

REFORMING TASMANIA'S YOUTH JUSTICE SYSTEM

Submission to Department of Communities Tasmania

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

The ALA office is located on the land of the Gadigal of the Eora Nation.

¹ www.lawyersalliance.com.au.

“[A]s far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help, and assistance.”

- The Committee of Inquiry into the State Farm and School for Boys, 1925

“The philosophical framework of the Child Welfare Act does not encourage a system where young people are held accountable for their actions. The act focuses on the 'needs' rather than the 'deeds' of young people who offend. Consequently, there are limited options available to the Children's Court for sentencing young people.”

- Youth Justice Bill 1997 (No. 29) Second Reading, 18 September 1997

Introduction

The ALA welcomes the opportunity to respond to the Discussion Paper for Reforming Tasmania's Youth Justice System. Our submission includes a brief history of youth justice legislation in Tasmania, followed by ALA's response to specific discussion points as set out in Appendix 3 of the Discussion Paper.

A brief history of youth justice legislation in Tasmania

Section 137 of *The Children of the State Act 1918* (Tas) provided that:

“as far as practicable every juvenile delinquent shall be treated, not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help, and assistance.”

This notion of recognising and promoting the welfare of young offenders – essentially seeing them as ‘Children First’² - was echoed in the report of the Committee of Inquiry into the State Farm and School for Boys (now Ashley Youth Detention Centre) in 1925.

Part V of both the *Children of the State Act 1918* (Tas) and its successor, the *Infancy Welfare Act 1935* (Tas), provided for a dedicated Children's Court to operate with respect to youth offending in Tasmania.

The Child Welfare Act 1960 (Tas) repealed the *Infant's Welfare Act 1935* (Tas) and also made provision for a dedicated Children's Court; Part III. Section 4 of the *Child Welfare Act* provided that the Act was to be exercised so as to “secure that....each child suspected of having committed, charged with, or found guilty of an offence shall be treated, not as a criminal, but as a child who is, or may have been, misdirected or misguided, and that the care, custody and discipline of each ward of the State shall approximate as nearly as may be to that which should be given to it by its parents.”

In 1997, the *Youth Justice Act* was passed by the Parliament. This Act removed the use of Children's Courts in Tasmania. In the Second Reading speech, the underlying purpose of the newly proposed legislation was set out:

“The legislation under which the current system of youth justice operates is the *Child Welfare Act 1960*. This act is an expression of the 'Welfare Model' of juvenile justice which was strongly held at that time. The *Child Welfare Act* states that young people who offend are to be seen as 'misdirected

² Tasmania Legal Aid (2021), ‘Children First: Children in the Child Safety and Youth Justice System’.

or misguided'. This model of youth justice argues that offending is a symptom of an underlying disturbance in a child, resulting from parental neglect or some other circumstances outside the child's control.

The philosophical framework of the *Child Welfare Act* does not encourage a system where young people are held accountable for their actions. The act focuses on the 'needs' rather than the 'deeds' of young people who offend...

...All other States have replaced the approach inherent in the *Child Welfare Act* with a system more in line with a 'justice model'. **This approach pays more attention to the offence that a child has committed rather than the child.** It assumes that the child is accountable and in this sense, it is **more like the adult justice system.**" [Emphasis added].

This statement demonstrates the current legislative framework around troubled young people in Tasmania. In particular the *Youth Justice Act 1997* (YJ Act) represents a regression towards a punitive approach to dealing with youth offenders – a widening of the net to bring young people into an institutionalised punitive setting with a withdrawal of notions of child welfare and rehabilitation. It demonstrates that the current measures are structured to deliver responses that primarily intend to reprimand the youth and hold them accountable, rather than deliver a holistic approach to young people that considers their environment and circumstances. Remarkably, notions of youth justice were, *prima facie*, more progressive in 1918 than today.

In light of this illuminating brief review of the legislative history, ALA's response to the discussion paper will focus on how the YJ Act and supporting legislation can be amended to see a return to those earlier notions of seeing young offenders as children first and provide a holistic and welfare-focused response to young offenders.

We note at the outset the obligation of the Tasmanian Government to ensure that in legislation, guidelines, and practice the *Convention on the Rights of the Child*³ must be adhered to, and inform such instruments and practices.

Prevention and early detection

Discussion point 19

What is local government's role in a youth centred community?

1. Local government has a vital role in ensuring that community-based services (tailored to the specific community) are available to support at-risk youth facing barriers to education, family support and health services. These services must be non-sectarian and inclusive, properly funded to ensure that they can positively and meaningfully impact on the lives of at-risk youth and must also be well-advertised and accessible for youth of all ages, genders, ethnicity, sexual orientation,

³ Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989; entry into force 2 September 1990, in accordance with article 49. Australia Signature: 1990, Ratification/Accession: 1990.

and capability levels. Without primary or early intervention by the wider community, at-risk youth will continue to encounter and become institutionalised in the justice system.

