

SECTION 28: CRIMINALISING THE YOUNG AND HOMELESS

Policy Position Paper Written by Natalia Gale | May 2019



This paper has been endorsed by:



ABOUT YFOUNDATIONS

For over 30 years Yfoundations has been the NSW peak body for youth homelessness, representing young people at risk of, and experiencing, homelessness, as well as the services that provide direct support to children and young people.

Our vision: Creating a future without youth homelessness. We believe that all children have the right to safety and stability, home and place, health and wellness, connectedness and participation, and education and employment (together these are the foundations of our organisation). We know these are the foundations for the prevention of, and pathways out of, homelessness.

Our values underpin all the work we do. We value:

- Young people;
- Justice and human rights;
- Diversity and inclusion;
- Optimism and hope;
- Courage; and
- Integrity.

We know that homelessness is an interrelated issue. It requires a whole of government and service response. We need to be innovative, collaborative and determined if we are going to end homelessness.



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FOREWORD

ASSOCIATE PROFESSOR KATH MCFARLANE
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As a panellist at Yfoundations' 2018 Youth Homelessness Matters Day, I was asked to name one of the biggest issues facing young people caught up in the criminal justice system. My answer was unequivocal: section 28 of the NSW Bail Act 2013 needs immediate attention, for it allows children to be detained in custody, for welfare rather than justice considerations. The spontaneous applause from young homeless people that greeted this observation affirmed that this is an area desperately requiring a remedy.

Highlighting the inequity whereby young people are propelled deep into the criminal justice system in circumstances where an adult would not be so affected, is an important responsibility. It is gratifying that Yfoundations, and the service providers it represents, have embraced this task.

This paper advocates for change to benefit children and young people who have been charged with a criminal offence, granted bail, but then remanded in custody pursuant to section 28 of the Bail Act 2013 (NSW).

Section 28 places magistrates in an unenviable position: they must deny a homeless child their right to liberty until accommodation can be found, or allow them a freedom that may involve exposure to predation, criminal activity and abuse. As many of the participants in Yfoundations' study reported, this is not an easy decision. As participants also said, it is not made easier when the Court lacks the power to compel agencies to provide accommodation, even for children it has placed into State care.

I commend YFoundations' policy paper Section 28: Criminalising the Young and Homeless, as an example of what can be done to affect positive change in the lives of children and young people in NSW.

EXECUTIVE SUMMARY

Every year in New South Wales, children and young people under the age of 18 who have been granted bail by the Children's Court of NSW - 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), a pre-release requirement that stipulates that children and young people cannot be released on bail until suitable housing is found for them.

This has had disastrous unintended consequences for young people experiencing, or at-risk of, homelessness at the time of their arrest. In 2018 alone, 260 homeless children and young people were remanded in custody for up to 45 days under this provision of the Bail Act. Juvenile detention not only has life-long effects on a child or young person's wellbeing and future opportunities, but also, it is expensive and further generates problems for society down the road.

Yfoundations set out to understand what changes could be made to ensure that all children and young people are released on the day bail is granted by the Children's Court. To do so, we consulted with Specialist Children's Magistrates and solicitors at Legal Aid and Aboriginal Legal Service to understand what they see as the key issues.

We found that, despite being introduced as a means of reducing the time spent on remand by homeless children and young people, section 28 has failed to do so. Magistrates have limited power to expedite the process or enforce responsibility for finding housing on any government agency. A delegation between Juvenile Justice NSW and Family and Community Services that sets out which agency is responsible for finding house does not appear to have been circulated to all relevant agencies and at times conflicts with other established policies. What's more, section 28 is not applied in a consistent way across NSW nor are there enough beds to release young people into, contributing to the avoidable detention of homeless young people.

INTRODUCTION AND PURPOSE

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 (the Court) and who have not been found guilty of any crime remain in detention simply because they are homeless.

When the NSW Police Force (the Police) arrests and charges a child or young person with a criminal offence, they will either be granted bail or remanded in custody pending the hearing of their charge. Being granted bail means that a child or young person can go home until their hearing starts. This is based on two important principles of justice: that a child or young person should be detained only as a last resort and for the shortest appropriate period.¹

When the Parliament of NSW originally put pen to paper, it is highly unlikely they would have imagined juvenile detention being used as a substitute housing option for homeless children and young people. Yet as Children's Magistrate MacMahon told us: "I can think of several cases where there isn't even a remote possibility of a control order being imposed. But I'm asked to keep them in detention because there's no alternative accommodation, which is not the proper use of a detention facility."

Children's Magistrate Hogg echoed these concerns and told us: "Twice a year, a number of Magistrates get together to discuss current issues in the law. At our most recent session, section 28 remand was raised as a major issue. Detention is an infectious environment, even for two days. And you don't want a non-violent offender to be in custody for a month with young people who are committing serious violent crimes."

We know anecdotally that the granting of section 28 bail has unintended consequences

on children and young people who are arrested while at-risk of or experiencing homelessness. The purpose of this paper is to examine and understand how section 28 is inadvertently contributing to the unnecessary detention of homeless children and young people, to propose how the Bail Act might be amended and properly supported to ensure that homeless children and young people are not disadvantaged in this way.

While our background research and initial consultations with the sector have highlighted that this is a problem, there have been no recent large-scale research projects exploring the issue at any great depth.

In fact, the impact of section 28 on children and young people has rarely been evaluated² and there is little publicly available information on this topic. Much of the evidence we have is anecdotal. Where data is available, it is mostly dated.³ In their submission to the Special Commission of Inquiry into Child Protection Services in NSW, Juvenile Justice NSW (JJ) reported that over a 3-month period, children and young people could not meet their bail conditions in 90% of cases and spent an average of 10 days on remand.⁴ They added that 95% of those remanded during the review period had residential conditions attached to their bail. The average remand time for young people aged 10-12 was 25 days.⁵ In 2014-15, children and young people spent an average of 17.8 days in remand, an increase of 36% from the previous 5 years.⁶ More recently, JJ revealed that between January 2018 and January 2019, 260 young people were unable to be released from detention and were detained under section 28 because they did not have any accommodation. Of these, 41% identified as Aboriginal and Torres Strait Islander and 57% as non-Indigenous.⁷

¹ Australian Government, 'Youth Detention Population in Australia' (Bulletin 143, Australian Institute of Health and Welfare, December 2017) 3; UN Convention on the Rights of the Child, Art 37(b).

