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Dear Secretary,

**Re: Reforming Tasmania's Youth Justice System Discussion Paper**

Thank you for the opportunity to respond to the *Reforming Tasmania's Youth Justice System Discussion Paper* (the Discussion Paper). I am grateful for the extension of time within which to provide my submission to inform this critical reform process.

**Introductory remarks**

The Government's commitment to reforming Tasmania's youth justice system provides a significant opportunity to design a system that better meets the needs of children, their families, and the community.

Children are fundamentally different from adults, both in terms of their physical and psycho-social development. This recognition has several important implications for how children's behaviour should be responded to. As set out by the United Nations Committee on the Rights of the Child (UNCRC),

[s]uch differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.<sup>1</sup>

Whilst I appreciate it is intended that the Discussion Paper provide the foundation for the consultation process, I strongly encourage the Tasmanian Government to undertake a transparent, considered, consultative and adaptive approach to the ongoing youth justice reform, including

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<sup>1</sup> United Nations Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (Comment, 2019) ('*Children's rights in the child justice system*').



evaluation throughout implementation. I would welcome the opportunity to provide further feedback throughout the reform process.

In the following parts, I consider the areas identified in the Discussion Paper that are particularly relevant to promoting and protecting the rights, wellbeing and best interests of children and young people in Tasmania.

Noting that the Discussion Paper represents only the first phase of consultation, my comments are preliminary in nature and are not intended to be exhaustive. In particular, the range of interventions which I identify below should not be taken as exhaustive. If I have not mentioned an initiative which is outlined in the Discussion Paper, this should not be taken to imply that this initiative is not viewed by me as valuable.

Consistent with the terminology of the United Nations Committee on the Rights of Child,<sup>2</sup> and the *Commissioner for Children and Young People Act 2016* (CCYP Act), in this submission I use the terms 'child' and or 'young person' to refer to persons who have not attained the aged of 18 years.<sup>3</sup>

In addition, any reference to Aboriginal people is understood to also encompass Torres Strait Islander people.

### Acknowledgment of Tasmanian Aboriginal People

I acknowledge and pay my respects to the palawa people of lutruwita (Tasmania) as the original and ongoing custodians of this land and for the more than 40,000 years they have cared for their country and their children.

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<sup>2</sup> Ibid.

<sup>3</sup> *Commissioner for Children and Young People Act 2016* (Tas) s 4.



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## The role of the Commissioner for Children and Young People (Tas)

My role as Commissioner for Children and Young People is governed by the CCYP Act. The Commissioner's functions include:

- (a) advocating for all children and young people in the State generally;
- (b) acting as advocate for a detainee under the *Youth Justice Act 1997*;
- (c) researching, investigating and influencing policy development into matters relating to children and young people generally;
- (d) promoting, monitoring and reviewing the wellbeing of children and young people generally;
- (e) promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives;
- (f) assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally;
- (g) encouraging and promoting the establishment by organisations of appropriate and accessible mechanisms for the participation of children and young people in matters that may affect them;
- (h) such other functions as are prescribed.

In performing my functions under the CCYP Act, I am required to:

- do so according to the principle that the wellbeing and best interests of children and young people are paramount; and
- observe any relevant provisions of the UNCRC.<sup>4</sup>

The provisions of the UNCRC which are particularly relevant to my consideration of the Discussion Paper include:

- The best interests of the child shall be the primary consideration in all actions concerning them, undertaken by both public or private social welfare institutions, courts, administrative and legislative bodies (Article 3).
- Children have the right, and should be given the opportunity, to express their own views freely on all matters affecting them and their views must be given appropriate weight (Article 12).
- Children who are victims of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman, or degrading treatment or punishment; have the right to be supported to make a physical and psychological recovery in an environment which fosters the health, self-respect, and dignity of the child (Article 39).

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<sup>4</sup> *Commissioner for Children and Young People Act 2016* (Tas) s 3(1).



In addition, Article 40 has special relevance to this comment. It provides that:

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.
2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
  - (a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;
  - (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
    - (i) To be presumed innocent until proven guilty according to law;
    - (ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;
    - (iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;
    - (iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
    - (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
    - (vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
    - (vii) To have his or her privacy fully respected at all stages of the proceedings.
3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:
  - (a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;



- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.
4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

In addition, there are several further relevant conventions, standards, guidelines, and rules that inform my comment. These include the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* ('Beijing Rules'), the *United Nations Guidelines for the Prevention of Juvenile Delinquency* ('Riyadh Guidelines'), the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* 1990, the *United Nations Declaration on the Rights of Indigenous Peoples*, *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Economic, Social and Cultural Rights*, and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

## 1 Overarching Principles

My submission is guided by three overarching principles that I believe must guide the reform of youth justice in Tasmania, across the continuum of prevention and early intervention, targeted and tertiary intervention.

- The first principle is that the *reforms should be child centred*.
- The second principle is that the reforms should *acknowledge the right of Aboriginal people to determine and lead the appropriate response for their children*.
- The third principle is that the reforms should *acknowledge the ecological model of child development which recognises the influence of families, communities and broader society on the wellbeing of children*.

The below comments relate to widely accepted policy approaches and implementation strategies that are particularly relevant to promoting and protecting the rights, wellbeing and best interests of children and young people in Tasmania.

### *Principle 1: The reforms should be child-centred*

Being child centred is about raising the status of children's interests and rights, in the work that we all do. It requires that each of us, as individuals, and as part of government and non-government organisations, consider the impact of decisions and processes on children, and seek their views, when appropriate, to inform decision-making on issues that affect them. Children and young people are the 'experts in their own lives',<sup>5</sup> and, listening to their views, especially of those with lived

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<sup>5</sup> Australian Childhood Trauma Group, 'Why have an approach to children's participation?' (2021). Available at <https://theactgroup.com.au/childrens-participation-and-voice/>.



experience, has the potential to improve decision-making and lead to more effective policy and program development.

Due to the short consultation period, I have not had an opportunity to undertake specific consultations with children and young people. Therefore, my contribution is informed by other consultations that I have undertaken with children (e.g. [Wellbeing Consultation Report](#)) and my interactions with children and young people with lived experience of the youth justice system, including in my role as advocate for young people detained under the *Youth Justice Act 1997* (YJA).

Barriers to the participation of children and young people is a systemic issue across government. On this point, it will be important to identify and embed mechanisms that guarantee the rights of children to participate in public decision-making processes such as this.<sup>6</sup> This is important across all levels of government, including, 'legislative reform, policymaking, data collection, resource allocation and service delivery'.<sup>7</sup>

The reform of youth justice both directly and indirectly affects children and young people in Tasmania. Consistent with Article 12 of the UNCRC, I strongly urge the Government to provide ongoing opportunities for children and young people with lived experience to be heard throughout the reform process. In addition, and in line with Article 19 of the UN *Declaration on the Rights of Indigenous Peoples*, the government should actively engage and seek the views of Aboriginal children and young people,<sup>8</sup> particularly given their over-representation in detention in Tasmania.<sup>9</sup> I further note that participatory processes must go beyond one-off individual consultations 'to move beyond tokenism'<sup>10</sup> and be premised on the principles of co-design.<sup>11</sup>

More broadly, I continue to encourage the government to implement the use of Child Impact Assessments (CIAs) to assist government and non-government organisations to continually assess the impacts of law and policy on the rights and wellbeing of children and young people.<sup>12</sup> I note their successful implementation in several countries, including New Zealand and Scotland, and several Australian states. I reiterate my previous advocacy on this issue, which is available [here](#).

I further note the important work of the Royal Commission into Institutional Responses to Child Sexual Abuse (Royal Commission) and its relevance to the reform of Tasmania's youth justice system. The Royal Commission recommended that state and territory governments require all institutions that engage in child related work to meet the Royal Commission's Child Safe

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<sup>6</sup> See further, Louise Forde, Ursula Kilkelly, Deirdre Kelleher and Laura Lundy, *The Rights of Children to Participate in Public Decision-Making Processes* (Research report by Save the Children International, 2020) iv. Available at [The Right of Children to Participate in Public Decision-Making Processes | Save the Children's Resource Centre](#).

<sup>7</sup> Ibid 13.

<sup>8</sup> Committee on the Rights of the Child, *The right of the child to be heard* (General Comments, 2009). Available at [Microsoft Word - CRC-C-GC-12 advance unedited for distribution.doc \(ohchr.org\)](#).

<sup>9</sup> Sentencing Advisory Council (Tas), *Sentencing Young Offenders* (Research Paper, 2021) 12. ('*Sentencing Young Offenders*').

<sup>10</sup> Forde, Kilkelly, Kelleher and Lundy (n 6) 14. See further Deirdre Horgan, 'Consultations with children and young people and their impact on policy in Ireland' (2017) *Social Inclusion* 5(3) 104-112; Committee on the Rights of the Child, *The right of the child to be heard* (General Comment, 2009) paragraphs 132-133. Available at [Microsoft Word - CRC-C-GC-12 advance unedited for distribution.doc \(ohchr.org\)](#).

<sup>11</sup> The Australian Centre for Social Innovation, *Unpacking Co-design* (2022). Available at [Unpacking co-design - The Australian Centre for Social Innovation \(tacs.org.au\)](#).

<sup>12</sup> Government of New Zealand Ministry of Social Development, *Improving the wellbeing of children and young people in New Zealand: Child Impact Assessment Guide* (Report, 2018) 3.





Standards.<sup>13</sup> The National Principles for Child Safe Organisations (National Principles) endorsed by the then Council of Australian Governments reflect the Child Safe Standards recommended by the Royal Commission.<sup>14</sup> The National Principles go beyond child sexual abuse to cover other forms of harm to children. The National Principles are available [here](#).

I acknowledge and welcome the establishment of a Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institution Settings (the Inquiry). As I stated in my submission to the Inquiry (available [here](#)), this Inquiry is an opportunity to learn from the past, and look to the future, by doing all that we can to reduce the risk of child sexual abuse occurring in institutional settings in Tasmania, including in youth justice. This means continuing to strengthen our approaches to preventing, identifying and responding to child sexual abuse in organisations, and helping to build child safe communities. All children in Tasmania have a right to grow up being and feeling safe in their home, in their community, and in the organisations they interact with, and we all have a responsibility to ensure this future is realised.

The National Principles are consistent with a trauma informed approach, which, in this context, requires that the Government adopt and implement a youth justice system that recognises and acknowledges the presence of trauma in the lives of children and families who come into conflict with the law.<sup>15</sup>

*Principle 2: The reforms should acknowledge the right of Aboriginal people to determine and lead the appropriate response for their children*

Genuine partnerships with Tasmanian Aboriginal people must be developed to ensure that services to children and their families are culturally safe and enshrine self-determination.<sup>16</sup> The representation of Aboriginal people in discussions on the National Agreement on Closing the Gap (National Agreement) targets and other initiatives provides self-determination for Aboriginal Communities in ways that meet their social, cultural, and economic needs.<sup>17</sup> In turn, this enables services for young people to be appropriately tailored, which assists in meeting Action 11 of the National Agreement; to reduce the rate of Aboriginal young people in detention by 30 percent by 2031.<sup>18</sup>

I understand that the Tasmanian Government has already commenced work under the National Agreement.<sup>19</sup> I further note that it has been recognised by the Australian Government, and the Joint Council on Closing the Gap, that adult and youth incarceration is an urgent priority, with the

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<sup>13</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Making institutions child safe: Volume 6* (Final Report, 2017).

<sup>14</sup> The Australian Human Rights Commission, *Child Safe Organisations: National Principles* (Report, 2018). Available at [National Principles for Child Safe Organisations \(humanrights.gov.au\)](https://www.humanrights.gov.au/national-principles-for-child-safe-organisations).

<sup>15</sup> Australian Child & Adolescent Trauma, Loss & Grief Network, *Trauma, young people and Juvenile Justice* (Australian National University). Available at [Trauma and juvenile justice in Australia.pdf \(anu.edu.au\)](https://www.anu.edu.au/trauma-and-juvenile-justice).

<sup>16</sup> Chris Cuneen, *Self-Determination and the Aboriginal Youth Justice Strategy* (Research Report, 2018). Available at [Microsoft Word - AJC Lit Review Final.docx \(uts.edu.au\)](https://www.uts.edu.au/~ajc-lit-review-final.docx) 6.

<sup>17</sup> Australian Human Rights Commission, *Right to self-determination* (Report, 2003). Available at <https://www.humanrights.gov.au/our-work/rights-and-freedoms/right-selfdetermination>.

<sup>18</sup> Attorney-General's Department, *Closing the Gap* (Australian Government). Available at [Closing the Gap | Attorney-General's Department \(ag.gov.au\)](https://www.ag.gov.au/closing-the-gap)

<sup>19</sup> Tasmanian Government, *Closing the Gap: Tasmanian Implementation Plan 2021-2023* (Report, 2021).



establishment of the Justice Policy Partnership.<sup>20</sup> It would be beneficial to understand how the National Agreement and Justice Policy Partnership will intersect with the reform process.

It is not clear from the Discussion Paper how the Tasmanian Government intends to actively engage and seek the views of Aboriginal children and young people in reforming youth justice. Again, I would urge the government, as a matter of urgency, to provide Aboriginal children and young people with a real opportunity to be heard as part of the reform process. This approach could also be facilitated through the National Agreement and Justice Policy Partnership discussions, in keeping with the Closing the Gap Tasmanian Implementation Plan's guiding principles to ensure that '...all perspectives are heard, respected and acknowledged appropriately as decisions are made.'<sup>21</sup>

In my role as Commissioner, I am responsible for promoting, monitoring, and reviewing the rights and wellbeing of all Tasmanian children and young people in Tasmania, including Aboriginal children and young people. However, Tasmania does not have an independent statutory officer who is Aboriginal and is specifically responsible for promoting the rights and wellbeing of Tasmanian Aboriginal children and young people. The establishment of such a role would honour the ongoing commitment of the Tasmanian Government to reset its relationship with Aboriginal communities and enable self-determination. As I have previously stated ([here](#)), a dedicated Aboriginal Children's Commissioner for Tasmania would be uniquely positioned to engage in a culturally safe and respectful manner with Tasmanian Aboriginal children and young people, and their families and communities, and to advocate for their rights and wellbeing.

*Principle 3: The reforms should acknowledge the ecological model of child development which recognises the influence of families, communities and society on the wellbeing of children*

The ecological model of child development recognises, as Jack explains, that the development of the child is the 'product of a complex set of interacting factors, at the individual, family and community levels'.<sup>22</sup> Consistent with this model, parents and carers have the primary influence on a child's development.<sup>23</sup> Supporting families, within their community, to care for their children is key to achieving a public health approach. This requires an integrated service system that meets the needs of children, families, and the community.

As a general principle, engagement with services should be voluntary and encouraged by identifying and addressing barriers to engagement. Improving outcomes for children and families requires a solid foundation of effective community engagement.<sup>24</sup>

Government systems must support children and families to find and get the help they need, where they need it, and when they need it. To make it easier for children and families to find help,

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<sup>20</sup> Joint Council on Closing the Gap, *Agreement to implement the justice policy partnership: Partnership agreement to improve outcomes under closing the gap for justice (adult and youth incarceration)*. Available at [Agreement to Implement the Justice Policy Partnership](#)

<sup>21</sup> Tasmanian Government, *Closing the Gap: Tasmanian Implementation Plan 2021-2023* (Report, 2021).

