Joint protocol to reduce the contact of young people in residential out of home care with the criminal justice system.

Version 2: July 2019

NSW GOVERNMENT

Acknowledgements

This Protocol has been inspired by collaborative interagency work in Western Sydney and could not have been developed without the significant contribution of the Western Sydney Residential Providers Forum. The Western Sydney sub group included representatives from:

- Child and Family, Communities and Justice (formerly Family and Community Services)
- Impact Youth Services
- Legal Aid NSW
- Marist Youth Care
- NSW Police Force, The Hills Police Area Command (formerly Local Area Command)
- NSW Police Force, Mt Druitt Police Area Command (formerly Local Area Command)
- NSW Police Force, Blacktown Police Area Command (formerly Local Area Command)
- NSW Police Force, Quakers Hill Police Area Command (formerly Local Area Command)
- St Saviours, and
- Uniting Care Burnside.

This Protocol was prepared by the NSW Ombudsman in 2016 based on consultation with relevant stakeholders. The contributions of the then NSW Police Force Youth Corporate Sponsor, Assistant Commissioner Jeff Loy, the then NSW Police Force Operational Programs Command, Legal Aid NSW, the Association of Children's Welfare Agencies and Residential Care Providers Network, and Family and Community Services were key in informing the development of the Protocol.

Provision has been made in the most recent version of the Protocol to include additional Aboriginal stakeholder consultation for both design and implementation by:

- Tranby, National Indigenous Adult Education and Training
- Aboriginal Child, Family and Community Care State Secretariat (AbSec), and
- Family and Community Service, Aboriginal Outcomes team.

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1 Purpose

The Joint Protocol to reduce the contact of young people in residential out-of-home care (OOHC) with the criminal justice system (the Protocol) applies to young people under 18 years of age living in residential OOHC[1] settings which are part of the NSW Government's Intensive Therapeutic Care services (ITC)[2] in NSW. The implementation of this Protocol is supported by Annexure A: Procedures for residential and ITC service staff, Annexure B: Policing responses to incidents in residential and ITC services and an Implementation and Engagement Plan that will be developed by the State-wide Steering Committee.

The Protocol aims to:

1. reduce the frequency of police involvement in responding to behaviour by young people[3] living in residential and ITC services, which would be better managed solely within the service
2. promote the principle that criminal charges will not be pursued against a young person if there is an alternative and appropriate means of dealing with the matter
3. promote the safety, welfare and wellbeing of young people living in residential and ITC services, by improving relationships, communication and information sharing both at a corporate level and between local police and residential services
4. facilitate a shared commitment by police and residential and ITC services to a collaborative early intervention approach
5. enhance police efforts to divert young people from the criminal justice system by improving the information residential and ITC services provide police about the circumstances of the young person to inform the exercise of their discretion, and
6. ensure that appropriate responses are provided to young people living in residential and ITC services who are victims.

The Protocol emphasises the importance of flexibility and proportionality in determining the most appropriate response to a young person's behaviour on a case by case basis. The procedures for residential and ITC staff stress that contact with police should only be made when the circumstances warrant it.

While the central purpose of the Protocol is to reduce unnecessary police contact with young people, it is equally important that residential service staff respond to the needs of any victim(s). In this regard, the Protocol also emphasises the importance of ensuring residential and ITC services promptly contact police when necessary, especially when there are immediate safety risks which require a police response. When police are called in these circumstances they will attend the service and take appropriate action to secure the safety of any alleged victim(s), the involved young person and residential staff.

[1] OOHC is one of a range of services provided to children who are in need of care and protection. This can include a variety of care arrangements other than with their parents, such as foster care, placements with relatives or kin, and residential care.
[2] In 2018 a new system of Intensive Therapeutic Care (ITC) replaced residential out-of-home-care (OOHC). The ITC system is comprised of group residential and non-residential service types. The Protocol applies to residential service types.
[3] In this Protocol 'young person' means any person under the age of 18 who resides in a residential OOHC and ITC service. Children in residential services under ITC must be at least 12 years of age, however some younger children have been placed in residential care while the full implementation of ITC is being rolled out.

1.1 Guiding Principles

This Protocol is underpinned by the following guiding principles:

- young people living in residential and ITC services may have a range of complex needs arising from experiences of trauma, abuse and neglect
- trauma informed approaches are key to managing behaviours associated with a young person's experience of trauma and neglect. Behaviours associated with trauma are best managed using trauma-informed approaches consistent with principles of therapeutic and trauma informed care, as outlined in the ***10 Essential Elements of Therapeutic Care*** that form part of the ***ITC service model***[4]
- a multi-agency commitment is necessary to divert young people in residential and ITC services from unnecessary contact with the criminal justice system
- police should only be called as a last resort in response to incidents arising from challenging behaviours by young people in residential services[5]. This action should reflect and to be similar to a response in a family situation where a child or young person is living at home with their birth parents
- services should always call police to respond to incidents involving young people where there is a safety risk. However, services have discretion not to call police for minor offences where no one is hurt and the victim wants no police action; or for minor breaches of house rules
- young people living in residential and ITC services have the right to seek assistance from police and residential and ITC service staff will provide appropriate support and assistance to young people who choose to report an incident to police
- the arrest of a young person should only be as a last resort
- the detention of a young person should always be avoided where possible and should be for the shortest possible time
- parties to the Protocol are to be consciously focused on the rights and interests of young people from Aboriginal backgrounds and to be culturally sensitive and relevant in their responses and in providing care
- young people from Aboriginal and culturally and linguistically diverse (CALD) backgrounds have the right to feel safe, protected and connected to community, family, culture and country
- genuine partnerships with local cultural communities, cultural groups and organisations are critical to meeting the needs of young people. Children and young people who are strong in their culture and can see that their culture is valued by others are more likely to develop a positive self-image
- the practice of being culturally responsive and facilitating connection to family, community and culture improves the child's wellbeing. This will also support ITC residential care workers to be culturally proficient and consider the impacts of intergenerational trauma including from past government policies relating to Aboriginal peoples, and
- parties to the Protocol recognise the importance of shared responsibility and collaboration to care for and support young people living in ITC residential care. Shared care is an effective way to support young people to recover from trauma and achieve best life outcomes. This includes recognising a shared role in preventing unnecessary exposure to the criminal justice system.

