Law Council of Australia
Justice Project
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Dear Sir/Madam

The Justice Project - Children and Yong People Consultation Paper

Thank you for the opportunity to provide a submission to the Law Council’s Justice Project “Children and Young People Consultation Paper”, August 2017. I note the overlap between the content of my response and issues raised in the “Aboriginal and Torres Strait Islander People Consultation Paper” August 2017.

As Commissioner for Children and Young People in Western Australia (WA) I have a statutory responsibility under the Commissioner for Children and Young People Act 2006 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 Aboriginal1 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.2

It is of grave concern to me that Aboriginal children and young people are disproportionately represented in the youth justice system. Given the profound impact that contact with the criminal justice system can have on Aboriginal children and young people’s wellbeing and capacity to lead productive lives, as well as the general vulnerability of such children and young people, youth justice is a priority area of work for my office.

It is within the context of my roles as an independent, statutory officer and the functions outlined above that I provide the following comments to draw attention to the needs, experiences and views of children and young people with experience of the youth justice system, for consideration in this Project. I have taken a broad, contextual view of each of the topics raised for discussion in order to provide a more holistic view of the legal needs of this group.

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1 For the purposes of this submission, the term ‘Aboriginal’ encompasses Australia’s diverse language groups and also recognises those of Torres Strait Islander descent. The use of the term ‘Aboriginal’ in this way is not intended to imply equivalence between Aboriginal and Torres Strait Islander cultures, though similarities do exist.

Caring for the future growing up today
1. **Enhance legal knowledge of children and young people, as well as persons who work with and care for children and young people**

While I generally support an improvement in the availability of accessible information for children and young people and those who work with them or care for them, children and young people require a comprehensive response from carers and service providers to tackle the issues causing interactions between young people and the justice system. Knowledge of a child’s rights under the legal system is insufficient if there is not a proper avenue available to utilise that knowledge and offences committed by children and young people are generally not the result of a lack of education about legal responsibilities, but rather poverty and disadvantage. As a result, the legal system and its providers need to look at how they can improve coordination with other specialists and service providers to better serve their client’s current and future needs.

The underlying factors leading to the overrepresentation of young people, particularly Aboriginal young people, in the justice system are complex and stem from the broader social and economic disadvantage they experience. These factors include family and community dysfunction and violence, drug and alcohol abuse, cyclical disadvantage and poverty and disengagement from education and training. Importantly, a comprehensive response needs to include a range of services, beyond direct legal services, and supports including child protection, police, health (mental health and drug and alcohol) and education, as well as community-led programs.

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. Two-thirds of these young people were Aboriginal. I released a report on the consultation findings titled "Speaking Out About Youth Justice" (available from [https://www.ccyp.wa.gov.au/our-work/projects/youth-justice-consultation/](https://www.ccyp.wa.gov.au/our-work/projects/youth-justice-consultation/)).

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.

The consultation highlighted that a child or young person’s vulnerability, significantly increase the likelihood of offending. A focus on factors of vulnerability or special needs, including cognitive or mental health impairment, is needed to systematically address the root causes of offending, rather than the symptoms. A mother who participated in the youth justice consultation highlighted how vulnerability affects all children, regardless of race:
“Not only for Aboriginals, the lower class people too, cos there is lot of wadjella, white kids that are not Aboriginal and they just as winyam (bad) as an Aboriginal kid and cos there is nothing really for the kids like that. They need to get them up and lift them out of the rut, unna?”

2. Greater public funding of legal outreach (advice, representation and education) through schools and community organisations frequented by disengaged young people.

In relation to young people’s vulnerability, I am also concerned by the lack of representation and support for children and young people in the court process, particularly given the likelihood of complex family circumstances such as alcohol and drug abuse, family violence, and historical trauma from contact with the justice system, which may mean that there is not a responsible adult present to support the child or young person.

Aboriginal children and young people also require additional support in that culturally appropriate services are required and assistance, including professional interpreters, may be required to address language barriers. I suggest that the Law Council look at how it can package or wrap-around services and service providers for any outreach or intervention to ensure that the needs of vulnerable children are adequately met, as well as how it can provide sustainable outreach. The UN Special Rapporteur on the Rights of Indigenous Peoples recently submitted her report on her visit to Australia to the UN\(^3\), which observes “a national mapping of unmet legal needs has however yet to be undertaken, a step that is essential in order to overcome the persistent disadvantage and to address effectively incarceration rates”.

