



Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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By email

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Inquiry into Australia's Youth Justice and Incarceration System: Submission from The Shopfront Youth Legal Centre

1 About The Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. The Shopfront is based in Sydney and is a joint project of Mission Australia, The Salvation Army and the law firm Herbert Smith Freehills.

Our service was established in 1993 in response to the AHRC (or HREOC, as it was then known) report, *Our Homeless Children*, better known as the Burdekin Report.

Our clients are among the most disadvantaged in our community. A large proportion are, or have been, in out-of-home care. Most are affected by a combination of issues including homelessness, unresolved trauma, cognitive impairment, and serious mental health problems.

Our four solicitors appear in court for vulnerable children and young people almost daily, mostly in criminal matters. We also provide other forms of legal assistance, legal education and social support.

The Shopfront's Principal Solicitor, Jane Sanders AM, is an Accredited Specialist in criminal law and in children's law. She has been practising in the field for over 30 years and has received awards and accolades for her work with vulnerable young people in the criminal justice system. She is currently the Chair of the Law Society of NSW's Criminal Law Committee, and has held other policy-related roles including as Deputy Chair of the former NSW Juvenile Justice Advisory Council.

Our other two senior solicitors, Emily Muir and Jacki Maxton, have decades of experience between them, working with vulnerable young people in their capacity as defendants and as victim/survivors.

All our lawyers have made a significant contribution to community legal education and to law reform in areas affecting young people such as policing, fines, bail, victims' support, and the law relating to mental health and cognitive impairment.

We would also like to acknowledge the contribution of our students, Ruth Begbie, Finn Bromwich, Ed Carrall, Amelia Gifford, Scarlett McNeil-Dean, Natasha Taylor and Juliet Ure in the preparation of this submission.

2 Scope of this submission

We welcome the opportunity to provide a submission to this Inquiry.

This submission will be brief, firstly due to time constraints, and secondly due to the wealth of evidence already available on this topic.

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The Shopfront Youth Legal Centre is a service provided by Herbert Smith Freehills in association with Mission Australia and The Salvation Army



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Much of the available evidence was recently summarised in the Australian Human Rights Commission's "Help Way Earlier" report, released in August 2024.¹

We will focus largely on New South Wales, the jurisdiction in which we practise, and on the following issues:

- Youth incarceration in NSW, including the unacceptably high proportion of children on remand;
- The over-representation in the youth justice system of First Nations young people and other vulnerable young people such as children in care;
- The negative impacts of incarceration and early contact with the youth justice system;
- Bail laws and practices in NSW;
- Access to diversion;
- The harmful impact of certain policing practices.

3 Young people in custody in NSW

3.1 Key statistics

In June 2024, statistics from the Bureau of Crime Statistics and Research ('BOCSAR') demonstrated a concerningly high youth detention population in NSW. As of June 2024, there were 247 young people in custody in NSW.² This figure represents an increase of 41% in the youth detention population between June 2023 and June 2024.³

It is a matter of grave concern that 80% of these young people are being held on remand.⁴ This will be addressed further in later sections of our submission.

3.2 Conditions in NSW detention centres

Although we have had many clients cycling through both juvenile and adult custody over the years, we do not currently have a large number of clients in youth detention. Therefore, we do not intend to comment extensively on current conditions in NSW's youth justice centres.

Children in NSW detention centres have not recently suffered the more extreme forms of maltreatment experienced by children in jurisdictions such as Western Australia, Queensland and the Northern Territory.

However, NSW's record is far from unblemished. Examples of harmful practices in NSW detention centres over the last two decades include:

- Transferring the management of Kariong juvenile detention centre to adult Corrective Services, ushering in a more punitive regime (accompanied by the political stunt of filling in the detention centre's swimming pool);⁵
- Young people being transferred from juvenile detention centres to adult prisons

¹ Australian Human Rights Commission (2024) 'Help way earlier!': How Australia can transform child justice to improve safety and wellbeing. Sydney: Australian Human Rights Commission ('Help Way Earlier Report 2024') <https://humanrights.gov.au/our-work/childrens-rights/publications/help-way-earlier>

² NSW Bureau of Crime Statistics and Research, NSW Custody Statistics June 2024 <https://bocsar.nsw.gov.au/documents/publications/custody/2024_06_Custody_Infographic.pdf>.

³ Ibid.

⁴ Australian Institute of Health and Welfare, 'Youth Justice', Australian Institute of Health and Welfare (Web article, accessed 1/10/34) <<https://www.aihw.gov.au/reports/australias-welfare/youth-justice>>

⁵ Mia Dambach, 'Kariong Juvenile Correctional Centre: Countless Contraventions of International Law' (2008) 14(1) Kariong Juvenile Correctional Centre 181, 188 <<http://www.austlii.edu.au/au/journals/AJHR/2008/7.pdf>>.

without due process;⁶

- The Chisholm Behaviour Unit;⁷
- Unreasonably intrusive strip searches being carried out at Baxter Juvenile Justice Centre with the assistance of adult correctional officers.⁸

Recent amendments to the *Bail Act* in NSW (discussed further below) show that the NSW government is still not above enacting legislation which conflicts with well-established youth justice principles and with international human rights obligations.

