

**Inquiry into Youth  
Diversionary Programs in NSW**

**Legal Aid NSW submission to the  
Committee on Law and Safety**

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323 CASTLEREAGH ST

HAYMARKET NSW 2000 / DX 5 SYDNEY

**Legal Aid**   
NEW SOUTH WALES

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## About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Children's Legal Service (**CLS**) advises and represents children and young people involved in criminal cases in the Children's Court, including young people appearing before the Children's Court for parole matters.

CLS lawyers also visit juvenile justice centres and give free advice and assistance to young people in custody.

The Legal Aid NSW Children's Civil Law Service (**CCLS**) provides a targeted and holistic legal service to young people identified as having complex needs. The CCLS works in collaboration with criminal lawyers in the CLS, the Aboriginal Legal Service NSW/ACT and Shopfront Youth Legal Centre to provide joined up legal services to vulnerable young people.

Legal Aid NSW welcomes the opportunity to make a submission to the Legislative Assembly Committee on Law and Safety's inquiry into youth diversionary programs in NSW. Should you require any further information, please contact:

Louise Pounder  
Manager, Strategic Law Reform Unit  
Policy, Planning and Programs  
Ph: (02) 9219 5063  
E: [louise.pounder@legalaid.nsw.gov.au](mailto:louise.pounder@legalaid.nsw.gov.au)

or

Debra Maher  
Solicitor in Charge  
Children's Legal Service  
Criminal Law  
Ph: (02) 9219 5902  
E: [debra.maher@legalaid.nsw.gov.au](mailto:debra.maher@legalaid.nsw.gov.au)

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## Introduction

Legal Aid NSW welcomes the opportunity to contribute to the Committee's inquiry into the adequacy of diversionary programs to deter juvenile offenders from long term involvement with the criminal justice system.

Legal Aid NSW considers diversion to be a necessary and appropriate response to most offending by young people. While young people commit a disproportionate amount of crime, most will not go on to offend throughout adulthood.<sup>1</sup> For example, a 2015 BOCSAR study of a subset of the young offenders' population in NSW across 10 years found that over 42% of the cohort had no further contact with the criminal justice system, and just over 17% had only one reconviction in the 10 years following their first contact.<sup>2</sup> The study cautioned that "the risk, speed, and frequency of reoffending was not universal and risk factors such as gender, age of first contact, sentence at first contact and Indigenous status all influenced the likelihood of reconviction".<sup>3</sup> However, the general trajectory of juvenile offending highlights the importance of a diversionary response to most offending by young people. Diversion provides a "swift and economically efficient response to offending, which is often non-serious and transient in nature".<sup>4</sup> It can also minimise the "criminogenic effects of formal justice system contact as a result of negative labelling and stigmatisation".

Diversion can also provide an opportunity to address underlying risk factors that may cause or contribute to offending behaviour in young people. While therapeutic responses or interventions will not be warranted or appropriate in all cases, they have the potential to promote rehabilitation and avoid a young person's re-entry into the criminal justice system.

Legal Aid NSW is of the view that the *Young Offenders Act 1997 (NSW) (YOA)* provides a good legislative framework for the diversion of young offenders in NSW. However, we are concerned that the Act's scope and implementation have hampered the full realisation of its objectives. This is most apparent with respect to young Indigenous people, who do not have the same access to diversion under the YOA as non-Indigenous young people, and remain over-represented in the criminal justice system.

In the experience of our lawyers, bail conditions and their enforcement, and the NSW Police Suspect Targeting Management Plan, also conflict with the objective of diverting young people and avoiding their ongoing involvement with the criminal justice system.

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<sup>1</sup> Abigail Fagan and John Western, 'Escalation and deceleration of offending behaviours from adolescence to early adulthood (2005) 38(1) *Australian and New Zealand Journal of Criminology* 59.

<sup>2</sup> Jason Payne and Don Weatherburn 'Juvenile reoffending: a ten-year retrospective cohort analysis' (2015) 50(4) *Australian Journal of Social Issues* 349.

<sup>3</sup> Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan. A Report of the Youth Justice Coalition NSW* (2017) (Sydney: Youth Justice Coalition NSW), referring to Payne and Weatherburn, above n 2.

<sup>4</sup> Troy Allard, Anna Stewart, April Chrzanowski, James Ogilvie, Dan Birks and Simon Little, "Police diversion of young offenders and Indigenous over-representation", *Trends and Issues in Crime and Criminal Justice* No. 390, Australian Institute of Criminology (March 2010), p1.

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We consider that diversion from traditional criminal justice processes should be accompanied by an investment in interventions for those young offenders and their families who need them. We briefly discuss the Youth Koori Court and Youth on Track as two current initiatives in NSW that are worthy of further support and expansion in this regard. We also highlight drug rehabilitation services as an importance diversionary measure to deter the long-term involvement of young people in the criminal justice system.

