CHILDREN & YOUNG PEOPLE WITH COMPLEX NEEDS IN THE ACT YOUTH JUSTICE SYSTEM

CRIMINAL JUSTICE RESPONSES TO MENTAL HEALTH CONDITIONS, COGNITIVE DISABILITY, DRUG & ALCOHOL DISORDERS, AND CHILDHOOD TRAUMA

A REPORT BY THE ACT CHILDREN & YOUNG PEOPLE COMMISSIONER


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EXECUTIVE SUMMARY

Across Australia a high proportion of young people in the youth justice system have mental health conditions, cognitive disabilities, problematic drug or alcohol use, or a background of childhood trauma. These young people have complex needs, often requiring intensive therapeutic support. In many instances the best approach, both for the young people involved and for long term community safety, is diversion out of the justice system to appropriate community support and therapeutic intervention. Diversion increases the likelihood of rehabilitation and reduces recidivism. A primary focus on diversion, rehabilitation and reintegration of young people is affirmed in international human rights instruments, local human rights legislation and ACT Government policy.

This investigation was undertaken as a Commission-initiated investigation under section 48(1)(a) of the Human Rights Commission Act 2005 in 2014/2015, given concerns that children and young people with complex needs were not receiving optimal treatment within the ACT youth justice system. In particular, there were concerns that young people were being held on remand in the ACT Bimberi Youth Justice Centre, not for the community’s protection or to reduce the risk of reoffending, but for their own wellbeing. Examples included circumstances where young people were at risk of self harm and needed close monitoring, where young people had such complex needs that available community-based supports could not meet their needs, and where suitable accommodation was not available. Clearly, these are not appropriate reasons for young people to be detained within the justice system.

METHODOLOGY

This report continues an ongoing body of work looking at the circumstances of young people with complex needs in the youth justice system. In particular, in 2011 the ACT Children and Young People Commissioner and the Human Rights Commissioner conducted a comprehensive review of Bimberi at the request of the Legislative Assembly. The review made several recommendations relevant to young people with complex needs. In undertaking the current investigation, the Children and Young People Commissioner and the Health Services Commissioner wrote to the Directors-General of the Health, Community Services, and Justice and Community Safety Directorates of the ACT Government seeking information. A discussion paper was released for public comment. The annual Youth Justice Forum hosted by the Commissioner brought together people from a range of legal, health, government and community sector organisations to grapple with issues raised in the discussion paper. A literature review was undertaken and both publicly available and unpublished agency data analysed.

It was not possible to quantify the number of young people in the ACT justice system with complex needs, or the number of young people with complex needs being detained due to lack of alternatives, highlighting the need for better data collection. However the information available demonstrated the range of mental health conditions experienced by young people in the ACT youth justice system, many exacerbated by co-occurrence with another condition or by drug and alcohol disorder. The investigation looked at how the justice system currently responds to these young people, including what works well and where improvements can be made.

At the time that information was gathered for this report, the Bimberi detention facility was experiencing a range of pressures. The number of young people detained in Bimberi had been declining for some years, however in 2013-14 the number of young people admitted remained relatively high. While the pressure is lower at present, and we hope this situation continues, this report remains an important resource. It provides a detailed picture of how youth justice works in the Territory for children and young people with complex needs, the range of agencies involved, their different roles, what is working well and what can be improved. The suggestions made will strengthen the youth justice system to achieve better outcomes for individual young people and better equip the system as a whole should pressures again escalate.
CURRENT CONTEXT

It was pleasing to find that in the ACT, overall, the youth justice system is responding reasonably well to young people with complex needs. There are numerous points on a young person’s pathway through the justice system where those with complex needs can be diverted or receive support services. These include, but are not limited to: ACT Policing can refer young people to drug and alcohol diversion programs; the Director of Public Prosecutions has discretion not to prosecute a young person with complex needs; the Children’s Court can make referrals for assessment by Forensic Mental Health Services (FMHS); magistrates can discharge a ‘mentally impaired’ young person, either unconditionally, or to the jurisdiction of the ACT Civil and Administrative Tribunal for a mental health order; and young people may be referred to FMHS on admission to Bimberi for an induction assessment. Cautions, bail, use of the Restorative Justice Unit, Youth Justice Case Management and the Court Alcohol and Drug Assessment Scheme are also relevant diversion points. While some of these intervention points are working better than others, their existence in the ACT system is an important foundation on which improvements can be made.

A number of recent initiatives have made significant improvements to the ACT youth justice system. The After Hours Bail Support Service was established in 2011 to divert young people from Bimberi and assist young people comply with their bail. It has been an effective diversionary service for young people, often at times of crisis, and has potential for expansion. The Community Services Directorate has enhanced its focus on complex and acute trauma, for example through the establishment of Melaleuca Place, a trauma recovery centre for children in the child protection and youth justice systems. There is a better understanding of the importance of information sharing and this has led to some changes in practice, including the development of an information sharing protocol between the ACT Community Services and Health Directorates, the notification to Forensic Mental Health Services clinicians of new admissions to Bimberi and better coordination with Child and Adolescent Mental Health Services, including a single case management service across Youth Justice.

SUGGESTIONS FOR IMPROVEMENT

There remains room for improvement in how the ACT youth justice system responds to children and young people with complex needs. Some minor changes may have substantial impact on the life courses of individual young people, and ultimately be better for the community as a whole. A number of suggestions are made throughout this report, which will help strengthen the youth justice system in the ACT and ensure it is better equipped for young people with complex needs. Suggestions are made in two broad areas. There are specific suggestions for information gathering and reporting. These suggestions are aimed at further improving our understanding of the treatment of young people with complex needs in the youth justice system, providing firm evidence as to the scale of some identified issues, increasing transparency of processes, and enabling the identification of further systemic issues. Second, there are suggestions for expanding diversion options and pathways away from the justice system. These suggestions are aimed at exploring new methods, and better using existing options, for responding to young people with complex needs who come into contact with the justice system. They include legislative, policy and practice changes.

Key among the areas for improvement is the adequacy of wider community supports and resources that intersect with the justice system. In particular, there remains concern that young people are entering the justice system, or being held on remand rather than granted bail, because suitable accommodation and therapeutic supports are not elsewhere available. A period of remand has negative consequences for young people in relation to education, employment and personal relationships, and can have a criminalizing effect by increasing the likelihood of reoffending. Treatment and support services which help prevent young people coming into contact with the justice system can be improved. Further, when young people do enter the justice system it can be difficult for those with complex needs to comply with multiple, onerous bail conditions that do not take account of their age, maturity and circumstances. The appropriateness of bail conditions and supports to assist young people comply with bail is an area for ongoing attention, with the potential to reduce the number of young people ending up in detention.
Transition out of Bimberi following a period of remand is another time when community supports are critical. Transition back to the community can be a challenging experience, and if young people disengage from mental health care or their housing arrangements break down, they are at high risk of reoffending. The adequacy of transition planning and ongoing intensive support for young people following a period of detention is also an area for ongoing attention.

A fundamental gap within the ACT youth justice system is the absence of a forensic mental health facility for children and young people with mental health conditions. This is a long standing gap which fails the standards for forensic mental healthcare. Current responses include admitting young people to Canberra’s adult mental health unit and, for longer admissions, transferring young people to a secure mental health facility in New South Wales. Given the small size of the ACT jurisdiction, alternatives to a dedicated facility may need to be considered, which give priority to the healthcare needs of young people who need to be held in custody.

Ideally the health treatment, support and judicial response to young people with complex needs will be tailored to their individual circumstances, history and needs. However, the justice system for young people with complex needs sits at the nexus of the legal system, the mental health system, the corrections system and the community sector. Within this complex network it is difficult for any one stakeholder to have a full picture of an individual young person’s situation. Information sharing, communication and collaboration are essential, as is continuity of treatment and support. While the small size of the ACT jurisdiction is a potential asset in this regard, goodwill among all stakeholders is of itself insufficient to ensure good outcomes for young people. Information sharing protocols which work within privacy legislation, co-location of services, regular meeting of key personnel, employment of staff across sectors and training and professional development are examples explored within this report to improve case management of young people. Not only does this accord with their human rights, but increases the likelihood of compliance and better outcomes.

**ONGOING INVOLVEMENT**

The ACT Children and Young People Commissioner remains committed to children and young people with complex needs in the ACT youth justice system, and our work extends beyond this report. Regular Bimberi oversight meetings, and ongoing community engagement and conversations continue the Commissioner’s engagement with systemic youth justice concerns. Thank you to all those who have given their time, knowledge and expertise towards this report, and who continue to work hard for better outcomes for children and young people with complex needs in the ACT youth justice system.

**STRUCTURE OF THE REPORT**

This report is set out in nine parts. Part 1 introduces and defines key terms, including what constitutes ‘complex needs’ within the youth justice system. Part 2 outlines the history of ongoing improvement and momentum for change in the ACT which gave rise to this report. Part 3 sets out the key ideological approaches to youth justice, the intersecting objectives at individual, systemic and community levels and a range of stakeholder perspectives. Part 4 outlines the rights, principles, legislation and policies that underpin youth justice. Part 5 provides detail about the different elements in the youth justice system in the ACT. Data is included to give a sense of the scale of the sector. Part 6 expands this picture with data about the extent and nature of the complex conditions of young people in the ACT youth justice system. This data is limited and suggestions are made to improve data collection and available information.

In Part 7 the current options for diversion and support for young people with complex needs on their pathway through the ACT justice system are explained. Recent initiatives and improvements are highlighted and suggestions for further development are made. In Part 8 suggestions for changes to current law, policy and practice are set out. In the main these are relatively small adjustments, which stand to have a significant impact on outcomes for children and young
people and the community as a whole. Part 9 draws on theory and expertise to outline key considerations which should inform any services for children and young people with complex needs. The special circumstances of particular groups, including Aboriginal and Torres Strait Islander children and young people, and young women and girls, are discussed. In the final section, all suggestions for improvement made throughout the report are brought together.
PART 1: DEFINITIONS

In this report the terms ‘mental health conditions’ and ‘cognitive disability’ are used to ‘refer to a broad spectrum of conditions that can result in a reduced capacity for mental functioning or reasoning’.\(^1\) The term ‘complex needs’, refers to young people presenting with two or more of the following: mental health conditions, cognitive disability, drug or alcohol use, and childhood trauma.

1.1 MENTAL HEALTH CONDITIONS

“The difficulty inherent in pinning down fluid concepts such as mental illness and cognitive impairment is compounded when attempted in a legal context”.\(^2\)

Mental illness is:

‘a dysfunction affecting the way in which a person feels, thinks, behaves and interacts with others. The term covers a vast group of conditions, ranging in degree from mild to very severe, episodic to chronic. Common forms of mental disorder include depression, anxiety, personality disorders, schizophrenia and bipolar mood disorder. People who experience these illnesses acutely often perceive reality in ways completely differently from others. They may experience hallucinations, severe mood swings, or lose their ability to rationalise their thoughts, emotions of behaviour.’\(^3\)

Other common terms are ‘mental health problem’, ‘psychiatric disability’ and ‘psychosocial disability’. Sometimes these terms are used interchangeably, but they do have distinct meanings that apply in different contexts:

- **Mental health condition**: ‘Diminished cognitive, emotional or social abilities but not to the extent that the criteria for a mental illness are met’.\(^4\)
- **Mental illness**: ‘A clinically diagnosable disorder that significantly interfered with an individual’s cognitive, emotional or social abilities. The diagnosis of mental illness is generally made according to the classification systems of the DSM or the ICD.’\(^5\)
- **Psychiatric disability**: ‘Refers to the impact of a mental illness on a person’s functioning in different aspects of a person’s life such as the ability to live independently, maintain friendships, maintain employment and to participate meaningfully in the community.’\(^6\)
- **Psychosocial disability**: ‘The term psychosocial disability differs from the term psychiatric disability in that it places an emphasis on the social consequences of disability whereas psychiatric disability focuses on the medically defined illness or impairment’.\(^7\)

Clinical definitions of mental health conditions are classified in two professional publications: the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-V), published by the American Psychiatric Association, and the *International Classification of Diseases* (ICD-10), published by the World Health Organisation.

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2. Ibid., para 1.32.
3. Ibid., para 1.28.
5. Ibid., page 84.
6. Ibid., page 85.
In the ACT there are several **legislative definitions** of mental illness. The *Mental Health (Treatment & Care) Act 1994* defines ‘mental illness’ and ‘mental dysfunction’ for the purpose of deciding mental health orders. The *Criminal Code 2002* defines ‘mental impairment’ for the purpose of deciding dismissals, fitness to plead and not guilty due to mental impairment.

### 1.2 COGNITIVE DISABILITY

**Cognitive impairment** refers to:

‘impairments in a person’s ability to think, concentrate, react to emotions, formulate ideas, and remember and process information. Cognitive impairments can be present at birth or can result from injury, disease or other environmental factors. It is commonly associated with ABI [acquired brain injury], autism spectrum disorder, Attention Deficit Hyperactivity Disorder, Foetal Alcohol Spectrum Disorder, dementia, learning disorders and substance dependencies.’

Cognitive impairment also encompasses **intellectual disability**, which is:

‘a permanent condition of significantly lower than average intellectual ability, or a slowness to learn or process information’. 

Unfortunately the concepts of cognitive impairment and mental illness are sometimes ‘confused and conflated’, particularly as some people with cognitive impairment may also have a mental health condition. An important distinction is that ‘intellectual disability is not an illness, is not episodic, and is not usually treated by medication’.

In line with contemporary use of language in the disability sector, in this report the term ‘cognitive impairment’ is used when referring to the condition; and ‘cognitive disability’ when referring to the people living with the condition (for example, ‘young person with a cognitive disability’).

### 1.3 DRUG & ALCOHOL DISORDERS

**Substance use disorders** refer to ‘the abuse of, and dependence on, drugs, alcohol, and/or other substances, to the extent that a person’s functioning is affected. This is distinguished from casual substance use or intoxication.’

### 1.4 CHILDHOOD TRAUMA

**Child traumatic stress** occurs when a child is exposed to trauma and develops reactions that persist and affect their daily lives and ability to function and interact with others.

‘**Acute trauma** results from exposure to a single event or situation which is overwhelming for the child, such as a bushfire, car accident or death of a parent... **Complex trauma** results from a child’s repeated and prolonged exposure to multiple traumatic events... [F]or children who experience persistent trauma and where adults are either the source...’

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10 Ibid., para 1.31.


of trauma (eg. abusive parent) or who have limited capacity to support the child (eg. family violence, homelessness, parental mental health concerns), the greater the likelihood the trauma will have a lasting impact on the child’s social and emotional wellbeing and development’.\textsuperscript{14}

1.5 DUAL DIAGNOSIS, COMORBIDITY, OR CO-OCCURRING DISORDERS

Some young people live with more than one impairment; a mental health condition and/or cognitive disability as well as a drug or alcohol problem. Several terms are used to describe these conditions, including \textit{dual diagnosis}, \textit{co-occurring disorders} or \textit{comorbidity}.

Other young people have one diagnosed form of impairment (mental health condition or cognitive disability), but a range of co-existing problems (such as homelessness, poverty, disengagement from education, and childhood trauma).

In this report the term \textit{complex needs} is used to refer to both these groups of children and young people. The term ‘complex’ ‘acknowledges that their problems are not just doubled but multiplied’:\textsuperscript{15}

\begin{quote}
\textit{‘dual diagnoses or comorbid diagnoses are not simply the presence of two conditions, but rather their combination creates an additional level of complexity that requires attention in its own right’.}\textsuperscript{16}

\textit{‘the effect of one impairment on an already impaired individual is not simply additive but exponential’}.\textsuperscript{17}
\end{quote}

\begin{footnotesize}
\begin{enumerate}
\item ACT Government Community Services Directorate (2014) \textit{Developing a Trauma-Informed Therapeutic Service in the Australian Capital Territory for Children and Young People Affected by Abuse and Neglect}, page 8.
\item Ibid., page 131.
\end{enumerate}
\end{footnotesize}
PART 2: INTRODUCTION

A high proportion of young people in the youth justice system have mental health conditions, cognitive disability, problematic drug or alcohol use, or a background of childhood trauma. Best practice principles require that some of these young people should be diverted out of the system, and the others be provided with intensive therapeutic support while involved in the system. This report aims to assist continuous improvement of the ACT youth justice system. It invites stakeholders to consider whether small adjustments can have a significant impact in improving health outcomes and reducing reoffending by children and young people with mental health conditions or cognitive disability in the youth justice system.

2.1 CONTEXT

2.1.1 BIMBERI OVERSIGHT AGENCIES

The Bimberi Oversight Agencies Group consists of:

- ACT Children and Young People Commissioner (CYPC)
- Public Advocate of the ACT (PA ACT)
- Official Visitor to Bimberi Youth Justice Centre (OV)
- Aboriginal & Torres Strait Islander Official Visitor (ATSI OV)
- Legal Aid ACT

The group meets monthly to discuss issues relating to Bimberi and the broader youth justice system, and meetings are chaired by the Children & Young People Commissioner. CYPC, PA ACT, OV and ATSI OV have legislative oversight functions in relation to Bimberi. While not formally an oversight agency, Legal Aid ACT plays an important role in providing legal advice and assistance to young people in Bimberi and in representing young people in the youth justice system more broadly.

2.1.2 INDEPENDENT REVIEW OF ACT YOUTH JUSTICE SYSTEM IN 2011

This report builds on the comprehensive review of Bimberi and the ACT youth justice system that was undertaken by the Children & Young People Commissioner and the Human Rights & Discrimination Commissioner in 2011 at the request of the Legislative Assembly of the ACT.18

In the report The ACT Youth Justice System 2011: A report to the ACT Legislative Assembly, the Children & Young People Commissioner and the Human Rights & Discrimination Commissioner raised a number of concerns regarding the facilities and services available for young people with significant mental health issues in the youth justice system. Recommendations made in that review that are relevant in this context included:

- A support service to enable diversion from custody for young people in police custody after hours (7.20)
- A protocol to articulate the ACT Government’s approach to working with young people with a disability in the youth justice centre (10.6)
- A wider range of supported accommodation options that are proven to meet the needs of young people with challenging behaviours and complex needs (11.3)
- Increase funding to supported accommodation services to provide a higher number of dedicated places for young people on bail (11.4)

• A comprehensive review of mental health services provided to children and young people in the youth justice system, including continuity of care (13.17)
• More general and specific counselling services at Bimberi (13.18)
• A residential mental health facility for young people in the youth justice system who require mental health care (13.19)
• A protocol to guide information sharing between Bimberi and Forensic Mental Health Services (13.20)
• A protocol to guide alcohol and drug interventions in Bimberi (13.21)
• The Human Rights Commission convene an annual youth justice forum involving other stakeholders in the youth justice system (15.3)
• The Official Visitor, the Public Advocate and the Human Rights Commission establish a regular meeting schedule to discuss systemic issues at Bimberi and in the youth justice system (15.7).

2.1.3 ANNUAL YOUTH JUSTICE FORUM HOSTED BY CHILDREN & YOUNG PEOPLE COMMISSIONER

The Children & Young People Commissioner each year hosts a Youth Justice Forum to discuss significant policy and service issues in the youth justice system. Professionals in the legal system, health system, government agencies, and community sector possess significant knowledge and expertise arising from their casework with individual children and young people. The Youth Justice Forum offers an important opportunity for these professionals to come together in one room and discuss matters from a systemic perspective, build awareness, and foster collaboration.

The Youth Justice Forum originated with the report by the Children & Young People Commissioner and the Human Rights & Discrimination Commissioner on the youth justice system, which was submitted to the ACT Legislative Assembly in July 2011 (described above in part 2). The Commissioners committed to hold a community forum each year, bringing stakeholders together to discuss particular themes or issues in the youth justice system.

The first of these events took place in October 2011, when the sector gathered to discuss the way forward for the youth justice system, following the Commissioners’ report and the ACT Government response. The 2012 forum and the 2013 forum identified and canvassed legislative, policy and practice issues relating to bail and remand of young people in the ACT (see part 7.7). As discussed in part 7.7, bail, remand and diversion issues are very relevant to any consideration of responses to children and young people with mental health conditions and cognitive disability in the youth justice system.

The 2014 Youth Justice Forum was held in December, and followed the release of a discussion paper by the Children & Young People Commissioner on mental health and cognitive disability in the youth justice system. 36 people attended the 2014 Youth Justice Forum from organisations in the legal, health, government and community sectors: ACT Health, Alcohol & Drug Services, Alcohol Tobacco & Other Drugs Assoc (ATODA), ACT Policing, Anglicare, Barnardo’s Canberra, Belconnen Community Service, Bimberi Youth Justice Centre, Care & Protection Services, CAMHS, CatholicCare, Children & Young People Commissioner, Community Services Directorate, Director of Public Prosecutions, Forensic Mental Health Services, Human Rights Commission, Justice & Community Safety Directorate, Legal Aid ACT, Official Visitor, Public Advocate of the ACT, Richmond Fellowship ACT, Ted Noffs Foundation, Youth Coalition of the ACT. The discussion during the forum has informed this final report.

2.1.4 COMMENCEMENT OF REVIEW OF SERVICES AVAILABLE TO CHILDREN AND YOUNG PEOPLE WITH MENTAL HEALTH CONDITIONS AND COGNITIVE DISABILITY IN THE YOUTH JUSTICE SYSTEM

The Public Advocate of the ACT provides individual advocacy and participates in case meetings for young people at Bimberi. The Official Visitor and the Aboriginal & Torres Strait Islander Official Visitor visit Bimberi each fortnight to

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The Children & Young People Commissioner receives phone calls from young people at Bimberi and their family members seeking to resolve concerns. Legal Aid ACT represents many of the children and young people who appear as defendants in the Childrens Court.

In late 2013 the Bimberi oversight agencies were concerned that some young people may have been held on remand at Bimberi Youth Justice Centre not for community protection or due to risk of reoffending, but for their own wellbeing or protection ('best interests'), in circumstances where:

- they are in crisis and at risk of harm, and need close monitoring in the short term,
- they are incapable of maintaining relationships needed for them to stay with their family, or in foster care, or in residential care, or in youth homelessness services,
- they have such high or complex needs that no community based residential services are available with the capacity to provide the required level of treatment and support, or
- mental health conditions or cognitive disability make it difficult for them to comprehend their bail conditions or adhere to them.

The group of agencies with oversight of Bimberi Youth Justice Centre decided to examine this situation in late 2013, following a referral for systemic advocacy by the Public Advocate of the ACT. The oversight agencies have identified some confirmed cases in which the above situations have arisen. However the full extent of the problem is not clear, therefore the Children & Young People Commissioner (CYPC) undertook research in order to prepare this report. The oversight agencies are conscious that clinical best practice requires that young people with certain clinical presentations not be placed in a youth detention centre, as it is not a suitable environment for provision of high levels of therapeutic support.

In January 2014 the Children & Young People Commissioner and the Health Services Commissioner (‘the Commissioners’) wrote to the Directors-General of the Health, Community Services, and Justice and Community Safety Directorates of ACT Government, commenced a commission initiated consideration under section 48(1)(a) of the Human Rights Commission Act 2005 into the services available to children and young people with mental health conditions and cognitive disability in the ACT youth justice system.

In the first half of 2014, the Community Services Directorate and Health Directorate provided information at the Commissioners’ request about service provision for young people in the youth justice system.

In November 2014 the Children & Young People Commissioner released a discussion paper titled Children & Young People with Complex Needs in the ACT Youth Justice System: Criminal justice responses to mental health, cognitive disability, drug and alcohol disorders and childhood trauma. The period of public comment extended to the end of February 2015. Written responses were received from the Community Services Directorate, Health Directorate, Education & Training Directorate, and ACT Policing.

On 9 December 2014 the Children & Young People Commissioner hosted a roundtable discussion, based on some of the themes raised in the discussion paper, involving 36 professionals from across the legal, health, government and community sectors (described above in part 2).

This final report incorporates literature on mental health and youth justice; the Commissioners’ analysis of data provided by ACT Government Directorates; discussion by professionals at the roundtable; and written submissions in response to the discussion paper.

During 2014 the oversight agencies observed that the population at Bimberi has reduced in number, on some days to as few as 4 young people. We welcome this occurrence, and hope that the situation continues. In the meantime we think that – even with the current low numbers in detention – it is still important to examine the services available to young people with mental illness or cognitive disability in the youth justice system to ensure they meet best practice.
2.2 PURPOSE OF THIS REPORT

In the course of a recent major report on people with cognitive and mental health impairments in the criminal justice system, the NSW Law Reform Commission asked:

>'How can the number of young people with cognitive and mental health impairments held on remand be reduced, while also satisfying other considerations, such as ensuring that the young person appears in court; ensuring community safety; the welfare of the young person; and the welfare of any victims.'

This is the fundamental question underlying this report. The report gathers current knowledge about prevalence of mental health conditions, cognitive disability, drug and alcohol disorders and childhood trauma among the children and young people engaged with the ACT youth justice system. It identifies the services available to support them, and the legislative and policy frameworks that guide decision making at each point in the youth justice system. It discusses the evidence which shows diversion and support is an effective response to these children and young people, and explores areas in which there might be improvement to law, policy or procedure in the ACT.