In our view there is much room for improvement in NSW's legislative safeguards to protect young people from inappropriate incarceration and from mistreatment in custody.

4 Vulnerable groups of young people

4.1 Young people with complex needs

The Help Way Earlier report notes that 'children that come in contact with the justice system have multiple and intersecting needs which have not been addressed by the service systems that are meant to help them'.⁹

This is consistent with our experience spanning 30 years in this field. Over this period, we have observed that young people are presenting with increasingly complex needs.

The complex and varied personal needs of young people require more sophisticated approaches than criminal punishment at one end of the spectrum and light-touch diversionary options at the other.

4.2 Vulnerability of young people in detention

The 2015 NSW Young People in Custody Health Survey showed a high prevalence of mental health concerns within the young detention population: 83% of young people in custody met the criteria for a psychological disorder, and 15.1% had experienced suicidal ideation in the previous 12 months.¹⁰ Further, one in six youth detainees were identified as potentially having an intellectual disability, and over 50% had 'severe reading difficulties'.¹¹

The survey also recorded that 68.2% of children in custody had a history of child abuse or trauma, and 21.1% had been removed from their families and placed into care.¹² The survey also confirmed the cycles of incarceration that can happen within families: 53.6% of participants reported that at least one of their parents had been incarcerated at some stage.¹³

⁶ see, for example, *ID, PF and DV v Director General, Department of Juvenile Justice and Anor* [2008] NSWSC 966 (19 September 2008)

⁷ Inspector of Custodial Services, 'Use of Force, Separation, Segregation and Confinement in Juvenile Justice' (Media Release, 23 November 2018) <<https://inspectorcustodial.nsw.gov.au/reports-and-publications/inspection-reports/youth-reports/use-of-force-separation-segregation-and-confinement-in-nsw-juvenile-justice-centres/media-release-use-of-force-separation-segregation-and-confinement-in-juvenile-justice-centres.html>>

⁸ NSW Ombudsman, 'Strip searches in youth detention', follow-up report, 12 May 2022 https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0020/138044/Strip-searches-in-youth-detention.pdf

⁹ Help Way Earlier Report 2024 (n 1) 14.

¹⁰ Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, 2015 Young People in Custody Health Survey Full Report, pages 65, 69 <https://www.nsw.gov.au/sites/default/files/2022-05/2015_YPiCHS_Full_report.pdf>. https://www.nsw.gov.au/sites/default/files/2022-05/2015_YPiCHS_Full_report.pdf

¹¹ Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, 2015 Young People in Custody Health Survey Full Report, page 89 <https://www.nsw.gov.au/sites/default/files/2022-05/2015_YPiCHS_Full_report.pdf>. https://www.nsw.gov.au/sites/default/files/2022-05/2015_YPiCHS_Full_report.pdf

¹² *Ibid* 13.

¹³ *Ibid* 17.

In short, the 2015 survey confirmed what was already well known. It is the most vulnerable young people who populate NSW youth detention centres. The disadvantage that these children experience is only exacerbated by time in custody.

4.3 Criminalisation of children in care

A strong predictor of young people's involvement with the youth justice system is placement in out-of-home care ('OOHC'). Some of the reasons for this were discussed in our submission to the Australian Human Rights Commission in 2023,¹⁴ and are also discussed in the Help Way Earlier report.¹⁵

These "crossover" children, as well as young adults who become involved in the adult criminal justice system after leaving care, form a significant proportion of The Shopfront's client base.

4.4 Over-representation of First Nations young people in detention

First Nations young people remain staggeringly over-represented in the NSW youth detention population. The 'NSW Closing the Gap Target 11 Quarterly Report' released by BOCSAR in March 2024 reported that Aboriginal young people accounted for 66.4% of young people in custody in NSW. 78.4% of these children were on remand.¹⁶

These highly concerning statistics in NSW unfortunately reflect those of Australia as a whole. A report published by the Australian Institute of Health and Welfare in December 2023 noted that 'on an average night' in June 2023, young First Nations people made up 63% of young people in detention, while making up only 5.7% of the general population.¹⁷

The Closing the Gap National Agreement committed the NSW government to reduce the rate of First Nations young people in detention by 30% by 2031.¹⁸ However, between March 2022 and March 2024, there has been an *increase* of 55.8% in the rate of Aboriginal young people in detention in NSW.¹⁹ This represents a significant failure in NSW's performance of this aspect of the Closing the Gap Agreement. According to the Productivity Commission's report on this target, this failure is reflected across Australia, with the Commission concluding that the 30% target is not on track to be met by 2031.²⁰

5 The impact of incarceration and contact with the youth justice system

5.1 Negative impact generally

Our experience and research suggest that juvenile incarceration can have serious implications for both a young person's general wellbeing and their risk of reoffending.