### *The Young Offenders Act 1997*

The YOA establishes the main framework for diverting young people from traditional court and criminal justice processes in NSW. The objects of the Act are as follows:

- a) to establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings, and
- b) to establish a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences, and
- c) to establish and use youth justice conferences to deal with alleged offenders in a way that:
  - i. enables a community based negotiated response to offences involving all the affected parties, and
  - ii. emphasizes restitution by the offender and the acceptance of responsibility by the offender for his or her behaviour, and
  - iii. meets the needs of victims and offenders, and
- d) to address the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings.<sup>5</sup>

The Act also contains a number of principles to guide its operation and the exercise of functions under the Act.<sup>6</sup> These principles include that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, and that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.<sup>7</sup> Legal Aid NSW broadly supports these objects and principles.

Below we set out some comments on the substantive provisions and implementation of the YOA, including areas for improvement.

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<sup>5</sup> YOA, s 3.

<sup>6</sup> YOA, s 7.

<sup>7</sup> YOA, s 7(a) and (c).

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## The scope of the YOA

A child can only receive a warning, caution or conference if they are alleged to have committed an offence covered by the YOA.<sup>8</sup> The YOA does not apply to strictly indictable offences, or a range of other offences that are excluded by the Act.<sup>9</sup> Further, warnings are only available for summary offences, other than a graffiti offence,<sup>10</sup> and police cautions are also unavailable for a graffiti offence.<sup>11</sup> Legal Aid NSW is of the view that many of these exclusions are unwarranted, and prevent the diversion of children in appropriate cases.

### *Traffic offences*

The YOA does not apply to a traffic offence committed by a child who was, when the alleged offence occurred, old enough to obtain a learner licence.<sup>12</sup> In Legal Aid NSW's view, consideration should be given to bringing traffic offences allegedly committed by young people within the scope of the YOA.<sup>13</sup> While a warning, caution or conference may not be appropriate in all traffic offences, in some instances these offences would properly attract a YOA outcome.

Legal Aid NSW also submits that all traffic offences allegedly committed by children should be heard by the Children's Court. At present, these matters are heard and determined by the Local Court. We note that a 2010 Strategic Review of the NSW Juvenile Justice System concluded that traffic offences should be heard in the Children's Court, as this would be consistent with the principles of the *Children (Criminal Proceedings) Act 1987* (NSW) and recognise that different considerations should apply to children and young people.<sup>14</sup> The Law Reform Commission has also expressed its provisional support for the transfer of jurisdiction for traffic offences to the Children's Court.<sup>15</sup> In Legal Aid NSW's view, this transfer of jurisdiction would ensure greater scope for the diversion of children in appropriate circumstances.

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<sup>8</sup> YOA, s 8.

<sup>9</sup> YOA, s 8.

<sup>10</sup> YOA, s 13. There is also the provision for other offences to be excluded from warnings by regulation, but there are currently no additional offences that have been prescribed.

<sup>11</sup> YOA, s 18.

<sup>12</sup> YOA, s 8(2)(b).

<sup>13</sup> The term "traffic offence" under both the YOA and the *Children (Criminal Proceedings Act) 1987*, means "an offence arising under a provision of: (a) the road transport legislation, (b) the *Roads Act 1993*, (c) the *Motor Accidents Compensation Act 1999*, or (d) the *Motor Vehicles (Third Party Insurance) Act 1942*, or (e) the *Recreation Vehicles Act 1983*, in respect of the use, standing or parking of a motor vehicle within the meaning of that provision".

<sup>14</sup> A McGinness, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice* (2010), at [247].

<sup>15</sup> NSW Law Reform Commission, *Report 132: Penalty Notices* (2012), p344.

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### *Most sexual offences*

Most sexual offences are also excluded from the YOA.<sup>16</sup> In our experience, many sexual offences committed by children are the result of sexual experimentation. We therefore consider that there may be some sexual offending by children that could be dealt with under the YOA in appropriate cases, such as:

- Section 61L (indecent assault) - where a teenager briefly touches another teenager's bottom
- Section 61N (act of indecency) - flashing, mooning or calling out an inappropriate sexual comment, and
- Section 66C (sexual intercourse) – where this is consensual sex between two children of similar age who cannot legally consent because one or both are under the age of 16 years.

### *Offences under the Crimes (Domestic and Personal Violence) Act 2007*

It is also not possible for a young person to be diverted under the YOA if they are alleged to have committed an offence under the *Crimes (Domestic and Personal Violence) Act 2007 (CDPV Act)*.<sup>17</sup> Legal Aid NSW does not support this exclusion.

In our experience the majority of offences under the CDPV Act dealt with in the Children's Court in NSW do not involve the typical domestic violence power imbalance that the CDPV Act seeks to address. A large number of Apprehended Violence Order matters in the Children's Court involve conflict between siblings, and between young people and their parents. In particular, we observe that parents and carers of young people with cognitive or mental health impairments call police as an attempted way of managing the behaviour of their children, and for whom there are inadequate respite, supported housing and other services. In addition, we observe that some residential care workers call police to control the behaviour of young people in out-of-home care, in circumstances that would ordinarily be a disciplinary matter in a family home. We understand that a result of NSW Police Force policy, police officers exercise limited discretion in these matters and generally take out Apprehended Domestic Violence Orders (**ADVOs**).

Our solicitors also observe that inappropriate ADVO conditions are imposed on young people not to ensure the safety of the community, but rather to discipline the young person, or control their behaviour. Often conditions are not properly understood by the young person, who then invariably breaches the ADVO.