Rather than criticising a system that, on the whole, is working well, this report aims to contribute to continuous improvement and skilful coordination of existing services. A range of professionals meet each child and young person for short periods as they move through the youth justice system. However no single organisation has a comprehensive view of each young person’s experiences across time. Further, as the legal system is focused on individual cases, it is difficult to obtain a perspective on the collective group.

This report aims to facilitate ongoing improvement of the youth justice system. There may be potential for small adjustments to have a significant impact in improving health outcomes for, and reducing reoffending by, children and young people in the youth justice system.

2.3 BACKGROUND

There is concern across Australia and internationally about the presentation of young people with high and complex needs in youth justice systems. One recent nation-wide study reported that professionals across Australian children’s court jurisdictions believe that the profile of the young people appearing before the court has changed over the last decade. The children, young people and families who become involved with the youth justice system have always tended to be from disadvantaged and marginalised communities, but ‘what is “new” is the complexity of their problems and needs including alcohol and drug abuse, domestic violence, mental health problems and involvement with the child protection system.

A recent report by the Australian Institute of Criminology suggested that young people with mental health conditions, cognitive disability and other complex needs may be less likely to be released on bail:

young people with complex needs and welfare issues (ie those with mental health, alcohol and other drug abuse problems, and/or a history of experiencing child maltreatment or other violence) are most vulnerable to receiving custodial remand—they are often excluded from mainstream and community-based services. This combined with legislation that aims to ‘protect’ a young person from the outside world and/or because

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required services are only available in custody, contributes to situations where young people may be remanded in detention ‘for their own good’.  

Children and young people with mental health conditions, cognitive disability and complex needs are over-represented in the youth justice system:

Young people who are involved with the criminal justice system are more likely to have mental disorders than other young people. Australian and international evidence points to high rates of depression, anxiety, Attention Deficit Hyperactivity Disorder as well as substance use and self harming behaviour. Psychosis appears in this group at ten times the rate of the general population and very high incidences of multiple exposure to trauma are consistent with elevated rates of post-traumatic stress disorder. At least two thirds report childhood trauma or neglect.

Research suggests that children and young people with mental health conditions and complex needs may be affected differently and adversely at some points along the youth justice continuum:

An increase in young people presenting with mental health issues, substance abuse problems, unstable home environments, poor health and disengagement from school, and an increase in very young people (ie those aged under 15 years) coming into contact with the criminal justice system were all raised as examples of increasingly complex needs that may render young people vulnerable to bail refusal.

People involved in the local youth justice system have expressed concern about particular cases. A 2013 study involved interviews with forty-six stakeholders linked to the ACT Children’s Court. Participants expressed the view that:

The Bimberi Youth Justice Centre was often used for accommodation and/or to ensure the safety of young people. Magistrates may have no alternative but to remand a young person in detention...

It was noted that family violence and other criminal activities may overlap with mental health issues and there is a lack of care options for affected young people... There was recognition of a need for a secure facility (mental health or drug and alcohol treatment) for young people.

In April 2014, it was publicly reported that Children’s Court Magistrate Peter Dingwall queried why a 12 year old girl was arrested and placed in Bimberi for property damage offences. The Canberra Times reported that ‘the girl is living in a special care facility, but her behaviour can quickly escalate out of control’. His Honour reportedly stated that ‘she ought not to be in the criminal justice system’, and questioned why there had not been an application for a therapeutic protection order.

Therapeutic Protection Orders are discussed in part 8.2.

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24 Kelly Richards & Lauren Renshaw (2013) Bail and Remand for Young People in Australia: A national research project, Australian Institute of Criminology, pages 64-65.
PART 3: DIFFERENT PERSPECTIVES, VALUE SYSTEMS AND PRIORITIES

3.1 VIEWS ON APPROPRIATE RESPONSES TO CRIMINAL BEHAVIOUR

“The criminal justice system provides a means by which the community responds to offending and holds people who have offended accountable to the community for their acts.”

There are different philosophical positions on the question of what should happen to people with mental health conditions or cognitive disability who are alleged to have committed a crime. Individual values and assumptions inform how people respond to children and young people with mental health conditions and complex needs who become involved with the youth justice system.

Someone adopting a traditional ‘justice’ viewpoint would ignore the background of defendants in the criminal justice system and focus on the application of the law and legal process. They would ‘not see the court as having a problem solving role: in criminal matters their role [is] simply to be neutral decision makers dispensing justice’.

Alternatively a person adopting a ‘welfare’ viewpoint would acknowledge that a high proportion of young people in the youth justice system have mental health conditions, cognitive disability, problematic drug or alcohol use, or a background of childhood trauma, and accept that these factors must be considered when making decisions. Some of these young people should be diverted out of the system, and the others will need intensive therapeutic support while in the system.

“There is a growing body of research describing a complex array of socio-economic factors that contribute to offending behaviour. Acknowledging that these factors may require “social or therapeutic responses, rather than legal solutions” underlies an emerging trend to situating justice processes firmly within (rather than above or outside) the broader social context.”

To some extent the ‘justice’ and ‘welfare’ models are binary concepts, and most professionals working with children and young people would adopt a mixed position somewhere in between. There is acceptance in the legal system that the public interest in trial and punishment of criminal offences is modified by contextual factors. When considering appropriate diversion options for people with mental health conditions, the NSW Law Reform Commission said:

‘we need to ensure the integrity of the criminal justice system by balancing a just outcome for society generally, and for victims of crime, with a fair outcome for the perpetrators. In situations where the perpetrator has a mental illness or cognitive impairment, what best meets the interests of justice may differ from the outcome that would be appropriate in ordinary circumstances. This is particularly the case where an offender’s criminal actions can be attributed wholly or partially to his or her impairment.”

What is involved is not simply weighing the interests of the defendant against the interests of victims and the community. ‘[I]n the case of a young offender there can rarely be any conflict between the offender’s interests and those of the public. The public has no greater interest than that he or she become a good citizen’. Justice Refshauge of the ACT Supreme Court recently described the public interest in both the person ‘charged with a criminal offence

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facing the full weight of the law’, and ‘treating, or regulating to the greatest extent practical, the conduct of individuals suffering from’ mental health conditions. 32 His Honour cites the NSW Court of Criminal Appeal in *DPP v El Mawas*:

> It should be emphasised that what is being balanced is two public interests, to some extent pulling in two different directions. It is not a matter of weighing the public interest in punishment as against the private interests of the defendant in rehabilitation. 34

Therefore the diversion to treatment for a person with mental health conditions or cognitive disability is a public interest, rather than a private interest of the defendant.

While most stakeholders in the youth justice system would accept that a defendant’s mental health condition or cognitive disability is relevant to their treatment within the system, there are different views about what types of diversion are appropriate, and the eligibility criteria for diversion (the nature of the person’s mental impairment, or the type of offending).

At each stage in the youth justice system, when officials and service providers make a decision in relation to a particular young person, they will be attentive to the facts of the case, and follow the procedures in their legislative or policy framework, but one of these underlying values may (consciously or unconsciously) inform their approach to the decision. That is, a person may be ‘animated more by the justice model of youth justice than the welfare model’, or vice versa, 35 and they may emphasise or prioritise one or more of these goals:

- to manage the risks that young people pose to themselves and others,
- to hold young people accountable for their actions,
- to protect young people from harm,
- to provide for young people’s rehabilitation, or
- to increase young people’s life chances. 36

### 3.2 CHILDREN AND YOUNG PEOPLE ARE DIFFERENT FROM ADULTS

When children and young people in the youth justice system present with mental health conditions or cognitive disability, it is easier to see the public interest in providing diversion and support services. The courts recognise that the role of rehabilitation is particularly relevant in relation to young offenders. 37 As discussed in section 4.7, due to the unique developmental needs of children and young people, rehabilitation and reintegration should be given a level of priority beyond that which is commonly accorded to adults. General deterrence and public denunciation usually play a subordinate role to the need to have regard to individual treatment aimed at rehabilitation. 38 In sentencing, the court may place more weight on the rehabilitation of the young person than other considerations. 39

The creation of the Childrens Court recognises the special position of children and young people in the legal system. The legal system operates on the basis that there are common characteristics of children and young people that justify

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33 Director of Public Prosecutions *v El Mawas* [2006] NSWCA 154; 66 NSWLR93 [71].
37 *Thorn v Laidlaw* [2005] ACTCA 49 at [26].
separate consideration from adults; such as capacity for rehabilitation, and opportunity for early intervention. Clinical research suggests the earlier the intervention in relation to mental health conditions or cognitive disability, the better the outcome. In some cases criminal behaviour may be an indicator of mental health problems or cognitive disability, and ‘there may be the opportunity for early intervention in emerging impairments to which attention has been drawn by associated offending behaviours’. 

It is important to acknowledge that diagnosis of mental health conditions among children and young people is not straightforward; it can be difficult to identify or assess mental health or cognitive conditions when they are emerging, and some professionals may be reluctance to make a diagnosis due to a young person’s age. This presents particular challenges when the age of criminal responsibility means that children as young as 10 years old are involved with the criminal justice system.

3.3 EVIDENCE ON EFFECTIVE RESPONSES TO MENTAL HEALTH CONDITIONS AND COGNITIVE DISABILITY IN THE YOUTH JUSTICE SYSTEM

Whether priority is placed upon community safety and reducing recidivism, or upon improving the health and rehabilitation of the offender (or both), evidence is increasingly showing that it is appropriate to consider diversion and support programs for people with mental health conditions and cognitive disability.

Even if prevention of recidivism and public safety is our priority, evidence shows that imprisonment is not an effective method of stopping a person from reoffending in future, and it is more effective to consider the mental health and disability of young people in the youth justice system:

‘Punitive sanctions alone do not lead to a safer community – the available research does not support the effectiveness of imprisonment as a specific deterrent to re-offending and in fact suggests that it may slightly increase recidivism... providing an appropriate range of mental health and other services to address underlying issues is more likely to reduce reoffending than usual criminal justice sanctions... appropriately targeted diversion and support has the potential to reduce re-offending without increasing risk to public safety’

‘[The basic rationale for diversion of people with mental illness and cognitive disability] is provided by the theory that contact with the criminal justice system has a stigmatising effect that can amplify existing disadvantage and may increase likelihood of further offending. Early diversion can provide opportunities to break the cycle of offending, prevent escalation of offending seriousness and secure better outcomes for offenders and the community.’

For these reasons it is important to establish a ‘structure or process to ensure that mental health and substance abuse problems associated with repeat offending are identified and treated’.

A set of best practice guidelines has been endorsed by the adult corrections departments in each state and territory. Based on the limited research that has been conducted in this field, they outline the potential benefits of diversion and support of people with mental health conditions and complex needs. These benefits are available for individual

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41 Ibid., paras 1.13-1.14.
42 Ibid., para 1.16.
44 Ibid., pages 18 and 34.
46 Western Australia Commissioner for Children and Young People (2011) Report of the Inquiry into the mental health and wellbeing of children and young people in Western Australia, page 78
children and young people, for the youth justice system as a whole, and for the community generally, as represented here in Table 1:

### Table 1: Individual, systemic and community objectives of diversion and support

<table>
<thead>
<tr>
<th>Individual objectives</th>
<th>Systemic objectives</th>
<th>Community objectives</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Objectives focused on outcomes for each individual with mental illness in contact with the criminal justice system</strong></td>
<td><strong>Objectives focused on the appropriateness, efficiency and effectiveness of system responses to mental illness</strong></td>
<td><strong>Objectives focused on the interests and expectations of the community as a whole</strong></td>
</tr>
<tr>
<td>• increasing human rights protections afforded to individuals with mental illness</td>
<td>• improving the early identification and assessment of people with mental illness within the criminal justice system</td>
<td>• improving community compliance with human rights obligations relating to treatment of people with mental illness</td>
</tr>
<tr>
<td>• increasing access to treatment services for individuals with complex mental health and related problems</td>
<td>• increasing coordination and efficiency at the interface of criminal justice, health and human services systems</td>
<td>• increasing community safety by addressing mental illness and related problems that contribute to repeated offending behaviour</td>
</tr>
<tr>
<td>• improving clinical outcomes for individuals with a mental illness in contact with the criminal justice system</td>
<td>• reducing the use of criminal justice sanctions for offending attributable to mental illness and cognitive impairment</td>
<td>• reducing the total social cost of processing offenders in the criminal justice system whose repeat offending is attributable to mental illness and related problems</td>
</tr>
<tr>
<td>• improving quality of life</td>
<td>• reducing the intensity, seriousness and frequency of reoffending by people with a mental illness</td>
<td>• strengthening protective factors that reduce the likelihood of offending</td>
</tr>
<tr>
<td>• reducing contact with the criminal justice system by addressing each individual’s health and criminogenic needs</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The rationale for diversion and support services is discussed further in part 7.1.

### 3.4 SERVICE BOUNDARIES – MULTIPLE PROFESSIONAL DISCIPLINES, PERSPECTIVES AND PRIORITIES

The youth justice system sits at the boundaries of the legal system, the mental health system, the corrections system, and the community sector. The different stakeholders in the youth justice system include:

- Children and young people and their families
- Victims and witnesses
- Police officers
- Defence lawyers
- Prosecution lawyers
- Magistrates and Court officials
- Clinical specialists (forensic mental health, community mental health, and alcohol and drug services)
- Youth justice workers
- Detention centre staff
- Child protection workers
- Community based support workers and advocates
- Statutory oversight agencies

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The youth justice system is a complex network of organisations that perform their roles at different stages of the criminal justice process; within different legislative frameworks; and with different values, cultures and ways of working. The system involves interactions between competing professional cultures:

‘The relationship between the treatment and rehabilitation culture of forensic mental health services and the custodial culture of correctional agencies is often problematic. Similarly, the police, courts, corrections and forensic mental health have different foci and sets of expectations, which can, at times, be difficult to reconcile.’

People working within the organisations in the youth justice system have had different professional training, and operate according to different conceptual frameworks (medical, legal, corrections and welfare). As a result they may have different expectations of what is best for a particular child or young person:

‘preferred objectives may be quite different for stakeholders coming from corrections, mental health, human rights and other perspectives.’

Given this context, programs for young people with mental illness and cognitive disability in the youth justice system need to operate effectively across system boundaries:

‘Mental health diversion and support programs operate at the intersection of the justice, health and other social support services. The success of such programs is largely dependent on the capacity of these sectors to work effectively together’.

Service boundaries present challenges for forensic mental health staff and clients. First, the boundary between the forensic mental health service and the correctional system. The major focus of correctional facilities is secure containment, while the focus of mental health services is on diagnosis, treatment and rehabilitation (though this distinction is less stark in youth detention centres, and many youth justice workers view their role as a rehabilitative one). Second, the boundary between forensic mental health services and the general mental health system. There are challenges in ensuring continuity of treatment when a young person moves between the community and detention.

During the Youth Justice Forum hosted by the Children & Young People Commissioner in April 2013, participants discussed the constraints within which stakeholders operate, including the limits of their role, the amount of time they had to perform their role, and the amount of information they had access to when making decisions.

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50 Ibid., page 43.
When a young person enters the youth justice system in the ACT, they find themselves at the intersection of a number of agencies and pieces of legislation. Legislation is designed for different purposes, and in some situations (when applied to individual cases) they are misaligned or conflicting.

### 4.1 INTERNATIONAL HUMAN RIGHTS STANDARDS

The rights of people with a disability ‘can be impaired if mental illness goes undetected or is not taken into account by the criminal justice system’.

‘Human rights are an important point of reference for considering what should happen for [young people] with cognitive disabilities and/or mental health issues.’ Detention of young people with mental health conditions and cognitive disability in the criminal justice system can raise significant human rights issues. An overarching statement of human rights is contained in the International Covenant on Civil and Political Rights (ICCPR). Additionally, there are several international human rights instruments relating to the detention of children and young people that provide important benchmarks against which to measure performance and guide the development of policy and practice:

- UN Convention on the Rights of the Child
- UN Convention of the Rights of People with Disabilities
- Standard Minimum Rules for the Administration of Juvenile Justice (‘the Beijing Rules’)
- Rules for the Protection of Juveniles Deprived of their Liberty (‘the Havana Rules’)
- Guidelines for the Prevention of Juvenile Delinquency (‘the Riyadh Guidelines’)
- Vienna Guidelines for Action on Children in the Criminal Justice System
- Standard Minimum Rules for the Treatment of Prisoners
- UN Principles on the Protection of People with a Mental Illness and the Improvement of Mental Health Care

The consistent theme in these documents is that, due to the unique developmental needs of children and young people, rehabilitation and reintegration should be given a level of priority beyond that which is commonly accorded to adults. There is also an obligation to detain children and young people only as a last resort and, if they are accused of a crime, to bring them to trial as quickly as possible. Children and young people in detention have the right to appropriate mental health care, and to be transferred to a mental health facility if required.

Diversion and support programs for people with mental health conditions and cognitive disability ‘can facilitate a person’s human rights, including rights to non-discrimination, equal recognition before the law, access to justice, independent living and support, health care... and rehabilitation’.

‘These provisions recognise that it may be necessary to provide adjustments for people with cognitive and mental health impairments in order to ensure that the rights in question are accessible. As a result, the

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implementation and use of diversionary schemes would align with the rights goals of the convention, and would assist to promote the rights of people with cognitive and mental health impairments.\textsuperscript{57}

The Australian Childrens Commissioners and Guardians have developed a charter of rights for children and young people in the youth justice system. Drawn from the Beijing Rules and Havana Rules, they include the rights:

- To see a doctor or nurse whenever you need to, and to receive proper healthcare,
- To receive help for your mental health if you need it, and to be transferred to a mental health facility for treatment if required,
- To get help if you have problems with drugs or alcohol,
- To have special care and protection if you are vulnerable or have special needs,
- To have a say in decisions about your rehabilitation and other issues that affect you,
- To participate in activities and programs that help your rehabilitation, and
- Before you leave the centre, to get help with somewhere safe to live and ongoing support.\textsuperscript{58}

4.2 HUMAN RIGHTS ACT 2004 (ACT)

Some human rights standards have been incorporated directly into ACT law. For example, sections 20 and 22(3) of the HRA, relating to a child’s rights in criminal proceedings, is drawn directly from the International Covenant on Civil and Political Rights (ICCPR). Other human rights standards provide guidance in the interpretation of legislation and the assessment of the adequacy of the youth justice system.

Under the Human Rights Act, Territory laws must, to the maximum extent possible, be interpreted consistently with human rights.\textsuperscript{59} Further, public authorities must act consistently with human rights and give proper consideration to relevant human rights when making decisions.\textsuperscript{60}

4.3 CHILDREN & YOUNG PEOPLE ACT 2008 (ACT)

The Children and Young People Act 2008 (ACT) (‘C&YP Act’) contains the ‘youth justice principles’, which must be considered when making decisions in the best interests of a child or young person involved in a criminal matter (section 94). The principles include the requirement that a child should only be detained in custody as a last resort and for the minimum time necessary. They place a strong emphasis on rehabilitation, re-entry into the community and an acknowledgement of the age, maturity and developmental capacity of each child and young person. The C&YP Act also makes it clear that these principles should be interpreted consistently with relevant human rights instruments and jurisprudence.\textsuperscript{61}

(1) For the criminal matters chapters, in deciding what is in the best interests of a child or young person, a decision-maker must consider each of the following matters that is relevant (the youth justice principles):

(a) if a child or young person does something that is contrary to law, he or she should be encouraged to accept responsibility for the behaviour and be held accountable;

(b) a child or young person should be dealt with in a way that acknowledges his or her needs and that will provide the opportunity to develop in socially responsible ways;


\textsuperscript{59} Section 30, Human Rights Act 2004 (ACT).

\textsuperscript{60} Section 40B, Human Rights Act 2004 (ACT).

\textsuperscript{61} Section 94(3), Children and Young People Act 2008 (ACT).
(c) a child or young person should be consulted about, and be given the opportunity to take part in making, decisions that affect the child or young person, to the maximum extent possible taking into consideration their age, maturity and developmental capacity;

(d) if practicable and appropriate, decisions about an Aboriginal and Torres Strait Islander child or young person should be made in a way that involves their community;

(e) if a child or young person is charged with an offence, he or she should have prompt access to legal assistance, and any legal proceeding relating to the offence should begin as soon as possible;

(f) a child or young person may only be detained in custody for an offence (whether on arrest, on remand or under sentence) as a last resort and for the minimum time necessary;

(g) children, young people and other young offenders should be dealt with in the criminal law system in a way consistent with their age, maturity and developmental capacity and have at least the same rights and protection before the law as would adults in similar circumstances;

(h) on and after conviction, it is a high priority to give a young offender the opportunity to re-enter the community;

(i) it is a high priority that intervention with young offenders must promote their rehabilitation, and must be balanced with the rights of any victim of the young offender’s offence and the interests of the community.

(2) The decision-maker may also consider any other relevant matter.62

The C&YP Act also governs the treatment of young people placed in a youth detention centre in the ACT.

Also relevant in this context, the C&YP Act provides for the declaration of Therapeutic Protection Places, and the granting of Therapeutic Protection Orders.

4.5 BAIL ACT 1992 (ACT)

The Bail Act 1992 outlines the criteria for police or courts granting bail to children, the conditions on which bail may be granted, and the procedures required.

4.6 COURT PROCEDURES ACT 2004 (ACT)

The Childrens Court has power to adjourn or dismiss proceedings for care and protection reasons under sections 74K and 74M of the Court Procedures Act 2004. The Childrens Court can also refer matters to Child and Youth Protection Services or Youth Justice (through the Director General of CSD) for assessment and report under section 74D of the Court Procedures Act.

4.7 CRIMES ACT 1900 (ACT)

Under Part 13 of the Crimes Act 1900, Magistrates in the Childrens Court have a range of legislative options available when mental health arises as a factor in offending behaviour:

- discretion to dismiss charges on the grounds of mental impairment63
- investigation of fitness to plead64
- finding of not guilty because of mental impairment65

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62 Section 94, Children & Young People Act 2008 (ACT).
63 Section 334, Crimes Act 1900 (ACT).
64 Division 13.2, Crimes Act 1900 (ACT).
65 Section 327, Crimes Act 1900 (ACT).
referral to ACAT after conviction (diversion after conviction, once issues of accountability and criminal records are considered)\textsuperscript{66}

### 4.8 HEALTH RECORDS (PRIVACY & ACCESS) ACT 1997 (ACT)

Professionals working in the youth justice system have obligations to protect the personal health information of the children and young people who become defendants and patients and clients.

### 4.9 ACT GOVERNMENT POLICY

ACT Government policy prioritises mental health services for young offenders in order to achieve early intervention, rehabilitation and addressing the underlying causes of offending behaviour. The \textit{Blueprint for Youth Justice in the ACT: 2012-2022} contains seven strategies for long term change in the ACT youth justice system. Strategy one is titled ‘Focusing on early intervention and prevention of contact with the youth justice system’ and includes the key action to ‘Improve mental health outcomes for young people and access to mental health services’\textsuperscript{67}. Strategy two is titled ‘Diverting children and young people from the formal justice system’ and includes the key action to ‘Strengthen therapeutic programs for young people on community and detention orders’\textsuperscript{68}.

### 4.10 BEST PRACTICE PRINCIPLES

There has been only limited research into the experiences of people with mental health conditions, cognitive disability, drug and alcohol use and childhood trauma in the criminal justice system, so there is not yet a comprehensive evidence base to inform legislation, policy and practice. However there are guidelines (both from a corrections perspective, and from a medical perspective) that help us identify best practice in the treatment and support of young people with high and complex needs in the youth justice system. There is also emerging research on the key elements of a trauma-informed youth justice system.

#### 4.10.1 BEST PRACTICE GUIDELINES: DIVERSION & SUPPORT OF OFFENDERS WITH MENTAL ILLNESS

Directors of the State and Territory justice departments produced principles for best practice diversion and support of people with mental illness in the criminal justice system. Given the limits of current research, this represents the best available guidance to inform practice. Principles which underpin best practice diversion and support:

1. Collaboration, communication and coordination are essential
2. Community safety is not compromised
3. Accountability for criminal behaviour is retained
4. Human and legal rights are protected
5. Consumer and family or carer participation ensures policy and service development are better targeted, more effective and sustainable
6. Mental illness and associated issues are identified, assessed and treated as early as possible
7. Programs deliver culturally safe, holistic services tailored to individuals
8. Quality and integrity of health interventions are maintained
9. A recovery orientation is essential

\textsuperscript{66} Section 331, Crimes Act 1900 (ACT).

\textsuperscript{67} ACT Government (2012) \textit{Blueprint for Youth Justice in the ACT 2012-2022: Improving outcomes for young people over the next 10 years}, page 39.

