

Submission to the Inquiry into Australia's youth justice and incarceration system

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About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

Disability rights: challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

Justice for First Nations people: challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

Homelessness: reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

Civil rights: defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

Energy and water justice: working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

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Recommendations

Recommendation 1

The age of criminal responsibility be raised in all jurisdictions to at least 14 years of age, without exception.

Recommendation 2

State and territory governments, supported by the Commonwealth, increase investment in early intervention and prevention programs and strategies to work with children and their families, to support the raising of the age of criminal responsibility to at least 14 years of age. Aboriginal and Torres Strait Islander-controlled organisations must be at the centre of program design and delivery for Aboriginal and Torres Strait Islander children and their families.

Recommendation 3

State and territory police forces review their use of pre-emptive policing practices and discontinue applying any 'risk-based' policing practices to young people. This should be reflected in police standard operating procedure documents.

Recommendation 4

State and territory governments, supported by the Commonwealth, invest in bail support programs for young people, assisting them to address the root causes of offending and increasing compliance with bail conditions and better realising the underlying goals of the bail system.

Recommendation 5

State and territory governments, supported by the Commonwealth, consult with communities and community-led organisations to identify opportunities to expand the availability of programs that take a place-based approach to reducing recidivism, with a focus on young people. Governments should also deliver adequate funding to support the implementation of any such new programs.

Recommendation 6

Young people at risk of offending or reoffending be supported by an evidence-based early intervention community-led model, separate to a criminal justice and policing response. Where the young person is Aboriginal or Torres Strait Islander, Aboriginal community-controlled organisations and supports should be prioritised.

Recommendation 7

State and territory governments, supported by the Commonwealth, increase support services and social and affordable housing for women and children experiencing domestic and family violence, particularly in regional and rural areas.

Recommendation 8

State and territory youth justice authorities decrease their reliance on segregation, separation and confinement in youth justice centres, and instead prioritise therapeutic and rehabilitative approaches.

Recommendation 9

State and territory governments introduce legislation, better defining and restricting the use of solitary confinement-like practices in youth detention facilities.

Recommendation 10

The Commonwealth, where it is within constitutional power, legislate to provide for minimum standards in youth detention facilities Australia-wide, including with respect to solitary confinement-like practices.

1. Introduction

The Justice and Equity Centre ('JEC'), formerly the Public Interest Advocacy Centre ('PIAC'), is pleased to provide a submission to the Inquiry of the Legal and Constitutional Affairs Reference Committee into Australia's youth justice and incarceration system.

We make recommendations on three issues impacting negatively on the rights and wellbeing of children and young people in Australia. Those are:

- the **age of criminal responsibility**, which we recommend be raised in all jurisdictions to at least 14 years of age, without exception;
- the use of **pre-emptive policing tools**, which we recommend should not be used on children and young people; and
- the use of **solitary confinement** in youth justice centres, which we recommend should be subject to more stringent safeguards.

While largely regarded as issues arising under state and territory laws, they are not exclusively so. For example, the Commonwealth Government can and should raise its own age of criminal responsibility for offences created under federal legislation, and we consider there is a clear role for the Commonwealth Government to play, leading and coordinating reform to these systems. Where there is a need for investment in alternatives to criminal legal system interventions or greater support for at risk young people, there is a role for the Commonwealth in committing its own funds alongside those of state and territory governments. Addressing youth justice failings across Australia requires action and investment from all governments.

There may also be a legislative role for the Commonwealth to play where it has the constitutional power to do so, creating minimum standards for children and young people involved with the criminal legal system. We note and endorse the recommendation of the recent report of the Australian Human Rights Commission ('AHRC') *'Help Way Earlier! How Australia can transform child justice to improve safety and wellbeing'*, that the Australian Government incorporate the Convention on the Rights of the Child into Australian law through a National Children's Act which would create certain minimum standards.¹ The Commonwealth may have the constitutional power to step into the youth justice field through implementation of international obligations such as these and by legislating with respect to children and young people detained in relation to an offence created under federal legislation. These issues are discussed further in Part 4 of our submission, particularly in relation to better regulating solitary confinement-like practices in youth detention centres.

While we draw on experiences from NSW in this submission, we understand each of the matters addressed to be issues across Australia.

¹ Australian Human Rights Commission, *How Australia can transform child justice to improve safety and wellbeing* (June 2024) ('Help Way Earlier Report'), Recommendation 4 and as discussed at 29–31.

2. Age of criminal responsibility

The JEC is a member organisation of the national campaign to Raise the Age of criminal responsibility, and is co-ordinating the Raise the Age campaign within NSW. We are undertaking this work in partnership with a wide range of other groups, including First Nations, legal and human rights, medical, youth, and community services bodies. Key partners include the Aboriginal Legal Service (NSW/ACT), Just Reinvest NSW and the Justice Reform Initiative.

The JEC has consistently argued for the minimum age of criminal responsibility to be raised in all jurisdictions around Australia to at least 14 years of age, without exception. This includes in our February 2020 submission to the Council of Attorneys-General Working Group review² considering this subject. We have set out our arguments for raising the age of criminal responsibility in that submission and elsewhere.³

These arguments include:

- *A minimum age of criminal responsibility lower than 14 does not reflect current evidence on child development.* Peak medical groups, including the Royal Australasian College of Physicians ('RACP'), support the view that the current minimum age of criminal responsibility is inappropriate in light of the physical and neurocognitive vulnerabilities of children in the 10-13 age bracket. From our submission to the Council of Attorneys-General.⁴

The RACP observe that behaviours which typically bring children aged 10 to 13 in conflict with the law are better understood and responded to 'as behaviours within the expected range in the typical neurodevelopment' for this group of children, particularly when considering children whose behaviours arise out of significant past trauma or severe disadvantage.

- *A minimum age of criminal responsibility lower than 14 entrenches children in the criminal justice system, decreasing community safety.* Not only does engaging children aged 10-13 in the criminal justice system not act as a deterrent, it actually increases the likelihood of future offending. In the words of leading Australian criminologist Professor Chris Cuneen.⁵

We... know that a small number of offenders commit a large proportion of detected offences and these tend to be those young people who first appeared in court at an early age. For this reason, it

² Public Interest Advocacy Centre, *Submission to Council of Attorneys-General – Age of Criminal Responsibility Working Group Review* (28 February 2020) <<https://jec.org.au/resources/submission-to-council-of-attorneys-general-age-of-criminal-responsibility-working-group-review/>>.

³ See, for example Public Interest Advocacy Centre, *Submission to NSW Parliamentary Inquiry into the Adequacy of Youth Diversion Programs* (23 March 2018) <<https://jec.org.au/resources/submission-to-nsw-parliamentary-inquiry-into-the-adequacy-of-youth-diversion-programs/>>.

⁴ Public Interest Advocacy Centre (n 2) 3, drawing on Royal Australasian College of Physicians, *Submission to the Council of Attorneys-General Working Group Reviewing the Age of Criminal Responsibility* (July 2019) 3 <https://www.racp.edu.au/docs/default-source/advocacy-library/b-20190729racp-submission-cag-review_final-gm-approved.pdf?sfvrsn=b384e61a_6>.

⁵ Christopher Cuneen, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Comparative Youth Penalty Project Research Report, February 2020) 19 (citations omitted).

is recognised that criminal justice systems can themselves be potentially criminogenic, with early contact being one of the key predictors of future juvenile offending.

- A minimum age of criminal responsibility lower than 14 has a disproportionate impact on Aboriginal and Torres Strait Islander children. Available data shows that Aboriginal and Torres Strait Islander children tend to come into conflict with the law at a younger age than non-Indigenous children.⁶ Notably, the greatest over-representation occurs between the ages of 10 and 14.⁷ Disappointingly the over-representation of First Nations children in prison is getting worse, not better, with recent figures from the NSW Bureau of Crime Statistics and Research (BOCSAR) revealing that:⁸

56.7% of imprisoned children in NSW are Aboriginal or Torres Strait Islander [and] the number of Aboriginal young people in custody [in NSW] is now 122, an increase of 28.4% in the 12 months to March 2023. Of those Aboriginal young people, 92 (75.4%) were on remand.

- A minimum age of criminal responsibility lower than 14 has a disproportionate impact on some of our most vulnerable children. This includes children and young people experiencing intellectual disability and mental illness, and children and young people who have been in contact with child protection services. It was one of the recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, that every state and territory introduce legislation to raise the age of criminal responsibility to 14.⁹ The Royal Commission was of the view that:¹⁰

Raising the age of criminal responsibility to 14 is an appropriate means of preventing and protecting young children with disability from experiencing violence, abuse and neglect...the evidence demonstrates that a high proportion of children under the age of 14 in youth detention have a cognitive disability, even though the disability may not be detected until some time after the child enters detention.