² Katherine McFarlane, NSW Bail Laws Mean Well but are Landing Homeless Kids in Prison (16 December 2016) The Conversation <<https://theconversation.com/nsw-bail-laws-mean-well-but-are-landing-homeless-kids-in-prison-68490>>

³ Katherine Boyle, 'The More Things Change...: Bail and the Incarceration of Homeless Young People' (2009) 21(1) Current Issues in Criminal Justice 61.

⁴ NSW Government, 'Annual Report 2007-2008' (Annual Report, Department of Juvenile Justice, 2008) 44.

⁵ The Honourable James Wood AO QC, 'Report of the Special Commission of Inquiry into Child Protection Services in NSW: Volume 2' (Report, Department of Premier and Cabinet, November 2008) 558 [15.12].

⁶ NSW Government, Young People in Custody (undated) NSW Juvenile Justice <http://www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/aboutdjj/statistics_custody.aspx>

⁷ Juvenile Justice NSW, 'RPE Live 1 April 2019' (2019).

STATISTICS

260

CHILDREN AND YOUNG PEOPLE

were unable to be released from detention between January 2018 and January 2019 because they were homeless.

45

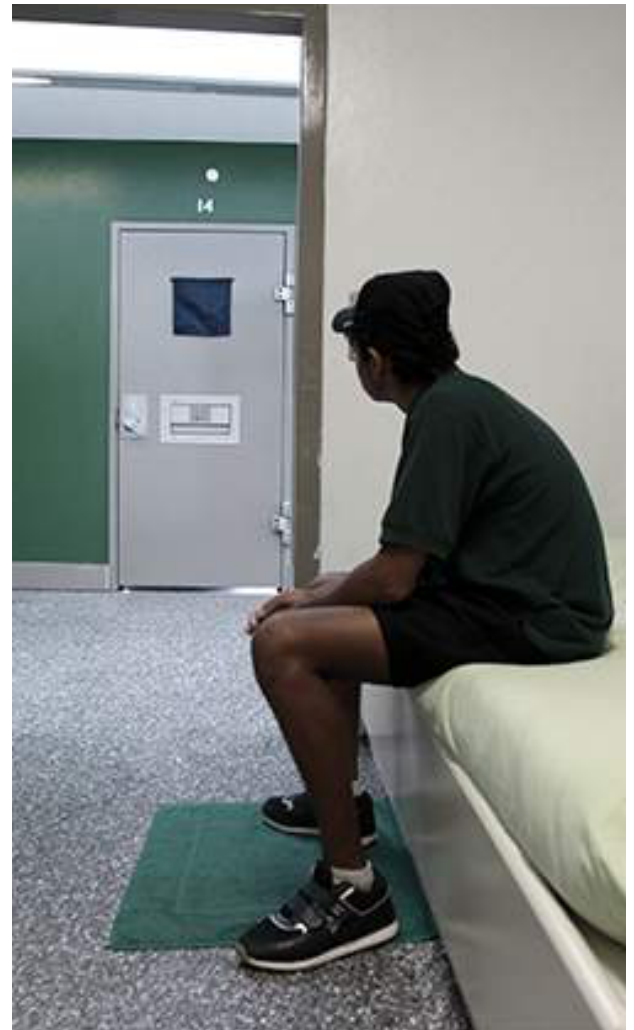
THE HIGHEST NUMBER OF DAYS⁸

spent in detention by a child or young person under section 28 between January 2018 and January 2019

41%

OF CHILDREN AND YOUNG PEOPLE

detained under section 28 identified as Aboriginal or Torres Strait Islander



“ I can think of several cases where there isn't even a remote possibility of a control order being imposed. But I'm asked to keep them in detention because there's no alternative accommodation, which is not the proper use of a detention facility.

- Magistrate MacMahon

⁸ Juvenile Justice NSW, 'RPE Live 2 April 2019' (2019).

BACKGROUND

BAIL AND SECTION 28

When a child or young person is arrested and charged, it is the Police who first decide whether to grant bail. They will consider a number of issues, including the seriousness of the offence and 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. If the Police do not grant bail, then the child or young person must be brought before the Court where they can ask for bail.⁹

In NSW, there is no right to release except for minor offences such as fine-only offences.¹⁰ A right to release means that bail will be granted unless there are good reasons why it should not be. When considering whether or not to grant bail, magistrates must assess a number of bail concerns. These include factors such as the protection of the community, any risk that the child or young person will not reappear before the Court and the likely risk of the child or young person committing further crimes while on bail.¹¹

A magistrate must also consider the nature and seriousness of the offence, the strength of the evidence and the severity of the probable penalty. 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.¹² If the Court is not concerned about any of these issues, or if the Court thinks 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. Section 28 can only be imposed on someone under the age of 18.¹³ 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). Children and young people on remand pending the hearing of their charge have not been found guilty of the charge(s).

The right to be presumed innocent until proven guilty is a

⁹ Legal Aid NSW, A Guide to Bail (January 2015) Legal Aid <<http://www.legalaid.nsw.gov.au/publications/factsheets-and-resources/guide-to-bail>>

¹⁰ Bail Act 2013 (NSW) s 21.

¹¹ Legal Aid NSW, above n 9.

¹² Bail Act 2013 (NSW) s 18.

¹³ Bail Act 2013 (NSW) s 28(3)(a).

well-established universal legal principle.¹⁴ As remand involves the detention of individuals who have not been convicted of a crime, according to international law, it is to be used only when strictly necessary and as a measure of last resort.¹⁵ This includes making every effort to provide children and young people at all stages of criminal proceedings with accommodation to facilitate the process.¹⁶ The high rate of children and young people on remand highlights the dispensability of this principle. Where children and young people have been granted bail but detained under section 28, the result is that the right to be presumed innocent is not fully extended to homeless children and young people charged with an offence.¹⁷

DEVELOPMENT OF SECTION 28

Before section 28 came into effect, children and young people would be directed to “reside as FACS directs”, a bail condition that assumed that Family and Community Services (FACS) would house a child or young person at the time bail was granted.¹⁸ Where FACS could not, children and young people were kept in detention. When this happened, there was little oversight to check what steps were being taken to find accommodation.

