

Section 28: Criminalising the Young and Homeless

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Every year in New South Wales (NSW), children and young people under the age of 18 who have been granted bail by the Children's Court of NSW (the Court) — all of whom have not yet been found guilty of any crime — remain in detention simply because they are homeless. This is provided for under section 28 of the NSW *Bail Act 2013* (the Bail Act), which stipulates that children and young people cannot be released on bail until suitable housing is found for them.

Having a safe and secure home is crucial to building a positive future, both psychologically and physically. It provides a sense of positive identity and security that is critical for children and young people in their transition to independence, as well as being fundamental in enabling someone to access structural elements such as education and employment.

On any given night in NSW, over 9,000 children and young people are experiencing homelessness.¹ Research has shown that there is a strong relationship between juvenile offending and youth homelessness.² Homeless children and young people are at higher risk of becoming involved in the criminal justice system than children and young people who are not homeless. They are often unable to support themselves, find it difficult to apply for benefits, and disengaged from education and employment. Often, these difficulties are compounded by mental health concerns. Consequently, they engage in risk taking behaviours such as theft, trespass and drug dealing to earn income and provide for themselves.³

It therefore comes as no surprise that juvenile detention centres (JDCs) are in a position where, at times, they are unable to release children and young people as a result of youth

homelessness. Data recently shared by Juvenile Justice NSW revealed that, between January 2018 and 2019, 260 children and young people were unable to be released from detention and were detained for up to 45 days under section 28 because they did not have any accommodation. Of these 41 per cent identified as Aboriginal and Torres Strait Islander.⁴

Section 28

When a child or a young person is arrested and charged, the Court will consider whether to grant bail. Bail can be conditional or unconditional depending on a number of issues. These include; the nature and seriousness of the offence, any community ties that may provide reassurance that the child or young person will not offend and will turn up to court if bail is granted, the strength of the evidence, and the severity of the probable penalty.⁵ These considerations are balanced against the defendant's special vulnerability or needs arising from, among other considerations, their age, identifying as Aboriginal or Torres Strait Islander or having cognitive or mental health impairment.⁶ If the Court is not concerned about any of these matters,

or if they think the concerns can be addressed by imposing conditions on bail, then bail will be granted.

Section 28 of the Bail Act is a bail condition that allows magistrates to impose an accommodation requirement on any grant of bail. This condition is a pre-release requirement, which means that if a child or young person does not have accommodation when granted bail, they cannot be released and are remanded into custody until such accommodation is located. Being held on remand means that a child or young person is held in detention until their matter is next at court (or in this case, until housing is found).

Impacts of Detention

This is concerning for a number of reasons. The impact of remand on the wellbeing of a child or a young person is significant. We know that children and young people who come into contact with Juvenile Justice are already among the most vulnerable in our society.⁷ We know that time spent on remand has been identified as 'the most difficult and unstable prison experience' with a corresponding range of negative outcomes, including a decrease in wellbeing, disengagement from education and employment, fewer positive relationships and social exclusion, and increased reoffending.⁸

As well as the lifelong impacts of remand on children and young people, it also costs the state — and by implication taxpayers — millions every year. The cost of detaining a child or a young person in NSW is more than the tuition and related fees of attending Australia's best boarding schools. It costs the government \$1,334 per day to keep one child or young person in detention, roughly \$486,910 per year.⁹



This is over 50 per cent higher than the daily cost of \$219 in NSW of detaining an adult.¹⁰ Research by Jesuit Social Services found that children and young people between the ages of 10 and 12 who first experience remand, cost the Victorian Government over \$3 million a year.¹¹ By contrast, The Victorian Equal Opportunity and Human Rights Commission noted that the cost of one child or young person in Out-Of-Home-Care was \$104,443 per annum, roughly \$287 per day.¹²

Coupled with these are indirect economic costs. These include loss of employment and deterioration of skills. The detention of children and young people can create a lifecycle of offending, limit the personal development opportunities available to them and slow their transition to independence.¹³ Governments also experience indirect costs through increased demand for health and welfare services both for prisoners and their families during and after imprisonment.

Yfoundations' Research Project

We know anecdotally that section 28 bail has unintended consequences for children and young people who are arrested while at risk of, or experiencing, homelessness. Yfoundations sought to provide a renewed focus on this critical issue and explore how we could collectively work together to find solutions.