<sup>22</sup> Gordon Jack, 'Ecological Influences on Parenting and Child Development' (2000) *British Journal of Social Work* 30, 703. See also, Urie Bronfenbrenner, *The ecology of human development* (Harvard University Press, 1979); Jill F. Kilanowski, 'Breadth of the Socio-Ecological Model' (2017) *Journal of Agromedicine*, 22(4) 295-297.

<sup>23</sup> United Nations, *Convention on the Rights of the Child*, GA Res 44/25 (2 September 1990, 17 December 1990); *Commissioner for Children and Young People Act 2016* s 3(2)(e).

<sup>24</sup> Tim Moore, Myfanway McDonald, Harriet McHugh-Dillon and Sue West, *Community Engagement: A key strategy for improving outcomes for Australian families* (Australian Institute for Family Studies, 2016).



Tasmania's service system needs to be better integrated. I have previously expressed concern about what I see as a 'fragmentation of effort' around the design and implementation of services for children and young people in Tasmania. The system is unconnected, poorly coordinated and operates within narrow programmatic silos.<sup>25</sup>

Mindful of such issues, I welcome the Government's recent announcement of its intention to consolidate major functions that support children and families into a single department of Education, Children and Young People. In undertaking this work, it will be important for the Government to ensure that services are delivered in a way that promotes 'joined up care' – this is critical to address individual needs holistically and break down the silos of delivering agencies. Joined-up care is particularly important when considering any new interventions to promote wellbeing during the first 1,000 days of children's lives.

The creation of a single department to support children and families represents a unique opportunity to create a more child-centred service system, and, if properly implemented and resourced, will lead to improved and enduring wellbeing outcomes for Tasmania's children and young people.

## 2 Adopting a public health approach

I congratulate the Government on its intention to adopt a public health approach to youth justice. I am very pleased to contribute to this *Discussion Paper* on the understanding that it will inform a Blueprint for re-imagining our youth justice service system; embedding a public health model to identify how investment in our service systems should be 'weighted' across universal prevention, diversionary, and statutory services.<sup>26</sup> In my view, there are two key barriers to realising a public health approach to youth justice in Tasmania. The first is the under investment in universal prevention and early intervention.<sup>27</sup> The second is the current lack of a comprehensive and cohesive information strategy to guide how different agencies collect, use and share data relating to children and young people to guide effective service delivery and measure success.

### 2.1 Investment in prevention and early intervention

Consistent with recent recommendations made by the Expert Panel on the essential therapeutic elements required for an improved service system response for Tasmanian children and young people with highly complex needs (Expert Panel),<sup>28</sup> prevention and early intervention is about directing resources towards children, their families and communities (including schools) to promote protective factors and mitigate against engagement or involvement in criminal behaviour.<sup>29</sup> A solid foundation of programs and interventions are

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<sup>25</sup> Commissioner for Children and Young People Tasmania, *Investing in the Wellbeing of Tasmania's Children and Young People* (Report, 2020), 11. ('*Wellbeing Report*').

<sup>26</sup> Department of Communities, *Reforming Tasmania's Youth Justice System Discussion Paper* (Tasmanian Government Discussion Paper, 2021) 5.

<sup>27</sup> Noetic, *Custodial Youth Justice Options Paper* (Report for the Tasmanian Government and the Department of Health and Human Services, 2016) 14 ('*Custodial Options Paper*').

<sup>28</sup> Expert Panel, *Expert Panel advice and recommendations to the Minister for Children and Youth on the essential therapeutic elements required for an improved service system response for Tasmanian children and young people with highly complex needs* (Final Report, 2021) Recommendation 1 ('*Expert Panel advice and recommendations*').

<sup>29</sup> Kate Freiberg and Ross Homel, *Preventing the onset of offending Evidence Based Policy and Practice in Youth Justice* (The Federation Press, 2011) 82-99. See also, Noetic, *Youth Justice, Effective Practice Guide* (Report, 2017) 18 ('*Effective Practice Guide*').



critical to promote the wellbeing and health of all children<sup>30</sup> and have been shown to be more effective than risk mitigation at reducing involvement with crime.<sup>31</sup>

In Australia, there is widespread agreement that children and young people who enter the youth justice system, and particularly those who enter custodial facilities, are a vulnerable population who invariably present with complex needs.<sup>32</sup> The risk factors that contribute to a child or young person's engagement or involvement in offending behaviour are complex and multifaceted. They include involvement with child safety services, homelessness, family violence, intergenerational trauma and disadvantage, mental health issues, alcohol and other substance misuse issues, cognitive disability, and disengagement from education.<sup>33</sup>

Yet, it is also clear that the relationship between the experience of one or more risk factors and the likelihood of early onset offending, or offending later in a life course, is not determinative. Research by the Australian Institute of Family Studies (AIFS) shows that many children who appear to be at risk of early onset offending do not go on to engage or become involved in offending behaviour.<sup>34</sup> Based on this evidence, the AIFS notes that

developing programs and resources that target children who show signs of being at-risk of engaging in crime or delinquency may not reach the kids who need it.<sup>35</sup>

Therefore, the most effective way to improve outcomes for all children, and to reduce inequalities between children, is through an evidence-based, holistic, integrated, and inclusive approach, which is delivered universally and proportionate to need.<sup>36</sup> This will undoubtedly require government to provide scaled-up investment in community-based services.

## 2.2 An appropriate information strategy

A public health approach cannot be achieved unless, and until, we are able to measure the outcomes of interventions across the full continuum of services. This is vital to ensure that interventions are consistent with 'effective practice' in youth justice.<sup>37</sup> As part of doing this, more accurate and timely collection, analysing, and sharing of data, in responsible ways, about children and young people within, between and among government departments and third parties is required. A well thought out and managed data strategy that respects the privacy of children and young people, gives them a voice, and recognises data sovereignty for Aboriginal people, is essential if government is to build a service system that is data-led and truly fit for purpose.

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<sup>30</sup> *Effective Practice Guide* (n 29) 18.

<sup>31</sup> Jesuit Social Services, *Thinking Outside: Alternatives to remand for children* (Research Report, 2013) 42 ('*Alternatives to remand for children*').

<sup>32</sup> Garner Clancey, Sindy Wang, and Brenda Lin, 'Youth justice in Australia: Themes from recent inquiries' (2020) *Trends and Issues in Crime and Criminal Justice* 605, 6.

<sup>33</sup> Department of Communities, *Reforming Tasmania's Youth Justice System* (Discussion Paper, 2021) 33-35.

<sup>34</sup> Australian Institute of Family Studies, *Young delinquents: Risk and protective factors for Australian children* (2015).

<sup>35</sup> *Ibid.*

<sup>36</sup> United Kingdom House of Commons Health and Social Care Committee, *First 1,000 days of life – Thirteenth Report of Session 2017-19* (Report, 2019).

<sup>37</sup> 'Effective practice' means is 'premised on the fact that children who offend are fundamentally different to adults'. See further, *Effective Practice Guide* (n 29) 14.



As Commissioner, access to such data would allow me to better perform the functions of the role as set out above.

I acknowledge the Tasmanian Government's commitment to develop an Information Strategy under the Child and Youth Wellbeing Strategy and would welcome further discussion on how progress to improve outcomes across the youth justice continuum will be monitored and evaluated.

### 3 Comment

In the following parts, my comment on the Discussion Paper is guided by the three overarching principles identified above. Namely, that a re-imagined youth justice service system and the public health model that underlines it, must be child-centred, empower the Aboriginal community to determine and lead the appropriate response for their children, and acknowledge the ecological model of child development which recognises the influence of families, communities and broader society on the wellbeing of children.

Drawing on the above principles, my below comments focus on three broad areas including

- Improving Prevention and Early Intervention;
- Strengthening Targeted Intervention; and
- Reforming Tertiary Intervention.

### 4 Improving Prevention and Early Intervention

As my former New Zealand counterpart, Judge Andrew Becroft put it, tackling issues in the first 1000 days of a child's life is 'our ultimate crime fighting tool'.<sup>38</sup> Evidence-based early intervention programmes have been shown to result in improved wellbeing outcomes for children and young people including, of relevance here, prevention of future criminal, antisocial and violent behaviour.<sup>39</sup>

The first 1000 days refers to the earliest stage of human development, from conception to the end of a child's second year of life.<sup>40</sup> This period is when the developing foetus and infant are at their most vulnerable to exposures and experiences, and we now know that these experiences will not only shape their development during this critical time, but will impact on their future health, wellbeing, learning and development outcomes.<sup>41</sup>

Evidence indicates that investing in the first 1000 days of a child's life is likely to have the greatest impact and be most likely to reduce the numbers of children needing expensive, high-intensity crisis and late intervention responses (for example, child protection, youth justice, mental health

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<sup>38</sup> Children's Commissioner (NZ) Andrew Becroft, *The child and youth wellbeing jigsaw in Aotearoa New Zealand: five missing pieces Some reflections and challenges* (Report, 2021).

<sup>39</sup> See further, *Wellbeing Report* (n 25) 11.

<sup>40</sup> PricewaterhouseCoopers, *The first thousand days: A case for investment* (Report, 2019).

<sup>41</sup> *Ibid.*



treatment and youth unemployment services). A recent estimate of the cost of such responses to the Australian government was \$15.2 billion per annum, or \$607 for every Australian.<sup>42</sup>

#### 4.1 Investing in the first 1000 days and beyond

In my February 2020 report [\*Investing in the Wellbeing of Tasmania's Children and Young People\*](#) (the *Wellbeing Report*), I advocated for greater investment in the first 1,000 days to give all children the best start in life and lay the foundations for healthy, happy, and prosperous lives. I reiterated my position again in April 2021, in my comment on *Tasmania's Child and Youth Wellbeing Strategy Discussion Paper*. I argued that the first 1,000 days should be a discrete component of the Government's wellbeing strategy to ensure that investment in this formative period of a child's life receives appropriate weight. I outlined that this must include dedicated objectives, outcomes and measures linked to tangible efforts to improve wellbeing from conception to two years.

To reiterate my recommendations, I advocated that

- Striving to achieve the very best experience for all children in their first 1,000 days should be a cross-partisan, mainstream undertaking in Tasmania and a key priority for all relevant government agencies.
- Interventions in the first 1,000 days should take an evidence-based, holistic, integrated, and inclusive approach, and be delivered both universally and proportionate to need.

In response to these recommendations, the Government announced several actions in its *Wellbeing Strategy* that target, and increase supports for the first 1000 days of a child's life. These consist of programs to support parents and carers including but not limited to

- *Bringing Baby Home* (pre and post birth support for parents at imminent risk of being placed in care);
- *Child Health and Parenting Service* (CHaPS) Sustained Nurse Home Visiting Program for families with complex needs;
- *Kids Care Clinics* to provide access to a multidisciplinary state-wide community paediatric service for vulnerable children; and
- *The Basics Program* to provide knowledge about effective caregiving in the first 1000 days.

I welcome these new targeted initiatives, and the Government's commitment to other actions, including the scoping and delivery of a parenting program and a staged outreach model for Child and Family Learning Centre (CFLCs) among others.

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<sup>42</sup> William Teager, Stacey Fox and Neil Stafford, *How Australia can invest early and return more: A new look at the \$15b cost and opportunity* (Report, Early Intervention Foundation, The Front Project and CoLab at the Telethon Kids Institute, Australia, 2019).





I would urge the Government to ensure that services are available and accessible to families widely, in addition to families who have been previously identified as vulnerable or as having complex needs.

In the following parts of this submission, I identify and discuss what is still needed to make a real and lasting positive difference to the lives of children in Tasmania. In short, I argue that the Government needs to make key services accessible and available to all Tasmanian children and families, and support must begin before a child is born.

In doing so, my comments go beyond the first 1,000 days of a child's life, in recognition that interventions after the age of two years and throughout childhood and adolescence can redress issues that may have occurred during the early years of a child's life. It is also important to understand how the Wellbeing Strategy will intersect with the youth justice reform process.

#### 4.1.1 A sustained Child Health Nurse Home visits program

I welcome the Government's commitment to introducing a CHaPS Sustained Nurse Home Visiting Program for families with complex needs under the *Wellbeing Strategy*. However, I strongly encourage the Government to expand this service to all Tasmanian children and families. Research consistently demonstrates that maternal, baby and child health and wellbeing is improved by regular maternal and child health nurse home visits during pregnancy and until the child is at least two years old.<sup>43</sup>

The efficacy of sustained nurse home visiting programs to support women and children in Tasmania is well demonstrated. Beginning in 2012, Tasmania was part of the trial for the right@home nurse home visiting program which involved 25 visits for families within the study, from birth to aged 2 years.<sup>44</sup> Consistent with the growing body of evidence in this area,<sup>45</sup> the study found benefits across several indicators including improvements to the safety of the home, parents were warmer and less hostile in their parenting style and parents were more actively involved in their child's learning.<sup>46</sup>

#### 4.1.2 Expanded mother and baby units

Families who are experiencing challenging ante-natal and post-natal issues need access to expanded mother and baby units to provide in-patient support and care. Issues include postnatal depression and anxiety, unsettled and irritable babies, and difficulties

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<sup>43</sup> Catriona May, 'More Maternal and child health nurse visits help mothers and babies thrive' (2019) *Pursuit* available at [More maternal and child health nurse visits help mothers and babies thrive | Pursuit by The University of Melbourne \(unimelb.edu.au\)](#); David L Olds, 'Home visiting nurses – preventing crime by improving pre-natal and infant health and development' (2007) *Centre for Crime and Justice Studies* 69.

<sup>44</sup> Centre for Community Child Health, 'right@home', The Royal Children's Hospital Melbourne. Available at [Centre for Community Child Health : right@home \(rch.org.au\)](#).

<sup>45</sup> Lynn Kemp, Elizabeth Harris, Catherine McMahon, Stephen Matthey, Graham Vimpani, Teresa Anderson, Virginia Schmied, Henna Aslam, and Siggie Zapart, 'Child and family outcomes of a long-term nurse home visitation programme: a randomised controlled trial' (2011) *Archives of Disease in Childhood* 96(6), 533-540. Lynn Kemp, 'Adaptation and fidelity: A recipe analogy for achieving both in population scale implementation' (2016) *Prevention Science* 17(4), 429-38.

<sup>46</sup> Sharon Goldfeld, Anna Price, Charlene Smith, Tracey Bruce, Hannah Bryson, Fiona Mensah, Francesca Orsini, Lisa Gold, Harriet Hiscock, Lara Bishop, Ashlee Smith, Susan Perlen, Lynn Kemp, 'Nurse home visiting for families experiencing adversity: a randomized trial' (2019) *Pediatrics* 143(1).



with feeding, sleeping, and settling. These units play a vital role in supporting parents, as well as their babies, at a critical time in their growth and development.

The availability of mother and baby units in Tasmania is currently limited, particularly for public patients, with only one privately-run unit available in Hobart within which there are one or two publicly available beds which are very difficult to access. Mother and baby units are a key part of the service system supporting new parents. Units should be available across Tasmania to ensure all parents who are struggling can get the help they need.