[4] The ITC service model requires service providers to adhere to the 10 Essential Elements of Therapeutic Care, which are designed to support all ITC Service Providers to deliver a consistent approach to Therapeutic Care and ensure ITC system integrity. Information about the service model can be found at: https://professionals.childhood.org.au/cetc/itcs/

[5] A breach of the peace occurs when harm is done or likely to be done to a person or to property when a person is present. It includes, for example, a situation where a person is in fear of being assaulted. Police are empowered to arrest a person they reasonably believe will commit or cause a breach of the peace. There must be some level of violence, threatened or actual, in order to justify an arrest for breach of the peace. [R v Howell (1982) QB 416] This allows police to take action to prevent serious injury or damage to property. However, a person arrested in relation to a breach of the peace will not be charged unless they commit a statutory offence.

2 Background

It is well established that for a variety of reasons, young people living in residential services are at increased risk of coming into contact the criminal justice system.[6]

In NSW, around 3 per cent of young people who are in OOHC live in residential care.[7] However, these young people have typically experienced numerous placement breakdowns and often present with multiple, complex needs. The placement of young people in residential care aims to provide a safe and supportive environment in which to address the combined impacts of abuse, neglect and separation from family.

In 2008, the link between young people who live in OOHC services and contact with the criminal justice system was highlighted by the Special Commission of Inquiry into Child Protection Services in NSW, which observed that significant proportions of juvenile detainees had a history of being placed in care.[8] In its 2011 issues paper, *The Drift from Care to Crime*,[9] Legal Aid NSW identified a growing trend towards the criminalisation of young people living in OOHC. According to the Children's Legal Service, many of their 'high service user' clients have a history of being in OOHC, with a significant proportion of the cohort having lived in residential services.

In NSW, residential care is primarily provided by accredited non-government residential and ITC service agencies funded by the Department of Communities and Justice. Specialist Homelessness Services (SHS) also provide care and accommodation for young people with backgrounds of trauma and/or neglect. The Protocol may be extended to SHS in future.

The NSW Police Force has responsibilities under the *Young Offenders Act 1997* to divert young people from the criminal justice system. The NSW Police Force also has policies that guide and direct police engagement with young people. The NSW Police Force's *Youth Strategy* promotes the use of collaborative approaches to policing young people with a focus on diversion and disruption of crime cycles through early intervention. The NSW Police Force's *Statement of Strategic Intent 2019* also includes early intervention and prevention strategies for at-risk groups, including young people. These strategies aim to limit escalation, minimise harm, positively influence behaviour and divert minor offenders and at-risk groups to reduce reoffending and unnecessary contact with the criminal justice system.

[6] Legal Aid NSW, The Drift from Care to Crime: A Legal Aid NSW Issues Paper, October 2011; Katherine McFarlane, From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System, Current Issues in Criminal Justice, Vol 22. No. 2, November 2010, p. 345; Special Commission of Inquiry into Child Protection Services in NSW, Report of the Special Commission of Inquiry into Child Protection Services in NSW, 2008.
[7] Australian Institute of Health and Welfare, Data Tables: Child Protection Australia 2017-18, 8 March, 2019.
[8] Special Commission of Inquiry into Child Protection Services in NSW, Report of the Special Commission of Inquiry into Child Protection Services in NSW, 2008. The Commission reported that between 2003 and 2006, 28% of male and 39% of female juvenile detainees had a history of OOHC.
[9] Legal Aid NSW, The Drift from Care to Crime: A Legal Aid NSW Issues Paper, October 2011.

2.1 Trauma and challenging behaviour

Many young people living in residential and ITC services have experienced 'complex trauma', meaning exposure to multiple and ongoing interpersonal trauma such as abuse, neglect or emotional or physical deprivation.[10] The impact of past experiences of trauma often surface for young people in a range of disruptive and difficult behaviours harmful to themselves and/or others. These behaviours are often referred to as 'challenging behaviours'. Challenging behaviours can involve risk taking, poor impulse control, resistance to boundaries (for example being absent from care without permission) and in some situations, can escalate into violent and/or criminal behaviour.[11]

While some challenging behaviour exhibited by young people in residential and ITC services may meet the threshold of criminal behaviour, the same behaviour occurring in family homes would likely be managed and de-escalated without the involvement of police. Challenging behaviours need to be managed in the residential and ITC care environment in a way that not only supports the young person who is exhibiting the behaviours (as outlined in the **10 Essential Elements of Therapeutic Care** that form part of the ITC service model),[12] but also ensures the safety of all residents and workers. Residential and ITC services have a duty to ensure the safety of their staff and the young people in their care. Police are also responsible for acting to ensure community and individual safety, while still applying the principles of the Protocol to each situation.

A 'trauma informed' approach recognises the presence of trauma symptoms, acknowledges the role of trauma in patterns of behaviour and aims to support young people to manage their emotions and regulate their behaviour. A key responsibility for those involved in providing care to this group of young people is to provide planned, positive and supportive strategies to assist them to work towards more positive patterns of behaviour, and where possible, to avoid more punitive approaches. Individual Behaviour Support Plans (BSPs) can be useful in identifying strategies to assist carers and young people to manage behaviour.

A trauma informed approach also seeks to protect young residents in residential and ITC services from further trauma caused by conflict with, or victimisation from, other young people living at the service. It is important that 'client mix' is a key consideration in the placement of young people and that the needs and views of any victim are always taken into consideration when responding to incidents at residential service.

For Aboriginal young people, the impact of intergenerational trauma (due to past government policies) and being absent and or disconnected from their community and culture means that the importance of preserving their connection to culture must also be considered as part of a trauma informed and culturally responsive approach.

