



Commissioner for Children and Young People
Western Australia

Discussion Paper: Youth Justice in Western Australia

January 2024

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Content note: This discussion paper covers issues that may be distressing for some readers. Please read with care.

If any of the topics discussed raise issues for you, you may wish to contact:

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Kids Helpline: 1800 551 800

Butterfly Foundation National Eating Disorders Helpline: 1800 33 4673

Introduction

The role of the Commissioner for Children and Young People

The Commissioner for Children and Young People is an independent statutory officer who provides reports to the Parliament of Western Australia, relating to the three key platforms outlined in the *Commissioner for Children and Young People Act 2006* (WA):

- promoting the rights, voices and contributions of children and young people
- monitoring and advocating to strengthen the wellbeing of all WA children and young people
- prioritising the needs of Aboriginal, disadvantaged and vulnerable children and young people.

In addition, the Commissioner is required to have regard to the 'United Nations Convention on the Rights of the Child'. In undertaking these functions, the Commissioner engages with, and encourages the participation of, children and young people in decision-making by the Commissioner. The Commissioner is also required to work in cooperation with, and consult with, other government and non-government agencies. This includes the development of guidelines for government and non-government agencies regarding the participation by children and young people in decisions which affect them.

Youth Justice: A national priority

The criminal justice system can have a profound impact on children and young people, who are especially vulnerable to the harmful effects that arise from contact with the system. For this reason, youth justice has been a priority area for each Commissioner since the establishment of the office in 2007.

In recent times, the focus of youth justice has often been on children and young people in detention, and the increased risks and incidents occurring which impact the physical, social, cultural and emotional wellbeing of detainees. When in detention, which should be used as a last resort, the rights of children and young people must be adhered to, and to therapeutic, rehabilitative approaches must inform the operation of youth detention centres.

While the needs of children and young people in detention are of great importance, a whole of system reform is needed – one that holistically responds to the needs of children and young people and their families and prioritises the reduction of the numbers of children and young people in detention.

While there is an urgent need to reform the detention system, it is critical that the approach to youth justice moves to a focus on how to engage early with children and young people and divert them away from incarceration. This requires a whole of Government approach with coordinated approaches. Programmatic responses are not achieving the best outcomes and a system response and approach is required.

There are ways forward in youth justice. Multiple reports from the Office of the Inspector of Custodial Services have identified the problems and potential solutions to youth detention in Western Australia.¹ Social Reinvestment WA has developed a well-researched, evidence-informed 'Blueprint for a Better Future - Paving the Way for Youth Justice Reform in Western Australia' (the Blueprint), whose call for significant whole of system change has yet to be responded to by State Government.²

The Commissioner advocates for a changed approach to youth justice that hears the voices of children and young people and families affected by the system. Their voices are clear: the current approach is not good enough.

What is needed is a holistic approach to youth justice that utilises early intervention and prevention approaches; supports community and family-led initiatives; privileges rehabilitation and restorative justice measures over punishment and ensures the wellbeing of children and young people, who often have complex and intersecting needs. Children's voices must be central in informing all aspects of youth justice reform.

Legislative reform is an important step, but such reform cannot be made in isolation from reforming approaches, practices, and policies. We must rebuild the foundations of a broken youth justice system, and do so in partnership with children, families and their communities.

Setting

In accordance with Article 40 of the *United Nations Declaration on the Rights of the Child*, Western Australian children and young people who have contact with the youth justice system have the right to be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Such treatment should reinforce the child's respect for the human rights and fundamental freedoms of others, taking into account their age, and their reintegration into society in a positive and constructive way.³ Such provisions should be adhered to and inform the treatment of youth justice issues on a domestic level.

Youth justice is a particular area of concern for the Commissioner's office. In Western Australia, children as young as 10 years old can be found guilty of a criminal offence and placed in youth detention.⁴ Mainstream diversion practices are ineffective at diverting children and young people and lack accountability.⁵ Youth detention centres are in crisis, and the lives and wellbeing of children and young people are at risk.⁶ More than half of children and young people who have

been released from sentenced supervision return within 12 months.⁷ A review of the *Young Offenders Act 1994* (YOA) has been a noted priority of successive governments and has yet to occur. This evidence shows that the current Western Australian youth justice system is failing children and young people at every juncture.