#### 4.1.3 State-wide intensive residential support services for families

Access for vulnerable parents and babies to intensive residential support services (including 24-hour wrap-around support) should be available state-wide. The Government's commitment to the *Bringing Baby Home* program is a positive step in the right direction. However, consideration should be given to ensuring that the right supports and interventions are in place for all children and parents, in addition to those parents with babies at imminent risk of being removed from their care.

The support that a family has access to at this critical stage of a child's growth and development has a significant impact on the wellbeing outcomes of not only children and young people, but their parents and the community.

#### 4.1.4 Parenting programs for all families

Universal positive parenting programs are needed to ensure all parents have access to services to build their capacity to provide appropriate care to their children. The overall objective of positive parenting programs is to improve the wellbeing outcomes of the child. This is achieved through increasing a parent's knowledge, skills, and capacity as a caregiver, by improving parent-child interactions, and addressing parental wellbeing and family relationships. These types of programs are beneficial for all parents, not just for those who are experiencing difficulties. They can be particularly useful for parents who are geographically isolated, for single parents, and those experiencing conflict within the family around parenting issues. Several jurisdictions, including Queensland and Victoria, are funding free access to positive parenting training online, and both states have seen a marked increase in uptake during the COVID-19 pandemic.

I commend the Government on its commitment to fund a project officer to determine the best parenting program or programs which could operate universally in Tasmania (see Action 5 of the *Wellbeing Strategy*). I also note the additional commitment to include a text message-based support service for parents that provides tips on child development through *The Basics Program* (see Action 38 *Wellbeing Strategy*). I encourage the Government to ensure that this program is appropriately resourced so that this service can maximise impact and reach the families who need support.





#### 4.1.5 Increasing access to Child and Family Learning Centres

Child and Family Learning Centres (CFLC) perform a vital function in providing families with access to a host of multidisciplinary services including primary health care, midwifery, child health services, mental health services, childcare, education, and social services are critical to support children and families. I am very supportive of the place-based hub service model as the best way to address the social determinants of inequities in child development.

I know, from my consultations to inform the [Wellbeing Consultation Report](#), that the activities taking place in these early learning centres are important to allow parents and carers to build support networks, particularly in communities where the lack of early childhood education and care services might make adults (and possibly also children) feel more isolated and vulnerable.

I warmly welcome the Government's ongoing commitment to increasing the number of CFLCs to meet what is currently a growing unmet need. I further note that there are several outstanding issues that need to be addressed including around ensuring equitable access to CFLCs across Tasmania and providing the appropriate range of multidisciplinary and allied health services within the CFLCs. I note with support the Government's commitment to provide free access to speech pathologists, psychologists and social workers for every child and family attending a CFLC (see Action 31 *Wellbeing Strategy*).

#### 4.1.6 Increasing availability and accessibility of health services

During consultation for the [Wellbeing Consultation Report](#), children, young people, and their families consistently told me that the health services they need are often not readily available or accessible. This is a particular issue for regional communities, where, in addition to lacking access to specialist health services, general health services are often unavailable. Common concerns included the need for

- More child health services, especially in regional communities
- More frequent public transport options to attend appointments
- More counsellors, psychologists, and acute mental health support for children and young people
- More paediatric specialists
- Drug and alcohol services for young people and their families

Evidence underlines the importance of early access to allied health professionals to reduce offending behaviour.<sup>47</sup> For example, a recent study highlighted the potential

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<sup>47</sup> Rebecca Addo, Paula Chronic, Rebecca Reeve and Leanne Dowse, *Economic evaluation of the impact of speech pathology services on criminal justice outcomes* (Report Commissioned for Speech Pathology Australia, 2020) 3.



benefit of speech pathology interventions to reduce offending behaviour among young people, by improving language and communication skills.<sup>48</sup>

I am concerned about the lack of paediatric and adolescent mental health services, across the continuum, including specific child mental health residential facilities for the small number of children who may require them in Tasmania. This was a recurrent theme in my consultations for the *Wellbeing Consultation Report*. I am also aware that children in out of home care often lack access to the mental health care that they require due to significant waiting times and insufficient trauma-informed therapeutic supports (see my reports [available here](#)).

There is often a close relationship between the experience of mental health issues and the misuse of drug and alcohol. Residential drug and alcohol detoxification or rehabilitation service specifically for children and young people in Tasmania, and specific child mental health residential facilities, are critical components of a therapeutic model of youth justice and should be addressed.

I welcome the government's commitment to and significant investment in implementing the recommendations of the review of Child and Adolescent Mental Health Services (CAMHS) to provide Tasmanian children and young people with access to the interventions and support they need.

#### 4.1.7 A supportive and responsive educational system

When I asked children and young people about their educational needs in the context of consultations to inform the [Wellbeing Consultation Report](#), they identified the need for

- Financial and other supports to ensure equality of access to education
- Flexible and relevant subject choice that is responsive to student and community needs
- Extension programs and/or self-paced learning support
- More in-class support for students experiencing learning challenges
- Improved and more available school-based support services (mental health, social work, counsellors)
- A more responsive education system
- Improved responses to bullying in schools
- Improved transport options, especially in remote areas, for students to participate in learning opportunities

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<sup>48</sup> Ibid.



Children have a right to education.<sup>49</sup> As the United Nations Committee on Economic, Social and Cultural Rights, who monitors implementation of the [International Covenant on Economic, Social and Cultural Rights](#) states

Education is both a human right in itself and an indispensable means of realizing other human rights. As an empowerment right, education is the primary vehicle by which economically and socially marginalized adults and children can lift themselves out of poverty and obtain the means to participate fully in their communities. Education has a vital role in empowering women, safeguarding children from exploitative and hazardous labour and sexual exploitation, promoting human rights and democracy, protecting the environment, and controlling population growth. Increasingly, education is recognized as one of the best financial investments States can make. But the importance of education is not just practical: a well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence.

In the Tasmanian context, many of the issues identified by children and young people are risk factors for disengagement. Disengagement from education is a critical early indicator of a potential risk factor for contact with the criminal justice system. Evidence shows that children and young people who have contact with the criminal justice system often have ‘fragmented and persistently problematic contact with educational services’.<sup>50</sup> Moreover, indicators such as poor performance at school, which have been identified as a risk factor for involvement in offending behaviour among young people, need to be considered as part of a more responsive education system.<sup>51</sup>

Disengagement from school can start very early in life, including in kindergarten. Supports and interventions should therefore begin much earlier, especially for vulnerable children. Currently, this is not adequately recognised. For example, under the current Department of Education (DoE) procedures for engagement, there is provision directed at effectively engaging learners on a continuum from Tier 1 to Tier 4, the latter tiers are concerned with learners who are identified as being at ‘significant risk of disengagement’ (Tier 3) or who have disengaged, and efforts are directed at re-engaging learners (Tier 4). This model is limited, as provision for Tier 3 and Tier 4 programs does not include primary school aged children where, as I noted above, issues often first emerge. Another significant issue in this context is the use of suspensions and exclusions from education within Tasmanian schools. Previous work undertaken by this office ([available here](#)) found that school exclusionary practices are not effective in changing student’s behaviour as they fail to address the underlying issues causing the behaviour. I also note that despite reforms under the *Education Act 2016* which require principals to proceed through a continuum of alternative measures to address unacceptable behaviour at school (except in the case of immediate health and safety risks) prior to

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<sup>49</sup> See United Nations, *Convention on the Rights of the Child*, GA Res 44/25 (2 September 1990, 17 December 1990) Article 28; *International Covenant on Economic, Social and Cultural Rights* (ICESCR) Article 13; among others.

<sup>50</sup> Penny Armytage and James Oglloff, *Youth Justice Review and Strategy: Meeting Needs and Reducing Offending – Part 1* (Report, 2017) 162.

<sup>51</sup> *Alternatives to remand for children* (n 31) 18.



using exclusionary practices, exclusions remain a commonly used behavioural management tool in many Tasmanian schools.<sup>52</sup>

Further, many children who I meet in my role as the individual advocate for young people in youth justice detention in Tasmania have been disengaged from our education system for some time, even years. To me, this indicates strongly that the education system is not meeting the needs of these children.

I further note that schools offer an enormously valuable opportunity for the implementation of interventions and programs for children and young people who seek to reduce detrimental contact with the criminal justice system. Two school-based programs that have shown promise in other jurisdictions are the Police in Schools program, and the Lawyer in School program.

The Police in Schools program is generally recognised as way to foster stronger relationships between police, children and young people and communities. However, there is a need for such programs to be culturally safe and trauma informed particularly given the profound experiences of Aboriginal people and vulnerable and marginalised groups in the context of interactions with police.

Similarly, in jurisdictions where it operates, the Lawyer in School program has value in reducing the involvement of young people in the legal system. It enables children to learn about the legal system and have ready access to legal assistance for issues such as family violence, bullying, criminal charges, and respectful relationships.<sup>53</sup>

Yet, to realise this opportunity, the issue of engagement must be addressed. I therefore strongly encourage the government to put in place interventions and supports to mitigate against disengagement from education across all levels of schooling. Co-designing educational programs with children and young people with lived experience of disengagement and disadvantage will be important in achieving this aim.

#### 4.1.8 More available and accessible housing for children and families

Young people account for a substantial proportion of those seeking specialist homeless services in Tasmania.<sup>54</sup> The need for ‘more available and affordable housing’ was a common theme during the consultations for the [Wellbeing Consultation Report](#). Stable housing is integral to children and young people’s wellbeing; it improves family relationships and parental mental health and stress, children attend fewer schools, and have better educational performance and school completion rates.<sup>55</sup>

I acknowledge the work that the Government is doing under their *Tasmanian Housing Strategy* and look forward to further details becoming available.

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<sup>52</sup> Department of Education, *Key Data* (Report, March 2021). Available at [DoE Key Data Set 2021 \(education.tas.gov.au\)](https://www.education.tas.gov.au/DoE-Key-Data-Set-2021)

<sup>53</sup> Tasmanian Legal Aid, *Children First: Children in the Child Safety and Youth Justice System* (Report, 2021) (*‘Child First Report’*).

<sup>54</sup> Australian Institute of Health and Welfare, *Specialist homelessness services 2019-20: Tasmania* (Report, 2020).

<sup>55</sup> Australian Housing and Urban Research Institute, *How does security of tenure impact on public housing tenants?* (Research and Policy Bulletin, 2006).



I take this opportunity to underline the need for this strategy to include a strong focus on unaccompanied children under 16 years old, for young people leaving care and for children who are part of families who are experiencing homelessness. In doing so, I acknowledge that research shows that if a child is involved with either child safety, youth justice or the homelessness system, they were more likely to become involved in the others, than children in the general population.<sup>56</sup>

#### 4.1.9 More things to do and places to do them for children

As children grow, access activities for children to engage in recreational, sporting, and other community-based activities play a vital role in improving physical and mental wellbeing and promoting community connectedness and other protective factors. During consultations for the [Wellbeing Consultation Report](#), children and young people around Tasmania told me that they need more things to do in their communities, and more places that are designed with their needs in mind including

- More free and/or low-cost activities outside school
- More all season, child-friendly sports, and leisure infrastructure (e.g., playgrounds, swimming pools, skate parks, basketball courts, bike paths)
- Accessible, low-cost learn-to-swim classes
- Improved transport options to access activities

I acknowledge the work of the Government in funding opportunities for recreational and social activities for children and young people through the Premier's Fund. The need to double the amount of funding available,<sup>57</sup> underlines the incredibly strong demand and need for further investment in this area. I strongly encourage the Government to consider further investing in innovative interventions that have demonstrated success in other jurisdictions. For example, the Icelandic Government has employed a voucher system to encourage and enable young people to spend their free time after school engaged in meaningful sports or cultural activities, coupled with additional family engagement and national policies that seek to decrease opportunities for young people to engage in risky behaviours.<sup>58</sup> A similar system, available to all young people in Tasmania, would be one such option to explore.

## 5 Strengthening Targeted Intervention

To complement universally available prevention efforts, such as those mentioned above, targeted programs and services delivered at a scale and intensity proportionate to need are required. These programs and services should be available for children, young people, and their families, where

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<sup>56</sup> Australian Institute of Health and Welfare, *Children and young people at risk of social exclusion: links between homelessness, child protection and juvenile justice* (Linkage Report, 2012).

<sup>57</sup> Premier Peter Gutwein, *More funding for Tasmania's children and young people* (Media release, 10 March 2022).

<sup>58</sup> Ina, M Koning, Charlotte De Kock, P. Van der Kreeft, Andrew Percy, Zila M. Sanchez, and G. Burkhart, 'Implementation of the Icelandic prevention model: a critical discussion of its worldwide transferability' (2021) *Drugs: Education, Prevention and Policy* 28(4) 367-378.



there are significant or multiple risk factors present and or where a child or young person is, for example, disengaged or at risk of becoming disengaged from family, education, and/or community.

In this context, my comments focus on how to effectively divert children and young people who have begun to engage in offending behaviour, who have committed low level offence(s) or who have significant risk factors for future offending, away from the statutory youth justice system.

In the forthcoming months, I understand that significant mapping work is being undertaken by the Brotherhood of St Lawrence to better understand the breadth and scope of services available for children, young people and their families in Tasmania. This work will be a critical input to this reform process. While I do not wish to pre-empt this important work, my discussions with children, families and services providers around the state to date have led me to the conclusion that the range of diversionary and targeted services currently available in Tasmania must be improved to prevent young people who are at risk of offending, or at risk of involvement in more serious offending, from engagement with the youth justice system. An effective youth justice system is one that diverts most young people away from the formal criminal justice system,<sup>59</sup> with provision for additional intensive therapeutic support for young people who have heightened needs and or pose a serious risk of harm to the public.<sup>60</sup>

### 5.1 Preventing and managing escalating behaviour

Preventing children and young people engaging in escalating behaviours requires the right supports and services to be in place from the beginning of the child's life, and that those supports, and services are universally available. By the time a child begins to engage in escalating behaviours, multiple opportunities to support the child, and the child's family may have been missed.

To facilitate change where escalating behaviour is occurring, children and families need access to a variety of programs, across the continuum, that meet the full spectrum of their needs. For young people, priority should be given to programs which respond flexibly to their needs, and which capitalise on existing embedded therapeutic relationships. I understand that a Lead Support Coordination approach to program delivery was conducted with the Targeted Youth Support Program (TYSS) and Supported Youth Program (SYP) in Tasmania. The outcome of this trial will be important to guide future approaches.

When a young person's behaviour continues to escalate, families need access to individualised and responsive interventions that are delivered to the individual child or young person. This is about ensuring that when behaviour has caused harm, is ongoing, and/or is serious, there is the ability to step up the response to ensure that the child's needs are met through therapeutic and restorative approaches (outside of the justice system) whilst holding the child to account for serious harm and to promote community safety.

Some options for individualised responses across the continuum of harmful behaviour include

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<sup>59</sup> *Effective Practice Guide* (n 29) 14.