As observed in our submission to the Council of Attorneys-General, raising the minimum age of criminal responsibility would also be consistent with international human rights law, and the situation in comparable countries.¹¹

Finally, as noted in that submission:¹²

⁶ Legislative Assembly Committee on Law and Safety, Parliament of New South Wales, *The Adequacy of Youth Diversion Programs in New South Wales* (Final Report, September 2018), [2.76].

⁷ Australian Institute of Health and Welfare, *Youth justice in Australia 2022–23* (March 2024) Data Tables S5a and S5b <<https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-annual-report-2022-23/contents/about>>.

⁸ As reported by Public Interest Advocacy Centre and the Aboriginal Legal Service (NSW/ACT) Limited, 'NSW prisons more unequal than ever with record level of Aboriginal people behind bars' (Media Release, 30 May 2023) <<https://jec.org.au/civil-rights/policing-and-detention/nsw-prisons-more-unequal-than-ever-with-record-level-of-aboriginal-people-behind-bars/>>.

⁹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Final Report, September 2023 ('Disability Royal Commission Report'), Recommendation 8.22.

¹⁰ Ibid, vol 8, 312.

¹¹ Public Interest Advocacy Centre (n 2), 10–11.

¹² Ibid, 11.

In advocating for the minimum age of criminal responsibility to be raised to at least 14, we are not arguing that actions should not have consequences. Rather, that those consequences should not be harmful, counter productive, contrary to evidence and unjust... There are many ways in which children can be effectively supported to take responsibility for their actions which avoid the blunt, harmful and criminogenic processes of the criminal justice system... We must move away from a narrative of accountability that emphasises reactive measures and the imposition of penalties and recognise the hard work involved in engagement and diversion and restorative justice processes that address the underlying causes of offending, and ultimately, improve community safety.

For all of these reasons, raising the minimum age of criminal responsibility to at least 14, without exception, would help achieve improved child wellbeing across the country.

To effectively address the underlying drivers of crime, governments must work collaboratively, in partnership with community, to develop evidence-based early intervention strategies.¹³ These strategies may prevent young people from entering (and re-entering) the criminal legal system and would provide the necessary infrastructure to support raising the age of criminal responsibility. This requires government agencies not only working together, but working with communities to understand community needs, aspirations and solutions. These measures are discussed further at 3.5 and 3.6 of our submission below.

We have had the benefit of reviewing a final draft submission by the National Raise the Age campaign to this Inquiry and we endorse that submission also, including the recommendations made in that submission.

Recommendation 1

The age of criminal responsibility be raised in all jurisdictions to at least 14 years of age, without exception.

Recommendation 2

State and territory governments, supported by the Commonwealth, should increase investment in early intervention and prevention programs and strategies to work with children and their families, to support the raising of the age of criminal responsibility to at least 14 years of age. Aboriginal and Torres Strait Islander-controlled organisations must be at the centre of program design and delivery for Aboriginal and Torres Strait Islander children and their families.

3. Pre-emptive policing of young people

3.1 Pre-emptive policing in New South Wales

The JEC has experience representing young people in NSW who have been subjected to three NSW Police pre-emptive policing tools, premised on the 'pre-crime logic of confronting and

¹³ Peter Murphy, Anthony McGinness, Andrew Balmaks, Tom McDermott and Megan Corriea, 'A strategic review of the New South Wales juvenile justice system' (Report for the Minister for Juvenile Justice, Noetic Solutions Pty Ltd, April 2010) 63.

countering threats before they emerge'.¹⁴ These are the Suspect Targeting Management Plan ('STMP'), bail compliance checks in the absence of a court ordered enforcement condition and searches further to firearms prohibition orders ('FPOs'), in the absence of any firearms related offending.

Pre-emptive policing of young people is harmful and ineffective. This is because:

- It increases interaction with, instead of diverting children from, the criminal justice system. When experienced by children, this early exposure is a key predictor of future involvement with¹⁵ and escalation through the criminal justice system.¹⁶
- People experience these practices as harassment and discrimination, causing feelings of antipathy and hostility toward police and the criminal justice system. This policing 'construct[s] suspect communities'¹⁷ with disproportionate impact on racial and ethnic minorities, particularly First Nations young people.
- It does not support or complement effective therapeutic and diversionary alternatives.
- There is no evidence these initiatives reduce youth crime in Australia.¹⁸

3.2 Suspect Targeting Management Plan

The STMP was a NSW Police policy and program that aimed to reduce crime by targeting individuals considered to be at risk of offending. The STMP was both an intelligence tool that used risk assessment to identify suspects, and a policing program that guided interaction with individuals who were subject to the program. Concerns about the STMP led to the publication by a coalition of organisations in 2017 of the report, 'Policing Young People in NSW: A Study of the Suspect Targeting Management Plan', analysing the impact of the 'STMP II' on young people in NSW.¹⁹

This in turn led the Law Enforcement Conduct Commission ('LECC') to open an investigation into use of the STMP on young people. In October 2023, shortly after the final report of that investigation was published, NSW Police discontinued the use of the STMP on young people.

In their final report on the STMP, the LECC found that since 2018 there had been:²⁰

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- ¹⁴ Jude McCulloch and Sharon Pickering, 'Pre-Crime and Counter-Terrorism: Imagining Future Crime in the 'War on Terror'' (2009) 49(5) *British Journal of Criminology* 628, 633.
- ¹⁵ NSW Government, *2022-24 NSW Implementation Plan for Closing the Gap* (Implementation Plan, August 2022) ('NSW CTG Implementation Plan') 98.
- ¹⁶ UNSW Comparative Youth Penalty Project, *Arguments for Raising the Minimum Age of Criminal Responsibility* (Report, 2017).
- ¹⁷ Louise Boon-Kuo et al, 'Policing Biosecurity: Police Enforcement of Special Measures in New South Wales and Victoria during the COVID-19 Pandemic' (2021) 33(1) *Current Issues in Criminal Justice* 76, 77; Vicki Sentas, *Traces of Terror: Counter-Terrorism, Law, Policing and Race* (Oxford University Press, 2002).
- ¹⁸ Youth Justice Coalition, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan* (Report, November 2017) 52 <<https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf>>.
- ¹⁹ Ibid.
- ²⁰ Law Enforcement Conduct Commission, *An investigation into the use of the NSW Police Force Suspect Targeting Management Plan on children and young people* (Operation Tepito Final Report, October 2023) ('Operation Tepito Final Report') 133 <<https://www.lecc.nsw.gov.au/publications/publications/operation-tepito-final-report.pdf>>.

- gross over-representation of young Aboriginal people selected for STMP targeting;
- overuse of overt and intrusive policing tactics applied by the NSW Police Force resulting in unreasonable surveillance and monitoring of young people;
- patterns of interactions showing the NSW Police Force had used a young person's STMP status as a basis for ongoing and repeated stops, searches, or visits to the young person's home, rather than relying on legislative, or court-ordered frameworks, with the consequence that some of these interactions were positively unlawful;
- unacceptable risks of bias in the target identification process;
- no rigorous evidence-based evaluations to assess the success, or otherwise, of the use of the STMP on an individual; and
- inadequate record keeping that prevented police from undertaking an overall assessment of utility and ongoing critical analysis.

As was the case with the STMP, risk assessment tools used by police often do no more than capture disadvantage, complex needs and vulnerability as proxies for risk, and legitimise reliance on these indicators through a quasi-scientific, 'objective' framework. Risk assessment technology relied on for predictive policing is not neutral, and it is likely that assumptions of suspicion, risk and racialised criminalisation will influence the design of any such tool.²¹

A wealth of research has occurred on the propensity of predictive policing tools to disproportionately impact ethnic and racial minorities.²² Data collection focuses on communities that are already subject to disproportionate surveillance and over-policing as a result of racial and ethnic profiling. Using historical crime data to create predictive models builds upon a racialised bias that further perpetuates and justifies disproportionate and racialised policing responses.²³ As Adelle Ulbrick explains:²⁴

Technology is neither neutral nor objective – it is based on human interactions that perpetuate socio-cultural inequalities and biases and act to disproportionately target racially marginalised communities (Williams & Kind, 2019). Assumptions of risk, suspicion and criminalisation affect the ways in which technology is developed, moderated, implemented and evaluated, particularly in the policing context (Haining & Law, 2007).

