factors. For example, family alcohol and drug use impacting the provision of basic needs at home which can in turn influence disengagement from school.

Family was a universal theme with all young people stating that their relationships with family significantly influenced their own criminal behaviour. This included family involvement in criminal activity, drug and alcohol use at home, family conflict and violence and lack of support at home. The role of family dysfunction in contributing to young people's offending behaviour cannot be ignored. The capacity of the system to intervene and support families to provide safe and supportive homes is critical. The number of children and young people in the care of the Department for Child Protection and Family Support who are also under the supervision of the youth justice system is also of concern and greater efforts to provide more effective support to reduce the number of children who enter the youth justice system while in the care of the Department must be made. Participants in my consultation suggested a number of ways issues related to family could be resolved. These included having a safe and stable home or accommodation including the provision of alternative places for young people to stay to escape chaotic family environments, adequate financial support, and drug and alcohol support programs. The need for structure and boundaries at home was also raised as a way to develop more positive behaviours.

The young people also cited that relationship with friends contributed to their criminal behaviour and suggested that there was a need for opportunities to have positive role models and mentors.

Disengagement from school and learning and a lack of optimism about the future were also a significant part of the picture. The majority of young people in my consultation, while largely disengaged from school, considered education important. Their suggestions for improving school engagement included more supportive teachers, educational programs designed specifically for young people in trouble with the law, practical support including transport and financial assistance, as well as help gaining employment.

Issues in the broader community were also identified as contributing to a young person's offending behaviour. Young Aboriginal participants identified an absence of cultural connections and activities in their communities. Others cited lack of access to community resources, living in areas with crime rates and discrimination and inequality. Their suggestions for addressing issues within their communities to assist them included having access to recreational activities that were consistently available and relevant to young people. Many young people were also keen to be involved in planning and designing programs specifically for them. Aboriginal participants who had experienced exclusion, discrimination or racism also identified the need for opportunities to practice important cultural activities and spend time on country.

Finally, participants in my consultation were appreciative of the practical support provided by programs for young people in the youth justice system. Participants stated that breaking the cycle was difficult and there was a need for such programs that offered sustained support. Supportive mentoring relationships with workers within these programs were important to young people. Young people described how accessing mental health and drug and alcohol services helped them overcome difficult

times; however, there was a need for more mental health services including psychological support in the community.

While these strategies are not necessarily within the purview of the YOA or the Department of Corrective Services, in order to achieve the intent of the legislation and improve our ability to rehabilitate young offenders a whole-of-government approach must be supported by the necessary mechanisms to ensure that such services are provided and are effective in achieving their intended outcomes.

I support a renewed commitment to diversion for all children and young people, including new legislation for a range of diversionary options. The CRC, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR) can provide guidance in legislating for the design and implementation of diversionary options for young people.

I recommend that the Review Team takes into account the Australian Human Rights Commission (AHRC) considerations when legislating for the design and implementation of diversionary options for children and young people.¹⁷

The CRC also requires certain standards to be met when developing and implementing diversionary options.¹⁸

1. Are Juvenile Justice Teams an effective diversionary method? What could be done to improve Juvenile Justice Teams?

The principles of Juvenile Justice Teams remain consistent with the principles of the YOA and I support their continuation. However, referrals to Juvenile Justice Teams have been variable, and consistently lower rates of referral for Aboriginal young people are concerning. Juvenile Justice Teams are a key alternative to court under the YO Act and have been Western Australia's primary initiative in the area of restorative justice. What is crucially important to the effectiveness of JTT's and other diversionary strategies is the provision of effective integrated programs that assist young people and their families to address the underlying reasons for offending, such as family dysfunction, and alcohol and drug issues. I support the integration of programs such as drug and alcohol and family support programs with JTTs and other diversionary programs. Refer to my discussion above regarding findings from my 2016 consultation with young people in the justice system.

In the context of declining total number of JTT referrals¹⁹ I recommend a renewed commitment from the key agencies involved both to support JTTs and to ensure justice workers are aware of their purposes and are encouraged to refer to JTTs after other

¹⁷ Human Rights Commission (2001) Human Rights Brief No 5 – Best Practice principles for the diversion of juvenile offenders. <https://www.humanrights.gov.au/publications/human-rights-brief-no5-best-practice-principles-diversion-juvenile-offenders-2001>

¹⁸ Ibid

¹⁹ Department of Corrective Services (2016) Young People in the Justice System: Review of the Young Offenders Act 1994 p 23.

diversionary strategies are considered. Moreover, and perhaps most importantly, police should seek to apply more strictly the provisions of the Young Offenders Act that encourage the referral of young people who have not previously offended to JJTs.²⁰

2. Should the general principle of the YOA relating to diversion be strengthened? If so, how?

The objectives and principles of the YOA are still relevant and valid, although an emphasis on the benefits and importance of diversion would be welcomed. This would further support and enhance the commitment of front line justice workers to diversionary strategies. The majority of young people who receive either a verbal or written warning from police will not have any subsequent contact with the criminal justice system.²¹ The current legislative framework grants police the power needed to make a determination that a young person should be cautioned or diverted rather than charged. However, relevant policies and guidelines also invest police with broad discretion in making such a determination.²² To this end, the Law Reform Commission of Western Australia has noted that,

although there are some legislative and policy guidelines in relation to police diversion it has been observed that the emphasis is on 'may' rather than 'must' and that police do not consider that they are bound by police guidelines.²³

While revision to ensure greater emphasis on diversion would be a welcome legislative amendment, if it is not accompanied by a concomitant change to policing practice, behaviours and strategies, it is unlikely to increase the effectiveness of diversion as an element of the youth justice framework.

3. How can the YOA encourage the diversion of a young person who has committed a non-scheduled offence?

I support a provision within the YOA that ensures that all reasonable steps and measures have been exhausted before a young person is arrested. I agree with the recommendations of the WA Aboriginal Legal Services that would require police to provide a written document to the court explaining why diversionary processes were inappropriate for that young person²⁴. This means that frontline justice workers will be compelled to justify why a diversionary option is not undertaken when arresting a child or young person under the age of 18 years. Inclusion of a provision that provides an additional step for police and other workers may encourage more diversion.

²⁰ Blagg H 2009, *Youth Justice in Western Australia*, Commissioner for Children and Young People, p.21

²¹ Blagg H 2009, *Youth Justice in Western Australia*, Commissioner for Children and Young People, p.8

²² Section 7(h), *Young Offenders Act (WA) 1994*

²³ Law Reform Commission of Western Australia 2006, *Aboriginal Customary Laws: Discussion Paper: No 94*, Perth, p. 240

²⁴ Department of Corrective Services (2016) *Young People in the Justice System: A Review of the Young Offenders Act 1994* p 25.