In this context, we take the view that it would be appropriate for police and the Children's Court to have the option to use YOA outcomes (in particular cautions and conferences) in response to offending by young people under the CDPV Act. There would be the discretion to apply traditional court processes and sanctions for cases involving more serious offending and/or serious violence. However, for less serious offences, diversionary measures may be a suitable response, and would avoid further entrenching a young

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<sup>16</sup> YOA, s 8(2)(d).

<sup>17</sup> YOA, s 8(2)(e).

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person's involvement in the criminal justice system. This would be particularly appropriate for many young people in out-of-home care, as an important measure to reduce unnecessary contact with the criminal justice system.

### *Drug offences*

The YOA applies to some offences under the *Drug Misuse and Trafficking Act 1985* (NSW), but there are exclusions for more serious drug offences.<sup>18</sup> Legal Aid NSW would prefer a stronger focus on diversion and rehabilitation for young people charged with drug offences, including by removing or winding back the exclusions for drug offences under the YOA.

### *Graffiti offences*

As noted above, a police warning or caution may not be given for a graffiti offence. Although a conference may be held for a graffiti offence, Legal Aid NSW solicitors most commonly see young people charged with graffiti offences taken to court and sentenced with a fine. As most young people have little or no income, fines can have a disproportionate effect, particularly young people from disadvantaged backgrounds. Fines can also be an ineffective sentencing option for young people, lacking deterrent and rehabilitative effect.<sup>19</sup>

Legal Aid NSW considers that the YOA offers the best opportunity for young people to be sanctioned and educated in relation to graffiti offences. We would therefore recommend that both police warnings and cautions be available for graffiti offences under the YOA. We would also encourage the greater use of youth justice conferences for graffiti offences. At a youth justice conference, a young person comes face-to-face with the person(s) whose property has been damaged by their graffiti. Under the conditions of a youth justice conference outcome plan, provision can also be made for graffiti clean-up. Legal Aid NSW believes that this is a much more effective rehabilitation process for young people who have committed a graffiti offence than traditional court processes and sanctions such as a fine.

## Cautions

### *Limit of three cautions*

Since 2002, the YOA has provided that a child can only be cautioned on three occasions.<sup>20</sup> Legal Aid NSW does not support this restriction, as it arbitrarily limits the ability of police to caution and divert a child when this is the most appropriate response to an offence.

Legal Aid NSW solicitors have, in recent years, observed an increase in the number of cautions given to younger children, particularly Aboriginal children and children living in remote areas. This increases the impact of the cap on cautions, as children will reach their

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<sup>18</sup> See YOA, ss 8(2)(e1)-(g).

<sup>19</sup> See discussion in NSW Law Reform Commission, *Report 132: Penalty Notices* (2012), pp 330-332.

<sup>20</sup> See YOA, s 20(7).

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limit of three cautions much earlier, and therefore have more limited opportunity for diversion.

We would recommend that the restriction on the number of cautions that a child can receive be removed. An alternative option would be that the court be given the discretion to go beyond the current limit in circumstances it deems appropriate.

#### *Requiring an admission on an ERISP*

The YOA provides that a police officer may caution a child if, amongst other things, the child admits the offence.<sup>21</sup> It appears that police currently interpret this requirement to mean that a child must make an admission to the offence on an electronic recording of interview of suspected persons (ERISP). In many cases, police will therefore arrest the child and take them to the police station, which may be some distance away, and where they may remain in custody for some time. At the police station, children are often locked in a cell and can be exposed to adult offenders in custody.

Generally, it is police practice to attempt to arrange for a child to receive legal advice via the Legal Aid NSW Youth Hotline. Some police will not interview a child unless the child has had the opportunity to obtain legal advice and, if it is after midnight on weeknights when the Hotline is not available, they will make arrangements to interview the child on a later date. However, although a child may not have had the opportunity to obtain legal advice, our solicitors observe that many police will either proceed to interview a child or, if the child refuses to be interviewed, proceed to charge the child because they have not made an admission on a recorded interview. In other words, cautions are not being given where they may be appropriate.

Legal Aid NSW recommends that the YOA be amended to expressly provide that for the purpose of a caution, it is not necessary to secure an admission of a child on an ERISP. In our view, it would be straightforward to have a child sign a standard form (similar to the current “protected admission” form) or even a notebook entry to admit the offence for the purposes of receiving a caution.

## Conferences

Legal Aid NSW wishes to record its support for the use of youth justice conferences under the YOA. Conferences require young offenders to openly acknowledge and talk about their offending behaviour, hear about its consequences, face the victim, and take action to make amends for their behaviour. It can be a confronting and uncomfortable process, but one that can be beneficial and more meaningful for young people than a traditional court process. We also note that studies have found that:

- Both offenders and victims report high levels of satisfaction with the conferencing process. In a 2013 study by BOCSAR, when asked immediately following the conference, more than 85 per cent of offenders and victims reported being

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<sup>21</sup> YOA, s 19(b).

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‘satisfied’ or ‘very satisfied’ with most aspects of the conference.<sup>22</sup> High levels of satisfaction with conferencing were also reported by victims four months after the conference.