\textsuperscript{68} Ibid., page 41.
10. Programs balance fidelity to the evidence base with environmental constraints and innovation.\(^69\)

### 4.10.2 NATIONAL STATEMENT OF PRINCIPLES FOR FORENSIC MENTAL HEALTH

In 2006 the Mental Health Standing Committee of the Australian Health Ministers Advisory Council created guiding principles for the provision of mental health services to forensic clients. The principles have been endorsed by the Australian Health Ministers' Conference (comprised of the health ministers of the Commonwealth, State and Territory governments). The principles are:

1. Equivalence to the non-offender
2. Safe and secure treatment
3. Responsibilities of the health, justice and correctional systems
4. Access and early intervention
5. Comprehensive forensic mental health services
6. Integration and linkages
7. Ethical standards
8. Staff: knowledge, attitudes and skills
9. Individualised care
10. Quality and effectiveness
11. Transparency and accountability
12. Judicial determination of detention/release
13. Legal reform.\(^70\)

### 4.10.3 KEY ELEMENTS OF A TRAUMA-INFORMED YOUTH JUSTICE SYSTEM

The National Child Traumatic Stress Network in the United States defines a ‘trauma-informed youth justice system’. ‘A service system with a trauma-informed perspective is one in which programs, agencies, and service providers:

1. Routinely screen for trauma exposure and related symptoms,
2. Use culturally appropriate evidence based assessment and treatment for traumatic stress and associated mental health symptoms,
3. Make resources available to children, families, and providers on trauma exposure, its impact, and treatment,
4. Engage in efforts to strengthen the resilience and protective factors of children and families impacted by and vulnerable to trauma,
5. Address parent and caregiver trauma and its impact on the family system,
6. Emphasise continuity of care and collaboration across child-service systems, and
7. Maintain an environment of care that addresses, minimises, and treats secondary traumatic stress, and that increases staff resilience.’\(^71\)

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PART 5: THE ACT YOUTH JUSTICE SYSTEM – SOME KEY FIGURES

“There is a very limited amount of existing research and information concerning young people with cognitive and mental health impairments in the criminal justice system.”

This section begins with a brief contextual overview of the numbers of young people who become involved in the criminal justice system each year. See summary in Table 2.

The population of the ACT is 385,573. There are 93,830 children and young people aged from birth to 19 years living in the ACT. The age of criminal responsibility in the ACT is ten years, so those children and young people aged between ten and 17 are potentially involved in the youth justice system.

5.1 POLICE CONTACT

In 2009-2010, ACT Policing apprehended 1,408 children and young people. This figure has decreased steadily over the past five years, and in 2013-2014, ACT Policing apprehended 716 children and young people. See table2.

5.2 COURT PROCEEDINGS

In 2009-2010, 608 matters were lodged in the criminal jurisdiction of the ACT Childrens Court. This figure has decreased steadily over the past four years, and in 2013-2014, 338 matters were lodged. See table 2.

5.3 COMMUNITY BASED SUPERVISION

In 2009-2010, there were 240 children and young people under community supervision. This figure has decreased steadily over the past four years, and in 2013-2014, there were 153 children and young people under community supervision. See table 2.

There is also data showing the numbers of young people under community supervision on an average day. On an average day in 2011-2012, there were 105 young people under community supervision. On an average day in 2013-2014, there were 73 young people under community supervision.

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75 ACT Government Justice & Community Safety Directorate (June 2014) ACT Criminal Justice Statistical Profile, ACT Policing Table 10, ‘Aboriginal and Torres Strait Islander people apprehended by ACT Policing by age – 5 years trends; ACT Policing Table 11, ‘Non-Aboriginal and Torres Strait Islander people apprehended by ACT Policing by age – 5 years trends.
77 Ibid.
78 Australian Institute of Health and Welfare (2014) Youth justice in Australia 2012–13, AIHW bulletin no. 120.
80 Ibid.
5.4 DETENTION

In 2009-2010, there were 174 individual children and young people placed in detention at Bimberi Youth Justice Centre. This figure has decreased steadily over the past four years, and in 2013-2014, there were 88 children and young people detained in Bimberi. See table 2, row 4. This data is based on the numbers of individual young people.

There is also detention data showing the number of episodes of admission (as some individual young people may be admitted on more than one occasion). Table 2, row 3, shows this number also declining steadily, from 398 admissions in the year 2009-2010, to 189 admissions in 2013-2014. Data for the first half of the 2014-2015 reporting year shows 64 episodes of admission (if this rate continues, projecting to 128 episodes of admission for the year).

For the purpose of this report the Commission requested data from CSD, and this showed that in the 2012 and 2013 calendar years there were 434 admissions to Bimberi. Some young people were admitted on more than one occasion. 400 admissions were on remand, and 34 under sentence. 44% of admissions were overnight or same day release. The high rate of short term admissions presents challenges for Bimberi in responding to the mental health needs of young people detention.

There is also data showing the numbers of young people in detention on an average day. On an average day in 2011-2012, there were 23 young people in Bimberi. On an average day in 2013-2014, there were 17 young people in Bimberi.

<table>
<thead>
<tr>
<th>Table 2: Numbers of young people involved in the youth justice system</th>
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<tr>
<td>----------------------------------</td>
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<tr>
<td>Number of children and young people (aged under 18) apprehended by ACT Policing</td>
</tr>
<tr>
<td>Criminal matters lodged in the Childrens Court</td>
</tr>
<tr>
<td>Admissions to Bimberi Youth Justice Centre</td>
</tr>
<tr>
<td>Number of children and young people in detention during the year</td>
</tr>
<tr>
<td>Young people in unsentenced detention during the year</td>
</tr>
</tbody>
</table>

81 Ibid.
83 Ibid.
84 ACT Government Justice & Community Safety Directorate (December 2014) ACT Criminal Justice Statistical Profile, ACT Policing Table 10, ‘Aboriginal and Torres Strait Islander people apprehended by ACT Policing by age – 5 years trends; ACT Policing Table 11, ‘Non-Aboriginal and Torres Strait Islander people apprehended by ACT Policing by age – 5 years trends.
86 ACT Government Justice & Community Safety Directorate (December 2014) ACT Criminal Justice Statistical Profile, Youth Justice Table 1, Admissions of young people to Bimberi Youth Justice Centre by gender and Aboriginal and Torres Strait Islander status – 5 year trends.
5.5 SOME NOTABLE COMPARATIVE INDICATORS: RATE OF LODGMENT IN THE CHILDRENS COURT, AND RATE OF DETENTION

For the last five reporting years, the ACT had the lowest number of cases initiated in the Childrens Court compared with other Australian jurisdictions. For example, the rate in 2010-2011 was 164 lodgments per 100,000 people, compared with 334 in Victoria and 519 per 100,000 in the Northern Territory. And in 2012-2013, the ACT was 107 compared with 367 and 851.⁹⁵

Yet, in comparison with the other Australian States and Territories, the ACT tends to fall midway in the group in terms of rate of detention of children and young people aged 10–17 in detention on an average night. For example, 0.50 per 1,000 children and young people aged 10-17 years in 2011, compared with 0.15 in Victoria and 1.2 in the Northern Territory.⁹⁶ And 4.1 per 10,000 in the June quarter of 2013, compared with 0.9 in Victoria and 18.7 in the Northern Territory.⁹⁷

Trends in small populations such as the ACT should be interpreted with caution as rates can fluctuate significantly with only small changes in numbers. However, it would be useful to examine why Victoria has proportionally more matters lodged in the Children’s Court, yet consistently achieves a very low rate of detention compared with our own, and identify legislative, policy or service provision measures which might facilitate a similar outcome in the ACT.

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⁸⁸ Ibid.
⁸⁹ Ibid.
⁹¹ Australian Institute of Health and Welfare (2014) Youth justice in Australia 2012–13, AIHW bulletin no. 120.
‘Establishing the incidence of cognitive disability and/or mental health issues amongst young people in contact with the criminal justice system is not a simple task. Unlike other personal and social characteristics that are routinely measured in statistical studies, cognitive disability and/or mental health issues are not always observable or stable. They require specialist assessment to confirm a diagnosis. Few criminal justice agencies formally collect disability data on a regular basis and even fewer research studies have been conducted in this area’.  

### 6.1 Prevalence in the General Australian Community

Estimates of the number of Australians **mental illness** vary between 13% and 20% of the population, depending on methodology. Results from the 2007 National Survey of Mental Health and Wellbeing show that ‘one in five (20.0%) Australians aged 16-85 years experienced mental disorders in the previous 12 months’.  

In the **Australian Health Survey of 2011-12**, conducted by the Australian Bureau of Statistics, 3.0 million Australians (13.6% of the national population) reported having a ‘mental and behavioural condition’. This represented an increase from 11.2% in the 2007-08 survey, and 9.6% in 2001.

Estimates of the number of Australians with **cognitive disability** vary between 2% and 3%, and are harder to interpret, due to differences in definition. The NSW Law Reform Commission adopted an estimate of 2-3%. The AIHW reported that in 2003, 588,700 people (3% of the population) had an intellectual disability (noting that the AIHW definition of intellectual disability includes ADHD, autism and dementia).

Approximately 5.1% of the Australian population has a **drug or alcohol disorder**. Results from the 2007 National Survey of Mental Health and Wellbeing show that one in twenty (5.1%) people aged 16-85 years had a substance use disorder in the 12 months prior to interview.

Estimates of the number of Australians who have experienced **childhood trauma** are more difficult to determine. The rate of involvement in the child protection system provides a basic but imperfect and partial measure of childhood trauma. In 2012-2013 across Australia 184,284 children and young people aged from birth to 17 years were the subject of a child protection notification (a rate of 35.2 per 1000 children in Australia). Of the notifications, 40,685 were substantiated. On 30 June 2013, 42,652 children and young people across Australia were on child protection orders. However family abuse or neglect is only one form of trauma experienced by children; child protection data does not account for acute episodes of trauma such as the death of a close family member, serious accidents, or being a victim of crime.


30
6.2 PREVALENCE AMONG YOUNG PEOPLE IN THE YOUTH JUSTICE SYSTEMS ACROSS AUSTRALIA

Mental illness, cognitive disability, drug and alcohol disorders and childhood trauma are significantly more prevalent in the youth justice population than in the general community. Young people with these conditions are overrepresented in the youth justice system.105 106 107 108

Before describing the statistics, it is important to state clearly that most people living with mental illness or cognitive disability do not display criminal behaviour:

‘The publicity given to critical incidents involving mentally disturbed people might lead the public to believe that a high proportion of people with mental illness commit crimes, but this is not the case. Nevertheless, people with mental illness comprise a disproportionate number of the people who are arrested, who come before the courts and who are imprisoned.’109

Despite this high correlation, progression into the youth justice system is not inevitable.110 Further, there is not a simple causal relationship between impairment and criminal behaviour:

‘There is strong evidence... that people with cognitive and mental health impairments are over-represented throughout the criminal justice system. But the great majority of people with cognitive and/or mental health impairment do not offend. The higher rate of offending does not arise from any simple relationship between impairment and crime, but from impairment, together with a multiplicity of other factors, such as disrupted family backgrounds, family violence, abuse, misuse of drugs and alcohol, and unstable housing.’111

Simultaneously, even if involved in the criminal justice system as an offender, people with mental illness or cognitive disability are also more likely to be victims of crime.112

Estimates of the number of young people in the youth justice system with mental illness vary between 40% and 70%. The ACT Children’s And Young People’s Justice Health Services Plan 2008-2012 and the ACT Mental Health Services Plan refer to research which reports that 60% of young men and more than two-thirds of young women in detention meet the criteria for a psychiatric diagnosis.113 US research indicates that between 65 percent and 70 percent of young people placed in the justice system have a diagnosable mental health disorder.114 In the 2009 Young People in Custody

Health Study, which studied 362 young people in detention in NSW, 87% were found to have ‘at least one psychological disorder’.  

‘Australian and international evidence points to high rates of depression, anxiety, Attention Deficit Hyperactivity Disorder as well as substance use and self harming behaviour. Psychosis appears in this group at ten times the rate of the general population... Overall prevalence of mental disorder (excluding conduct disorder) has been estimated at between 40 – 70 per cent in juvenile offenders... a NSW report suggests that 88 per cent of juveniles in custody have symptoms consistent with a clinical disorder (inclusive of substance use and conduct disorder).’

Estimates of the number of young people in the youth justice system with cognitive disability vary between 11% and 17%. In the 2009 Young People in Custody Health Study, the results from 14% of participants ‘indicated the possible presence of an intellectual disability’.  

‘Intellectual disability also appears to feature strongly in juvenile delinquency. Studies suggest approximately 11 per cent of offenders on community orders and 17 per cent in detention have an IQ estimated at 70 or lower.’

One estimate of the number of young people in the youth justice system with drug or alcohol disorders comes from the 2009 Young People in Custody Health Study, which reported that 64% of the 361 young people involved in the study had an alcohol or substance disorder.

Estimates of the number of young people in the youth justice system who have experienced childhood trauma vary between 50% and 66%. There is a strong correlation between young people’s experiences of trauma, involvement in the child protection system, and participation in crime. US research concludes there is ‘a strikingly high prevalence of trauma exposure and traumatic stress’ among young people in the youth justice system, and ‘[a] majority of children involved in the [youth] justice system have a history of trauma:’

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"Young people who are involved with the criminal justice system [have experienced] very high incidences of multiple exposure to trauma are consistent with elevated rates of post-traumatic stress disorder. At least two thirds report childhood trauma or neglect."\(^{125}\)

The high prevalence of these conditions are evident at all points in the criminal justice system, ‘including among people in contact with police, subject to arrest, held in the police watchhouse, appearing in court, detained on remand, or detained under sentence.’\(^{126}\)

<table>
<thead>
<tr>
<th>Table 3: Summary of prevalence rates in the general Australian community with prevalence rates in the youth justice systems</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Prevalence in the general Australian community</strong></td>
</tr>
<tr>
<td>Mental health conditions</td>
</tr>
<tr>
<td>Cognitive disability</td>
</tr>
<tr>
<td>Drug and Alcohol disorders</td>
</tr>
<tr>
<td>Childhood trauma</td>
</tr>
</tbody>
</table>

**6.3 PREVALENCE IN THE ACT YOUTH JUSTICE SYSTEM**

In preparing this report the CYP\(^{125}\)\(^{126}\) tried to determine the extent of presentation of mental health conditions, cognitive disability, drug and alcohol disorders and childhood trauma locally in the ACT youth justice system. This proved to be a complex task, and the available data provides only a limited and partial picture of the situation. Unfortunately the following observation made by the Children & Young People Commissioner and the Human Rights Commissioner in 2011 appears to remain true:

‘data collection activities at Bimberi and throughout the youth justice system are limited. Basic information such as the numbers of young people with dual engagement in youth justice and care and protection, the number of young people with disabilities and mental health issues... are not currently accessible.’\(^{127}\)

This section presents the limited information we have been able to locate on the prevalence of mental health conditions, cognitive disability and substance disorders in the ACT youth justice system.

Data on exposure to trauma among children and young people in the ACT youth justice system is not available. There are only anecdotal reports (for example, participants in the review of the youth justice system conducted by the Children & Young People Commissioner and Human Rights Commissioner in 2011 reported that they observed a high prevalence of trauma experienced by young people in the youth justice system).\(^{128}\) A minimum measure of childhood trauma might be the number of young people in the youth justice system who are also involved in the child protection system, but this information is not available.

**6.3.1 PREVALENCE AMONG CHILDREN AND YOUNG PEOPLE IN CONTACT WITH ACT POLICING**

A young person’s first contact with the criminal justice system will be through the police. We could not locate publicly available data recording the number of children and young people who present to police with a suspected mental

\(^{126}\) Ibid., page 2.
\(^{128}\) Ibid., para 10.9.4.
health problem or cognitive disability. ACT Government reports that ACT Policing made 323 referrals of young people to drug and alcohol diversion programs through SupportLink.129

6.3.2 PREVALENCE AMONG CHILDREN AND YOUNG PEOPLE INVOLVED IN ACT CHILDREN’S COURT PROCEEDINGS

Forensic mental health assessments conducted on request of the Childrens Court

For the purpose of this report the Commission requested information from the Health Directorate on the forensic mental health assessments conducted at the request of the Childrens Court.

The data provided by the Health Directorate showed that in the two calendar years 2012 and 2013, the Childrens Court made 49 referrals for assessment by Forensic Mental Health Services. Some young people were the subject of multiple referrals. Of the 49 assessments, 4 were not finalised because the young person did not attend the initial appointment, or a subsequent rescheduled appointment. The remaining 45 assessments all resulted in a formal diagnosis. Most assessments resulted in multiple diagnoses (ie. mental health condition and cognitive disability, or mental health condition and drug/alcohol disorder).

The range of conditions identified in this group of young people are listed in Table 4 below. We have placed the conditions into these 4 categories for ease of reference. The purpose of the list is to demonstrate the wide variety of mental health conditions experienced by young people at Bimberi, some of them quite serious on their own, and made even more complex by co-occurrence with another condition.

Table 4: The range of conditions diagnosed among the 49 young people referred by the Childrens Court for a forensic mental health assessment in the calendar years 2012 and 2013

<table>
<thead>
<tr>
<th>Mental health condition</th>
<th>Cognitive disability</th>
<th>Drug &amp; alcohol disorder</th>
<th>Other condition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adolescent onset paedophilia</td>
<td>Acquired brain injury</td>
<td>Alcohol abuse</td>
<td>Epilepsy</td>
</tr>
<tr>
<td>Antisocial personality traits</td>
<td>Asperger’s disorder</td>
<td>Alcohol abuse disorder</td>
<td>Fifth metacarpal fracture</td>
</tr>
<tr>
<td>Attachment disorder</td>
<td>Attention deficit hyperactivity disorder</td>
<td>Alcohol misuse</td>
<td>Parent child relational problem</td>
</tr>
<tr>
<td>Bipolar disorder</td>
<td>Intellectual disability</td>
<td>Amphetamine abuse</td>
<td></td>
</tr>
<tr>
<td>Conduct disorder</td>
<td></td>
<td>Amphetamine abuse disorder</td>
<td></td>
</tr>
<tr>
<td>Dysthymia</td>
<td></td>
<td>Amphetaminedependence</td>
<td></td>
</tr>
<tr>
<td>Dysthymic disorder</td>
<td></td>
<td>Cannabis abuse</td>
<td></td>
</tr>
<tr>
<td>Generalised anxiety disorder</td>
<td></td>
<td>Cannabis abuse disorder</td>
<td></td>
</tr>
<tr>
<td>Intermittent explosive disorder</td>
<td></td>
<td>Cannabis dependence</td>
<td></td>
</tr>
<tr>
<td>Oppositional defiant disorder</td>
<td></td>
<td>Cannabis dependence disorder</td>
<td></td>
</tr>
<tr>
<td>Possible first episode psychosis</td>
<td></td>
<td>Cannabis dependence disorder</td>
<td></td>
</tr>
<tr>
<td>Post traumatic stress disorder</td>
<td></td>
<td>Opioid abuse</td>
<td></td>
</tr>
<tr>
<td>Schizoaffective disorder</td>
<td></td>
<td>Polysubstance abuse disorder</td>
<td></td>
</tr>
<tr>
<td>Youth psychopathic traits</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Findings of ‘unfit to plead’ ‘not guilty by reason of mental impairment’ in the Childrens Court

The Justice & Community Safety Directorate publishes quarterly reports on the criminal justice system, which include the number of findings of ‘unfit to plead’ and ‘not guilty by reason of mental impairment’ in the Childrens Court.130

These findings are not a common occurrence. While there were 18 occasions of finding of not guilty by reason of mental impairment in the Childrens Court in 2009-2010, the annual number has since remained below ten. Findings of unfit to plead in the Childrens Court are even rarer; there were 3 occasions in 2010-2011, and one in 2012-2013.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Findings of unfit to plead in the Childrens Court</td>
<td>0</td>
<td>3</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Findings of not guilty by reason of mental impairment in the Childrens Court</td>
<td>18</td>
<td>8</td>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
</tbody>
</table>

### 6.3.4 PREVALENCE AMONG CHILDREN AND YOUNG PEOPLE UNDER ACT YOUTH JUSTICE SUPERVISION

A child or young person may be placed under supervision of Youth Justice Services upon an order from the Childrens Court, or following their release from a period of detention under sentence at Bimberi. The CYPJ could not locate publicly available figures on the rates of mental health conditions, cognitive disability, or drug and alcohol use among this population group. Such information may be recorded on individual case files, but CYPJ is unaware if CSD aggregate and analyse the figures from a population perspective.

### 6.3.5 PREVALENCE AMONG CHILDREN AND YOUNG PEOPLE IN BIMBERI YOUTH JUSTICE CENTRE

For the purpose of this report, the Commission requested data from the Community Services Directorate about admissions to Bimberi in the calendar years 2012 and 2013. As discussed above in part 5, there were a total of 434 admissions (400 on remand and 34 under sentence). Some young people were admitted multiple times during the two year period.

On admission to Bimberi a young person may be referred to Forensic Mental Health Services for an induction assessment. These assessments are conducted by a social worker or psychologist employed by Forensic Mental Health. On our request the Health Directorate provided data for FMHS assessments on induction. FMHS conducted 83 admission assessments at Bimberi in the calendar years 2012 and 2013.

The CYPJ was initially concerned about the significant disparity between the number of admissions (434) and number of induction assessments (83), and sought to confirm that the requirements for admission assessments under the Children & Young People Act 2008 are being met. This is discussed further below in part 7.9.2.

In beginning this project, it was hoped that, by comparing admission data and clinical assessment data at Bimberi, some conclusions could be formed about the rates of mental health conditions or cognitive disability among children and young people who are admitted to Bimberi. However this proved not to be straightforward.

Cross referencing the Bimberi admission data (from CSD) with the admission assessment data (from the Health Directorate) does enable us to make some limited observations. Of the 83 admission assessments conducted by FMHS, 58 (70%) resulted in a clinical diagnosis or some other notation on the file. These descriptions are listed below in Table 6. The remaining 25 assessments (30%) have the notation ‘nil recorded on assessment’.

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131 Ibid.

Table 6: The range of conditions diagnosed among the 83 young people assessed by Forensic Mental Health Services upon admission to Bimberi in 2012 and 2013

<table>
<thead>
<tr>
<th>Mental health condition</th>
<th>Cognitive disability</th>
<th>Drug &amp; alcohol disorder</th>
<th>Other condition or description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Attachment disorder</td>
<td>Atypical autism</td>
<td>Alcohol abuse</td>
<td>Childhood abuse</td>
</tr>
<tr>
<td>Bipolar affective disorder</td>
<td>Mental retardation</td>
<td>Alcohol and THC abuse</td>
<td>Disturbance of activity and attention</td>
</tr>
<tr>
<td>Conduct disorder</td>
<td>Other organic personality and behavioural disorder due to brain disease, damage</td>
<td>Alcohol, THC, amphetamine, hallucinogen dependence</td>
<td>Significant impairment of behaviour requiring attention</td>
</tr>
<tr>
<td>Current euthymia</td>
<td>Dysthymia</td>
<td>Amphetamine abuse</td>
<td></td>
</tr>
<tr>
<td>Hyperkinetic conduct disorder</td>
<td>Moderate depressive episode without somatic syndrome</td>
<td>Cannabis abuse</td>
<td></td>
</tr>
<tr>
<td>Moderate depressive episode without somatic syndrome</td>
<td>Moderate depressive episode without somatic syndrome arising in the postnatal period</td>
<td>Harmful use of alcohol</td>
<td></td>
</tr>
<tr>
<td>Paranoid schizophrenia</td>
<td>Post traumatic stress disorder</td>
<td>Harmful use of multiple drugs and other psychoactive substances</td>
<td></td>
</tr>
<tr>
<td>Schizoaffective disorder, mania</td>
<td>Severe depressive episode with psychotic symptoms</td>
<td>Polysubstance misuse</td>
<td></td>
</tr>
<tr>
<td>Unsocialised conduct disorder</td>
<td>Unspecified non-organic psychosis</td>
<td>Polysubstance abuse (amphetamine, opioid, THC)</td>
<td></td>
</tr>
</tbody>
</table>

Of note is the fact that the diagnosis of ‘moderate depressive episode without somatic syndrome arising in the postnatal period’ indicates that there has been at least one young mother placed in detention at Bimberi.

In preparing this report the CYPC attempted to establish the proportion of young people at Bimberi living with mental health conditions or cognitive disability. The data available shows that, at a minimum, 58 (13%) of the 434 admissions to Bimberi in 2012 and 2013 involved a young person with a diagnosed mental health condition, cognitive disability, or drug or alcohol disorder. It is not clear how helpful this conclusion is, given that the real figure will be higher, as:

- FMHS do not conduct a full induction assessment of all children and young people admitted to Bimberi.
- Some young people who received an induction assessment were admitted to Bimberi more than once in the two year period.
- Due to the way data is reported from the FMHS database, it is not possible to conclude from the notation ‘nil recorded on assessment’ that those young person did not have a diagnosis. It is possible that they had received a diagnosis on a previous assessment, with which the clinician agreed, and they had no additional information to record on this occasion.
- A more definitive analysis could be undertaken through a further (resource-intensive) manual search of the FMHS database.