The Blueprint identifies many of the key risks for youth offending and antisocial behaviour, many of which are related to socio-economic disadvantage; unstable family environments, education disengagement, homelessness, mental illness, and disability. The overlap between young people in the youth justice system and the child protection system is significant – in Australia, more than half of young people who had been in youth justice supervision (53%) also had an interaction with the child protection system in the last five years.⁸ Of similar concern is the link between disengagement from education and increased contact with the youth justice system, which is well established in the literature.⁹

There is also significant prevalence of intellectual and cognitive disabilities and neuro-divergence among those involved with youth justice services. In 2018, research in Western Australia showed that 89 per cent of the children detained had severe neuro-developmental disability or cognitive challenges and 36 per cent were diagnosed Foetal Alcohol Spectrum Disorder.¹⁰ Often, children and young people are not diagnosed in a timely manner, and do not receive the necessary supports and services to assist them in living a life of nurture and care. The failure to recognise and support children with disabilities early in life can lead to the criminalisation of young people with complex support needs.¹¹

The Commissioner fully supports the principles outlined in the Blueprint that support a changed approach to youth justice. These principles include:

- community leadership and co-design
- holistic and therapeutic approaches
- data and evidence-driven proactive interventions
- accessible supports
- Aboriginal self-determination
- justice reinvestment
- transparent, accountable and anti-discriminatory systems.

The recommendations contained within the Blueprint provide a comprehensive overview of the steps required for change. These are also supported by the Commissioner.

The Commissioner's Policy Statement: Youth Justice, identified key areas for reforming the approach to youth justice. Such an approach should emphasise:

- early intervention, prevention, diversion, and support
- rehabilitation, reintegration, and restorative approaches
- providing children and young people with specifically designed services and supports, ensuring they are treated differently to adults
- approaches that privilege relationships and engagement
- tailored responses for different cohorts
- therapeutic, trauma informed approaches.

Themes

Early intervention, prevention, diversion and support

Research shows that formally charging young people as a response to youth offending is not developmentally appropriate, and most young offenders

'mature out' of crime. Further, there is strong evidence that contact with the youth justice system is harmful and increases the likelihood that a young person will have further contact in the future.¹² The damaging effects of system contact are magnified for those who spend time in custody where they are disconnected from positive influences including school, work, sport, culture and family.¹³

Pillar 2 of the Australia and New Zealand School of Government's (ANZSOG) 'Ten Pillars of Youth Justice' is clear that diverting children and young people away from harmful system contact is crucial.¹⁴ This requires a focus on earlier intervention, prevention and diversion and alternative approaches, such as privileging the principles of minimum intervention and use of custody as a last resort.

"They [police] should be helping young children and stuff. Like helping them stay out of trouble, speak to them about what's happening in their lives and stuff, not just picking them up, arresting them and stuff... Instead of sitting in the police station and saying nothing they should go out driving around in the car, checking if the kids are okay, speak to them and make them go back home early instead of just staying in town."
17 year-old male

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In particular, restorative justice approaches such as Victim-Offender mediation and Family Group Conferencing have been shown to have significant potential for reducing reoffending in young people.¹⁶ In Western Australia conferencing is available for young offenders, including Family Group Conferencing and Court Conferencing.¹⁷

The evidence outlined in the Australian Institute of Criminology's 'Restorative Justice in the Australian Criminal Justice System' demonstrates that restorative justice programs work "at least as well as formal criminal justice responses".¹⁸

Further, these approaches are consistently associated with increased youth and victim satisfaction with the criminal justice system, can help low risk cohorts avoid formal contact with the youth justice system, and provide an opportunity to involve family and community in the justice process.¹⁹

Increased use of restorative justice programs is consistent with the *Young Offenders Act 1994* (YOA), which requires that the treatment of a young person who commits an offence that is not part of a well-established pattern of offending should seek to:

- avoid exposing the offender to associations or situations likely to influence the person to further offend; and
- encourage and help the family or other group in which the person normally lives to influence the person to refrain from further offending.²⁰

The YOA requires police to consider diverting young people who have committed less serious offences away from court.²¹ Police must also prefer to caution young people unless the young person's offending history or the offence makes it inappropriate to do so.²² Linking young people with the appropriate support services has occurred, however the lack of a case management, or a whole of family and system approach, has meant this often has little impact.