Increasing availability and access to legal services plays an important role in improving young people’s experience of and outcomes in the justice system, which can ultimately serve to reduce incarceration rates of young people. This is particularly so for Aboriginal young people who may often lack the support and advocacy of a responsible adult and be disempowered in their interactions with the justice system.

Ensuring legal services are youth-friendly can significantly improve accessibility for young people. This includes the services being: confidential; open at hours young people are available; staffed by people who are experienced in working with young people, culturally competent and can develop trusting, respectful relationships with young people; located in a place that is safe and can be accessed easily by public transport; and information and resources provided in language that is appropriate for young people. I recommend young people are consulted and involved in the design of youth-friendly legal services so their views and ideas are incorporated to maximise the accessibility of such services.

Further to improving the youth-friendly operations of legal services, some other critical components to ensuring legal services are available and accessible to Aboriginal young people include: providing interpreter services so that Aboriginal people can communicate in their local language and with the use of sign language if required; providing more legal services in regional and remote areas; and increasing the number

of Aboriginal people employed in legal services and correction facilities to support culturally secure practice.

Many young people who participated in my office’s youth justice consultation commented on the importance of having respectful, trusting relationships with youth justice staff and of employing more Aboriginal people in the youth justice system to ensure young people’s cultural safety.

Given generally high levels of disengagement from the education system amongst "at-risk" young people, a school program is unlikely to reach the most vulnerable or "at-risk" children and young people. Any strategy to build the capacity of young people, carers and service providers to engage with and support young people through, contact with the justice system, is required to be multi-layered and systemic in order to ensure that a high quality response and service is available to all children and young people, particularly those in rural and remote areas.

In my office’s youth justice consultation we were told:

“Kids need more support. Lots of people want to change their life, but it’s really hard, you know?” 16 year-old male.

In my consultation five key themes emerged from participants' responses to why young people get into trouble:

• problems with family
• friends who were involved in criminal behaviour
• disengagement from school
• disconnection from the broader community
• personal issues including, crime as a normal habit, drug and alcohol use, cognitive disorders and mental health issues.

Support programs targeting “at-risk” young people need to be responding to these drivers of offending in a coordinated, sustainable and culturally appropriate way.

In my youth justice consultations, some families expressed feeling overwhelmed by the system and highlighted the need for a more streamlined provision of service.

“You know how (my son) is involved with justice system, so you have Corrective Services or whatever generally for education, housing and DCP, that’s a bit confusing but there’s like 20 different people every day. Well maybe there could be a service that's involved in that area, where they can get one person to deal with that family and their issues, have one person allocated to that family because it does get overwhelming and communication can be done by that one person because it does get overwhelming.” Mother

Young people and families recognised that offending behaviours could be prevented when they were able to access appropriate supports and services. These included:
• positive role models
• living in safe and stable homes
• participating in education or employment
• being involved in activities and having fun things to do
• support to change behaviour and cope with personal challenges.

Opportunities for young people in detention or on remand to engage with education must be a priority focus. This should include culturally appropriate supports and services for young people to:

• attend school or educational programs that are designed for students who experience difficulties engaging in mainstream schooling
• connect young people to employment vocational training and/or academic study courses
• address changeable criminogenic factors including attitudes to education, peer associations, use of drugs, attitude to authority, behaviour in the work place, and inter-personal relationships
• provide local community-based support and parental training for disadvantaged families that can assist them to support their young people to engage with education.

Some of the young people and their families in my office’s consultation recommended more intensive support for young people to reengage with education and greater opportunities for culturally relevant, alternative education and rehabilitation options.

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

"There’s still no support from the system...yeah, the schools, networks, programs, educational. I remember it took so long for my son to get engaged in another school...that’s why he just fell through the cracks." Mother

"I feel like just make opportunities to go to school and inform them all about the bad stuff and how to make good choices and bad choices and how to make them involved in good stuff rather than bad stuff." 18 year-old male

"Probably go back to school, yeah and just go to school and then you won’t be in that trap system, going to Banksia." 16 year-old male

"Yeah my CARE (Curriculum and Reengagement in Education) school was alright, we did metal work and wood work and all that...[they had] Aboriginal officers and that out there and they picked you up on the bus and they work with you." 17 year-old male

"I would give them a chance to figure out what they wanted to do instead of locking them up...They have brains to go and get a job...a course to study." 18 year-old female
While some of these recommendations may be beyond the direct reach of the current legal system, these are the systems-based considerations that must be given to any program seeking to target this cohort, including legal outreach (advice, representation and education) through schools and community organisations. I recommend that legal institutions and service providers take a more holistic approach to justice, program funding and servicing the community, to enable the system to begin tackling the overrepresentation of young people in the justice system.