Understanding and addressing any barriers to the use of diversion options by police and ensuring the regular and transparent monitoring of the use of diversion options may also be effective.

4. Do you believe that new mechanisms of diversion such as conditional cautioning would be effective in stopping re-offending?

All strategies supported under the YOA need to be evidence based.

Conditional cautioning involving a formal agreement that a young person is required to comply with under threat of being charged with the offence could be a useful diversionary strategy for mostly non-Aboriginal young people. I am concerned that this form of diversionary strategy will not be suitable for Aboriginal young people as they are more likely not to admit to an offence in the first instance or not make any comment at arrest rendering them ineligible for this form of diversion.²⁵ Diversionary strategies specific to Aboriginal young people are also required.

I recommend that conditional cautioning, although keeping young people accountable for their actions, is flexible in its application. As previously demonstrated in some of the comments from the young people earlier, my consultation found that young offenders found it stressful to comply with some of the requirements of certain orders and they felt that the youth justice system was inflexible.

I am concerned that for most young people offending behaviour occurs in the context of complex social issues meaning that if conditions of this form of cautioning are too onerous, or beyond the capacity of the young person, they may be difficult to comply with and may set that young person up to fail.

Therefore, I recommend that the conditions under which conditional cautioning operates are developed in consultation with the young person and their families having regard to the young person's capacity to comply with any conditions.

Importantly, I recommend that the basic parameters of conditional cautioning as listed in the review documentation include the provision and referral of young offenders to community support programs that are designed to address their offending behaviour. That is, the young person is provided with supportive programs that act to help that young person address their underlying offending behaviour that may include drug and alcohol programs, family support programs, educational and skill development programs and mental health programs.

In this context I support, in principle, conditional cautioning as an alternative to detention but within a suite of other diversionary strategies.

5. Should court conferencing arrangements be formalised under the YOA?

²⁵ Blagg, H (2009) Youth Justice in Western Australia. Commissioner for Children and Young People. www.cyp.wa.gov.au p 22.

Any alternative provided as a means of supporting the human rights principle of detention as a last resort is supported. I support processes that focus on those young people who commit more serious offences as these young people are more likely to become entrenched in the justice system. I support the principles of restorative justice to be extended to scheduled offences particularly if they result in community based orders and supportive integrated programs addressing underlying offending behaviour.

I support the Australian Law Reform Commission (as cited in the Human Rights Commission Human Rights Brief 5) in recommending best practice guidelines for conferencing. The Commission listed the following matters that should be considered:

- "Administration of diversionary options by someone independent of law enforcement bodies, such as a judicial officer, youth worker or community based lawyer
- the need to monitor penalties agreed to in conferences to ensure that they are not significantly more punitive than those a court would impose as appropriate to the offence
- the need to ensure that young people do not acquire a criminal record as a result of participating in conferencing
- the need to monitor conferencing proceedings to ensure that they do not operate in a manner oppressive or intimidating to the young person
- the child's access to legal advice prior to agreeing to participate in a conference
- whether it is preferable for schemes to have a legislative basis so that the process is more accountable and less ad hoc
- the need to monitor the overall effect of conferencing schemes to ensure they do not draw greater numbers of young people into the criminal justice system or escalate children's degree of involvement with the system.²⁶

6. What need is there to insert a provision in the YOA which requires that a young person held in custody be brought before the court as soon as practicable?

In the context of children and young people, particularly Aboriginal children and young people being held on remand, I support this recommendation as a matter of urgency. We know from criminological research that being remanded in custody, irrespective of the seriousness of the offence, increases the likelihood of receiving a custodial sentence when arriving in court.²⁷

Although ensuring that young people on remand are brought before the courts as soon as practicable, I support a focus on diversion as well as the issuing of court notices so that these young people are not held on remand for any longer than is necessary. Many Aboriginal young people, however, are on remand because they have nowhere safe to stay the night. These young people who have an unsafe home environment and no responsible adult relatives to whom they could be released are held on remand

²⁶ Human Rights Commission (2001) Human Rights Brief No 5 – Best Practice principles for the diversion of juvenile offenders. pg 5 <https://www.humanrights.gov.au/publications/human-rights-brief-no5-best-practice-principles-diversion-jvenile-offenders-2001>

²⁷ Ashworth A. (2005) Sentencing and Criminal Justice (4th edition). Cambridge University Press. Cambridge

as bail is conditional on appropriate accommodation. This is inherently unfair and contravenes the UN Convention on the Rights of the Child as detention should not be used as a placement for children in care.²⁸ What is urgently required, in the first instance, is a renewed focus on diversion for Aboriginal young people through the use of warnings, cautions and proceedings by way of court notices rather than arrest, and failing that, investment in bail hostels, safe houses or other forms of culturally appropriate accommodation to enable diversion of Aboriginal young people as well as appropriate collaboration and communication with the Department of Child Protection and Family Support.

Young people held in police custody pending a bail hearing should also be brought before the Court as soon as practicable. It is my understanding that, being mandated by section 5 of the Bail Act, this is already taking place. However, to the extent that a provision in the Young Offenders Act, reaffirming the applicability of this principle to young offenders, would help to ensure time spent in police lockups is kept to a minimum practicable level I would support an amendment to the Act in this regard.

7. Are there alternatives to remanding children under the age of 14 in detention?

From a human rights perspective, I consider that for those children who are under the age of 14 years detention is not just a last resort but to be used only in the most exceptional circumstances.

I reiterate my recommendation that diversion programs for young people (particularly those who are under the age of 14 years, as evidence suggests that those young people are at higher risk of developing entrenched criminal behaviour²⁹) need to include services and supports that address issues such as family dysfunction, disengagement from school and other issues that are often behind offending behaviour.

I refer you to the Australian Institute for Health and Welfare Report Young People aged 10-14 in the Youth Justice System³⁰ for an overview of available services and interventions available to those 10-14 year olds under youth justice supervision that may provide some direction to the review team.

I also refer you to the NSW Department of Community Services Report on Models of Service Delivery and Interventions for Children and Young People with High Needs.³¹

²⁸ Joint Submission Aboriginal Legal Service NSW / ACT and North Australian Aboriginal Justice Agency Queensland Aboriginal and Torres Strait Islander Legal Service (2010) Inquiry into the high level of involvement of juveniles and young adults in the criminal justice system p 20.

