

THE GOVERNOR'S  
COMMISSION ON YOUTH,  
PUBLIC SAFETY,  
AND JUSTICE

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Summary of Recommendations for  
Juvenile Justice Reform in New York  
State



*Our juvenile justice laws are outdated. Under New York State law, 16- and 17- year- olds can be tried and charged as adults ...It's not right; it's not fair. We must raise the age.<sup>1</sup>*

*Governor Cuomo, State of the State Address, January 8, 2014*

Governor Cuomo signed Executive Order 131 on April 9, 2014, to establish the Commission on Youth, Public Safety, and Justice. He instructed this Commission to develop a concrete plan to raise the age of juvenile jurisdiction in the most effective and prudent manner possible, and to make other specific recommendations as to how New York State's juvenile and criminal justice systems could better serve youth, improve outcomes, and protect communities. The Commission was ordered to complete its work by December 31, 2014.

Why "raise the age" now? Numerous developments have converged in recent years to forge a growing consensus for this and related reforms to New York State's juvenile justice system. At least seven key developments have brought us to this point where reform is both necessary and possible.

First, experience in states like Connecticut and Illinois that have raised the age of criminal responsibility recently has demonstrated that recidivism and juvenile crime rates can be lowered through evidence-based interventions that steer non-violent young offenders out of the justice system and into family mental health or other needed services. These experiences have helped to reduce opposition to reform in this area by showing that public safety can actually be enhanced by such changes. In fact, analysis completed in support of this Commission found that implementation of the Commission's recommendations would eliminate *between 1,500 and 2,400 crime victimizations every five years*.

Second, extensive research on the significant negative impacts on adolescents of incarceration in adult jails and prisons has brought a sense of urgency for reform. Higher suicide rates, increased recidivism, and many other measures all suggest that both offenders and their communities are harmed by placing adolescents into adult jails and prisons.

Third, New York's unique history of juvenile justice has created a pressing reason for reform now. Despite a proud early history in this area, New York State now stands as one of only two states in the country that has set the age of criminal responsibility at age 16. That single fact has become a rallying cry for the current reform movement in this State, led the State's Chief Judge to urge legislative action, and inspired the Governor's initiative to appoint this Commission.

Fourth, the impacts of processing all 16- and 17-year-olds in the criminal justice system fall disproportionately on young men of color. Young men of color are substantially overrepresented among youth who are arrested at age 16 and 17 and who end up incarcerated as a result of the offense. Those impacts are felt not only by the young men themselves, but also by communities of color around the State.

Fifth, scientific research into brain development has revealed only very recently that portions of our brains, including that governing impulse control, develop far later than expected – after adolescence and as late as

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<sup>1</sup> <http://www.governor.ny.gov/news/transcript-governor-cuomos-2014-state-state-address>

one's early to mid-20s. This research has demonstrated that adolescents do not have fully developed faculties of judgment or impulse control. It has also shown that adolescents respond more fruitfully to efforts to rehabilitate them and put them on the right track.

Sixth, that research has, in turn, undergirded several opinions from the United States Supreme Court and lower courts restricting the nature and scope of state and local governments' punishment of adolescent offenders on the ground that such offenders are both less culpable criminally and more susceptible to fruitful rehabilitation because of their still-developing brains. Those decisions have both resulted from and encouraged reform efforts across the country to improve the juvenile justice laws to reduce unnecessary incarceration and improve rehabilitative programming.

Finally, this shifting view of adolescent offenders has coincided with, and arguably been facilitated by, a steady and significant decrease in violent crimes committed by young offenders since the 1990s. That reduction in crime has replaced outsized fears of young "super predators" with a more thoughtful focus on targeted criminal justice interventions to reduce recidivism without simply expanding costly incarceration.

For all of these reasons, the Commission has the wind at its back in drafting this plan for raising the age of juvenile jurisdiction and reforming the juvenile justice system in other respects. The Commission's recommendations reflect a balanced approach that incorporates the wisdom and experiences of law enforcement, probation, criminal defense attorneys, policy advocates, service providers, local and State officials, and youth and their parents affected by the current system. Partly as a result of this balanced approach, the Commission's members support these recommendations unanimously and without reservation.