Section 28 was introduced as a safeguard, which included a requirement that the matter be relisted before the court every two days. At the time, then Attorney General, Greg Smith SC, stated that this requirement would ensure that a “young person is not detained for an unduly lengthy period beyond the grant of bail.”¹⁹

The intention behind this was to ensure regular judicial oversight and a mechanism through which magistrates could apply pressure on the relevant agency to house a child or young person, to ensure that they were not simply ‘lost in the ether’. One participant told us: “The two-day timeframe provides a mechanism to ensure that a kid gets out. Whereas previously you could have kids lost in the system, waiting for ages with not much happening.”

APPLICATION OF SECTION 28

In practice, attaching a residential condition to a child or young person’s bail is common. Most children and young people granted bail will likely be directed to reside at the address they have provided the court.²⁰ This in part helps mitigate their risk of reoffending. But also, other common bail conditions tend to be structured around a residence condition. For example, a curfew condition

¹⁴UN Universal Declaration of Human Rights 1948 art 11(1); UN International Covenant on Civil and Political Rights 1966 arts 10(2)(a) and 14(2); UN Convention on the Rights of the Child 1989 art 40(2)(b)(i); UN Standard Minimum Rules for the Treatment of Prisoners 1957 art 84(2), UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 r 7.1; UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 r 17

¹⁵UN Conventions on the Rights of the Child 1989 art 37(b); UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 r 13.1; UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 rr 1, 2 & 17; UN Standard Minimum Rules for Non-Custodial Measures 1990 r 6.1; UN International Covenant on Civil and Political Rights 1966 art 9(3)

¹⁶United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 r 24.1

¹⁷Boyle, above n 3, 69.

¹⁸McFarlane, above n 2.

¹⁹Bail Bill 2013 (NSW) Second Reading (1 May 2013) 92.

²⁰Wood, above n 5.

requires that child or young person to return to a particular address by a certain time. When it becomes apparent they are homeless, that is when the section 28 condition is imposed.

We know that children and young people who remain in detention under section 28 are remanded for no other reason than their homelessness. As one participant puts it: "But for accommodation these young people would be released on bail."

A key problem with the residential condition set out under section 28 is that children and young people are impacted by a condition that is beyond their control to meet on their own. With all other bail conditions – to obey a curfew, to report to the police, not to go within a certain distance of a specific place, to name a few – it is within a child or young person's control to be compliant or not (though compliance is dependent on the right supports being in place). But sourcing appropriate accommodation to be released to is largely outside of their control.

“Detention is an infectious environment, even for two days. You don't want a non-violent offender to be in custody for a month with young people who are committing serious violent crimes.

- Magistrate Hogg

ONCE SECTION 28 IS APPLIED

When bail is granted subject to section 28, it sets the wheels in motion for JJ and FACS to find accommodation as a matter of urgency.

Four days prior to section 28 of the Bail Act coming into effect, JJ and FACS, then known as the Department of Community Services, agreed on the contents of a delegation that sets out whether it is the responsibility of JJ or FACS to take the lead in finding accommodation for a child or young person on remand under section



Lindy Kerin

28 based on the age and legal status (i.e. whether under the care of the Minister for FACS or not) of that child or young person.²¹ JJ confirmed that, as of November 2018, the delegation is up to date and in effect. The delegation stipulates that the 'lead agent' in each instance will develop the plan and the 'secondary agent' will provide support. In the first instance:

"JJ assumes initial lead responsibility for all remand interventions and will inform [FACS] of successful interventions for [FACS] clients. This table applies when a young person is at risk of remaining in detention due to accommodation issues and contact with [FACS] is able to be made."

The delegation then stipulates the following:

²¹ Juvenile Justice and Community Services, 'Table of Agreed Responsibility for Reporting and Planning for both Shared and Non-Shared Clients of JJ and CS (under s 28 of the amended Bail Act - commencing 20 May)' (16 May 2014) 1.

Client	Lead Agency
The young person is under the care of the Minister, or shared responsibility of the Minister with residency	[FACS] and JJ have joint responsibility for finding housing with [FACS] acting as the lead agency
The young person is under the care of a parent, relative or third party with no FACS involvement	Where the young person is under the age of 16, [FACS] and JJ have joint responsibility with JJ acting as the lead agency. Where the young person is over the age of 16, JJ will have the sole lead
The Minister holds some aspects of parental responsibility but not residence or day-to-day care responsibility	[FACS] will lead an interagency discussion for the purposes of tabling a plan with the Children's Court (this arrangement was to be reviewed within 6 months of the 20th May 2014)
The young person has no current care orders but [FACS] has an open and allocated risk-of-significant-harm (ROSH) case	[FACS] and JJ have joint responsibility for finding housing with [FACS] acting as the lead agency
The young person has no current care orders but [FACS] has an open unallocated ROSH report on the young person that is unable or unlikely to be allocated	An interagency discussion is triggered for the purposes of tabling a plan with the Children's Court. The lead agency is to be determined at this meeting

The delegation sets out what should happen in practice once bail is granted subject to a section 28 condition. As we will see, it is not always applied.

METHODOLOGY



Yfoundations did a rapid literature review of relevant research reports, policy documents and publicly available administrative data from government data sources to ensure that any work we do does not duplicate existing efforts and fills a gap essential to establishing best practice and positive outcomes.

We then conducted qualitative interviews with 19 legal professionals in NSW. These included Judge Johnstone, President of the NSW Children's Court; Specialist Children's Magistrate Hogg; Specialist Children's Magistrate MacMahon; and 17 solicitors from Legal Aid's Children's Legal Service (CLS) and Aboriginal Legal Service (ALS) across NSW who have experience working on children's matters. Nine participants were from rural, regional and remote (RRR) parts of NSW, and ten were

metropolitan.