The CYPC also attempted to establish, of the cohort at Bimberi who experience mental health conditions and cognitive disability, what proportion are being held on remand, and what proportion are being held under sentence. The data requested from CSD and the Health Directorate shows that 77 (92%) of those who received a diagnosis during an induction assessment by FMHS were on remand at the time, and were later released without receiving a custodial sentence.
The CYPC intended to compare the average length of admission at Bimberi for young people with mental health conditions and cognitive disability, compared with young people without a mental health condition or cognitive disability. On the information requested from CSD and the Health Directorate, this was not possible.

### 6.3.6 STRENGTHENING DATA COLLECTION AND MONITORING OF MENTAL HEALTH CONDITIONS AND COGNITIVE DISABILITY ACROSS THE YOUTH JUSTICE SYSTEM

An important question facing organisations in the youth justice system is: how can the ACT improve data collection and analysis of mental health conditions and cognitive disability across the youth justice system?

As demonstrated in the preceding sections, it is currently not possible to form a definitive or complete picture of the prevalence of mental health conditions and cognitive disability across each stage of the ACT youth justice system. In particular, the CYPC hoped to answer the following questions, but cannot do so with the information currently available:

- Among the group of young people at Bimberi, what proportion of them experience mental health conditions or cognitive disability?
- Of the cohort at Bimberi who experience mental health conditions or cognitive disability, what proportion are being held on remand, and what proportion are being held under sentence?
- What is the average length of admission at Bimberi for (a) young people with mental health conditions or cognitive disability, and (b) young people without mental health conditions or cognitive disability?

Record keeping processes in the legal system are designed to facilitate access to individual case information rather than aggregate data. When CYPC asked the Health Directorate for aggregate information it was not easily retrievable or interpretable, and when CYPC tried to cross reference Health Directorate data with Community Services Directorate (CSD) data this could not be readily achieved. This indicates that each agency is performing their function in providing services to individual children and young people, but no one is tasked with the role of monitoring overall mental health of the youth justice population across the system.

While each matter before the Childrens Court plainly must be dealt with individually according to law, there is still benefit to understanding the overall situation from a policy perspective. Therefore it would be helpful for the ACT Government, the legal sector, and the community sector to collaborate in measuring and reporting the rates of mental health conditions and cognitive disability among the cohorts of young people at different points in the youth justice system, as:

> planning effective services for mentally ill prisoners is problematic in the absence of accurate information on the extent and the types of disorders.

Data specific to young people in the youth justice system would:

> provide a solid basis on which to plan appropriately targeted mental health services within the correctional system and ensure that appropriate screening and treatment programmes exist both at the point of reception and for those who are sentenced.

The Community Services Directorate has this year begun participating in the Young People in Custody Health Survey which assesses the health status of children and young people in detention in NSW (and now in the ACT). The survey report will provide CSD with a greater understanding of the therapeutic needs of children and young people in Bimberi, and will assist in the design of policies, procedures and services.

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134 Ibid., page 1.
Legal Aid ACT is implementing new measures to record the number of clients appearing before the court with an identified mental health condition.

The Justice & Community Safety Directorate (JCSD) is implementing further changes of the ACT Criminal Justice Statistical Profile, following their Consultation Review Process in 2013. The CYPc understands that upcoming changes will result in the publication of data sets on alcohol and other drugs, and family violence.

**Suggestions:**

1. That the Justice & Community Safety Directorate considers what additional data on mental health conditions might be included in the ACT Criminal Justice Statistical Profile (for example, drawing from police records of young people in custody) as they continue to implement changes to the Profile following the 2013 Review.
2. That the Community Services Directorate and Health Directorate measure and monitor the proportion of young people admitted to Bimberi who are living with mental health conditions or cognitive disability, and report publicly.
3. That the Community Services Directorate measure and monitor the proportion of young people under community supervision living with mental health conditions or cognitive disability, and report publicly.
7.1 RATIONALE FOR MENTAL HEALTH DIVERSION AND SUPPORT

With high rates of mental health conditions and cognitive disability recorded at all points in the criminal justice system, there is a strong rationale for diversion and support initiatives. Well designed diversion and support programs have potential to improve health outcomes for people with mental health conditions, and reduce the frequency and seriousness of offending behaviour.  

This report adopts a broad (rather than a technical) definition of ‘diversion and support programs’, referring to interventions that target mental health conditions and related problems in place of, alongside, or integrated with other criminal justice processes:

‘Programs which operate alongside other criminal justice system processes... in addition to those which divert people ‘out’ of the criminal justice system. The definition encompasses intervention settings at all stages of the criminal justice continuum.’

Mental health diversion and support programs have the dual aim of improving wellbeing and reducing reoffending in children and young people whose mental health condition or cognitive disability contributes to their offending behaviour.

Some children and young people have their first contact with physical health services or mental health services when they enter the criminal justice system. Therefore diversion and support programs are a ‘gateway to care’; they play an important role in identifying mental health conditions and cognitive disability, and connecting children and young people with the care and therapy they need.

‘Diversion recognises that the criminal justice system is not best placed to address a range of welfare and health issues and tries to connect young people with more appropriate community based services.’

As mentioned above in part 3.3, promoting the health and wellbeing of individual children and young people benefits the community as a whole by preventing reoffending:

‘By focusing on underlying causes of offending behaviour, diversion and support programs also help to make our communities safer.’

‘Traditional criminal justice mechanisms are less likely to succeed in the rehabilitation of people with cognitive and mental health impairments or in preventing future offending, than a diversion program addressing the underlying cause or causes of offending.’

136 Ibid., page 17.
137 Ibid., page 8.
138 Ibid., page 2.
‘The magnitude of [the gains achieved by diversion] cannot be estimated with any precision, but because mental illness and crime impose such large costs on individuals and society, the scale of improvement does not need to be very large to justify substantial investment in diversion on value for money grounds… The case for diversion is particularly strong when it means diverting offenders away from short sentences in prison. Prison is a high-cost intervention which is ineffective in reducing subsequent offending and inappropriate as a setting for effective mental health care.’

Finally, diversion ‘aims for the least intrusive intervention.’ See part 9.8 for discussion of the risks of unintended consequences and ‘net widening’.

7.2 OPPORTUNITIES FOR INTERVENTION EXIST AT SEVERAL POINTS ALONG THE YOUTH JUSTICE SYSTEM

There are several potential points along the youth justice system that provide opportunity for young people with mental health conditions or cognitive disability to be diverted, or to receive support services. These are outlined in Table 7. Progress through the youth justice system occurs in stages, and diversion away from the criminal justice system into treatment or rehabilitation can occur at any of these points. If the stakeholders in the youth justice system are informed of the value and importance of responding to mental health conditions and cognitive disability, they can take advantage of a series of possible ‘interception points’ for diversion and support:

‘The particular pathway through the criminal justice system taken by an offender with a mental illness of cognitive impairment will... depend on the responses of certain key players.’

The relevance of this point was made clear by participants in the 2013 Youth Justice Forum hosted by the Children & Young People Commissioner (described further in part 7.7.7). During a hypothetical discussion, stakeholders recognised that, had they known certain facts about the fictional young person in the case study, or the operation of the system, they would have had ability to make different decisions, ultimately avoiding the young person being placed in Bimberi.

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## Table 7: Intervention settings

<table>
<thead>
<tr>
<th>Description of diversion and support services</th>
<th>Preventive interventions prior to first contact with police</th>
<th>Pre-arrest and arrest interventions (law enforcement)</th>
<th>Court linked interventions</th>
<th>Corrections based interventions (after sentencing; pre-release; post-release)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community based, involving police, clinical and social support services and communities working together to improve access to supports for people with mental illness and at elevated risk of contact with the criminal justice system. Operate prior to offending occurring.</td>
<td>Elevated risk (pre-offending)</td>
<td>Crisis</td>
<td>Bail</td>
<td>Sentence</td>
</tr>
<tr>
<td>Often police, emergency services or mental health services based and targeted at improving response and outcomes to mental health crises. Also includes non-crisis situations, including use of police cautions, prosecutorial discretion, police bail and referrals.</td>
<td>Offence</td>
<td>Plea</td>
<td>Pre-release</td>
<td></td>
</tr>
<tr>
<td>Operate where a person has been charged with an offence and appears before a court. Responsive to a defendant’s mental illness, seeking to inform judicial decision making and facilitate interventions to reduce offending and improve wellbeing.</td>
<td>Arrest</td>
<td>Trial</td>
<td>Parole and community corrections</td>
<td></td>
</tr>
<tr>
<td>Operate after a person has been sentenced, including prison-based transition programs and community corrections. Aims to address mental illness and other risk factors for future offending in people who have a mental illness.</td>
<td>Charge</td>
<td>Sentencing</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Examples of diversion and support services or interventions in the ACT

| Early intervention programs funded by the Community Services Directorate and Education Directorate | Police warning or formal caution | Restorative Justice Unit |
| Police referral to Youth Alcohol Diversion Program | Galambay Circle Sentencing Court |
| Police bail | Youth Justice Case Management |
| Restorative Justice Unit | ACT Youth Drug and Alcohol Court Program |
| After Hours Bail Support Program | Court Alcohol & Drug Assessment Scheme (CADAS) |
| Dismissal of proceedings for care and protection reasons | Forensic Mental Health Services |
| Dismissal of proceedings on grounds of mental impairment | CAMHS |
| Finding of unfit to plead on grounds of mental impairment | Referral to ACAT after conviction |
| Finding of not guilty on grounds of mental impairment | |

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Deciding the most appropriate point of diversion for a particular child or young person requires careful consideration of their individual circumstances, but a general principle is that diversion and support ‘should occur as early as possible in a young person’s involvement with the criminal justice system’. 149

Identifying multiple points for intervention highlights the fact that ‘it is never too late to invest in diversion, and that the responsibility for diversion is not limited to the front end of the criminal justice process’. 150

### 7.3 EARLY INTERVENTION

Early intervention is important both from a clinical and justice perspective. Early intervention is associated with improved outcomes for children and young people with mental health conditions and their families, and ‘reduced total social costs associated with untreated illness’. 151 Supports to families early on may help prevent criminal behaviour:

> ‘there is good evidence that provision of mental health treatments to high-risk young people has also been found to reduce rates of subsequent arrest and detention’. 152

Some parents and caregivers report significant emotional distress about their child’s escalating behaviour, and describe trying to access support before the point of police and court involvement:

> ‘It is not uncommon for parents or caregivers attending Court to voice their frustrations at the escalating nature of their child’s criminal behaviour and it is not uncommon for those same parents, or caregivers, to give the court a history of their attendances upon a variety of agencies seeking assistance for dealing with their child’s increasingly problematic behaviour. Often at the heart of these frustrations and concerns is a suggestion that the child is suffering from a chronic mental illness.’ 153

The Commissioners received informal feedback in response to the November 2014 discussion paper that the youth justice system is reasonably responsive to young people who present with mental health conditions, but that there is significant potential for improvement in early therapeutic interventions with children under the age of criminal responsibility (eight to ten years old) who have been diagnosed with conduct disorder, or exhibit behaviour that is extremely challenging for their family and school to manage.

Early intervention is fundamental to any discussion of the youth justice system:

> ‘Child protection, family support and youth-specific services have a vital role to play when dealing with young people with emerging mental illness who are at risk of offending or are engaged with the [youth] justice system.’ 154

However, despite its importance, early intervention is not the focus of this report. Preventive programs and policies are essential, but this section examines responses to children and young people once they have entered the system.

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152 Ibid., page 21.


Australia reports regularly to the UN Committee on the Rights of the Child on its implementation of the Convention on the Rights of the Child. The most recent reporting cycle was completed on 28 August 2012 and the UN Committee made these comments in the concluding observations about Australia:

82. The Committee regrets that despite its earlier recommendations, the juvenile justice system of the State party still requires substantial reforms for it to conform to international standards, in particular the Committee is concerned that:

... (b) No measures have been taken to ensure that children with mental illnesses and/or intellectual deficiencies who are in conflict with the law are dealt with using appropriate alternative measures without resorting to judicial proceedings (CRC/C/15/Add.268, para. 74(d)); CRC/C/AUS/CO/42.1.155

The committee recommended:

84. ...the Committee reiterates its previous recommendations to:

... (b) Deal with children with mental illnesses and/or intellectual deficiencies who are in conflict with the law without resorting to judicial proceedings (CRC/C/15/Add.268, para. 74(d)).156

Data shows the ACT has a very low court lodgment rate compared with other Australian jurisdictions, which may suggest that the problem of criminalisation of children and young people with mental health conditions and cognitive disability may be less significant than other places.

As described above in part 4.3, section 94 of the Children & Young People Act 2008 includes a statement of ‘Youth Justice Principles’ that must be considered when making certain decisions in relation to a child or young person in the youth justice system. Similar legislative principles exist in other Australian States and Territories. The ‘general principles of juvenile justice’ in Western Australia are notable for including the explicit requirement that:

‘consideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so’.157

The Young Offenders Act 1994 (WA) establishes two mechanisms for dealing with young offenders without taking court proceedings. Before starting a proceeding against a young person, police are instructed to consider whether in all the circumstances it would be more appropriate to take no action or to administer a caution to the young person.158 Police, prosecutors and the court can refer a young person to a ‘juvenile justice team’ instead of proceeding with charges.159 The juvenile justice teams are coordinated by the youth justice authority, and may comprise representatives of the police, the education department, the child protection authority, the young person’s cultural group, and other organisations with a connection with the young person.160 A team established for a young person ‘may determine the way in which it considers the matter should be disposed of and invite the young person to comply with terms to be

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157 Section 7(g), Young Offenders Act 1994 (WA).
158 Section 22B, Young Offenders Act 1994 (WA)
159 Part 5, Division 2, Young Offenders Act 1994 (WA).
160 Section 37, Young Offenders Act 1994 (WA)
specified by the team. The young person’s participation is voluntary. The purpose of these legislative mechanisms in WA are to avoid exposing the young person to ‘associations or situations likely to influence the person to further offend’, and to encourage and help the family or other group in which the person normally lives to influence the person to refrain from further offending.

Currently in the ACT, criminal proceedings in the Children’s Court may be dismissed for care and protection reasons under section 74M of the Court Procedures Act 2004, avoiding further intervention from the judicial system in the life of a young person if that is deemed appropriate. However, this process still requires the child or young person to attend court, and potentially be placed on remand at Bimberi. Adopting the WA model may result in earlier diversion.

Suggestions:

4. That ACT Government consider legislative amendment to include within the youth justice principles in section 94 of the Children & Young People Act 2008 a provision similar to that in section 7(g) of the Young Offenders Act 1994 (WA). Section 7(g) requires that consideration be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so.

5. That the Community Services Directorate, Health Directorate, Education Directorate, Justice & Community Safety Directorate and ACT Policing explore whether the model of ‘youth justice teams’ undertaken in Western Australia is suitable for consideration in the ACT context, and convey to the Children & Young People Commissioner the outcomes of their consideration.

7.5 CONTACT WITH POLICE

Police are ‘often the first to come into contact with children and young people suffering from acute mental health episodes – either those who have committed an offence or those who are non-compliant and require transportation to hospital for assessment and treatment.’

A review of the research suggests a best practice approach to diversion at the ‘pre-arrest and arrest stage’ of the system involves:

- ‘modifying the traditional law-enforcement role of police to one in which police accept an active role in responding to mental illness as a community safety and public health issue
- ‘training and support for front line police (and dispatchers) to improve their ability to recognise when a mental illness may underlie or significantly contribute to a person’s problematic behaviour
- ‘timely police access to mental health screening and, where screening indicates likely mental illness, the ability to refer for comprehensive assessments by mental health professionals (moderated by appropriate confidentiality and privacy safeguards)
- ‘availability of protocols and guidance for the considered exercise of discretion not to arrest or charge (for police) or prosecute (for prosecutors) where a person has or is suspected to have a mental illness’.

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161 Section 32, Young Offenders Act 1994 (WA)
162 Section 24, Young Offenders Act 1994 (WA)
163 Western Australia Commissioner for Children and Young People (2011) Report of the Inquiry into the mental health and wellbeing of children and young people in Western Australia, page 78.
7.5.1 POLICE POLICY/GUIDELINES FOR DIVERSION OF YOUNG PEOPLE WITH MENTAL HEALTH CONDITIONS OR COGNITIVE DISABILITY

The Victoria Law Reform Commission recommended in 2007 that ‘[p]olice should develop a policy to issue a caution or summons to children rather than arrest them, unless there is a good reason to arrest them.’\(^{165}\) When children and young people with mental health conditions or cognitive disability are accused of an offence, ACT Policing may choose to issue a caution and refer them to support services, or refer them to diversion programs (such as drug and alcohol diversion, or restorative justice). The Commissioners have not had opportunity to examine the policies and procedures guiding individual officers in making such decisions. ACT Policing informed the Commissioners that mental health clinicians are placed on duty at ACT Policing Operations to provide professional advice to officers on the front line. The clinicians are involved in police decision making processes when a person engaging with police officers presents with ‘poor mental health’. In addition, a psychologist from Child & Adolescent Mental Health Services (CAMHS) is available to provide phone liaison and onsite review of young people engaged with police in ‘mental health related emergency situations’.\(^{166}\)

7.5.2 DISCRETION TO DISCONTINUE CHARGES ON IDENTIFICATION OF MENTAL HEALTH CONDITIONS OR COGNITIVE DISABILITY

The NSW Law Reform Commission recommended in 2012 the creation of ‘a statutory scheme providing police with clear power to discontinue proceedings in appropriate cases in favour of referral to services.’\(^{167}\) The recommendation involves police being given the discretion to discontinue charges, after:

‘taking into account factors including: the apparent nature of the person’s cognitive or mental health impairment; the nature, seriousness and circumstances of the alleged offence; the person’s history of offending, if any; and the availability of treatment, intervention or support in the community’.\(^{168}\)

A similar mechanism was also discussed at the Children & Young People Commissioner’s Youth Justice Forum in 2013 (see part 7.7.7). To facilitate this decision making, the NSW LRC recommended the police be given access to the same assessment and case management services that are available to the Childrens Court.

Currently ACT Policing receive support from the After Hours Bail Support Service in helping them to identify, assess and divert young people with mental health conditions or cognitive disability. It would be useful to consider whether giving ACT Policing the discretion to discontinue charges against children and young people with mental health conditions or cognitive disability, supported by clinical assessments and case management, would be useful and appropriate in the ACT context. Flexibility in police response to breach of bail should be included in this consideration (see part 7.7.8).

**Suggestion:**

6. That ACT Government considers the creation of a statutory scheme providing police with clear power to discontinue charges against children and young people with mental health conditions or cognitive disability in appropriate cases in favour of referral to services.

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\(^{166}\) Comments from ACT Policing to the Children & Young People Commissioner and Health Services Commissioner, in response to the discussion paper ‘Children & Young People with Complex Needs in the ACT Youth Justice System: Criminal Justice Responses to Mental Health Conditions, Cognitive Disability, Drug & Alcohol Disorders, and Childhood Trauma’.

\(^{167}\) NSW Law Reform Commission (2012) *People with cognitive and mental health impairments in the criminal justice system: Diversion*.

\(^{168}\) Ibid., page 377.
7.6 PROSECUTION POLICY

As mentioned above, a review of the research suggests a best practice approach to diversion at the ‘pre-arrest and arrest stage’ of the system involves:

‘availability of protocols and guidance for the considered exercise of discretion not to arrest or charge (for police) or prosecute (for prosecutors) where a person has or is suspected to have a mental illness’. 169

Prosecutors have discretion to consider whether it is in the public interest to prosecute a young person with mental health conditions or cognitive disability. The ACT Director of Public Prosecutions Prosecution Policy states that the factors involved in considering the public interest include, among other things:

- ‘[t]he youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender or victim’,
- ‘[t]he availability and efficacy of any alternatives to prosecution’,
- ‘[t]he age, apparent maturity and mental capacity of the juvenile’, and
- ‘[w]hether a prosecution would be likely to cause emotional or social harm to the juvenile having regard to such matters as his or her personality and family circumstances.’170

In some matters it may seem appropriate for the DPP to allow the court to decide whether and how to respond to suspected mental health conditions or cognitive disability, as the court can access advice from Forensic Mental Health Services to inform their decision. However this results in the problematic situation of young people being taken to court in order to access a mental health service. Moreover there are also cases where it is not in the public interest for a vulnerable child or young person to be exposed to court processes at all.

The DPP are called upon to make quick decisions with limited information. They can take into account submissions made to them by others, but have limited time and resources to seek out information to inform their decision. It is therefore appropriate to examine the communication channels that exist between organisations in the youth justice system before the point of prosecution. Systems might be established to better enable legal, community and health services to provide the DPP with information about a young person’s mental health, cognitive capacity or background. Such coordination would be challenging in a short time frame, but not impossible. One organisation perhaps well placed to facilitate information flow is the After Hours Bail Support Service, which speaks with young people detained in the police watchhouse overnight. Information obtained by the AHBSS might about a young person’s health status or disability status might, with the consent of the young person or their parents, support informed decision making by the DPP.

The Commissioners will invite Youth Justice Case Management within the Office for Children Youth & Family Support to attend one of the regular Bimberi Oversight Group meetings to discuss current policy and program responses.

7.7 BAIL AND REMAND

‘Bail is a significant issue for young people with cognitive and mental health impairments. It raises challenging and contested legal policy issues.’171

Bail and remand was the subject of the Youth Justice Forum in 2012 and 2013, hosted by the Children & Young People Commissioner. The topic is closely linked to the issues raised in this report.

The NSW Law Reform Commission concluded in 2010 that the application of the NSW bail legislation might be problematic for young people with mental health conditions or cognitive disability:

‘A number of concerns have been identified regarding the application of bail legislation to young people with cognitive and mental health impairments, including that the application of bail legislation may impact differently and adversely on these young people and ultimately lead to their remand in custody. Particular concerns include... the nature of bail conditions imposed on these young people; monitoring and the impact of non-compliance with bail conditions and difficulty accessing appropriate accommodation and services.’

The Victorian Law Reform Commission formed similar conclusions about Victorian bail legislation in 2007:

‘Although bail law appears to apply equally to everyone, it doesn’t operate that way in practice. Indigenous Australians, immigrants, children, young people, people with mental illnesses and women are all disadvantaged by the operation of the current bail law.’

### 7.7.1 HIGH RATES OF YOUNG PEOPLE ON CUSTODIAL REMAND ACROSS AUSTRALIA

The decision whether to grant bail or remand in custody is a critical factor in the experience of a young person in the criminal justice system. In recent decades there has been a demonstrated increase in rates of remand across Australia, or ‘underutilisation of bail’. One study has found that of the total population of young people in detention in Australia, the percentage on custodial remand (i.e. unsentenced) rose steadily from around 20 per cent in 1981 to around 60 per cent in 2008. This rise is partly (but not wholly) explained by decreasing sentencing rates.

ACT Government statistics show that the rate of remand was extremely high in 2008-2009 (94% of all admissions to Bimberi) and 2009-2010 (93%), and has fallen slightly in the last few years, to 82% in 2010-2011, 81% in 2011-2012, and 80% in 2012-2013.

For this review the Children & Young People Commissioner and Health Services Commissioner requested Bimberi admission data from the Community Services Directorate. The data received for the calendar years 2012 and 2013 showed 400 out of 434 total admissions to Bimberi were on remand (92%).

The reasons for the increase in the use of remand in Australia are complex, however the AIC identified a list of factors they describe as ‘drivers of custodial remand’ for young people. The increasingly complex needs of young offenders (including those with mental health issues) appearing before the courts are among those factors:

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172 Ibid., paras 2.24 and 1.66.
175 Kelly Richards & Lauren Renshaw (2013) Bail and Remand for Young People in Australia: A national research project, Australian Institute of Criminology, page 2.
176 Ibid.
179 Kelly Richards & Lauren Renshaw (2013) Bail and Remand for Young People in Australia: A national research project, Australian Institute of Criminology, page 63.

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An increase in young people presenting with mental health issues, substance abuse problems, unstable home environments, poor health and disengagement from school, and an increase in very young people (ie those aged under 15 years) coming into contact with the criminal justice system were all raised as examples of increasingly complex needs that may render young people vulnerable to bail refusal.\(^{180}\)

7.7.2 REMAND IS HARMFUL

Research shows that a period of remand has negative consequences for young people’s lives in relation to education, employment and personal relationships. Remand also has a criminalising effect, drawing young people further into the justice system and increasing the likelihood of future reoffending:\(^{181}\)

‘[t]he available research does not support the effectiveness of imprisonment as a specific deterrent to re-offending and in fact suggests that it may slightly increase recidivism,’\(^{182}\)

In recent years the Community Services Directorate has been among the agencies that are locally ‘increasing awareness by all involved in the youth justice system of the deleterious effects of exposure to the formal justice system.’\(^{183}\)

7.7.3 YOUNG PEOPLE WITH COMPLEX NEEDS ARE MORE LIKELY TO BE DENIED BAIL

Children and young people with mental health conditions and related problems are more likely to be exposed to remand:

‘young people with complex needs and welfare issues (ie. those with mental health, alcohol and other drug abuse problems, and/or a history of experiencing child maltreatment or other violence) are most vulnerable to receiving custodial remand—they are often excluded from mainstream and community-based services. This, combined with legislation that aims to ‘protect’ a young person from the outside world and/or because required services are only available in custody, contributes to situations where young people may be remanded in detention ‘for their own good.’\(^{184}\)

The CSD evaluation report of the After Hours Bail Support Service showed that, during the six month review period, two young people in police custody were assisted by the AHBSS but were still remanded at Bimberi by police ‘for mental health concerns’.\(^{185}\)

The NSW Law Reform Commission considered these questions during a recent review of the NSW legal system, asking:

‘Do the provisions in the bail legislation setting out the conditions for the grant of bail make it harder for a person with a mental illness or cognitive impairment to be granted bail than other alleged offenders?’\(^{186}\)

‘What other approaches might be adopted to avoid remand in custody in appropriate cases where a young person with a cognitive or mental health impairment breaches a bail condition as a result of their impairment?’