Diversion and targeted interventions

Discussion Point 29

What are the barriers to working collaboratively to provide a coordinated approach to service provision?

2. Barriers to working collaboratively to provide a coordinated approach to service provision include a lack of funding within the youth justice, child protection and education systems to effectively provide support services to at-risk youth. Despite the *Children, Young Persons and their Families Act 1997* (Tas) ('CYPF Act') and YJ Act being passed by Parliament in 1997 as a comprehensive approach to child protection and young offenders,⁴ the gaps in coordination between the YJ Act, CYPF Act and *Education Act 2016* (Tas) (Education Act) result in children who are at-risk of offending, being insufficiently supported by government regarding educational, family or health issues they may face.
3. Effective implementation of a coordinated approach in respect of these three pieces of legislation would ensure that all youths who come into contact with youth justice services, are provided with adequate opportunities to be supported by government-provided family, health and/or educational services. Therefore, any amendments to the YJ Act should be reflected in the CYPF Act and the Education Act to facilitate a coordinated approach to Youth Justice.
4. In summary, it is ALA's submission that the YJ Act, CYPF Act and Education Act should be considered as a suite of legislative instruments dealing with youth justice and there must be clear and consistent linkages and concepts flowing through into each act.

Discussion Point 30

How can the issue of responsibility for governance be addressed?

5. As highlighted above, the issue of responsibility for governance can be addressed through a consistent approach to tackling at risk youth through the provisions of the Education Act, CYPF Act and YJ Act. To ensure a coordinated approach, it is recommended that the three legislative instruments sit under a single Ministerial portfolio.

⁴ Children, Young Persons and their Families and Youth Justice (Transitional and Saving Provisions) Bill 1997 (Fact Sheet, 1997).

6. Creating statutory duties that mandate referrals to services when children come into contact with the justice system, and reflecting these provisions in the CYPF Act and Education Act, will ensure that children are given a genuine opportunity to be supported in respect to educational, health, and family issues they may be experiencing. This approach requires community services to be available, sufficiently funded and accessible by government employees to support identified at-risk youth.
 - 6.1. Suggested amendments to the YJ Act are set out in response to Discussion Point 44 below.
 - 6.2. A suggested amendment to the CYPF Act to better support a holistic approach to youth justice is to mandate assessments of at-risk youth. Currently, the CYPF Act is largely unsupportive of “unnecessary” intervention, demonstrated by the following quote from the 1997 Second Reading speech:

“There is a strong move from a coercive approach to a more supportive approach - recognising the strengths within families. This provides the foundation for ensuring the best possible child and family support system in the country. The legislation recognises that no system can ever be perfect.”
 - 6.3. However, the lack of mandatory obligations to assess at-risk youth results in late intervention and missed opportunities for children to be diverted away from criminogenic risk factors. In order to address this issue, it is suggested that section 18 of the CYPF Act be amended. This section places a discretion upon the Secretary to make an assessment on the circumstances of a child who they reasonably believe or suspect is at-risk of abuse. By amending this to a mandatory obligation – that the Secretary *must* make an assessment of a child in such circumstances – will require that relevant departmental staff are made aware of at-risk children at an early stage, allowing for an assessment of the level of risk and any interventions that may be required to protect the young person and prevent criminal behaviours that often go hand in hand with abuse and/ or neglect.⁵
 - 6.4. Similarly, in the *Education Act*, the Secretary has a discretion under section 133 to determine the educational instruction available for children who have been excluded, expelled, or prohibited from attending school. This provision should be amended to place a positive obligation on the Secretary mandating that children *must* be provided with education regardless of their ability to physically attend a school. Access to education, particularly in circumstances where a youth is already identified as at risk (which is often going to lead to

⁵ See for eg: Tasmania Legal Aid (2021), ‘Children First: Children in the Child Safety and Youth Justice System’ – discussion regarding the over-representation in the YJ system of children also involved in the child safety system (‘crossover children’).

exclusion from school in the first place) will provide an opportunity to address one of the important criminogenic risk factors being insufficient education.

Discussion Point 34

Are the current legislative diversionary options appropriate?

7. The current legislative diversionary options in the YJ Act are not appropriate to achieving successful diversion. Currently, police are only empowered to informally caution,⁶ , formally caution,⁷ or refer young offenders to a community conferencing procedure,⁸ or file a complaint for the offence.⁹ Apart from an informal caution, all other pathways can lead to the youth being referred to Court.¹⁰ Although community conferencing was included in the YJ Act as a strong restorative justice pathway¹¹, the provisions regarding outcomes of the process primarily focus on imposing sanctions on the youth.¹² Therefore, it is ALA's submission that Part 2, Division 2 of the YJ Act (Diversionary procedure by police) should be amended to incorporate an emphasis on welfare and rehabilitation rather than punishment.

Further suggested amendments are discussed below in response to Discussion Point 44.