[10] Toro, Dworsky and Fowler 2007; Kezelman and Stavropoulos 2012, cited in Youth Health Resource Kit, NSW Kids and Families, 2014, p.84.

[11] Other examples of challenging behaviour include stress intolerance; alcohol and other substance abuse; self-harming; behaviours; social isolation and limited capacity to form relationships with peers and/or adults; sexually inappropriate behaviour; anti-social behaviours, including aggression and or violence towards people, and in some instances, criminal behaviour. (Source: Out-of-home Care Service Model – Residential Care, April 2007.)

[12] The ITC service model requires service providers to adhere to the 10 Essential Elements of Therapeutic Care, which are designed to support all ITC Service Providers to deliver a consistent approach to Therapeutic Care and ensure ITC system integrity. Information about the service model can be found at: https://professionals.childhood.org.au/cetc/itcs/

2.2 Interagency collaboration

Young people with complex needs are likely to require the combined support of multiple services and agencies. The parties to this Protocol share a commitment to working collaboratively on early intervention and prevention strategies which support vulnerable young people, enhance their wellbeing and assist them to develop positive behaviour patterns which are less likely to bring them into contact with the criminal justice system.

Collaborative interagency approaches which facilitate integrated responses to vulnerable young people is a preferred means of managing incidents. This kind of collaborative case management should ideally lead to improved service delivery by reducing duplication and clarifying roles and responsibilities. It can also enhance the opportunity for creative solutions.[13] Incidents in residential and ITC services can present opportunities for collaborative problem solving and trigger revision of current strategies and/or involvement of additional partner agencies to better support the young person.

[13] http://www.community.nsw.gov.au/kts/guidelines/case_management/case_management.htm

3 Roles and responsibilities

3.1 Joint Responsibilities

While each agency has a specific role to play in implementing the Protocol, all parties endorse the Guiding Principles and agree to:

1. act within the spirit of the Protocol when responding to incidents involving young people living in residential and ITC services
2. implement procedures for residential and ITC services and police to ensure the safe, appropriate and proportionate response to individual incidents at residential services (i.e. consistent with Annexures A and B)
3. ensure systems are in place to facilitate the implementation and evaluation of the Protocol, including appropriate record keeping
4. liaise and share information with other parties to the Protocol (and where appropriate, with other prescribed bodies such as schools, health providers and other support services)
5. promote the safety, welfare and wellbeing of young people in accordance with the provisions of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*
6. implement the Protocol with consideration of local services and programs (as consistent with the Implementation Engagement Plan design)
7. develop, implement and promote the delivery of appropriate training and guidance about the Protocol and related policies, and
8. ensure that Aboriginal young people are connected to preventative supports that are culturally responsive and appropriate at a local level. This includes linking the young person with the local Aboriginal community for their cultural and spiritual care and into local programs for youth justice as a proactive measure for case management.

3.2 Communities and Justice

As the government agency with the lead role for ensuring the safety, welfare and wellbeing of children and young people in NSW, Communities and Justice has an overriding interest in the promotion of interagency practices which minimise the involvement of young people in the criminal justice system. As the commissioners of residential and ITC services, Communities and Justice, Commissioning Division is responsible for promoting good practice in providing services to vulnerable young people assisted by residential services through its ongoing management of service contracts and related performance monitoring.

Child and Family, Communities and Justice will promote the effective implementation of the Protocol to residential and ITC services through existing governance mechanisms such as interagency meetings within each District. Child and Family will develop resources and work with peak bodies to encourage local implementation of these protocols as part of their annual planning, including information sessions and practice forums to promote provider requirements. In this regard, Child and Family will work with peak bodies and the residential and ITC services sector to identify and promote examples of best practice in relation to behaviour management in individual residences and local processes between residential services and police.[14]

The Children's Guardian is responsible for the accreditation of designated agencies in accordance with the *NSW Child Safe Standards for Permanent Care*.[15] Designated agencies are required to meet the requirements of their accreditation and funding obligations outlined in the *Out-of-home Care Contracted Care Program Guidelines* and the *Out-of-home Care Service Model: Residential Care* (the Residential Care Service Model). A key feature of the Residential Care Service Model is that residential service staff need to have an understanding that the behaviour of young people often has its basis in past traumatic experiences and that this should be considered when responding to the behaviour to avoid inadvertently adding further trauma.

Residential staff also need to understand the potential impact of police contact for a young person and how this can have lifelong implications and contribute to the continuation of intergenerational trauma and disadvantage. When responding to crisis situations, residential care and ITC agencies should have clear guidelines around the involvement of the police, who should only be contacted as a last resort or if a young person's behaviour presents a *significant* risk to an individual's personal safety. The decision to call police by authorised residential staff should mirror that of family where children and young people live with their parents in a family home.

To support the implementation of the Protocol, Child and Family will review the existing behaviour management/support policy in collaboration with NSW Health, the Office of the Children's Guardian (OCG) and non-government agencies. Child and Family, in partnership with ACWA, has also developed the *NSW Therapeutic Care Framework*[16] to support agencies to embed trauma theory, child brain development and attachment theory in service delivery, aiming to improve the wellbeing and outcomes for young people in OOHC whilst also supporting carers, staff members and significant others caring for the young people (see also Annexure A).

[14] See also Section 5: Training and Identifying best practice.
[15] Available at URL: https://www.kidsguardian.nsw.gov.au/ArticleDocuments/449/ChildSafeStandards_PermanentCare.pdf.aspx?Embed=Y
[16] The NSW Therapeutic Care Framework is available at URL: https://www.facs.nsw.gov.au/about/reforms/NSWPF/nsw-therapeutic-care/chapters/publications

3.3 Residential out-of-home care and Intensive Therapeutic Care services

As day-to-day care givers, residential and ITC service staff are uniquely placed to know about the history, relationships and current situation of young people residing at their service. They are frequently called upon to decide whether to contact police in response to incidents and should be provided with the necessary support and guidance to make these decisions in often difficult and demanding circumstances. To effectively implement this Protocol, it is acknowledged that residential and ITC service staff require appropriate training and guidance to appropriately manage challenging behaviour. This includes training about the effective use of strategies in behaviour support plans,[17] and to identify situations which require police assistance.