Young people on community-based orders have told the Commissioner these options were not adequate and there was a lack of available or appropriate supports and services to divert them from crime and into more positive behaviours.²³

A 'one size fits all' model of programs will not meet young people's diverse needs. A genuine spectrum of options more likely to support rehabilitation must be made available to youth,²⁴ such as diversion programs that address drug and alcohol rehabilitation, mental illness, or cultural healing.

Some diversion programs have been identified by as best practice in reducing the rate of youth incarceration in WA.²⁵ The Target 120 program provides individualised support for at risk young people as well as additional coordinated support for their families for a period of 12 months.²⁶ The Whitelion 'Deadly Diversions' program provides prolific and priority offenders referred from WA Police with intensive case management support and works to address the root causes of their offending through individualised support, mentoring, and social engagement activities.²⁷

While many programs have been shown to be effective in addressing rates of youth offending, piecemeal resourcing and service silos are currently preventing these best practice approaches from having a wide impact and reach in Western Australia.²⁸ It must be noted that all programs will work for *some* of the people, for *some* of the time – a one-size fits all approach does not work and that alternatives must be available to engage children and families to prevent further offending.

Questions: Early intervention, prevention, diversion and support

1. How can we improve approaches to holistic responses across the whole of government, and the service system, to children and young people at risk of offending?
2. How can justice reinvestment principles support improved outcomes from intervention, prevention, diversion and support programs?

3. In reviewing the *Young Offenders Act 1994 (WA)*, what consideration needs to be given to strengthening approaches for early intervention, prevention, diversion and support to reduce the numbers of children and young people coming into contact with the youth justice system?
4. How can we engage with children and young people to ensure they are supported in resolving the issues that lead them to entering the youth justice system?
5. How can we ensure comprehensive approaches to rehabilitation and reintegration are implemented to prevent recurring engagement with the youth justice system?

Providing children and young people with specifically designed services and supports, ensuring they are treated differently to adults

Children and young people in contact with the youth justice system must be treated differently to adults. They have neurological and developmental vulnerabilities and continue to rely on adults in many cases for support in their development and growth.²⁹ The youth justice system needs to cater for these aspects. For this reason, youth justice would more appropriately be approached from a community services approach than the current approach of “children in jail”.

Engaging families is a crucial element to success of support services. The principles of family support and early intervention are embedded in the Blueprint, which emphasises prioritising of responsive support or early intervention for at-risk young people, and a whole-of-community approach that require collaboration between community services and government.³⁰

Indeed, children and young people have told the Commissioner that their family, friends, school and employment, community can strongly influence their desire to ‘do crime’:

“My family was all doing crime, but I got out, moved away from them. It’s hard to move away from them. You just gotta say, ‘no, you’re right, I don’t wanna do it.’ I feel bad saying it to them but I gotta just say to myself, ‘No, I don’t wanna do it no more, just do it yourself. I don’t wanna be your company no more’.”

19 year-old male

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The vital influence of families and communities must be acknowledged in early prevention approaches, which must work together with families and communities to enable them to develop their own solutions to preventing youth offending and reducing recidivism.

There is a lack of data in Australia about the effectiveness of prevention and early intervention programs that address youth offending. However, international research has shown that family support programs have been shown to reduce youth delinquency and antisocial behaviour.³²

Partnerships between schools, community agencies and families can strengthen child development, change school disciplinary practices and ultimately contribute to the prevention of youth offending.³³ Interventions with young people from over-represented cultural and ethnic groups are most effective when delivered in local settings and in active partnerships with community.³⁴

For Aboriginal children and young people, facilitating strong connections to family, community and country is essential.³⁵

While there is strong evidence to support community-led approaches, a piecemeal approach to resourcing, expanding and evaluating these solutions impacts their effectiveness.³⁶ A funding shift will be critical to ensure that all Western Australian children and young people are effectively cared for and supported by their communities.