Discussion Point 35

How might police be better supported to deliver diversionary processes for young people?

8. It is our submission that police would be better supported to deliver diversionary processes for young people with the introduction of:
- Youth Police Officers with specialist training in dealing with young offenders. This would ensure police are better supported to deliver diversionary processes for young people;

⁶ YJ Act s 8(1).

⁷ Ibid, s 9(1)(a).

⁸ Ibid s 9(1)(b).

⁹ Ibid s 9(1)(c).

¹⁰ Ibid ss 9(6), 12A(4), 20(2).

¹¹ Tasmania, *Parliamentary Debates (Youth Justice Act 1997 Second Reading Speech)*, Legislative Council, 18 September 1997, 3 (John Cleary, Minister for Transport on behalf of the Minister for Community and Health Services).

¹² YJ Act s 19(1).

- A focus on Police-led programs to provide opportunities for diversion away from the criminal justice system;
- Amendments to the YJ Act to ensure the objects of the Act align with the specific statutory obligations and options available to police to refer young people to diversionary services.

It is our submission that any time a youth comes into contact with the justice system they are automatically assessed for referral to community services.

8.1. Youth Police Officers:

8.1.1. Introducing Youth Task Force Officers to Tasmanian Police (TP) would ensure that police responding to youth offenders are adequately trained and aware of the circumstances that at-risk youth commonly face, and have the skills to effectively communicate with young people. This approach has been implemented by the Victorian Police Force, with officers receiving specialist training to become Youth Resources Officers and Youth Specialist Officers.¹³

Youth Resource Officers *'focus on engaging with young people and supporting their safety and wellbeing'* and work with a number of stakeholders such as families, schools, health services and other police officers to promote positive engagement of youths in the justice system.

Youth Specialist Officers have specialist knowledge in relation to particular vulnerabilities or increased risks of harm. Specifically, Youth Specialist Officers are utilised in relation to serious youth offending and aim to work with different stakeholders to reduce the risk of the youth reoffending. Youth Specialist Officers also work with a range of stakeholders such as government agencies, community services, schools, and families to promote justice literacy and an understanding of the justice system and processes.

8.1.2. These diversionary measures have been deemed largely successful in Victoria, noting that it has been recognised that more funding is needed to ensure their continued success.¹⁴

8.2. Police-led Youth Programs:

8.2.1. TP would be better supported to divert youth offenders by being provided with dedicated youth programs aimed at assisting at-risk youth who come into contact with the youth justice system.

¹³ See www.police.vic.gov.au/youth.

¹⁴ Parliament of Victoria, *Inquiry into Youth Justice Centres in Victoria* (Final Report, March 2018) 36.

8.2.2. The Victorian Police Force has implemented a pilot program, “Embedded Youth Outreach Program” that aims to enhance the police force’s ability to support the complex needs of young offenders. This program partners a police officer with a Youth Support Advocacy Worker, and they respond together to the young person’s initial interactions with law enforcement in order to assess the youth and then provide them with the necessary support service referrals. An independent evaluation demonstrated that this program:

- has a positive effect on participants compared to a matched control group;
- has increased awareness of and engagement in support services; and
- created positive relationships between the police force, youth workers and at-risk youth.

It should be noted that the independent evaluation identified that for this program to be successful, adequate funding for staffing and resources is vital.¹⁵

8.2.3. In New South Wales, a similar program “Youth on Track” has also been implemented. In this program, all stakeholders, including police, education providers and youth workers, can make a referral to the Youth on Track Team, who are a centralised referral body. Once the referral is processed by Youth on Track, the team then assess the youth and their criminogenic needs, and then make the appropriate referrals to specific support services. This program has had significant positive results in improving education and employment capabilities of participating youth and has been demonstrated to reduce the risk of reoffending.¹⁶

8.3. Amendments to the Youth Justice Act:

8.3.1. Police can also be supported to divert youth through provisions that mandate that police refer all youth that come into contact with the justice system to community services that can assess the young person and provide them with any holistic or practical support they require. However, it should be noted that mandated referrals to services must be supported by adequately funded and resourced community-based service providers in collaboration with Local Government and community organisations.

¹⁵ See S Luebbbers, A.S. Pichler, R Fullam, and J Ogloff ‘Embedded Youth Outreach Program Evaluation,’ (Final Report, Swinburne University of Technology, 24 September 2020).

¹⁶ New South Wales Department of Communities and Justice, ‘Youth on Track Snapshot Report 2020’ (Report, 2020).

Discussion Point 37

Should the age of detention be higher than the age of criminal responsibility?