<sup>60</sup> Lisa Ward, '10 Pillars of Youth Justice' (Australian & New Zealand School of Government Report, 2020) 7; Mark W Lipsey, James C. Howell, Marion R. Kelly, Gabrielle Chapman, and Darin Carver, 'Improving the effectiveness of juvenile justice programs' (2010) *Washington DC: Center for Juvenile Justice Reform at Georgetown University*.



- Thorough assessment and referral pathways that addresses the needs of the child and family. A specific plan for the individual child/family/carer/community is devised by a multidisciplinary panel or team of experts.
- Continued support through services and support systems such as those outlined in my comments on 'early intervention' above.
- Restorative approaches (including group conferencing) to encourage responsibility and accountability for actions, outside of a court or legal system. Supports for victims including access to restorative processes, assistance with recovery, and information about steps taken in relation to addressing the child's behaviour.
- Therapeutic interventions for harmful behaviours, evidence-based psychological intervention such as multi-systemic therapy (MST), residential and community-based drug and alcohol treatment, residential and community-based mental health treatment, referral to intensive family support services (IFES).
- Therapeutic residential environments which can provide wrap-around support by trauma-informed, well-trained multi-disciplinary staff.

Responses must also include the extension of appropriate supports to individuals who are affected by a child or young person's behaviour.

Tasmania has a number of valuable intensive support programs for families (e.g., Integrated Family Support and Intensive Family Engagement Support). However, the scope of these programs is limited to families at the edge of the statutory system and cannot readily respond earlier when families begin to experience escalating behaviour.

I further note that foster and kinship carers, especially those who care for children and young people in out of home care with complex needs, require additional sustained support. There must also be greater investment in therapeutic supports within placements, beginning from early childhood, to increase the likelihood of continuity of placement and support the best interests of the child. I note this view is consistent with the recommendations of the Expert Panel.<sup>61</sup>

As a general comment, support programs for children and families must be adequately and sustainably funded, and their design should seek to learn from families and children who have lived experience through a co-design method.

## 5.2 Upholding the rights of children who come into contact with the youth justice system

Children and young people experience a range of legal problems and often lack knowledge about their legal rights, and experience barriers to obtaining information or advice including uncertainty about how to access it. A strategy to reduce barriers faced by children and young people in accessing child-friendly legal information, advice and representation is needed. For example, although I acknowledge the Tasmanian Government's commitment to providing access to legal representation for children who appear before after-hours courts, I am aware that children appearing before out-of-hours courts across Tasmania, but particularly in the

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<sup>61</sup> See further, *Expert Panel advice and recommendations* (n 28) 14 (Recommendation 2).





North and North-West, continue to experience challenges to accessing legal representation out-of-hours.

### 5.2.1 Case Study 1

*K was 13 years old when they were remanded in detention for the first time. They were arrested in the evening and appeared in an afterhours Court without legal representation. This experience left them feeling ‘scared and confused about what was happening’. Compounding these feelings, the next day they appeared in Court via video-link from detention. K found it hard to hear what their lawyer was saying, and the Magistrate and prosecutor used lots of words they did not understand. At the end of the video-link, K looked to their Youth Worker for an explanation, but their Youth Worker had not understood either.*<sup>62</sup>

Many children in conflict with the law already face a range of communication and other barriers to accessing justice which can be exacerbated by a lack of access to legal representation and support to navigate and understand the legal process. Timely and effective legal representation, advice and support (e.g., in the form of communication intermediaries<sup>63</sup>) for children and young people would go some way to addressing this problem. I have heard from many young people who have experienced such barriers.

I also acknowledge and value the role of police as first responders in Tasmania. Between 2019 and 2020, the SAC identified that 856 young people were proceeded against by Tasmanian police for both court and non-court action (e.g., cautions, conferencing and fines). This accounts for 2 per cent of all 10- to 17-year-olds in Tasmania. This number does not represent or reflect the total number of interactions between Tasmanian police and children and young people. Police interact with children and young people in a broad range of situations, with respect to both offending behaviours and as victims of and or witnesses to the behaviours of others.

As such, police play a pivotal role in the youth justice system. Particularly relevant here, police act as gatekeepers to the statutory youth justice system, and police decisions about how to respond to alleged offending behaviour, including whether to make referrals to services, refer for formal or informal diversionary processes, or to file a complaint can have significant implications for outcomes for young people.

I would therefore welcome further discussion about how police interact with children and young people in Tasmania, and going forward, how to ensure that such interactions are child centred, culturally safe and developmentally appropriate.<sup>64</sup> I believe that such discussion will

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<sup>62</sup> To ensure anonymity this case study uses the pronouns ‘they’, ‘their’ and ‘them’ (as appropriate) and is a composite based on the experiences of several children in Tasmania’s youth justice system during my time as Commissioner.

<sup>63</sup> I note the use of intermediaries to help ensure that children and others with communication needs who are to give evidence in specified offences, can better participate in the criminal justice system under the state-wide Witness Intermediary Scheme currently being piloted with the commencement of the *Evidence (Children and Special Witnesses) Amendment Act 2020*. I understand that the pilot scheme has facilitated the use of intermediaries for young people charged with criminal offences where the Supreme Court has exercised its inherent jurisdiction.

<sup>64</sup> For example, in the United Kingdom, the National Police Chief’s Council (NPCC) released the National Strategy for the Policing of Children and Young people – Child Centred Policing which, among other things, includes six key principles that children and young





be increasingly valuable in the context of the reform of youth justice and in considering raising the minimum age of criminal responsibility in Tasmania.

There are a range of current practices that concern me in this broader context and require immediate review. For example, while it is rare for a child to be held in an adult correctional facility for any significant length of time, I am aware that currently, children and young people who are detained following arrest by Tasmania Police are routinely held in reception prisons managed by the Tasmanian Prison Service (TPS) pending interview/investigation or court. In my view, a reception prison is neither a child-centred nor therapeutic environment in which to hold a child even for a short period of time, and TPS staff do not have appropriate trauma and child development training to support and respond to the complex behaviour that children and young people may exhibit in this environment.

Fundamentally, the front door to the adult and the youth justice systems should not be the same; it is my view that it is not appropriate for children and young people to be held in reception prisons, or indeed any adult correctional facility. I would strongly encourage exploration of an alternative therapeutic and more developmentally appropriate approach to caring for children and young people who are detained while police investigations are carried out or to appear in court.

### 5.3 Diversion

A key purpose of the YJA is that, wherever possible, young people who admit committing an offence should be diverted from the courts' criminal justice system.<sup>65</sup> The preference for diversion, over formal judicial proceedings is a key principle of the UNCRC (see Article 40; Beijing Rules, Rule 11). Yet, diverting, or minimising contact between children and young people and the criminal justice system per se, irrespective of whether the behaviour is admitted, is neither an objective nor a general principle of youth justice (see sections 4 and 5 of the YJA respectively). A point recognised by others, including the TLA.<sup>66</sup> I support the recommendations of the TLA, namely, that the YJA should be amended

to explicitly reflect the different approach to be adopted for children and focus on early intervention and diversion. While there would be consequences for behaviour there would also be the proper recognition and response to trauma experienced by children and the impact this has on offending, rehabilitation and recidivism. The Act should include a focus on the strengths of children to support their positive growth and development. To be effective, this needs to flow through to the sentencing options and programs implemented by youth justice services.<sup>67</sup>

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people should be treated as 'children first', their vulnerability should be identified and responded to, a full understanding of a child or young persons situation should be sought, every interaction should be positive and as an intervention opportunity, the voices of children and young people must be heard and their opinion respected, and children and young people must be kept out of the criminal justice system unless necessary. See further, National Police Chiefs' Council, *Child Centred Policing: National Strategy for the Policing of Children and Young People* (NPCC, 2015) 5. Available at [CYP strategy 2016 \(npcc.police.uk\)](https://www.npcc.police.uk/cyp-strategy-2016).

<sup>65</sup> *Youth Justice Act 1997* (Tas) s 7.

<sup>66</sup> *Child First Report* (above n 53) 17.

<sup>67</sup> *Ibid* 18.



This approach, as noted by the SAC, 'reflects the greater recognition of the relevance of trauma to young offenders, including in the sentencing process, in Australia.'<sup>68</sup>

Increasing the availability of diversion and the range of diversionary options under the YJA is critical. This is needed to prevent and reduce contact between children, young people, and the criminal justice system. As acknowledged by the Committee for the Rights of the Child, this aim should be ongoing and

diversion options should be offered from the earliest point of contact, before a trial commences, and be available throughout the proceedings. In the process of offering diversion, the child's human rights and legal safeguards should be fully respected, bearing in mind that the nature and duration of diversion measures may be demanding, and that legal or other appropriate assistance is therefore necessary. Diversion should be presented to the child as a way to suspend the formal court process, which will be terminated if the diversion programme is carried out in a satisfactory manner.<sup>69</sup>

The value of diversion in the context of youth justice cannot be overstated. As neatly summarised by the Australian Human Rights Commission,

[d]iversionary options may create better opportunities to identify any family, behavioural and health problems contributing to the offending behaviour, and they may enable the child to participate meaningfully in the proceedings. They may also save resources for law enforcement and criminal justice agencies.<sup>70</sup>

Reiterating this point, the Productivity Commission notes that diversion can fundamentally change the life trajectory of young people as it provides an opportunity for the criminal justice system to identify and respond to the complex needs of young people so that they are prevented from entering and re-entering the system, which can fundamentally change their life trajectory.<sup>71</sup>

More effective measures need to be put in place to address the behaviour of children and young people in a way that is trauma informed<sup>72</sup> and accords with best practice principles for juvenile diversion as set out by the Australian Human Rights Commission ([available here](#)).<sup>73</sup>

It is not within the scope of this submission to provide a comprehensive analysis of these principles, however, below I draw attention to several issues that I believe are directly relevant to the question of whether the current legislative diversionary options in Tasmania are appropriate.

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<sup>68</sup> *Sentencing Young Offenders* (n 9) 34.

<sup>69</sup> Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (General Comment, 2019).

<sup>70</sup> Australian Human Rights Commission, *Best practice principles for the diversion of juvenile offenders* (Human Rights Brief No 5, 2001) ('*Best practice for diversion of juvenile offenders*').

<sup>71</sup> Productivity Commission, *Overcoming Indigenous Disadvantage: Key Indicators 2020* (Report, 2020) 11.

<sup>72</sup> *Sentencing Young Offenders* (n 9) 33-34.

<sup>73</sup> *Best practice for diversion of juvenile offenders* (n 70).



### 5.3.1 Diversion outside the youth justice system

Greater attention must be given to recognising that the concept of diversion, changing the direction that the child or young person is going in, can and should begin *before* contact with police and *before* an offence or harmful behaviour has occurred. I refer again to my above comments relating to prevention and early intervention, and in particular, supporting vulnerable and at-risk young people, within their families and communities early, and at the point when their behaviour begins to escalate. There are a range of non-government organisations that do, and can, play an important role in providing diversionary options for children and young people in this area. This needs to be better recognised and appropriately resourced.

Indeed, in my role as advocate for individual young people detained under the YJA, I have often observed that young people on remand at the Ashley Youth Detention Centre (AYDC) are receiving more support to engage in pro-social behaviour, education as well as access to stable accommodation and health services at the AYDC than they had access to in their communities. A shift to a therapeutic approach must address this and provide appropriate supports within families and communities as a priority.

### 5.3.2 Pre court diversion

As recognised by the Sentencing Advisory Council (SAC), under the YJA police have a 'significant gate-keeping function in relation to a youth's diversion by way of caution or community conference'.<sup>74</sup> Police have the option of an informal or formal caution, provided the young person admits to the commission of an offence, and/or requiring the young person to participate in a community conference that is convened by the Department of Communities (Tas) upon request by police.<sup>75</sup> Of concern, the use of pre-court diversion by police is discretionary, and I understand that this can result in variation between individual police officers, and regions. There needs to be a consistent state-wide approach to pre-court diversion that is child centred, developmentally appropriate and includes a range of well-developed and funded diversionary options.<sup>76</sup>

### 5.3.3 Post court diversion

Prior to sentencing, a judicial officer has the option to grant bail and defer sentencing for a young person for up to 12 months for various purposes (see section 56A(2) of the YJA) or order a community conference (instead of proceeding to sentencing).<sup>77</sup> There needs to be a range of programs available for young people to engage in, during a deferral period that tackle risk factors and foster and bolster protective factors. There is

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<sup>74</sup> *Sentencing Young Offenders* (n 9) xi.

<sup>75</sup> *Youth Justice Act 1997* (Tas) ss 8, 9, 10 and 14; for further, see *Sentencing Young Offenders* (n 9) 51.

<sup>76</sup> For example, in New Zealand, under the *Children, Young People and Their Families Act 1989* outlines a 'two-fold emphasis in the legislative first, on not charging young offenders and if at all possible using police organised alternative responses; and, secondly (where police diversion was not possible), replying on the Family Group Conference (FGC) – both as a diversionary mechanism to avoid charging, and as the prime decision making mechanism for all charges that were not denied or which were subsequently proved.' See further, Justice Andrew Becroft, 'Playing to Win – Youth Offenders Out of Court (And Sometimes In): Restorative Practices in the New Zealand Youth Justice System (Paper delivered at the Queensland Youth Justice Forum Brisbane, Australia, 2015).

<sup>77</sup> See further, *Sentencing Young Offenders* (n 9) 51.



a significant link here, between these factors and the availability and accessibility of support, for both the child or young person, and their families as discussed elsewhere in this submission. Further, the sentencing framework for young people charged under the YJA is set out in the Act and focuses on treatment, rehabilitation and, if appropriate, a sanction. Yet, while treatment and rehabilitation are primary objectives of the regime, too often, the lack of available programs through which young people could be supported to achieve rehabilitation goals and/or receive treatment, falls short of the intention of these objectives. This is particularly highlighted by the lack of any residential drug and alcohol rehabilitation services for children and young people, together with the lack of any specific mental health residential facility for children and young people (see below for further discussion).

#### 5.3.4 Diversionary options

In 2016, the lack of intensive diversionary programs available to young people in Tasmania was identified as a key limitation of the existing system.<sup>78</sup> My observation is that there has been no wholesale increase in options since that time.

In their recent report, *Children First*, TLA argued that there is 'scope for the greater use of pre and post court diversion'.<sup>79</sup> On this point, data obtained by the SAC found that the use of diversion by Tasmania Police account for less than half of youth files (47.4%), with more than half of youth cases (52.6%) sent to prosecution.<sup>80</sup> The SAC also comments that there has been a 'decrease in the use of diversion, in particular informal cautions and community conferences.'<sup>81</sup> Various explanations for this decrease were provided to SAC, however, I note that a lack of diversionary programs, a lack of support for young people to access such programs, and a perception that the undertakings from formal cautions and conferences were likely to be more onerous than orders made in the Youth Division, were all emphasised.<sup>82</sup> Diversionary options are also not available to police in the context of prescribed offences under the YJA, a matter which requires further consideration particularly as the list of prescribed offences in respect of young people aged 14 and above has grown to include vehicle and traffic offences since the YJA was passed.

Diversion options such as community conferences require a lot from young people. Not least, because they rely on verbal communication and thoughtful discussion. For trauma affected young people or those with communication difficulties, that can be very difficult. To better support the process a needs assessment could be conducted to help identify whether a particular type of diversion is the right option for a child, and/or whether additional support is needed for them to meaningfully engage in such diversion.