The interviews were conducted either over the phone or face-to-face, and were semi-structured. The length of each interview varied between 20 and 75 minutes. Questions included what the key issues were for our participants, ideas around possible solutions and their views on section 28 in practice.

The transcript of each interview was analysed to draw out key themes. The main researcher who interpreted the data is a Sector Projects and Policy Officer at Yfoundations with degrees in Psychology and Law. The final draft was sent to the participants for their feedback on the interpretation and reporting of results before it was published. The project's Aboriginal Working Group was also asked for their feedback.

FINDINGS

Many participants considered the introduction of section 28 to be an improvement over what was in place beforehand, the requirement to “reside as FACS directs”, particularly in instances where homelessness played a role in the circumstances of the offence. One participant told us: “In that instance, the section 28 was a positive thing for that young person.”

While the introduction of section 28 has provided some benefits to homeless children and young people in detention, the majority of our participants (85% or 16 participants) reported that section 28 could also be an issue for them. The time children and young people spent on remand varied and could be anywhere between 2 days to 2 months. From their experiences, typically there seems to be a longer wait for children and young people in RRR areas, and for children and young people who are under the care of the Minister for FACS.

IMPACTS OF SECTION 28

The impact of section 28 on homeless children and young people is threefold: firstly, the inherent injustice of being held on remand for reasons unrelated to their alleged offence. Secondly, it has life-long effects on a child or young person’s wellbeing and future opportunities; and thirdly, it costs the State more money and further generates problems down the road.

1) Impacts on a Child or Young Person's Human Rights

Remanding children and young people into custody because they are experiencing homelessness undermines a number of key international legal principles of the criminal law, JJ and child protection. These are set out in a number of United Nations (UN) treaties including the Convention of the Rights of the

Child, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

It also breaches a range of associated Rules and Guidelines including the Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), the Rules for the Protection of Juveniles Deprived of their Liberty (The Havana Rules) and the Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines). All mandate that the detention of young offenders awaiting a hearing of their charge should be a measure of last resort and for the shortest possible period of time.²²

Under the Children (Criminal Proceedings) Act (the CCP Act), children and young people should also have rights and freedoms before the law equal to those enjoyed by adults.²³ As section 28 bail results in children and young people spending time on remand where an adult who commits the same offence would not, the legislation is contradictory to the requirement of the CCP Act.

In addition, most children and young people on remand (84%) in NSW do not go on to receive a custodial sentence.²⁴ Our participants confirmed this, with many frustrated that vulnerable children and young people are finding themselves deprived of their freedom for offences that are unlikely to result in a prison sentence if found guilty: “By the time housing is found, you're talking about a young person who has spent several nights in custody for something as simple as a shoplifting offence, something they are never going to be locked up for.”

This suggests that many are being held for low level offending, disproportionate to the nature and seriousness of their offence, and reinforces the notion that many are being detained for reasons other than the wider safety of the community. This might also be contributing to the overall increase in the number of children and young people held in detention pending the hearing of their charge. Between 1981 and

²² UN Convention on the Rights of the Child, art 37(b).

²³ McFarlane, above n 2.

²⁴ NSW Government, ‘Law Reform Commission Review of Bail Law’ (Juvenile Justice Submission, Attorney General & Justice, July 2011) 2.

2018, the rate of children and young people on remand increased from 21% to 59%.²⁵ The NSW Law Reform Commission raised this as a concern 6 years ago, particularly surrounding the rates of unsentenced Aboriginal and Torres Strait Islander people and young detainees. In fact, children and young people are remanded at a rate twice that of the adult remand population.²⁶ The continued overrepresentation of Aboriginal and Torres Strait Islander young people on remand, despite government enquiries and policies, is a significant concern.²⁷

2) Impacts on a Child or Young Person's Wellbeing and Future Opportunities

The impact of remand on a child or young person's wellbeing is significant. We know that children and young people who come into contact with JJ are already among the most vulnerable in our society.²⁸ And the time spent on remand has been identified as 'the most difficult and unstable prison experience' with a corresponding range of negative outcomes impacting children and young people, including a decrease in wellbeing, disengagement from education and employment, fewer positive relationships and social exclusion, and increased reoffending.²⁹

Freeman and Seymour (2010) interviewed young people (aged 16 to 21) on remand in Ireland and found that most identified the sense of uncertainty on remand as the worst aspect of their experience of JJ. This sense of being 'in limbo' worsened existing vulnerabilities and difficulties the young people faced, and had negative psychological and social consequences including high levels of anxiety, disrupting and withdrawing from social relationships, a sense of having no control, feelings of hopelessness, housing difficulties, and unemployment.³⁰

Aboriginal and Torres Strait Islander detainees in particular are profoundly affected by detention with the breakdown of links with family members and communities. The Royal Commission into Aboriginal Deaths in Custody and international research have emphasised the devastating impact that disconnect with Country and culture caused by detention has on the identity and wellbeing of Aboriginal and Torres Strait Islander people. Both conclude that connection to culture can serve as a preventive measure against risk-taking behaviours.

As well as dealing with the impacts of detention, children and young people impacted by section 28 also have to wrestle with the long-term negative impacts of homelessness. Mission Australia surveyed 21,812 young Australians on their experiences of homelessness and concluded:

"Homelessness is one of the most severe forms of disadvantage and social exclusion ... It is a traumatic experience ... [and] makes everyday activities like attending school ... or getting a job difficult ... Homeless young people often experience mental and physical health problems and experience much higher rates of disconnection from family and friends. The personal and community costs of homelessness are very high. The absence of safe and secure accommodation, [worsened] in many cases by poor health, difficult financial circumstances and social isolation, has direct adverse effects on young people's health and wellbeing. The choices many young homeless people make, in order to cope or survive the homeless experience, put them at further risk of harm."³²

3) Impacts on society

Researchers have consistently found that detention does little to reduce offending

²⁵ Ibid; NSW Government. Young People in Custody (undated) NSW Juvenile Justice <http://www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/aboutdjj/statistics_custody.aspx>; Australian Government. 'Youth Detention Population in Australia (Bulletin 143, Australian Institute of Health and Welfare, December 2017) 15.

²⁶ NSW Law Reform Commission, 'Bail' (Report 133, NSW Government, April 2012).