3. **Commitment by governments to long-term, stable investment in specialist legal services for children and young people.**

In addition to expanding the availability and quality of legal services and advocates for children and young people, I recommend reviewing the criteria for young people in hearing and sentencing them, including potentially introducing *Gladue*-type cultural or vulnerability based reports. It does not seem that courts have sufficient background information about an individual young person in relation to their vulnerability factors, including any cognitive and/or behavioural issues the accused may have. This could include, for example, factors such as language proficiency and the need for interpreters so that the accused may properly understand the charges they are facing and the consequences as well as the nature of the proceedings and options available to them. To resolve this issue, specialist legal services must be provided on a long-term and sustainable basis, but also supported and connected by other key services.

Using what is known to service providers and professionals about a young person's mental and physical health and personal background to inform sentencing reports can provide vital information to enable the most appropriate sentencing options with a focus on prevention, diversion and rehabilitation. This should include appropriate through care with professionals, family and community members whom young people trust and have strong relationships, and collaboration between child protection, family support and education services.

Cognitive or behavioural issues may be the drivers for offending as well as being factors impacting the accessibility and fairness of the justice system and its ability to achieve its functions — including punishment and rehabilitation - with individual young people.

A clear example of where this occurs is among young people with Fetal Alcohol Spectrum Disorder (FASD). The Telethon Kids Institute's research into knowledge, attitudes and practice regarding FASD among professionals in the WA justice system demonstrated that:

- most indicated a need for more information about FASD, including information to improve the identification of individuals in need of specialist assessment, and guidelines on how to deal with people with FASD

- widespread agreement that the assessment and diagnosis of FASD would improve the possibilities of appropriate consequences for unacceptable behaviour

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• strong support for the development of appropriate alternative or diversionary sentencing options for people with FASD.

A report to the Education and Health Standing Committee 2012 inquiry, titled ‘Fetal Alcohol Spectrum Disorders: the invisible disability’, detailing Chief Justice Wayne Martin’s comments in his address to the Committee, highlights the significant disadvantage experienced by people with FASD in the court process.

“There are also symptoms of FASD that will place a person at a significant disadvantage when they enter the criminal justice system. Those symptoms include high levels of suggestibility, which means that people with FASD are very likely to agree with propositions that are put to them by police in their interview. Other symptoms include memory deficit. That obviously is going to place a person at a disadvantage when trying to explain their behaviour to police or when giving instructions to defence lawyers or when giving evidence to a court in defence of a charge brought against them. FASD sufferers also have considerable difficulty understanding sarcasm, idiom or metaphor, and these are all common characteristics of language used in the courtroom process. Hearing impediment is another feature of FASD…Those factors in combination, together with language difficulties and low socioeconomic status, almost inevitably place FASD sufferers at a very significant disadvantage in their dealings with police, in securing adequate legal representation, in comprehending the court process, deciding upon the strategy to be adopted in response to the charges that are laid and in either defending themselves or placing relevant material before the court in relation to a sentence to be imposed.”

In my youth justice consultation, young people and their families discussed cognitive and behavioural issues such as Attention Deficit Hyperactivity Disorder (ADHD) and trauma as factors driving young people’s involvement with the youth justice system.

“They see the dysfunction of their families and they don’t feel normal so they have something to prove, they get all tough. My grandson has ADHD and trauma. He has temper tantrums and beats holes in my doors. I had to call the cops because I didn’t know what else I could do.” Grandmother

“So we need to stop this thing of young kids getting in trouble. Something needs to stop them because it’s hard for them growing up and being a silly person with mental issues and stuff like that.” 16 year-old female

A few young people discussed FASD as a contributing factor to criminal behaviour.

“It’s a circle of life to us, for me…their mum or dad, smoke drugs… mum’s smoking and drinking when their baby was in their guts and changes their brain…damage their brain, I think. Cos they’re dumb… they can’t control the stealing.” 15 year-old male

These cognitive issues impact an individual’s capacity to understand the consequences of their actions and regulate their behaviour as well as to participate in the legal system in an informed and equal manner; as a result these conditions and
individual's complex personal backgrounds should be known to the court and taken into consideration during sentencing.

Specialist reports by organisations, service providers familiar with the young person and their community, and independent mental health/health assessors can assist to provide the court with a full picture of an individual's background and drivers for offending including social and systemic factors. This information can assist in a fair representation of the young person in court and to identify options for forms of sentencing which may be more effective than imprisonment or other conditions, and serve to rehabilitate the young person.