9. The age of detention for youth should be higher than the age of criminal responsibility. Noting that Tasmania has made a commitment to raise the age of criminal responsibility to 12 years of age, the age of detention should still be higher than the age of 12.
10. As highlighted in the discussion paper's appendix 2, many youth come into contact with youth justice due to behaviour which is a result of their circumstances. Therefore, addressing youth who are engaging in offending behaviour must be conducted with a focus on welfare, as this approach will address the motivation and risk factors behind the offending.
11. It is our submission that at a minimum, the earliest that a youth offender can be incarcerated should be raised to 14 years of age.¹⁷ However, because research demonstrates that detention itself increases the likelihood of recidivism,¹⁸ and youth commit offences primarily due to their personal circumstances, it is urged that youth, at any age, should not be placed in secure detention.
12. Further, as discussed below in response to Discussion Point 38, it is our submission that the YJ Act and associated holistic and diversionary approaches to crime should be extended in its application to young people up to the age of 21 years.

Discussion Point 38

How can we ensure that appropriate legal support is available to children and young people appearing in court?

9. Creating a Children's Court would provide age-appropriate legal support to children and young people. However, the success of a dedicated Children's Court will be heavily dependent on its implementation.
10. A paper reviewing the use of a Children's Court in NSW highlights current shortcomings and provides recommendations on how Children's Courts can be improved to be more effective.¹⁹ The review makes clear that all staff involved in the process need to be properly educated and it

¹⁷ Committee on the Rights of a Child (2019) *General Comment No. 24 (replacing General Comment No. 10) on Children's Rights in the Child Justice System* U.N. Doc CRC/C/GC/24 [33].

¹⁸ See Jason Payne, 'Recidivism in Australia: Findings and Future Research' (Research and Public Policy Series Report No. 80, Australian Institute of Criminology, 1 October 2007).

¹⁹ See Elizabeth Fernandez, Jane Bolitho, Patricia Hansen, Myvanwy Hudson and Sacha Kendall, 'A Study of the Children's Court of New South Wales' (Report, University of New South Wales, 19 August 2014).

is imperative that adequate funding be available for the education of staff and to provide resources, including addressing language and education barriers between children, their families and the Court.

11. We are of the view that the jurisdiction of the Children’s Court – perhaps better termed the Youth Court (as is the case in, for example, South Australia) – should be extended so that it can deal with youth up to the age of 21. This is because research tells us that brain development is such that there is little difference between 17 and 21 in many cases. In the United States this fact is driving a debate on, and proposals for, raising the age jurisdiction for youth courts. As the National Governors Association has written:

“Research shows that there is no clear age at which a person can think and reason as an adult: The prefrontal cortex, which moderates risk-taking, continues to develop into the mid-20s, and emotional and social factors are more likely to influence a young person’s cognitive functioning than that of an adult. Accordingly, officials in several states are considering extending the upper age limits of juvenile court jurisdiction beyond age 18 to include emerging adults or young people through their early 20s. As of 2021, three states, Vermont, Michigan and New York, have raised the age of maximum juvenile court jurisdiction to 18, meaning that a young adult can remain under the purview of juvenile courts until they turn 19. Vermont’s Act 201 of 2020 allows for further age expansions of juvenile court jurisdiction to include 19 year olds in 2022.”²⁰

12. It is our submission that based on the NSW experience, a specialist Children’s Court should aim:
 - To maintain the specialisation of court affiliated staff;
 - To commit to long term inter-agency collaboration through joint training, professional development, and possibly the sharing of data;
 - to focus on understanding the ways that disadvantage can intersect leading to entrenched social problems. In particular, understanding indigenous culture, mental health issues, and the impact of low socio-economic status (for example on parenting, health & housing) are integral to working in the Children’s Court.²¹

²⁰ National Governors Association (2021); *Age Boundaries In Juvenile Justice Systems*, August 12 <https://www.nga.org/center/publications/age-boundaries-in-juvenile-justice-systems/>.

²¹ *Ibid*, 46.

Discussion Point 42

How should we respond to young people who breach bail conditions, especially in circumstances where this activity would not otherwise be considered unlawful?

13. Bail conditions should be focused primarily on the welfare and rehabilitation of the child. Currently, children often fail to meet their bail conditions due to their personal circumstances.²² Therefore, breaches of bail conditions should be approached by assessing the current bail conditions and whether they remain appropriate.
14. More appropriate bail support programs are also required to ensure that youth have adequate housing, means of transportation and access to other services to give them the best opportunity to not only meet their bail requirements, but also to be eligible for bail instead of being held in detention whilst on remand.²³

A therapeutic service system for repeat and high-risk offenders

Discussion Point 43

How can we ensure that young people have access to appropriate supports throughout the legal process? What could be done to help them and their families better understand the legal process?

15. Providing education programs to youth and their families will increase justice literacy for people who come into contact with the justice system. Where appropriate, families should be incorporated into processes within the Children's Court so that they understand the proceedings, and educational materials should be provided by the Children's Court to participating youth and their families.
16. Currently, there is minimal research in Australia that shows the level of understanding that children have regarding court processes when they appear in Court,²⁴ although as suggested in the Discussion Paper, evidence in other jurisdictions demonstrates that there is a low level of

²² See Julie Stubbs 'Re-Examining Bail and Remand for Young People in NSW' (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485.