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<sup>78</sup> *Custodial Options Paper* (n 27) 40.

<sup>79</sup> *Child First Report* (n 53) 14.

<sup>80</sup> *Sentencing Young Offenders* (n 9) xi.

<sup>81</sup> *Ibid* xi.

<sup>82</sup> *Ibid*.



Further, the current model assumes a support network exists around the child or young person that is resourced to be able to support the child to lead a different lifestyle. For many children and young people, this is simply not their reality. Research indicates that the experience of diversion is impacted and influenced by the relationship between parents and children.<sup>83</sup> Equally, there is a relationship between successful diversion and family support; a family which has multiple risk factors may find it very difficult to support a young person through a diversionary process without strong support.

In other jurisdictions the options open to police are greater, for example, in addition to informal and formal cautions, or warnings and community conferences, under New Zealand's *Children, Young Person's and Their Families Act 1989* police can recommend 'alternative action' as a measure to attempt to keep a young person out of the formal criminal justice system. Depending on the severity of the offence, and of the young person's offending history, 'alternative action' measures may include home visits from a police youth aid officer, written or face to face apologies, reparation, projects, agreements to engage in education, curfews (with parental consent) and other actions.<sup>84</sup>

Increasing the range of diversionary options is essential to recognise the challenges faced by many young people who have engaged in offending behaviour and provide options that can be individualised to the child or young person and their circumstances.

As I have previously stated ([here](#)), consideration must also be given to whether the provisions in the YJA that relate to the diversion of children and young people should be amended to encourage and support children and young people with harmful behaviours, such as sexual and violent behaviours, to participate in assessment and appropriate therapeutic treatment programs.

The feasibility of removing or reducing the limitations on the availability of diversion, subject to additional diversionary options being available, needs to be examined. As stated by the Australian Human Rights Commission, it is an important best practice principle for juvenile diversion that

[d]iversionary measures should not be restricted to minor offences. Diversion should be an option 'whenever appropriate'.<sup>85</sup>

This includes, for example, that a record of attempted unsuccessful diversion should not be a basis to deny further attempts at diversion. I refer here also to the Commentary on Beijing Rule 11.4 that a merits-based assessment should be used to determine whether diversion is appropriate on a case-by-case basis, and this may

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<sup>83</sup> Mark Magidson and Taylor Kidd, 'Juvenile Diversion and the Family: How Youth and Parents Experience Diversion' (2021) *Criminal Justice and Behaviour* 48(11) 1576.

<sup>84</sup> Oranga Mamariki Ministry for Children, *Youth Justice Service Pathway guidelines – Alternative Action* ([Youth Justice Service Pathway guidelines | Practice Centre | Oranga Tamariki](#)). Accessed 25 February 2022.

<sup>85</sup> *Best practice for diversion of juvenile offenders* (n 70) 2.



make diversion appropriate, even when more serious offences have been committed (for example first offence, the act having been committed under peer pressure, etc.).<sup>86</sup>

Other options that may have considerable merit in this context include: a legislative presumption in favour of alternative pre-charge measures such as warnings and cautions; if pre-charge diversion is not available, a legal requirement to prioritise diversion at all stages of the legal process; and, a legislative presumption in favour of diversion for all first-time offenders under 18 years old.<sup>87</sup>

#### 5.4 Bail

In 2013, the then Acting Commissioner for Children, Elizabeth Daly, undertook an inquiry into alternatives to secure detention for young people in Tasmania ([available here](#)). An important area of recommendation was the need for alternative or expanded bail options. This included that the government establish

- (i) a state-wide after-hours bail support service for youth;
- (ii) a state-wide structured bail support program for youth at significant risk of remand; and,
- (iii) examines and considers the feasibility of weekend or night detention, perhaps in conjunction with electronic monitoring or provision of placements in the community.<sup>88</sup>

In 2018, the then Interim Commissioner for Children and Young People, David Clements provided a detailed analysis of the fundamental human rights principles applicable to children in conflict with the law, including a discussion of specific articles of the UNCRC and YJA ([available here](#)). In doing so, the former Interim Commissioner urged the Tasmanian Government to give detailed attention to bail provisions as they relate to children and young people.

It concerns me greatly that almost 10 years after Acting Commissioner Daly's inquiry, and despite the urging of Interim Commissioner Clements, the situation for children and young people with respect to bail remains very challenging.

I have continued advocacy regarding bail and specifically, the lack of safeguards for children and young people. In my [submission to the draft Bail Bill 2020](#), I identified the draft bill failed to uphold fundamental human rights principles and YJA principles; that it was inconsistent with a therapeutic approach to youth justice; and, it did not align with the National Agreement on Closing the Gap target to reduce the rate of Aboriginal and Torres Strait Islander young people in detention by at least 30 per cent by 2031.

While the details of my specific recommendations are available [here](#), it is necessary to again underline that changes to bail must not result in more children and young people being denied

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<sup>86</sup> United Nations, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules').

<sup>87</sup> See Victorian Aboriginal Legal Service, *Submission to the Commissioner for Children and Young People Inquiry: Our Youth, Our Way* (Submission, 2019) 11.

<sup>88</sup> Commissioner for Children Tasmania, *Alternatives to Secure Youth Detention in Tasmania* (Report, 2013) 12 ('*Alternatives to Secure Youth Detention*').



bail, nor should there be a reversal of the presumption of bail unless a child or young person could prove ‘exceptional circumstances.’ Neither of these changes would be consistent with the principle of last resort set out in the UNCRC.

Our bail legislation should include specific acknowledgement of the important and unique considerations relevant to making decisions about bail for children and young people. While section 24B of the YJA directs bail decision makers to section 5 in deciding whether to impose bail conditions, and in determining such conditions, I note the complete lack of any provision to guide decision makers as to whether to grant bail for a child or young person in the first instance. This is an unacceptable oversight. In my submission on the draft Bail Bill, I detailed legislative provisions in other jurisdictions, including Victoria and the Australian Capital Territory, that specifically reference the matters that a decision maker must consider (see pages 9-10). Further, the inclusion of a non-exhaustive list of specific matters that a court or authorised officer (e.g., Justices of the Peace) must consider in deciding whether to grant bail for a child or young person is key to ensuring that the principles of youth justice, including detention as a last resort, are given effect in this context.<sup>89</sup>

Notwithstanding the above, I question whether the operation of section 24B including utilisation of section 5 in respect to the decision to impose bail conditions, and the nature of such conditions, is sufficient given that I understand that children and young people are often granted bail subject to onerous conditions, even for minor offending.<sup>90</sup> Below, I make several observations about the types of bail supports and conditions frequently imposed on children and young people including with respect to curfews, reporting conditions, non-association conditions and non-attendance conditions. I note that most if not all of these observations relate to availability of bail support and accommodation.

#### 5.4.1 Case Study 2

*B and Z were 15 years old when they were arrested and charged with a series of dishonesty offences they had allegedly committed together. After being formally charged, the police bailed Z to Z’s mother’s house with a curfew and a condition that Z did not associate with B.*

*B, however, was not bailed by police and after many hours waiting in a cell in a reception prison, B was taken to appear before the Court. At Court, the lawyer appearing for B asked whether they had anywhere to stay, or if they had any family they’d like to contact. B explained that their father was in prison and their mother had kicked them out of home. Since then, B had been couch-surfing and mostly staying with Z’s family. When B nominated Z’s address, the lawyer explained that because of Z’s non-associate condition, B couldn’t go there. The Youth Justice worker at the Court phoned the local youth shelter but reported that it was full. She even tried a shelter in a different region, but this was also at capacity.*

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<sup>89</sup> On this point, see further Committee on the Rights of the Child, *General Comment No. 24 (2019) on children’s rights in the child justice system* (Comment, 2019) para 87.

<sup>90</sup> *Child First Report* (n 53) 18.





*Ultimately, B was refused bail and remanded in detention. The Magistrate explained that without stable accommodation and sufficient supports in place, the Court could not be satisfied that B would comply with bail conditions.*

*Six weeks later, B was sentenced to a supervision order and released. On the same day, Z received the same sentence, but unlike B, Z had not spent 6-weeks in detention. B felt angry at the unfairness. Because Z had a supportive family, Z was bailed. Soon B returned to couch surfing and eventually, without access to money, returned to offending.<sup>91</sup>*

#### 5.4.2 Bail support

I am very concerned about the lack of appropriately resourced bail support programs, including with a residential component, for children and young people in Tasmania. The evidence tells us that the provision of these types of programs can reduce offending on bail, encourage attendance at court, and provide feasible community-based alternatives to detention.<sup>92</sup> Bail support programs for children and young people should be expanded and funding increased. This should include bail support workers who are able to coordinate appropriate support services and access brokerage funds for accommodation, as provided in other jurisdictions.<sup>93</sup>

As stated above, it is critical to have these supports in place to ensure that detention is only used as a last resort and for as short a time as possible. I understand that some of the practices that currently occur appear contrary to this aim. For example, I am aware of instances where Bail Support Plans (BSPs) have been prepared by Youth Justice at the direction of the Court which have resulted in a young person being remanded in custody for several weeks in circumstances that, if sentencing had occurred immediately, a period of detention may not have been given. While I commend the intention behind BSPs, to determine whether a young person has support if they were to be granted bail, consideration needs to be given to more effective ways to supporting young people to successfully answer their bail and to reduce time in detention.

#### 5.4.3 Lack of accommodation prohibition

No child should be detained or deprived of their liberty simply due to a lack of available accommodation and care. As noted by the SAC, currently, suitable accommodation is a relevant factor when bail is being considered.<sup>94</sup> Consideration should be given to whether legislative (or other) mechanisms are needed to ensure the provision of accommodation for a child who would otherwise be bailed. In this context, I agree with

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<sup>91</sup> To ensure anonymity this case study uses the pronouns 'they', 'their' and 'them' (as appropriate) and is a composite based on the experiences of several children in Tasmania's youth justice system during my time as Commissioner.

<sup>92</sup> *Custodial Options Paper* (n 27) 38-39.

<sup>93</sup> *Child First Report* (n 53) 19.

<sup>94</sup> *Sentencing Young Offenders* (n 9) 16.





the position of TLA that a lack of accommodation should properly be seen as a ‘prompt’ for support from child safety services.<sup>95</sup>

#### 5.4.4 Curfew conditions

While a residential condition is not among the types of bail conditions that may be imposed under proposed s 16 in the draft Bail Bill mentioned above, curfews are included. Compliance with curfew conditions can be particularly problematic for children and young people who are homeless or at risk of homelessness given the lack of suitable accommodation and other supports. These children and young people are often ‘couch surfing’ or living in crisis shelters or unstable or risky accommodation and invariably move address frequently. If a child does not pre-emptively apply to amend their bail, they are automatically in breach of bail and, if arrested, can be remanded in custody until they can appear in court to apply for a bail variation.

To reduce the disproportionate impact that a curfew condition can have on a homeless child or young person, I have recommended that consideration be given to incorporating a legislative mechanism into our bail laws which would enable a police officer of appropriate rank to vary any residential component of a court ordered curfew condition in certain circumstances.

#### 5.4.5 Reporting conditions

Reporting conditions can pose practical difficulties for children and young people due to access to transport, and timing issues, and can further criminalise children and young people through exposure to adult offenders when reporting to police stations. These issues must be recognised, and provision made for alternatives to help children and young people comply with any conditions. A more child centred, and rights-based approach would combine opportunities to meet reporting obligations with opportunities for young people to access support.

#### 5.4.6 Non-association conditions

As I have stated previously, non-association conditions on bail provide a very short-term solution to a very complex and long-term issue for children and young people involved in the justice system. Such conditions fail to recognise and give adequate weight to the fact that many of the enduring friendships and supports of young people who come into contact with the criminal justice system may involve other young offenders. These children and young people often lack pro-social, and family supports as an alternative and in this context, non-association conditions may be counterproductive.

#### 5.4.7 Non-attendance conditions

Non-attendance provisions can be highly problematic for children and young people if they restrict their access to essential areas (e.g., bus terminals, supermarkets, Centrelink

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<sup>95</sup> *Child First Report* (n 53) 19.



offices, etc.). Although I accept that the protection of victims and the community are important considerations in the granting of bail, it is also important that children and young people have the freedom to attend essential services without being in contravention of their bail. Children and young people need an individualised approach to bail (see the need for bail support programs below).

#### 5.4.8 Electronic monitoring

As I have previously stated ([here](#)), while the use of electronic monitoring may provide opportunities for bail where it would otherwise be refused, electronic monitoring of children is untested in Tasmania. I am also concerned that the use of monitoring devices on children and young people could lead to social stigma and interfere with their right to privacy. Arguably, wearing a tracking device may pose a risk to the safety of a child or young person who would be immediately identifiable by members of the public as a person on bail. In practice, given the large number of children and young people without stable accommodation, many would be precluded from electronic monitoring as a bail option. The use of electronic monitoring for children and young people on bail therefore warrants further consideration and discussion.

#### 5.4.9 Breach of bail

According to the SAC data, breach of bail accounted for 10 per cent of guilty finalisations in the Youth Division for the period 2014-15 to 2019-20.<sup>96</sup> Further work is needed to determine the factors that contribute to breach of bail by young people in Tasmania. In line with most of the research, I would expect that the factors I have discussed above, particularly, a lack of accommodation and ongoing support, are key contributors.

### 5.5 Remand

I am far from alone in expressing my concern about the number of Tasmanian children and young people who spend time on remand in Tasmania.<sup>97</sup> According to the latest data from the AIHW, there were 7 young people in unsentenced detention on an average night for the June quarter of 2021.<sup>98</sup> Admittedly, there is a need for caution regarding this data because of Tasmania's overall low numbers and I acknowledge that a detailed analysis of recent Tasmanian data on remand has not been done. Nonetheless, this is very worrying as a potential violation of article 37(b) of the UNCRC, particularly when used in the pretrial context.<sup>99</sup>

Research has long highlighted the disruptive and serious consequences of being remanded in detention for children and young people. This includes feelings of isolation and a lack of

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<sup>96</sup> *Sentencing Young Offenders* (n 9) xii.

<sup>97</sup> *Ibid* 95.

<sup>98</sup> Australian Institute of Health and Welfare, *Youth detention population in Australia 2021 – Number of young people in detention* (Report, 2021).