Questions: Providing children and young people with specifically designed services and supports, ensuring they are treated differently to adults

1. How do we develop and implement wrap-around holistic whole of family programs across the early intervention, prevention, diversion space to ensure continuity of care for at risk children and young people?
2. How can we co-design solutions with children and young people with lived experience of the youth justice system so that we better meet their needs?
3. How do we improve government and service collaboration to ensure gaps in supports are minimised?
4. How might community policing approaches be reimaged to incorporate principles of early intervention and whole of family support into diversion practices?
5. How might youth justice models of community engagement support self-determination and partnerships with Aboriginal communities and Aboriginal Community Controlled Organisations?

Approaches that privilege relationships and engagement

The importance of privileging relationships and engagement in youth justice approaches cannot be understated.

In the early intervention space, strong engagement with school can be an important source of support for children and young people in diverting them from engagement in the youth justice system. In the Commissioner's School and Learning Consultation with almost 2,000 WA school students, school students identified quality interpersonal relationships – with friends, other students, teachers and other school staff and their families as the foundation for their engagement with education.³⁷

Oppositely, studies have shown that factors such as low school grades, a lack of commitment to school, and a lack of opportunities for prosocial activity at school are significant risk factors for adolescent violent behaviour.³⁸

Suspension of such students not only fails to reduce antisocial behaviours, but may exacerbate students' alienation and detachment from the school community, and further antisocial and violent behaviour resulting in youth justice contact.³⁹

Such evidence demonstrates that relationships and engagements, or the lack thereof can be 'make or break' factors in preventing or increasing a child or young person's contact with the youth justice system. Children and young people highly value relationships that support them to engage in positive ways in all aspects of their lives, and provision of opportunities to build positive relationships with family, friends and others in their community can be a strong protective factor. However, falling in with peers or adults who encourage them to 'do crime' can impede their ability to gain support, and direct them down pathways of concern.

Engaging children and young people to develop effective initiatives that improve their wellbeing and future opportunities is critical to success of any approach.

In addition, it is important to support the development of Aboriginal-led solutions through engaging children and young people, community Elders and those with cultural authority, and their families, to identify opportunities for change that will have a positive impact on the future of children and young people.

An early intervention initiative that privileges relationships and engagement in practice is the 'Clean Slate Without Prejudice' program, a New South Wales grass roots community program designed to help Aboriginal and Torres Strait Islander youth.⁴⁰ This program has been run in partnership between the Tribal Warrior Aboriginal Corporation and Redfern Police since 2009, and involves young people at risk of offending participate in boxing training three mornings each week with Aboriginal mentors and local police. The program was described as 'changing the way we interact with each other, the way policing happens, the way that police deal with Indigenous young offenders here, and with community-based policing.'⁴¹ The impact the program has had on the community has been profound, with youth robberies reducing by 80 per cent in the first year of the program's operation.⁴²

Approaches that privilege relationships and engagement must also be implemented in the youth detention space. Countless incidents at Banksia Hill Detention Centre have arisen out of children and young people feeling like their needs are not met and they are not being listened to, or treated with care and respect. Young people in detention have told my office that having the support of respectful workers helped them to make better choices.

"Good people just know how to get on the kids' level, help them...but don't pretend that you're trying to get along with them, just do get along with them, you know? You don't pretend it. [It's] just respect."
18 year-old male

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Imagine the possibilities if Youth Custodial Officers, psychologists, teachers and others working in youth detention were supported to engage in robust and safe relationships with children and young people in detention. This could be a key difference in the future trajectory of the child or young person and can influence their desire to reoffend.

Relationships are powerful. All proven youth justice interventions rely on quality relationships between staff and young people.⁴⁴ One-to-one connections are the foundation for change – youth justice practitioners must work with young people on challenges requiring their support in a consistent and dependable manner, prioritise respect and understanding for the young person's point of view; and focus on improving the situation.