¹⁴ The Shopfront Youth Legal Centre, Submission to AHRC on Youth Justice and Child Wellbeing Reform across Australia, 28 June 2023, https://humanrights.gov.au/sites/default/files/the_shopfront_youth_legal_centre_submission_redacted_0.pdf

¹⁵ Help Way Earlier Report 2024 (n 1), page 19

¹⁶ BOCSAR, NSW Closing the Gap Target 11 Quarterly Report, < <https://bocsar.nsw.gov.au/documents/topic-areas/aboriginal-over-representation/target-11-young-people/CJS-Aboriginal-over-representation-Youth-March-2024.pdf> >.

¹⁷ Youth detention population in Australia 2023 (Web report, 13 Dec 2023) <<https://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2023/contents/first-nations-young-people>>.

¹⁸ Closing the Gap in Partnership, National Agreement on Closing the Gap July 2020, page 33 <https://www.closingthegap.gov.au/sites/default/files/2022-09/ctg-national-agreement_apr-21-comm-infra-targets-updated-24-august-2022_0.pdf>.

¹⁹ BOCSAR, NSW Closing the Gap Target 11 Quarterly Report, page 1 < <https://bocsar.nsw.gov.au/documents/topic-areas/aboriginal-over-representation/target-11-young-people/CJS-Aboriginal-over-representation-Youth-March-2024.pdf> >

²⁰ Australian Government Productivity Commission, Closing the Gap Annual Data Compilation Report, page 74 <<https://www.pc.gov.au/closing-the-gap-data/annual-data-report/closing-the-gap-annual-data-compilation-july2024.pdf>>.

Some of the harmful aspects of detention for children are summarised in the Australian Human Rights Commission's *Help Way Earlier* report.²¹

The Justice Reform Initiative's discussion paper on Youth Justice emphasises that 'incarceration for all children, including First Nations children, is trauma reinforcing'.²²

When children are removed from their family and carers, and unable to participate in further education, employment, and meaningful social activities, they are driven further away from their community.²³ For First Nations children, incarceration disconnects them from Country, kinship groups and their culture, which 'reflects and reproduces many forms of structural disadvantage, systemic racism and continued institutionalisation and dispossession'.²⁴

There are few studies in Australia that examine the link between juvenile incarceration and adult wellbeing. However, one study conducted in the United States suggested that incarceration during adolescence and early adulthood is independently associated with worse physical and mental health during adulthood.²⁵ The study found that incarceration during adolescence may 'compound any social vulnerabilities and hinder opportunities for success'.²⁶

5.2 Criminogenic effect

The link between *adult* imprisonment and recidivism is quite well documented in Australian studies. Studies conducted by BOCSAR show that an adult is more likely to re-offend after a prison sentence than a non-custodial penalty.²⁷

The criminogenic effect of youth incarceration in Australia appears to be less well-documented. However, studies suggest an association between detention and recidivism.

In a literature review conducted in 2013, New Zealand academics Lambie and Randall noted that the incarceration of young people is often a result of complex individual and environmental factors which are rarely able to be addressed effectively in a confinement setting. The literature reveals that incarceration often has the adverse effect of causing negative mental health and behavioural outcomes, which can lead to and manifest in ongoing offending.²⁸

BOCSAR data shows that 73.6% of young people released from custody in NSW in 2022 reoffended within 12 months, compared to only 44.6% of all young people found guilty in court during the same period.²⁹ Of course, this does not necessarily mean that incarceration *causes* recidivism, but we think it is safe to infer that incarceration is *not*

²¹ Australian Human Rights Commission, 'Help way earlier! How Australia can transform child justice to improve safety and wellbeing 2024', 112-13 < https://humanrights.gov.au/sites/default/files/document/publication/1807_help_way_earlier_accessible_0.pdf >

²² Mindy Sotiri, Louis Schetzer and Aysha Kerr, 'Children, Youth Justice and Alternatives to Incarceration in Australia' (Youth Justice Discussion Paper, Justice Reform Initiative, June 2024) 12 https://assets.nationbuilder.com/justicereforminitiative/pages/441/attachments/original/1720409799/JRI_YOUTH_JUSTICE_JUNE_2024.pdf?1720409799

²³ Ibid.

²⁴ Ibid.

²⁵ Elizabeth Barnert et al, 'How Does Incarcerating Young People Affect Their Adult Health Outcomes?' (2017) 139(2) *Official Journal of the American Academy of Pediatrics* <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5260153/>>.