ITC providers can also support their workforce by building the cultural capability of their care staff. Additionally, ITC providers are to take preventative actions for young people, especially those at greater risk of contact with the criminal justice system. This can be achieved through identifying culturally safe, universal and targeted services for Aboriginal young people to participate in. It is essential that young people are introduced and connected with members of the local Aboriginal community for the continuation of their cultural and spiritual connectedness.

The ITC Service Model provides guidance to services about appropriate procedures for the management of crisis situations and advises services to have in place 'clear guidelines around the involvement of the police in response to crisis situations, with the understanding that attempts should be made to minimise police involvement, wherever possible'.[18] The Centre for Excellence in Therapeutic Care (CETC) has been funded as a key part of the ITC system to build the evidence base around best practice for therapeutic care and to support practitioners in residential care settings through training and communities of practice. The CETC's work on capacity building includes a focus on the management of challenging behaviours and trauma in residential care settings. This Protocol will also assist services to meet this objective.

To implement this Protocol, residential and ITC services will nominate an appropriate senior residential staff member (e.g. service coordinator or manager) as the 'liaison officer' to regularly liaise with local police.

The liaison officer is also responsible for ensuring information is provided to police following an incident involving police attendance at the service according to the *Procedures for residential OOHC services* (Annexure A).

[17] Where a young person exhibits challenging behaviour that exceeds what is normally expected to be managed by the carer, a Behaviour Support Plan may be required. These are prepared by a psychologist or other skilled professional in behaviour management of young people who display challenging behaviour.
[18] Out-of-home Care Service Model – Residential Care, NSW Department of Community Services, April 2007, p.9.

3.4 NSW Police Force

A key aim of the Protocol is to provide practical guidance for police in implementing their existing legislative responsibilities in the context of dealing with young people in residential and ITC services.

The NSW Police Force recognises the necessity of early intervention and prevention in diverting young people from the criminal justice system and currently delivers several programs and cross-government processes to achieve this. It is anticipated that a number of these programs may be appropriate for young people in out-of-home care settings. As such, in addition to the above key aim, it is expected that police and service providers will use the Protocol as a means of improving collaborative efforts to provide this cohort of young people with access to diverse supports and opportunities in conjunction with their care.

The Crime Prevention Unit (CPU) in each Police Area Command (PAC)/Police District (PD) is the main contact point for community engagement and plays a significant role in the development and implementation of local crime prevention strategies. The CPU within each PAC/PD will be responsible for Protocol case management, including engagement with local residential and ITC services, information sharing and data recording. The Crime Coordinator or an appropriate delegate will be responsible for liaising with the residential services within their PAC/PD.

In addition to the Crime Manager, Crime Coordinator and Crime Prevention Officer, CPUs typically include various liaison roles within the Command or District. These include a Domestic Violence Liaison Officer (DVLO), a Youth Liaison Officer (YLO), as well as an Aboriginal Community Liaison Officer (ACLO), an Elder and Disability Abuse Prevention Officer and a Multicultural Community Liaison Officer (MCLO), the latter two being unsworn positions.[19] Each PAC/PD also has a Youth and Crime Prevention Portfolio Holder, with these Inspector-level positions responsible for driving the implementation of youth and crime prevention strategies in their PAC/PD.

Police usually attend residential and ITC services in response to calls from staff members, young people or other members of the community. Some behaviour by young people, such as 'boundary testing', may reflect normal teenage behaviour and should generally be managed without police assistance as there is little risk of harm to the young person or any other person. However, police involvement remains necessary where criminal or other behaviour occurs that may lead to a breach of the peace. Frontline police will often consult with the YLO in relation to incidents they attend which involve young people. Better engagement between the CPU and residential and ITC services will support frontline police to better understand a young person's circumstances and will ideally lead to a more informed response.

When responding to incidents at residential and ITC services, police will consider information provided by staff members, victims and witnesses, and have regard to relevant legislation, Standard Operating Procedures, and their own judgement in applying the Protocol. The *Young Offenders Act 1997* makes clear that criminal charges should not be pursued against a young person if there is an appropriate alternative for dealing with the matter.[20] For appropriate offences which are not dealt with by warning or caution, police in consultation with the Specialist Youth Officer will consider whether the young person is entitled to be dealt with via a Youth Justice Conference.

Local CPUs will ensure frontline police officers are provided with appropriate training and guidance to ensure consistent implementation of this Protocol. Annexure B provides an outline of Police responsibilities in implementing the Protocol.[21]

[19] The DVLO and YLO roles are sworn officers. A primary aspect of their role is stakeholder engagement. However, these officers do not generally attend incidents.
[20] Young Offenders Act, 1997, s.7(c).
[21] Young Offenders Act, 1997, s.37.

4 Governance

A state-wide interagency governance structure underpinned by local arrangements has been established to support the consistent and effective implementation of the Protocol and provide clear pathways for the resolution of systemic issues.

4.1 State-wide Steering Committee

The implementation of the Protocol will be overseen by a steering committee which is jointly chaired by Child and Family and ACWA. The committee is comprised of representatives from ITC service providers and other relevant Government and non-Government stakeholders. For further details of the State-wide Steering Committee see the Terms of Reference.

4.2 Operational Issues Group

The Operational Issues Group is a sub group of the State-wide Steering Committee.
The purpose of the Operational Issues Group is to provide a timely and collective response to resolve identified issues as they arise for young people living in residential and ITC services, where the issue they are experiencing is related to a break-down or non-application of the Protocol.
The purpose of the Operational Issues Group is to identify system malfunction and to facilitate early remediation.

For further details of the operational issues group, see the Terms of Reference.