Young people involved in the youth justice consultation also discussed the value of being offered access to mental health and drug and alcohol support services while in detention or on return to the community, to support their rehabilitation. The process of reviewing and identifying the need of a young person to access such services should be formalised within the legal system, to ensure that the legal services targeting vulnerable children and young people are specifically attuned to the holistic needs of the child which impact upon their likelihood and experience of contact with the justice system.

"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

"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

Funding therefore needs to go beyond purely legal representation and look at the specialised package of services and supports required for the young person both to assist them in the court/justice process but also to treat the underlying causes of their interaction(s) with the justice system and prevent further contact with the justice system. Legal services should utilise any opportunity or ability to request assessments or other service assistance wherever it may assist their clients. Where the individual has not had recent contact with services, an assessment of their language competency should be undertaken by their legal representative (or one should be appointed by the court for this purpose) and a mental and physical health assessment should also be completed in order to identify any cognitive or physical disabilities that could impede their capacity to hear and comprehend the proceedings. Long-term, sustainable funding to support these assessments and to ensure that they are provided in a systematic, comprehensive and integrated manner is required in order to best protect and observer the rights and interests of children and young people.
4. State and Territory governments should invest in further research and dedicate more resources to improving the quality of residential care, to providing adequate training to care and protection staff, and to developing uniform best practice guidelines for responding to challenging behaviour in out-of-home care environments.

I endorse the calls for further investment in researching the connection between out of home care and the justice system, but more specifically the solutions to addressing the causes of this connection; dedicating more resources to improving the quality of residential care; to providing adequate training to care and protection staff; and to developing uniform best practice guidelines for responding to challenging behaviour in out-of-home care environments. Children in care often do not have the natural advocate of a parent or family member to ensure that their needs are met and they are kept safe, so it is crucial that the system is working well and we give every child in care the opportunity to thrive.

Aboriginal children and young people have made it clear to my office that their connection to culture is critical to their wellbeing and efforts to work with the Aboriginal community to prevent children coming into the care system is vital. I am a signatory to the national “Family Matters: Strong Communities. Strong Culture. Stronger Children” campaign led by SNAICC which aims to ensure Aboriginal and Torres Strait Islander children and young people grow up safe and cared for in family, community and culture. Family Matters aims to eliminate the over-representation of Aboriginal and Torres Strait Islander children in out-of-home care by 2040⁵. The campaign seeks to address the laws, policies and practices which affect this group of children and young people, and may be a valuable resource for further research and action in this space, particularly in developing best practice.

Further, families caring for additional children need to be supported and it is also essential that we increase support for young people as they transition out of care so that their support structures do not stop when they turn 18.

I recommend that children and young people who are or would be affected by these guidelines and who have lived experience in this field should be a focus group for developing best practice and training in this space, as a key stakeholder with unique and valuable insight.

5. State and Territory governments should invest in adequate training to juvenile justice and corrections staff, and to developing uniform best practice guidelines for responding to challenging behaviour in juvenile detention.

The vast majority of the young people in the youth justice system have experienced significant trauma and neglect in their lives and this is a major reason why they end up offending. This means that every decision made about them, and every response to their behaviour, should be aimed at their rehabilitation, which will also help ensure they are held fully responsible for their actions.

⁵ More details about the campaign are available on the official website: http://www.familymatters.org.au/our- vision/
Banksia Hill is the only detention centre for young people in the justice system aged 10 to 17 years in Western Australia. It accommodates young males and females from all over the State who:

- have been sentenced to a period of detention
- have been arrested and are waiting for a first Court appearance or bail determination
- are waiting for their court case if they have been denied bail, or
- are waiting to be sentenced after conviction.

In some cases, where required by law or directed by the Children’s Court, a young person aged over 17 may also be held at Banksia Hill instead of an adult prison.

The “Behaviour management practices at Banksia Hill Detention Centre” June 2017 report by the Inspector of Custodial Services\(^6\) identifies clearly that Banksia Hill Detention Centre is not structurally suitable to providing this type of support and management, and this is contributing to problems with reform processes and staff morale. The Report concluded that “Behaviour management practices at Banksia Hill have been inconsistent, inexplicit, and ineffective. The problems are exacerbated by the lack of options created though having only one facility.”\(^7\) The Report makes 17 recommendations on the changes required to provide consistent and appropriate responses to the behaviour of children and young people in detention in Western Australia.