²⁶ Ibid.

²⁷ Don Weatherburn 'The effect of prison on adult re-offending' (Crime and Justice Bulletin report number 143, August 2010) <https://www.austlii.edu.au/au/journals/NSWCrimJustB/2010/5.pdf>

²⁸ Ian Lambie and Isabel Randall, 'The Impact of Incarceration on Juvenile Offenders' (2013) 33(3) *Clinical Psychology Review* 448, < <https://www.sciencedirect.com/science/article/pii/S027273581300010X> >.

²⁹ NSW Bureau of Crime Statistics and Research 'Reoffending' (Last updated 21 August 2024) <https://bocsar.nsw.gov.au/topic-areas/re-offending.html>

preventing young people from reoffending.

Whether or not a young person is incarcerated, any contact with the youth justice system at a young age may have a criminogenic effect. A study into young people's contact with the criminal justice system over their life course, published in 2018 by the NSW Bureau of Crime Statistics and Research ('BOCSAR'), found that contact with the system before the age of 15 was a 'powerful signal of later persistent contact with the court and custodial systems.'³⁰ The study also found a pronounced inverse relationship between the age of first contact and the average number of court contacts.³¹ That is, the earlier children were exposed to the justice system, the more likely, and more frequent, their later contacts with the system would be.

6 Bail laws and practices in NSW

6.1 Young people in custody on remand

It is clear that bail refusal is a key driver of incarceration of children in NSW. Reducing the youth detention population (and thus mitigating the negative flow-on effects of youth incarceration) therefore depends on understanding and reforming bail laws and practices for young defendants.

Of the 247 children in custody in NSW in June 2024, 189 were on remand.³² This represented an increase of 44.3% of young people on remand from the previous year.³³ The proportion of young people on remand (as opposed serving a custodial sentence) was 76%. The BOCSAR statistics show that the proportion of young detainees on remand has been consistently high for several years.³⁴

In 2012, the NSW Law Reform Commission noted that 80% of children held on remand do not go on to receive a custodial sentence.³⁵ Admittedly, some of these children might have received a custodial sentence if not for the fact that they had already 'done enough time'. However, the majority of children are held on remand for offences which are not serious enough to warrant a custodial sentence.

Also concerning is the prevalence of short-term remand in the NSW juvenile detention system. Recent statistics show that the average length of stay in custody on remand is approximately 15 days.³⁶ Short stints in custody, especially when young people are churning through custody repeatedly, can perpetuate destructive cycles of re-offending.

6.2 Bail practices which drive high remand rates

Section 8 of the *Children (Criminal Proceedings) Act 1987* (NSW) creates a presumption that young people appearing before the Children's Court should be dealt with by court attendance notice (as opposed to arrest and bail) where possible.

³⁰ Don Weatherburn and Stephanie Ramsey, 'Offending over the life course: Contact with the NSW criminal justice system between age 10 and age 33' (Bureau Brief No 132, NSW Bureau of Crime Statistics and Research, April 2018) 8 <https://www.bocsar.nsw.gov.au/Publications/BB/2018-Report-Offending-over-the-life-course-BB132.pdf>.

³¹ Ibid 6

³² BOCSAR, NSW Custody Statistics June 2024 <https://bocsar.nsw.gov.au/documents/publications/custody/2024_06_Custody_Infographic.pdf>

³³ Ibid.

³⁴ The referenced studies go back to 2013 but our experience is that the high proportion of children on remand has been a problem for decades; BOCSAR, NSW Custody Statistics June 2024 <https://bocsar.nsw.gov.au/documents/publications/custody/2024_06_Custody_Infographic.pdf>

³⁵ New South Wales Law Reform Commission, 'Bail' 2012, 72 <<https://lawreform.nsw.gov.au/documents/Publications/Reports/Report-133.pdf>>.

³⁶ Youth Justice NSW, Young People in Custody Statistics 2024 <<https://www.nsw.gov.au/legal-and-justice/youth-justice/about/statistics/custody>>.

This is based on sound reasoning - that arrest should be a last resort, and imposing bail conditions on children can often be counter-productive.

Regrettably, in our experience, section 8 is not widely observed by the police. Children's Court magistrates, too, are often prone to imposing well-intentioned but problematic bail conditions.

Children often find it difficult to comply with some of the more commonly-imposed types of bail conditions such as curfews and reporting. This can be due to inability to understand or remember the conditions, poor executive functioning, and a lack of control over their life circumstances. Bail conditions often set children up to fail and risk criminalising them for their social disadvantage, cognitive deficits, and lack of agency over their daily lives.

Although breach of bail conditions is not itself an offence in NSW, failure to comply with bail conditions often leads to arrest, revocation of bail and detention on remand. Bail is often re-granted after a short period, but often with the same unworkable conditions, and the cycle is perpetuated.