To do so, we conducted qualitative interviews with 19 legal professionals in NSW. These included the President of the NSW Children's Court; two Specialist Children's Magistrates; and 17 solicitors from Legal Aid's Children's Legal Service and Aboriginal Legal Service across NSW who have experience working on children's matters. The purpose of our research was to examine and understand how section 28 is inadvertently contributing to the unnecessary detention of homeless children and young people, and provide some practical recommendations to remove those barriers.

Barriers to the Release of Young People

Our research highlighted a number of barriers affecting the release of homeless young

people from detention on the date bail is granted by the Court:

- Once section 28 bail has been imposed, there is no corresponding obligation within the Bail Act for any government agency in NSW to find accommodation. A magistrate has no power to expedite the process or to enforce responsibility for finding housing on any person or agency. We repeatedly heard from participants of instances where — frustrated by their lack of options to facilitate the release of children and young people caught up under section 28 — magistrates removed the accommodation condition and ordered that the child or young person be dropped off at their local Family and Community Services office for housing to be found.
- It is not always clear to them who should be doing what when sourcing accommodation. Participants told us that, in their experience, this lack of clarity allows agencies to shift responsibility among one another and avoid taking ownership of the problem, meanwhile delaying the release of a child or young person from detention.
- A strong theme across interviews was the lack of appropriate accommodation to release children and young people into, especially in rural, regional and remote parts of NSW.
- Another important concern raised is the lack of consistency in the application of section 28 among legal practitioners. The granting of section 28 bail sets the wheels in motion for accommodation to be found for a child or young person. When it is misapplied, or if bail is not applied for, the release of a child or young person from custody is delayed.

Conclusion

The findings of our research confirmed what we already knew to be true: that vulnerable children and young people are spending avoidable time in detention simply because they are homeless. These are children and young people who are already

in difficult situations and who are having trouble in their lives. These are children and young people whom we should be supporting in their transition through to adulthood. Instead, they are being further disadvantaged by a system that is failing to meet their basic needs.

We all have a duty to play a part to ensure that children and young people are not placed at a disadvantage when granted bail by the Court simply because they are homeless. Our research has made one thing clear: the way the system currently operates does not deliver positive outcomes for homeless children and young people and changes need to be made to ensure that it does.

* Yfoundations is the NSW Peak Body for youth homelessness
Yfoundations' full findings and recommendations can be found at <http://yfoundations.org.au/wp-content/uploads/2019/05/Yfoundations-Bail-Policy-Position-Paper.pdf>

Endnotes

1. Australian Bureau of Statistics 2016, *Census of Population and Housing: Estimating Homelessness*, Australian Government, Canberra.
2. The Honourable James Wood AO QC 2008 *Report of the Special Commission of Inquiry into Child Protection Services in NSW: Volume 2*. (Report, Department of Premier and Cabinet, November 2008) 556 [15.1].
3. Stewart A and Hurren E 2017, *Child Maltreatment, Homelessness and Youth Offending*, Australian Institute of Family Studies. <<https://aifs.gov.au/cfca/2017/10/04/child-maltreatment-homelessness-and-youth-offending>>
4. Juvenile Justice NSW, *RPE Live 1 April 2019*. Juvenile Justice NSW, 'RPE Live 2'.
5. *Bail Act 2013 (NSW)* s 18.
6. *Bail Act 2013 (NSW)* s 18.
7. van de Zandt P and Webb T 2013, *High Service Users at Legal Aid NSW: Profiling the 50 Highest Users of Legal Aid Services*. (Research Report, Legal Aid, June 2013) pp. 3-4.
8. Freeman S and Seymour M, *Just Waiting: The Nature and Effect of Uncertainty on Young People in Remand Custody in Ireland*, vol. 10, no. 2, Sage Journals 126.
9. Just Reinvest NSW 2019, *Policy Platform: NSW Election 2019*, p. 5.
10. Ibid. p. 4.
11. Victorian Equal Opportunity and Human Rights Commission 2013, *Submission to the Enquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia*, p. 5.
12. Legal and Constitutional Affairs References Committee, above n 31.
13. Legal and Constitutional Affairs References Committee, above n 31, 12 [3.11]-[3.12].