- Youth justice conferences cost, on average, about 18 per cent less than the average cost of a comparable matter dealt with in the Children’s Court.<sup>23</sup>

We also consider that Juvenile Justice NSW is well-placed to organise youth justice conferences, and in our experience generally oversees and conducts conferences well.

### Calls to the Legal Aid NSW Youth Hotline and Custody Notification Service

Police will often call the Legal Aid NSW Youth Hotline when they are considering diverting a young person under the YOA, and also where they have arrested a young person and diversion under the YOA is not available, so that the young person can receive legal advice.

The NSW Police Force has raised concerns on a number of occasions that Legal Aid NSW solicitors on the Youth Hotline advise young people to exercise their right to silence in all or most cases. In response to these concerns, Legal Aid NSW reviewed the advice records of all Police calls to the Youth Hotline in August 2017 to obtain a snapshot of indicative practice. This review found:

- There were 195 calls where police indicated they were considering a YOA outcome.
- There were an additional 213 calls where the police indicated that YOA options were not available. These would have been for the more serious offences or for the young people with existing serious antecedents.

Of the 195 calls where police indicated they were considering a YOA outcome, in 177 (over 90 per cent) of those calls, the solicitor’s advice to the young person was to make an admission and receive either a YOA caution, or referral to a youth justice conference.

In the less than 10% of calls where the solicitor advised that the young person exercise their right to silence, the two main reasons were: (1) the young person denies the offence; and (2) the young person was under 14 years old and therefore *doli incapax* may apply.

Police will also call the Custody Notification Service (**CNS**), staffed by the Aboriginal Legal Service (**ALS**), where they are dealing with a young Aboriginal person who they are considering for a YOA outcome, or may arrest or charge for an offence. To date, police have used the CNS (and the Youth Hotline) not only when they have a young person at a police station, but also when they have visited the young person’s home, or when dealing with the young person in a public place. However, the ALS has recently advised Legal

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<sup>22</sup> Paul Wagland, Bianca Blanch and Elizabeth Moore, “Participant satisfaction with Youth Justice Conferencing”, *BOCSAR Crime and Justice Bulletin No 17* (2013).

<sup>23</sup> Andrew Webber, “Youth Justice Conferences versus Children’s Court: A comparison of cost-effectiveness”, *BOCSAR Crime and Justice Bulletin No 164* (2012).

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Aid NSW that the CNS will no longer be available in situations where a young person (or adult) is not in police custody. It is uncertain whether Police will make a call to the Youth Hotline in these circumstances. This is likely to impact upon the diversion of Aboriginal young people under the YOA, which is already an issue (see below).

### Inconsistent use of diversion across NSW

Based on our casework experience, Legal Aid NSW is concerned that there may be variation in the use of diversion between the dedicated Children's Courts and the Local Court sitting as the Children's Court in rural and regional areas. That is, anecdotally, legal practitioners often advise that the dedicated Children's Courts are more likely to caution a young person or refer them to a youth justice conference than regional Local Courts sitting as Children's Courts. This could be attributable to the different training and experience of the Magistrates presiding in these matters (specialist Children's Magistrates versus generalist Local Court Magistrates), and also the lack of familiarity with the YOA by legal practitioners in these areas. We would encourage the inquiry to obtain data on and otherwise investigate this issue.

### Diversion of Indigenous young people

As noted earlier, one of the express objects of the YOA is to address the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings.<sup>24</sup> However, Legal Aid NSW is concerned that the YOA is failing to meet this objective.

Research by BOCSAR has found that Aboriginal and Torres Strait Islander children do not enjoy equal access to diversion under the YOA.<sup>25</sup> After examining data for almost 20,000 records of cautions, conferences and Children's Court matters between 2010-2011, BOSCAR found that Indigenous children were less likely to receive a caution or a conference than non-Indigenous children, even after adjusting for factors such as prior cautions, conferences and court appearances.<sup>26</sup>

A 2008 study of diversion as a response to offending by Indigenous and non-Indigenous young people in New South Wales, South Australia and Western Australia had similar findings. The study found that Indigenous young people were "less likely to be diverted in all three jurisdictions, even after controlling for the effects of age, sex, offence type and prior history".<sup>27</sup>

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<sup>24</sup> YOA, s 3.

<sup>25</sup> Clare Ringland and Nadine Smith, "Police use of court alternatives for young persons in NSW", BOCSAR Crime and Justice Bulletin No 167 (January 2013), p10.

<sup>26</sup> Ibid.

<sup>27</sup> Allard et al, above n4, referring to Snowball L, *Juvenile diversion of Indigenous offenders: A study examining juvenile offenders in Western Australia, South Australia and New South Wales*, Canberra: Criminology Research Council (2008).