<sup>99</sup> For further see, Committee on the Rights of the Child, *General Comment No. 24 (2019) on children's rights in the child justice system* (Comment, 2019) paragraph 86.



support, both familial and with respect to the availability of programs.<sup>100</sup> On this latter point, the AIC notes that

young people on remand are likely to be exposed to the detrimental effects of detention but are not there long enough to gain substantial therapeutic or rehabilitative benefit.<sup>101</sup>

My observations are consistent with the analysis undertaken by the SAC, that young people sentenced in the Supreme Court under the YJA are often sentenced to a period of custodial detention equivalent to the time served on remand.<sup>102</sup> The TLA has also made this observation.<sup>103</sup> Moreover, in some instances, the ‘material effect of remand [for some young people] may be worse than the final sentence disposition’.<sup>104</sup> Further work is clearly warranted to establish if, and how often, this is the case.<sup>105</sup>

A decade ago, the ALRC made the point that ‘chronic welfare problems should not have to be solved by placing young people on remand.’<sup>106</sup> There are several issues that affect the use of remand in this state.<sup>107</sup> However, the use of remand when a young person lacks suitable accommodation must stop. It unjustifiably penalises children and young people for a situation that is invariably outside of their control, especially if they are in the care of the State.<sup>108</sup> It is also contrary to the principle in the UNCRC that detention must only be used as a last resort. The lack of suitable accommodation is a universal issue, but also warrants further consideration of appropriate cultural supports within Community, as an issue for Aboriginal young people, specifically those in regional and remote areas and those with complex needs.<sup>109</sup>

### 5.5.1 Case study 3

*L was 14 years old when, due to family conflict, they left home and ended up sleeping ‘rough’ and couch surfing. L resorted to stealing food and clothing to support themselves. L was charged and bailed by police for shoplifting, however, due to their itinerant lifestyle L missed a Court appearance.*

*One evening, L became involved in a physical altercation with a young woman and police were called. L appeared in an afterhours Court session and was remanded in custody on charges of shoplifting, assault and failing to appear.*

*Two days later, during L’s next appearance, L’s lawyer made an application for bail on their behalf, however bail was refused. The Magistrate explained that unless L*

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<sup>100</sup> Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report, 2010) 18.170.

<sup>101</sup> Clancey, Wang, and Lin (n 32) 7.

<sup>102</sup> *Sentencing Young Offenders* (n 9) 96.

<sup>103</sup> *Child First Report* (n 53) 18.

<sup>104</sup> *Sentencing Young Offenders* (n 9) 96.

<sup>105</sup> Previous work undertaken by the Australian Institute of Criminology for this office was completed in 2005 see Julia Tresidder, *Review of data on juvenile remandees in Tasmania* (Final Report, 2005).

<sup>106</sup> Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report, 2010) 18.171.

<sup>107</sup> *Sentencing Young Offenders* (n 9) 95.

<sup>108</sup> *Child First Report* (n 53) 18.

<sup>109</sup> Clancey, Wang, and Lin (n 32) 10.



*returned to their home, bail would not be granted. L told their lawyer that they would rather go to the AYDC than go back home. In response, the Magistrate asked Youth Justice to prepare a Bail Support Plan (BSP) to consider other supports and accommodation options.*

*Two weeks later, L reappeared. Despite a BSP being completed, bail was again refused due to lack of suitable accommodation. L's lawyer advised them that L's best chance of being released was to resolve all matters and proceed to sentence. However, L disputed the assault charge and L's lawyer required further disclosure from the Prosecution. A one-week adjournment was sought and granted.*

*A week later, L pleaded guilty to some charges and not guilty to the assault. L's lawyer explained the assault matter would need to be listed for a hearing. The Magistrate advised that the first available hearing date was in 3 weeks' time.*

*On the day of the hearing for the assault charge, a prosecution witness failed to appear. L's lawyer was able to negotiate with Prosecution and the matter was resolved. After L's lawyer delivered a plea in mitigation, the Magistrate explained that a full Pre-Sentence Report would be required. A further adjournment of 4 weeks was granted for preparation of the report.*

*Four weeks later, L was sentenced to a Release and Adjourn Order with Youth Justice Supervision. In total, L spent 10 weeks and 3 days remanded in detention.<sup>110</sup>*

### 5.5.2 The need for an alternative to custodial remand

A truly therapeutic approach to youth justice should include an alternative to custodial remand for children and young people. This has been known in Tasmania for more than 15 years.<sup>111</sup> In 2005, a report published by the AIC at the request of the then Commissioner for Children (Tas) examined a year of data on young people remanded in custody in Tasmania. The report identified that alternative secure placements to AYDC in other locations and alternative options to custodial remand, such as supervised supported accommodation, was a change that would affect the rate and length of time that young people spent in custodial remand.<sup>112</sup> In particular, stakeholders identified that there was,

a need for more and better services so that there are realistic options available to magistrates for alternative placements such as supervised and supported accommodation. This would make it less likely that difficult and older juveniles need to be placed on remand.<sup>113</sup>

It is concerning that despite knowing about these issues, and, how to address them, Tasmanian young people continue to be frequently held on remand, for extended

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<sup>110</sup> To ensure anonymity this case study uses the pronouns 'they', 'their' and 'them' (as appropriate) and is a composite based on the experiences of several children in Tasmania's youth justice system during my time as Commissioner.

<sup>111</sup> Tresidder (n 105) 5.

<sup>112</sup> Ibid 5; *Alternatives to remand for children* (n 31) 30.

<sup>113</sup> Tresidder (n 105) 28.



periods of time at AYDC. In other jurisdictions, including New Zealand, innovative approaches to remand have shown promise. For example, Mahuru is a remand initiative developed by Ngāpuhi social services. It provides one-on-one care, using existing family homes and trained youth mentors for serious young Ngāpuhi offenders who previously would most likely have been held on remand in a youth prison.<sup>114</sup>

### 5.5.3 Greater protection for children on remand

Young people also need greater protections on remand. Two issues in this context are the need for appropriate maximum time limits for children and young people placed on remand, and a requirement for judicial officers to give reasons for remanding a child or young person in custody.<sup>115</sup> In practice, young people are being held on remand for extended periods. Whilst there are prescribed limits for the maximum time allowed before a person is brought back before the Court, this does not adequately transpire to the total length of time the young person may actually be held on remand. Furthermore, as the YJA defers to the *Justices Act 1959* for proceedings generally, there remains no delineation for the treatment of young people and adults in this regard. There should be very specific timeframes around how long a young people can be held on remand. Moreover, requiring a judicial officer to give reasons for placing young people on remand would allow a child's lawyer to attempt to address those reasons in any review process.<sup>116</sup>

## 5.6 Criminogenic needs programs

Tasmania has a very limited number of offence specific therapeutic programs for young people that provide specialised support (e.g., specialist Targeted Youth Support Services (TYSS), homeless youth crisis services, and the AYDC). In describing these services, Robertson writes,

[t]ogether these services are characterised in the NGO sector as the very last line of available care for adolescents who are unable to access a child protection response (despite repeat notification), who have fallen through child protection and out-of-home care supports (including foster care and therapeutic residential care), and/or who experience periodic bans from crisis accommodation services.<sup>117</sup>

In my experience, where these services are being delivered by community organisations, they can be influenced by short-term tenuous funding arrangements and the absence of a systematic embedded approach. More sustainable funding arrangements, commensurate with variations in demand for services should be considered to support a more therapeutic approach.

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<sup>114</sup> Chair's Report, Ngāpuhi Iwi Social Services, *Chair's Report* (Ngāpuhi Iwi Social Services, 2019). Available at [2019-NISS-Chair-Report.pdf \(ngapuhi.iwi.nz\)](#).

<sup>115</sup> Tresidder (n 105) 5.

<sup>116</sup> *Ibid* 28.

<sup>117</sup> Catherine Robinson, *Too Hard? Highly Vulnerable Teens in Tasmania* (Report, 2017) 22.



While further analysis is needed, data about the types of offending that are most prevalent amongst children and young people suggest the needs for a focus on programs to respond to physically violent and harmful behaviours, stealing (including motor vehicle stealing), sexual offending and family violence.<sup>118</sup> These programs must acknowledge, and address, the effect of substance misuse on such behaviour (see further below).

#### 5.6.1 Case study 4

*J first entered the youth justice system at age 14 following the death of their main caregiver. Between the ages of 14 to 18, J had more than 10 admissions to AYDC and in between would couch surf and access youth shelters. Despite many notifications to Child Safety Services, J had no formal involvement with Child Safety.*

*Like many of their friends, J's offending history related mostly to motor vehicle stealing and driving offences. For J, driving was a release, and when things got too difficult, they would find a car and 'just drive'. Over time, J began using illicit drugs. At first it was mostly cannabis, but soon J was also using ice, sometimes daily. By the time they were 16, AYDC had become a place where J could return when it all became too much, and they needed to "dry out."*

*Each time J was released from AYDC, instead of feeling excited, they felt nervous. J knew they'd be returning to the same life, with little support and no stable accommodation. Although J had an exit plan in place, the gaps in services and the lack of a targeted intervention program for driving offences meant that they were unable to get the support they needed. While at AYDC, J had a work experience placement with a mechanic, but each time they were released, this would end. J expressed the wish that they could do something like this on the outside.*

*To address their drug use, J was told they could attend counselling sessions once a fortnight with someone from the alcohol and drug service, but J didn't click with the counsellor and usually didn't go. Youth Justice suggested they could get funding for J to go to an alcohol and drug treatment facility interstate, but J didn't want to leave his friends.*

*When J tried to get help to find accommodation, they were told that because they weren't involved with Child Safety they could not get support or access to funding such as the Transition to Independent Living Allowance (TILA). In the end, J was placed on the adult Housing list, and told they would have to wait for up to 2-3 years.<sup>119</sup>*

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<sup>118</sup> *Sentencing Young Offenders* (n 9) 7-8.

<sup>119</sup> To ensure anonymity this case study uses the pronouns 'they', 'their' and 'them' (as appropriate) and is a composite based on the experiences of several children in Tasmania's youth justice system during my time as Commissioner.



### 5.6.2 A limited number of programs

There are a limited number of criminogenic needs programs that address even the most common types of offending behaviours of children and young people in Tasmania.

- *Physically violent behaviour*: Except for the *Step-Up Program*, operated by Colony 47, which aims to intervene with adolescent perpetrators of family violence, there are no programs targeting violence, such as anger management, currently available for children and young people in Tasmania.
- *Motor vehicle stealing and related offences*: Prior to being defunded by the Tasmanian Government, the *U-Turn* program was available for young people aged 15-18 years old who had committed car-related offences. However, there are currently no programs that I am aware of available specifically for young people who have committed traffic and vehicle offences.
- *Harmful sexual behaviours*: The Government has recently introduced a harmful sexual behaviours program, including provision for young people who have committed sexual offences.<sup>120</sup> In my comment on the [Consultation Paper: Developing a program to prevent harmful sexual behaviours for children and young people](#) (*Consultation Paper*), I expressed my support for the Tasmanian Government's commitment to developing a robust program across the public health continuum to prevent and more effectively respond to harmful sexual behaviours for children and young people in Tasmania. I also endorsed the best practice principles developed by the Royal Commission to guide therapeutic interventions for children and young people in this area. However, I remain concerned that the government does not have an overarching policy or framework on harmful sexual behaviours. This is problematic for several reasons, including a fundamental lack of clarity about how harmful sexual behaviour is or should be defined, what the appropriate response is, or should be, and a lack of support available for those involved, including for families.

### 5.6.3 A lack of mental health and drug and alcohol detox services

There are significant challenges faced by vulnerable and at-risk Tasmanian young people in accessing appropriate mental health services, and drug and alcohol detox services. The experience of mental health problems<sup>121</sup> and the experience of disability (e.g. Foetal Alcohol Spectrum Disorder) are disproportionately high among young people within the criminal justice system.<sup>122</sup> Substance misuse is a key issue for young people who offend.<sup>123</sup>

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<sup>120</sup> I note that the *Discussion Paper* uses the term 'sex offenders' (page 26) to refer to young people who have committed sexual offences. I would encourage the government to move away from this type of stigmatising language as it is counterproductive and harmful (see further [here](#)).

<sup>121</sup> Australian Institute of Health and Welfare, *National data on the health of justice-involved young people: a feasibility study* (Report, 2018) 4-5.

<sup>122</sup> *Sentencing Young Offenders* (n 9) 14.

<sup>123</sup> *Ibid* 14.





Anecdotally, there is a substantial, and to an extent, under acknowledged overlap between offending by young people in Tasmania and the misuse of drugs. One impact of this is that children and young people are remanded in detention to ‘come down’ and ‘dry out’. This is not only inappropriate but dangerous, as young people are detoxing in remand facilities without the appropriate level of medical supervision.

I am supportive of and look forward to the reforms which will be implemented in response to the CAMHS review, in particular, the establishment of a new youth forensic mental health service which will be very valuable in the context of the youth justice system reform.

Ensuring the availability of a wide range of programs to meet individual criminogenic needs includes funding specialised therapeutic intervention programs that, critically, are accessed via robust referral pathways that exist within an overarching policy framework underpinned by best practice standards.

#### 5.6.4 Specialised therapeutic intervention programs

Targeted interventions must be based on individual assessment of risk and be tailored to individual need. For instance, with respect to harmful sexual behaviours, the Royal Commission found that where children receive specialist assessment which identifies therapeutic interventions appropriate to their individual needs, ‘harmful sexual behaviours can reduce or cease altogether, and the wellbeing of the child can improve’.<sup>124</sup> More broadly, diversionary programs that target ‘higher risk offenders produce a greater benefit than those for lower risk offenders’.<sup>125</sup> It also bears highlighting that inappropriately targeted interventions, for instance, targeting low risk offenders may be counterproductive as they may ‘respond adversely’.<sup>126</sup>

#### 5.6.5 Referral pathways

Clear and agreed referral pathways should be available to all children and young people exhibiting a range of antisocial and harmful behaviours to promote and facilitate their access to specialist assessment and interventions appropriate to their assessed level of need and risk. These referral pathways must be available to children and young people of all ages and regardless of whether they are involved in the statutory child safety or criminal justice systems. I caveat this comment in recognition that further work is needed, and I understand is on foot, to properly understand and map what the program needs of children and young people in this area are, and the most appropriate model for delivering such interventions in Tasmanian is. Any program that is funded by the Tasmanian Government needs to establish that it is evidence based or at the very least, evidence informed, and that interventions are delivered by suitably qualified professionals.

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<sup>124</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 10 Children with harmful sexual behaviours* (Report, 2017) 138.

<sup>125</sup> *Effective Practice Guide* (n 29) 15.

<sup>126</sup> *Effective Practice Guide* (n 29) 15.





## 6 Reforming Tertiary Interventions

There are a small number of children and young people who are involved in the youth justice system, for whom the current universal and targeted prevention interventions have failed. I know, from my role as an advocate for young people at AYDC, that many young people in detention have experienced multiple adverse and traumatic life events, faced challenges around access to housing and support, substance misuse and have had a range of other complex needs.

Further to the discrete issues that I have raised relating to the operation of the YJA above, there are four further areas where reform is needed to realign our youth justice legislation with a best practice, therapeutic and child rights informed approach.

### 6.1 Raise the minimum age of criminal responsibility

Overwhelmingly, evidence tells us that children and young people do better when they are kept out of the formal criminal justice system for as long as possible.<sup>127</sup> Raising the minimum age of criminal responsibility, with no carve outs,<sup>128</sup> is an important and substantive action that the Government can take to direct children away from the statutory youth justice system. Most children and young people will grow out of their involvement in offending behaviour by the time they become young adults,<sup>129</sup> without progressing to serious offending.<sup>130</sup> In fact, desistance occurs 'spontaneously' in most instances.<sup>131</sup> Research consistently shows that 'the younger the child is when first having contact with the juvenile justice, then the more likely it is the child will become entrenched in the justice system'.<sup>132</sup> In other words, contact with the criminal justice system invariably does significantly more harm than good.<sup>133</sup> Therefore raising the minimum age of criminal responsibility is about reducing the damaging and counterproductive contact between the criminal justice system and young people who are below the age of criminal responsibility.