²³ See Allan Borowski 'Whither Australia's Children's Courts: Findings of the National Assessment of Australia's Children's Courts.' (2013) 46(2) *Journal of Criminology* 268.

²⁴ See Bernadette Saunders, Gaye Lansdell and John Frederick 'Understanding Children's Court Processes and Decisions: Perceptions of Children and Their Families' (2020) 20(3) *Youth Justice* 272.

understanding. Therefore, it is suggested that an empirical review into youth offender comprehension of court processes should be conducted in Tasmania. This evidence can then be used to inform any type of action that should be taken by the Tasmanian Government regarding programs that should be in place to enhance the justice literacy of at-risk youth.

17. Specific training should be made available to lawyers representing young offenders, for example through the Law Society's Continuing Professional Development program.
18. In line with the goal of a holistic approach to youth justice, it would be beneficial to provide professional development opportunities to teachers to assist in supporting students involved in the youth justice system to continue or re-engage with education.²⁵

Discussion Point 44

How can the Youth Justice Act be strengthened to further support a therapeutic approach? What services are required to enable this approach and how can they best be provided?

19. The YJ Act of 1997 came into force on 1 February 2000 as a parliamentary response to criticisms that children who committed offences, were not being adequately held accountable. As outlined above, the purpose of the YJ Act was conveyed in the Second Reading speech as a move away from a welfare approach towards a focus on making children accountable and *"in this sense it is more like the adult justice system."*²⁶
20. In light of these statements and the underlying purpose of the YJ Act, recommendations for amendments have been included below, with a focus on recognising the need for early intervention, diversion and a return to a welfare approach to dealing with young offenders.
 - 20.2 It is ALA's submission that amendments to sections 4 and 5 of the Act are required to ensure that the principles and objectives of the YJ Act convey the primacy of rehabilitative processes and welfare-based approaches to young offenders who are subject to the provisions of this Act. These objectives and principles should then be supported by amending Part 2 (Diversionary processes) to mandate assessment and referrals of youth to community services by police as soon as they come into contact with the youth justice system, regardless of the legal outcome of their offence.

²⁵ See for e.g. <https://education.vic.gov.au/school/teachers/classrooms/Pages/pd-supporting-students-engaged-in-the-youth-justice-system.aspx>.

²⁶ Tasmania, *Parliamentary Debates (Youth Justice Act 1997 Second Reading Speech)*, Legislative Council, 18 September 1997, 2-3 (John Cleary, Minister for Transport on behalf of the Minister for Community and Health Services).

20.3 Regarding bail, it should be mandated that youth cannot be refused bail due to inadequate housing, and that breaches of bail will be responded to by the conditions of bail being reconsidered in light of the young person's socio-economic and life circumstances.

20.4 Importantly, section 80 should be amended to raise the minimum age of incarceration to 14. A commitment should also be made to phase out detention and replace it with restorative housing options that focus on engaging community services to support the young person. Therefore, section 80 should be amended to reflect that detention should only be used when all other options have been exhausted *and* only when the youth presents a significant danger to society.

20.5 The detention facility that is subsequently used to house these youth should still have a primary focus on rehabilitation with the aim of transitioning the youth back to supported accommodation.

20.6 Proposed Amendments to the Youth Justice Act:

20.6.1 Amendments to section 4 – Objectives of the Act:

20.6.1.1 Section 4(e) currently articulates the objective of ensuring that a youth who has committed an offence is given appropriate treatment and rehabilitation and, if necessary, is appropriately sanctioned. Although this objective supports the rehabilitation of youth offenders, it is not translated into practice in the substantive provisions of the YJ Act. Therefore, relevant provisions in the YJ Act should be amended to support this objective.

20.6.1.2 The objective currently set out in section 4(f) is to enhance and reinforce the roles of guardians, families and communities in –

(i) minimising the incidence of youth crime; and

(ii) sanctioning and managing youths who have committed offences; and

(iii) rehabilitating youths who have committed offences and directing them towards the goal of becoming responsible citizens.

Although this objective supports the involvement of communities to assist in the rehabilitation of youth, this is also not translated into the provisions of the YJ Act. Therefore, provisions mandating referrals to community services are required to better support this objective.

20.6.1.3 Section 4(h) currently sets out the objective to ensure that, whenever practicable, a youth who has committed, or is alleged to have committed, an offence is dealt with in

a manner that takes into account the youth's social and family background and that enhances the youth's capacity to accept personal responsibility for his or her behaviour. While this section encourages consideration of the socio-economic circumstances of the youth, this objective must become a primary consideration when youth are subject to the provisions of the YJ Act. Furthermore, the wording of this provision should be changed from "*whenever practicable*" to "*must*" to mandate a welfare-based approach to youth offenders.