²⁹ Farmer, E (2011) 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives', *Journal of Children's Services*, 6 (2), pp. 86-95.

³⁰ Australian Institute for Health and Welfare (2014) Young People aged 10-14 in the Youth Justice System Australian Government pg 26.

<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129543941>

³¹ NSW Department of Community Services (2011) Report on Models of Service Delivery and Interventions for Children and Young People with High Needs.

http://www.community.nsw.gov.au/__data/assets/pdf_file/0020/321716/research_service_delivery_models.pdf

I support raising the minimum age of criminal responsibility from 10 to 12 years. Farmer (2011) found that the onset of offending by a child compared to an adolescent is associated with significantly greater childhood trauma and adversity and neuropsychological impairment³². I consider that offending by children aged 10 to 12 years is best dealt with by human services agencies rather than the criminal justice system through investment in intensive supervision and support that includes comprehensive wrap around family and community based interventions.

8. Are there any other options that might make diversion a more effective and available option for young offenders?

I reiterate my comments above regarding the need for diversion programs to be integrated with programs that address the underlying causes of youth offending such as programs that address family issues, drug and alcohol issues and disengagement from school.

Comment on Recommendations

It is proposed that the general principle stated at section 7(g) of the YOA relating to diversion be strengthened. The general principle should be amended to more closely reflect the principle used in New Zealand, Queensland and the Northern Territory.

I support this recommendation.

It is proposed that a provision be inserted at Part 5, Division 1 and 2 requiring police to lodge a document outlining why diversion was not pursued wherever court proceedings are commenced against a young person in respect of relevant offences - or; Part 5, Division 1 of the YOA be amended to provide that Police must issue a caution or Juvenile Justice Team referral for any non-scheduled offence.

I support this recommendation.

It is proposed that consideration be given to introducing an additional measure of cautioning under Part 5, Division 1, allowing for the issuance of a conditional caution by a police prosecutor.

I support this recommendation.

In relation to court conferencing, it is proposed that:

a) a provision is inserted to create court conferencing at Part 7, Division 3;

b) such a provision express that the Court is not obliged to dismiss a case where the offender is referred to court conferencing; and

³² Farmer, E (2011) 'The Age of Criminal Responsibility: Developmental Science and Human Rights Perspectives', *Journal of Children's Services*, 6 (2), pp. 86-95.

c) a principle be inserted reinforcing the preference for court conferencing over upfront sentencing for first time scheduled offenders.

I support the introduction of court conferencing although propose that children and young people are provided with the opportunity to participate fully and express views in these judicial proceedings consistent with their rights under the CROC.

In enabling a young person to have a voice, the courts need to be aware of the individual circumstances of that young person such as their intellectual capacity (at least one third of young people in detention in Western Australia are affected by fetal alcohol spectrum disorder³³), the presence of language issues and the real possibility of a history of trauma and neglect.

It is proposed that consideration be given to inserting a provision which states that where criminal proceedings are commenced against a young person and the young person has not been released from custody, the young person shall be brought before the Children's Court as soon as practicable.

I support this recommendation.

6. It is proposed that a new sub-section be inserted under s 19 stating that a child aged less than 14 years may not be placed in a detention centre prior to their sentencing for an alleged offence.

I support this recommendation as a matter of urgency.

Aboriginality

Contact with the criminal justice system can have a profound and lifelong impact on Aboriginal children and young people.

The review documentation prepared by the Department of Corrective Services states that Aboriginal overrepresentation in the WA youth criminal justice system remains high, the rate of return to detention within a two year period has not changed materially in the past five years and there remains a high proportion of young people in detention waiting on remand. The over-representation of Aboriginal children and young people is a crisis at both the state and national level that requires immediate attention, sustained action and investment in community-based options and integrated programs that address underlying causes of offending behaviour.

These include diversionary options including cautioning as well as community based orders that recognise the complex interplay of social conditions and be located within a comprehensive and holistic response that is trauma informed and deals with a range of intergenerational issues. These programs need to be community-based, that is delivered in the communities where Aboriginal young people live including regional and remote communities.

³³ Telethon Kids Institute (2016) <https://www.telethonkids.org.au/news--events/news-and-events-nav/2017/march/1-in-3-young-people-in-detention-has-alcohol-related-brain-damage/>

Every effort needs to be expended and sustained to disrupt the contact that Aboriginal children and young people have with the criminal justice system from an early age. I encourage justice reinvestment involving the redistribution of human and financial resources to disadvantaged communities (those that are in rural and remote areas) to effectively address the underlying causes of crime.

The reasons for the overrepresentation of Aboriginal young people in the justice system are complex and require a comprehensive and tailored policy and legislative response. An effective and holistic response to Aboriginal offending must recognise this as a social issue and take account of intergenerational poverty and disadvantage. Importantly, a comprehensive response needs to include a range of services and supports including child protection, police, health (mental health and drug and alcohol) as well as local communities.

I refer you to a joint submission of my office with the Northern Territory Children's Commissioner to the Senate Committee Inquiry into Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services.³⁴ This submission deals with the reasons for high incarceration rates for Aboriginal children highlighting a lack of caution and diversion options for this high risk group. It also addresses the issue of mandatory sentencing, which is in my view, both ineffective and inconsistent with Australia's human rights obligations.

In 2014, my office held consultations with WA Aboriginal children and young people³⁵. The aim of the consultations was to give Aboriginal children and young people the opportunity to be heard at all levels of the community about the matters they see as important. The consultations asked more than 1,200 Aboriginal children and young people about their views on what was good in their lives, where they needed help, their views on culture and their hopes and dreams for the future. While not specifically focused on youth justice this consultation provides insight into what and how Aboriginal children and young people think and could be used as guidance for the review of the YOA. My office has developed the following principles for promoting strong families and communities based on the views of Aboriginal children and young people that could be used to design integrated programs that address the underlying reasons for youth offending:

- Parents, families and communities have the primary role in safeguarding and promoting the wellbeing of their children and young people and should be supported in carrying out their role.
- The participation of children and young people should be encouraged in the making of decisions that affect them. Children and young people have the right to be heard and to have their views taken into account by adults.³⁶

³⁴ This submission can also be found at <https://www.cyp.wa.gov.au/media/2088/submission-to-senate-finance-and-public-administration-references-committee-inquiry-into-aboriginal-and-torres-strait-islander-experience-of-law-enforcement-and-justice-services.pdf>

³⁵ Commissioner for Children and Young People WA 2015, "Listen To Us": Using the views of WA Aboriginal and Torres Strait Islander children and young people to improve policy and service delivery, Commissioner for Children and Young People WA, Perth.