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## The Suspect Targeting Management Plan

The Suspect Targeting Management Plan (**STMP**) is a confidential NSW Police Force policy regarding the identification and management of high-risk and recidivist offenders.<sup>28</sup> It has been in place since 2000 but little information is publicly available about the plan. According to the NSW Ombudsman,

*The plan aims to standardise police practices through the ‘introduction of structured, accountable and ethical identification and targeting mechanisms’ It requires police to nominate individuals for consideration, with the risk of their involvement in ongoing offending assessed by an intelligence officer based on suspected and historical criminal activity and other available information.*<sup>29</sup>

Individuals who are designated ‘high-risk’ are allocated a case manager.<sup>30</sup> A person who is on an STMP is not usually informed that this is the case, and they have no right to this information.<sup>31</sup> The Youth Justice Coalition recently obtained data on the use of the STMP in ten Local Area Commands across NSW. Of the 213 people subject to an STMP in 2014-15:

- 104 (almost half) of all people subject to an STMP were under 25 years old
- 50 were under 18 years old, and
- the youngest person on an STMP was just 11 years old.<sup>32</sup>

Interviews conducted with lawyers acting for people believed to be subject to an STMP revealed that young people on an STMP are regularly stopped and searched by the police, visited at home by police seeking information about their whereabouts, and given move on directions.<sup>33</sup> Police have indicated to the young people that these interactions occur because they are on an STMP.<sup>34</sup> It does not appear that an STMP addresses the causes of youth offending, and the focus appears to be on detecting minor offences such as drug possession.<sup>35</sup>

The case study of David, below, is taken from the Youth Justice Report and highlights the concerns around the use of STMP to deal with minor offending by vulnerable young people.<sup>36</sup>

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<sup>28</sup> NSW Ombudsman *The consorting law. Report on the operation of Part 3A, Division 7 of the Crimes Act 1900* April 2016 (**NSW Ombudsman**), pp viii.

<sup>29</sup> NSW Ombudsman, p 118.

<sup>30</sup> Vicki Sentas, Camilla Pandolfini *A study of the Suspect Targeting Management Plan 2017*, Youth Justice Coalition (**Youth Justice Coalition**), p 5.

<sup>31</sup> *DEZ v Commissioner of Police* [2015] NSWCATAD, at 15.

<sup>32</sup> Youth Justice Coalition, pp 10-11.

<sup>33</sup> Youth Justice Coalition, p 20.

<sup>34</sup> Youth Justice Coalition, p 27.

<sup>35</sup> Youth Justice Coalition, p 21.

<sup>36</sup> Taken from Youth Justice Coalition, pp 22-23.

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### David

David is a 15 year-old Aboriginal young person who was put on the STMP by a city-based Local Area Command. David has prior convictions for theft offences and no history of violent offending. The majority of the police contact David experienced was a result of him being at local landmarks with his friends in places where teenagers routinely gather and out on the street generally. Police cars were also routinely parked outside David's family home, causing stress for the entire family. David reported it to be particularly stressful when officers would knock on the door to have a chat, to demand David's whereabouts from his family and to express their disapproval of his comings and goings to family members. The ongoing stress for David's family, not only from police presence, but also David's behaviour, was causing serious problems for the family's well-being.

One of David's siblings manifested an anxiety disorder at this time and was unable to complete their HSC. David's mother reported that the constant police presence and stigma led to their lease not being renewed. The family eventually moved out of the area, and their lawyer believes the change of address was a direct result of police harassment.

There are concerns that the STMP policy is damaging the relationship between the NSW Police Force and Aboriginal communities, and undermining diversionary initiatives such as Youth Koori Court<sup>37</sup> and section 32 orders under the *Mental Health (Forensic Provisions) Act 1990* (NSW).<sup>38</sup> The Youth Justice Coalition report found that:

*The use of the STMP in relation to children is at odds with the aims and principles of the YOA. The findings of our research indicate that the STMP, when used on children, is a 'parallel system' to the YOA. The STMP is an inappropriate parallel system because it conflicts with YOA's principles, not least its aim to divert young people from criminal proceedings. In contrast, the objective of the STMP appears to be to proactively increase police contact to communicate to the young person that they are being monitored and are under surveillance. The STMP is also being used to detect and prosecute minor offences. The negative impacts of the SMTP on young people in our research indicates it is not in the best interests of young people.*<sup>39</sup>

Legal Aid NSW shares these concerns. There is no evidence that the STMP approach reduces criminal offending. We consider that STMPs should not be imposed on children (persons under 18 years).

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<sup>37</sup> Youth Justice Coalition, pp 32-33.

<sup>38</sup> Youth Justice Coalition, p 36.

<sup>39</sup> Youth Justice Coalition, p 43.

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## Bail

Legal Aid NSW is concerned that inappropriate bail conditions and the lack of suitable accommodation can hamper the diversion of young people, and draw them further into the criminal justice system unnecessarily.

### Bail conditions

Section 20A of the *Bail Act 2003* (NSW) (**Bail Act**) requires a bail condition to be imposed only if the condition is:

- reasonably necessary to address a bail concern
- reasonable and proportionate to the offence for which bail is granted
- appropriate to the bail concern in relation to which it is imposed
- no more onerous than necessary to address the bail concern
- reasonably practicable for the accused person to comply with, and
- there are reasonable grounds to believe that the condition is likely to be complied with.