In relation to the STMP, the Commission found that 'the tools police might use to predict the likelihood of reoffending are unlikely to be neutral and will be influenced by historical and cultural assumptions'.²⁵ We believe the same will be true of any tools used by police to engage in pre-

²¹ Patrick Williams and Eric Kind, *Data-driven policing: The hardwiring of discriminatory policing practices across Europe* (European Network Against Racism, November 2019) 14.

²² Brian Jordan Jefferson, 'Predictable Policing: Predictive Crime Mapping and Geographies of Policing and Race' (2018) 108(1) *Annals of the American Association of Geographers* 1; Williams and Kind (n 21); Will Douglas Heaven, 'Predictive policing algorithms are racist. They need to be dismantled' (July 2020) *MIT Technology Review*; Robert Haining and Jane Law, 'Combining police perception with police records of serious crime records of serious crime areas: A modelling approach' (2007) 170(4) *Journal of the Royal Statistical Society* 1019; Adelle Ulbrick *Predictive Policing and Young People: The discriminatory impacts of pre-emptive and racialised policing in Victoria* (Police Accountability Project, 2021); Julia Angwin et al, 'Machine Bias: There's software used across the country to predict future criminals. And it's biased against blacks' *ProPublica* (Online, 2016) <<https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing>>.

²³ Ulbrick (n 22) 24.

²⁴ Ibid.

²⁵ Operation Tepito Final Report (n 20).

emptive policing of young people, without the inclusion of adequate external oversight and safeguards. We urge significant caution in the use of police risk assessment tools which have not been subjected to external scrutiny to check for the undue influence of pre-existing or improper biases and question the need for such tools to be used on young people at all.

We consider that the findings regarding the STMP exemplify the outcomes when police utilise generalised ‘pre-emptive’, ‘proactive’ or ‘intelligence-led’ policing approaches with young people, at the expense of genuine diversionary programs and working with local communities to support community-led and designed place-based approaches to reduce recidivism. What is needed is investment in alternatives to pre-emptive policing, discussed further at 3.5 below.

3.3 Bail compliance checks

The *Bail Act 2013* (NSW) (‘Bail Act 2013’) provides that a court can make ‘enforcement conditions’ to empower police to attend people’s homes to check for compliance with bail conditions,²⁶ which reflects amendments to the former *Bail Act 1978* (NSW) and gives police powers otherwise generally unavailable at law.²⁷ However, compliance checks are routinely conducted by NSW Police beyond the scope of court ordered enforcement conditions, or in the absence of any such conditions, including against children and young people on bail. For nearly a decade, the JEC has represented clients who have been subject to these ‘bail compliance checks’ by NSW Police, and we continue to challenge the lawfulness of this practice.²⁸

The experiences of our clients is that NSW Police officers regularly enter onto private property to monitor compliance with residence or curfew conditions, without first obtaining an enforcement condition from a court. These checks often occur multiple times a day, and very late at night or in the early hours of the morning. They are experienced by our clients as disruptive and as part of a pattern of targeted police harassment. Regular police attendances at our clients’ homes are stigmatising and impinge on their privacy, family and home life. They are particularly disruptive for young people, trying to establish good school and life routines. This is illustrated in the experience of JEC client ‘Joanne’.

Case Study: Joanne*

Joanne is a single mother of three, living in Western Sydney, who was referred to the JEC through the Aboriginal Legal Service (NSW/ACT). She and her family were subject to more than 90 police visits over 18 months. 59 of these visits appear to have been unlawful as they were in excess of the limitations specified in bail enforcement conditions. Through that time, Joanne’s anxiety increased, and she had difficulty sleeping.

‘Police coming around didn’t only affect my son who was on bail. It also affected me and his sisters, especially when police were shining torches through the windows after midnight. It felt as though they were harassing the whole family. My youngest daughter is now scared of police.’

²⁶ *Bail Act 2013* (NSW) s 30.

²⁷ See, New South Wales, *Parliamentary Debates*, Legislative Council, 24 October 2012, 1 (The Hon Michael Gallacher, MP); New South Wales Law Reform Commission, *Bail* (Report 133, April 2012) 250 [16.22–16.23].

²⁸ See for example Michaela Whitbourn, ‘Police visited Megan’s home 153 times in less than two years. Now she is fighting back’, *Sydney Morning Herald* (online, 29 April 2024) <<https://www.smh.com.au/national/nsw/police-visited-megan-s-home-153-times-in-less-than-two-years-now-she-is-fighting-back-20240314-p5fcdz.html>>.

'The checks felt relentless. Once there were three checks in just a few hours. Police seemed to just do whatever they wanted, and completely ignored what the court said about how much they were allowed to come.'

'Sometimes my son would start behaving really well. But police continued to harass him anyway, and he'd feel like his good behaviour was pointless and end up being charged again.'

'It was very embarrassing to have the police constantly at my house. It made it hard for me with my neighbours. And I stopped inviting guests over in case the police turned up.'

'The checks often happened on school nights, which meant my youngest daughter was too tired to go to school in the morning.'

**Client's name has been changed to protect privacy.*

The JEC holds similar concerns about the ongoing practice of bail compliance checks, as were held about the STMP. Namely that:

- current policy is leading NSW Police officers to engage in unlawful conduct, entering or remaining on private property in excess of lawful authority to do so;
- current practice is improperly discriminatory in its effect, with bail compliance checks being disproportionately conducted on First Nations people, particularly First Nations young people;
- the frequency and timing of bail compliance checking is often unreasonable, unjust or oppressive in its effect on the person on bail, without due regard to the purposes for which the bail conditions exist;
- by engaging in excessive bail compliance checking on young people particularly, NSW Police are prioritising policing strategies that tend towards increased interactions with the criminal justice system; and
- excessive and oppressive bail compliance checks on young people have an intrusive and disruptive impact on them and their families, impeding rehabilitation efforts.

In 2022, statistics produced during NSW Budget Estimates showed that, of all bail compliance checks conducted on young people without an enforcement condition during that financial year, 75.6% were conducted on Aboriginal and Torres Strait Islander young people.²⁹ More recent statistics broken down by Police Area Command, obtained by the JEC through freedom of information laws, are similarly alarming. In Orange, the proportion of bail checks conducted on First Nations people for FY21/22 and FY22/23 were 91.5% and 90.6% respectively.

One of the reasons for this disproportion is likely to be the broad discretion police officers are currently exercising to conduct bail compliance checks in the absence of an enforcement condition. When police officers enjoy a broad discretion to select who they target and when they target them, they regularly apply this discretion in discriminatory ways in what has been described as a reliance by police on 'racialised proxies for risk to construct suspect communities'.³⁰ The evidence with respect to bail compliance checks is consistent with the weight

²⁹ Legislative Council, Parliament of New South Wales, Portfolio Committee No 5 – Regional NSW and Stronger Communities, *Budget Estimates 2022-2023: Responses to Supplementary Questions*, 27 September 2022, 58 <<https://www.parliament.nsw.gov.au/lcdocs/other/17796/ASQON%20-%20Hon%20Paul%20Toole%20MP%20-%20Deputy%20Premier,%20Regional%20NSW,%20Police%20-%20received%2027%20September%202022.pdf>>.

³⁰ Sentas (n 17); Louise Boon-Kuo et al (n 17) 77.

of evidence that, more generally, police discretionary decisions work against the interests of Indigenous people.³¹

A more effective way of promoting bail compliance would be to increase investment in bail support programs, which support people to comply with their bail conditions and target criminogenic risk factors. The two principle aims of bail support programs are to prevent reoffending while on bail and increase the likelihood of a person appearing in court for the hearing of their charges.³² Recent research shows that bail support programs:

- reduce reoffending by 33%;³³
- increase compliance with bail conditions by 95%;³⁴
- improve a range of other social and health wellbeing measures relevant to the drivers of criminal justice system contact;³⁵ and
- achieve cost savings when compared to an absence of bail support.³⁶

One example is the Bail Support Court Integrated Services Program in Victoria. Evaluations have found this program reduces contact with the criminal justice system and facilitates access to support and treatment.³⁷ Another example is the Caxton Legal Centre Men's Bail Support Program in Queensland, where 95% of participants were bail compliant in 2021-2022 and were less likely to re-offend in the short to medium term.³⁸

Supporting people to comply with their bail obligations and address the root causes of offending is more likely to serve the underlying goals of bail, than monitoring bail compliance.