4.3 Internal agency governance

Signatory government agencies, including the NSWPF and Child and Family, will identify suitable internal governance processes to facilitate consistent implementation of the Protocol across each agency. Residential and ITC services will also need to ensure consistent implementation of the Protocol occurs across their organisation.

Agencies will assign responsibility for implementation of the Protocol to a suitably senior officer.

4.4 Implementation and Local Action Plans

The Protocol will be implemented at the local level within each of the nine ITC residential hubs and corresponding PACs and PDs across NSW. This local approach will provide intensive awareness and engagement to embed the application of the Protocol across the entire service system.
The implementation process must ensure local service providers, local Aboriginal and CALD stakeholders, other networks and community have the opportunity to participate in the design and delivery of local plans.

The implementation will be guided by an agreed Implementation and Engagement Plan to be developed by the State-wide Steering Committee.

4.5 Dispute resolution

Open and honest communication will be maintained between parties to the Protocol. Parties should aim to resolve any disputes about procedures or actions in relation to this Protocol at the local level as soon as possible. Local level resolution includes escalation of unresolved issues to the PAC and PDs Commander (or region commander where relevant), district director and/or residential and ITC service chief executive officer (or equivalent).

Local level disputes about how best to resolve systemic issues can be escalated to the operational issues group, as required when attempts to resolve the issue locally have been unsuccessful.

5 Training and identification of best practice

A range of training has already been delivered by the NSW Police Force, Child and Family and the Association of Children's Welfare Agencies (ACWA) to support the implementation of the Protocol and raise awareness of its purpose. Introduction to the Protocol online training is available for all residential and ITC service staff. The training module is available on the Association of Children's Welfare Agencies (ACWA) learning management website.

To access the module go to: http://lms.acwa.asn.au/login/index.php

The implementation of the Protocol is overseen by the State-wide Steering Committee. Training will be reviewed on a regular basis to ensure the engagement of relevant local key stakeholders, ITC service providers and the NSW Police are aware of the application of the Protocol, as well as any recent amendments and changes to practice and delivery. All signatories of the Protocol will remain committed to ensuring that training and education materials reflect best practice and that any issues related to such material are raised within the relevant governance structures.

6 Evaluation and monitoring

The State-wide Steering Committee will settle a strategy for evaluating/reviewing the Protocol's implementation and the necessary data collection and reporting processes to support the evaluation process.

The process for collecting data should not be onerous and should be consistent with the type of records that should already be made by police and residential and ITC services in responding to incidents. A critical component of evaluation and monitoring will involve assessing not only the contact between residential and ITC services, Communities and Justice Commissioning and Planning staff and police, but also the systems and processes residential and ITC services have in place to monitor and guide their ongoing collaborative work with police; and how services manage challenging behaviour and incidents more generally.

7 Term and review of the Protocol

The Protocol will be reviewed on an annual basis and a comprehensive review will be conducted every three years by the State-wide Steering Committee as outlined in the terms of reference.

8 Signatories to the Protocol

The following parties agree to the terms and guiding principles of this Protocol

- NSW Police Force
- Child and Family, Communities and Justice
- Association of Children's Welfare Agencies, and
- AbSec.

The following agencies support the principles of this Protocol:

- Legal Aid NSW
- Youth Justice, Communities and Justice
- YFoundations
- NCOSS
- CREATE Foundation
- Office of the Children's Guardian
- Office of the Advocate for Children and Young People
- Mental Health Commission of NSW, and
- Aboriginal Legal Service (NSW/ACT).

9 Related legislation and guidelines

- Young Offenders Act 1997
- Children and Young People (Care and Protection) Act 1998
- Crimes (Domestic and Personal Violence) Act 2007
- NSW Office of the Children's Guardian, NSW Child Safe Standards for Permanent Care
- NSW Police Force Youth Strategy
- Protected Admissions Scheme (Information Sheet)
- Out-of-home Care Contracted Care Program Guidelines
- Out-of-home Care Service Model: Residential Care
- The report of the NSW Therapeutic Care Steering Committee (when available)
- Charter of Victims Rights, Part 2, Division 2, Victims Rights and Support Act 2013
- NSW Police Force Aboriginal Strategic Direction 2018-2023
- NSW Police Force Statement of Strategic Intent 2019

10 Annexures

A Procedures for residential and ITC services.

B Policing responses to incidents in residential and ITC services.

ANNEXURE A:
Procedures for ITC and residential OOHC services

1 Overview

This document:

1 provides ITC and residential service staff with additional guidance for managing young people'sbehaviour consistent with principles of therapeutic care[22]
2 promotes adherence to the NSW Child Safe Standards for Permanent Care
3 reinforces the right of young people who are victims of crime to report an incident to police, and to be provided with appropriate assistance from residential service staff to do so[23]
4 recognises the right of ITC and residential service staff to a safe workplace and to exercise informed judgement about when a call for police assistance is required, and
5 encourages ITC and residential services to use a measured and consultative decision-making process to determine whether a call for police for assistance is necessary - except in circumstances where there are immediate safety risks requiring an expedited response.

2 Behaviour Support Plans and other support issues

Where a young person exhibits challenging behaviour that exceeds what is normally expected, a Behaviour Support Plan (BSP) may be required. These are prepared by a psychologist or other skilled professional in the area of behaviour management. A BSP may also be appropriate where existing strategies have had little impact in addressing the behaviour or the behaviour continues to escalate. ITC and residential services should develop a BSP tailored to the needs of each individual young person. BSPs should demonstrate a positive approach to behaviour support and address presenting behaviour in the context of the young person's overall support requirements. Intervention should be child-centred and culturally appropriate.

The nature of the relationship between ITC and residential services, neighbours and the local community can also be a factor in the frequency of police attendance at a service. A focus by services on developing positive relationships with neighbours and other community members is critical to encouraging discussion of non-urgent issues with service staff before police are contacted for assistance.