20.6.1.4 Similarly, the wording in section 4(i) should mandate that youth are provided with the opportunity to repair any harm caused to the victim of the offence and the community and to re-integrate themselves into the community by the substitution of the phrase "*wherever practicable*" with a positive obligation ("*must*").

20.6.2 Amendments to Section 5 – General principles of youth justice:

20.6.2.1 For section 5(1)(g), reference to youth detention in custody being used only as a last resort and for as short a time as necessary, requires clearer parameters, for example by the inclusion of a definition of "last resort" and guidelines for assessing the term "necessary". There must be explicit reference to enforceable human rights which apply to all detainees.

20.6.2.2 For section 5(1)(h), changing the word "is" to "must" will have the effect of mandating that any sanction applied be rehabilitative in nature. Further, this obligation should become a provision in Part 2 (Diverting youths from court system) and Part 4 (Court proceedings against a youth) of the Act, so that it becomes a binding obligation rather than merely a guiding principle.

20.6.2.3 Sections 5(2)(c)-(d), should provide a clear obligation to ensure adequate consideration of a young person's family environment and continuity of education or employment, such as providing guidelines in assessing what is "unnecessary".

Overall, the current principles in section 5 do not reflect the contemporary literature on how offences committed by youth are generally a result of their circumstances. Therefore, section 5 should be amended to include principle(s) that define that the primary principle of youth justice is rehabilitation and improving welfare. The principles should also convey the importance of

diversion and rehabilitation being a primary consideration throughout the whole process of “sanctioning” youth.²⁷

20.6.3 Amendments to Part 2 – Diverting youths from the court system

20.6.3.1 Diversionary procedures by the police must be better structured to support a rehabilitative and welfare approach to youth offending. This might include a process between formal and informal cautioning whereby there is a standard formal caution but also an obligation on a police officer to refer youth to community services. However, this would require the availability of adequate services, and that the CYPF Act and Education Act contain similar provisions that mirror the diversion provisions in the YJ Act.

20.6.3.2 As a part of this process, it would be beneficial for liaison officers from youth justice, young people and their families, education and health departments to form a panel or unit that can meet with and discuss a welfare approach to dealing with youth offenders. This approach aligns with the blueprint goals of achieving a holistic approach in the safety and wellbeing of children.

20.6.3.3 Provisions mandating police referral to community support services should be included for all diversionary processes, including community conferencing and court complaints. Referral to rehabilitation for at-risk youth should not be contingent on the outcomes of community conferencing and court processes. Therefore, mandatory referrals by police officers should be added as an additional requirement under s 9 “more formal proceedings” of the YJ Act. By way of illustration, if an officer decides to deal with a matter with a more formal proceeding, then the officer must also refer the youth to community services that are relevant in the circumstances.

20.6.3.4 Section 24C (Breach of condition of bail) should be amended so that bail conditions of the youth must be reconsidered if the young person breaches their bail conditions, to ensure that youth are able to meet their bail conditions in light of their socio-economic circumstances and environment.

20.6.3.5 In section 47 (Sentences and other orders that may be imposed), a provision should be included that if a youth is sentenced, there must be referral to community services. This will require consideration of police referrals to be made prior to the youth appearing before a justice of a Youth Court.

²⁷ In the Second Reading Speech for the YJ Act Amendment (Miscellaneous) Bill 2012, the word sanctioning was used instead of “punishment” because sanction can be reparative as well as punitive: (Tasmania, *Parliamentary Debates*, Legislative Council, 30 May 2013, 3.

- 20.6.3.6 In section 25 (How youth is to be dealt with if not granted bail), a provision should be included that provides that a lack of housing and accommodation does not confer the right to refuse to grant bail to a youth. This mandates a positive obligation to ensure that youth who have not been found guilty of an offence have access to adequate support and housing.
- 20.6.3.7 Section 80 (Preconditions for making detention order) should be amended to raise the minimum age of incarceration to 14. Furthermore, a commitment should be made to phase out detention and replace it with restorative housing options that focus on engaging community services to support the youth.
- 20.6.3.8 Section 80 should also be amended to reflect that detention should only be used when all other options have been exhausted *and* only when the youth presents a significant danger to society. The detention facility that is subsequently used should still have a primary focus of rehabilitation with the aim of transitioning the youth back to supported accommodation.
- 20.6.3.9 Sentencing options should be widened to allow for mandatory therapeutic interventions, for example rehabilitation orders to address substance abuse issues or to assist the youth to engage or re-engage with educational or employment opportunities.

Discussion Point 45

What might a contemporary and therapeutic youth justice court look like?