3.4 Firearms prohibition orders

The NSW Commissioner of Police ('Commissioner') has a broad power to make an FPO against a person under the *Firearms Act 1996* (NSW) (the 'Firearms Act') if the Commissioner is of the opinion that the person 'is not fit, in the public interest, to have possession of a firearm'.³⁹ Once made, FPOs do not expire and continue unless and until the Commissioner exercises the discretionary power to revoke the FPO 'at any time for any or no stated reason'.⁴⁰ A person

³¹ Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 2015) 153.

³² Justice Reform Initiative, *Alternatives to Incarceration in New South Wales* (2023) 43.

³³ Elena Marchetti, *Evaluation of the Caxton Legal Centre Bail Support Program* (Griffith University, 2021); Rohan Lulham, *The magistrates' early referral into treatment* (Contemporary Issues in Crime and Justice, 131, July 2009); Ilya Klauzner, *An evaluation of the youth bail assistance line* (Crime and Justice Bulletin, 237, July 2021), as cited in Justice Reform Initiative (n 32) 8.

³⁴ Ibid.

³⁵ Susan Spratley, Neil Donnelly and Lily Trimboli, *Health and wellbeing outcomes for defendants entering the Alcohol-MERIT program*, (Bureau Brief No. 92, December 2013); Meredith Rossner et al, *ACT drug and alcohol sentencing list: Process and outcome evaluation final report* (June 2022), as cited in Justice Reform Initiative (n 32) 8.

³⁶ Alaina Cannon, *Evaluation of the Court Integrated Services Program: Final Report* (May 2017); Department of Justice, *Economic Evaluation of the Court Integrated Services Program (CISP): Final report on economic impacts of CISP* (November 2009), as cited in Justice Reform Initiative (n 32) 8.

³⁷ Justice Reform Initiative (n 32) 44.

³⁸ Ibid.

³⁹ Firearms Act s 73(1).

⁴⁰ Ibid s 73(3).

subject to an FPO is subject to new offences and additional penalties related to firearms.⁴¹ Statistics obtained by the JEC under NSW freedom of information laws, show that there are currently 7,990 FPOs in force in NSW.

The Commissioner has had the above powers since 1973.⁴² However, since 2013, FPOs have also enlivened broad and extraordinary search powers under a new s 74A of the Firearms Act.⁴³ The s 74A search powers were reviewed by the NSW Ombudsman in 2016⁴⁴ but there has been no formal NSW Government response to the findings.

NSW Police were encouraged to use FPO searches as part of intensive policing under the STMP,⁴⁵ until that policy was abolished. NSW Police have recently indicated that FPOs remain 'heavily utilised' as a 'crime prevention and deterrent tool'.⁴⁶

Our concerns about the FPO regime are that:

- FPOs are being disproportionately made against Aboriginal people. In the statistics obtained by the JEC, of the 7,990 FPOs currently in force in NSW, 40% are against Aboriginal people. 109 of those FPOs are in respect of people under the age of 18 years, of whom 63 – or roughly three-in-five – are Aboriginal.
- The Commissioner has a broad and discretionary power to impose an FPO. A person does not have to be charged with, or convicted of, a firearms-related offence to have an FPO made against them⁴⁷ and the Commissioner does not need to consider the fact that the person has never posed a threat or danger to anyone by reason of their possession or use of firearms.⁴⁸ This also makes reviewing the Commissioner's exercise of the power in the NSW Civil and Administrative Tribunal ('NCAT') difficult,⁴⁹ and for children and young people, there is no right

⁴¹ See Firearms Act s 74. We note also that the New South Wales Sentencing Council has expressed concern about these additional penalties, finding that current laws 'offer adequate protections against individuals at higher risk of offending' and that 'NSW laws make increased maximum penalties for such persons unnecessary': New South Wales Sentencing Council, *Firearms, knives and other weapons offences* (May 2024) 18 [2.50] <https://sentencingcouncil.nsw.gov.au/documents/our-work/firearms-knives-and-other-weapons/Report_Weapons_2024.pdf>.

⁴² *Firearms and Dangerous Weapons Act 1973* (NSW) s 69; *Firearms Act 1989* (NSW) s 39; *Firearms Act* s 73.

⁴³ *Firearms and Criminal Groups Legislation Act 2013* (NSW).

⁴⁴ New South Wales Ombudsman, *Review of police use of the firearms prohibition order search powers: Section 74A of the Firearms Act 1996* (August 2016)

<https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0003/138297/Review-of-police-use-of-firearms-prohibition-order-search-powers.pdf>

⁴⁵ Operation Tepito Final Report (n 20) 6, 68.

⁴⁶ Evidence to Legislative Council Portfolio Committee No 5 – Justice and Communities, New South Wales Parliament, Sydney, 30 August 2024, 45 (NSW Police Deputy Commissioner David Hudson)

<[https://www.parliament.nsw.gov.au/lcdocs/transcripts/3322/CORRECTED%20Transcript%20-%20PC5%20-%2030%20August%202024%20-%20Budget%20Estimates%20\(Catley\).pdf](https://www.parliament.nsw.gov.au/lcdocs/transcripts/3322/CORRECTED%20Transcript%20-%20PC5%20-%2030%20August%202024%20-%20Budget%20Estimates%20(Catley).pdf)>.

⁴⁷ Evidence to Legislative Council Portfolio Committee No 5 – Justice and Communities, New South Wales Parliament, Sydney, 7 November 2023, 66 (NSW Police Deputy Commissioner David Hudson)

<[https://www.parliament.nsw.gov.au/lcdocs/transcripts/3172/Transcript%20-%20PC5%20-%20Budget%20Estimates%20\(Catley\)%20-%207%20November%202023%20-%20CORRECTED.pdf](https://www.parliament.nsw.gov.au/lcdocs/transcripts/3172/Transcript%20-%20PC5%20-%20Budget%20Estimates%20(Catley)%20-%207%20November%202023%20-%20CORRECTED.pdf)>.

⁴⁸ *Solomon v Commissioner of Police* (NSW) [2021] NSWSC 236 at [69].

⁴⁹ See, eg, *Hamid v Commissioner* [2018] NSWCATAD 43, in which the person subject to the FPO had no criminal history, had never been charged with any offence, interviewed, cautioned or even had her details recorded in relation to any offence or investigation involving a firearm. The FPO was issued on the basis only of the person's close relationships with two people with criminal histories. Given the breadth of the discretion available to the Commissioner, NCAT upheld the making of the FPO.

of review to NCAT.⁵⁰

- FPOs do not expire. They continue unless and until the Commissioner exercises the power to revoke them. Information we have obtained through freedom of information laws indicate that FPOs are currently active against people in their 80s and 90s, and two FPOs are active against people who are 100 years old.
- It is very difficult to seek revocation of an FPO. Senior and Junior Counsel have advised us that if a request for revocation is made, a court is unlikely to find that the Commissioner could be compelled to even consider that request. The same counsel have advised that it is 'difficult to conceive of a broader discretion' than the one given by statute to the Commissioner, which is likely to make judicial review of a decision not to revoke 'extremely difficult'. We understand from information obtained through freedom of information laws that only 10 FPOs have been revoked since 1 July 2019, and the circumstances in which those were revoked is unclear.
- The scope of FPO search powers is broad and ambiguous – it is not clear whether police need to have a suspicion or belief, on reasonable grounds or otherwise – that the person subject to the search has committed an offence under the Firearms Act.⁵¹ Information obtained through freedom of information laws indicates that in FY2022-23, FPO searches resulted in the location of firearms or 'firearms accessories/attachments' in just 0.09% of cases.

We are concerned that FPO searches continue to be used as an STMP-style disruption tool, particularly in relation to young people, and not for a legitimate firearms safety purpose.⁵² As with the STMP and bail compliance checks, using FPOs to search young people with no history of firearms related offending is having discriminatory impacts, prioritising policing strategies that tend towards increased interactions with the criminal justice system and having an intrusive and disruptive impact on young people and their families, impeding rehabilitation efforts.

3.5 Alternatives to pre-emptive policing

An effective alternative to pre-emptive policing is to adopt community-led and designed place-based approaches to reduce recidivism.

In 2019, the Productivity Commission suggested that:⁵³

[G]overnments need to adopt a place-based approach to the design and delivery of services and programs for families and children... [A] place-based approach involves flexible service provision to find fit-for-purpose solutions that reflect the needs of local communities... By its nature, a place-

⁵⁰ *DWK v Commissioner* [2019] NSWCATAD 135.

⁵¹ See *Solomon v Commissioner of Police (NSW)* [2021] NSWSC 236 at [88]-[93]; *DPP (NSW) v Shaba* [2018] NSWSC 811 at [17] and *Fahma v DPP* [2021] NSWDC 329 at [39]. This was a subject of concern to the NSW Ombudsman also: New South Wales Ombudsman (n 44) Chapter 6.