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\(^{180}\) Ibid., pages 64-65.  
\(^{184}\) Kelly Richards & Lauren Renshaw (2013) Bail and Remand for Young People in Australia: A national research project, Australian Institute of Criminology, page 2.  
It would provide useful information to collect and analyse data on the rate of presentation of mental health conditions and cognitive disability among children and young people placed on remand at Bimberi, compared with young people who are released on bail by police or the court. However such research would be too resource intensive for routine reporting.

There are some indications that the provisions in the bail legislation setting out the conditions for the grant of bail make it harder for a person with mental health conditions or cognitive impairment to be granted bail than other alleged offenders. However without the analysis mentioned above, we cannot know this for sure.

The Commissioners remain interested in the question of what additional approaches might be adopted to avoid remand in custody in appropriate cases where a young person with cognitive or mental health impairment breaches a bail condition as a result of their impairment. The Commissioners will invite Youth Justice Case Management within the Office for Children Youth & Family Support to attend one of the regular Bimberi Oversight Group meetings to discuss current policy and program responses.

7.7.4 YOUNG PEOPLE WITH LIMITED CAPACITY TO UNDERSTAND OR COMPLY WITH BAIL CONDITIONS

Some young people with mental health conditions or cognitive disability may not fully understand their conditions, and may unintentionally breach bail (this was also the conclusion of the Noetic review of the NSW juvenile justice system). It is important that courts are able to craft bail conditions which young people with cognitive and mental health impairments are able to comply with and understand, otherwise they may be remanded in custody unnecessarily. The Commissioners will invite Youth Justice Case Management within the Office for Children Youth & Family Support to attend one of the regular Bimberi Oversight Group meetings to discuss current policy and program responses.

7.7.5 THE IMPACT OF MULTIPLE, COMPLEX OR INAPPROPRIATE BAIL CONDITIONS

It is difficult for young people to comply with multiple and complex bail conditions:

‘Young people, especially with a cognitive or mental health impairment, may find it difficult to comply with numerous, and prescriptive, bail conditions. This could result in court appearances for breach of bail conditions and subsequent remand.’

In the ACT youth justice system, bail is often conditional, and the bail conditions imposed on young people, particularly under the ‘reasonable directions’ of the Director General, are numerous, and attempt to prescribe their behaviour and conduct. The Commissioners will invite Youth Justice Case Management within the Office for Children Youth & Family Support to attend one of the regular Bimberi Oversight Group meetings to discuss current policy and program responses.

189 Ibid., para 2.36.
According to the AIC, one of the drivers of increased use of remand are inappropriate or arbitrary use of bail conditions; bail conditions that are onerous, unrealistic, difficult to understand or are not sufficiently related to the crime itself. These typically include orders that the young person reside in a particular place, attend school, report to police, or observe a curfew. A survey conducted in NSW in 1990 found that, in that State:

‘Bail conditions were framed around what would normally be considered part of a case management plan (for instance, attending counseling, residing as directed).’

A report in Victoria in 2007 found there were some cases of inappropriate and punitive bail conditions being imposed on young people in that State, sometimes more onerous than sentencing orders imposed on young people. The Victorian Law Reform Commission stated that these conditions ‘while well meant, may not take into account the child’s age and maturity and ability to comply.’

Bail conditions that are intended to control the behaviour of the young person (to set boundaries for a young person living in a chaotic childhood), or to promote their welfare, can mean that the young person is set up to fail. To be appropriate the conditions must involve consultation with the young person and their family, and careful assessment of the young person’s circumstances.

7.7.6 SOME EPISODES OF REMAND SEEM UNNECESSARY IN HINDSIGHT

With the perspective of hindsight, some episodes of remand seem to be unnecessary; the young person is held on remand then released on bail, or charges are dismissed, or a custodial sentence is not imposed:

‘It is arguable that remand in custody was not appropriate in cases where a custodial sentence has not been imposed, where charges have been dismissed, or where the young person has been diverted out of the criminal justice system.’

During the six month evaluation period of the After Hours Bail Support Service in 2011-2012, ‘62% of police-initiated remand in custody episodes led to the young person being released at the next court appearance’, and ‘significant numbers of young people [were] being held in detention on remand who were subsequently not sentenced to periods of detention’.

When provided with access to Bimberi admission data for 2012 and 2013, the Commission calculated that 194 (45%) of the 434 admissions were overnight, and 281 (65%) were for less than one week. It would be interesting to undertake ongoing monitoring of the reasons young people are denied bail, and the subsequent circumstances under which they are released from Bimberi, to help us identify if systemic measures could avert the need for some of these admissions.

Such analysis was conducted during the six month evaluation of the After Hours Bail Support Service (AHBSS) in 2011-2012. The evaluation report showed that breach of bail (with no further offence) was the primary reason for admission of young people to Bimberi. Most remand episodes were initiated by police rather than the court (97 out of 112 in the six month review period). The main reason for police initiated remand was breach of bail without any additional offence (44 out of 97 in the six month review period). Following a police initiated remand episode, on 62 occasions

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194 Kelly Richards & Lauren Renshaw (2013) Bail and Remand for Young People in Australia: A national research project, Australian Institute of Criminology, page 77.
(64%) the young person was released on bail at their next court appearance; these were short term remand episodes of 1-2 days. 197

These comments do not imply any criticism of police. Police are asked to make a difficult judgement about the safety and wellbeing of the young person before them, and of the community generally, with imperfect information and in evolving circumstances, and their discretion is limited by the legislative framework in which they operate.

**Suggestion:**

7. That the Community Services Directorate continue to analyse the reasons that young people are denied bail when placed on remand in Bimberi, and the outcome of their first court appearance, as they did during the evaluation of the After Hours Bail Support Service in 2011-2012. If such analysis is too resource intensive to undertake on an ongoing basis, perhaps periodic collection and analysis could be undertaken (for example, three months of each year).

### 7.7.7 AGREEMENT ON THE DESIRABILITY OF REDUCING THE NUMBER OF REMAND EPISODES IN THE YOUTH JUSTICE SYSTEM

International human rights conventions and the ACT Youth Justice Principles state clearly that detention of children and young people should only be considered as a last resort. ‘Last resort’ is subject to interpretation; nonetheless most people involved with the youth justice system would agree it is desirable to reduce the number of remand episodes as far as possible. In the course of a recent major report on people with cognitive and mental health impairments in the criminal justice system, the NSW Law Reform Commission asked:

> ‘How can the number of young people with cognitive and mental health impairments held on remand be reduced, while also satisfying other considerations, such as ensuring that the young person appears in court; ensuring community safety; the welfare of the young person; and the welfare of any victims.’ 198

**After Hours Bail Support Service (AHBSS)**

The Community Services Directorate is aware of the importance of reducing young people’s exposure to remand. The After Hours Bail Support Service (AHBSS) was established in 2011 with the aim of diverting young people from Bimberi, and assisting young people on community-based justice orders to comply with their bail. A detailed and considered evaluation report was published in 2012 which showed that in the first six months of operation of the AHBSS, 21 young people were diverted from Bimberi as a result of the service. 199 During 2013-2014, AHBSS assisted to divert 39 young people from Bimberi. 200 The evaluation report concluded:

> ‘AHBSS appeared to have filled a shortfall in service options for young people outside business hours that were often a time of crisis for young people.’ 201

Most requests to the AHBSS were from youth homelessness and OOHC services for assistance for young people on bail to comply with their bail conditions. Police also contacted AHBSS for assistance outside business hours when they were considering refusing bail to a young person, in which case:

> ‘AHBSS staff attended the ACT Watch House and completed an assessment with the young person to determine if they were suitable for bail support. AHBSS assisted to identify suitable community-based options for young

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200 CSD annual report 2013-2014
people including arranging or providing transport after hours and arranging transport to court the following day. Young people deemed suitable for bail support were subsequently diverted from a remand episode at Bimberi.’

However if the young person had been arrested for breach of bail or on an outstanding warrant the police generally continued to remand the young person in custody. This is discussed further in the following part 7.7.8.

We agree with the conclusion stated in the evaluation report of AHBSS that there would be benefit in:

‘broad[ening] the scope of AHBSS beyond a narrow focus on diverting young people from custody and assistance with bail to support for youth justice orders more generally. This would recognise the valuable work that can be undertaken after hours to support young people and their families to meet their obligations.’

The Community Services Directorate has expressed willingness to consider expanding the AHBSS, for example in supporting young people under community supervision orders out of hours. There may be potential to extend the AHBSS to further support young people with mental health conditions or cognitive disability to meet their court ordered obligations and access therapeutic support. The Commissioners will invite Youth Justice Case Management within the Office for Children Youth & Family Support to attend one of the regular Bimberi Oversight Group meetings to discuss current policy and program responses.

**Roundtable discussion at the 2013 Youth Justice Forum hosted by the Children & Young People Commissioner**

During the Youth Justice Forum hosted by the Children & Young People Commissioner in April 2013, participants from the legal system, government agencies and community sector discussed ideas that may help reduce the number of short term remand episodes, including the potential for:

- greater use of family and existing support services to assist behaviour control and modification for young people, rather than court imposed bail
- police to be granted discretion to not arrest young people who they find in breach of their bail, but to engage the AHBSS or community based support agencies to support the young person
- police to be granted discretion to ‘un-arrest’ a young person if they deem it appropriate after finding out more about the individual circumstances of a young person (reasons for the breach, and relationship with existing support services, etc)
- police to be granted discretion to ‘re-bail’ a young person with the same bail conditions if they deem it appropriate
- community youth workers on call to be able to attend police stations to engage and work with young people as soon as possible after their arrest
- develop a greater range of accommodation options for young people who can’t go home
- expand the AHBSS to be available on a 24 hour basis
- engage the community sector as early as possible to provide Individualised support for young people and remove them from the statutory system as soon as possible
- earlier and more detailed assessments of young people post arrest to determine their capacity and the best way to supervise and support them
- improved capacity for different parts of the youth justice system to share information about young people in contact with the system in a timely and effective manner
- improve data collection across the system.

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203 Ibid.

The After Hours Bail Support Service (AHBSS) has demonstrated that, with support and additional information from Youth Justice, police have a wider range of options and they are willing to exercise their discretion to release a young person on bail rather than transport them to Bimberi. However there is a perception that police have limited options after a young person has been arrested, and if young people are arrested for breach of bail or on an outstanding warrant the police generally proceed to remand them in custody, despite the assistance of AHBSS.  

The evaluation report of the AHBSS concluded that it is important ‘to understand what might be preventing police from exercising discretion [to release a young person on bail] even when the support of the AHBSS was available to them’, because ‘current legislation as applied to young people might not be in the best interests of young people and might be having perverse consequences of drawing young people unnecessarily into the formal justice system’.  

This section raises the possibility of legislative amendment to allow police greater discretion in dealing with breaches of bail by young people with mental health conditions or cognitive disability. The following legislative provisions seem to be the ones that police feel limit their discretion in responding to breach of bail:

- Section 14 of the Bail Act 1992 states that an authorised officer must not grant bail to a person accused of an offence if a decision about bail in relation to the offence has been made by a court.
- If a police officer believes on reasonable grounds that a person ‘has failed to comply with a bail condition’, or ‘will not comply with a bail condition’, they may arrest the person without warrant, and must bring them before a court as soon as practical (section 56A of the Bail Act). In contrast, under section 212 of the Crimes Act 1900, where a police officer suspects on reasonable grounds that a person has committed or is committing an offence, they may arrest the person without warrant only in certain circumstances and to achieve certain purposes (for example, to ensure the person appears in court, or to prevent the loss of evidence). Such limitations with respect to arrest are not present in s56A of the Bail Act.
- Section 50 of the Bail Act does not distinguish different types of breaches (for example ‘technical breaches’ which do not involve the commission of a further offence, and suggest no increased risk to the community).

There are also legislative restrictions to police discretion in relation to family violence and first instance warrants.

During the roundtable discussion hosted by the Children & Young People Commissioner at the 2013 Youth Justice Forum, there was discussion of the potential benefits of:

- amendment to allow police discretion not to breach a young person if they deem it appropriate after learning about the individual circumstances of a young person, and
- legislative amendment to allow police discretion to ‘re-bail’ a young person with the same bail conditions if they deem it appropriate after finding out more about the individual circumstances of a young person.

One of the Suggestions of this report (see part 7.5.2) is that ACT Government considers the creation of a statutory scheme providing police with clear power to discontinue charges against children and young people with mental health conditions or cognitive disability in appropriate cases in favour of referral to services. Flexibility in police response to breach of bail should be included in this consideration.

The legal purpose of bail is to reduce the risk of a young person reoffending, and to contain their behaviour, not to rehabilitate young people. The young person is making a choice either to agree and follow the conditions, or be detained at Bimberi, and any breach must be treated seriously. However it is also important to view bail from the
wider perspective of remand. The community will benefit from a youth justice system that does not draw young people further into the system unnecessarily, particularly vulnerable young people with mental health conditions or cognitive disability. It may be helpful to allow police to gather information to assist them to consider the young person’s individual circumstances, and then make a decision about how to respond to the breach. This would demonstrate to young people that bail is serious, but avoid the criminalising effect of detention in Bimberi unless it is truly necessary.

It would be useful to discuss ways in which the youth justice system can simultaneously:

- create the circumstances in which police and the court are not forced to detain a child or young person on remand in situations where they would prefer to release them on bail,
- assist the police and the court to identify appropriate bail conditions, and
- support children and young people to understand and comply with bail conditions.

The Commissioners will invite Youth Justice Case Management within the Office for Children Youth & Family Support to attend one of the regular Bimberi Oversight Group meetings to discuss current policy and program responses.

### 7.8 CHILDRENS COURT PROCEEDINGS

#### 7.8.1 ASSISTING THE CHILDRENS COURT TO MAKE DIFFICULT DECISIONS

Young people often present to the ACT Childrens Court in crisis situations, and the Magistrate is called upon to make difficult decisions with imperfect information. More broadly the legal system is asked to manage complex situations that the community has not been able to prevent or resolve. When adjudicating charges against an adult man with acquired brain injury requiring residential care, but for whom there were limited facilities available, the Supreme Court of NSW noted:

’In our society we do not make proper provisions for people such as the defendant, and busy Magistrates are constantly being placed in a situation of having to deal with impossible cases with inadequate evidence, and in having to deal with matters that society itself has not been adequately prepared to deal with, in terms of appropriate legislation or appropriate institutions.’

The Court currently benefits from the advice, specialist assessments, and resources of Youth Justice, Care & Protection Services, Forensic Mental Health Services, and Court Alcohol and Drug Assessment Service (CADAS). However there are still situations where a young person is placed on remand for a few days or weeks while suitable arrangements are explored, identified and put in place to allow the young person to return to the community. Comments by Childrens Court Magistrates in public and in Court indicate their frustration that lack of suitable community resources, particularly supported accommodation services, sometimes undermines attempts at diversion.

Detention of children and young people should be considered as a last resort (see part 4.1), and even short periods of remand have a criminalising and harmful effect on children and young people (see part 7.7.2).

Two of the Suggestions of this report (see part 8.1) are:

- That ACT Policing or the After Hours Bail Support Service record and monitor the number of occasions each year in which a young person is transferred from police custody to Bimberi because suitable accommodation cannot be found in the community, and

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That Childrens Court administration or Youth Justice Case Management record the number of occasions each year in which a young person is remanded in custody because suitable accommodation cannot be found in the community.

Capturing this data will help us understand the most common reasons that no suitable accommodation can be found for a young person, and how the ACT community can address these challenges systemically. For example, relevant factors may include: youth accommodation services and out of home care services refuse to accept the young person because of their previous behaviour; the young person refuses to accept the safe accommodation options presented to them; the young person refuses to engage with therapeutic or support services offered to them in the community; escalating verbal or physical aggression towards family, carers or support workers; risk taking behaviour; or self harming behaviour.

7.8.2 CHILDRENS COURT REFERRALS FOR FORENSIC MENTAL HEALTH ASSESSMENT

Mental health services need to be accessible and integrated with the Childrens Court, so that the Magistrate can rely on clinical advice. A Magistrate in the United Kingdom observed:

‘...Without [liaison and diversion services] being available and in the court sometimes I would have made the decision to remand and in others the decision to give a sentence...I feel reassured by them....it’s a matter of being able to trust them...' 208

Magistrates in the ACT can request that a young person be assessed by Forensic Mental Health Service (FMHS). See part 6.3.2 for a description of the assessments conducted in 2012 and 2013. Where the individual is diagnosed with a mental health condition, that diagnosis becomes part of the court’s store of knowledge of that young person, and can be used for a variety of purposes, for example in sentencing and setting bail conditions. The diagnosis is also kept by FMHS in its case management system which is accessible to clinicians on later occasions should that individual return to the justice system.

In some Australian jurisdictions there are concerns about unnecessary remands in custody, or unnecessarily long periods in custody, arising because the Court is waiting for a psychiatric report. Reports suggest this is not a significant concern in the ACT. FMHS apparently prioritises assessments of young people in Bimberi, to minimise their time in custody, though as a result there can reportedly be significant delay in assessments of young people in the community. See part 7.9.2 for separate discussion of forensic mental health assessments at Bimberi.

7.8.4 IS THERE SCOPE FOR INCREASED USE OF DISMISSEALS UNDER S.334 OF THE CRIMES ACT 1900?

The Fourth National Mental Health Plan states the importance of ‘[s]creening people for mental health problems at courts, and where possible diverting them to services in the community’. 209

Section 334 of the Crimes Act 1900 provides a vehicle for the Childrens Court to divert a child or young person to treatment or support services that avoids the need for admissions. Under s334 of the Crimes Act 1900, if a Magistrate is of the opinion that a young person is ‘mentally impaired’, he or she may dismiss the charge and discharge the defendant, either unconditionally, or with the requirement they submit to the jurisdiction of the ACT Civil & Administrative Tribunal (ACAT) to enable the making of a mental health order under the Mental Health (Treatment and Care) Act 1994 (ACT). 210 This applies to summary offences, or indictable offences dealt with summarily.

210 Section 334(2), Crimes Act 1900 (ACT).
Mental impairment is defined in the *Criminal Code 2002* as:

> ‘mental impairment includes senility, intellectual disability, mental illness, brain damage and severe personality disorder’.\(^{211}\)

In turn, mental illness is defined as:

> ‘an underlying pathological infirmity of the mind, whether of long or short duration and whether permanent or temporary, but does not include a condition (a reactive condition) resulting from the reaction of a healthy mind to extraordinary external stimuli. However, a reactive condition may be evidence of a mental illness if it involves some abnormality and is prone to recur.’\(^{212}\)

Section 334 of the *Crimes Act 1900*:

> ‘gives Magistrates ability to ‘seek advice from the Tribunal as to whether a person is mentally dysfunctional and recommendations as to how the person should be dealt with’, and gives them ‘flexibility to make other appropriate orders’.\(^{213}\)

In NSW, of all the children and young people who have matters finalised before the Children’s Court, between 1.1% and 1.8% of them receive orders discharging the matter under section 32 of the *Mental Health (Forensic Provisions) Act (NSW)* (the equivalent provision to s334).\(^{214}\) The NSW Law Reform Commission found that, given the high rates of both cognitive and mental health impairments among the young people coming into contact with the criminal justice system, there was scope for increased use of s32 (the equivalent provision to s334) in the NSW Children’s Court.\(^{215}\)

Justice Refshauge of the ACT Supreme Court has also recently commented on the usefulness and purpose of s334 dismissals:

> ‘[T]he Magistrates Court should not be too quick to ignore the very valuable provision of diversion under s334 because of the desirability of the mental health system managing persons who are mentally impaired rather than the criminal justice system, which has no great reputation for success in doing so.’\(^{216}\)

It would be interesting to learn the proportion of matters which are dismissed under s334 in the ACT Childrens Court, however unfortunately this data is not published, and may not be collated. Identifying and analysing this information would be useful from a policy perspective (see further discussion of strengthening data collection and analysis in part 6.3.6 and part 8.9).

**Suggestion:**

8. That the Childrens Court administration records the number of matters dismissed in the Childrens Court under section 334 of the *Crimes Act 1900* each year, and that the Justice & Community Safety Directorate reports this data in the Criminal Justice Statistical Profile.

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\(^{211}\) Section 27, *Criminal Code 2002* (ACT).

\(^{212}\) Section 27, *Criminal Code 2002* (ACT).


\(^{215}\) ibid., page 100.

7.8.5 THERAPEUTIC SUPERVISION ORDERS BY THE CHILDRENS COURT

In 2014 the Victorian Law Reform Commission recommended giving the Children’s Court the power to make fixed term (two-year) therapeutic supervision orders with built-in six-month review periods. An existing scheme of therapeutic supervision orders is available for adults in Victoria.

Given the decision by the Community Services Directorate not to use the provisions in the Children & Young People Act 2008 that allow for Therapeutic Protection Orders (see part 8.2.2), ‘therapeutic supervision orders’ might be an appropriate option for some young people; compelling them to participate in treatment or support services, while limiting their exposure to the youth justice system. Under youth justice supervision, failure to attend psychiatrists’ appointments could be a breach of bail and may result in youth justice detention. In comparison, under therapeutic supervision, failure to attend psychiatrists’ appointments might result in compulsory treatment in a mental health facility, but not remand in Bimberi.

**Suggestion:**

9. That ACT Government explore whether the Childrens Court should be granted legislative authority to make therapeutic supervision orders in appropriate circumstances.

7.8.7 YOUTH MENTAL HEALTH COURTS

Some people advocate for a ‘collaborative problem-solving therapeutic jurisprudence approach’ to mental health conditions and cognitive disability in the youth justice system. That is, a ‘shift away from the critical incident-based and confrontational approach’ of some courts, to an approach that focuses ‘on the often long-term and complex problems of those who appear in court’.

Therapeutic jurisprudence is loosely associated with the concept of ‘problem solving courts’, which ‘are characterised by… judicial case monitoring and close collaboration with service providers’. One example of a problem solving court is the Youth Drug and Alcohol Court Program, established by the Childrens Court Magistrate in 2011. The YDAC aims to reduce ‘drug and/or alcohol related criminal activity by children and young people through judicial and therapeutic interventions’ and ‘divert young offenders from custody by addressing the issues related to drug and alcohol offending in a holistic way.’ The YDAC develops a ‘program plan’ for each participant, and provides an ‘intensive monitoring process and continuing supervision of the child or young person’s progress and general compliance with the Program Plan’. The Community Services Directorate reported that, in 2011-2012, five young people were assessed for suitability for the program, three young people were accepted into the program, and one young person was exited. In 2012-2013, CSD reported that one young person was referred for assessment of their suitability for the program, and CSD is undertaking ‘ongoing work to evaluate the effectiveness and viability of the program.’

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220 Ibid., page 283.
221 Childrens Court of the ACT, Practice Direction No.1 of 2011, ‘Youth Drug and Alcohol Court Program’, page 1.
222 Ibid., page 6.
Another example of a problem solving court is a ‘mental health court’. There are various models of mental health courts, which originated in the USA and have been implemented in South Australia, Tasmania and Victoria. The Magistrates Court in Tasmania trialed a ‘Special List’ to hear complex matters involving ‘vulnerable offenders, such as those with drug and alcohol and/or mental health problems’. An evaluation reported that:  

‘Early evidence points to reductions in arrest rates and charged incidents, improvements in coordination between justice and mental health agencies and reported efficiencies in handling defendants with mental impairments’.

However, it is important to note that this trial coincided with the creation of a Youth Justice Division of the Tasmania Magistrates Court; before this time, children and young people were brought before any one of eight Magistrates in the State. Therefore any improvements noted by the evaluation may be attributable to the decision to nominate for the first time a specialised Magistrate and a ‘dedicated courtroom working group’, coordinating the involvement of government and community support services for young defendants.

The concept of a ‘youth mental health court’ is mentioned in this report, due to the enthusiasm with which ‘problem solving courts’ are discussed in some sections of the youth justice literature. However, while it would be interesting to hear a range of views on this topic, it seems unlikely that a specialised court list for young people with mental health conditions and cognitive disability in the ACT Childrens Court will improve health or reoffending outcomes for children and young people.