²⁷ Julie Stubbs (2010) 'Re-examining Bail and Remand for Young People in NSW' 43(3) Australian & New Zealand Journal of Criminology 485-505.

²⁸ Pia van de Zandt and Tristan Webb, 'High Service Users at Legal Aid NSW: Profiling the 50 Highest Users of Legal Aid Services' (Research Report, Legal Aid, June 2013) 3-4.

²⁹ Sinead Freeman and Mairead Seymour, 'Just Waiting: The Nature and Effect of Uncertainty on Young People in Remand Custody in Ireland' 10(2) Sage Journals 126.

³⁰ Ibid.

³¹ Legal and Constitutional Affairs References Committee, 'Value of a Justice Reinvestment Approach to Criminal Justice in Australia' (2013) 22 [3.20].

³² Jo Fildes, B Perrins and Jacquelin Plummer, 'Young people's experiences of homelessness: Findings from the Youth Survey 2017' (Report, Mission Australia, 2018).

behaviour but rather has the opposite effect.³³ Spelman conducted a detailed review of all previous major studies and concluded that a 10% increase in imprisonment rates will produce at most a 2-4% decrease in crime rates. This estimate is now the most cited and tends to be accepted as a benchmark.³⁴

The crime-boosting effects of detention have been separated into three categories:³⁵

- The effects of detention itself including prisons as “schools of crime”, the fracturing of family and community ties, hardening and brutalisation, and the harmful effects of prison on mental health
- Post-detention crime-producing effects such as labelling, deskilling, reliance on criminal networks established in prison, reduced employment opportunities and reduced access to benefits and social programs
- Third-party effects, including crime-producing effects on families of offenders and their communities.

Remand costs the state – and by implication taxpayers – millions every year. The cost of detaining a child or 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.³⁶ This

is 84% higher than the daily cost of detaining one adult in NSW of \$219 per person per day.³⁷ Research by Jesuit Social Services found that children and young people who first experience remand between the ages of 10 and 12 years, cost the State of Victoria over \$3 million a year. This does not include collateral costs including policing, court time, legal aid, or social services.³⁸ By contrast, The Victorian Equal Opportunity and Human Rights Commission noted that the cost of one young person in Out-Of-Home-Care (OOHC) was \$104,443 per annum, roughly \$287 per day.³⁹



I've had a magistrate delete section 28 because they were tired of waiting.

Coupled with these are indirect economic costs. These include loss of employment and deterioration of skills. The imprisonment of children and young people can create a lifecycle of offending, disrupting their schooling and precluding the individual from developing important life skills.⁴⁰ Governments also experience indirect costs through increased demand for health and welfare services both for prisoners and their families both during and after imprisonment.

³³ David Brown, 'The Limited Benefit of Imprisonment in Controlling Crime' (2010) 22(1) Current Issues in Criminal Justice 461-472.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Just Reinvest NSW, 'Policy Platform: NSW Election 2019' (2019) 5.

³⁷ Ibid. 4.

³⁸ Victorian Equal Opportunity & Human Rights Commission, 'Submission to the Enquiry into the Value of a Justice Reinvestment Approach to Criminal Justice in Australia' (Submission, March 2013) 5.

³⁹ Legal and Constitutional Affairs References Committee, above n 31.

⁴⁰ Legal and Constitutional Affairs References Committee, above n 31, 12 [3.11]-[3.12].



BARRIERS TO SECTION 28 OPERATING AS DESIGNED

1) Legislative Barriers

The impact of homelessness on the remand of children and young people has remained largely unchanged, despite the introduction of section 28 as a means of reducing the time spent on remand by children and young people experiencing homelessness. In practice, while section 28 has provided some benefit, the legislation does not go far enough for it to have the intended impact: there is no corresponding obligation within the Bail Act for any government agency in NSW to find the child or young person accommodation. A magistrate has no power to expedite the process or to enforce responsibility for finding housing on any person or agency and there is also no limit on the number of times a matter can be relisted. This means that a matter can be relisted every two days for days, weeks, or even months, at a time. As a result, and in spite of the introduction of section 28, magistrates are in a similar position to the one they were in prior to section 28 coming into effect and we are still seeing instances where children and young people are spending days or weeks in custody waiting for accommodation.

Magistrate Hogg told us: "I will write on the bail application 'bail granted subject to section 28 and FACS to find accommodation', but I can only make that order if FACS has parental responsibility of that young person. Otherwise my hands are tied ... Where JJ takes responsibility, I can say on the bail application 'JJ to take responsibility' but they cannot supervise [until a young person enters a plea] and these kids need that supervision to ensure that conditions are being complied with and they're not getting themselves into more trouble."

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 FACS office for housing to be found: "I've had a Magistrate delete section 28 because they were tired of waiting. I've had colleagues in similar positions with the kid then being dropped off at FACS."

This is not ideal as it leads to a last minute scramble to find housing. One participant's young client released under these circumstances spent a couple of months staying in a local motel with a caseworker. This is expensive and not the appropriate environment for a child or young person.

2) Implementation Barriers

When section 28 bail is granted, it should set the wheels in motion for JJ and FACS to find accommodation as a matter of urgency, based on what is set out in the delegation. But our participants told us that it is not always clear to them who should be doing this. They 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.

Only one participant was aware that the delegation sheet exists suggesting that the resource has not been widely circulated to relevant staff within the Court, JJ and FACS. One participant told us: "No one can point me to any written rule anywhere about who is responsible for finding accommodation. That is the problem." When we interviewed participants, each had a different understanding of who should do what when sourcing accommodation that often differed from what is set out in the delegation. At other times, the expectations set out in the delegation are at odds with other established policies.

For example, the delegation sets out that JJ should take the lead in the first instance for all



remand interventions. However, some participants told us that difficulties could arise in instances where FACS is involved with the child or young person. We were told: “As I understand it, anyone under the care of the Minister may only live where approved by the Minister. Not even the magistrate can direct a child to live somewhere not approved by the Minister. Thus the [delegation] may not be able to be applied.”

Magistrate Hogg told us: “We have a very proactive JJ officer at the Court who looks anyway. But technically they can’t be involved in the supervision of young people.”