⁵² An illustrative example is at [61] of the decision of Conlon ADCJ in *R v Smith* [2023] NSWDC 88, where the offender was said to come 'nowhere near' the category of persons intended to be dealt with under the FPO regime.

⁵³ Productivity Commission, *Expenditure on Children in the Northern Territory* (Draft Report, November 2019) 50, cited in Aboriginal Legal Service, Submission to the Council of the Attorneys-General, *Review of the Age of Criminal Responsibility* (3 March 2020) 32.

based approach relies on engagement between governments and the community to understand the specific issues faced by the community.

Rather than being police-led initiatives, these involve genuine partnerships with non-government organisations, police and service providers. The NSW Implementation Plan for Closing the Gap notes that early interventions to support young people need to be community designed and driven and to support health, education and housing.⁵⁴

There have been many successful examples in NSW of place-based approaches to reducing recidivism. Each year, the Maranguka Justice Reinvestment Initiative⁵⁵ is estimated to save Bourke's criminal justice system \$3 million, and a KPMG impact assessment in 2018 recorded an increase of 31% in year 12 student retention rates, 38% less charges across the top five juvenile offence categories, 14% less bail breaches and 42% less days spent in custody.⁵⁶

Other examples of place-based approaches in NSW include:

- Dharriwaa Elders Group (Walgett) who have launched an Action Plan to be implemented in partnership with the University of NSW.⁵⁷
- Deadly Connections (Sydney) which seeks to break cycles of disadvantage and trauma to directly address the over-representation of Aboriginal people in the child protection and justice systems, delivering programs including Street Smarts and Breaking the Cycle.⁵⁸
- Weave Youth and Community Services (Sydney) which provides support to children, young people, families and communities facing complex situations and runs programs including Creating Futures and Kool Kids.⁵⁹
- BackTrack (Armidale) which offers holistic, flexible, long-term support to young people aged between 14 and 17 years old who are having a difficult time.⁶⁰ A 2021 study conducted a survey of community members in Armidale and found that 75% preferred BackTrack over a greater police presence as a method to reduce youth crime.⁶¹

⁵⁴ NSW CTG Implementation Plan (n 15) 99.

⁵⁵ Just Reinvest NSW, *Justice Reinvestment in Bourke* <<https://www.justreinvest.org.au/justice-reinvestment-in-bourke/>>.

⁵⁶ KPMG, *Maranguka Justice Reinvestment Project: Impact Assessment* (Report, 2018) 6, cited in Aboriginal Legal Service, Submission No 120 to Parliament of New South Wales, *Inquiry into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (15 September 2020) 13.

⁵⁷ Dharriwaa Elders Group, *Yuwaya Ngarra-li – 'Vision'* <<https://www.dharriwaaeldersgroup.org.au/index.php/yuwayangarrali>>; UNSW Sydney, Institute for Global Development, *Dharriwaa Elders Group launches a vision for young people in Walgett* <<https://www.igd.unsw.edu.au/dharriwaa-elders-group-launches-vision-young-people-walgett>>; Ruth McCausland et al, 'CommUNlty-Led development: A partnership to realize Aboriginal Elders' vision for change' (2021) 52(4) *Community Development* 1, 13.

⁵⁸ Deadly Connections, <<https://deadlyconnections.org.au/>>; Centre for Crime, Law and Justice, Faculty of Law and Justice, UNSW, 'Replacing the Youth Justice System for Children aged 10 – 13 years in NSW: A 'Best Interests' Response' (September 2021) 26.

⁵⁹ Weave Youth and Community Services <<https://www.weave.org.au/#>>.

⁶⁰ BackTrack, *What BackTrack Does* <<https://backtrack.org.au/what-we-do/>>.

⁶¹ Kim Edmunds et al, 'Exploring Community-Based Options for Reducing Youth Crime' (2021) 18 *International Journal of Environmental Research and Public Health* 1, 1-2.

Recommendation 3

State and territory police forces review their use of pre-emptive policing practices and discontinue applying any 'risk-based' policing practices to young people. This should be reflected in police standard operating procedure documents.

Recommendation 4

State and territory governments, supported by the Commonwealth, invest in bail support programs for young people, assisting them to address the root causes of offending, increase compliance with bail conditions and better realise the underlying goals of bail systems.

Recommendation 5

State and territory governments, supported by the Commonwealth, consult with communities and community-led organisations to identify opportunities to expand the availability of programs that take a place-based approach to reducing recidivism, with a focus on young people. Governments should also deliver adequate funding to support the implementation of any such new programs.

3.6 Reducing the drivers and root causes of youth crime

Reducing the drivers of youth crime requires a focus on capacity building through social policy, education, health, housing and the provision of support services. This necessitates a whole of government response and a move away from reactive law and order responses that continue to fail Australia's communities.

To effectively address the underlying drivers of crime, governments must work collaboratively, in partnership with community, to develop evidence-based early intervention strategies.⁶² These strategies may prevent young people from entering (and re-entering) the criminal legal system and would provide the necessary infrastructure to support raising the age of criminal responsibility. This requires government agencies not only working together, but working with communities to understand community needs, aspirations and solutions.

As explored below, insecure housing is one example of a driver of youth crime that requires the mobilisation of services that sit outside the criminal legal system.

The failure of top-down and police-led responses

When designing programs and strategies, priority must be given to consulting communities about the issues affecting their young people.⁶³ A community-led, whole of government approach, would shift the focus to the wider community, rather than focusing only on the individuals affected, which can be experienced as both stigmatising and isolating.

⁶² Murphy et al (n 13) 63.

⁶³ The NSW Implementation Plan for Closing the Gap notes that early interventions to support young people need to be community designed and driven and to support health, education and housing: NSW CTG Implementation Plan (n 15) 99.

For example, early intervention programs which support disadvantaged households are among the most effective prevention programs in terms of their ability to reduce the number of juvenile crime outcomes and deliver substantial long-term savings to taxpayers.⁶⁴ The most successful programs are those that emphasise family wellbeing, likely because they focus on upskilling the adults in the best position to care for the child.⁶⁵

Conversely, crime reduction programs that focus on the individual offender rather than the family and underlying systemic causes of offending are much less successful. Intensive supervision, surveillance and early release programs which overlook health, education and housing, for example, have not been found to be effective.⁶⁶ These programs have a similar effect to targeted policing as they reduce trust and increase stigmatisation, while neglecting root causes of offending.⁶⁷

Similarly, aiming to reduce youth crime by prioritising policing strategies that increase interaction of young people with the criminal legal system is counterproductive and harmful. Coercive policing approaches have a minimal impact on crime reduction and, in some cases, have been found to create or exacerbate social problems.⁶⁸ As noted above, there is little convincing evidence that targeted or proactive policing reduces the long-term costs associated with ongoing criminal legal system contact, or is appropriate for addressing the needs of children and young people.⁶⁹ In fact, in some circumstances targeted policing is shown to increase long term financial and social costs.⁷⁰

Community-focused early intervention programs require a whole of government approach. For example, the NSW Police Youth Strategy 2023 – 2025 ('Youth Strategy') sets out that NSW Police understand that youth issues must be addressed collaboratively, from a whole-of-government approach and recognises that risk factors associated with offending by youth are

⁶⁴ Eileen Baldry, Julian Trofimovs, Jude Brown, Nicola Brackertz and Michael Fotheringham, Springboard Evaluation Report (Evaluation Report, University of NSW and Australian Housing and Urban Research Institute, 2015) 19–21.

⁶⁵ PW Greenwood, 'Cost Effective Violence Prevention through Targeted Family Interventions' (2004) *Annals of the New York Academy of Sciences*, 1036(1) 201.

⁶⁶ Steve Aos, Roxanne Lieb, Jim Mayfield, Marna Miller and Annie Pennucci, 'Benefits and costs of prevention and early intervention programs for youth' (Report No. 04-07-3901, Washington State Institute for Public Policy, 17 September 2004).

⁶⁷ Rob White, 'Ethnic Diversity and Differential Policing in Australia: The Good, the Bad and the Ugly' (2009) 10(4) *Journal of International Migration & Integration*, 359.

⁶⁸ Cunneen, White and Richards (n 31) 153, Daryl S Borgquist, Timothy J Johnson and Martin A Walsh, 'Police and urban youth relations: an antidote to racial violence: A guide for police, youth and community leaders to improve police/urban relations' (Report, United States Department of Justice, Community Relations Service, 1995); John Liederbach, 'Controlling suburban and small-town hoods: an examination of police encounters with juveniles' (2007) 5(2) *Youth Violence and Juvenile Justice* 107; Rob White, 'Police practices, punishment and juvenile crime prevention', in Allan Borowski and Ian O'Connor (eds), *Juvenile crime, justice and corrections* (Addison Wesley Longman, 1997).