#### 6.1.1 Case Study 5

The following case study was originally provided to the CCYP by the Tasmanian Aboriginal Legal Service to include in the *Age of Innocence: Children and Criminal Responsibility Background Paper* available [here](#).

*S is 11 years old and is before the Court for Aggravated Armed Robbery. She lives with her mum, Jess, who has an intellectual disability. Jess drank alcohol during her pregnancy with S. S's father was around in the early years, but he committed both verbal and physical family violence in the home and left the family unit when S was 3. S's mum has always tried her best to care for S. She*

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<sup>127</sup> *Sentencing Young Offenders* (n 9) 97.

<sup>128</sup> There is no principled basis to distinguish between offences for this purpose and doing so is usually the done 'to respond to public pressure and are not based on a rational understanding of children's development'). Committee on the Rights of the Child, *General Comments No. 24 (2019) on the Children's Rights in the Child Justice System* (Comment, 2019) 25.

<sup>129</sup> Ward (n 60) 6.

<sup>130</sup> *Sentencing Young Offenders* (n 9) 7.

<sup>131</sup> *Ibid* 7.

<sup>132</sup> *Ibid* 6.

<sup>133</sup> Ward (n 60) 7.



*doesn't have a lot of control over her and she doesn't engage with services because she is afraid of Child Safety Services taking S from her.*

*There have been some meetings at the school because S has been socially withdrawn, she has had difficulty concentrating and is impulsive. Jess has attended the school meetings and has engaged. She puts S's issues down to parenting on her own and the violence that occurred in the home when S was growing up. S attends school without lunch sometimes and has dirty clothes.*

*When S was 11, she started hanging out with a man in his 20's who lived in the same street as her. He asked her to come to the pizza shop down the road with him and handed her a spanner (which she didn't ask any questions about). S walked to the pizza shop with him. Once they arrived, he yelled at her to pass him the hammer in an aggressive tone. S handed it over to him and he demanded money from the register and hit the shop attendant on the head.*

*S was charged with aiding and abetting the robbery with the older male and was bailed to be at Court. S presented to her lawyer as very young for her age with symptoms of FASD. There were questions about whether S knew what she did was wrong. A report was ordered from a Forensic Psychiatrist through the Court. It was determined that S presented with FASD symptoms, had an IQ of 47 and a mental age comparable to a 7-year-old. The report indicated that it would be likely S would be eligible for NDIS and recommended that a referral be made.*

*S attended Court on four occasions whilst the report was being prepared. Ultimately, given what was in the report, the Prosecution did not proceed with the charge.<sup>134</sup>*

The current position of the Tasmanian Government is to work towards a national approach to raise the minimum age of criminal responsibility (MACR). All State Attorneys-General have agreed to support the development of a proposal to increase the MACR from 10 years to 12.<sup>135</sup> While this agreement signals a willingness to lift the MACR, raising the age to just 12 would be a huge, missed opportunity. Further, a MACR of 12 years would not be consistent with the recommendation of the UN Committee on the Rights of the Child that Australia raise its MACR to at least 14 years.

I acknowledge the concern to ensure community safety and recognise that it is a legitimate aim of the justice system. However, in this regard I underline the comment of the Committee on the Rights of the Child that

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<sup>134</sup> This case study was provided by the Tasmanian Aboriginal Legal Service. To ensure anonymity, this case study is a composite based on cases involving several different children.

<sup>135</sup> Attorney-General, 'States agree to develop nationally consistent approach to raising the age of criminal responsibility' (Media Release, 15 November 2021).



States parties should serve this aim subject to their obligations to respect and implement the principles of child justice as enshrined in the Convention on the Rights of the Child. As the Convention clearly states in article 40, every child alleged as, accused of or recognized as having infringed criminal law should always be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles.<sup>136</sup>

There is a growing body of research around how governments could raise the age of criminal responsibility, and the additional supports that must be in place to do so responsibly.<sup>137</sup> In the forthcoming months I will be providing comprehensive advice to the Tasmanian Government on this matter. This will include consideration of alternative models for youth justice, and whether thresholds around prosecution and or detention have value in this context.

## 6.2 A contemporary Youth Justice Act

To create a contemporary, and fit for purpose YJA, there are several changes that are necessary as part of the reform process. At this junction, I limit my comments to those parts of the YJA that I see as particularly as out of step with a re-imagined youth justice system.

### 6.2.1 Prevention and early intervention principles should be front and centre

Prevention and early intervention principles are not built into the YJA. Moreover, and as observed by SAC, the YJA framework is neither 'trauma informed' nor does it 'reflect contemporary evidence-based understandings of young offenders'.<sup>138</sup> This is a concern to me; the legislation should include a much greater emphasis on a child focused approach that puts the best interest of children front and centre. Such an approach must acknowledge, at its heart, that a very large proportion of children and young people that engage in risky, harmful, or criminal behaviour likely have complex needs, which may include intergenerational disadvantage, trauma and, all too frequently, substance misuse issues. Any response to such behaviour must, in my view, take account of these factors.

### 6.2.2 Abandon 'prescribed offences' in the YJA

Under the YJA, the distinction between a 'prescribed offence' and a non-prescribed offence means that a young person will be treated differently, depending on the nature of their behaviour. If a youth is alleged to have committed a prescribed offence, these differences include

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<sup>136</sup> Committee on the Rights of the Child, *General Comments No. 24 (2019) on the Children's Rights in the Child Justice System* (Comment, 2019).

<sup>137</sup> Morag McArthur, Aino Suomi and Belinda Kendall, *Review of the service system and implementation requirements for raising the minimum age of criminal responsibility in the Australian Capital Territory: Final Report* (Final report, 2021).

<sup>138</sup> *Sentencing Young Offenders* (n 9) 34 ('[a] trauma-informed approach reflects basic knowledge of the impacts of stress on the brain and body, and has as a core principle that service delivery (including through the youth justice system) should not re-traumatise young people').



- (i) non-eligibility for pre-court diversion;
- (ii) the matter cannot be heard by the Youth Justice Division (s 161 YJA); and,
- (iii) the matter is typically sentenced under the *Sentencing Act 1997 (Tas)* rather than the YJA.

Under section 3(1) of the YJA, 'prescribed offences' include murder, manslaughter, and attempted murder for all young people. However, if the young person is 14, 15 or 16 years old, 'prescribed offences' also include rape, persistent sexual abuse of a child or young person, armed robbery among others. And, if a young person is over the age of 17 years old, 'prescribed offences' include all the above-mentioned offence in addition to offences relating to excessive noise or smoke, for vehicle and racing vehicles and various drink driving and traffic related offences.

The notion of 'prescribed offences' should be removed from the YJA and instead, all types of offences including serious offending should be dealt with in a trauma informed, child centred way that is consistent with best practice. This will likely require, as I note below, provision for a specialised Children's Court with jurisdiction to hear all allegations against children and young people (see further below at 3.3).

#### 6.2.3 Remove detention offences from the YJA

Part 6, Division 5 of the YJA contains 'Offences relating to detention', commonly referred to as Detention Offences (DO). Section 139 lists a range of offences relating, principally, to the behaviour of a detainee within a detention facility. Much of the language used to describe behaviour while in detention is outdated and inconsistent with a therapeutic approach to youth justice. For example, the Act requires that a detainee must not act in a 'disorderly or riotous manner' or do an act or omission of 'insubordination or misconduct subversive of the order and good management of the detention centre.'

Division 5 also sets out how a young person is to be dealt with if a 'detention offence' is committed. The general approach outlined in the YJA to responding to 'detention offences' is neither restorative nor therapeutic. In my view, this division should be removed. The behaviour of young people in detention should be managed as part of an overarching therapeutic and restorative framework, that does not include, or threaten a punitive response in the first instance.

### 6.3 Develop and implement therapeutic detention and effective throughcare

The Government has an obligation to do everything possible to ensure that children and young people are not deprived of their liberty. The use of detention must truly be used 'only as a measure of last resort and for the shortest appropriate period of time' (Article 37(b)). Yet, as pointed out by this office almost a decade ago,

this principle can only operate to reduce detention rates where there is an effective package of alternatives to detention available to judicial officers,



and those alternatives are grounded in, and integrated with, other primary, secondary, and tertiary programs and/or services across the continuum.<sup>139</sup>

As I have detailed above, there needs to be much greater investment in universal and targeted prevention. And, in relation to diversion, bail and remand, there are several issues that call into question whether current practices are consistent with the obligation under article 37(b) of the UNCRC.

I am therefore supportive of the Government's decision to adopt the preferred approach, as outlined by Noetic, to build two smaller, purpose-built facilities in the North and the South of the State.<sup>140</sup> I am in favour of this model on the basis that it will put young people's specific and holistic needs at the centre of the system: ensuring they would have access to the right support at the right time, underpinned by effective coordination across government and with service providers.<sup>141</sup>

My position in this context is informed by the knowledge that our current approach to custodial detention is, with a recidivism rate of 74 per cent within the first 12 months post release, failing everyone; young people and our community alike.<sup>142</sup>

I look forward to further details about how these two facilities will be managed and run becoming available. I note that, as Noetic acknowledges, this will

involve significant reform of the current custodial model and will need the ongoing political and interagency support to be successful.<sup>143</sup>

I note the large amount of work already undertaken regarding the development of a Therapeutic Model of Care for Detention in Tasmania, and that this provides a very solid basis from which to develop and embed a model of care within the new facilities. I note that transparency throughout this process and the involvement of key stakeholders with a vested interest in the wellbeing of children and young people is vital.

### 6.3.1 The detention of Tasmanian children and young people

Consistent with Article 37(c) of the UNCRC, any future arrangement for custodial detention of a child in Tasmania must align, at a minimum, with the principles and rules set out by the Committee on the Rights of the Child.<sup>144</sup> In short, children and young people must be provided with a physical environment and accommodation that is in line with the reintegrative aims of the detention, be supported to pursue their right to education based on their personal needs and abilities, receive adequate physical and mental health care throughout their time at the facility, be free to communicate, particularly with their lawyer and others who are important to their wellbeing, be

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<sup>139</sup> *Alternatives to Secure Youth Detention* (n 88) 75.

<sup>140</sup> *Custodial Options Paper* (n 27) 34.

<sup>141</sup> *Ibid* 34

<sup>142</sup> *Child First Report* (n 53) 12.

<sup>143</sup> *Custodial Options Paper* (n 27) 34.

<sup>144</sup> Committee on the Rights of the Child, *General Comments No. 24 (2019) on the Children's Rights in the Child Justice System* (Comment, 2019) para 95.



treated in a way that recognises their inherent dignity and have access to appropriate complaint and oversight monitoring by an independent and qualified body.

I also acknowledge here the findings of the Royal Commission, and the need to ensure that custodial environments are ‘child safe’, with particular attention to the implementation of the Child Safe Standards identified previously above.<sup>145</sup> On this point, it is timely to add that, as the Royal Commission recognised, the use of searches including strip searches of children and young people in detention is an issue that warrants further legislative reform. I note the Youth Justices Amendment (Searches of Youth in Custody) Bill 2022 is currently under consideration and that significant work has progressed to address the recommendations I made in relation to the legislative amendments in my 2019 [advice](#) on this topic. Ensuring a consistent, consolidated reference point for a human rights-based approach to searching of youths is paramount. Further details about my view is available [here](#).

In line with our obligations under the UNCRC, detention must be used only as a last resort, and serious consideration must be given to identifying appropriate alternatives to custodial detention involving care for young people within their family and community. The evidence shows that interventions delivered in community settings are more effective than those delivered in a custodial setting.<sup>146</sup> Examples include functional family therapy (FFT), multi-systemic therapy (MST) and Multidimensional Treatment Foster Care Evaluation.<sup>147</sup>

With respect to custodial detention, a wealth of international evidence demonstrates that small-scale, local, therapeutic environments promote rehabilitation and reduce recidivism.<sup>148</sup> Several international jurisdictions have closed youth prisons and replaced them with smaller, therapeutic treatment focused programs and facilities. There is much to learn from these jurisdictions in terms of the key priorities in the development of the new custodial centres. Yet, in doing so it is important for us to remember that, as former Acting Commissioner Elizabeth Daly noted in the 2013 report,

[a]n assessment of the potential for successful adaption of innovative alternatives to detention implemented overseas or in other Australian jurisdictions, can only be undertaken in the context of a consideration of other aspects of service delivery along the continuum of youth offending and reoffending.<sup>149</sup>

The former Acting Commissioner found that there was substantial stakeholder support for a shift towards the strategies that underpin alternative models of detention.<sup>150</sup> And, while the stakeholder engagement undertaken for the former Acting Commissioner’s

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<sup>145</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Contemporary detention environments, Volume 15* (Final Report, 2017) 115.

<sup>146</sup> *Alternatives to remand for children* (n 31) 79.

<sup>147</sup> Andrew Becroft, *10 Suggested Characteristics of a Good Youth Justice System* (Speech for The Pacific Justices’ Conference, 2014) 16.

<sup>148</sup> Sanne Oostermeijer and Matthew Dwyer, *Local Time. Design Guide for Small-scale Local Facilities* (Report, 2019).

<sup>149</sup> *Alternatives to Secure Youth Detention* (n 88) 75.

<sup>150</sup> *Ibid* 76.



report is now dated, it serves to demonstrate a continued recognition of the need for alternative ways of approaching custodial detention in Tasmania.

It is not within the scope of this submission to provide an in-depth comparative analysis of the strengths and weaknesses of alternative models, and whether they would be a good fit for Tasmania. However, I would welcome the opportunity for further discussion.

### 6.3.2 The physical environment of detention

Informed by the evidence, and my experience as the independent advocate for young people detained under the YJA, the physical environment of a detention facility is a hugely significant factor in helping, or hindering, a young person to rehabilitate. As stated by Oostermeijer and Dwyer, the physical environment

greatly impacts the procedures within a youth justice environment, the relationships between staff and young people, and ultimately a young person's prospects of rehabilitation and community safety.<sup>151</sup>

Key features of best practice facility design include small scale facilities, situated close to a young person's home and community, which have capacity for adaptable and relational security measures<sup>152</sup>, and that are fundamentally therapeutic.<sup>153</sup>

The Missouri model, run by the Missouri's Division of Youth Services, provides an example of these features in practice. It provides a continuum of regionalised services from community care, group homes to moderately and secure care facilities.<sup>154</sup> This regional continuum means that young people, depending on the level of offending seriousness, are either accommodated in the community, with support determined by need, or in facilities with moderate or secure care. Importantly, the secure care facilities are only one part of the model.

The secure care facilities are small, non-prison like and are close to the young persons' home and family.<sup>155</sup> With the intention of creating facilities that are 'intentionally humane',<sup>156</sup> there is little or no visible security hardware, except for perimeter fences.<sup>157</sup> The interior of the facilities is described as 'homelike' and young people wear their own clothes and keep personal effects with them in their rooms.<sup>158</sup> This design approach is informed, as Mendel observes, by the belief that

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<sup>151</sup> Oostermeijer and Dwyer (n 148).