<https://www.cyp.wa.gov.au/our-work/resources/aboriginal-and-torres-strait-islander/>

³⁶ United Nations Convention on the Rights of the Child, Article 12.

Children and young people should be provided with support they need to contribute effectively to their communities. The Commissioner's publication, *Involving Children and Young People: Participation Guidelines*, explains how organisations can encourage the participation of children and young people in planning and decision-making processes.

- The strengths and significance of extended family and kinship structures must be respected and acknowledged.
- All families and communities should have access to appropriate, universal support services, with more intensive interventions available to families and communities that need them.
- Strength-based approaches should be encouraged that enhance people's existing skills and build on the strengths and capabilities in families and communities. This will promote prevention and early intervention where children and young people are at risk.
- An integrated approach to resolving family and community problems is essential as, almost always there are multiple factors that combine to create environments where children and young people are at risk. Collaboration between service providers and the integration of services promote better use of resources and more effective interventions.
- Policies and services must be culturally respectful and appropriate, and developed in partnership with families and communities. This helps build trust between people and service providers. It also enables customised solutions to be developed to address local needs and circumstances.
- It is important for services to be sustainable, which requires long-term funding and an adequate, skilled workforce.
- Services must be accountable for achieving outcomes for children, young people, families and communities. Data collection and evaluation should be built into policy and service development.³⁷

I support the principles contained in the Report to the NSW Juvenile Justice Minister³⁸ that have been shown to be effective in addressing Indigenous overrepresentation in the youth justice system. These include:

- "maximise access to and utilisation of, alcohol and substance abuse programs;
- an avoidance of incarceration wherever possible;
- promotion of sustained engagement with the education system;
- a high level of participation by the Indigenous community in formulating and implementing responses to Indigenous youth crime; and
- adequate provision of local community-based support and parental training for disadvantaged families."³⁹

³⁷ Commissioner for Children and Young People WA 2015, "Listen To Us": Using the views of WA Aboriginal and Torres Strait Islander children and young people to improve policy and service delivery, Commissioner for Children and Young People WA, Perth. pp 42-43.

<https://www.cyp.wa.gov.au/our-work/resources/aboriginal-and-torres-strait-islander/>

³⁸ Noetic Solutions (2010) Review of Effective Practice in Juvenile Justice Report for the New South Wales Minister for Juvenile Justice.

<http://www.juvenile.justice.nsw.gov.au/Documents/Juvenile%20Justice%20Effective%20Practice%20Review%20FINAL.pdf>

³⁹ Ibid at 5

1. What considerations could a new type of Community Based Order provide for to reflect the needs of young Aboriginal people?

I support consideration for new types of Community Based Orders in particular for those Aboriginal young people who live in regional and remote areas of Western Australia. Young people who live in rural and remote Western Australia have limited options and current practice is for these young people to be removed from their communities and sent to detention many thousands of kilometres away. Thus, a community based order that allows these young people to remain in their communities and includes integrated support services and strategies is supported.

I recommend that the review team consult with Aboriginal children and young and their families before the introduction of any new community based order or other sentencing options. Seeking the views of children and young people to guide the development and implementation of these orders is important to the acceptability and effectiveness of these orders.

As previously stated, my youth justice consultation⁴⁰ revealed five key themes for why young people get into trouble and I recommend these are taken into account when designing a new type of CBO.

Some of the young people involved in my consultation talked about their experiences on community based orders and some of them considered that the structure provided by a community-based order supported them to stay out of trouble.

“Orders, I guess...the freedom that we used to have was, kinda, pretty bad criminal activity, like doing drugs and stuff like that, they stop us from doing that with, um, urinalysis, it’s kind of a good thing though.” 17 year-old male

“The support and the reporting as well, cos you’re not doing your own thing all the time, you have to do stuff that you have to, so you don’t have too much time on your hands and then like after you report, you’re like oh yeah I’ll just finish this up and I’m not going to go out and get into trouble again.” 18 year-old male

“[My curfew]...it’s 8:00pm to 5:00am. It just stops...cos most crime is committed at night, so if they make sure people are, like, they’re home...I have to. Or else I’ll go back jail.” 18 year-old male

However, some young people described the stress of completing an order and expressed a need for more chances.

“They just need to give people a second chance or a third chance. Everyone’s not perfect. I know I’m not perfect. You’re not going to complete the Order you know. It’s like if we just chucked them an Order. You know, bang! You’ve got

⁴⁰ Commissioner for Children and Young People (2016) Speaking Out About Youth Justice. Commissioner for Children and Young People WA.

an Order. You've got to report everyday...before they gave me two orders I had to ring up three times a week and I had to go in there three times a week. Like, I had to ring them up and go straight into report every three days, I was thinking what the f***...it was too much you know, then they want you to do all these things, they expect you to do all on your own." 16 year-old male

2. *How could the YOA be made flexible enough to allow for 'community owned justice' responses?* I refer you to the *Children, Young Persons and their Families Act 1989 (NZ)* as an example of youth offending legislation that is highly inclusive of Indigenous families, and the wider Indigenous community.

Youth justice principles under the *Children, Young Persons and their Families Act 1989 (NZ)* apply to any person exercising powers under the Act, including police. The principles state that:

(a)... unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter:

(b) the principle that criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whanau¹, or family group:

(c) the principle that any measures for dealing with offending by children or young persons should be designed—

(i) to strengthen the family, whanau⁴¹, hapu, iwi, and family group of the child or young person concerned? and

(ii) to foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:

(d) the principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:

(e) the principle that a child's or young person's age is a mitigating factor in determining—

(i) whether or not to impose sanctions in respect of offending by a child or young person? and

(ii) the nature of any such sanctions:

(f) the principle that any sanctions imposed on a child or young person who commits an offence should—

(i) take the form most likely to maintain and promote the development of the child or young person within his or her family, whanau, hapu, and family group? and

⁴¹ Whanau is a Maori term meaning 'family'.

(ii) take the least restrictive form that is appropriate in the circumstances:

(g) the principle that any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending:

(h) the principle that the vulnerability of children and young people entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

I support amendments to the YOA that seek to increase sentencing flexibility and provide a foundation upon which community-owned justice initiatives could be strengthened however in order for such initiatives to succeed they must receive consistent and sustained support. It is now demonstrably clear that "well-resourced programs that are owned and run by the community are more successful than general, inflexible programs imposed on communities."⁴² To this end, it is essential that an increased emphasis on community-owned justice initiatives, either in a legislative or policy sense, is undergirded by concomitant increases to funding and support.