We also heard that specialist homelessness services (SHS) are not usually able to provide accommodation to children and young people who are under the care of the Minister, as this is within the scope of out of home care (OOHC) providers, limiting the number of available placements. For some SHS, this is specified in their contracts with FACS.

Another participant told us that for children and young people under the age of 16 who are not under the care of the Minister, staff from JJ need parental consent to place a child or young person under the age of 16 into an SHS, which at times can be difficult to obtain. We heard from our participants that it is common for parents to be unwilling to welcome their children home, but also unwilling to provide consent for them to stay elsewhere. This leads to delays while FACS tries to convince the parents/legal guardians to give consent.

With the conflicting understanding of the role of JJ and FACS, the apparent failure of officials to circulate the delegation to the relevant workers, and the conflict between what is set out in the delegation against the larger framework, it can be seen how the release of children and young people on remand under section 28 can be delayed.

3) Housing Barriers

A strong theme across interviews was the lack of appropriate accommodation to release children and young people into. This is another contributor to the unnecessary detention of children and young people on remand and a barrier to section 28 operating as it should. One participant told us: “It is more of an external problem where there simply is not enough

“By the time housing is found, you're talking about a young person who has spent several nights in custody for something as simple as a shoplifting offence, something they are never going to be locked up for.

suitable placements where young people can be housed while on bail.”

Magistrate MacMahon echoed this concern, telling us: “I recently had to sentence a young person and put it on to FACS to provide accommodation because I’d become so frustrated trying to get some accommodation for the young person. I couldn’t leave them in a detention facility because they were never going to get a control order. That’s the biggest frustration I have.”

In one area, despite there being a bed available exclusively for young people leaving detention, a technicality meant that it went unused for over a year: “We found a bed in our local area that hadn’t been accessed for over a year because it needed a police referral and not a court referral. When we explained to the Police that they could put a kid there rather than taking the child to Court as bail refused, it started to get referrals.”

This lack of housing and availability of SHS or OOHC beds, especially in RRR parts of NSW results in children and young people staying on remand. It can also lead to children and young people sent to refuges some distance from their hometown:

“I have a client who has been placed in accommodation several hours away from their family and they hate it. So they keep running away, breaching their bail and ending up back in custody. It’s a revolving door. They keep sending them back to the same place, and they’ll place themselves in danger by hitchhiking home. FACS says it’s the only place

that will take them and that they've tried to find another placement. This client has now breached their bail so many times; at least into the double digits. Each breach of bail goes on to their record which is getting bigger and bigger. Every time you go in to try to get bail, prosecutors will say there are now 50 breaches of bail, the Court is more inclined to bail refuse, and then you have to break it down for the Court and provide perspective, that they're breaching bail for a common assault. A crime that they are pleading not guilty for and even if they were found guilty, they would never receive a control order for it."

4) Application Inconsistencies

Another important concern raised is the lack of consistency in the application of section 28 among legal practitioners. One participant told us that the Bail Court Working Group often receives complaints of misapplications or non-applications of section 28, either by magistrates or solicitors.

The Bail Court Working Group is chaired by the Court and is attended by Legal Aid, ALS, the Police and JJ. The purpose of the Working Group is to deal with cross-agency operational issues in relation to bail court matters, including section 28 operational issues. When a child or young person is in custody but has no accommodation to be released to, the proper procedure is for the child or young person's solicitor to apply for bail before the Court as instructed. If a magistrate is satisfied that a child or young person can be granted bail, but it comes to light that they have nowhere to go, bail should be granted with a section 28 residential requirement condition. This then sets the wheels in motion for the appropriate agency to start looking for accommodation. The matter is then re-listed every two days to keep track of any enquiries and progress made.

Misapplication and non-applications can take several forms.

First, there are instances where a magistrate will refuse bail altogether once they learn that there are no accommodation arrangements, which can impact on a child or young person's chance of being granted bail at a later date. We were told: "For example, the Court sees that a young person has no appropriate accommodation lined up, refuses bail and

adjourns the matter for two days. If the case is subsequently picked up by another magistrate, they might look at the case and tell the young person they've already been refused bail and will remain so, and the work that happened over the two-day adjournment will have been for nothing."

This was the case for one of our participants in a regional area of NSW. They told us: "Unless our local magistrate is given the details of the accommodation and support lined up they stay in custody. When the Court rolls around again, we apply for section 28 bail to the children's magistrate but by that time a young person might have spent weeks in custody."

Secondly, when a child or young person is granted section 28 bail the matter is re-listed for two days while housing is found. If accommodation is found during those two days, that child or young person does not need to appear in court again and can be released. We were told, however, that: "Sometimes that doesn't happen. We get kids who have accommodation but still have to come back to court just to have an adjournment while they're settling into a new house. If the young person doesn't appear in court it's noted as a failure to appear and there are ramifications that flow from that."

Thirdly, some solicitors don't see the practical benefit of section 28 and prefer to wait until accommodation has been secured for the child or young person before applying for bail. This, in part, is because children and young people don't always understand what is going on when they are granted section 28 conditional bail, and managing their expectations around whether or not they are going to be released can be challenging. One participant in a RRR part of NSW, told us: "When a magistrate tells them they've been granted bail but subject to accommodation, often young people don't understand what that actually means and that they won't get out right away."

Another participant told us: "There's a misunderstanding with young people about section 28. As far as they are concerned, they're bail refused. Court can be so legalistic and it's not necessarily explained. A young person is granted bail but then are taken back to the cells."

It is not just a case of managing a child or young person's expectations, however: "When

we get instructions on bail, if there isn't anywhere for them to go, we hold off applying. There's no point because they're not going to get out. It would be very unusual for a magistrate to grant unconditional bail without somewhere for them to live. And realistically, not much is going to happen in those two days. Relisting is difficult for us as practitioners and it's difficult for the young people who have to come in to court every two days just to be told there is still nowhere for them to go." This was echoed by a number of our participants in RRR areas.