⁶⁹ Ruth McCausland, Eileen Baldry, Sarah Johnson and Anna Cohen, 'People with mental health disorders and cognitive impairment in the criminal justice system: Cost-benefit analysis of early support and diversion' (Report for Australian Human Rights Commission, UNSW and PricewaterhouseCoopers, August 2013).

⁷⁰ Eileen Baldry, Leanne Dowse, Ruth McCausland and Melissa Clarence, 'Lifecycle institutional costs of homelessness for vulnerable groups' (Final Report, Australian Government, 15 May 2012); McCausland et al (n 69) 1-12.

often beyond the direct influence of the NSW Police Force.⁷¹ As the Youth Strategy sets out:

The NSW Police Force plays an important role in identifying at-risk young people, however, the way in which the NSW Police Force can assist those young people to make better choices and avoid contact with the criminal justice system is limited. The importance of building collaborative relationships with other agencies is vital to ensure a harmonious approach is taken in connecting young people with appropriate support services.⁷²

Programs which help minimise unnecessary coercive contact between police and young people can better support crime prevention.⁷³ On the other hand, programs which increase police contact with youth negatively affect perceptions of and relationships with police,⁷⁴ leading to a deterioration in trust. In some instances, disadvantaged children with ‘challenging behaviour’ borne out of mental and cognitive disability, or other indicators of social disadvantage, are left to the police to manage, when they should be being supported by social service agencies.⁷⁵

If we want different outcomes, we cannot keep doing more of the same. We need to invest in our communities and their capacity to support young people at risk.

Recommendation 6

Young people at risk of offending or reoffending should be supported by an evidence-based early intervention community-led model, separate to a criminal justice and policing response. Where the young person is Aboriginal or Torres Strait Islander, Aboriginal community-controlled organisations and supports should be prioritised.

Investment in early and preventative interventions are the key to raising the age of criminal responsibility to 14 years of age

A whole of government approach focused on service provision and capacity building, which develops strategies in partnership with the community, would enable states to raise the age of criminal responsibility to 14.

Programs and frameworks based on early intervention and prevention to address the underlying causes of anti-social behaviour must be at the core of any youth justice strategy, forming a vital element of an alternative response.

⁷¹ New South Wales Police Force, *Youth Strategy 2023-2025* (2023) 10

<https://www.police.nsw.gov.au/_data/assets/pdf_file/0010/616816/YouthStrategy_D17.pdf>.

⁷² Ibid.

⁷³ See, eg, Shuling Chen, Tania Matruglio, Don Weatherburn, Jiuzhao Hua, NSW Bureau of Crime Statistics Research, ‘The transition from juvenile to adult criminal careers’ (Crime and Justice Bulletin, Number 86, 2005); Jiuzhao Hua, Joanne Baker and Suzanne Poynton, ‘Generation Y and crime: a longitudinal study of contact with the NSW criminal courts before the age of 21’ (Crime and Justice Bulletin, Number 96, 2006); Mark Lynch, Julianne Buckman, and Leigh Krenske, ‘Youth justice: criminal trajectories’ (Trends and Issues No 265, Australian Institute of Criminology, September 2003); Grace Skrzypiec and Joy Wundersitz, ‘Young people born 1984: extent of involvement with the juvenile justice system’ (Research Findings, Office of Crime Statistics and Research, April 2005); Don Weatherburn, Rachel Cush and Paula Saunders, ‘Screening juvenile offenders for further assessment and intervention’ (Crime and Justice Bulletin, Number 109, 2007).

⁷⁴ Cunneen, White and Richards (n 31) 314.

⁷⁵ McCausland et al (n 69) 1-12.

The need for targeted and evidence-based prevention, supports and services for vulnerable children and their families is not controversial. It has been emphasised by several recent state and territory reports investigating youth justice.⁷⁶ The NSW Youth Diversion Inquiry stated:

The Committee agrees that early intervention is key and that, wherever possible, funds should be used to address the underlying causes of offending before it occurs, rather than reacting afterwards. For this reason, the Committee has made findings and recommendations throughout the report in support of an early intervention approach ... It has also recommended increased funding for youth homelessness services, mental health, and drug and alcohol services, measures to stop young people disengaging from school, and training and staff within schools to identify areas of concern.⁷⁷

Similarly, the Royal Commission into the Protection and Detention of Children in the Northern Territory observed:

The goal of early intervention is to reduce risk factors, strengthen protective factors and provide children and young people with life skills and family and community support. Prevention programs are aimed at reducing the likelihood a child may offend or reoffend through addressing individual risk factors for offending behaviour.⁷⁸

...

Diversion gives children and young people an opportunity to learn from their mistakes and correct their behaviours without resorting to the formal justice system.⁷⁹

Any government response to children who come to the attention of the criminal legal system at a young age must consider their unique vulnerabilities and backgrounds, and ensure services and programs are adequately resourced to meet those needs.

Domestic and family violence and insecure housing as drivers of youth crime

In seeking to understand the drivers of youth crime, it is important to recognise the well-established link between experiences of family and domestic violence and increased risk of youth offending.⁸⁰ Links such as these provide stark examples of why a whole of government approach

⁷⁶ Royal Commission into the Protection and Detention of Children in the Northern Territory (Final Report, November 2017) 411-12; NSW Parliament Committee on Law and Safety (n 6) Finding 13; Robert Atkinson, 'Report on Youth Justice from Bob Atkinson AO, APM, Special Advisor to Di Farmer MP, Minister for Child Safety, Youth and Women and Minister for Prevention of Domestic and Family Violence: Version 2', 2018, Recommendations 2-5.

⁷⁷ NSW Parliament Committee on Law and Safety (n 6) [4.246]–[4.247]; see also Findings 4, 13 and 32; Finding 13 states 'Early intervention is a key factor in diverting young people from the criminal justice system'.

⁷⁸ Royal Commission into the Protection and Detention of Children in the Northern Territory (n 76) 411.

⁷⁹ Ibid, 249.

⁸⁰ Local Government Association, *The relationship between family violence and youth offending* (Report, June 2018) 6 <https://www.local.gov.uk/sites/default/files/documents/15%2034%20-%20The%20relationship%20between%20family%20violence%20and%20youth%20offending-V4_1.pdf>; Equity Economics, *Nowhere to go: The benefits of providing long-term social housing to women that have experienced domestic and family violence* (Report, July 2021) 13 <https://everybodyshome.com.au/wp-content/uploads/2022/03/EE_Women-Housing_Domestic-Violence_WEB_SINGLES-2-compressed.pdf>.

is required to address youth crime. In regional and rural NSW particularly, the lack of adequate housing and support for women and children experiencing domestic and family violence, and the subsequent instances of homelessness, puts children and young people at greater risk of contact with the criminal legal system. We consider the situation is likely to be similar in other states and territories.

Regional NSW experiences higher rates of domestic and family violence than the Greater Sydney area.⁸¹ From 2019 to 2023, reports of domestic violence-related assaults increased by 24% in regional NSW.⁸² Compared to those in major cities, people who live in regional and remote Australia also face greater difficulties leaving violent relationships and accessing support.⁸³ Among the many detrimental consequences of domestic and family violence, young people who experience violence have a higher risk of offending.⁸⁴

The current housing crisis in regional and rural NSW is further impeding the ability for women and children to safely leave violent situations. The NSW Regional Housing Taskforce Findings Report found that regional NSW has an urgent need for more social and affordable housing.⁸⁵ Housing on the private market is increasingly unobtainable as rental affordability in regional NSW is declining.⁸⁶ The number of low-income households in regional NSW paying more than 50% of their income on rent increased by 52% from 2020 to 2022.⁸⁷ These households are under significant financial stress and at risk of homelessness.⁸⁸ High rental prices and low vacancy rates mean that many young people are being locked out of the rental market.⁸⁹

The lack of housing options drives many women to return to perpetrators and the risk of violence, or into homelessness.⁹⁰ Many dependent children, and youth who leave the home, are couch-surfing, living in unsafe or overcrowded dwellings or experiencing homelessness.⁹¹ Yfoundations, the NSW peak body advocating for young people at risk of and experiencing homelessness,

⁸¹ New South Wales Bureau of Crime Statistics and Research, *NSW Trends in Domestic & Family Violence – Quarterly Report Sep 2023* (September 2023) 3 <<https://www.bocsar.nsw.gov.au/Documents/RCS-Quarterly/NSW%20Trends%20in%20Domestic%20n%20Family%20Violence%20-%20Quarterly%20report%202023Q3.pdf>>.