If approaches to supporting change are to be sustained, youth justice staff – whether based in detention centres, or working in juvenile justice teams in community – must be able to build relationships with children and young people and their families. Listening to the voices of children and young people is crucial in understanding their needs, their worries and their hopes.

Questions: Approaches that privilege relationships and engagement

1. How do we support youth justice staff to build robust and safe relationships with children and young people?
2. What challenges might youth justice staff face in building relationships and positively engaging with children and young people?
3. What are the potential benefits of investing in training for staff to enable them to build quality relationships with children and young people experiencing significant trauma and disadvantage?
4. What support will children and young people require to engage in meaningful dialogue and activities with youth justice services and staff?
5. How can we encourage children and young people in detention to speak up or express their needs to Youth Custodial Officers?
6. What support do families need to build trust with their children, justice professionals and the justice system?

Therapeutic, trauma-informed approaches

As noted by the Royal Commission into the Protection and Detention of Children in the Northern Territory, '[i]n most jurisdictions, the young people who come into detention disproportionately come from disadvantaged backgrounds, have a high level of need for support and, at least, initially have behaviours that make them difficult to work with.'⁴⁵ In the system of youth justice generally, it is critical to recognise the individual needs of the child, particularly the evidence of significant disadvantage experienced by the majority of those who become involved in the system.

There is strong evidence that therapeutic interventions are more effective at reducing chronic reoffending by young people than those based on punishment or control,⁴⁶ including social skills training and cognitive behaviour therapy. Further, many children and young people may experience and express trauma in ways that can impede their ability to participate in treatment.⁴⁷ Trauma informed approaches should privilege predictability in routines, relationships and maximise young people's control over their daily choices, while also building in practitioners an understanding of the meaning and triggers of problem behaviour in children and young people.⁴⁸

It is essential that youth justice staff have training in understanding the symptoms and impact of trauma in young people's lives to enable them to respond accordingly. All children and young people entering the justice system – not just detention – must have comprehensive assessments to identify trauma, neuro-divergence and/or disability where relevant, and their treatment must be prioritised to ensure that support services can intervene early to provide children and young people with the necessary supports.

A more welfare-oriented approach to youth justice should prioritise community intervention and support rather than criminal justice intervention. This is especially the case for younger children, noting that early contact with the youth justice system can cause an increased likelihood of further offending, interruption to their education, and trauma and mental illness.⁴⁹ Further, the negative impacts of detention will disproportionately impact on already vulnerable children, Aboriginal and Torres Strait Islander children and children with cognitive impairments.

In Western Australia, children as young as 10 years old can be charged and convicted of a criminal offence.⁵⁰

This is despite it being well documented that children and young people under the age of 14 (and potentially to a higher age depending upon cognitive, neuro-divergent and intellectual disabilities) do not have the necessary brain development necessary to understand consequential thinking or to manage their impulses.⁵¹

Research shows that children and young people under the age of 14:

- are less neurocognitively developed than adults which affects their decision-making capacities;
- lack impulse control and have higher levels of risk-taking behaviour; and
- often do not have a sufficiently mature understanding of knowing when something is seriously ‘wrong’ to be held culpable for their actions.⁵²

The current minimum age of criminal responsibility is not child centred and does not reflect the best interests of the child. Further, detaining children at that age is incompatible with a trauma informed approach, given the irreparable harm that detention can cause for younger children. Holistic approaches to prevention, diversion and rehabilitation must be prioritised for this younger cohort, and the life-long impacts of incarceration on brain development at such an early age must be guarded against.

In this context, the minimum age of criminal responsibility must, as a priority, be raised to at least 14 years of age. Immediate action should be taken to also raise the minimum age of detention to at least 14.

Questions: Therapeutic, trauma informed approaches

1. What are the impediments to building trauma-informed approaches into, and across, the span of the youth justice system?