LIMITATIONS

This position paper is part of a larger research project in which interviews were conducted with legal professionals, staff within JJ, and staff from SHS. Through these interviews, themes relating to safety assessments and OOHC placements emerged. Understanding these themes requires further research outside of the scope of this project, but that is important to fully eradicate the issue of children and young people remanded in detention under section 28.

To inform a better system for children and young people leaving detention, the following areas would benefit from further research:

“ I recently had to sentence a young person and put it on to FACS to provide accommodation because I'd become so frustrated trying to get some accommodation for the young person.

- Magistrate MacMahon

- The decision making processes used across different agencies to assess whether home is safe for a child or young person, and how agencies share information and work together to make decision based on safety assessments
- Local service capacity to provide suitable OOHC accommodation to children and young people under the care of the Minister leaving detention.



POSSIBLE SOLUTIONS EXPLORED



We have shown that section 28 can have a detrimental impact on children and young people experiencing homelessness. If we are to ensure that a child or young person's human rights are upheld, that their physical and emotional wellbeing is safeguarded, and that they have future prospects and opportunities, systemic changes must be made.

LEGISLATIVE CHANGES

The introduction of section 28 shows that we are aware that there are children and young people in detention who are experiencing homelessness, but also, that we understand that they cannot simply be released onto the streets. There must be a duty of care to ensure that no child or young person is released into homelessness with nowhere to sleep. However keeping children and young people in detention is not the right way to go about it.

The costs to those children and young people and to society as a whole are far-reaching and we simply must do better. Through our research, it is clear that the introduction of section 28 into the Bail Act has not had the anticipated positive impact on children and young people experiencing homelessness.

Homeless children and young people can still be remanded into custody for excessive periods of time and, when this happens, magistrates have limited authority to expedite the matter. Releasing children and young people on unconditional bail and dropping them off at their local FACS office should not be the only viable option available to magistrates.

For section 28 to be effective, magistrates need to be empowered through the legislation to be able to direct JJ and FACS to take ownership and find accommodation. There also needs to be a reasonable timeframe in which a child or

young person must be released from detention, it is simply not acceptable in Australia today to have young people languishing in detention for weeks at a time because there is nowhere for them to go.

Magistrate Hogg is of the opinion that: “The only way the problem can be dealt with is for amendments to be made to the Bail Act to ensure that the court has discretion to mandate that FACS and JJ, regardless of who is responsible for finding accommodation, provide a coordinated response and work together to find accommodation ... In instances where they do join forces, accommodation can usually be found quite quickly.”

POLICY CHANGES

The unintended impact of section 28 on homeless children and young people faced with homelessness, demonstrates a much larger problem, one that cannot be solved only by amending the relevant parts of the Bail Act.

Changes to legislation are a good starting point, but they are not enough. It is never enough to simply have the legislation in place. If section 28 is to work effectively, a strong and collaborative support framework must underpin it. Restricting the number of times a matter can be relisted, for example, is pointless if it is not supported by adequate housing options and a clear understanding of the policy processes to be followed.

1) Implementation Changes

It is essential that caseworkers with JJ and FACS are clear on who holds the responsibility, for each child or young person, to find appropriate accommodation. This information needs to be circulated to the relevant people so that there is no uncertainty, and to ensure consistency across the state.

We believe that JJ and FACS have the best intentions and are doing their best to manage what is a difficult situation. The reality is that the ambiguity around who should be doing what and when, and the lack of clarity about how agencies need to work together to manage

a child or young person’s pathway through JJ means that far too many are slipping through the cracks and are spending avoidable time in custody. This is part of a wider problem where we have a child protection system that is underfunded and understaffed and that is, as a result, unable to meet current demand for services and support. For example, in 2017, FACS had the capacity to provide a face-to-face response to just 32% of young people considered at risk of significant harm.⁴¹

However, this is not just a resourcing issue. It is as much about ensuring that there is clarity around how the system should work to manage the speedy transition of children and young people out of detention. It is essential that all policy documents support agencies to work smoothly together and are clear about their own individual roles.

Magistrate Hogg would like to see a more collaborative approach to finding accommodation: “The saddest part in all of this”, he told us, “is that we don’t need section 28. When a young person has committed a crime and has nowhere to go, it’s an issue for JJ. But it’s also a child protection issue for FACS to deal with. They need to work together for a resolution.”

2) Housing Changes

Asked what they would like to see change around accommodation options, many told us that they would like to see more accommodation available for children and young people and less stringent entry requirements. One participant told us: “The reality is, with the criminal justice system, with kids that are at the point where accommodation is required, they’re not going to be perfect, there are going to be those difficult boxes that are ticked. So we need more services that are willing to take on those difficult kids.”

One practical solution is to increase the number of bail beds and Joint Support Program beds (JSP) available to JJ and the Police.

JJ uses JSP beds to transition children and young people out of detention. The emphasis is on a continuum of service delivery between JJ

⁴¹ Ombudsman of NSW, ‘More Than Shelter – Addressing Legal and Policy Gaps in Supporting Homeless Children’ (Report, June 2018).

and SHS through strong collaboration and case management processes to ensure target outcomes are being achieved. There are 14 regions across NSW but just two JSP beds available: one on the Northern Beaches in Sydney and one in the Illawarra Shoalhaven region. These beds are held for referrals from JJ.⁴²

Bail Beds are 28-day crisis beds held for referrals from the Bail Assistance Line. There are just 13 across NSW including one in the Illawarra Shoalhaven region, one in the Central Coast, one in Northern Sydney, one in Western Sydney, one in Western NSW and one in Sydney. One participant told us that they only have one available bail bed in their area, but it is not enough: "One bed for how many kids who need that bed? You would have to be lucky for it to be available. I have never had the opportunity to use it."

It will be important to ensure, for Aboriginal and Torres Strait Islander young people, that their cultural needs are respected. The Aboriginal and Torres Strait Islander Child Placement Principle (the ATSICPP) aims to keep children connected to their families, communities, cultures and country, and to ensure the participation of Aboriginal and Torres Strait Islander people in decisions about their children and young people's care and protection. The ATSICPP centres on five elements: prevention, partnership, participation, placement and connection.⁴³



3) Application Changes

While we appreciate the difficulties expressed by our participants and their reasons for not applying for bail under section 28 when it is apparent there is no accommodation for a child or young person, we nonetheless support the consistent application of section 28 across NSW. Section 28 is the only mechanism in place that sets the wheels in motion for housing to be found and actively monitors progress. When bail is not applied for or is outright refused, this mechanism is not set in motion. Our hope is that, taken together, the recommendations in this paper will change the landscape for housing homeless children and young people, such that the difficulties of the application of section 28 will resolve.