<sup>152</sup> Ibid 3 (noting that '[r]elational security is the understanding and knowledge staff have of residents, and how this information is used to inform appropriate responses and maintain safety along with effective security).

<sup>153</sup> Oostermeijer and Dwyer (n 148).

<sup>154</sup> Richard A. Mendel, *The Missouri Model: Reinventing the Practice of Rehabilitating Youthful Offenders* (Research Report, 2010) 15-16.

<sup>155</sup> Mendel (n 154) 15.

<sup>156</sup> Ibid 27.

<sup>157</sup> Mendel (n 154) 19.

<sup>158</sup> Ibid 43.





the less they treat a young person like a criminal, the less likely he or she will be to feel and behave like a criminal.<sup>159</sup>

Further analysis of the Missouri Model was undertaken by this office and is [available here](#) (see pages 135-139).

As I have previously stated, despite efforts to the contrary, the physical design of AYDC remains inconsistent with these features. The experience, I know, for children and young people coming into AYDC for the first time is frightening. The overwhelming impression is of locked metal doors, barred fences, reinforced concrete walls, benches and floors. The spaces reverberate incessantly with noise without any, or only limited, soft furnishings. These features contribute to an environment that promotes anxiety and stress and exacerbates trauma.

In Tasmania, the number of young people that are sentenced to a period of custodial detention is relatively small. This presents us with an opportunity to, in line with best practice evidence, create small scale facilities which are better able to provide an individualised and relational approach to therapeutic treatment and security.<sup>160</sup> In particular, the design of a detention facility must ‘support young people in feeling safe, secure and calm’.<sup>161</sup>

Previous work undertaken by Noetic identified that there is much that the then titled Tasmanian Department of Health and Human Services could learn from the Missouri Model about ‘designing and implementing creative and compassionate approaches to youth justice’.<sup>162</sup> I would note however that more work is needed to determine what the right size for any facilities in Tasmania would be and how issues of scale and cost effectiveness could be overcome.<sup>163</sup>

Further, there is a clear need to think much more carefully about our wider approach to youth justice. There is much to commend the Shared Services Hub model, described by Noetic, that could offer a range of services to young people in secure and non-secure custody, and those at risk in the community.<sup>164</sup>

### 6.3.3 Therapeutic programs

The evidence demonstrates that therapeutic interventions with young people are most successful when they are grounded in a therapeutic approach which is ‘highly individualised’ and emphasises the importance of ‘staff developing and building relationships with young people in custody’.<sup>165</sup>

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<sup>159</sup> Mendel (n 154) 43.

<sup>160</sup> Oostermeijer and Dwyer (n 148) 5.

<sup>161</sup> Armytage and Ogloff (n 50) 22.

<sup>162</sup> *Custodial Options Paper* (n 27) 77.

<sup>163</sup> *Custodial Options Paper* (n 27) 77.

<sup>164</sup> *Ibid* 38.

<sup>165</sup> Oostermeijer and Dwyer (n 148) 8.



Under alternative models, such as the Missouri model, therapeutic treatment is described as ‘a 24/7 activity’.<sup>166</sup> The characteristics of the treatment programs that young people take part in include, close supervision of young people in small groups with rigorous group treatment process offering extensive and ongoing individual attention.<sup>167</sup> There is significant work that must be undertaken to ensure that young people who are detained in Tasmania have access to the programs that they need, before, during and – as I discuss further below – after release from detention.

#### 6.3.4 Education

Young people at AYDC often tell me that the Ashley School is a positive experience for them. Consistent with good practice, the Ashley School supports young people to pursue academic education and provides some vocational opportunities for hands on learning.<sup>168</sup> Evidence shows that education is critical to help young people rehabilitate while detained, but to maintain these gains, continuing engagement or reengaging with education post release can reduce the likelihood of recidivism.<sup>169</sup>

However, currently, many positive educational gains that are made while a young person is detained at AYDC invariably end when they leave. There is, as Noetic notes, no ‘cohesive or durable link to education outside AYDC’.<sup>170</sup> There is substantial work that needs to occur in this area, as connecting young people in detention with education is a complex undertaking. In this context, I note with support the statement by prominent researchers in this area that

[a] complex professional system of shared values and practices is required to enable incarcerated young people to become connected with education. The task is challenging and multi-faceted and requires subtlety and consistency. The consequences of not connecting young people with education are potentially devastating for these young people and for their futures.<sup>171</sup>

Much can be learnt from the substantial work undertaken in Victoria around the question of how young people can be assisted to ‘maximise the likelihood of successful educational transition’ post release from custodial detention.<sup>172</sup> Planning for and supporting a young person to transition from custody to education or training in the community is critical and requires commencement upon entry and ongoing support beyond enrolment. Any new custodial model must include detailed consideration of how young people can be supported to stay engaged with education once they leave detention.

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<sup>166</sup> Mendel (n 154) 43.

<sup>167</sup> Ibid 21.

<sup>168</sup> Mendel (n 154) 32.

<sup>169</sup> Armytage and Ogloff (n 50) 162.

<sup>170</sup> *Custodial Options Paper* (n 27) 76.

<sup>171</sup> Julie White, Kitty te Riele, Tim Corcoran, Alison Baker, Phillipa Moylan and Ruq Abdul Manan, *Improving educational connection for young people in custody* (Final report, 2019) 34.

<sup>172</sup> Fiona MacDonald, Kitty te Riele, Julie White, Tim Corcoran, Phillipa Moylan, Alison Baker and Rug Abdul Mana, *Educational Transition from Custody* (Final report, 2020) 7.



On this point, I commend the Government on its recent announcement that education will be a key focus of the youth justice reforms, including in the context of detention as well as strengthening post release links to longer-term education and vocational training. I look forward to further details becoming available.

#### 6.3.5 Through care/after care

When I ask young people what they need or want in preparation for their release from AYDC, a common response includes ‘somewhere to live, and someone to help me.’ Under our current model, the system often fails children and young people on both counts. Young people detained at AYDC have indicated to me that they would prefer a model where the support they receive at AYDC can follow them back into their community. I am also aware, that some young people make contact with staff at AYDC post release to reconnect to staff, because they see them as stable and important adults in their lives.

The Transition from Detention Program is a voluntary mentoring program for young people transitioning from remand or detention back into the community. In my experience, young people transitioning from detention particularly value being able to participate in pro-social activities as part of this program. However, I am advised that current resourcing for this program has limited the ability of youth workers to attend AYDC and to engage with young people as often as has been the case in the past.

Through and after care must be key priorities in the development of any model of detention. The evidence tells us that it is important to provide young people leaving secure facilities with transitional support, including ‘step-down’ accommodation. I note with support the suggestion by Noetic that planning for transition should begin prior to sentencing, and that this could be mandated as a sentencing option under the YJA.<sup>173</sup> In my view, planning for transition should begin from the time a child or young person is admitted to AYDC.

There are several national and international examples of programs that have been successful in this area. Two common characteristics of these programs are supported family involvement and intensive post release supervision and support.

In the Missouri model, families are encouraged to become involved ‘as partners in the treatment process and as allies in planning for success in the aftercare transition.’<sup>174</sup> This often includes family therapy, which occurs towards the end of a period of detention and centres on ‘helping parents and youth jointly change negative family dynamics and create an alliance to support the youth’s continued success’.<sup>175</sup> I note that this approach would also acknowledge the often complex interrelationship between young people’s involvement in the youth justice system and the broader need for family support.

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<sup>173</sup> *Custodial Options Paper* (n 27).

<sup>174</sup> Mendel (n 154) 13-15.

<sup>175</sup> *Ibid* 34.



There needs to be provision for greater family involvement in exit planning for young people at AYDC, beyond the merely practical, to include, for example, consideration of a formalised process to support family group conferences prior to release. I understand that such conferences have been trialled on an informal basis at AYDC with promising results but are no longer occurring due to resourcing restraints.

In addition, under the Missouri model, considerable support and supervision is provided for youth transitioning home from a facility — this includes intensive aftercare planning prior to release, monitoring, and mentoring young people closely in the first crucial weeks following release, and working hard to enrol them in school, place them in jobs, and/or sign them up for extracurricular activities in their home communities.<sup>176</sup>

Young people have told me that the transition from AYDC back to the community is challenging for a range of reasons. Currently, one of these reasons is that if a young person's release date falls on a weekend or public holiday, they will be released on this date, rather than the nearest weekday. This adversely affects their ability to receive support from their Youth Justice Worker and/or other professional supports, access services (e.g., Centrelink) and other forms of practical assistance on the day of their release.

More broadly, there is an urgent need to address transitional accommodation for young people leaving detention. In addition to helping young people to find housing, young people need help to find work and/or engage in education; both involvement in employment and education immediately following release from a detention facility are protective factors, particularly for young people with a disability.<sup>177</sup>

In addition, children and young people, particularly those in the out-of-home care system, need continuity of support. I have been advised that there are some contractual arrangements that can prevent the provision of supports being continued by non-government providers once a young person is under a detention order and housed at AYDC. Service providers with whom a child or young person has an existing positive relationship should be able to continue to support and work with that child or young person during and after their time at AYDC.

### 6.3.6 Therapeutic workforce

Developing the capacity of the youth justice workforce is critical to realising a truly therapeutic approach to youth justice. It requires a highly qualified and trained workforce that is committed to supporting children or young people in and out of detention, using trauma informed practice.

Under alternative models, such as the Missouri model, frontline staff (i.e., 'youth specialists') together with all staff, have responsibility for the 'safety, personal conduct,

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<sup>176</sup> Mendel (n 154) 13-15.

<sup>177</sup> *Alternatives to remand for children* (n 31) 19.



care and therapy’ of the young people in their care.<sup>178</sup> This means that, as Mendel explains,

[a]ll [staff] must understand and buy in to the agency’s rehabilitative mission, and in their interactions with youth they must demonstrate the same tone of respectfulness and high expectations.<sup>179</sup>

The emphasis on a therapeutic workforce is also evident in the alternative to juvenile detention model offer in Spain, by the Diagrama Foundation. Under the Diagrama model, staff seek to build ‘warm parenting relationships’ with young people, guided by the Technical Team.<sup>180</sup> The Technical Team is comprised of highly qualified psychologists, social workers, and reintegration workers (who support young people before released, and after release with housing, education, and employment) and health care staff. While security staff are part of the Diagrama model, their role is one of ‘last resort in incident management’ and, as far as possible, they stay in the background.<sup>181</sup>

Whilst I acknowledge that Tasmania does not currently employ the use of spit hoods or mechanical restraint chairs, in my view, an explicit legislative prohibition of their use is necessary to fully ensure that all staff interactions with children and young people in custody are therapeutic.

#### 6.4 A Tasmanian Children’s Court

In Tasmania, the Youth Justice Division of the Magistrates Court has jurisdiction to hear and determine all offences against young people, except those deemed to be ‘prescribed offences’. I recognise the tremendously valuable work of the court, particularly the ‘greater coordination and cooperation between various agencies involved in youth justice’ since the introduction of the ‘special lists and the use of specialised magistrates.’<sup>182</sup> Going forward, it is important that these strengths are acknowledged and built upon. However, as noted above, I believe serious consideration should be given to establishing a standalone Children’s Court in Tasmania with jurisdiction to hear all matters involving children and young people in Tasmania. I envision that this would include prescribed offences and including sentencing for matters that are currently dealt with under the under the *Sentencing Act 1997* (Tas).

This view is informed by the operational principles of a contemporary and therapeutic youth or children’s court, as identified by the Centre for Innovative Justice (RMIT). Namely, that a contemporary youth court is a specialised court which is

- child focused;
- promotes the participation of children and families in the court process;
- incorporates problem solving, collaborative and multidisciplinary practices;

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<sup>178</sup> Mendel (n 154) 28.

<sup>179</sup> Ibid 43.

<sup>180</sup> Diagrama Foundation, *A Blueprint for Change: Adapting the lessons of the Spanish Youth Justice System to the Northern Territory* (Report, 2019)

<sup>181</sup> Ibid 15.

<sup>182</sup> *Sentencing Young Offenders* (n 9) 54.



- supported by a specialised and trained workforce;
- provides culturally responsible approaches.<sup>183</sup>

These five operational principles are informed by the rights established under the UNCRC and by research into the court experiences of children and their families.

In addition, several specific considerations inform my view, including

- *Reducing remand time:* The lack of a separate court system has previously been identified as an issue that detrimentally affects the rate and length of time that young people spend on remand in Tasmania.<sup>184</sup>
- *Consistent and better support:* In its recent report, the SAC notes that a lack of services to support the conditions made in orders imposed by the court was a well-recognised issue among their stakeholders, and that appropriate services were often non-existent, at capacity, or with extended wait times for access.<sup>185</sup>
- *Consistency in treatment:* While the number of young people who are sentenced under the *Sentencing Act* in the Supreme Court for ‘prescribed offences’ is low,<sup>186</sup> the SAC identified several issues relating to the treatment of these young people in the Supreme Court including: a lack of available supports compared to the Youth Division; inappropriate processes that treat children like ‘mini adults;’ less therapeutic than the Youth Division; a lack of infrastructure provision for young people; and, a lower level of specialist knowledge of judges in dealing with young people due to the infrequency of their appearances.<sup>187</sup>
- *Specialist problem-solving:* Young people, especially those with complex needs, would benefit from a forum where the key parties could come together to problem solve issues, such as accommodation, support service, and counselling for trauma.

These issues, among others, underline the desirability of establishing a Children’s Court for Tasmania with complete jurisdiction to hear and determine all prosecutions against children and young people and which is ‘designed with the distinct development characteristics of young people front and centre’.<sup>188</sup>

## Conclusion

Thank you again for the opportunity to comment on the *Discussion Paper*. I appreciate the enormity of what a review of the Tasmanian youth justice system involves. And, if done in a considered, consultative and staged approach, I believe that there is a real opportunity to affect key reform and positively impact the lives of Tasmanian children and young people.

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<sup>183</sup> Centre for Innovative Justice (RMIT), *Specialist Children’s Court Approaches* (Research Report, 2020) 1-6.

<sup>184</sup> Tresidder (n 105) 28.

<sup>185</sup> *Sentencing Young Offenders* (n 9) 69.

<sup>186</sup> *Ibid* 87 (noting that only 38 youths were sentenced between 2016-17 to 2019-2020).

<sup>187</sup> *Sentencing Young Offenders* (n 9) 89.

<sup>188</sup> Ward (n 60) 6.



If you or other members of the consultation team have any questions about my submission, please do not hesitate to contact me on (03) 6166 1366 or via email to [childcomm@childcomm.tas.gov.au](mailto:childcomm@childcomm.tas.gov.au).

Yours sincerely

**Leanne McLean**

Commissioner for Children and Young People

cc     *The Hon Roger Jaensch, Minister for Education, Children and Youth*  
       *The Hon Elise Archer, Attorney General and Minister for Justice*  
       *The Hon Jeremy Rockliff, Minister for Health*  
       *The Hon Jacquie Petrusma, Minister for Police, Fire and Emergency Management*