⁸² New South Wales Bureau of Crime and Statistics, *Crime in Regional and Rural NSW in 2023: Trends and Patterns* (Briefing Report No 169, March 2024) 17 <<https://www.bocsar.nsw.gov.au/Publications/BB/BB169-Report-Crime-in-Regional-and-Rural-NSW-2023.pdf>>.

⁸³ Australian Institute of Health and Welfare, *Family, domestic and sexual violence in Australia: continuing the national story 2019 – In brief* (Report, 2019) 9 <https://www.aihw.gov.au/getmedia/b180312b-27de-4cd9-b43e-16109e52f3d4/aihw-fdv4-fdsv-in-australia-2019_in-brief.pdf?v=20230605172455&inline=true>.

⁸⁴ Equity Economics (n 80) 13.

⁸⁵ New South Wales Department of Planning, Industry and Environment, *Regional Housing Taskforce Findings Report: Summary of Stakeholder Engagement* (September 2021) 3-4 <<https://www.planning.nsw.gov.au/sites/default/files/2023-03/regional-housing-taskforce-findings-report.pdf>>.

⁸⁶ SGS Economic and Planning, *Rental Affordability Index* (Report, November 2023) 64 <https://sgsep.com.au/assets/main/SGS-Economics-and-Planning_RAI2023-Website.pdf>.

⁸⁷ Impact Economics and Policy, *Aftershock: Addressing the Economic and Social Costs of the Pandemic and Natural Disasters* (Report No 3, October 2022) 6 <https://homelessnessnsw.org.au/wp-content/uploads/2022/10/IE_Aftershock_Housing_-1.pdf>.

⁸⁸ Ibid 22.

⁸⁹ Yfoundations, *Regional Youth Homelessness Forum Consultation Report* (October 2022) 3 <https://assets.nationbuilder.com/yfoundations/pages/357/attachments/original/1664845066/Regional_Youth_Homelessness_Forum_Report.pdf?1664845066>.

⁹⁰ Equity Economics (n 80) 4.

⁹¹ Yfoundations (n 89).

reported that in 2019-20, 35% of 12- to 25-year-olds who accessed specialist homelessness services in NSW lived in rural or regional areas.⁹²

Homelessness has traumatic and wide-ranging effects on a young person.⁹³ The Australian Institute of Family Studies explains that:

Young homeless people are often unable to support themselves, ineligible for benefits, and unlikely to find employment. Consequently, they may engage in survival behaviours—begging, theft, drug dealing and prostitution—to earn income for food and shelter. Not only are some of these behaviours illegal, they are also more visible to police due to the lack of privacy experienced by homeless people.⁹⁴

The experience of homelessness can also lead to higher likelihood of mental illness, increased levels of substance abuse, and lower educational outcomes.⁹⁵ These effects create an additional likelihood of contact with the youth justice system.⁹⁶ Young homeless people are also at risk of being charged for ‘justice procedure offences’, including breaches of bail, parole, community-based order and AVOs.⁹⁷ For youth, homelessness increases the risk of crime, and crime increases the risk of homelessness.⁹⁸

Any measures to reduce youth crime must ensure that women and children can escape domestic and family violence safely. There must be domestic violence and homelessness services available to provide support, as well as long-term, stable options for housing to ensure the safety and wellbeing of women, children and youth.⁹⁹

Recommendation 7

State and territory governments, supported by the Commonwealth, should increase support services and social and affordable housing for women and children experiencing domestic and family violence, particularly in regional and rural areas.

⁹² Ibid 2.

⁹³ Australian Institute of Family Studies, *Children’s exposure to domestic and family violence: Key issues and responses* (Report No 26, December 2015) 5 <https://aifs.gov.au/sites/default/files/publication-documents/cfca-36-children-exposure-fdv_0.pdf>.

⁹⁴ Australian Institute of Family Studies, ‘Child maltreatment, homelessness and youth offending’ (Short article, October 2017) <<https://aifs.gov.au/resources/short-articles/child-maltreatment-homelessness-and-youth-offending>>.

⁹⁵ Nous Group, *Youth Homelessness Info Paper* (Report, 11 January 2023) 5 <<https://nousgroup.com/assets/docs/Australia-Nous-ESSC-Youth-Homelessness-Paper.pdf>>.

⁹⁶ Australian Institute of Health and Welfare, *Vulnerable young people: interactions across homelessness, youth justice and child protection* (Report, December 2016) 19-23 <<https://www.aihw.gov.au/getmedia/944d5eb5-a940-41be-b1a6-f81f95636aa5/20475.pdf?v=20230605173150&inline=true>>.

⁹⁷ Yfoundations, *Young, in trouble and with nowhere to go: Homeless adolescents’ pathways into and out of detention in NSW* (Report, 2021) 19 <<https://assets.nationbuilder.com/yfoundations/pages/200/attachments/original/1654146355/Youth-Justice-Research-Report-FINAL-2021-compressed.pdf?1654146355>>.

⁹⁸ Ibid 5.

⁹⁹ Equity Economics (n 80) 8–10.

4. The use of segregation, separation and confinement in youth justice centres

4.1 Concerns regarding solitary confinement-like practices

In 2018, the NSW Inspector of Custodial Services ('ICS') published a report on the use of force, separation, segregation and confinement in NSW juvenile justice centres. The ICS found that 'confinement is the most prevalent punishment in all [Youth Justice Centres] in NSW. This is despite there being no evidence that supports the use of confinement to effect positive behavioural change.'¹⁰⁰

We are concerned that youth justice authorities around Australia, including Youth Justice NSW, rely on solitary confinement-like practices including segregation, separation and confinement as forms of punishment, behaviour management or as a response to staffing shortages, when they should be prioritising therapeutic and rehabilitative approaches. In October 2022, the NSW Ombudsman reported a 46% rise in periods of segregation lasting more than 24 hours in youth justice centres during the 2021-22 financial year.¹⁰¹

Solitary confinement interferes with child development and can traumatise young people, potentially causing permanent psychological damage which may lead to self-harm, psychosis, and suicide. We currently represent a person who was seventeen years old when subjected to solitary confinement in Cobham Youth Justice Centre in 2016, locked in a cell for 25 days and only allowed half an hour out each day while handcuffed and ankle-cuffed, forced to eat all meals with his hands and punished for trying to communicate with other young people in the centre.¹⁰² Similar concerning practices have been identified in other states and territories, including recently in Western Australia at the Banksia Hill Detention Centre,¹⁰³ and in Queensland at the Cleveland Youth Detention Centre.¹⁰⁴

In the 2018 report of the ICS, which is the most recent report on the conditions of confinement in NSW youth justice centres, the ICS found evidence that:

- Some periods of segregation and confinement were scheduled to end after bedtime, meaning that a young person spent a longer period than prescribed locked in their room.¹⁰⁵

¹⁰⁰ New South Wales Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres* (Report, November 2018) 16 <<https://inspectorcustodial.nsw.gov.au/documents/inspection-reports/use-of-force-separation-segregation-and-confinement-in-nsw-juvenile-justice-centres.pdf>>.

¹⁰¹ New South Wales Ombudsman, *Annual Report 2021 – 2022* (Report, 25 October 2022).

¹⁰² Georgina Mitchell 'It broke my mind': Former youth detainee sues after being held in solitary confinement' *Sydney Morning Herald* (online, 15 August 2022) <<https://www.smh.com.au/national/nsw/it-broke-my-mind-former-youth-detainee-sues-after-being-held-in-solitary-confinement-20220812-p5b9dk.html>>

¹⁰³ Western Australia Office of the Inspector of Custodial Services, *2023 Inspection of Banksia Hill Detention Centre and Unit 18 at Casuarina Prison (Part One)* (Report No. 148, May 2023) 15–16.

¹⁰⁴ Ellen Fanning, 'Queensland government may have broken own laws by locking 13yo in detention cell for up to 24 hours a day', *ABC News* (online, 15 March 2023) <<https://www.abc.net.au/news/2023-03-15/qld-youth-crime-human-rights-watch-house-detention/102093378>>.

¹⁰⁵ NSW Inspector of Custodial Services (n 100) 121.