A 2020 paper on short-term remand by the Aboriginal Legal Service analyses this issue comprehensively.³⁷

NSW criminal justice agencies have recognised the harmful effects of short-term remand and are currently piloting a 'Short-Term Remand Project' in one metropolitan and one regional location.³⁸

6.3 Section 22C of the *Bail Act 2013*

Despite commendable initiatives like the Short-Term Remand Pilot, the NSW government has recently taken backward steps in regard to young people and bail.

As a response to a perceived 'rural youth crime crisis' The *Bail and Crimes Amendment Bill 2024* was introduced to Parliament on 12 March 2024, and came into force just 9 days later on 21 March 2024. The bill introduced Section 22C into the *Bail Act 2013*.

Section 22C applies to 14-17 year olds who are charged with a 'motor vehicle theft' or 'serious break and enter offence' while on bail for an offence of the same kind. The section provides that such a young person cannot be granted bail unless the bail authority has a 'high degree of confidence' that the young person will not commit a serious indictable offence if granted bail. "Serious indictable offence" means an offence punishable by imprisonment for 5 years or more,³⁹ which includes comparatively minor offences such as shoplifting and property damage.

An example may serve to highlight the extreme implications of this section. If a child, who is on bail for allegedly riding as a passenger in a stolen car, is later charged with similar conduct, they will not be granted bail unless the court is 'highly confident' that they will not commit even a relatively petty offence such as shoplifting.

In our view, the new addition of Section 22C of the *Bail Act 2013* represents a significant step in the wrong direction. We echo the concerns outlined in the Law Society's open

³⁷ 'Short term remand: a snapshot', Aboriginal Legal Service, 2020
https://assets.nationbuilder.com/alsnswact/pages/464/attachments/original/1616406359/A_snapshot_of_short_term_remand_-_TFM_ALS.pdf?1616406359

³⁸ For more information about this program see NSW Police Force Youth Strategy 2023-2025
https://www.police.nsw.gov.au/_data/assets/pdf_file/0010/616816/YouthStrategy_D17.pdf; Save the Children 'Program Profile: Mobile Youth Outreach Short Term Remand Pilot' < <https://sascamel.pacloc01.blob.core.windows.net/position-descriptions/54-reasons/nsw/program%20profiles/Program%20Profile%20-%20Mobile%20Youth%20Outreach%20Short%20Term%20Remand%20Pilot.pdf>>.

³⁹ *Crimes Act 1900* s 4(1).

letter to Members of the Legislative Council concerning this new section.⁴⁰

Section 22C introduces a test previously unknown to the criminal law and may result 'in a more punitive approach than that taken for adults for equivalent offences'.⁴¹ As Lonergan J commented in *R v RB* [2024] NSWSC 471:

"There is a concern that s 22C operates in an unfairly discriminatory way upon a section of the community, children aged 14 to under 18, who have been widely and specifically recognised as a group that needs support and guidance, not incarceration and disconnection from their family and the community"⁴²

Not only does this section ignore the evidence around youth incarceration in NSW, but as Lonergan J also notes in *R v RB* [2024] NSWSC 471, section 22C sits in conflict with the purpose and operation of the *Children (Criminal Proceedings) Act 1987* (NSW). The section creates "significant tension" with the principles outlined in section 6 of that Act, particularly the principle that children have rights and freedoms equal to adults, and that wherever possible a child should be permitted to reside in their own home.⁴³

It may properly be said that the section also contravenes Australia's obligations under the Article 37(b) of the *Convention on the Rights of the Child*, which requires that detention or imprisonment of a child can only be used as a measure of last resort and for the shortest appropriate period of time.⁴⁴

While the government has called this amendment a 'circuit breaker' to address youth offending, we are firmly of the belief that the tougher bail laws like s 22C *perpetuate*, rather than break, cycles of youth incarceration and offending.⁴⁵ Section 22C is emblematic, in our view, of the 'tough on crime', reactionary approach to youth justice that the AHRC has outlined as a barrier to child justice reform.⁴⁶ The amendment was introduced without proper (if indeed, any) consultation with stakeholders. Not for the first time, we see in Section 22C a "panicked reaction" that "ignores decades of evidence".⁴⁷

6.4 Long-term impact of bail breaches and refusal

The Shopfront Youth Legal Centre has worked with thousands of young adults who have had contact with the youth justice system. Their juvenile criminal histories are often littered with entries for 'breach of bail'.

This can make it more difficult to obtain bail or non-custodial sentences for adult offences. We have encountered too many judicial officers in adult courts who take an adverse view of the young person's history, without making a genuine effort to interrogate the nature and circumstances of the past breaches of bail.