In order to facilitate passage of these recommendations and to ensure effective implementation, the Commission has concluded that the added investments and expenses necessary to implement these reforms should be borne by the State to the extent possible and appropriate.

After a thorough review of current New York State law and practice in both the criminal and juvenile justice systems; analysis of national practice and the raise the age experience in other states; consideration of input from hundreds of stakeholders across the State through focus groups, interviews, and public hearings; and site visits to current adult and juvenile confinement settings, the Commission recommends that New York State phase in an increase in the age of juvenile jurisdiction to age 18.

This one change should trigger a more comprehensive series of reforms in order to place New York as a national leader in youth justice policy. These reforms would ensure that interventions proven to be effective with adolescents are used for 16- and 17-year-olds; reserve confinement only for those who pose a significant risk to public safety; protect young people through the use of juvenile facilities regardless of the court system in which they are sentenced; create capacity for young people to avoid a lifelong criminal record for one adolescent mistake; and provide a rehabilitative response for all minors accused of committing a crime, thereby reducing reoffending and making communities safer.

The Commission recommends the following reforms:

## **RAISING THE AGES OF JUVENILE JURISDICTION:**

### **1. Raise the age of Juvenile Jurisdiction to 18, consistent with other states.**

New York stands as one of only two states that process all 16- and 17-year-olds in the criminal justice system, no matter their offense. Forty states provide juvenile court jurisdiction for youth up to age 18 and eight states draw the line of juvenile jurisdiction at age 17. Exclusion of 16- and 17-year-olds from the juvenile system denies them the rehabilitative interventions of that system – from parental notification at first contact with the police to confinement in facilities for youth instead of jails and prisons, the juvenile system is structured to intervene with adolescents in a manner that supports the adolescent brains' unique capacity for change.

New York's current structure provides some protections from a lifelong criminal record for 16- and 17-year-olds through Youthful Offender status. However, about 1,600 convictions of 16- and 17-year-olds do result in a lifelong criminal record annually. In addition, the protection from a criminal record does not translate into protection from incarceration in jails and prisons. On any given day, there are about 700 16- and 17-year-olds in jails across New York State and about 100 more 16- and 17-year-olds in State prison. Finally, even those 16- and 17-year-olds who are arrested for less serious offenses that do not result in a criminal conviction or incarceration are not provided access to the many community-based interventions proven to reduce reoffending among young people.

Connecting these young people with the evidence-based interventions of the juvenile system will avoid *between 1,500 and 2,400 crime victimizations every five years*. Providing these effective juvenile interventions will make New York's communities safer and support positive outcomes for young people.

Learning from lessons learned in other states that recently raised the age, the Commission supports phasing in the proposed reforms, with enough preparation time to support development of new community-based and residential service capacity. Juvenile jurisdiction should be expanded to include 16-year-olds in 2017 and 17-year-olds in 2018. This phased approach will allow for an initial infusion of the smaller population of 16-year-olds followed by full implementation.

### **2. Raise the lower age of juvenile jurisdiction to twelve, except for homicide offenses, which should be raised to ten.**

Children as young as seven are currently arrested and processed as juvenile delinquents in New York. New York is among only three other states that formally set a lower age for juvenile jurisdiction at seven or younger. Most states do not set a formal age of lower jurisdiction. Instead, they rely on the lack of capacity that very young children have to meaningfully participate as a defendant in a trial to govern a practical standard for a lower age of delinquency jurisdiction. Very young children have been found to have impaired reasoning and poor understanding of trial matters. In fact, many states require juvenile competency determinations to try youth as old as 13 in juvenile court.

Very young children do not commit significant levels of crime across New York. Children under 12 account for only four percent of all the delinquency petitions in Family Court. The very young children who are coming into contact with the police should be targeted for intensive service provision within the context of their family and community through the social services system. Juvenile probation, detention and placement are not developmentally appropriate responses for very young children who do not have the capacity to

participate as a defendant in a trial. The lower age of juvenile jurisdiction should therefore be raised to 12, with a lower age of 10 for the extremely rare homicide cases.