3. Can a restorative justice approach be appropriate and useful for Aboriginal young people?

I support a criminal justice system that seeks to encourage young people to accept responsibility for their actions in a positive way that emphasises social responsibility. This is consistent with the principles of the YOA. I believe that this aim should be pursued by disrupting young people's interaction with the criminal justice system from a young age.

Approaches that seek to encourage young people to develop social responsibility are supported while at the same time encouraging an appreciation of their offending behaviour on the community. In my discussions with Aboriginal communities across Western Australia I have been struck by the considerable impact of offending behaviour on Aboriginal communities themselves. It is well known that Aboriginal young people are over-represented in the Western Australian justice system; however, Aboriginal people including young people are also over-represented as victims of crime.⁴³ The need for healing programs that address the trauma and despair in Aboriginal communities I believe are integral to addressing offending behaviour within Aboriginal communities that perpetuate the trauma and offending cycle. Such programs can only be developed by supporting the leadership within the Aboriginal community to design and deliver Aboriginal-led, place-based programs to address healing and trauma.

4. Are there any other options for using the YOA to address high levels of Aboriginal over-representation in the youth criminal justice system?

⁴² Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, Northern Territory Government, *Ampe Akelyernemane Meke Mekarle — 'Little Children Are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse (2007) ('Little Children Are Sacred Report')*, recommendation 5.

⁴³ ABS (2014) Recorded Crime – Victims, Australia, 2013. Cat no. 4510.0. Canberra: ABS.

As I have stated elsewhere, it is important that any options that seeks to address over-representation of Aboriginal young people in the justice system should be developed in consultation with Aboriginal children and young people. Children and young people should be given every opportunity to participate in decision making processes that affect their lives and wellbeing. This contribution by young people serves to enrich and legitimize strategies that address and prevent Aboriginal young people from staying as well as entering the youth justice system.

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs 2011 Inquiry into the high level of involvement of Indigenous juveniles in the criminal justice system made 40 recommendations to address the over-representation of Indigenous young people, including in the areas of social development, health, education and training, the juvenile justice system, and broader government policy directions.⁴⁴

The Inquiry cited the importance of empowering Indigenous communities and elders and delivering coordinated initiatives focusing on early intervention and the wellbeing of Indigenous young people. The Committee supported justice reinvestment which includes funding being redirected from detention facilities to communities with a high rate of offending. This funding is to be used to develop local programs and services that address underlying causes of crime.

The Inquiry recommended community-based programs providing a significant and responsible role for Aboriginal and Torres Strait Islander adults that makes use of their knowledge and skills and provides respect to Aboriginal communities.

In particular, I am supportive of intensive family support programs to at risk families particularly those in rural and remotes areas. These programs need to be adapted to local circumstances and involve a comprehensive community engagement process.

Comment on Recommendations

It is proposed that a new Order is created under the YOA to allow for non-government managed, culturally appropriate community justice.

I am supportive of this recommendation in the context of effective funding models and supportive structures to ensure that non-government agencies can deliver fully inclusive intensive support programs for Aboriginal children and young people and their families at an appropriate dose that produces long term outcomes. I also support structures that assist in ensuring collaboration with government agencies such as child protection, education and health. I also reiterate the need to ensure that these orders are community developed and community owned.

⁴⁴ Standing Committee on Aboriginal and Torres Strait Islander Affairs (2011) Doing Time – Time for Doing: Indigenous Youth in the Criminal Justice System. Australian Government. http://www.aph.gov.au/Parliamentary_Business/Committees/Committees_Exposed/atsia/sentencing

It is proposed that consideration be given to reducing the emphasis on restorative justice through general principles (b) and (e).

I support flexibility in the legislation for dealing with Aboriginal children and young people, although advise against moving too far away from a restorative justice framework without clarity around other options for dealing with Aboriginal children and young people who come in contact with the criminal justice system.

Pre-release

A youth offending system that fails to provide proper preparation for release and adequate supervision of young offenders upon release from detention is not consistent with the principles of the YOA. Policy and practice needs to support young offenders leading up to and upon release from detention to ensure that their human rights are protected, but also to avoid recidivism.

The Western Australian system needs a renewed commitment to through-care. Through-care is a consistent and progressive case management approach to young offender rehabilitation and begins when a young person enters detention, continues through the period of detention and ends sometime after release from detention when that young person is able to live supported by their community. A key component of the through-care is intensive case management.

Best practice in rehabilitation suggests that through care is the backbone of successful criminal justice systems with this through care addressing the specific needs of young offenders, including tailored culturally appropriate through care services for Aboriginal children and young people.⁴⁵

I understand that developing through-care systems has been a key part of the current reform process and fully support the Department's intent in this regard and urge the prioritizing of this strategy as a means to reducing the cycle of offending for current young people engaged in the system. Monitoring the development of the through-care process, particularly the collaboration between child protection and family support and education services, is critical to ensuring the positive outcomes for young people.

My consultation with young people in the youth justice system found that better access to supports and services was seen as essential to addressing criminal behaviours. Breaking the cycle was difficult and young people identified a need for ongoing support and opportunities to reengage in positive activities as critical in this process. Young people appreciated the practical support provided by programs that are designed for young people in youth justice.

"[Staff at White Lion]...they helped me do my Order. They took me there. They took me to the counsellor and all that...urinalysis. Yeah transport. That was really helpful." 16 year-old male

⁴⁵ Walsh, Tamara (2004) Research Report: Investigating prison release practice and policy in Queensland and its impact on community safety. <http://www.sistersinside.com.au/reports.htm>

Supportive, mentoring relationships with workers at these programs was said to be integral to young people's engagement.

"Get a mentor and get the mentor to have a talk with them and see what goes from there...I need that support from [my mentor] as much as I can, yeah. Yeah, they tell me some good things, they helped me out. Like in my attendance I stopped coming for a while and they kept on talking to me and I got back on, and I need to commit my attendance for a while, so they can help me out with what I want... they just kept on telling me and telling me, got it through my head, 'got to stick at it' to get what I want, like my licence and stuff like that. I went to the licensing centre and passed it, yeah." 19 year-old male

Young people and family members were grateful for the support of dedicated workers and suggested if they could change anything they would have more role models for young people in youth justice.

"I would hire more staff members. So, let's say I had so many kids who need help, I would get, like, hire more staff members, for each single one of them, one-on-one time with them, more time, would be great." 17 year-old male

A number of young people told us that lack of support meant they reoffended.