To provide a safer community and better results for young people, families and the community, Banksia Hill needs to be ‘unpacked’, this means ensuring young people in detention are separated into different facilities according to gender and age, and by the nature of their offending. There is no doubt that young people who exhibit violent and dangerous behaviours need to be located in a secure facility under strict control, but this is a very small number of young people. The majority of young people in detention should be located in smaller, regional facilities where services for both young people and their families can be better coordinated and supportive relationships maintained.

Young people in the youth justice system have told me that education, a safe and supportive place to live and help to overcome mental health and alcohol and drug problems are vital to creating a better future. It is important that the views of young people with these experiences are heard and responded to.

In addition to developing best practice guidelines for responding to challenging behaviour, a greater expansion of the types of programs and supports available to young people in detention is required. In my justice consultation, young females in the


justice system described the programs they would like access to and the need for more Aboriginal staff in detention centres to provide culturally appropriate support.

"I would do something like Banksia but programs. Like music programs, sport programs. I would actually find out individually what they were really interested in, what they really like doing, or what’s their hobby. Yeah, something different you know." 17 year-old female

"I’d say if there were more Noongar people working [at Banksia Hill] then the kids would have more fun and speak more...it’s more better for us to just have Aboriginal peoples here, like staff, not just like them staff...They should welcome us in...they have got a lot of stress and it’s hard for them looking at white people here every day so it’s better for them to have Indigenous people...They should have Aboriginal people in here cos like some of them Aboriginal boys and girls, they are not feeling right cos they get picked on every day and I can see it in their face, every kid in here, they’ve got something going on. I think they need more help." 15 year-old female

There is a clear need for programs and services that specifically target the mental health, wellbeing and education needs of all young people in detention, and to support their rehabilitation; with special emphasis on females in the justice system as they are a particularly vulnerable group which are often overlooked for specific services/programs.

I recommend that young people with current or prior experience in the youth justice system are consulted and involved in the design and development of any programs aimed at addressing the underlying drivers of their offending and rehabilitation, to ensure such programs are responsive to their specific needs and preferred modes of support. This will not only help the rehabilitation of young people, but also improve their wellbeing, and is likely to assist in addressing challenging behaviours.

6. **Address concerns raised regarding key laws, policies and practices which affect this group with respect to:**

   a) **Bail laws**

   It is deeply concerning that children who are eligible for bail are being held in detention simply because there is nowhere else for them to go. I ask that particular attention be given to this issue. An inability to locate a responsible adult demonstrates that a child or young person is in need of care and support, and it is unacceptable that such children are incarcerated by virtue of their circumstances.

   For some young people, the inflexibility of the youth justice system was a significant challenge and they explained that it was often too difficult to meet the required bail conditions.

   "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

It is very concerning that many young people are unnecessarily held on remand or returned to custody due their failure to comply with onerous or unreasonable bail conditions, which can ultimately perpetuate the cycle of involvement in the youth justice system. I request that this process be reviewed, particularly in respect of culturally appropriate conditions for Aboriginal children and young people.

b) Child care and protection system

In 2016, I consulted 96 children and young people with experience of out-of-home-care (OOHC) to hear their views on how they raise concerns and access help regarding the issues that affect their lives. As a result of the consultation, I produced a report of the findings titled “Speaking Out About Raising Concerns in Care” (available at https://www.ccpp.wa.gov.au/our-work/projects/out-of-home-care-consultation/).

“Most of us kids, the reason why we are in care is because our families are not reliable. You know, money problems, food, clothes, safety problems… But what’s the point of taking us off our families? Hundreds of kids are like this, and I don’t know how many different child protection departments are there but the main one I’m in now is DCP. The whole reason why they took us off our family was because we feel unsafe, we don’t feel much protected, there’s no food, and we’re not getting clothes… we’re not getting anything. But what’s the point of that if they do exactly the same in all these houses.

It’s not better either way: living with our family, living with DCP, government homes… or living on the streets… it’s not good anywhere. It’s like a big trap… we end up getting in trouble by the law and then we just go to prison, and we just get trapped, it’s like a big circle trap. That’s how it’s been in my life personally. I think it’s like that for hundreds of kids out there. It’s just a big trap game. It’s never going to change unless they do something about it but obviously none of them’s gonna do something about it… cos you can’t help yourself obviously, that’s why you’re in a position of help. But the people who are meant to be professional is not helping you. They are not helping you either way.” 17 year-old Aboriginal male, residential care

Adequate training and support to ensure that care and protection staff can address the complex needs of children in care is critical. Children and young people offered their ideas on what would improve their relationships with their case workers, the individual qualities that the Department should look for when recruiting case workers, and how some of the issues relating to the case worker role could be addressed.