Firstly, it appears that the ACT Childrens Court, operating as it does in a small city the size of Canberra, with a specialised Magistrate, access to expert clinical advice and services from FMHS and CADAS, and access to case management from Youth Justice Case Management, already has many of the beneficial features of a ‘youth mental health court’.

Secondly, there is criticism of ‘problem solving courts’ from some quarters. According to the AIC, the impact of therapeutic jurisprudence may be one of the factors leading to increased use of remand in Australia. Critics argue that mental health courts ‘increase the involvement of criminal justice system in the lives of people with mental illness (net widening)’, with ‘young people being drawn into the juvenile justice system, the “gateway” to services, when they may otherwise have faced a much lower sanction or dismissal of their case’. Some of this criticism is based on US experience, and advocates for mental health courts argue ‘[t]here is a strong chance that problem-oriented courts may enjoy more success in Australia due to the wider array of support and treatment options already open to Australian courts’.

It seems likely that the ACT youth justice system can best respond to children and young people with mental health conditions and cognitive disability through early intervention (prevention), diversion and support services:

226 Ibid.
228 Kelly Richards & Lauren Renshaw (2013) Bail and Remand for Young People in Australia: A national research project, Australian Institute of Criminology.
Mental health courts have proliferated in tandem with rising concerns about large numbers of people with mental illnesses cycling through the criminal justice system. Although the goals of these problem-solving courts are laudable, they have flourished because of systemic failures in public mental health and the criminal justice system. In addition to raising various civil rights and public policy concerns, these specialty courts are inherently flawed, unintentionally signaling an acceptance of the rates at which people with serious mental illnesses are entering the criminal justice system. Their very presence makes it more difficult to generate political will to address the root of the problem. Alternative, evidence-based programs address the same concerns without raising the same civil rights and policy questions.232

7.9 DETENTION IN BIMBERI YOUTH JUSTICE CENTRE

7.9.1 PLACEMENT IN DETENTION MAY HAVE A NEGATIVE IMPACT ON MENTAL HEALTH

There is potential for detention to negatively affect a young person’s mental health. Principles 3 of National Statement of Principles for Forensic Mental Health states: ‘Custodial practices should promote positive mental health and minimise negative impacts on the mental health of those in custody.’233

7.9.2 HEALTH SCREENING AND ASSESSMENT ON ADMISSION TO BIMBERI

The Children & Young People Act 2008 (‘C&YP Act’) requires that each young person admitted to Bimberi is assessed as soon as practicable, and in any event within 24 hours after admission, to identify any immediate physical or mental health needs or risks (including any risk of self harm).234 The assessment of mental health needs and risks may be made by a doctor, nurse or other health professional; but must be reviewed by a doctor.235

When examining the data for 2012 and 2013 provided by CSD and the Health Directorate, the CYPJC was initially concerned about the significant disparity between the number of admissions (434) and number of induction assessments conducted by Forensic Mental Health Services (83), and sought to confirm that the requirements under the C&YP Act are being met. The disparity may be explained in this way:

- The figures provided by CSD and HD are not easily cross referenced. The directorates use separate electronic databases to record client/resident information. One set of data is occasion-based, the other set is identity-based. The Health Directorate database is not designed for this type of reporting.
- Nearly half (44%) of all admissions were a same day release, or overnight release. If a young person arrives after hours and is released at court the next morning, they may not be formally assessed by FMHS, which partly explains why the Health Directorate figures were so low.
- When a young person has been admitted to Bimberi more than once, it appears they do not always receive a new induction assessment by FMHS on each separate occasion. It is possible that on admission they receive an appointment with FMHS which is recorded as a general clinical session, rather than a formal induction assessment.
- There are other procedures for assessing a young person’s physical and mental wellbeing when they arrive at Bimberi, and this informal assessment is conducted by CSD staff, not by FMHS. Bimberi receives information from the police watchhouse before the young person is transferred to Bimberi. Team Leaders are responsible for inducting a child or young person into Bimberi (not junior staff or new staff). The Senior Manager or On-

234 Section 160, Children & Young People Act 2008 (ACT).
235 Section 161, Children & Young People Act 2008 (ACT).
Call Manager is involved in decisions about a child or young person’s placement following induction, their level of classification and risk alerts, their level of observations, and any special management requirements. All admissions are put on 5 minute observations, in a room with a camera, and staff may decide to sit with a young person until they settle. If there is any risk of self-harm the young person will be placed in a sterile room. Staff can call the on call manager, the on call doctor, and the CATT Team for assistance or advice if they are concerned about a young person’s presentation out of hours.

The focus during admission to Bimberi is on keeping the young person safe and comfortable, and assessing risk of self harm, rather than providing a full mental health assessment. This may be appropriate, first, because of the demonstrated increased risk of suicide/self harm when a young person is first placed in detention. Second, because children who have experienced acute or complex trauma need safety and stability before commencing therapeutic intervention (so no real therapeutic work can be done on a short period of remand).

The question of access to effective rehabilitation and therapeutic services after the admission period is discussed in the following section.

7.9.3 THERAPEUTIC AND REHABILITATION SERVICES IN BIMBERI

Principle 4 of the National Statement of Principles for Forensic Mental Health states:

‘[t]here should be access to acute interventions including treatment directed to alcohol and substance dependence, and to psychosocial rehabilitation and pre-release planning, in order to minimise the acute effects of illness and longer-term disability… Strategies aimed at early intervention and prevention through education, development of social skills and improved coping mechanisms should be available to those within the justice system’.236

There is a danger that ‘[t]he prime focus for psychological services in the juvenile detention centres [becomes] the suicide and self harm risk management of young people in custody.’237 While attention to these risks is essential, it is also important that young people receive access to a wider range of therapeutic and support services while they are in detention. For some young people their involvement in the youth justice system is their first opportunity to access health services, and criminal offending can be an indicator of emerging mental health concerns or cognitive disability. Therefore it is crucial that, if a young person must be detained, the opportunity is taken to identify and address their health needs. The aim is to move away from disconnected, episodic interventions toward a holistic and long term approach to health and wellbeing. See part 8.6 for discussion of the importance of screening and assessment processes in identifying which children and young people need intervention and support.

A theme in the 2011 review of the ACT youth justice system by the Children & Young People Commissioner and the Human Rights Commissioner was the structure of mental health services in Bimberi. While psychiatric treatment is available through FMHS, it was unclear the extent to which Bimberi provided services which promoted general mental health, and the report discussed the need for in-depth counselling services, to help young people develop resilience, social skills, coping mechanisms, stronger relationships, and positive images of themselves:

‘It was the view of many participants that medical and forensic models of mental health only met the needs of some young people, particularly those diagnosed with chronic mental health issues, and that the broader and often more criminogenically influential issues were left relatively unconsidered. In particular, poor impulse control, attitudinal problems, thinking errors and anger management difficulties, which have shown to strongly

influence young people’s capacity to desist from crime, do not seem to be considered by existing support models.”

The Children & Young People Commissioner and Human Rights Commissioner recommended that more general and specific counselling services be provided at Bimberi.

The Community Services Directorate has in recent years directed their attention to the impact of complex and acute trauma on young people’s development and behaviour. CSD has established Melaleuca Place, a trauma recovery centre for children in the child protection and youth justice systems, based on ‘new theoretical frameworks that focus on trauma-informed therapeutic approaches to working with children, and in particular focus on a child’s developmental age (as opposed to chronological age) and the importance of building safe and secure relationships as a means of recovery.’ They have also committed to actions in the Blueprint for Youth Justice in the ACT 2012-22:

- ‘Strengthen therapeutic programs for young people on community and detention orders’.
- ‘Provide staff with training and professional development in trauma and its impact on children and young people’.

Evidence supports a trauma-informed therapeutic approach to policies, procedures, programming and staff training at Bimberi, and it would be good practice for youth workers to undertake trauma-informed interactions with young people. There may also be potential for a greater presence at Bimberi of professionals trained in long term and in depth counselling services, as youth workers have an authority relationship (not a clinical relationship) with young people at Bimberi.

7.9.4 INFORMATION SHARING AND COLLABORATION BETWEEN BIMBERI AND FORENSIC MENTAL HEALTH SERVICES

Communication between Forensic Mental Health Services and Bimberi is vital to support the health and wellbeing of children and young people in detention, but it needs to be managed carefully. FMHS can provide Bimberi with useful clinical advice to help inform a young person’s case plan, behaviour management plan, and therapeutic support while in Bimberi. At the same time, FMHS are required to limit the personal health information provided to Bimberi staff, to protect the young person’s privacy.

In 2011 the Children & Young People Commissioner and Human Rights Commissioner recommended the development of a protocol to guide information sharing between Bimberi and Forensic Mental Health Services. The Health Services Commissioner helped facilitate discussions between FMHS and CSD, and there have since reportedly been several improvements to information sharing:

- CSD and the Health Directorate have negotiated an ‘Information Sharing Protocol for Youth Justice, Justice Health, and Forensic Services working with young people in Custody’, and
- FMHS clinicians are now included in notifications of new admissions to Bimberi, and other essential information.

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239 Ibid., recommendation 13.18.
241 ACT Government (2012) Blueprint for Youth Justice in the ACT 2012-2022: Improving outcomes for young people over the next 10 years, action items 2.6 and 7.3.
• Bimberi staff and FMHS staff continue to attend weekly client services meetings to discuss young people’s case plans, behaviour management plans and therapeutic support.

7.9.5 TRANSITION PLANNING AND COORDINATION OF CARE ACROSS SETTINGS

The Fourth National Mental Health Plan states the importance of ‘support to link with community services at the point of release’.

Principle 5 of the National Statement of Principles for Forensic Mental Health states that a comprehensive forensic mental health service should provide (among other functions) ‘coordination of care across settings, including pre-release planning and linking clients with general mental health and private mental health services.’

Principle 6 states that ‘linkages are required between mental health and general health care services, and social services such as housing and income support, which are necessary to maximize the positive clinical outcomes for forensic mental health clients. Effective inter-agency pre-release planning is vital to successful reintegration into the community following release.’

‘The quality and continuity of services offered under diversion and support programs can benefit from collaboration between forensic and general health and mental health services.’ In 2011 the Children & Young People Commissioner and Human Rights Commissioner expressed concern about coordination and consistency of mental health care for young people who move in and out of Bimberi. A participant in the Review told the Commissioners:

‘the split between FMHS and CAMHS has the potential to create a fragmented service that does not best serve the interests of young people. It is potentially confusing for young people in this system to be subject to different diagnoses or treatment regimes.’

When a young person is in Bimberi mental health services are provided by FMHS, but when the young person is released from Bimberi they receive care from CAMHS. This transition, plus the different approaches to FMHS and CAMHS to diagnosis and treatment, meant there is risk of poor continuity of care, and lack of follow up, especially if a young person entered Bimberi several times. The Commission recommended in 2011 that:

‘The Health Directorate undertake a comprehensive review of the mental health services provided to young people in the youth justice system... This review should also consider whether the current model of Forensic Mental Health Services providing care within Bimberi, and Child and Adolescent Mental Health Services having primary carriage for young people outside of Bimberi, promotes continuity of care.’

Since the Commissioners’ report in 2011, CSD has taken steps to improve coordination of case management for young people transitioning in and out of Bimberi, and there is now a single case management service across Youth Justice. The Health Directorate has also taken steps to improve continuity of mental health care for young people who transition in and out of Bimberi. In May 2013 the Health Directorate finalised the CAMHS Model of Care which implemented a change to service delivery in Bimberi, allowing some flexibility to meet the individual needs of children and young people. CAMHS now attend the weekly client services meeting at Bimberi; they are allowed to continue to provide ‘support and therapy’ for existing clients while they are in Bimberi, while the Bimberi psychiatrist and the

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245 Ibid., principle 6.
248 Ibid., page 295.
young person’s community psychiatrist will ‘liaise closely on treatment regimes’. CAMHS can also provide ‘in-reach’ services, going to Bimberi to meet new clients before they are discharged.249

See part 7.10.2 for discussion of the post-release period when young people leave Bimberi.

### 7.10 COMMUNITY SUPERVISION

#### 7.10.1 CASE MANAGEMENT FOR YOUNG PEOPLE DIVERTED AWAY FROM DETENTION

When a child or young person accused of an offence has a mental health condition or cognitive disability, their release on bail should involve engagement with therapeutic and support services:

> ‘the power to grant bail can be a means of diverting people out of the criminal justice system and into programs for treatment as well as to support services’.250

NSW Law Reform Commission commented on ‘the vital role that case management services play’ in supporting the diversion of young people with mental health conditions and cognitive disability from the youth justice system.251 Effective diversion involves assessment, engagement with therapeutic and support services, case management and reporting to court.252

In the ACT, Youth Justice Case Management (YJCM), within the Office for Children Youth & Family Support (OCYFS), provide case management for children and young people on bail, or on supervision order, or following release from a custodial sentence. Staff will work with a young person to improve their access to services and supports that address their needs including general living and social skills, literacy and numeracy, family support/counselling, finding and maintaining stable accommodation, drug programs, anger management programs, financial support, employment, resilience, positive relationships, mental health intervention.

YJCM have demonstrated willingness to reflect on their practice and identify strategies to better meet the needs of children and young people (for example, by designing and implementing the After Hours Bail Support Service, and moving to a single case management model, so young people have the same caseworker if and when they move between Bimberi and the community).

Part 8.3 discusses the importance of trauma-informed therapeutic approaches to working with children and young people in Bimberi, and those comments apply equally to work undertaken with children and young people under community supervision.

The Commissioners will invite Youth Justice Case Management within the Office for Children Youth & Family Support to attend one of the regular Bimberi Oversight Group meetings to discuss current policy and program responses, including the therapeutic and support services available for young people with mental health conditions or cognitive disability under community supervision.

#### 7.10.2 THE CRITICAL POST-RELEASE PERIOD

Youth Justice Case Management (YJCM) and Child & Adolescent Mental Health Services (CAMHS) have a vital role in helping young people experience a successful transition to the community when they are released from Bimberi. Part 249 ACT Government Health Directorate (2013) CAMHS Model of Care, page 15.


252 Ibid., page xxvi.
7.9.5 discusses transition planning while young people are in Bimberi. This section focuses on the critical days and weeks when a young person with mental health conditions or cognitive disability is released from Bimberi and returns to the community.

The Fourth National Mental Health Plan states the importance of “[i]mproving linkages between community correctional staff and the primary and specialist mental health service sector through better information exchange and staff training will lessen the risk of people falling between services.”\(^{253}\)

It is vital that, before a young person with a mental health condition leaves Bimberi, they have a connection with the service who will provide their mental health care in the community. It is also vital that they move into stable and appropriate accommodation. Research shows the importance of housing both to support recovery from mental health conditions, and prevent reoffending:

‘Stable and secure housing is especially critical for people with mental health problems.’\(^{254}\)

‘Housing instability is a clear risk factor for recidivism and a significant barrier to recovery from mental illness. Housing services should be engaged as part of holistic diversion and support programs.’\(^{255}\)

The days and weeks following a young person’s release from Bimberi are critical to their health outcomes, and their reoffending outcomes. The transition to the community is a challenging experience, and if the young person disengages from mental health care, or their housing arrangement breaks down, they are at high risk of reoffending.

Most young people are released from Bimberi under YJCM supervision, and YJCM are involved in transition planning before release, referring the young person to CAMHS or Alcohol and Drug Services (A&DS) as required. However, YJCM cannot necessarily be with the young person on a daily basis. Is there a role for a more intensive temporary support services in the critical post-release period for young people with mental health conditions or cognitive disability?

The Community Integration Team (CIT) in NSW works with young people in custody who have serious mental illness, emerging mental illness and/or problematic drug and alcohol use or dependence. CIT clinicians coordinate care prior to release, and in the weeks following, assisting with reintegration, coordinating care and follow up, and linking the young person to specialist and generalist community services. We have informally been told that the CIT offers only weekly or fortnightly visits to young people in the program. However it presents a model for intensive post-release support for young people with mental health conditions or cognitive disability.

Would a more intensive transition support service assist YJCM, CAMHS and A&DS to support young people who have high support needs post-release? Alternatively, if there is no need for an additional discrete service, could closer collaboration between the existing services strengthen the support available to children and young people?

**Suggestion:**

10. That the Community Services Directorate and Health Directorate explore whether the model of intensive transition support following release from youth detention undertaken by the Community Integration Team in NSW is suitable for consideration in the ACT context, and convey to the Children & Young People Commissioner the outcome of their consideration.

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This section of the report examines particular elements of the youth justice system (areas of law, policy or practice) which might offer opportunities for change and improvement.

Small adjustments may have a significant impact in improving health outcomes for, and reducing reoffending by, children and young people in the youth justice system.

8.1 CHILDREN AND YOUNG PEOPLE WITH COMPLEX NEEDS DETAINED ON REMAND BECAUSE COMMUNITY BASED ACCOMMODATION AND SUPPORT SERVICES CANNOT MEET THEIR NEEDS

The Bimberi oversight agencies are concerned that some young people may be held on remand at Bimberi Youth Justice Centre not for community protection or due to risk of reoffending, but in their ‘best interests’, for their own wellbeing or protection, in circumstances where:

- mental health conditions or cognitive disability make it difficult for them to comprehend their bail conditions or adhere to them, or
- they are incapable of maintaining relationships needed for them to stay with their family or in foster care or in residential care or youth homelessness services, or
- they are in crisis and at risk of self harm, and need close monitoring in the short term, or
- they have such high or complex needs that no community based residential services are available with the capacity to provide the required level of treatment and support.

According to the AIC, lack of access to programs and services is one of the factors leading to increased use of remand in Australia. Young people may be detained on remand because they do not have access to suitable accommodation in the community:

- They may have been excluded from supported accommodation services (foster care, residential care or homelessness services), due to the challenges posed by their behaviour. ‘This is a particular issue in a group with high prevalence of behavioural disorders such as conduct disorder (above 50 per cent).’
- They may be refusing to participate in the residential programs and services offered to them.
- Their needs may be too complex for the available mainstream supported accommodation services (for example, ‘some [mental health] facilities are reluctant to treat people who are obviously using drugs, while drug rehabilitation programs will not treat mental illness’).

The Wood Royal Commission in NSW, and the Australia Law Reform Commission (ALRC) have both described the problem that can arise when a young person is a defendant in criminal proceedings, and cannot live at home with their family:

‘It is recognised that there is a clear distinction between the child protection and criminal justice systems which needs to be maintained. On the other hand, coming within the juvenile justice or criminal justice system should not exclude a young offender from long term services from DoCS and other human service agencies. Nor should...

256 Kelly Richards & Lauren Renshaw (2013) Bail and Remand for Young People in Australia: A national research project, Australian Institute of Criminology.
a shortage of refuges or other forms of accommodation result in young people, who cannot live safely with their families, being remanded in custody unnecessarily, pending trial.\textsuperscript{259}

‘[The ALRC acknowledges] the serious community concerns for many young people who traverse the child protection and juvenile justice divide. The lack of suitable accommodation and other support services, and the consequent remand in custody of increasing numbers of young people, undermines established juvenile justice principles of diversion and rehabilitation. Of particular concern are young people who are homeless as a result of family dysfunction and violence.’\textsuperscript{260}

The Childrens Court has power to adjourn or dismiss proceedings for care and protection reasons under sections 74K and 74M of the \textit{Court Procedures Act}. To inform the Court’s decision, the Director General must report back to the court with CYPS’ position on the matter within 15 days.\textsuperscript{261} The Childrens Court can also refer matters to Child and Youth Protection Services or Youth Justice (through the Director General of CSD) for assessment and report under section 74D of the \textit{Court Procedures Act}. However there continue to be cases in which it is difficult or impossible to identify accommodation suitable for particular young people, due to their multiple and complex needs. CSD are aware of the factors leading to high rates of remand, and in recent years have attempted to implement solutions, for example:

- The After Hours Bail Support Service (AHBSS) was established in 2011 with the aim of diverting young people from Bimberi, and assisting young people on community-based justice orders to comply with their bail.
- Bimberi Residential Services (Narrabundah House Indigenous Supported Residential Facility) reopened in August 2013 under Bimberi management. One bed has been set aside for clients of the After Hours Bail Support Service, and can be used for both Aboriginal and non-Aboriginal clients.

The CYPC hoped through this review to quantify the number of children and young people who are remanded in custody at Bimberi because suitable accommodation cannot be found in the community, but it has not been possible, as it would likely involve a manual search of Court records. This is an important topic for future research. It would be useful to discuss how this data may be collected and analysed to inform service provision (if it is not already being monitored by CSD).

\textbf{Suggestions:}

11. That ACT Policing or the After Hours Bail Support Service records and reports publicly the number of occasions each year in which a young person is transferred from police custody to Bimberi because suitable accommodation cannot be found in the community.

12. That Childrens Court administration staff or Youth Justice Case Management records and reports publicly the number of occasions each year in which a young person is remanded in custody because suitable accommodation cannot be found in the community.

While acknowledging the improvements to service provision in recent years, the question remains:

‘Are additional legal and/or procedural measures required to avoid young people with cognitive and mental health impairments being held on remand because of problems accessing accommodation and/or services?’\textsuperscript{262}


\textsuperscript{261} Section 74L, \textit{Court Procedures Act (ACT)}.

Victorian legislation provides that ‘[b]ail must not be refused to a child on the sole ground that the child does not have any, or any adequate, accommodation.’ It would be interesting to examine whether this is one of the factors contributing to Victoria’s comparatively low rate of detention (see part 5.5). During 2014 the average daily population at Bimberi reduced noticeably, and is reportedly in single figures. If the population in Bimberi increases again, an important topic for discussion will be whether such a provision is likely to be useful or necessary in the ACT. Related questions are whether it would it be effective in the absence of any additional investment in or redesign of services, and whether it would it have unintended consequences (see part 9.8).

### 8.2 Secure Therapeutic Accommodation Facilities for Young People with Complex Needs

#### 8.2.1 A Forensic Mental Health Facility for Children and Young People

As discussed above in part 2, some young people in the ACT are being placed on remand, or being kept on remand for longer periods than would otherwise be the case, because they need a secure accommodation environment to ensure their safety, or ensure they participate in therapeutic and support services. The Public Advocate has observed young people in Bimberi under sentence with apparently serious mental health conditions and related problems, and for whom a detention centre may not be an appropriate place to access treatment.

The ACT has many of the components of a ‘best practice’ youth justice system, including forensic mental health assessments, alcohol and drug assessments, and youth justice case management services at the court; and the mental health services in the youth justice system are provided by the health department rather than the corrections department.

However one fundamental gap in service delivery is the absence of a secure forensic mental health facility for children and young people with mental health conditions. Principle 4 of the National Statement of Principles for Forensic Mental Health states: ‘All custodial facilities should have capacity to assess and treat mental illness within the primary care setting, and to refer to specialist mental health services, both outpatient within the custodial setting and inpatient in a secure mental health hospital, as clinically indicated.’ The ACT fails to meet this standard. There is no purpose-designed accommodation where children and young people with a mental health condition who need to be held in custody can receive mental health treatment and care. This is a ‘major mental health services gap and area of need for young people’. A gap which has long been identified.

Given the small size of the ACT jurisdiction, the construction and maintenance of a dedicated forensic mental health facility for children and young people may be unfeasible. The next alternative would be placement in a general youth mental health facility. In their response to the 2011 Bimberi Review, the ACT Government indicated that an Adolescent and Young Adult Mental Health Inpatient Unit would be constructed at a location to be determined, and to be based on

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263 Section 346, Children Youth & Families Act 2005 (VIC).
265 Western Australia Commissioner for Children and Young People (2011) Report of the Inquiry into the mental health and wellbeing of children and young people in Western Australia, pages 81-83.
a model of care that was being developed.\textsuperscript{267,268} However, there has not been significant progress in the design, construction or establishment of such a facility, or discussion about whether it will be used for forensic patients.

There are suggestions that transferring young people from Bimberi to a general mental health facility may not be appropriate. Western Australia is another jurisdiction without a forensic mental health facility for young people. Currently an informal arrangement operates whereby young people on remand who are mentally unwell can be placed on conditional bail and transferred as a voluntary patient to the general youth mental health facility in WA. The Western Australia Commissioner for Children and Young People (WA CCYP) suggests this is not an appropriate alternative, as:

- the youth mental health facility does not have the necessary planning, resources, safety procedures or staff training to provide care for forensic patients,
- although nominally the young people transferred from the youth detention centre are admitted as voluntary patients, in practice they are not free to leave the facility, and a warrant will be issued for their arrest if they do, and
- as a voluntary patient the young people transferred from the youth detention centre do not have the same rights accorded to involuntary patients under the mental health legislation.\textsuperscript{269}

It will be years before a youth mental health facility is established in the ACT, if at all. In the meantime there are limited options for the care and treatment of young people in the youth justice system requiring residential mental health care. The Health Directorate inform us they will be admitted to the Adult Mental Health Unit on the grounds of The Canberra Hospital, and placed in the vulnerable person’s wing for stabilisation of their condition. If a secure psychiatric admission is required for a period of months, they can be transferred from ACT to a secure youth mental health facility in NSW.