21. A Therapeutic Youth Justice Court (TYJC) should be collaborative and problem solving, separate the offence from the offender, and be non-adversarial.²⁸
22. As youth offend primarily due to their circumstances, a TYJC should have the ability to provide outcomes that take into account and address the underlying circumstances of their offending behaviour. It is important that young people are able to understand the processes and outcomes of the court, through effective communication from the judge and representatives of the party.
23. A TYJC should have the power to deal with all aspects of children and youth at risk, not simply the interaction with the criminal justice system. A public health approach to the court is

²⁸ See Allan Borowski 'Whither Australia's Children's Courts: Findings of the National Assessment of Australia's Children's Courts.' (2013) 46(2) *Journal of Criminology* 268.

necessary.²⁹ A model in this context is Scotland. The Centre for Justice Innovation describes the approach as follows in the box below.³⁰

Based on research including the Edinburgh Study of Youth Transitions and Crime, the Scottish Government in 2010 introduced its Whole Systems Approach (WSA) to young people who have offended. The WSA was a new way for all agencies to work together to keep young people up to the age of 18 out of the criminal justice process, avoid labelling and use early intervention as quickly as possible. It is a voluntary programme that local authorities can choose to incorporate into their youth justice strategy. The evidence base on which the WSA was built asserts that the earlier a young person is removed or distanced from the criminal justice system the less likely he or she is to re-offend.

The Scottish Government's 'Whole System Approach for Children and Young People who Offend' aims to significantly reduce the use of custody and secure accommodation through the availability and use of services, and; to seek opportunities to engage these young people by establishing a more direct and consistent response that invites all systems and agencies to work together to achieve better outcomes for young people and their communities.

As a result, the main aim of the WSA is to ensure that only those under 18 who really need formal measures – such as compulsory supervision by the Children's Hearing System, prosecution, secure care or custody are taken through such a process.

To achieve this aim, the WSA established three main policy strands to target the reduction of young offenders in the criminal justice process or system:

At the Point of Arrest (POA) - Early and effective intervention brought about by the establishment of a Juvenile Liaison Office (JLO) risk assessment team/Youth Management Unit. This unit at the point of arrest determines if a case is suitable for early diversion or it should be referred for direct measure or to Children's Reporter and Procurator Fiscal. As a result of such early intervention, the amount of time that a young offender spends under charge is significantly reduced.

After POA: Pre-Referral Screening - At this level a case that is identified for early diversion is sent to partner agencies. After which there is a multi-agency screening group that meets and which agencies and diversionary programmes can help the young offender. They may also decide that the young offender should be referred back to direct measures or the Children's Reporter and/or Procurator Fiscal.

Post screening – In the case of the offender being determined to need diversion, the most appropriate agencies then take lead in the diversion. Such agencies could include:

- Youth Justice Social Work (including mentoring support)
- Children and Families Social Work

²⁹ See H Klose Re-Thinking Approaches to Youth Justice A Public Health Model Approach to Respond to Young People's Involvement in Violence in Australia (2020) 6 *Court of Conscience* 22.

³⁰ Centre for Justice Innovation: Whole Systems Approach to Youth Offending in Scotland.

- Health (CAMHS and ISSU18) usually in regards to substance misuse
- Sacro (including restorative justice)
- Education (referral to Education Welfare Officer)
- Community Safety (such as home visit) and
- Employability

These three main policy strands have worked together to create a practitioner-friendly, user prioritising and cost-saving approach to youth offending that has been praised throughout Scotland by practitioners and users alike

This model is one that could be replicated in Tasmania. It is a highly successful model. A 2015 evaluation by Burman and McVie from the Scottish Centre for Crime and Justice Research³¹ found *“closer multi-agency working, closer information sharing and the strong incorporation of welfarist values in decision-making and practice are important for ensuring better outcomes for young people.”*

Discussion Point 46

Are the current sentencing options available appropriate? Are there other sentencing options that might be considered?

24. The current sentencing options that are available are not adequate because they do not primarily focus on rehabilitating the youth offender. Widening sentencing options to take a primarily therapeutic approach to the youth offender will be more successful at responding to the underlying causes of youth offending. Options could include:

- Adding in a sentencing option that explicitly aims to rehabilitate the youth offender, either through drug or psychological rehabilitation. The success of this option is dependent on resource availability and collaboration with local government would widen access to appropriate support programs; and/ or
- Mandating a rehabilitation/community services outreach plan with every type of sentence. Widening sentencing options to include mandatory therapeutic interventions, such as rehabilitation orders for youth who are engaging in substance abuse would have the effect

³¹ Murray, K., McGuinness, P., Burman, M. and McVie, S. (2015) 'Evaluation of the Whole System Approach to Young People Who Offend in Scotland'. SCCJR Research Report 7/2015. Edinburgh: SCCJR.

of preventing recidivism rates by addressing the underlying criminogenic factors leading to the offending.

Discussion Point 47

What, if any role could home detention and electronic monitoring play in the youth justice response?