"Yeah, no support...and that's what I mean! That's why I've been here four times." 18 year-old male

My consultation also found that young people accessing mental health and drug and alcohol services helped them to overcome difficult times in their lives.

"Get 'em to see a psychologist/therapist or whatever like three times a week, regularly and then they could help us like, then the psychologist or whatever it is, could like write it down and then, what they're saying and stuff and...then give it to the person that like treats us...say, 'this kid has this' and you be diagnosed." 14 year-old

"Yeah my friend went to drug and alcohol DAYS, down in Perth...And yeah, he's been out, he's completed and now he's been put in a unit, and he's stayed clean for the whole time, so yeah." 17 year-old male

Some of the young people my office consulted with described the psychological support provided by Youth Justice Services in custody and in the community as helpful.

"The psychs [in Banksia Hill], they're good...I don't really need a psych. Only sometimes when I was doing it hard I needed a psych, you know?" 16 year-old male

"I still see the same psych as when I was in jail, yeah they do help, I didn't want to see another one, starting all over again, so they gave me the same one.

"They come every [week]...it's a bit full on at the start, you get used of it though." 18 year-old male

1. What is an appropriate amount of time for young detainees to be released on day release? Should some flexibility be provided in the time limits?

It is not within the realm of my expertise to comment on a specific timeframe. However, I support the concept of day release as an important part of successful rehabilitation and consideration of the individual circumstances of each young person is a critical part of the success of such a strategy.

2. Would Graduated Release Orders be a useful mechanism for pre-release? Are there any other mechanisms of pre-release that should be considered?

I support the inclusion of culturally appropriate gradual release orders that are embedded into a comprehensive through-care system. These through-care systems need to ensure that young people receive services and supervision, incorporate intensive intervention while in detention and during transition to the community. According to Save the Children⁴⁶ a typical release program needs to:

- work to bring together the young people, their families and community support systems;
- prepare young people for increased responsibility and freedom in the community;
- encourage positive social youth interaction in the community;
- identify and develop new and existing resources and supports for young people;
- connect young people to employment vocational training and/or an academic study courses;
- identify target high risk offenders;
- address changeable criminogenic factors including cognition, attitudes education, peer associations, use of drugs, attitude to authority, behaviour in the work place, and inter-personal relationships;
- link institutional and community-based services for a seamless transition;
- involve systems of collaboration to build a comprehensive supportive network⁴⁷.

Forms of gradual release to be considered may include home detention or temporary release and/or release to community residential facilities. The key to a successful transition for young offenders is the provision of monitoring and support who provide these young people with practical and emotional support. A positive working relationship with community justice officers is crucial to the success of a graduated release program.

⁴⁶ Save the Children and European Commission – Directorate General Justice Freedom and Security (2010) JUST Juvenile Justice: Development of Child Rights Based Methods of Intervention to Prevent Juvenile Crime and Promote Reintegration of Young Offenders. <http://images.savethechildren.it/f/download/protezione/agire/It/Italy-report-on-practices.pdf>

⁴⁷ Ibid

3. Should Supervised Release Orders be able to last longer than a sentenced period of detention? How would this help to prevent re-offending?

Supervised Release Orders (SROs) allow a young person, subject to certain conditions, to serve the final part of their sentence in the community. This enables a young person to commence the process of community reintegration under supervision and subject to terms that are calculated to foster their rehabilitation. As Supervised Release Orders are granted by the Supervised Release Review Board (SRRB) and not by a judge of the Children's Court it is appropriate that they run only until the end of the term for which the offender would be liable to be detained if there were no supervised release order. I am concerned that imposing an obligation that binds the young person after the end of the term imposed by the Court would be tantamount to the exercise of judicial power and inappropriate under the current SRO framework. Increasing supervision after a young person's release from detention could be an effective tool through which to reduce recidivism rates however it is my view that mandated periods of supervision upon the expiration of judicial sentences could only appropriately be imposed at the time of sentencing. Extending the period of an SRO could, however, be effected on the front end by giving the SRRB the power to make a pre-release order prior to the young person's earliest release date. This would provide the young person with an opportunity to demonstrate their suitability for an SRO by participating in community-based remedial and reintegration programs.

Moreover, the SRRB has itself suggested that the provision of remedial programs to young people held on remand could serve to counter the short duration of SROs as this would increase the amount of time the young people would spend in these programs. It would also provide incarcerated young people with an opportunity to "demonstrate their readiness for supervised release by the earliest release date".⁴⁸ Additionally, evidence suggests that a comprehensive through care model of practice that seeks to partner corrective services with relevant agencies and organisations could serve to reduce recidivism rates by providing holistic support to young people upon their release from detention which would seek to address the range of complex factors that contributed to their offending in the first place. Such through care models should be developed and implemented as a matter of priority.

4. How would the use of 'family responsibility conditions' in a Supervised Release Order be helpful to young offenders?

Family responsibility conditions in areas such as parenting, income management and budgeting have been acceptable and effective for some families, particularly Aboriginal families⁴⁹. Family responsibility conditions need to be developed in consultation with Aboriginal families and young offenders and these families need to be supported to comply with the conditions. A punitive enforcement approach to these conditions is not supported.

⁴⁸ 2015/16 Annual Report, Supervised Release Review Board Western Australia, 11

⁴⁹ KPMG Implementation Review (2010) Implementation Review of the Family Responsibilities Commission FINAL REPORT September 2010. Report prepared for FaHCSIA.
<https://www.dss.gov.au/sites/default/files/documents/implementation-review-of-frc-sept-2010.pdf>

5. In what way, if any, do the expiry processes around Conditional Release Orders need to be tightened?

I do not have any comments to make regarding this issue.

6. What need is there to account for young people who are unable to leave detention on their first day of eligibility?

I do not support a child or young person remaining in detention any longer than the law dictates. Collaboration with the Department of Child Protection and Family Support is crucial in designing and implementing programs for children and young people who do not have adequate family or community support to enable these children and young people to leave detention as soon as their sentence has expired.

Further, the funding of culturally appropriate secure accommodation is required as part of essential infrastructure for young Aboriginal people leaving detention that acts as a hub for service provision involving programs that focus on the underlying reasons for offending including mental health and drug and alcohol programs, and education and skill development programs.

7. Are there any other options for assisting young detainees leading up to and post-release?

See comments above.

Comment on Recommendations

It is proposed that section 188(4) of the YOA be amended to provide that the CEO may, in writing, authorise a detainee to be absent from a detention centre for a period not exceeding 5 days.