**3. The Governor should appoint one or more individuals with expertise in juvenile justice and a commitment to these reforms to help coordinate their implementation.**

The Commission’s research into other states’ “raise the age” reform initiatives revealed that successful implementation of such reforms depends upon one or more government agencies or officials having clear responsibility for such implementation. In New York State, the Governor’s commitment to these reforms provides an auspicious foundation for their success. Various State agencies must be involved in implementation of these proposed reforms, including OCFS, DOCCS, DCJS, and the Governor’s Office itself. Services and interventions critical to the reform must be supported at local community-based providers and not-for-profit residential agencies across the State. County executives, district attorneys, county attorneys, and the various courts at issue must also be involved. Finally, the Chief Judge of the Court of Appeals and the Office of Court Administration would play a critical role in the reform process.

Coordination and leadership of efforts across these many entities is critical to successful implementation. Accordingly, the Commission recommends that the Governor appoint one or more individuals with expertise in juvenile justice and a commitment to these reforms to help coordinate their implementation. The responsible official(s) would need the support and cooperation of all of the agencies and entities involved.

## **ARREST & POLICE CUSTODY**

Whether New York treats a youth as an adult or as a juvenile at the first stages of interaction with the justice system – at and immediately after arrest – has lasting consequences for effective law enforcement and to improve outcomes for the youth who are involved. The Commission analyzed other states’ practices, as well as those used in New York State currently for juveniles and adults, to develop the recommendations below.

**4. Expand to 16- and 17-year-olds the current juvenile practice regarding parental notification of arrest and the use of Office of Court Administration-approved rooms for questioning by police.**

Research has shown that adolescents are much more likely to waive their right to remain silent and to confess to crimes quickly than adults during police interrogation. Their increased likelihood to comply with authority figures, to tell police what they think they want to hear, and to succumb to an impulsive decision to make a statement, even a false statement, if it will end an interrogation, places them and law enforcement at great risk for unreliable confessions. Unreliable confessions, in turn, create challenges in prosecution and can result in ongoing crime by the actual offender who remains in the community.

Juveniles have protection against this vulnerability through existing law that requires police to make reasonable efforts to notify a parent at the arrest of a youth age 15 and under and to question those youth only in a room that is specially designed for questioning in an office-like setting. However, 16- and 17-year-olds are not currently afforded these protections. Instead, they are arrested and processed as adults without notice to their parents and alongside other adult arrestees in secure areas of police stations. The protections of parental notification and use of questioning rooms for youth should be extended to 16- and 17-year-olds.

**5. Expand the use of videotaping of custodial interrogations of 16- and 17-year olds for felony offenses.**

Videotaping interrogations is widely viewed as an effective strategy for improving the reliability of interrogations. Broad support for this practice comes from academic and legal experts as well as from across the spectrum of legal practitioners and law enforcement professionals. This broad-based support rests on several benefits that come from the electronic recording of interrogations such as: increased quality of police interviews; reduced litigation regarding suppression of statements and reduced necessity to defend against claims of misconduct; reduced chance of proceeding against the wrong defendant, leaving the real perpetrator at large; and increased public confidence in the fairness and accuracy of the justice process.

Currently, more than one third of states and the District of Columbia have adopted electronic recording of interrogations as a statewide practice for some or all felony offenses. Within New York State, at least 43 counties, cities, or smaller jurisdictions already record police interrogations. By all accounts, the practice has proven valuable not only to protect defendants but also to protect police officers against accusations of coercion or other improper practices. The use of electronic recording should be expanded to all custodial interrogations of 16- and 17-year-olds for felony offenses.

## **PRE-TRIAL DIVERSION OF CASES**

Research has demonstrated that diversion of appropriate cases before they reach the courts both improves outcomes for the youth involved and better protects public safety. In addition, the cost of diversion is much lower than that of juvenile detention or out-of-home placement. Fiscal modeling performed by the Commission suggests that diversion interventions can be provided for an average cost of \$3,000 per case while the cost of out-of-home placement can reach over \$200,000 per child annually. For these reasons, the Commission analyzed best practices in diversion across the country and the existing barriers within New York to effective diversion in appropriate cases.