⁴² Juvenile Justice NSW, The Joint Support Program (undated) NSW Government <http://www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/funded-services/joint_support_program.aspx>

⁴³ Secretariat of National Aboriginal and Islander Child Care, 'The Aboriginal and Torres Strait Islander Child Placement Principle: A Guide to Support Implementation' (12 December 2018) SNAICC <<https://www.snaicc.org.au/the-aboriginal-and-torres-strait-islander-child-placement-principle-a-guide-to-support-implementation/>>

RECOMMENDATIONS AND CONCLUSION

Recommendation 1:

The Bail Act is amended to restrict the number of times a matter can be relisted before a child or young person must be released. Every effort should be made to secure appropriate accommodation on the day the Court grants bail. Any additional time should not be treated as a deadline but rather, a safety net.

Recommendation 2:

The Bail Act is amended to give magistrates the authority to direct any relevant government agency be responsible for finding accommodation based on the individual circumstances of a child or young person's case. Particular urgency needs to be considered for young people with special vulnerabilities or needs, including age or identifying as Aboriginal or Torres Strait Islander.

Recommendation 3:

JJ, FACS, SHS and OOHC providers collaborate to produce a memorandum of understanding (MoU) to clarify the role each should take when supporting a child or young person out of detention. This MoU must be aligned with other relevant policy instruments, be made publicly available and relevant parties should be made aware of and receive training about the MoU.

Recommendation 4:

JJ to partner with SHS across NSW to fund bail beds and JSP beds specifically for children and young people leaving detention.

Recommendation 5:

A Children's Court Practice Note is circulated to legal professionals and magistrates to ensure consistency and the proper application of section 28.

Recommendation 6:

Disaggregated data on section 28 remanded

children and young people should be collected and published by the Court, JJ, and FACS. This should include information on the number of children and young people in OOHC who are remanded on section 28 orders, and the length of time that children and young people are remanded in custody due to a lack of suitable accommodation.

CONCLUSION

The findings of this research confirm what we already know to be true: that vulnerable children and young people are being unnecessarily detained simply because they are experiencing homelessness. These are children and young people who are already in difficult situations and who are having trouble in their lives. Children and young people whom we should be supporting in their transition through to adulthood, but instead they are further disadvantaged by a JJ system that is failing to meet their basic needs.

It is important that the decision of the Court to grant bail is not obstructed by conflicting policies or the lack of an appropriate and well-funded support framework. What is required – and what we would like to see – is a system that operates in such a way that the use of section 28 becomes obsolete because there are appropriate supports and accommodation options in place to transition children and young people out of detention on the date bail is granted.

Whether we look at this from the perspective of the cost of managing what is an important social issue or whether we look at it from the perspective of creating the fair and just society that we all seek, the clear conclusion is that 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.

ABBREVIATIONS AND GLOSSARY

Aboriginal Legal Service (ALS)

is an after-hours service for police who are considering granting conditional bail to a child or young person who is in their custody but who cannot be released, as they cannot meet their bail conditions.⁴⁴

The Children's Court of NSW

is a specialist court that deals with both care and protection and children's criminal matters where the child or young person is between 10 and 18 years of age. The Court does not deal with traffic offences or extreme offences such as certain sex offences and matters punishable by life or in excess of 25 years, such as robbery armed with a dangerous weapon.⁴⁵

Children's Legal service (CLS)

of Legal Aid NSW advises and represents children and young people under 18 involved in criminal cases and Apprehended Violence Order applications in the Children's Courts.

A Control Order

is a prison sentence imposed by the Children's Court. When a control order is imposed on a child or young person, they are in detention serving a custodial sentence.

Family and Community Services (FACS)

is the main government agency in NSW that protects children and young people. They have responsibility for the safety and wellbeing of young people and for helping to protect them from abuse or harm.

Juvenile Justice NSW (JJ)

is a branch of the Department of Justice that deals with juvenile offenders. JJ supervises and cares for children and young people who have been charged with or convicted of a criminal offence, either in the community or in detention. Their prime focus is to address offending behaviour in ways that are proven to

be effective in reducing the risks associated with reoffending and to effectively supervise young offenders as they meet their legal obligations.

Juvenile Justice Centres (JJC)

are detention centres that accommodate both remand and sentenced children young people. There are six JJC in NSW.

Juvenile Justice Community Offices (JJCOs)

provide court directed supervision to children and young people who are on good behaviour bonds; probation and community service or parole orders and provide community-based interventions for young offenders. There are 34 JJCOs across NSW.

Out-of-Home-Care (OOHC)

is provided to children and young people who are unable to live with their own families. Children and young people stay in care until they're able to safely return home.⁴⁶

A remanded

child or young person is being detained in a JJC until a later date when a defended hearing or sentencing hearing takes place. The majority of children and young people on remand have not been convicted of a criminal offence and are awaiting a hearing following a not-guilty plea.

Rural, regional and remote (RRR) areas

encompass all areas outside NSW major cities.

Specialist Homelessness Services (SHS)

are non-governmental organisations that provide assistance to children and young people experiencing or at risk of experiencing homelessness, including accommodation, case management, court assistance and transport.

⁴⁴ Juvenile Justice NSW, 'Bail Assistance Line' (NSW Government, 2018) <http://www.juvenile.justice.nsw.gov.au/Pages/Juvenile%20Justice/bail_assistance_line.aspx>

⁴⁵ Katherine McFarlane, 'Care-Criminalisation: The Involvement of Children in Out of Home Care in the NSW Criminal Justice System' (Thesis, UNSW, 2015) 22.

⁴⁶ Family and Community Services, Types of Out-of-Home-Care (undated) FACS <<https://www.facs.nsw.gov.au/families/out-of-home-care/about-out-of-home-care/care-types>>