The key ideas were for case workers to:

• be more available, reliable and see young people more regularly
• build stronger relationships with young people
• make it easier to obtain permission to undertake activities or travel
• listen to and genuinely care for young people.

“Case workers need to be more involved with the children they look after. They need to be there more, they need to check up on them more, even if it’s just them telling their social workers that they have a problem – write it down, email it, just let them know that they’re still there. Usually you just see them maybe a couple of times a year and then they’re just AWOL. It would be nice for them to be in more contact and let them know that they’re still there. Be more involved. How are you supposed to move forward if you don’t have a relationship with the person that’s pretty much your guardian. Even if they do change a lot they still need to make that effort for you.” 15 year-old Aboriginal female, residential care

Strong themes emerged on the barriers to speaking up that many children and young people in OOHC face, including:

- fear of the consequences
- being told not to speak up
- not knowing how to or not having the words to articulate concerns
- not having anyone to speak to or anyone who would listen
- fear of not being believed
- isolation and lack of privacy
- a lack of confidence or feeling scared
- shame
- an imbalance of power.

These barriers highlight how important it is that children and young people understand their rights to voice their concerns, are informed on who they can talk to and how they can access help, feel confident and have access to people and services to support them. This is more critical for our most vulnerable young people in OOHC who are also at risk of, or who already have, interactions with the justice system.

There is anecdotal evidence to suggest that there is a “criminalising” of behaviour for children and young people in OOHC, where challenging behaviours which would normally be managed within the home (for example, smashing a plate or damaging furniture in anger) are reported to police and young people are charged with offences such as property damage. There is a clear need for the effective implementation of trauma-informed approaches in OOHC in response to such scenarios.

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"Knowing that you have someone to talk to and knowing that they will do something and actually listen is the most important thing for me." 21 year-old female, family care

We need to ensure that we provide quality care arrangements to our children and young people including the provision of well trained staff who implement best practice in supporting children and young people to live happy, healthy and fulfilling lives.

"Most of them don't care really. Some of them don't deserve to work there. Some of them are big hotheads, they can't control their own anger. They take it out on the kids. They start shouting and that. They say one thing but they are not doing what they say. That's how it is in the homes. They are not doing enough for us, to teach us, to teach ourselves." 17 year-old Aboriginal male, residential care

"First of all [residential carers] should build relationships, bonding with the kids. They should take an interest in what the kids like and want to do and stuff like that. But after that they should help the kids become independent people. Teach them how to cook, so they can cook at least a hundred different meals, teach them how to clean. Teach them to do stuff. Teach them more. Truly teach them, daily. That's all." 17 year-old Aboriginal male, residential care

"We had a bunch of kids go because they just weren't getting what they needed, they weren't asking them what was wrong because they just kept playing up and not listening, and I think it was because they didn't put us with stable carers, they kept getting agents [agency staff] in. I know it's hard but if you want healthy kids, you gotta have healthy, stable carers as well." 15 year-old Aboriginal female, residential care

c) Juvenile justice system

Through care

I recommend the inclusion of culturally appropriate release orders that are embedded in a comprehensive throughcare system. Throughcare is a consistent and progressive case management approach to young people's 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. Policy and practice need to prepare and support young people leading up to and upon release from detention to ensure that their human rights are protected, but also to avoid recidivism.

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 critical need for ongoing support and opportunities to reengage in positive activities 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

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

On the other hand, 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

As detailed earlier in my submission, I support the need to recognise the underlying socioeconomic, environmental and individual vulnerability factors that lead to offending and for these to be taken into consideration during sentencing. The need for an individualised response was recognised by young people in my youth justice consultation:

"It depends on their personality, their background, their family. So maybe you need to ask them a lot of questions so that you know them. Get to know them better and they’ll get to know you better. And you’ll find what they need later in life." 17 year-old female

Reparation/Restoration

I recommend that where appropriate, state and territory governments provide for reparation or restoration as a sentencing principle, as this provides the opportunity for young people to take responsibility for their actions in a positive way that emphasises social responsibility and rehabilitation. This is consistent with principles set out in the Young Offenders Act 1994 (WA).