The Commission's research also revealed reason for an important caveat: the current adult court system effectively weeds low-level cases against 16- and 17-year-olds out of the system before conviction and significant intervention, with 59% of such arrests not prosecuted at all or resulting in dismissal. Research has demonstrated that low-risk youth who are drawn into "deep end" interventions (like out-of-home placement or intensive community-based programming) actually are more likely to re-offend than if such interventions are not used. Accordingly, any reforms must not have the unintended consequence of keeping youth who do not commit serious offenses or otherwise present a significant risk to public safety in the "deep end" of the justice system.

The recommendations below arise from the Commission's comprehensive research and review.

**6. Mandate diversion attempts for low-risk (per risk assessment) misdemeanor cases except where probation finds no substantial likelihood that youth will benefit from diversion in the time remaining for adjustment or if time for diversion has expired and the youth has not benefited from diversion services.**

The opportunity for pre-court diversion through probation is unique to the juvenile system. This "adjustment" process requires use of a risk assessment instrument and provides for evidence-based services to reduce risk of

reoffending. New Adolescent Diversion Parts (ADP) piloted by the Office of Court Administration showed that a probation diversion process at the outset of a case of a 16- or 17-year-old can substantially improve outcomes for youth and for the justice system. The research on Nassau County's ADP demonstrated that, compared to the 2011 reference cohort, providing formal pre-court diversion or dismissal opportunities produced more frequent straight dismissals, reduced numbers of incarcerative sentences, and produced no increase in the rate of re-arrest. In addition, the provision of evidence-based services to youth reduces recidivism and the cost of these programs is likely to be recouped within five years due to the resulting decreases in crime.

**7. Expand categories of cases eligible for adjustment to allow for adjustment in designated felony cases and Juvenile Offender cases removed to Family Court, with a requirement for court approval for all Juvenile Offender cases and if the youth is accused of causing physical injury in a designated felony case. Revise the criteria for determining suitability for adjustment to include risk level and the extent of physical injury to the victim.**

Under current law, probation departments are barred from adjusting cases that have been removed from criminal court. While the universe of designated felony offenses and other offenses removed from criminal court to Family Court are extremely serious in nature, current system processing of 16- and 17-year-old violent felony offense cases shows that many violent felony arrests of 16- and 17-year-olds do not currently result in felony convictions. In fact, 47% of violent felony arrests of 16- and 17-year-olds disposed during 2013 did not result in indictment. Instead, half of those arrests that were not indicted resulted in no conviction at all and the other half resulted in a conviction on a misdemeanor or non-criminal violation. While the Commission expects that most of these cases may not be appropriate for adjustment, in those cases where the offender is determined by the risk assessment tool to have a low risk of re-offending, adjustment may be appropriate. The court and the probation department should have the option of adjustment in these cases.

In addition, the Family Court Act provides that local probation departments may adjust only those cases that are "suitable." Probation is directed to consider a range of factors when making suitability determinations including: age; elements of the offense; likelihood of cooperation and success in timeframe; risk of re-offense or victim harassment during adjustment; history of offending; need for court removal from home; and whether there is an allegation against anyone else for acting jointly with the youth. Reframing the considerations for a youth's suitability for adjustment to reflect objective risk assessment and severity of harm to the victim would shift the use of diversion to an evidence-based framework.

**8. Create the capacity and a process for victims to obtain orders of protection without a delinquency case being filed in court.**

Under current law, no mechanism exists for a victim to obtain an order of protection without a delinquency case proceeding in the Family Court. This means that even where the victim would consent to having a case adjusted without a petition being filed with the court as long as she could obtain an order of protection, the probation department cannot explore adjustment in appropriate cases. Forty-five percent (25 counties) of the 56 counties that responded to a survey conducted in support of the Commission reported the inability to obtain orders of protection was a barrier to adjusting cases. This change would allow a victim to obtain an order of protection without filing a delinquency petition in Family Court. Probation would thus be able to seek adjustment if the victim consents.

**9. Allow two additional months for probation diversion (beyond 120 days) if a documented barrier to diversion exists or a change in service plan is needed.**

If a probation department chooses to attempt adjustment in an eligible case and victim consent is obtained, the department is allowed only an initial two-month period and an additional two months upon judicial approval. Thirty-six out of the 56 local probation departments that responded to the probation survey identified this limited period for adjustment as a barrier to adjustment of eligible cases.