However, our solicitors observe that courts impose bail conditions on young people such as curfews, place restrictions and daily reporting requirements that do not meet these requirements. This often results in breach of those conditions, with the young person then being taken into custody. This is generally reflected in Department of Justice statistics: in 2015-16, children charged with a criminal offence who were unable to meet their bail conditions were remanded in custody on 67 occasions.<sup>40</sup>

Research in this area points to similar patterns. A 2011 study of matters in the Parramatta Children's Court found that the majority of remand episodes arose as a result of a breach of bail.<sup>41</sup> It stated:

*Children ... were predominantly remanded after they failed to comply with a curfew, were not in the company of a parent or appropriate adult, had associated with a co-offender, failed to report to police, entered an exclusion zone, failed to reside as directed, failed to follow the directions of a parent or guardian or consumed alcohol. Children under 14 years of age were particularly affected by bail breaches: ... it is likely that this is due to the greater number of conditions imposed on them, the greater surveillance and reporting of breaches by both police and carers and*

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<sup>40</sup> Department of Justice, *Annual Report 2015-16*, (October 2016), p 92.

<sup>41</sup> Katherine McFarlane, *Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system* (2015), p 135, available at:  
< <http://unsworks.unsw.edu.au/fapi/datastream/unsworks:38185/SOURCE02?view=true>>

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*the welfare-based nature of conditions which essentially criminalised non-criminal behaviour.*<sup>42</sup>

The study noted that other research had also indicated that children are most often remanded for a breach of bail conditions rather than the commission of a new offence.<sup>43</sup>

Our solicitors report that many young people do not have stable home environments, and that there are often reasons why they may leave home after curfew hours. These reasons can include exposure to domestic violence and drug use. For Indigenous young people, the expanded notions of kinship means that there are often several relatives and households that are considered as family, and current bail practices by courts struggle to reflect this reality.

Legal Aid NSW considers that the concerns around inappropriate bail conditions could be addressed by judicial and police education on the nature and scope of bail conditions that should be imposed on young people.

We also recommend that concerns around bail enforcement be addressed by a legislative amendment to stipulate that arrest on a breach of bail should be a matter of last resort. This could be accompanied by police education on this provision.

These measures are necessary to ensure that young people charged with criminal offences are not further drawn into the criminal justice system.

### Accommodation concerns

Legal Aid NSW solicitors have observed that some young people charged with criminal offences are remanded in custody because of a lack of suitable accommodation.

Section 28 of the Bail Act allows a court, in granting bail, to impose a requirement that arrangements be made for the accommodation of the accused person before he or she is released on bail (an accommodation requirement). Such a requirement can only be made in certain circumstances, including where the accused person is a child. The court responsible for hearing bail proceedings must ensure that, if an accommodation requirement is imposed in respect of a child, the matter is re-listed for further hearing at least every two days until the accommodation requirement is complied with.

We support the intention and policy behind this provision, which was to address the “recurring difficulty” faced by the Children’s Court “when dealing with children whom it wishes to release to bail but who do not have suitable accommodation available”.<sup>44</sup>

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<sup>42</sup> Ibid.

<sup>43</sup> McFarlane, above, at pp135-136, referring to Wong, K., Bailey, B., and Kenny, D. T, *Bail Me Out, NSW Young Offenders and Bail* (2009), and Vignaendra, S., Moffat, S., Weatherburn, D., and Heller, E. ‘Recent trends in legal proceedings for breach of bail, juvenile remand and crime’, *BOCSAR Crime and Justice Bulletin No. 128* (2009).

<sup>44</sup> The Hon Greg Smith, Second Reading Speech for the Bail Bill 2013, available at: < <https://www.parliament.nsw.gov.au/bill/files/420/2R%20BAIL%20BILL%202013.pdf>>

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However, it is not clear that this provision has been working as intended. We have concerns about the way in which it has been applied, particularly in rural areas and by judicial officers who are unfamiliar with the intention behind section 28. A Legal Aid NSW solicitor recently acted for a young person who was granted bail with an accommodation requirement under section 28 by a Children’s Court magistrate. When the young person was brought back before a Local Court magistrate two days later, as required by section 28(4), the Local Court magistrate marked the papers ‘bail refused’. We suggest that this issue could be addressed by legislative amendment to expressly clarify that bail has been granted when an accommodation requirement is imposed under section 28, and that the grant of bail cannot be changed without a formal revocation process. Judicial education on this provision may also assist.

We also note that despite the requirement to report back to the Court every two days, there is no obligation on the Department of Family and Community Services to secure the accommodation needed for the child to be released on bail. In the two recent case studies below, the Court indicated that it was willing to grant bail, but vulnerable young people were detained because suitable accommodation was not available.

#### ***Case Study: Matthew***

Legal Aid NSW assisted Matthew, a young man with a cognitive impairment under the care of the Public Guardian. He came to police attention for assaulting the carers and damaging property at his care home. The police facts stated that ‘the accused’s current [living] arrangement .....is not adequate and not in the best interests of the accused’ and that ‘the accused requires more appropriate care and treatment’. Matthew was not considered by Legal Aid NSW or the police to be a risk to the public.

In bail proceedings, the Magistrate indicated that he wanted to grant bail, but the Legal Aid NSW solicitor was not able to provide a suitable address as she was repeatedly told that no suitable accommodation was available. Matthew spent five months in custody, during which time the police noted that he needed to have his teddy bear with him. Matthew’s charges were ultimately dismissed under section 32 of the *Mental Health (Forensic Provisions) Act 1990 (NSW)*.