2. What are the opportunities associated with implementing holistic trauma-informed approaches at all phases of the youth justice system?
3. How can we change detention practices to ensure the safety of both the staff and the children and young people?
4. What opportunities are available to ensure staff have quality training and development in understanding child and youth development and trauma?
5. What are the barriers identified for raising the minimum age of criminal responsibility in Western Australia?

Review and reform: Legislation, policies and practices

Reform of legislation, policies and practices to embed a more rehabilitative, reintegrative and restorative approach to youth justice across the system must be prioritised.

Legislation

The *Young Offenders Act 1994 (WA)* (YOA) is the primary legislation that provides for the administration of youth justice in Western Australia. The review of the YOA is long overdue and must address some of the most pressing issues with the youth justice system, such as the effectiveness of diversionary measures, overrepresentation of Aboriginal children and youth in the justice system, and youth detention practices.

The impending review of the YOA must also consider review of other legislation which impacts children and young people who have contact with youth justice, for example the *Criminal Code Act 1913 (WA)*, the *Bail Act 1982 (WA)*, and the *Sentencing Act 1995 (WA)*.

Some aspects of the current youth justice legislative framework that are incompatible with a rehabilitative approach and require urgent review include:

- the current minimum age of criminal responsibility,
- the presence of mandatory sentencing provisions that apply to young people,
- the transfer of young people into adult prisons at 18 years of age, and
- use of solitary confinement in detention centres.

Youth detention policies and practices

In June 2023, the WA government announced a range of measures to enhance safety and welfare in youth detention.⁵³ Such included a review of infrastructure needs in WA's youth justice system and measures to increase staffing. A new operating philosophy and service model was also developed and is currently being implemented.

Nonetheless, during this period there have been serious, escalating events that have put staff and the detainees at great risk. A young person has died by suicide. These events demonstrate an urgent need for a change in approach and this also requires a change in policy and practice.

The evidence shows that traditional 'get tough' methods of reducing youth offending are costly and ineffective at reducing recidivism.⁵⁴ In 2021-2022, the WA Government spent \$63 million on youth detention, with an average cost per person, per day of \$1,460.⁵⁵ In 2020 – 2021, 73.67 per cent of young people who were released from detention returned to detention within 12 months. These statistics show that wholesale changes are required to see improved outcomes for the safety of the community safety, children and young people and youth justice staff.

Recent comments regarding Banksia Hill Detention Centre made by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability show that the detention of children and young people is **not** improving community safety, and is significantly harming those detained, as well as causing harm to custodial staff.⁵⁶ This harm is contributed to by an over-reliance by youth detention centres on punishing young people for their actions⁵⁷ rather than encouraging their rehabilitation. This cannot be the case. **Detention is the punishment and it is not a place to go be punished.**

Practices that see children and young people confined to their cells for a significant portion of the day – up to 23 hours in many instances –⁵⁸ can only lead to further harm to children and young people who already have significant trauma and mental health issues. The negative behaviours of the children and young people in these circumstances are understandable. They have no control over their situation; they do not understand the reasons for the approaches they are subjected to; and often they do not have avenues that consistently support them in raising their concerns.

While complaints mechanisms are available, they are not necessarily child friendly or helpful. The Department of Justice must commit to embedding the National Child Safe Principles, particularly their principles around effective complaints management,⁵⁹ into the structure, policies, programs and practices in youth detention and in youth justice more broadly.

**Questions: Review and reform:
Legislation, policies and practices**

1. How can we ensure that the reforms committed to by the State Government – including the Operating Philosophy and Service Model and Model of Care in youth detention – are prioritised to minimise harm to children and young people?
2. How might the *Young Offenders Act 1994* be amended to align with a holistic, rehabilitative, reintegrative and restorative approach to youth justice?
3. How can we embed the National Child Safe Principles into the youth justice service system?
4. What can be done to ensure the United Declaration the Rights of the Child is embedded into legislation, policy and practice in youth justice?
5. How can we embed a whole-of-system focus on early intervention, prevention, support, diversion and rehabilitation and re-integration into the legislation, policies, practices and programs available to children and young people who are at risk of or have contact with the youth justice system?

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