ITC and residential services should give consideration to:

1 The training provided to staff to:
i manage challenging behaviour
ii identify the situations and behaviours that require police assistance
iii minimise client-initiated conflict, and
iv implement, review or refine the BSP.
2 The routines in the household and environmental factors such as the provision of quiet spaces and privacy which can help regulate behaviour.
3 The client mix in the household.
4 Household strategies promoted to support residents to manage stressful and escalating situations.
5 Strategies to improve the relationship between the household and the neighbourhood if police are being called by neighbours to deal with concerns about the residential service.

[22] These Procedures should be read in conjunction with the young person's current Behaviour Support Plan.
[23] In responding to an incident, it will be important for residential service staff to take into account the age of the young people involved. In particular, when responding to the victim's wishes about police involvement, the victim's age and any other relevant factors such as mental health or intellectual disability should be considered.

3 Appointing a liaison officer for Police

The ITC or residential service will appoint a senior residential staff member (e.g. service coordinator or manager) to be the liaison officer for the purposes of this Protocol. The liaison officer is the main (though not necessarily the only) point of contact between the local police Crime Management Unit and the ITC or Residential Service. The liaison officer should be kept informed of all contact between the staff of the residential service and police.
The liaison officer is responsible for ensuring that regular meetings occur with local police to implement the aims of this Protocol according to the local level arrangements set out in section 4.2

4 Before calling police

Before calling police, be clear about the purpose of the call.

Police should always be called in circumstances where a staff member believes there are immediate safety risks.

4.1 The Helpline and the Mandatory Reporter Guide (MRG)

Where there is a risk of significant harm to a child under 16 years of age, a report should be made to the Child Protection Helpline. When the staff member suspects there is risk of significant harm to a child under 16 years of age, the MRG should be applied to inform whether a report to the Child Protection Helpline should be made. If the MRG indicates a report should be made to Communities and Justice, contact the Child Protection Helpline on 133 627.

The MRG may recommend that the Child Protection Helpline not be contacted if the circumstances do not reach the risk of significant harm (ROSH) threshold. The MRG may recommend other actions, including that the staff member:

- talks through concerns with their supervisor or a colleague, or a person nominated by the relevant residential service
- refers the young person to another service for assistance, and
- documents the concerns, continues a professional relationship with the young person and monitors the situation.

Young people in residential services with a history of complex trauma may have limited ability to regulate their behaviour. As a result, service staff should implement trauma-based responses through identifying a young person's trigger points and ways to de-escalate their behaviour.

4.2 Strategies for ITC and residential service staff

Some strategies for ITC and residential service staff to consider are outlined below:

1 Ensure there is a comprehensive handover at the beginning of every shift. The changeover should include an outline of the events of the day (including the young person's mood, presence of conflict or tension, any incident that occurred during the day) as these may provide a context to any triggers that arise later.

2 When a young person starts exhibiting challenging behaviour, apply the strategies for de-escalation contained in the young person's BSP.

3 If the behaviour cannot be de-escalated, contact senior residential service staff (i.e. House Co-ordinator, Residential Program Manager, Head Office (business hours) or the On-Call Manager (after hours)) to discuss options, including on-call attendance at the residential service, deployment of additional staff etc. Senior residential service staff will discuss:

i the nature and seriousness of the incident any legal requirements to notify police and/or the Child Protection Helpline
ii the views of any victim about calling the police (including any age or capacity issues)
iii the current behaviour and situation of the young person and any victim
iv the age of the young person involved in the incident
v steps already taken to de-escalate the behaviour
vi previous incidents or behaviour of a similar nature by the same young person
vii the staff member's views about calling police
viii any relationships which may have an impact on the young person's behaviour e.g. between young people involved in the incident
ix potential impact (positive and negative) on the young person if police involvement is requested and whether the situation can be managed safely without police involvement, and
x alternative courses of action.

5 Authorisation to call police

In emergency situations ITC and residential service staff should not hesitate to call 000.
For non-emergency situations, the following guidance applies:

1 Only senior ITC/ residential service staff (i.e. House Co-ordinator, ITC/ Residential Program Manager, Head Office (business hours) or the On-Call Manager (after hours) can authorise seeking police assistance.

2 Once authorisation has been given, the relevant staff member will contact local police and provide the following information:

i an explanation of what has occurred
ii the wishes of any alleged victim
iii any historical context
iv any relevant information about the young people involved e.g. mental or physical health issues, intellectual disability
v the existence of any bail/AVO conditions
vi what has been done so far to de-escalate the behaviour
vii the strategies contained in the BSP which have already been implemented, and
viii the nature of the police assistance sought.

6 After calling police (post-incident response)

6.1 Records

An incident report must be completed before the end of the staff member's shift. The incident report provides a summary of the incident(s) leading up to a request for police involvement, including what was done to de-escalate the presenting behaviour. Records should be sufficiently detailed (although not onerous) to ensure continuity of care at staff changeovers and inform agency liaison meetings, risk assessments and evaluation of the Protocol. Records should be made in all circumstances where police assistance is requested. Ideally records will be made whenever the Protocol is utilised, including where a decision is made not to call police. Record keeping should also have regard to any Insurance and/or Work Cover requirements.

6.2 Within two weeks of incident*

[* Two weeks is the maximum period and is indicative only. Police and senior ITC and residential service staff may agree on a different and lesser time period as appropriate.]

1. Senior ITC and residential service staff will undertake a review of the incident with the staff member on duty at the time the incident occurred. This will allow for discussion and consideration of the options which were available throughout the course of the incident. The circumstances leading up to the incident and any previous similar incidents will be considered. Behaviour support strategies will also be reviewed.
   As a result of the incident review, the BSP will be reviewed and (where appropriate) amended.
2. Where the care team assesses it is appropriate, a meeting with the young person will be arranged to reflect upon the incident and identify what could be done differently in future (including alternative behaviours). Where appropriate, the meeting may include local police (preferably the police officer who responded to the incident or the Youth Liaison Officer or Specialist Youth Officer). The young person may choose to have a support person present.
3. Where there is on-going conflict between the young person and another resident or a staff member involved in the incident, ideally all people involved in the conflict should attend a mediation meeting facilitated by a senior residential service staff member or external clinician.
4. Senior ITC and residential service staff will give consideration to whether the service should engage other support services for the young person, including liaison with their school where relevant, to ensure that the young person is supported through an integrated case plan.
5. After discussing the above actions with the appointed liaison officer,[24] an appropriate staff member will update the Police and provide relevant information about the actions taken. (Police will use the information provided in exercising their discretion to determine whether and how to proceed.).