#### ***Case Study: Mina***

Legal Aid NSW assisted Mina, a 12 year old girl, who came to a regional town in NSW with her family from Iraq as refugees. She has significant trauma-related issues after witnessing family members being murdered by IS, and being sexually abused while in a refugee camp in Turkey.

She assaulted her parents a number of times, and eventually they said she could not stay at home. She had no other family or community network in the area, and has been in and out of juvenile detention because of a lack of suitable accommodation.

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It has been argued that the detention of children in custody because they are homeless or otherwise without suitable accommodation breaches well-established international human rights laws and principles, including the presumption of innocence, the right not to be arbitrarily detained, proportionate sentencing, detention as a last resort for juveniles, and the entitlement of children to special protection.<sup>45</sup> However detention in these circumstances is also of concern because it can lead to further criminalisation of these young people, and increase their risk of offending. As McFarlane has observed, “[b]eing in custody, even for short periods of time, increases the likelihood of criminal behaviour”.<sup>46</sup>

The problem of children being held on remand in these circumstances arises from an inadequate supply of accommodation for homeless young people, particularly those with complex needs or challenging behaviour. Therefore increasing the supply of such accommodation is an important component of the policy response to this issue.

From a legislative perspective, we would also recommend that the current inquiry, and the NSW Government, investigate whether section 28 of the Bail Act has been operating as intended. As highlighted above by our case studies, we have real concerns that the section is not preventing young people from being held in custody because of a lack of suitable accommodation.

## Youth Koori Court

The Youth Koori Court is an alternative process in the NSW Children’s Court for dealing with Aboriginal and Torres Strait Islander young people who have pled guilty to, or have been found guilty of, a criminal offence.<sup>47</sup> The Youth Koori Court has the normal powers of the Children’s Court, but:

- provides for Aboriginal and Torres Strait Islander community involvement in the court process, including the young person’s family and Elders
- provides low volume case management mechanisms to facilitate greater understanding of and participation in the court process by the young person
- identifies relevant risk factors that may impact on the young person’s continued involvement with the criminal justice system, and
- monitors appropriate therapeutic interventions to address these risk factors.<sup>48</sup>

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<sup>45</sup> See Katherine Boyle, “‘The More Things Change ...’: Bail and the Incarceration of Homeless Young People”, *Current Issues in Criminal Justice*, Vol 21 No 1 (July 2009) 59 at 68-69, referring to the Universal Declaration of Human Rights, the International Covenant on Civil and Political rights, and the Convention on the Rights of the Child and its associated rules and guidelines, such as the Standard Minimum Rules for the Administration of Juvenile Justice (‘the Beijing Rules’) and the Guidelines for the Prevention of Juvenile Delinquency (‘the Riyadh Guidelines’).

<sup>46</sup> Dr Katherine McFarlane, *NSW bail laws mean well but are landing homeless kids in prison*, (19 December 2016), available at <<http://news.csu.edu.au/features/police-and-crime/nsw-bail-laws-mean-well-but-are-landing-homeless-kids-in-prison?p7DRPX4IRewTopfx.99>>

<sup>47</sup> Children’s Court of NSW, *Practice Note No 11: Youth Koori Court*, section 4.

<sup>48</sup> Children’s Court of NSW, *Practice Note No 11: Youth Koori Court*, section 1.3

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It currently operates at Parramatta Children's Court.

Legal Aid NSW's CCLS partners with the Aboriginal Legal Service NSW/ACT to provide civil law advice and assistance to participants in the Youth Koori Court. Since the Youth Koori Court pilot commenced in 2015, the CCLS has worked with over 70 participants, who are all young Aboriginal people with complex needs and, often, a multitude of civil law issues. If left unaddressed, these issues would affect their path to rehabilitation. The following recent case study demonstrates the importance of a collaborative and therapeutic approach to these issues.

#### ***Case Study: Conrad***

Conrad is a young Aboriginal man who was removed from his family due to concerns around substance abuse, transience and neglect. Conrad and his siblings were placed with his grandparents, but the placement broke down, resulting in the children spending time in foster care, crisis accommodation and residential out-of-home-care. Most of Conrad's placements have broken down because his carers were unable to provide the therapeutic care that his complex needs require.

Conrad has often had to couch-surf with friends or sleep on the streets, where he has been exposed to further violence and alcohol and drug use. He has also spent time in juvenile detention, which he has indicated was often preferable to sleeping on the street. He also has had interactions with the child protection system as a young parent, with his own child removed from his care.

Conrad struggles with drug and alcohol issues, as well as mental health issues which has included incidents of self-harm. His homelessness has impacted on his education, employment, contact with his child and ability to maintain professional appointments to address his drug use and mental health. His experiences have also engendered a mistrust of welfare agencies.

Conrad was referred to the Youth Koori Court. With the assistance of Legal Aid NSW's CCLS he has been referred to Alcohol and Other Drug (AOD) counselling, as well as mental health services to ensure that he received sufficient support around his mental health and risk of suicide. The CCLS has also provided Conrad with care coordination and facilitated cross agency collaboration between numerous government and non-government agencies working with him. This has included assistance with Conrad's debt, accommodation, Centrelink and family law issues. As Conrad has now commenced seeing an AOD counsellor, CCLS is helping him to set up a Work and Development Order (WDO) to satisfy his outstanding fine debt.