8.2.2 THERAPEUTIC PROTECTION ORDERS

There is provision in the Children & Young People Act 2008 (‘C&YP Act’) for therapeutic protection orders to be used in situations where a young person needs to be detained for their own protection.\textsuperscript{270} The C&YP Act contains detailed provisions for making therapeutic protection orders (TPOs), which can only be granted by the Childrens Court on the application of the Director-General. No one else has authority to apply. The Children’s Court may only grant such an order after all other less restrictive options have been eliminated, and then only for a maximum of 8 weeks at a time in a specially designated ‘therapeutic protection place’. While initial work was conducted by CSD in 2008 to draft policies and procedures to implement the legislative provisions, there has since been an apparent decision by CSD to not declare any accommodation to be a Therapeutic Protection Place, and to not apply to the Court for use of TPOs.

In the absence of a youth mental health facility (and with limited supported accommodation placements available in out of home care services and youth accommodation services) some people have suggested that TPOs under the C&YP Act could perform a similar function; facilitating a secure therapeutic environment that would provide an alternative to Bimberi for some young people. It could prevent the criminalisation of children and young people who require secure therapeutic support.

In contrast, others question the usefulness of TPOs. Some people claim there is no evidence that TPOs improve health outcomes for young people. Some people suggest what is needed are intensive therapeutic services to support the young person in the community.

If TPOs are not to be used, any alternative residential or therapeutic programs designed to care for young people with high and complex needs must incorporate the same level of transparency and oversight that is guaranteed in the TPO legislation.

**Suggestion:**

13. Given the apparent decision by the Community Services Directorate not to use the provisions in the *Children & Young People Act 2008* governing the use of therapeutic protection orders, that the ACT Government amend the legislation accordingly by revoking Chapter 16 of the *Children & Young People Act 2008*.

### 8.3 INCREASED AWARENESS OF THE IMPACT OF ACUTE AND COMPLEX TRAUMA IN CHILDHOOD

A high proportion of children and young people in detention have experienced trauma; through abuse and neglect and subsequent involvement in the child protection system; as victims of crime; or following other adverse events in their lives.  

“There is growing evidence to suggest that unless the legacy of childhood abuse and neglect is fully appreciated and responded to within youth justice systems, positive outcomes (including the rehabilitation of young offenders) are likely to be limited.”

The Community Services Directorate is taking steps to adopt a trauma-informed response to the children and young people in Bimberi and under YJCM supervision. The Children & Young People Commissioner and Health Services Commissioner welcome the development of the Trauma Recovery Centre, and the action item in the Blueprint for Youth Justice to “[p]rovide staff with training and professional development in trauma and its impact on children and young people”. Two senior managers at Bimberi are completing a university diploma in developmental trauma, and CSD workers attend workshops on trauma-informed practice. Such training and professional development is significant, and may have a flow-on impact upon youth justice and child protection procedures and practice. There is great potential for youth justice and child protection workers to engage in purposeful trauma-informed interventions with young people.

### 8.4 INTEGRATED SERVICE PROVISION FOR YOUNG PEOPLE WITH DUAL DIAGNOSIS

“The capacity of the civil and forensic mental health systems to deal adequately with the interaction within and between mental disorders, cognitive impairments and substance abuse is crucial to people receiving appropriate and effective treatment.”

‘People with complex needs may have difficulties in obtaining an accurate diagnosis and receiving effective care,'
treatment and services.\textsuperscript{276} The challenges for the mental health system in dealing effectively with dual diagnoses of mental health conditions and cognitive disability or drug and alcohol disorders has long been recognised.\textsuperscript{277} Often mental health conditions are present in association with other disabilities such as substance abuse and intellectual disability.\textsuperscript{278} People with dual diagnosis come into contact with the criminal justice system more often than those with a sole diagnosis of a mental health condition.\textsuperscript{282} \textsuperscript{283}

Integrated mental health and drug and alcohol services are best practice for services working with young people with dual diagnosis in the youth justice system.\textsuperscript{284} Principle 6 of the National Statement of Principles for Forensic Mental Health Services states:

\begin{quote}
Forensic mental health services must be linked with other relevant services in order to provide treatment in the most clinically appropriate manner and setting. Other services are often required by forensic mental health clients, especially drug and alcohol services and disability support services; appropriate linkages between forensic mental health and these services must be ensured.
\end{quote}

Some young people in the youth justice system access multiple service providers, including Child and Youth Protection Services, Youth Justice, Forensic Mental Health Services, CAMHS, and Alcohol and Drug Services. The ACT can continue to work to ensure continuous improvement in coordination and integration of these services. See part 8.7 for further discussion about communication and coordination across the youth justice system.

8.5 MEETING THE NEEDS OF YOUNG PEOPLE WITH COGNITIVE DISABILITY

As discussed above in part 1, cognitive disability is not the same as mental illness, and while they frequently present together, there are some young people in the youth justice system with a sole diagnosis of one form of cognitive disability.

There is concern in other Australian jurisdictions that the needs of people with cognitive disability in the youth justice system are not fully recognised in legislation, policy and services.\textsuperscript{286} For example, it has been suggested in other States that some definitions of ‘mental impairment’ exclude certain forms of cognitive disability, and some diversionary options are only available to people with mental health conditions because some residential facilities are not designed to support patients with cognitive disability.

\begin{itemize}
\item \textsuperscript{276} NSW Law Reform Commission (2012) People with cognitive and mental health impairments in the criminal justice system: Diversion, page 131.
\item \textsuperscript{278} Australian Health Ministers Advisory Council, Mental Health Standing Committee (2006) National statement of principles for forensic mental health, page 2.
\item \textsuperscript{280} National Justice Chief Executive Officers’ Group and the Victorian Government Department of Justice (2010) Diversion and support of offenders with a mental illness: Guidelines for best practice, page 8.
\item \textsuperscript{281} Tony Butler & Stephen Allnutt (2003) Mental Illness among NSW Prisoners, NSW Corrections Health Service [now Justice Health], page 1.
\item \textsuperscript{283} NSW Law Reform Commission (2010) Consultation Paper 5, People with cognitive and mental health impairments in the criminal justice system: an overview, para 1.41.
\item \textsuperscript{284} National Justice Chief Executive Officers’ Group and the Victorian Government Department of Justice (2010) Diversion and support of offenders with a mental illness: Guidelines for best practice, page 55.
\item \textsuperscript{285} Australian Health Ministers Advisory Council, Mental Health Standing Committee (2006) National statement of principles for forensic mental health, principle 6.
\item \textsuperscript{286} NSW Law Reform Commission (2010) Consultation Paper 11, Young People with cognitive and mental health impairments in the criminal justice system.
\end{itemize}
In the ACT, it appears that legislative definitions and mechanisms are accessible and relevant to young people with cognitive disability. The legislative definition of ‘mental impairment’ includes ‘mental illness’, ‘intellectual disability’, and ‘brain damage’.\textsuperscript{287} Brain damage may be interpreted clinically to include acquired brain injury and substance disorders. Therefore it appears that many people with cognitive disability would fall within the eligibility criteria to allow them to apply for legal mechanisms for disposal of proceedings (ie. dismissal on the grounds of mental impairment, or determination of unfit to plead, or not guilty by reason of mental impairment under the \textit{Crimes Act 1900}). Following the release of the discussion paper prior to this report, the Commissioners were not informed of any cases in which an application of this type to the Childrens Court was denied on the basis that the young person’s particular diagnosis, while relevant to their offending behaviour, did not fall within the legislative criteria.

The capacity of the youth justice system to provide appropriate services for young people with cognitive disability is less certain. Part 8.7.3 discusses the integration between youth justice services and disability services in the ACT. Young people living with a cognitive disability do not require ‘treatment’, but rather support or rehabilitation programs relevant to their functional capacity.\textsuperscript{288}

\textit{‘The nature of the care, containment and support that intellectually disabled people require… is very different from that of the mentally ill. While they require psychological and psychiatric understanding and appropriately structured care, to define such processes as treatment is to miss the difference between the onset of an illness which is largely treatable and reversible in the case of major mental illness [and a condition] which is simply managed by training, allowance of maturation and caring support in the case of an intellectual deficit.’}\textsuperscript{289}

It is a topic for ongoing discussion as to whether the legislation, policies and services in the ACT youth justice system appropriately designed to meet the needs of young people who have cognitive disability but not a mental health condition.

\textbf{8.6 IDENTIFICATION – SYSTEMATIC SCREENING AND ASSESSMENT}

Identification of mental health conditions and cognitive disability is the essential first step in diversion and support. This begins with ‘systematic screening of potential participants at gateway points such as police cells or court.’\textsuperscript{290} Screening processes should be conducted early, to identify when there is need to progress to comprehensive assessment, and to help inform better decision making in both the health system and the legal system about the most appropriate pathway for a young person to take. Effective screening is important as it helps us avoid the situation where ‘only those young people displaying “obvious” signs of cognitive/intellectual disability or mental illness, will be referred for assessment.’\textsuperscript{291}

Screening helps identify which young people need to undertake more detailed assessment. Comprehensive assessments should include not only mental health conditions, but drug and alcohol use, and common forms of cognitive disability such as intellectual disability and acquired brain injury, as well as acute and complex trauma, ‘given the significant implications these issues have for both health and recidivism outcomes.’\textsuperscript{292, 293}

\textsuperscript{287} Section 27, \textit{Criminal Code 2002 (ACT)}.
\textsuperscript{290} National Justice Chief Executive Officers’ Group and the Victorian Government Department of Justice (2010) \textit{Diversion and support of offenders with a mental illness: Guidelines for best practice}, page 64.
\textsuperscript{292} National Justice Chief Executive Officers’ Group and the Victorian Government Department of Justice (2010) \textit{Diversion and support of offenders with a mental illness: Guidelines for best practice}, page 35.
Identification of mental health conditions and cognitive disability in young people may be particularly difficult, and some health professionals are cautious about specifying a diagnosis for young people, given that a diagnosis can be stigmatising, and the condition may be still emerging. Nonetheless identification is vital because:

"it can lead to appropriate treatment, helps to determine effective and efficient allocation of resources, demonstrates eligibility for diversion, triggers different sentencing considerations and potentially reduces the “cycles of admissions to the criminal justice system”."  

It is important to use evidence based assessment tools, and to identify the most suitable assessment tools for use at each stage of the youth justice system. Many factors would inform such a decision, including cost, time, purpose of the assessment (immediate risk management, or interim screening, or comprehensive assessment), the qualification and training of the person conducting assessment, and the typical emotional state of children and young people arriving at that point in the system (i.e. screening a young person at the police watch house immediately following a crisis event will involve a different process than a full clinical assessment of a young person who is comparatively stable and under community supervision). Following the release of the discussion paper prior to this report, the Commissioners did not receive any comment on the question of the most suitable clinical screening and assessment tools for use in different settings within the youth justice system. Nonetheless, the question of whether current practices of screening for cognitive and mental health impairments in young people at each stage of the youth justice system (police watchhouse, court holding cells, Childrens Court, Bimberi, community supervision) can be improved is an important question to hold in mind.

With the release of the discussion paper prior to this report, the Commissioners asked what training and procedural guidance is in place to help police determine that a young person might have impaired capacity. ACT Policing provided advice that:

- The Mental Health Community Policing Initiative (MHCPI), a joint initiative of ACT Policing and the Health Directorate, provides training to ‘first responder’ police officers on responding to people that require mental health care. The MHCPI includes a four-day Enhanced Mental Health Training Program (EMHTP), which ACT Policing say emphasises that mental health dysfunction is primarily a health and not a policing issue, and ‘provides ACT Policing members with a decision making framework to ensure a better result for the mental health consumer, their carers and the community in general’. The EMHTP has been delivered to more than 600 members of ACT Policing and AFP.

- ‘Mental Health Clinicians, seconded from MHJHADS, are embedded into ACT Policing Operations where they are available to provide their professional advice to officers on the frontline. The Clinicians, with access to the ACT Health database, can provide a police dedicated resource; providing a triage and information service to responding police in real time’. In addition, a psychologist from the Child and Adolescent Mental Health Service (CAMHS) is able to provide phone liaison and onsite review of young people aged under 18 years for police in mental health related emergency situations.

### 8.7 COMMUNICATION AND COORDINATION ACROSS THE YOUTH JUSTICE SYSTEM

The National Justice Chief Executive Officers Group, a collaboration of the justice departments in the Australian States and Territories, has produced guidelines for best practice in the diversion and support of people with mental illness.

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295 Submission by ACT Policing to the Children & Young People Commissioner in response to the discussion paper Children & Young People with Complex Needs in the ACT Youth Justice System (November 2014).
They list ten principles for best practice, and the one they nominate as ‘especially critical’ is ‘collaboration, communication and coordination’. They list ten principles for best practice, and the one they nominate as ‘especially critical’ is ‘collaboration, communication and coordination’.296

Best practice diversion and support involves attempts to ‘reduce barriers and strengthen enablers of communication’ between stakeholders in the youth justice system: 297

‘Collaborative practices can be hampered or enhanced by factors that are internal and external. Significant internal factors, for example, commonly include organisational policy, practice and culture. External barriers may include legislation dealing with confidentiality of health and other personal information, physical distance between service providers and ineffective communication’.298

From the medical perspective, communication and coordination is similarly seen as essential. Principle 3 of the National Statement of Principles for Forensic Mental Health states:

‘The provision of mental health care is the joint responsibility of the Health, Justice (including police and court systems) and Correctional systems and is to be addressed in partnership. The contributions/responsibilities of the agencies involved are to be planned, agreed, documented and freely available. Effective communication between Health, Justice and Corrections (and any external agencies or professional groups engaged by them) is essential to implementing these joint responsibilities.299

As discussed in part 3.4, the youth justice system is comprised of multiple participants:

- Children and young people and their families
- Victims and witnesses
- Police officers
- Defence lawyers
- Prosecution lawyers
- Magistrates and Court officials
- Clinical specialists (forensic mental health, community mental health, and alcohol and drug services)
- Youth justice workers
- Detention centre staff
- Child protection workers
- Community based support workers and advocates
- Statutory oversight agencies

Each of these people might at times experience frustration with the limits of the options available to them in the performance of their role. They may also experience frustration with decisions made by other professionals, either prior to or following their own involvement with a particular young person. The Borowski study interviewed stakeholders in the youth justice systems across all Australian jurisdictions, and found professionals are not always aware of the ‘work realities’ of other officials in the youth justice system:

298 Ibid., page 45.
‘in many jurisdictions courtroom workgroup members did not fully appreciate each others’ roles... This suggests that many jurisdictions would benefit from training in the role of the various courtroom workgroup members and their work realities.’\textsuperscript{300}

Though notably the same study acknowledged that the small size of the ACT jurisdiction means it is relatively easy to facilitate communication among professionals: ‘[t]he small size of the ACT jurisdiction was seen as facilitating collaborative working relationships among courtroom workgroup members and access to the judicial officer.’\textsuperscript{301}

In a system composed of multiple participants, communication about expectations and priorities is important. Diversion and support services occur:

‘at the intersection of the criminal justice, mental health and human service systems, and as such, draws on the values of each. Because these values are not always aligned, or are expressed differently, it is essential that programs operating across system boundaries define a set of common principles that underpin their joint activities.’\textsuperscript{302}

Agreement is needed on program principles, objectives, outcomes and parameters (client eligibility, access to services, agency roles and accountability, data collection and information exchange). Coordination and collaborative practice is aided by clear legislation, service level agreements, operational protocols, and program procedures.\textsuperscript{303}

\section*{8.7.1 CURRENT ACTIVITIES IN SUPPORT OF COMMUNICATION AND COLLABORATION BETWEEN AGENCIES IN THE ACT YOUTH JUSTICE SYSTEM}

Best practice guidelines recommend these practical strategies to facilitate better communication and collaboration across the youth justice system:

1. Strengthening relationships between sectors, agencies, the community and advocacy groups
2. Establishing mechanisms for cross agency planning, management, advice and evaluation
3. Employing boundary-spanning staff working across sectors
4. Regular meetings of key personnel
5. Reciprocal training initiatives
6. Clear role definitions and practice protocols
7. Encouraging program staff to develop and nurture effective working relationships with counterparts in other agencies
8. Timely information sharing and communication.\textsuperscript{304}

Table 8 attempts to identify examples of each of these recommended strategies that currently operate in the ACT, and would welcome information about additional mechanisms that are not acknowledged here.

\textsuperscript{302} National Justice Chief Executive Officers’ Group and the Victorian Government Department of Justice (2010) Diversion and support of offenders with a mental illness: Guidelines for best practice, page 34.
\textsuperscript{303} Ibid., pages 34-45.
\textsuperscript{304} Ibid., page 44.
Table 8: Current strategies to facilitate better communication and collaboration across the ACT youth justice system

<table>
<thead>
<tr>
<th>Strategy</th>
<th>Examples in the ACT youth justice system</th>
</tr>
</thead>
</table>
| 1. Strengthening relationships between sectors, agencies, the community and advocacy groups | • The new Supreme and Magistrates Court building, currently under design, will include the co-location of Forensic Mental Health Services, Youth Justice Case Management, and the Court Alcohol and Drug Assessment Service.  
• Annual Youth Justice Forum hosted by the Children & Young People Commissioner. |
| 2. Establishing mechanisms for cross agency planning, management, advice and evaluation | • Feedback is invited on mechanisms that currently exist in these areas. |
| 3. Employing boundary-spanning staff working across sectors | • Mental health clinicians from the Health Directorate are embedded into ACT Policing Operations where they are available to provide their professional advice to officers on the frontline.  
• Forensic Mental Health Services staff attend Childrens Court proceedings.  
• Youth Justice staff attending Childrens Court proceedings.  
• Forensic Mental Health Services staff are based at Bimberi. |
| 4. Regular meetings of key personnel (‘regular meetings and liaison between key decision makers and practitioners’) | • Aboriginal and Torres Strait Islander Programs and Services Coordination Committee established by Community Services Directorate. Quarterly meetings between Aboriginal elders, community members and staff from across youth justice.  
• Client services meetings occur between Bimberi staff and Forensic Mental Health Services staff each Tuesday.  
• CAMHS liaison officer attends the weekly Bimberi Services meeting.  
• The statutory authorities with oversight responsibility for Bimberi meet monthly. |
| 5. Reciprocal training initiatives | • Mental Health Community Policing Initiative (MHCPI), a joint initiative of ACT Policing and the Health Directorate, provides training to ‘first responder’ police officers on responding to people that require mental health care.  
• Forensic Mental Health Services developed a training program for Bimberi staff on mental health issues.  
• Significant opportunities exist here; there would be benefit to reciprocal tours and information sessions between agencies. |
• In the 2011 Bimberi Review, the HRC recommended CSD develop a protocol outlining how Disability ACT, Therapy ACT and OCYFS work together to support young people with a disability. CSD report this is under development. |
| 7. Encouraging program staff to develop and nurture effective working relationships with counterparts in other agencies | • Feedback is invited on mechanisms that currently exist in these areas. |
| 8. Timely information sharing and communication | • Negotiated procedure for declaration of care teams under the C&YP Act to authorise information sharing between CSD staff and HD staff.  
• FMHS and CAMHS psychiatrists will ‘liaise closely on treatment regimes’ for CAMHS |

305 Blueprint for Youth Justice Annual Progress Report 2013, page 27  
309 ACT Government (undated) Information sharing protocol for Youth Justice, Justice Health, and Forensic Services working with young people in custody.  
310 Ibid.
8.7.2 HELPING THE POLICE AND THE COURT ACCESS RELEVANT INFORMATION ABOUT THE YOUNG PERSON BEFORE THEM

One example of the importance of communication and collaboration is the ability of the police and the court to access information about a child or young person who comes before them. Police and courts have to make difficult judgments with imperfect information in evolving circumstances.

During the Youth Justice Forum in 2013, hosted by the Children & Young People Commissioner, the group discussed a hypothetical case study, and participants had opportunity to follow a fictional young person through the youth justice system (see part 7.7.7). Participants commented that they found this exercise extremely useful, in enabling them to understand a case from other points of view (particularly the young person’s); and in demonstrating that, if they had access to full information about the young person’s circumstances, they would have had ability to make different decisions.

Part 7 discusses the significance of bail and remand decisions for young people with mental health conditions and cognitive disability, and the important role of the After Hours Bail Support Service (AHBSS). Even when intervention by the AHBSS does not result in the young person being released on bail, they facilitate assessments and information sharing (engaging the young person, their family, their existing support workers, and the Youth Justice Court Liaison Officer) which can improve the capacity of the court to respond to the young person:

‘On some occasions, AHBSS were notified that a young person in police custody was to be remanded in custody at Bimberi and were provided an opportunity to complete an assessment with the young person before they were transported to Bimberi. On these occasions the AHBSS gathered relevant and important information that was provided to the Youth Justice Court Liaison Officer... In these circumstances AHBSS may have identified critical support needs and options for the young person that affected their likelihood of being granted bail by the court such as accommodation... The provision of this information seems to have assisted the court to make more informed decisions and therefore increased the likelihood of a young person being granted bail by [the court], therefore reducing the time the young person was remanded.’

8.7.3 GREATER INTEGRATION OF THE DISABILITY SECTOR AND THE YOUTH JUSTICE SYSTEM

A second example of the importance of communication and collaboration is the intersection between the youth justice system and the disability sector. In 2011, the Children & Young People Commissioner and Human Rights Commissioner expressed concern that, despite the high rates of cognitive disability among young people in Bimberi, and despite the co-location of Disability ACT, Therapy ACT, Child and Youth Protection Services, and Youth Justice within the Community Services Directorate (CSD), there appeared to be no formal policy or service integration between the agencies. The Commission recommended that:


In 2013, the Commission requested information about the progress of the implementation of this recommendation, and received a copy of a ‘Draft Agreement on Collaborative Practice between Disability ACT, Therapy ACT and the OCYFS to support young people with a disability who come into contact with the youth justice system’.

CSD is revising this work in the context of the rollout of the National Disability Insurance Scheme (NDIS), and in the interim ‘practice guidelines’ are being finalised to assist staff to respond appropriately and effectively to young people with a disability in the youth justice system.

8.8 TRAINING AND PROFESSIONAL DEVELOPMENT

‘Everyone involved in the criminal justice system—judges, magistrates, lawyers, court staff and police—should receive training in the best way to deal with ... people with mental illness or brain injury.’

The Borowski study interviewed stakeholders in youth justice systems across all Australian jurisdictions, and ‘there was a national consensus that all judicial officers, especially the generalists, were in need of more ongoing professional development’:

‘Participants felt that all court room workgroup members needed further training. The training needs most commonly identified were in developmental psychology and childhood trauma arising from abuse and/or neglect and removal, developmental criminology, mental health, intellectual disability and communication skills.’

Training workers in the youth justice system to recognise and respond to mental health conditions, cognitive disability and childhood trauma is important for several reasons. First, it assists with early identification of those young people who need treatment or support for mental health conditions, cognitive disability and childhood trauma. Training can involve ‘supporting non-clinical justice personnel to recognise signs of mental illness through providing mental health literacy training or provision of simple screening tools or guidelines.’

Second, training in mental health conditions, cognitive disability and childhood trauma can assist professionals to perform their role with greater effectiveness and confidence. For example, ‘the more comfortable and skilled police feel, the more likely they are to use their discretion wisely.’

CSD staff are undertaking training in trauma-informed practice (see part 8.3), and such programs may be beneficial for solicitors, Magistrates, community workers and other stakeholders in the youth justice system. A US judge who undertook such training observed:

For years our court treated these cases as ‘bad behavior’ and ‘lack of self control.’ It is only in the last several years that we, as a court, have educated ourselves about trauma. As a result, we now know that it is important

316 Ibid., page 278.
to ask about trauma. Indeed, we often discover a history of trauma that has gone undetected, despite attempts to help the child through traditional counseling services.\textsuperscript{19}

Cross-sector training activities may provide an opportunity for collaboration between the clinical, legal, government and community sections of the youth justice system (see part 8.7).

\section*{8.9 STRENGTHENING DATA COLLECTION AND EVALUATION}

Part 6.3.6 discusses the importance of using data to monitor the presentation of mental health conditions and cognitive disability across the youth justice system. This section examines the importance of collecting data in order to evaluate the impact of policies and services.

\subsection*{8.9.1 EVALUATING PATHWAYS AND OUTCOMES FOR CHILDREN AND YOUNG PEOPLE}

It is important to collect and analyse data in order to monitor and evaluate the outcomes of diversion and support programs in the youth justice system.\textsuperscript{20} The two primary objectives of diversion and support programs in the youth justice system are to improve young people’s health outcomes, and to reduce reoffending.\textsuperscript{21} Data collection helps us to establish which responses to mental health conditions and cognitive disability are effective in achieving these objectives.