[24] The Protocol requires that a senior residential staff member be nominated as the liaison officer.

ANNEXURE B:
Policing responses to incidents in ITC and residential OOHC services

The NSW Ombudsman, in consultation with the NSW Police Force has prepared this document to outline how local police will work with service providers when responding to incidents that occur in ITC residential services.
The NSW Police Force has committed to providing guidance and training to frontline police to facilitate the effective implementation of the Protocol; and ensuring it has adequate processes in place to support the evaluation of the Protocol's use and impact.

This document outlines:

- Police responsibilities when responding to incidents notified by residential OOHC and ITC services
- factors to be considered by police when determining how to respond to incidents at residential services
- available options for dealing with young people, including diversionary measures under the *Young Offenders Act 1997*
- the requirements of the C*rimes (Domestic and Personal Violence) Act 2007,* including recent changes, and
- recording incidents and relevant information.

1 Responding to incidents in ITC and residential OOHC services

Police responses to incidents reported by ITC and residential service providers should remain consistent with usual police practice, with appropriate and informed use of police discretion central to the effective operation of this Protocol.

In attending an ITC or residential OOHC service in response to an incident, police will adopt a consultative approach with services. However, police retain the ultimate authority to make the decision.

Police may need to take immediate action to deal with the young person involved, however, where immediate action is not necessary, police will consult with their local Crime Prevention Unit (CPU) to determine the most appropriate way to respond. All matters involving young people residing in residential services will be reported to the CPU as soon as practicable for its review.

In considering what action should be taken by attending police, the following factors will be considered:

- the seriousness of the offence
- the degree of actual or threatened violence involved and any harm caused to alleged victims
- age of any alleged victims and any capacity issues
- the wishes of any alleged victim
- the age of the involved young person, and
- any other matter the investigating officer thinks appropriate in the circumstances.

[25] See NSW Police Force, Young Offenders Act Pocket Guide.

Following the initial response, and in consultation with the CPU, police should consider the following factors:

- the number and nature of any offences committed by the young person, including the number of times the young person has been dealt with under the *Young Offenders Act 1997*
- Information provided by the service about the young person's situation (including disorders/illnesses/medication issues) or other factors impacting on the young person's behaviour
- the young person's behaviour support plan (BSP) and any proposed revisions
- the views of the victim/s
- whether the young person has shown remorse, apologised or made reparations (e.g. damage has been repaired), and
- the views of staff regarding the potential effect of a criminal justice intervention on the young person.

An approach which first considers the appropriateness of exercising discretion to deal with a young person informally or by issuing a warning is likely to leave police with more diversionary options in the longer term. This is especially applicable to young people in their early or pre-teens who have already been the subject of three cautions and are more likely to be dealt with via criminal proceedings.

Where police attending an ITC and residential service initially determine that formal action is required (e.g. under the *Young Offenders Act 1997* or by instituting criminal proceedings), they will consult with the relevant residential service liaison officer and directly with any alleged victim within two weeks of the incident and prior to making a final determination about taking action. This consultation will allow police to take into account any measures which have been put in place by the service to manage the young person's behaviour and any additional information which the service may provide.

2 A stepped approach to deciding how best to respond

2.1 No further action

Police may determine, after discussing the incident with relevant residential service staff, the young person and any victim/s, that no further action is required in response to the incident.

2.2 Use of diversionary options under the Young Offenders Act 1997

If police determine that an offence has been committed, they must identify whether it can be dealt with by one of the diversionary options provided by the *Young Offenders Act 1997* (YOA). If the offence is covered by section 8 of the YOA Act police, may:

- issue a warning, pursuant to Part 3
- issue a caution, pursuant to Part 4 (including by utilising the *Protected Admissions Scheme*[26] where appropriate), or
- refer the matter to a Specialist Youth Officer to determine, pursuant to Part 5, whether a youth justice conference should be held.

Police must first consider whether a warning – the least punitive sanction – is appropriate. If a warning is not appropriate, police should consider whether the young person is eligible to receive a caution and if so, follow the requirements of the YOA. These include informing the young person of the nature and circumstances of the offence; their rights to obtain legal advice and have the matter dealt with by a court; and the purpose, nature and effect of the caution.[27] Where the young person does not initially admit to the offence, police are encouraged to make use of the Protected Admission Scheme, which provides a guarantee to the young person that any information they disclose in relation to the relevant offence will not be used against them in criminal proceedings.

Where the police officer considers that the young person is not entitled to a caution, the police officer must refer the matter to a Specialist Youth Officer who will decide whether the matter should be dealt with by caution, through a Youth Justice Conference or the Children's Court.

Police will liaise with the ITC and residential service to help ensure that the young person has access to legal advice (e.g. Legal Aid NSW or the Aboriginal Legal Service) and/or other services. Police will ensure contact is made with the service within 14 days of the incident to discuss action taken by the service to manage the young person's behaviour and any additional information which the service may provide.

2.3 Criminal Proceedings

Criminal proceedings are only to be pursued against a young person in the absence of appropriate alternatives.30 The age31and capacity32 of a young person are relevant factors for police to consider when determining whether to initiate criminal proceedings. Where a decision to initiate formal criminal proceedings is made, police will continue to liaise with the service to ensure the ongoing wellbeing of the young person, including linking the young person with programs and services to divert them from crime.