Legal Aid NSW considers that the Youth Koori Court has considerable benefit in diverting and supporting young Indigenous offenders, and addressing their risk of ongoing involvement with the criminal justice system. We consider that the Youth Koori Court should be adequately funded to maintain this important role and to enable expansion to regional areas. This should be accompanied by a commitment to therapeutic services for

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young people, including outpatient and residential drug and alcohol detoxification and rehabilitation facilities that are accessible and culturally appropriate.

## Youth on Track

Youth on Track is an early intervention scheme for 10-17 year olds that responds to young people at risk of long-term involvement in the criminal justice system. It is funded by the Department of Justice and delivered by non-government organisations. Young people are referred to the scheme by police officers and schools and participation is voluntary. Eligible young people are provided with case management and services that respond to the underlying causes of their offending. The key principles of the Youth on Track model include:

- intervening earlier to divert young people from the criminal justice system
- one-on-one case management to manage and support juvenile offenders and those at risk of offending
- separating treatment from punishment
- responding to risk and need rather than simply to crime
- responding promptly to enable a response to an immediate problem.<sup>49</sup>

Early evaluations of the scheme, which commenced in 2013, are generally positive. Young people who completed the intervention were assessed as having a lower risk of offending.<sup>50</sup> The scheme appears to contribute to enhanced social outcomes, especially improvements in antisocial behaviour and thinking.<sup>51</sup>

Our CCLS solicitors and social worker have observed that some of the case workers involved in Youth on Track are effective and work well with young people and their families. At the same time, some reservations have been expressed:

- Some case workers have difficulty engaging complex needs clients, and do not have system knowledge or skills in cross-agency collaboration.
- Further efforts need to be made to employ Aboriginal workers and to engage with Aboriginal young people.<sup>52</sup> Youth on Track employs the CHART (Changing

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<sup>49</sup> Department of Justice *About Youth on Track* <http://www.youthontrack.justice.nsw.gov.au/youth-on-track/about-youth-on-track> accessed 16 January 2018.

<sup>50</sup> On the Youth Level of Service / Case Management Inventory: Department of Justice *Youth on Track Snapshot 1 July 2013 – 31 December 2016*. <http://www.youthontrack.justice.nsw.gov.au/Documents/Snapshot%20YOT%20Dec%202016.pdf> accessed 16 January 2013.

<sup>51</sup> Cultural & Indigenous Research Centre *Youth on Track Social Outcomes Evaluation Final Report 2017*, p 34.

<sup>52</sup> See further Cultural & Indigenous Research Centre Australia *Youth on Track Social Outcomes Evaluation 2017* at pp 58, 60.

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Habits and Reaching Targets) approach and it is not clear that this approach is effective with Aboriginal young people.

- Because of the historic and current difficult relationship between Aboriginal people and police, a scheme that relies upon referrals from police officers may struggle to engage Aboriginal young people.

Notwithstanding these concerns, Legal Aid NSW supports the continuation of Youth on Track, and recommends that the above issues should be addressed as the scheme is evaluated and further developed.

## Drug rehabilitation services for young offenders

In the context of youth diversionary programs to avoid long-term involvement in the criminal justice system, we submit that there should be more attention paid to the drug rehabilitation needs of young offenders. The 2015 *NSW Young People in Custody Health Survey* found that 92 per cent of the young people surveyed had tried illicit drugs, with cannabis the most commonly used (90 per cent), followed by crystal methamphetamine at 55 per cent. Illicit drugs were used at least weekly by 81 per cent of young people surveyed, while 65 per cent reported committing crime to obtain alcohol or drugs and 78% were intoxicated (on alcohol, drugs or both) at the time of their offence.<sup>53</sup> It is also worth noting that this drug use coexisted with other complex needs, including a high incidence of psychological disorders and history of trauma/abuse.

In our recent submission to the Legislative Council inquiry into the provision of drug rehabilitation services in regional, rural and remote NSW, we expressed concern about the range and types of services that are available to our young clients, particularly young Aboriginal clients. There are almost no drug rehabilitation services available for children in regional areas, and even where services do exist, many do not appear to take a culturally appropriate or trauma-informed approach to service delivery.

Our submission also noted the evidence that drug courts have been proved to be effective in reducing reoffending.<sup>54</sup> For example, a 2008 evaluation of participants in NSW Drug Court found that participants were:

*17 per cent less likely to be reconvicted for any offence, 30 per cent less likely to be reconvicted for a violent offence and 38 per cent less likely to be reconvicted for a drug offence at any point during the follow-up period.*<sup>55</sup>

In light of these findings, Legal Aid NSW would support the establishment of a fully funded youth drug and alcohol court, with a legislative basis.

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<sup>53</sup> NSW Health, NSW Justice, *2015 Young People in Custody Health Survey. Key Findings for All Young People*, p 2.

<sup>54</sup> Craig Jones, *Intensive judicial supervision and drug court outcomes: interim findings from a randomised controlled trial* (2011) NSW Bureau of Crime Statistics and Research, p2.

<sup>55</sup> Don Weatherburn et al, *The NSW Drug Court: a re-evaluation of its effectiveness* (2008) NSW Bureau of Crime Statistics and Research, p1.