⁴⁰ Open Letter to Members of the Legislative Council, Brett McGrath, President, NSW Law Society, 20 March 2024 <https://www.lawsociety.com.au/sites/default/files/2024-03/Letter%20to%20Members%20of%20the%20Legislative%20Council%20-%20Bail%20and%20Crimes%20Amendment%20Bill%202024%20-%2020%20March%202024.pdf>

⁴¹ Ibid 2.

⁴² *R v RB* [2024] NSWSC 471, [53].

⁴³ *Children (Criminal Proceedings) Act 1987* (NSW), s 6(a), (d).

⁴⁴ United Nations Human Rights, Convention on the Rights of the Child, General Assembly resolution 44/25 (20 November 1989) < <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> >.

⁴⁵ NSW, Parliamentary Debates, Legislative Assembly, 12 March 2024, page (Michael Daley, Attorney General) <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#docid/HANSARD1323879322-139003>.

⁴⁶ Australian Human Rights Commission, 'Help way earlier!' How Australia can transform child justice to improve safety and wellbeing 2024', page 108 < https://humanrights.gov.au/sites/default/files/document/publication/1807_help_way_earlier_-_accessible_0.pdf >.

⁴⁷ Aboriginal Legal Service (NSW/ACT) Limited, Opinion editorial by Arthur Moses SC and Karly Warner, < https://www.alsnswact.org.au/op-ed_arthur_moses_karly_warner >.

7 Diversion

Diversion from the court system through warnings, cautions, and youth justice conferencing is an integral part of the NSW youth justice system, as it is in other Australian jurisdictions. It has the potential to reduce reoffending as well as protecting adolescents from the harms associated with contact with courts.⁴⁸

In a study published by BOCSAR in 2012, youth justice conferencing was found to be no more effective than Children's Court interventions at preventing reoffending. The Director of BOCSAR at the time, Dr Don Weatherburn, suggested "one possible explanation is that YJCs do not address the underlying causes of juvenile offending (e.g. drug and alcohol use, parental neglect and abuse, poor school performance, boredom and unemployment)".⁴⁹

However, research published in 2013 suggested that *Young Offenders Act* interventions overall were effective in reducing the likelihood of a subsequent custodial sentence.⁵⁰

We are concerned that diversionary options in NSW are under-utilised, particularly for First Nations young people.⁵¹

According to recent statistics, the youth diversion rate in NSW fell from 51.3% to 46.8% between 2022/23 and 2023/24.⁵² Referrals to Youth Justice Conferences have remained steady in recent years,⁵³ but the number of cautions declined by 10.5% and warnings by 7.3% in the past year.⁵⁴

We are of the view that the offences currently excluded from diversion under section 8 of the *Young Offenders Act* are somewhat arbitrary, create artificial notions of more serious types of offending, and operate to unjustly fetter discretion. For instance, section 8 of the Act allows for an offence of assault occasioning actual bodily harm to be diverted, while excluding from diversion an offence of breaching an apprehended violence order, which may be part of the same incident, and which is usually lower in objective seriousness. The exclusion of certain offences is unnecessary on account of the protections already within the Act, such as the factors to be considered by the police, DPP and courts when exercising their discretion,⁵⁵ and the fact that conferences can be facilitated in a way that protects victims from re-traumatisation.

In 2018, the NSW Legislative Council Inquiry into the adequacy of youth diversionary programs in NSW discussed various barriers to the use of diversionary options and made recommendations to overcome these barriers. In the Government Response, the NSW

⁴⁸ NSW BOCSAR, 'Youth diversion rate falls in NSW' (Web Page, 19/09/2024) <[https://bocsar.nsw.gov.au/media/2024/mr-nsw-recorded-crime-statistics-quarterly-update-jun-2024.html#:~:text=From%202022%2F23%20to%202023,7.3%25%20\(down%20225\)>](https://bocsar.nsw.gov.au/media/2024/mr-nsw-recorded-crime-statistics-quarterly-update-jun-2024.html#:~:text=From%202022%2F23%20to%202023,7.3%25%20(down%20225)>)>.

⁴⁹ Don Weatherburn, 'The Effect of Youth Justice Conferences on Re-offending' (Media Release, 15 March 2012), <https://bocsar.nsw.gov.au/media/2012/bocsar-mr-cjb160.html>>.

⁵⁰ Wai-Yin Wan, Elizabeth Moore and Steve Moffat, 'The Impact of the NSW Young Offenders Act (1997) on the Likelihood of Custodial Order' (Report No 166, NSW Bureau of Crime Statistics and Research, January 2013), <<https://www.indigenousjustice.gov.au/wp-content/uploads/mp/files/resources/files/cjb166.pdf>>.

⁵¹ Don Weatherburn and Brendan Thomas, 'The Influence of Indigenous Status on the Issue of Police Cautions' (2022) 56(2) *Journal of Criminology* <<https://journals.sagepub.com/doi/abs/10.1177/26338076221146326>>.