3 The Crimes (Domestic and Personal Violence) Act 2007

When police attend an incident at an ITC or residential service, the *Crimes (Domestic and Personal Violence) Act 2007* (CDPV Act) will influence the response they take. This legislation creates the framework for Apprehended Domestic Violence Orders (ADVOs) and apprehended personal violence orders (APVOs). It also creates the offence of stalking or intimidation, and the offence of contravening an apprehended violence order (AVO).
When personal violence offences are committed or attempted in a "domestic relationship", they are considered "domestic violence offences".

26 The reluctance of young offenders to make admissions to an offence, which is a precondition for police giving a caution, was impeding police use of cautions under the Young Offenders Act 1997. Operating since April 2014, the Protected Admission Scheme is designed to enable young offenders to seek advice on whether they should make admissions to an offence whilst preserving their right not to provide self-incriminating evidence
27 Young Offenders Act 1997, s.22 & s.39.

Police officers must apply for an ADVO on behalf of a person in need of protection (PINOP) where there they suspect that a domestic violence offence, a stalking offence or a child abuse offence has occurred or is likely to occur. The only exception to this obligation is where the PINOP is 16 years old or over and:

(a) the PINOP intends to make an application for an AVO, or
(b) there is good reason not to make the application.

The NSW Police Force Domestic and Family Violence Policy also 'enforces a proactive victim support response to ensure appropriate protective measures are taken to keep victims safe and prevent further violence against them, including applying for an ADVO and referral to specialist domestic violence services.'[29]

3.1 Who is in a domestic relationship?

Young people living together in the same residential service

"Domestic relationship" is defined broadly in the CDPV Act and will generally include a relationship where two young people live long term in a residential facility together.[30]

If the PINOP is under 16 years of age, police officers have limited discretion in these matters and must apply for an ADVO.

However, if the PINOP is 16 years old or over, a police officer can decline to apply for an ADVO if there is good reason not to make the application. In making this decision, police will always focus on the protection of the victim, but will consider all the circumstances of the incident, including the:

- age and background of the PINOP and the defendant
- nature of the relationship between the PINOP and defendant
- views of the PINOP and whether the PINOP wants an AVO in place, and
- age of the PINOP and the defendant, including any capacity issues (e.g. intellectual disability, cognitive impairment, mental illness or disorder).

If a police officer decides not to apply for an ADVO, they must make a written record of the reason.[31]

Young people and their paid carers

As a result of recent amendments, the relationship between a young person in residential care and a paid carer will not always be treated as a domestic relationship.[32] Under the changes, a "dependent" (this includes a young person in residential care) is treated as having a domestic relationship with their paid carer only for the purposes of the protection of the dependent.
Generally, a paid carer:

1) can no longer take out an ADVO against a young person in a residential facility, and
2) any offences by a young person in a residential facility against the paid carer are not domestic violence offences.

[28] Crimes (Domestic and Personal Violence) Act 2007, section 27.
[29] NSW Police Force Domestic and Family Violence Policy, 2018, p.3.
[30] See Crimes (Domestic and Personal Violence) Act 2007, section 5.
[31] Crimes (Domestic and Personal Violence) Act 2007, ss 49(5) and 27(5).
[32] See Crimes (Domestic and Personal Violence) Act 2007, s5A.

These amendments recognise the difference that often exists in the power dynamic between paid carers and dependants and provides police with greater discretion to deal with disputes within these relationships.

An APVO may be made against a dependant for the protection of a paid carer if the paid carer and dependant do not have a domestic relationship. However, there is no obligation to make an APVO. Further, given that a domestic relationship is a legal requirement for Domestic Violence Evidence in Chief (DVEC), a written statement should be taken in instances where the dependant commits an offence against a carer.

Police should also take into account the general considerations around the use of AVOs against children and young people in residential care, as set out below.

3.2 General considerations

The routine use of AVOs can further disadvantage young people who have often been placed in care as a consequence of their own experience of trauma and abuse. Further, breaching an AVO can expose young people to criminal sanctions, loss of a dwelling and the possibility of incarceration. NSW Police Force policies seek to divert young people from this kind of pathway into the criminal justice system.

Where police have discretion, they will consider all the circumstances of the incident and any history of violence between the parties before determining whether an AVO is necessary. The NSW Police Force recognise that AVOs are designed to protect victims from violence and should not be viewed as a behaviour management tool.

The use of AVOs may not always be the most effective or suitable method to address the behaviour of young people towards carers and other residents of residential services. In many circumstances, a collaborative interagency approach between the service and other relevant agencies may achieve better and more enduring outcomes.

3.3 Domestic Violence offences and the Young Offenders Act 1997

There is often a misconception that the YOA does not apply to “domestic violence offences” .

“Domestic violence offence” is defined in the CDPV Act as a ‘personal violence’ offence where the victim and offender are, or were, in a ‘domestic relationship’.

Diversionary options under the YOA can be used in relation to many “domestic violence offences”. The only offences that are not able to be dealt with under the YOA are:

- Breaching an AVO
- Stalking offences, and
- Intimidation offences.

[29] NSW Police Force Domestic and Family Violence Policy, 2018, p.3.
[30] See Crimes (Domestic and Personal Violence) Act 2007, section 5.
[31] Crimes (Domestic and Personal Violence) Act 2007, ss 49(5) and 27(5).
[32] See Crimes (Domestic and Personal Violence) Act 2007, s5A.

4 Recording incidents and relevant information

There are concerns that some young people living in residential OOHC services attract numerous police records in relation to minor incidents and that this can impact the decisions of police when they attend an incident involving these young people.

The Protocol aims to reduce the frequency of police attendance at residential services in relation to behaviour which could be safely managed within a service and this in turn, should lead to a reduction in or prevention of the number of police records held about a young person relating to minor incidents. Even where police attend a residential service, there may still be scope for police to determine that no formal action is required and no entry needs to be made against the young person's record on COPS.

If the attending officers choose to make a record of the incident on COPS, the entry should record the factual events of the incident and reference any decision not to take further action based on the Protocol, such as any consultation with the OOHC residential service.

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