I support this proposed amendment. It would provide more flexibility in considering the individual circumstances of young people held in detention.

It is proposed that the following amendments are made to provide the framework for rehabilitative SRO's:

a) the Court having imposed a sentence of detention, the offender would have to serve 50% of the term, or the minimum fixed by the Court, before becoming eligible for release;

b) the SRRB would then determine when, and upon what conditions, accepted by the offender, they were to be released, service of the term of detention being suspended upon release;

c) the conditions might be amended in any way by the SRRB as the need arose, and with the consent of the offender;

d) as is the case now, after 6 months the SRRB could cancel any or all of the conditions except the condition, applicable in every case, that the offender must not commit any offence;

e) the SRO would have duration of 6-12 months, fixed by the SRRB, having regard to the evidence as to the time needed to complete applicable programs. If successfully completed, the offender would be discharged from the service of any unserved portion of the term of detention;

f) a breach of the SRO, by re-offending or by otherwise failing to comply with a condition of the order, would result in the SRRB:

i. taking no action in the case of a minor breach;

ii. leaving the SRO in place, but amending its terms; or

iii. returning the offender to custody to serve any unserved period of the detention imposed, the service of which would be conditionally suspended upon the making of the SRO. The offender would be immediately eligible for an SRO to be made as before;

I support any amendment that reduces or removes the need for a child or young person to be held in detention and provides greater flexibility for the circumstances and best interest of each child to be considered in making such decisions. The need to provide adequate support to each child and their family to ensure their capacity to comply with any conditions imposed and to be in a safe environment is also paramount.

Detention facilities

My 2016 consultation with young people in the youth justice system⁵⁰ asked young people for suggestions that could improve the detention system in Western Australia. Some of the young people recommended a more youth-focused approach to working with young people as well as more opportunities for culturally relevant education and rehabilitation.

"I'll make a rule like staff members must be professional, not fake professional, they must always like protect the kids no matter what. I'll properly train all my workers and that, and each week, or each month or each fortnight, I'll organise a big thing with all the high bosses like myself, and all...the lower guys and all the kids as well. We all come along and have like a big...party but not a proper party, you know? Dancing with the CEO there." 17 year-old male

"I would make Banksia different so like every kid that comes in probably gets more like cultural, like Aboriginal education." 16 year-old male

⁵⁰ Commissioner for Children and Young People (2016) Speaking Out About Youth Justice. Commissioner for Children and Young People WA.

I consider that independent oversight of detention facilities is critical to protecting the rights of vulnerable individuals, ensuring compliance with policy and practice, identifying and developing system weaknesses for continual improvement, and providing real and perceived robustness and confidence in detention services and systems.

Regular independent oversight and monitoring is critical to ensure compliance with human rights standards and identify issues as early as possible. Important to meeting a basic need to be treated fairly and justly, access to effective procedures to raise complaints and concerns is essential. Children and young people who have access to systems to do this are less likely to resort to challenging behaviours.⁵¹ Such systems require proactive consultation mechanisms to anticipate issues before they arise, complaints system that are accessible and responsive, and an independent advocacy system that can assist the young person to identify, raise and resolve issues satisfactorily. Work by my office in producing guidelines for the development of effective complaints systems for children and young people, and further work around more vulnerable populations of young people such as those in care or in the justice system is available on my website at www.ccyp.wa.gov.au.

My office is currently undertaking a mapping exercise of independent oversight mechanisms in WA to make recommendations to government on the adequacy of the oversight system of services to children and young people and any gaps or improvements that are required to ensure a robust and effective system is in place.

1. What value do you see in the use of an independent statutory board to assist facility management at a detention centre? What powers should the board have? Should facility management be accountable to the board in any way?

I support independent oversight of detention centres to assist facility management to ensure that children and young people are treated fairly and justly and detention centres are complying with their own policy and practices. However, in reference to the mapping of oversight agencies noted above, it is important that the development of new oversight is undertaken with reference to existing structures and evidence of best practice requirements in achieving intended outcomes.

2. How can the YOA be amended to better facilitate transfer to adult prison for young people who have turned 18?

The evidence suggests that the human brain continually develops well beyond the first few years of life and this development continues throughout adolescence and into early adulthood⁵². We know that brain development is influenced by exposures (such as alcohol and illicit drugs in utero) and experiences (such as ongoing trauma, victims of abuse or neglect). Children and young people who have been exposed to trauma, abuse and neglect in their young lives are more likely to come into contact with the

⁵¹ Youth Justice Board for England and Wales (2006) Managing the Behaviour of Children and Young People in the Secure Estate. Code of Practice. www.youth-justice-board.gov.uk

⁵² Casey BJ, Jones RM, Hare TA. (2008) The Adolescent Brain. *Ann N Y Acad Sci.* 2008 Mar; 1124: 111–126. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2475802/>

criminal justice system. Farmer (2011) found that 'many young people who come into contact with the criminal justice system are those least competent to engage with it.'⁵³ A March 2017 report by the Telethon Kids Institute found a third of young people held in detention in Western Australia have fetal alcohol spectrum disorder.⁵⁴ This disorder is characterized by poor impulse control, lower than average intelligence and other behavioural and intellectual deficiencies which all contribute to a young person coming into contact with the criminal justice system.

What this means is that even after a young person has turned 18 years his or her developmental needs are still relevant and many of these young people require intensive support not found in an adult facility. I recommend flexibility in the system and do not support young people who have turned 18 to be automatically transferred into the adult system. A range of options are worthy of further investigation including the role of the Wandoo Reintegration Facility, transfer to a disability justice centre, legislative change that permits 18 to 20 year olds to be detained in a youth detention centre, in certain circumstances, instead of an adult prison similar to Victoria's dual-track system.⁵⁵

3. Should the option of entering into contracts for custodial services be available in relation to youth detention?

I do not support privatisation of youth detention services. The State has a responsibility to young offenders as well as ensuring compliance with human rights law. The evidence suggests that privately run prisons provide low-quality services, fail to save taxpayer money, and negatively affect criminal justice policy⁵⁶. I am particularly concerned that the privatisation of youth detention facilities will compromise the rights of children and young people, further amplifying the negative effects of detention on these vulnerable children and young people.

4. How can the YOA better provide for dealing with detention offences?

Independent oversight of detention facilities needs to include oversight for how the detention centre deals with detention offences to ensure the facility adheres to their own policies and procedures.

There is a critical need for young people to be able to access free and culturally appropriate legal services. Access to legal representation is a fundamental human right as contained in the Convention for the Rights of the Child and other human rights instruments.