⁵² Ibid

⁵³ See NSW Government, 'Youth Justice Conferencing' (Web Page, 6 July 2024) <<https://www.nsw.gov.au/legal-and-justice/youthjustice/about/statistics/conferencing#:~:text=Youth%20Justice%20Conferencing%20referrals%20and%20Conferences&text=The%20highest%20number%20of%20conferences,referrals%20and%2096%20conferences%20facilitated>>>;

Nadine Smith and Don Weatherburn, 'Youth Justice Conferences on Re-offending' (Report No 160, NSW Bureau of Crime Statistics and Research, February 2012), <<https://bocsar.nsw.gov.au/media/2012/bocsar-mr-cjb160.html>>.

⁵⁵ Section 37(3); section 20(3) *Young Offenders Act 1997* (NSW)

Government committed to reviewing the *Young Offenders Act*.⁵⁶

The *Young Offenders Act* has undergone several reviews over the years, most recently in 2020. However, no substantive amendments have been made to the Act for several years. Our views on appropriate amendments were outlined in our submission to the 2020 review of the Act.⁵⁷ We call for the NSW Government to make this a matter of priority so that diversionary measures can be implemented in a more equitable and appropriate way.

Recognising that youth justice conferences alone may not prevent reoffending, especially for children with complex needs, we also support holistic support programs for young people who are referred to conferences.

8 Harmful policing practices

The Help Way Earlier report makes some mention of harmful policing practices in the section on “Training and upskilling of staff across the sector”. Enhanced training and specialisation of police is suggested as one part of the solution.⁵⁸

Specialist trained police are of little benefit, however, when the overarching police culture is “tough on crime” or is driven by metrics that measure success according to numbers of arrests, stops and searches.

The NSW Police Force has a Youth Command, a Youth Strategy, and a number of well-trained and skilled Specialist Youth Officers. However, this is not enough to counteract some of the more harmful policing practices, including:

- “Proactive” policing which involves extensive use (or misuse) of stop and search powers. These practices often appear to be based on racial and other forms of profiling and are experienced by young people as harassment.⁵⁹
- Disruptive strategies, such as the ones used as part of the Suspect Target Management Plan (STMP). These strategies, ostensibly aimed at crime prevention, are inappropriate for children and may promote rather than prevent offending. The use of the STMP on children was strongly criticised by the Law Enforcement Conduct Commission (LECC), which stopped short of making formal findings of institutional misconduct only because the NSW Police Force agreed to cease the use of STMP on children.⁶⁰ The NSW Police Force is now developing alternative strategies, which we suggest will need close monitoring to avoid replicating the harmful aspects of the old STMP.
- Bail compliance checks unreasonably intruding into the lives of children and their families. This has been the subject of a recent issues paper from the LECC.⁶¹

⁵⁶ NSW Government, ‘Report of the Legislative Assembly Committee on Law and Safety – Inquiry into the Adequacy of Youth Diversionary Programs in NSW’ (Report, Legislative Assembly Committee, 28 August 2019), <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2464#tab-reportsandgovernmentresponses>.

⁵⁷ Review of The Young Offenders Act 1997, Submission from The Shopfront Youth Legal Centre, 4 May 2020 https://humanrights.gov.au/sites/default/files/the_shopfront_youth_legal_centre_attachment3_redacted_0.pdf

⁵⁸ Help Way Earlier Report 2024 (n 1), pages 78-81

⁵⁹ ‘A dangerous numbers game’, Paul Farrell, Inga Ting, Alex Lim, Thomas Brettell, Katia Shatoba and Jack Fisher, ABC Investigations and Digital Story Innovations, 18 March 2024 <https://www.abc.net.au/news/2024-03-18/how-proactive-policing-quotas-sent-nsw-police-searches-soaring/103579210>

⁶⁰ Law Enforcement Conduct Commission, ‘An Investigation Into the Use of the NSW Police Force Suspect Targeting Management Plan on Children and Young People’ (Operation Tepito Final Report, October 2023) <https://www.lecc.nsw.gov.au/publications/publications/operation-tepito-final-report.pdf>.

⁶¹ Law Enforcement Conduct Commission, *Bail Compliance Checks NSW* (Web Page, 25 July 2024) <<https://www.lecc.nsw.gov.au/make-a-submission#3ad55adb-2a0b-4321-ac66-3d0ac92fa2de>>.

- Strip searches carried out as a matter of routine by police seeking to find small quantities of drugs.⁶²
- The over-use of arrest. This is at odds with section 8 of the *Children (Criminal Proceedings) Act 1987* (NSW), with section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), and with the common law of arrest as a last resort.