In particular, it would be useful to gather better information on the pathways and outcomes for children and young people with mental health conditions and cognitive disability who pass through the youth justice system. The ‘lack of available, comprehensive and consistent data regarding the representation of, and outcomes for, people with cognitive and mental health impairments’ means it is difficult to quantify the present situation, and assess the potential impact of changes to law, policy or procedure.\textsuperscript{22} The collection and analysis of better data would enable several things:

‘It would provide baseline data which would allow us to understand the current situation more accurately. More importantly it would provide a more rational basis for evaluating the impact of changes in policy and law by, for example, enabling the tracking of changes in the prevalence of people with cognitive and mental health impairments in their contact with various parts of the criminal justice system.’\textsuperscript{23}

\subsection*{8.9.2 INTER-AGENCY WORKING GROUP ON DATA COLLECTION AND ANALYSIS}

This report identifies a range of research questions that might be answered through collecting and analysing data from police, the Childrens Court, the Health Directorate and the Community Services Directorate.

The NSW Law Reform Commission in 2012 recommended ‘the creation of a working group of relevant government and non-government stakeholders, to formulate a strategy for data collection and analysis’, to provide a foundation from which to evaluate the impact of law, policy and services. They identified the need for data on the representation of,

\textsuperscript{22} NSW Law Reform Commission (2012) \textit{People with cognitive and mental health impairments in the criminal justice system: Diversion}, page xvii.
\textsuperscript{23} Ibid., page 100.}
and outcomes for, children and young people with mental health conditions and cognitive disability across the youth justice system (police contact, bail, court, detention, community supervision). 324

The application of such a concept in the ACT would involve the Justice & Community Safety Directorate (on behalf of the Courts Administration), the Community Services Directorate, ACT Policing, and various statutory authorities and community organisations.

**Suggestion:**

14. That the Justice & Community Safety Directorate, Community Services Directorate, ACT Policing, and relevant statutory authorities and community organisations establish an interagency working group, to formulate a strategy for data collection and analysis in the youth justice system.

8.9.3 A MINI-VERSION OF BOSCAR FOR THE ACT

The NSW Bureau of Crime Statistics and Research (BOSCAR) produces some very useful statistics and research reports in the NSW context (for example, they report on the number of people whose proceedings are dismissed on the grounds of mental impairment, and the rates of reoffending of people with a mental health dismissal). 325

BOSCAR is a statistical and research agency located within NSW Department of Attorney General and Justice. They ‘assist policy makers and administrators in the criminal justice system to develop and implement strategies which reduce crime, and provide a more efficient, effective and equitable justice system’. 326 Their aims are to:

- ‘identify factors that affect the distribution and frequency of crime,
- identify factors that affect the effectiveness, efficiency or equity of the NSW criminal justice system, and
- ensure that information on these factors and on crime and justice trends is available and accessible to our clients’

Their activities are:

- ‘developing and maintaining statistical databases on crime and criminal justice in NSW,
- conducting research on crime and criminal justice issues and problems,
- monitoring trends in crime and criminal justice, and
- providing information and advice on crime and criminal justice in NSW.’ 327

It is possible that, in a small jurisdiction such as the ACT, equivalent information could be produced through the part-time allocation of one staff member in the Justice & Community Safety Directorate and one staff member in the Community Services Directorate.

324 Ibid., page 101.
325 This data was reprinted in NSW Law Reform Commission (2012) People with cognitive and mental health impairments in the criminal justice system: Diversion, page 98.
327 Ibid.
PART 9: IMPORTANT CONSIDERATIONS WHEN DESIGNING DIVERSION AND SUPPORT

This section of the report mentions some important considerations that should inform design of diversion and support services for children and young people with mental health conditions, cognitive disability, drug and alcohol disorders and childhood trauma.

9.1 THEORETICAL EXPLANATIONS FOR THE OVER REPRESENTATION OF PEOPLE WITH COGNITIVE DISABILITIES IN THE CRIMINAL JUSTICE SYSTEM

There are a range of theoretical explanations for the high prevalence of cognitive disability among young people in the youth justice system. AHRC describes work by Hayes who described the following categories:

- **School failure hypothesis** – Due to difficulties with learning, young people with cognitive disabilities are more likely to leave school early; and young people who leave school early are more likely to become involved with the criminal justice system.
- **Susceptibility hypothesis** – Young people with cognitive disabilities are more likely to become involved with the youth justice system due to ‘personality attributes, including impulsivity, emotional liability, inadequate understanding of causal relationships, and poor reception of social cues’. In some cases, this vulnerability can be exploited by ‘more sophisticated’ young people who involve them in offending.
- **Differential treatment hypothesis** – Young people with cognitive disabilities commit crime at the same rate as other young people, but are dealt with differently by the criminal justice system. Contact with police may result in higher likelihood of arrest; they may not have information explained in a way they can understand; they may be more easily persuaded to confess to a crime they have not committed; they may be more likely to have bail refused due to previous breaches of bail (which may be due to lack of support or understanding of their obligations), and they may be more likely to receive a custodial sentence due to lack of alternative placements in the community.
- **Response bias hypothesis** – Young people with cognitive disabilities commit crime at the same rate as other young people, but are more likely to be caught.
- **Socio demographic characteristics hypothesis** – There are greater numbers of young people with cognitive disabilities in disadvantaged groups, who are in turn more likely to become involved in the youth justice system. (But AHRC notes the evidence for this claim is contested.)

These theories can assist in the process of designing and evaluating diversion and support interventions for young people in the youth justice system.

9.2 ELIGIBILITY CRITERIA – WHO SHOULD BE TARGETED FOR INTERVENTION?

9.2.1 DEVELOP A PROFILE OF THE YOUNG PEOPLE SUITED TO EACH DIVERSION AND SUPPORT OPTION

Members of the Bimberi Oversight Agencies Group have worked with individual young people placed in Bimberi with mental health conditions or cognitive disability, and young people placed in Bimberi in their best interests because there was not suitable accommodation and support available to them in the community. There are some factors common to many of these situations:

- Young age (12-14 years)
- Undiagnosed/suspected, or emerging, or diagnosed mental health condition

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• Diagnosed or undiagnosed cognitive disability
• Problematic drug or alcohol use, or diagnosed substance disorder
• Background of acute or complex trauma (eg. abuse or neglect or victim of crime)
• Disengaging or disengaged from school
• Refusal to engage with therapeutic or support services offered to them in the community
• Lack of suitable accommodation
• Refusal to reside in safe accommodation
• Risk taking behaviour
• Self harming behaviour
• Escalating verbal or physical aggression towards family/carers/support workers

As mentioned above in part 3.1, most stakeholders in the youth justice system would accept that a defendant’s mental health and cognitive disability is relevant to their treatment within the system, however there are different views about what types of diversion are appropriate, and the eligibility criteria for diversion (the nature of the person’s mental impairment, or the type of offending).

It is important that eligibility criteria for diversion and support programs are carefully designed, to ensure clarity about which forms of intervention are appropriate for children and young people in different circumstances. There are several reasons why this is essential: to ensure effectiveness of the intervention, to prevent unintended consequences, and to guarantee community acceptance.

It would be helpful to develop profiles of the types of children and young people who should have access to the current range of diversion and support services. This would involve detailed and clear discussion about the range of circumstances of the children and young people who become involved in the youth justice system (their mental health condition or cognitive disability, their history of offending, their risk factors and protective factors) and their suitability for existing mechanisms for diversion and support. This process would also identify if there are some groups of children and young people who are not adequately served by the current range of options for diversion and support:

‘Developing a profile of the people who will have access to a diversion and support program is essential. A clear profile enables resources to be matched to the target cohort’s needs and risk factors... Coordinating client profiles and associated inclusion and exclusion criteria across programs operating at different points on the criminal justice continuum is important. This can reduce gaps, ensure overlaps are planned and appropriate and support good decision making about the most appropriate pathway for each individual.’

9.2.2 SERIOUS OFFENDING SHOULD NOT IN ITSELF BE A DISQUALIFYING FACTOR

It is a common view that the more serious the crime, the less appropriate diversion will be. However the NSW Court of Appeal found that serious offending should not prevent a young person being diverted, if it is appropriate to do so in all the circumstances:

‘The Court of Appeal indicated that any decision whether to divert would depend on an assessment of whether diverting a person who had committed a serious offence would produce a better outcome for the individual and the community. Other interests are clearly relevant in deciding whether to divert an accused person. For example, the impact of offending on a victim may be important. In other cases the need to protect the public is

330 Ibid., page 48.
important. However, where diversion provides a way of preventing further offending, the protection of the public may be better secured by diversion than by incarceration.\textsuperscript{331}

9.2.3 DIVERSION AND SUPPORT PROGRAMS MAY NEED TO ADAPT TO MEET THE NEEDS OF YOUNG PEOPLE WITH COMPLEX NEEDS

Young people with mental health conditions or cognitive disability may be deemed ineligible for some diversionary schemes, for example if they assessed as incapable of coping with a conference, or group therapy, or cognitive behavioural therapy. However the Aboriginal & Torres Strait Islander Social Justice Commissioner points out that ‘finding young people with cognitive disabilities or mental health problems not suitable for diversionary programs may be masking the need for the program to be more flexible and offer people with cognitive disabilities a greater level of support’.\textsuperscript{332}

9.3 CONSENT TO TREATMENT

Principle 7 of the National Statement of Principles for Forensic Mental Health Care states the importance of consent to health treatment:

‘Mental health treatment should always be provided only with the explicit informed consent of the client except in circumstances where the client is unable to give informed consent by virtue of their mental illness or intellectual impairment. Treatment should only be provided with the consent mechanisms outlined in the relevant jurisdictions’ substitute decision making legislation and/or mental health act, or in accordance with judicially determined conditions under relevant legislation.’\textsuperscript{333}

In other words, does the young person consent to medication or therapy recommended to them? Do they have capacity to consent? If no, then what legal authority is there for providing treatment?

Consent to health treatment is made more complex in the context of diversion. Diversion should only occur with the informed consent of the young person involved, and this is especially the case when there are any conditions attached to diversion:\textsuperscript{334 335}

‘Informed consent requires that the individual is fully aware of the options open to them, having had these explained to them in plain terms and is able to weigh the advantages and disadvantages of each in reaching a decision. Informed consent also means that each individual understands what is expected of them and the consequences if they do not meet those expectations.’\textsuperscript{336}

\textsuperscript{331} NSW Law Reform Commission (2012) People with cognitive and mental health impairments in the criminal justice system: Diversion, page 42.
9.4 PRIVACY – AUTHORITY TO SHARE PERSONAL HEALTH INFORMATION

Principle 7 of the National Statement of Principles for Forensic Mental Health states: ‘[s]haring of information between correctional and health providers will only occur to the extent necessary for treatment and care or with the consent of the client.’ A key issue at the intersection of the justice and health system is when and what information is exchanged:

‘The clinical and support components of diversion and support programs are likely to capture a significant amount of confidential personal information about participants... To ensure compliance with information privacy legislation, guidelines should be developed about how confidential information is managed, including processes for seeking express consent from participants when this is appropriate.’

It is important to seek consent of a young person before sharing their personal information. However the Health Records (Privacy & Access) Act 1997 recognises that there are situations where it is appropriate for agencies to share personal health information without a person’s consent, where this use is necessary to prevent or lessen a significant risk to life or health of a person.

Another legal mechanism that authorises limited information sharing is contained in the Children & Young People Act 2008. The Director General may declare a care team be established in relation to a young person. The members of the Care Team may share with each other information relevant to the health, safety and wellbeing of the young person where this is in the young person’s best interests. The use of a declared care team does not remove the need to seek consent from a young person to share their personal information, but does allow this information to be shared without consent where this is in the young person’s best interests. The draft Information Sharing Protocol between Youth Justice, Justice Health and Forensic Services is based on this legislative framework.

9.5 PARTICIPATION BY CHILDREN AND YOUNG PEOPLE

Principle 10 of the National Statement of Principles for Forensic Mental Health discusses quality and effectiveness, and states: ‘effective treatment and rehabilitation will involve forensic mental health clients as fully as possible in decision making.’

Young people should be provided opportunity to participate in decision making about their personal legal proceedings and health care, as ‘voluntary and active participation by consumers in planning their own care is desirable and increases likelihood of service engagement’.

‘[T]here is good evidence that involving consumers in decisions about their care can lead to improved compliance with treatment, better health outcomes and greater satisfaction with services received. While application of this principle in the justice environment can present some challenges, every effort should be made to support individuals’ decision making in relation to treatment and intervention choices.’

340 Section 863, Children & Young People Act 2008 (ACT).
343 Ibid., page 60.
Young people should also be provided opportunity to participate in the design and implementation of policies and services. Consumers should be consulted about what outcomes are important to them and meaningfully engage in negotiations around program goals and objectives. The participation of young consumers in decision making processes considerably enriches program design and policy development, and is supported by the National Mental Health Policy 2008.

**9.6 INDIVIDUALISED CARE, AND RECOVERY ORIENTATION**

Individualised care is described in Principle 9 of the National Statement of Principles for Forensic Mental Health:

‘Forensic mental health services should meet the changing needs of an individual, taking into account the entirety of their biological, psychological, cultural and spiritual context. Individualised care implies facilitated access, comprehensive assessment, unimpeded treatment, regular review and recognition of the humanity of the person including the involvement of significant others in treatment, support and care. There should be agreed recognition of the role and responsibilities of the involved agencies.’

In summary, therapeutic and support services for young people with mental health conditions and cognitive disability in the youth justice system should be holistic and tailored to the young person’s needs:

‘Effective diversion and support programs need to be holistic in scope. They should accept and be responsive to the complexity and diversity of contributing and protective factors that impact on both mental illness and offending.’

They should be coordinated, comprehensive, view the young person in context, and subject to regular review, and they should focus on long term recovery:

‘Diversion and support strategies should move away from disconnected, episodic interventions and should focus instead on supporting recovery from illness and managing offending behaviour in the longer term’.

They should also be strengths based, inclusive of the young person’s family, and culturally appropriate:

‘Effective case management is essential... Supports linked to diversion should be able to provide or broker well-coordinated, integrated services. They should suit the range of problems faced by each individual and build on individual strengths and protective factors. In many cases, this means working with a person in the context of their family and community.’

**9.7 PARTICULAR GROUPS OF CHILDREN AND YOUNG PEOPLE**

‘People with mental illness who have contact with the criminal justice system are a diverse population; the particular needs of subgroups require special consideration’.

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345 Ibid., page 60.
348 Ibid., page 50.
349 Ibid., page 36.
350 Ibid., page 36.
351 Ibid., page 11.
Aboriginal and Torres Strait Islander young people are overrepresented in the youth justice system, and they also experience higher rates of psychological distress. An Aboriginal and Torres Strait Islander young person aged 10-17 years is 11 times more likely to be under community based supervision as a non-Indigenous person the same age, and 22 times more likely to be in detention.

The Indigenous view of health

Aboriginal and Torres Strait Islander communities have different understandings of health and identity. ‘The Indigenous view of health is holistic, encompassing mental health and physical, cultural and spiritual health’. Therefore to be culturally appropriate, assessments, diagnoses and treatment of mental health conditions should be based on the concepts of ‘social and emotional wellbeing’ (SEWB), ‘an established clinical paradigm recognised by the World Health Organisation’, Services designed to support young people with mental health conditions and cognitive disability in the youth justice system ‘must be holistic... interventions should address physical, psychological, emotional, social, spiritual and cultural aspects of wellbeing.’

Culturally appropriate assessments of mental health conditions and cognitive disability

Some experts argue that the data on mental health conditions and cognitive disability under represents the extent of the problem in Indigenous communities; disability may be ‘masked’ by a range of cultural factors such as English as a second language, hearing impairment, disengagement from education, drug or alcohol use, or racism. In contrast, other experts argue that the data on cognitive disability for Indigenous young people is inflated; that Indigenous young people are disadvantaged in testing as they ‘do not possess the assumed cultural knowledge of the dominant culture’. This contradiction means that ‘the true rates of cognitive disabilities and/or mental health issues are not currently known, and further work needs to be done to develop culturally appropriate assessments of cognitive functioning and mental health issues.’

Culturally safe services

Aboriginal and Torres Strait Islander people may be uncomfortable within mainstream disability and mental health services, therefore substantial adjustments must be made to ensure accessibility. Services for young people with mental health conditions or cognitive disability in the youth justice system must understand the cultural background of
their client group, and make adjustments in order to be culturally safe. Engaging Aboriginal and Torres Strait Islander health workers will assist in the development of culturally safe services. 362

**Partnership and engagement with Aboriginal and Torres Strait Islander communities**

Governments should respectfully draw on both Indigenous and non-Indigenous expertise in developing youth justice policy and programs. 363 Planning and providing culturally safe services requires meaningful partnership with Aboriginal & Torres Strait Islander communities. 364

‘Communities need to be involved and have control over programs. In particular this means engaging with Indigenous concepts of disability and mental health as well as consulting with communities to understand service barriers and gaps.’ 365

Indigenous workers and organisations should be at the centre of interventions for young Aboriginal and Torres Strait Islander children and young people in the youth justice system, and involved in service provision in a systematic (rather than ad hoc) way. 366

It is important to establish close consultation between government and Indigenous communities in addressing youth justice matters. Consultative mechanisms exist in the adult criminal justice system in Victoria, for example the Aboriginal Justice Forum (AJF). 367 The AJF in Victoria is ‘the Indigenous community-based peak coordinating body’ established under the Victoria Aboriginal Justice Agreement, and they have a role in evaluating Department of Justice performance. 368

The ACT Community Services Directorate has established an Aboriginal and Torres Strait Islander Programs and Services Coordination Committee, under which quarterly meetings are held between Aboriginal elders, community members and staff from across youth justice. 369 It will be interesting to hear views about how all the agencies in the ACT youth justice system might strengthen partnership and engagement with Aboriginal and Torres Strait Islander communities.

### 9.7.2 Young Women and Girls

The female population in the youth justice system is a small minority, with characteristics quite different from the male population. Health statistics show young women and girls typically have a different profile of mental health problems to their male counterparts, and justice statistics show they generally display different types of offending behaviour. 370 Young women are also a minority in the youth justice system. These facts have significant implications for the design of

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364 Ibid., page 57.


366 Ibid., page 66.


diversion and support programs.\textsuperscript{371} If youth justice policy and programs are not designed carefully, they can disadvantage young women and girls.

Many studies have found high levels of abuse and experiences of trauma among young women in detention.\textsuperscript{372} The NSW Young People in Custody Health Survey found that young women (39%) were more than twice as likely as young men (17%) to have a diagnosis of post traumatic stress disorder. Young women (55%) also experienced high levels of psychological distress at twice the rate of young men (24%). The survey also found higher levels of self harming behaviour and suicidal ideation among young women. This demonstrates ‘the need for effective screening and provision of support for this vulnerable group’.\textsuperscript{373} Strikingly, the combined impact of gender, cultural background, and health/disability status, means that ‘Aboriginal women with mental illness are the most disadvantaged group among all prisoners.’\textsuperscript{374}

\textbf{9.8 AVOIDING ‘NET WIDENING’ AND OTHER UNINTENDED CONSEQUENCES}

With any consideration of reform to legislation, policy or services, it is important to be aware of the risk of unintended consequences. When designing programs to divert children and young people from the youth justice system, it is possible that any changes will have unintended consequences, particularly a ‘net widening effect’:\textsuperscript{375}

‘That is, rather than keeping people out of the criminal justice system, diversion could have the paradoxical result of entrenching more people in that system due to a desire to “provide them with programs that would not otherwise be available if they were not charged with criminal offences”.’\textsuperscript{376}

‘Despite the generally positive regard for diversion in the literature there is some concern about its “net widening” potential. Net widening occurs when the actual diversionary intervention leads to more young people being involved in the criminal justice system, or facing more consequences’.\textsuperscript{377}

‘In general, diversion and support programs, including preventive programs, should avoid inappropriately increasing the degree of criminal justice system involvement.’\textsuperscript{378}

For example, the Australian Human Rights Commission reported that, following the introduction of cautioning in Western Australia, arrest rates remained fairly stable, while level of contact with police increased by 30%. ‘This means that cautioning has occurred on top of, rather than instead of, arresting young Aboriginal people... the cautioning system seems to be netting some other, younger, less delinquent young people for trivial offences that may have been

\begin{itemize}
  \item \textsuperscript{371} National Justice Chief Executive Officers’ Group and the Victorian Government Department of Justice (2010) \textit{Diversion and support of offenders with a mental illness: Guidelines for best practice}, page 6.
  \item \textsuperscript{372} ACT Children & Young People Commissioner & ACT Human Rights & Discrimination Commissioner (2011) \textit{The ACT Youth Justice System 2011: A Report to the ACT Legislative Assembly by the ACT Human Rights Commission}, page 232.
  \item \textsuperscript{374} National Justice Chief Executive Officers’ Group and the Victorian Government Department of Justice (2010) \textit{Diversion and support of offenders with a mental illness: Guidelines for best practice}, page 76.
  \item \textsuperscript{375} Ibid., page 35.
  \item \textsuperscript{376} NSW Law Reform Commission (2012) \textit{People with cognitive and mental health impairments in the criminal justice system: Diversion}, page 41.
  \item \textsuperscript{377} Aboriginal & Torres Strait Islander Social Justice Commissioner (2008) \textit{Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues}, page 32.
  \item \textsuperscript{378} National Justice Chief Executive Officers’ Group and the Victorian Government Department of Justice (2010) \textit{Diversion and support of offenders with a mental illness: Guidelines for best practice}, page 20.
\end{itemize}
Some examples of potential risks of unintended consequences in the ACT are:

- If there was a forensic mental health facility in the ACT, which cohort of young people would it engage? Would it have the perverse outcome of drawing in young people who are currently released on bail, rather than the intended outcome of diverting young people who would otherwise be detained at Bimberi?
- Similarly with Therapeutic Protection Orders (discussed in part 8.2.2). A range of people advocate for their use in diverting young people from Bimberi. But if they were brought into effect, would they end up being used for young people on care orders who have no involvement in the criminal justice system?

It is possible to guard against unintended consequences through careful and precise drafting of client eligibility criteria and systematic monitoring and evaluation.

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1. That the Justice & Community Safety Directorate considers what additional data on mental health conditions might be included in the ACT Criminal Justice Statistical Profile (for example, drawing from police records of young people in custody) as they continue to implement changes to the Profile following the 2013 Review.

2. That the Community Services Directorate and Health Directorate measure and monitor the proportion of young people admitted to Bimberi who are living with mental health conditions or cognitive disability, and report publicly.

3. That the Community Services Directorate measure and monitor the proportion of young people under community supervision living with mental health conditions or cognitive disability, and report publicly.

4. That ACT Government consider legislative amendment to include within the youth justice principles in section 94 of the *Children & Young People Act 2008* a provision similar to that in section 7(g) of the *Young Offenders Act 1994* (WA). Section 7(g) requires that consideration be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so.

5. That the Community Services Directorate, Health Directorate, Education Directorate, Justice & Community Safety Directorate and ACT Policing explore whether the model of ‘youth justice teams’ undertaken in Western Australia is suitable for consideration in the ACT context, and convey to the Children & Young People Commissioner the outcomes of their consideration.

6. That ACT Government considers the creation of a statutory scheme providing police with clear power to discontinue charges against children and young people with mental health conditions or cognitive disability in appropriate cases in favour of referral to services.

7. That the Community Services Directorate continue to analyse the reasons that young people are denied bail when placed on remand in Bimberi, and the outcome of their first court appearance, as they did during the evaluation of the After Hours Bail Support Service in 2011-2012. If such analysis is too resource intensive to undertake on an ongoing basis, perhaps periodic collection and analysis could be undertaken (for example, three months of each year).

8. That the Childrens Court administration records the number of matters dismissed in the Childrens Court under section 334 of the *Crimes Act 1900* each year, and that the Justice & Community Safety Directorate reports this data in the Criminal Justice Statistical Profile.

9. That ACT Government explore whether the Childrens Court should be granted legislative authority to make therapeutic supervision orders in appropriate circumstances.

10. That the Community Services Directorate and Health Directorate explore whether the model of intensive transition support following release from youth detention undertaken by the Community Integration Team in NSW is suitable for consideration in the ACT context, and convey to the Children & Young People Commissioner the outcome of their consideration.

11. That ACT Policing or the After Hours Bail Support Service records and reports publicly the number of occasions each year in which a young person is transferred from police custody to Bimberi because suitable accommodation cannot be found in the community.

12. That Childrens Court administration staff or Youth Justice Case Management records and reports publicly the number of occasions each year in which a young person is remanded in custody because suitable accommodation cannot be found in the community.

13. Given the apparent decision by the Community Services Directorate not to use the provisions in the *Children & Young People Act 2008* governing the use of therapeutic protection orders, that the ACT Government amend the legislation accordingly by revoking Chapter 16 of the *Children & Young People Act 2008*.

14. That the Justice & Community Safety Directorate, Community Services Directorate, ACT Policing, and relevant statutory authorities and community organisations establish an interagency working group, to formulate a strategy for data collection and analysis in the youth justice system.