I recommend that reparation or restoration approaches, although keeping young people accountable for their actions, are achievable and flexible in their application. Comments from young people in my office’s consultation demonstrate that young
people in the justice system found it stressful to comply with some of the requirements of certain orders and they felt that the youth justice system was inflexible. It concerns me that given for most young people offending behaviour occurs in the context of complex social issues, if reparation/restoration requirements are too onerous or beyond the capacity of the young person, they may be too difficult to comply with and may set that young person up to fail. For example, reparations in the form of monetary fines must be financially feasible for young people and not further disadvantage them.

Given the profound impact that contact with the criminal justice system can have on young people’s wellbeing and capacity to lead productive lives, as well as the vulnerability of these young people including their significant overrepresentation in the justice system, all opportunities to reduce or avoid sentences of incarceration must be explored. This includes understanding and promoting models of early intervention and rehabilitation strategies that are effective in preventing young people entering the justice system and reforming their offending behaviour so they can go on to lead productive, positive lives.

**Behaviour of youth justice professionals**

In my office’s youth justice consultation young people spoke about their relationships with justice professionals including police. Young people explained that if they were treated with respect by police, they were more likely to reciprocate positive behaviour and stay out of trouble.

“I find most cops are younger and more chilled back and more understanding you know? If they listen to you and they talk like proper, you know? If I know that they give me respect, so I show them respect back.” 15 year-old female

Young people and family members predominantly described distrustful relationships with police and gave suggestions on how police could engage with young people and divert them from offending behaviour.

“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

Some young people had positive experiences with police and were supported to stay out of trouble with the support of youth crime intervention officers.

“[The youth crime intervention officer] is moorditj (good)...He just cares. He sees where we’re coming from. He sees how hard it is. He sees how life can be. He has eyes to see where we are coming from, like family issues and what not. So he has helped us out. Doing everything yeah…When he was working in one of the police stations they wouldn’t give me bail but he talked to the boss and said, ‘give him bail, I know he will stay within his curfew’ and they were like, ‘no he won’t, no he won’t!’ and I did it.” 16 year-old male
These comments from young people highlight the important role police can play in diverting young people from the youth justice system and the positive outcomes possible when relationships between police and young people are respectful, trusting and genuinely supportive. These principles are equally applicable to other justice professionals, including legal service providers.

d) Children’s fines

There is a disproportionate impact of unpaid fines on Aboriginal young people who may be unable to pay public transport fares or who may be driving unlicensed due to regional and remote barriers to obtaining licenses, the financially restrictive nature of obtaining licenses, or driving unlicensed to escape family violence or neglect and who are more likely to be on a low income, be homeless or transient and have complex needs.

Given these underlying causes of Aboriginal young people, but also young people more generally, driving unlicensed and receiving fines, I recommend greater investment in programs that support young people to overcome the financial, literacy and access barriers to obtaining their driver’s licence. Enabling more age-ready young people to obtain their driver’s license can have a direct impact on reducing the number of fines issues and subsequent fine default and potential imprisonment.

I support the reduction of monetary penalties received under infringement notices given the disproportionate and lifelong negative impact fines can have on young people as the debt remains with them and continues to collect interest until it is paid. Further, I support restricting the number of infringement notices that can be issued in one transaction should be limited, with a compulsory consideration of whether the issuing of multiple penalty notices in response to a single set of circumstances would unfairly or disproportionately punish a person in a way that does not reflect the totality, seriousness or circumstances of the offending behaviour required of the officers issuing the notices.

Programs such as the Aboriginal Justice Program (AJP) in Western Australia, managed through the Department of the Attorney General, should be sustainably funded and expanded to regions beyond the identified “priority locations”. The AJP works to reduce the overrepresentation of Aboriginal people in the justice system with a focus on raising community awareness and knowledge and providing support services in relation to motor drivers licensing issues and fines enforcement. The projects within the AJP receive funding through the Royalties for Regions program in WA, which I note has been significantly wound back under the new WA government.

Justice for children and young people should focus on rehabilitation and diversion from the justice system. Best practice principles include:

- being culturally appropriate

- addressing the underlying issues such as family dysfunction and alcohol and drug use that lead young people 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
- reengaging young people with school and learning
- meaningful community engagement so that communities can more effectively own and address the offending and underlying causes.

I also recommend young people are always consulted and participate in the development of programs designed to support their diversion away from the youth justice system and their rehabilitation.

In Western Australia, the recent report into Banksia Hill Detention Centre (the state’s sole centre for detained youth both on remand and sentenced) by the Inspector of Custodial Services titled ‘Behaviour management practices at Banksia Hill Detention Centre (June 2017) emphasised the need for localised justice responses and for reduced use of custody as a sentence for children and young people “to keep young people close to their families and networks, and to increase the prospects of successful rehabilitation”.