⁵³ Ibid at 89.

⁵⁴ Telethon Kids Institute <https://www.telethonkids.org.au/news--events/news-and-events-nav/2017/march/1-in-3-young-people-in-detention-has-alcohol-related-brain-damage/> Accessed 10 March 2017

⁵⁵ Section 32 of the *Sentencing Act 1991 (Vic)*

⁵⁶ Mason, Cody (2013) International Growth Trends in Prison Privatisation. The Sentencing Project. <http://www.sentencingproject.org/wp-content/uploads/2015/12/International-Growth-Trends-in-Prison-Privatization.pdf>

Any amendment to the YOA that deals with detention offences needs to be consistent with the Convention for the Rights of the Child and other human rights instruments.

5. Are there any other options for improving detention facilities under the YOA?

I am aware of the current extensive reform underway in Banksia Hill and more broadly across our youth justice system. I am encouraged by many of the reform directions particularly the intended improvements to needs assessment, education and other services and supports to improve the outcomes for young people in youth justice.

I believe there is a need for changes to the environments within detention facilities in Western Australia that ensures that young people are safe and feel safe. Ensuring that young people are safe and feel safe requires attention to their needs in relation to the environment. A review of residential youth facilities in Canada in 2016 identified the 'size of the facility and the ability to work with the number of people housed there' to be of significant influence on the capacity of the facility to be youth centred and establish positive relationships with young people.⁵⁷

I advocate for the realignment of youth justice facilities to cater separately for girls and boys and for those on remand and those currently sentenced. Further consideration needs to be given to the capacity of our youth justice facilities to separate out young people who require a higher level of security and behavioural management to avoid the situation where all young people are exposed to critical incidents, violence and disruptions and forced to endure certain processes and practices (such as long periods of lock downs) due to the behaviour of the minority.

I recommend the review team investigate the Disability Justice Centre model which is an example of a smaller management models in secure, yet supportive environments. The Canadian experience suggests capping occupancy at 8 residents in secure facilities commenting, 'establishment of effective relationships with children and young people is best accomplished in smaller settings.'⁵⁸ This may also make the provision of facilities closer to the young person's community of origin more viable, which given the cost of transportation and the importance of through-care and family/cultural connection, should be a priority for the Department.

I recommend a child centred approach that focuses on the needs of young people in the justice system and provides services and supports to meet those needs. In particular, these services and supports need to recognise the ongoing experiences of the young people in Banksia Hill that are signified by abuse, neglect and trauma. Thus, access to appropriate mental health services and supports is critical to successful rehabilitation of these young people.

As I have discussed elsewhere, relationships between young offenders and staff within detention facilities is crucially important to positive outcomes for these young people. My consultation with young people in the youth justice system identified the

⁵⁷ Residential Services Review Panel (2016) Because Young People Matter. Ministry of Children and Youth Services, Ontario, Canada. www.children.gov.on.ca

⁵⁸ Ibid. p. 31

importance of developing respectful, trusting relationships with youth justice staff as integral to the support they needed to change their offending behaviour. While some cited specific examples of excellent practice this was not a consistent experience across the board.

I also refer you to a paper prepared by my office, Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices (Attachment 5) in consultation with my counterparts in other jurisdictions who work collaboratively as the Australian Children's Commissioners and Guardians. This paper was released in April 2016 and sets out specific human rights standards in relation to particular incident and behaviour management strategies and the reported use of such strategies in different jurisdictions. Essentially the paper highlights the complexity of managing behaviour in youth detention facilities and the need to ensure that in doing so responses are guided by evidence of what works and awareness of the vulnerability of the young people concerned, concluding, 'Any period of detention must serve to support, educate and rehabilitate child offenders and seek to mitigate any factors that could exacerbate pre-existing vulnerabilities.'⁵⁹ Processes for diversion and de-escalation must be prioritised under a behaviour management regime and use of any restrictive practices, restraint processes or disciplinary regimes must be documented fully to ensure accountability for appropriate use and compliance with relevant policy and practice standards. Use of isolation and segregation is of particular concern, given the potential for serious implications for individuals.⁶⁰

Interaction with other legislative provisions

1. Is it possible or appropriate to amend the YOA to reflect the intent of mandatory sentencing through providing alternative options for dealing with younger offenders who have committed offences which are subject to mandatory penalties for adults?

I do not support mandatory sentencing for young offenders in any form as these laws violate Australia's human rights obligations.⁶¹ I support giving judges and magistrates discretion in sentencing that provides them with the discretion to consider individual circumstances and other mitigating factors. Mandatory sentencing for young people is harsh and unfair and shifts discretion from the courts to police and prosecutors. Further, mandatory sentencing affects the most marginalised communities such as Aboriginal young people disproportionately and has not been found to reduce crime.⁶² The YOA should not contain any mandatory sentencing provisions.

⁵⁹ Australian Children's Commissioners and Guardians (2016). Human rights standards in youth detention facilities in Australia: the use of restraint, disciplinary regimes and other specified practices. www.cyp.wa.gov.au

⁶⁰ Residential Services Review Panel (2016) Because Young People Matter. Ministry of Children and Youth Services, Ontario, Canada. www.children.gov.on.ca. Pp.68

⁶¹ Article 37(b) of the CROC states: "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 for the shortest appropriate period of time"; Article 40(4) provides that punishment must be in proportion with the circumstances of the offence.

⁶² Victorian Sentencing Advisory Council (2011) Does Imprisonment Deter? A Review of the Evidence, April 2011, Melbourne, 15.

Summary

I believe that the YOA provides a suitable legislative framework for the provision of youth justice in Western Australia. Opportunities to strengthen the implementation of the general principles of juvenile justice are welcomed. As a matter of priority I consider that attention to:

- improving the effectiveness of diversion opportunities, particularly for Aboriginal young people
- provision of effective family support programs that address the underlying reasons for young people's offending behaviour
- provision of mental health and other approaches to support the effective management and rehabilitation of young people who are engaged more formally in the youth justice system; and
- urgent review of the detention facilities available for young people to provide more suitable facilities that cater for the needs of different genders, age groups, regional location and level of security requirements of young people.

Ongoing and comprehensive independent oversight of the youth justice system is critical to ensure adherence to appropriate standards of care and positive outcomes for the children who become involved with the system.

Thank you for the opportunity to make a contribution to the review process. I am happy to discuss any aspect of this submission in further detail, should it be required.

Yours sincerely



COLIN PETTIT

Commissioner for Children and Young People WA

28 April 2017