- Some young people reported that they were woken during the night to be moved from a holding room back to their own room.¹⁰⁶
- Meals were required to be eaten alone.¹⁰⁷
- Young people placed in separation, segregation or confinement are sometimes not provided with cutlery because of a risk of self-harm, and had to eat rice and curry with their fingers.¹⁰⁸
- Exercise facilities are generally not available to young people in separation, segregation or confinement, although the ICS reported that some facilities adopt a more flexible approach and allow young people to access exercise facilities, for example, an indoor gym, an oval, basketball courts or a pool.¹⁰⁹
- Young people placed in separation, segregation or confinement will generally not attend school.¹¹⁰ They may receive an 'education pack', consisting of some educational activities they are expected to complete on their own while in their room. The ICS observed, however, that some 'education packs' consisted of only magazines and a stress ball.¹¹¹
- While visits with family members are usually not disrupted by periods of isolation,¹¹² visits are sometimes required to be non-contact given the often complex needs of young people held in isolation.¹¹³ These visits can be experienced as 'shameful and humiliating'.¹¹⁴

In 2017, it was noted that the contact between young people in separation, segregation or confinement and staff members from the Forensic Mental Health Unit and correctional officers usually takes place in handcuffs, though an opening in a door.¹¹⁵

Our primary concerns about the regulation of solitary confinement-like practices in NSW are:

- There is no legislative definition of 'solitary confinement' and as such no proper regulation of, reporting on, or accountability for the practice.
- The legislation permits children to be held in conditions that would amount to solitary confinement as defined by international law.
- The legislation does not limit the making of consecutive confinement orders, allowing for children to be held in conditions that would amount to prolonged solitary confinement as defined by international law.
- The legislation defines solitary confinement-like practices in accordance with their intended purpose, however 'administrative' or 'protective' forms of isolation may be used as punishment in practice. Further, these types of confinement are likely to be experienced as punitive.
- The law permits solitary confinement-like practices to be used as a form of punishment in youth justice centres in NSW.¹¹⁶ And, as at 2018, this was the most prevalent form of

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid 122.

¹⁰⁹ Ibid 123.

¹¹⁰ Ibid 125.

¹¹¹ Ibid.

¹¹² Ibid 131.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Ibid 132, citing James Ogloff, *Separation, Segregation and Confinement of Juvenile Detainees: Towards Best Practice, report prepared for the Inspector of Custodial Services* (March 2017) p 13.

¹¹⁶ *Children (Detention Centres) Act 1987* (NSW) s 21.

punishment in youth justice centres in NSW.¹¹⁷

- Once a child is placed in isolation, there are insufficient safeguards in place to mitigate that isolation having a negative impact on that child's wellbeing.

4.2 Suggested reforms to solitary confinement-like practices

Drawing on the ICS report and the experiences of our clients, the JEC has identified a number of policy and regulatory improvements we believe should be implemented by Youth Justice NSW and by similar bodies nationally in order to avoid the harmful effects of segregation on young people.

Definitions

Both 'solitary confinement' and 'prolonged solitary confinement' must be defined by law. It is our view that the international law definitions should be adopted in domestic law.

To properly define and regulate 'solitary confinement', 'meaningful human contact' must also be defined. It is established that a key element of solitary confinement as defined in the Mandela Rules is the absence of 'meaningful human contact', however the Mandela Rules do not define 'meaningful human contact'. We suggest that state and territory governments should draw on the guidance provided in the Essex Paper¹¹⁸ to craft a definition, in consultation with experts, including psychologists, social workers, and young people with lived experience of solitary confinement-like practices.

Prohibition of solitary confinement

The use of solitary confinement on young people should be prohibited, in line with international law.¹¹⁹ We note that this recommendation has been supported in three recent reports:

- Recommendation 8.3 of the Disability Royal Commission, that 'states and territories should introduce legislation to prohibit solitary confinement in youth justice settings'.¹²⁰
- The United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment recommended that '[Australia] ensure that persons under the age of 18 years are never subject to solitary confinement, as this constitutes a form of ill-treatment and in some cases may amount to torture'.¹²¹

¹¹⁷ NSW Inspector of Custodial Services (n 100) 16.

¹¹⁸ The University of Essex and Penal Reform International, *Essex paper 3: Initial guidance on the interpretation and implementation of the UN Nelson Mandela Rules* (Report, February 2017), based on deliberations at an expert meeting organised by Penal Reform International and Essex Human Rights Centre at the University of Essex, 7–8 April 2016 <<https://cdn.penalreform.org/wp-content/uploads/2016/10/Essex-3-paper.pdf>>.

¹¹⁹ United Nations General Assembly, *Rules for the Protection of Juveniles Deprived of their Liberty* (UN Doc GA/RES/45/113, 14 December 1990) ('Havana Rules') 8 [67]. <https://www.ohchr.org/sites/default/files/res45_113.pdf>; see also Committee on the Rights of the Child *General comment No. 24 (2019) on children's rights in the child justice system* (UN Doc CRC/C/GC/24, 18 September 2019) 95(h) <<https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-comment-no-24-2019-childrens-rights-child>>.

¹²⁰ Disability Royal Commission (n 9) 18.

¹²¹ United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *Visit to Australia undertaken from 16 to 23 October 2022: recommendations and observations addressed to the State party* (Report, 20 December 2023) [74].

- Recommendation 19 of the AHRC's Help Way Earlier Report, that 'Australian Governments legislate to prohibit solitary confinement practices in child detention facilities, and prohibit the use of isolation as punishment in any circumstance'.¹²²

The prohibition on solitary confinement should include a prohibition on the use of confinement, for any period of time, as a form of punishment. This would reflect the international law position that the isolation of children should be a measure of last resort and for the shortest possible time. This recommendation was made in the Final Report of the Disability Royal Commission¹²³ and in the Help Way Earlier Report.¹²⁴

Additional safeguards

In addition to the primary reforms suggested above, if a child is to be placed in separation, segregation or confinement, there are minimum safeguards that need to be mandated by legislation to avoid the most harmful effects of isolation.

Some of these include:

- A minimum of six hours outside their cell each day.
- A minimum of two hours outside in fresh air every day, between the hours of 8 am and 6 pm.
- Continued access to recreation and exercise facilities.
- Continued school attendance.
- Meals to be eaten with others, outside of their cell, and using cutlery.
- Ongoing access to a psychologist. Consultations should be out of cell, face to face, and for a minimum of half an hour per consultation.

Commonwealth minimum standards

While these reform recommendations are primarily directed to state and territory governments, there may also be a role for the Commonwealth to play, legislating minimum standards of treatment for children and young people involved with the criminal legal system, where it has the constitutional power to do so. This should include with respect to better defining and regulating solitary confinement-like practices in youth detention centres.

This may be appropriate and warranted as an immediate step, in circumstances where state and territory systems have been plagued by repeated controversies and failings.

We are not experts on constitutional law and suggest this is a matter on which the Commonwealth should seek legal advice. However, on the face of it, there may be a constitutional basis for the Commonwealth to legislate minimum standards, in reliance on:

- the external affairs power, as a means to give effect to Australia's obligations under the Convention on the Rights of the Child; and

¹²² AHRC (n 1) 90-91.

¹²³ Disability Royal Commission (n 9) 18.

¹²⁴ AHRC (n 1) 90-91.

- the Commonwealth's power to legislate with respect to those who have committed or are charged with Commonwealth criminal offences.

As to the second of these, we understand that power to be variously sourced in the express incidental power in s 51 (xxxix) of the Constitution or in the implied incidental powers contained in the heads of power in ss 51 and 52 and in the executive power in s 61.¹²⁵

As to the external affairs power, a number of articles of the Convention on the Rights of the Child may particularly support legislation to set minimum standards for the treatment of children and young people in the criminal legal system, including in youth detention facilities. These include Articles 3(3), 19, 37 and 40(1), (2) and (3).

We note that Australia has a reservation to Article 37(3) of the Convention, in respect of the obligation not to detain children with adults. The AHRC has recommended that this reservation be withdrawn¹²⁶ and we support that recommendation.

Recommendation 8

State and territory youth justice authorities decrease their reliance on segregation, separation and confinement in youth justice centres, and instead prioritise therapeutic and rehabilitative approaches.

Recommendation 9

State and territory governments introduce legislation, better defining and restricting the use of solitary confinement-like practices in youth detention facilities.

Recommendation 10

The Commonwealth, where it is within constitutional power, legislate to provide for minimum standards in youth detention facilities Australia-wide, including with respect to solitary confinement-like practices.

¹²⁵ Parliament of Australia, 'History of criminal law' (online) <https://web.archive.org/web/20190321171637/https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/Crimlaw/Historycriminallaw>

¹²⁶ AHRC (n 1) Recommendation 18.