A particular concern is the use of arrest for offences where it is clearly appropriate to use a diversionary option such as a police caution or youth justice conference. Our experience suggests that arrest is sometimes used by police as a convenient way to get the young person to the police station and offer them an interview, rather than organising for them to attend voluntarily at a later date.

- Inappropriate responses to alleged domestic and family violence offences committed by children.

Alleged domestic violence offending by children often involves acting out against harsh discipline or violence from parents or caregivers, predictable behaviour in response to trauma, or low-level conflict between siblings or other children in the same household.

As the NSW Police Force acknowledge in their Domestic and Family Violence Policy, 37% of DV-related assaults involve people in non-intimate relationships.⁶³ The Policy also recognises that it may be appropriate to deal with children's domestic violence offences under the *Young Offenders Act*.⁶⁴

Despite this, we have observed that police often deal with young people in a manner more appropriate to adults who commit intimate partner violence, where the power dynamics are entirely different. The police response often involves arrest as a first rather than a last resort, and the extensive use of Apprehended Violence Orders (AVOs).

AVOs often contain conditions which are not age-appropriate, are unworkable, and are ineffective to protect the alleged victim. Breaches of AVOs are often the gateway into the youth justice system, particularly for children in care or in dysfunctional families. It is commendable that the NSW Children's Court (and the Police Prosecutors in that jurisdiction) have adopted a sensible approach to AVOs, making interim orders which lapse after a few months if there are no further incidents. However, this may not always be enough to undo the harm done by the initial police intervention.

9 Summary and recommendations

We agree with the views expressed in the Help Way Earlier report about the barriers to child justice and child wellbeing reform in Australia - in particular, the lack of political commitment to evidence-based reform, the pervasive "tough on crime" rhetoric that persists in most Australian states and territories, and the failure to prioritise the rights and wellbeing of children at a national level.⁶⁵

As we write, we note that the Prime Minister and at least two State Premiers are currently calling for limits on children's access to social media, acknowledging the vulnerability of

⁶² Dr Michael Grewcock and Dr Vicki Sentas, 'Rethinking Strip Searches by NSW Police' (UNSW Report, Redfern Legal Centre, 16 August 2019) < <https://rlc.org.au/resources/papers-and-submissions/uns-w-report-rethinking-strip-searches-nsw-police> >.

⁶³ NSW Police Force, 'Domestic and Family Violence Policy' February 2018, page 16 https://www.police.nsw.gov.au/_data/assets/pdf_file/0006/477267/Domestic_and_Family_Violence_Policy_2018.pdf >.

⁶⁴ Ibid, page 20

⁶⁵ Help Way Earlier 2024 (n 1), pages 98-114

young people in their teen years. We find it perverse that our leaders see an urgent need to restrict children's access to social media yet see no urgency in lifting children out of poverty, raising the age of criminal responsibility, or protecting children from harms associated with incarceration.

We support most of the recommendations made in the Help Way Earlier report. In particular, we endorse the national approach to child justice outlined in Recommendations 1-4.

Recommendation 1, the establishment of a National Taskforce, can and should be implemented without delay.

Recommendations 2-4, especially the incorporation of the Convention on the Rights of the Child into Australian law and the enactment of a national Human Rights Act, may take more time, but immediate steps should be taken to progress these proposals.

We support public health and justice reinvestment approaches to minimise the risk of children coming into contact with the youth justice system in the first place.

We echo the need to raise the age of criminal responsibility to 14 years across all Australian jurisdictions.

When children do come into contact with the youth justice system, interventions must be evidence-based and tailored to meet the often-complex needs of children who offend. The Justice Reform Initiative's recent Youth Justice discussion paper provides examples of what works, and makes recommendations for reform.⁶⁶

Any police youth strategy needs to be genuine, well understood by all officers, and backed by appropriate resources. Importantly it must not be subordinate to strategies such as "proactive" policing and STMP-type programs.

We also make the following recommendations specific to New South Wales:

- Section 22C of the *Bail Act 2013* (NSW) must be urgently repealed;
- The *Young Offenders Act 1997* should be amended to expand the range of offences and offenders eligible for diversion.

Above all, we stress that youth justice issues must be governed by a child-rights based approach rather than a reactionary, "tough on crime" rhetoric. It is imperative that legislation and policy concerning youth justice are made based on evidence and with proper consultation. The needs of children must come before politics.

Thank you for the opportunity to comment. We are happy to be contacted for further comment and to give evidence at the Inquiry if requested.

Yours sincerely

Jane Sanders
Principal Solicitor

⁶⁶ Mindy Sotiri, Louis Schetzer and Aysha Kerr, 'Children, Youth Justice and Alternatives to Incarceration in Australia', Justice Reform Initiative, June 2024
https://assets.nationbuilder.com/justicereforminitiative/pages/441/attachments/original/1720409799/JRI_YOUTH_JUSTICE_JUNE_2024.pdf?1720409799