In my office’s youth justice consultation, some young people identified 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

State and territory governments should work with peak youth and Aboriginal and Torres Strait Islander organisations to ensure that community-based sentences are more readily available as an alternative to fines and other custodial orders, particularly in regional and remote areas. There is a need for alternative sentences, such as community-based, diversionary options, particularly in regional and remote areas.

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 would also recommend that Aboriginal children and young people and their families are consulted before the introduction of any new community-based order or other sentencing options. Seeking the views of Aboriginal children and young people to
guide the development and implementation of these orders is important to their acceptability and effectiveness.

Suggestions to improve the existing system provided during the justice consultation included a more youth-focused approach to working with young people:

"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

Aboriginal young people in custody recommended more opportunities for culturally relevant education and rehabilitation:

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

Young people also suggested alternatives to detention, particularly as a way to prevent recidivism.

"In a way, I do think that the system is still a bit unbalanced, unstable... they do get caught, they do get put on orders, and they do breach, which they do go to lockup, they come out and do the same thing over and over...there’s not that much kids that do get into trouble and learn their lesson...Being locked up...is mainly a badder influence than being on the street and stealing and stuff, like us boys we have been locked up we have, like we seen everything." 18 year-old male

Given the disproportionate and negative impact incarceration can have on children and young people, particularly Aboriginal young people, as a result of unpaid fines, I suggest that the application of child fines is re-visited and alternative options are explored.

e) Institutional sexual abuse

I have reviewed the Criminal Justice report released by the Royal Commission into Institutional Responses to Child Sexual Abuse in August 2017\(^9\) and will monitor the responses to the Royal Commission’s report at a state and federal level.

I also draw your attention to the WA Law Reform Commission’s “Community Protection (Offender Reporting) Act 2004” report released January 2012\(^10\), in particular Chapter 5 pg 91-95 “A therapeutic approach to juveniles” which makes 3 recommendations extracted below (recommendations 18, 19,20):

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"Recommendation 18 - Therapeutic treatment orders

1. That the Western Australian government provide sufficient resources across the state to enable juvenile child sex offenders to participate in appropriate therapeutic treatment.

2. That the Western Australian government investigate the viability of providing the Children’s Court with the option of a therapeutic treatment order for juvenile child sex offenders under the Community Protection (Offender Reporting) Act 2004 (WA) as an alternative to a juvenile offender reporting order in appropriate cases.

Recommendation 19 - Prosecutorial policy

That the Office of the Director of Public Prosecutions amend its Statement of Prosecution Policy and Guidelines 2005 to include a specific policy relating to the prosecution of juveniles for child sexual offences and that this policy be modelled on the Victoria Office of Public Prosecutions, Prosecution Policies and Guidelines 2008—2010 Policy 2.9.2.

Recommendation 20 - Decision to charge

That the decision to charge a juvenile with a child sexual offence be overseen or made by a senior police officer of the rank of sergeant or above.”

Over five years later, Western Australia still does not have any legislation in respect of the above recommendations. I recommend the consideration of these recommendations by the Law Council and would support affirmative action to realise these recommendations in legislation and practice.

Conclusion

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 and address underlying causes of offending are crucial to addressing the high incarceration rate of young people. Such approaches must be culturally secure, place-based and involve meaningful community engagement so that communities can more effectively own and address the offending and underlying causes.

The young people who participated in my office’s youth justice consultation expressed their desire to overcome the challenges they were experiencing and their hopes for the future including being engagement in a constructive pathway, finishing school and getting a job.

“I want a life for myself and I want a job when I get out of [Banksia Hill] cos I’m sick of it. Like, this life we live is not sustainable, if you get what I mean. Like, we can’t keep going the way we go. You can’t keep on doing crime, cos this is the way we end up, in here…we’re all young still and got time. I have a lot of time.” 17 year-old female

“I might get a job and that…I might go back to school when I get out and finish year 12…I just wanna be a good dad to my baby and get a job as a diesel mechanic. I don’t wanna come back here [in Banksia Hill] that’s for sure!” 16 year-old male
Justice reinvestment programs can provide the opportunity for young people to realise these aspirations. Such programs highlight the need for a holistic and integrated approach to justice across key systems and stakeholders and must be continually monitored and evaluated to ensure they are reducing contact with the justice system and recidivism, and achieving the positive outcomes young people wish for.


Yours sincerely

COLIN PETTIT
Commissioner for Children and Young People
27 September 2017