25. Home detention and electronic monitoring is unlikely to rehabilitate youth.³² Any introduction of home detention and electronic monitoring should follow evidenced-based practice that is specific for youth. Currently, there is a lack of conclusive evidence that electronic monitoring is a successful way of reducing youth offending.
26. Using Electronic monitoring as a youth justice response is likely to result in net widening of youth offenders and overenforcement, and may result in harsher sentences or penalties being applied.³³
27. Electronic monitoring may be a useful way of monitoring offender attendance at rehabilitative services, however in the current climate of Tasmania's limited capacity to deliver rehabilitation services, home detention and Electronic Monitoring is highly unlikely to be an effective youth justice response.³⁴

Discussion Point 49

What is needed to build the knowledge, skills and competencies of the workforce to address criminogenic need and risks in a responsive way?

28. Providing youth-specific education for youth justice workers (including police and workers involved in the Children's Court) will provide them with the necessary skills to interact with youth using methods of de-escalation and trauma-informed care.
29. Further, educating workers on common criminogenic risk factors and circumstances that lead youth to offend will also provide workers with an understanding of the environment in which most youth offenders are likely to have grown up.

³² See Kate Weisburd, 'Monitoring Youth: The Collision of Rights and Rehabilitation' (2015) 101(1) *Iowa Law Review* 297.

³³ See Catherine Crump, 'Tracking the Trackers: An Examination of Electronic Monitoring of Youth in Practice.' (2019) 53(2) *U.C. Davis Law Review* 795.

³⁴ See Lorana Bartels and Marietta Martinovic, 'Electronic monitoring: The experience in Australia.' (2017) 9(1) *European Journal of Probation* 80.

30. It is also important that workers are able to respond to the different ages, cultural backgrounds and capabilities of young people involved in the juvenile justice system.

Discussion Point 54

How can we maximise the opportunity for learning while young people are held in custody? How can we support continuity between learning in custody and when transitioning back into the community?

31. Continuity throughout transitioning back into the community is contingent on creating legal obligations on departments to take accountability for following up with the educational and welfare needs of youth when transitioning back into the community.³⁵ The Queensland government has implemented the Transition 2 Success program³⁶ which offers youth pathway suggestions during their transition period back into the community. This program has demonstrated success in minimising recidivism as well as being cost effective. This program has also reported increased rates of social and community cohesion in respect to youth offending.³⁷

Discussion Point 55

What can we do to further develop our youth justice workforce capability?

32. Education should be provided to the youth justice workforce in relation to common circumstances leading to youth offending. Skills/methods of de-escalation and communication with youth of different ages and capabilities should also be provided to the workforce.³⁸
33. It is also important that adequate funding be invested in the youth justice workforce. It should be noted that lack of funding is a common denominator preventing diversionary programs and Children's Courts from being successful and properly responding to youth offenders. As the Productivity Commission recently found, diversion can lead to lower rates of reoffending, save money and lead to better community outcomes.³⁹

³⁵ See Tim Moore, Vicky Saunders and Morag Arthur, 'LOST IN TRANSITION: Exploring young people's experiences of transition from youth detention in the ACT' (Executive Summary, Institute of Child Protection Studies: Australian Catholic University, 2008).

³⁶ www.qld.gov.au/law/sentencing-prisons-and-probation/young-offenders-and-the-justice-system/youth-justice-community-programs-and-services/t2s/about-transition-2-success.

³⁷ Deloitte Access Economics 'Transition to Success: Evaluation Report' (Report, September 2018).

³⁸ See S Luebbbers, A.S. Pichler, R Fullam, and J Ogloff 'Embedded Youth Outreach Program Evaluation,' (Final Report, Swinburne University of Technology, 24 September 2020).

³⁹ Tasmania Legal Aid (2021), 'Children First: Children in the Child Safety and Youth Justice System', p. 14.

Discussion Point 56

What mechanisms might be put in place to increase engagement, collaboration and cooperation in achieving the best outcomes for Tasmania’s children and young people and the safety of the community?

34. The above responses to the Discussion Points provide suggestions for legislative reform and mechanisms to increase engagement, collaboration and cooperation in achieving the best outcomes for Tasmania’s children and young people. Increasing awareness and reducing recidivism through a holistic, welfare and rehabilitation approach to youth offending will in turn result in better outcomes in respect to community safety.
35. It is imperative that adequate funding is provided at a State and Local Government level to ensure police, child protection workers, teachers, youth justice employees, the Courts and other services are able to work together to deliver a consistent and collaborative response to young people within the YJ system.

“Many children are successfully diverted from the justice system, supported by those working within the system – police, child safety, the Court and support services. However, the data shows that more needs to be done for some of the most vulnerable and marginalised children in our community.

Reducing the involvement of a young person in the justice system not only benefits the child, it also reduces the number of victims of crime and is a more cost-effective response.

It is important that these young people are recognised as children first. Children in need of support and protection in order to improve their chances of fulfilling their potential”.⁴⁰

Conclusion

The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the Youth Justice Reform Discussion Paper.

⁴⁰ Tasmania Legal Aid (2021), ‘Children First: Children in the Child Safety and Youth Justice System’, p. 5.