The review of comparable states revealed that many other states currently allow a longer period of time for pre-petition probation diversion in their juvenile justice system. Several states allow six months for diversion attempts with Florida and Illinois allowing a full year. Increasing the time for probation to use diversion services will allow greater opportunities to adjust cases successfully, especially for those cases with more intense service needs or where localities have waiting lists for services.

**10. Establish a continuum of diversion services that range from minimal intervention for low-risk youth to evidence-based services for high-risk youth.**

Use of probation diversion for 16- and 17-year-olds can only reap positive benefits if localities across New York have access to a range of responses proven to be effective with youth. Results from the survey of probation directors showed that, while most of the large counties have access to some evidence-based services at probation diversion, the majority of the smaller counties do not. In addition, while counties generally have access to psychiatric evaluation and psychological assessment, there are consistent waiting lists for those services throughout the state. Survey results also showed that the only restorative justice intervention that is widely available throughout New York State is community service. Given that restorative interventions provide rapid means for direct accountability to the victim or the community at a relatively low cost, expansion of these interventions holds significant promise.

Tremendous regional variation was reported in the survey results. For example, two counties reported fewer than five services available at probation diversion while the City of New York and four other counties reported over 20 different types of available services. All counties should have access to a continuum of intervention that meets their local needs, including low-cost, low-intensity responses such as restorative interventions (including juvenile accountability boards and youth courts), and more intensive services for smaller numbers of youth and families who pose a higher risk and have more intense needs. A comprehensive range of interventions across New York would provide access to services proven to reduce recidivism as well as rapid accountability measures that provide opportunity for youth to repair the harm they have caused without the need for more costly out-of-home placement. Creative solutions must be sought to create service capacity in more rural parts of New York to equalize access to services for youth in all parts of the state.

**11. Establish family engagement specialists to facilitate adjustment.**

Probation departments also identified family engagement as a significant barrier to the successful diversion of appropriate cases. Family engagement is critical in order to obtain the parental consent that is necessary for diversion services and to ensure that youth substantially engage in the services that may be needed. Support for family engagement specialists would strengthen system capacity to engage youth and their families in targeted services and maximize the benefits of adjustment services. Family engagement specialists have proven successful and extremely cost effective in those jurisdictions that have used them.

## COURT PROCESSING OF 16- AND 17-YEAR-OLDS

One of the most significant questions addressed by the Commission is how 16- and 17-year-olds should be handled in the court system once the age of juvenile jurisdiction is raised. If these cases were simply shifted to the current juvenile model, all cases would be handled in Family Court under its juvenile delinquency jurisdiction, except those cases required to be charged in adult criminal courts as Juvenile Offenders. While that default outcome could work well for many cases, it would not take into account the critical public safety concerns that require certain of the most serious violent offenses, committed in more significant volume by those who are 16 and 17 than those 15 and under, to be handled in criminal court, at least in the first instance. The Commission considered this question in detail and recommends reforms to the current system designed to ensure that *every* young offender is handled in the most appropriate manner to improve their prospects for future productivity as well as the safety of their communities.

### **12. Expand Family Court jurisdiction to include youth ages 16 and 17 charged with non-violent felonies<sup>2</sup>, misdemeanors, or harassment or disorderly conduct violations. Provide access to bail for 16- and 17-year-olds in Family Court and allow Family Court judges to ride circuit to hear cases, at the discretion of the Office of Court Administration.**

The Commission found that Family Court would be the most appropriate court to handle misdemeanors and non-violent felonies against 16- and 17-year-olds. Family Court provides a range of youth-centered approaches that are not available in the criminal court. Family Court already has a well-developed system for probation departments to attempt to divert appropriate cases before they are filed in court and to provide diversion services designed to improve outcomes for youth. If a case reaches the court, youth are represented by attorneys who are specially trained in the unique role of providing counsel to children, judges are enmeshed in the cases of children full time, probation assessments and reports focus on issues unique to youth (such as academic and family supports and challenges), and dispositional decision making is rooted in the needs and best interest of youth as well and public safety. In addition, Family Courts have the capacity to order a range of services that are part of a larger portfolio of services to prevent out-of-home placement at the local level. None of these structures are currently incorporated into the criminal court context. While not insignificant, the projected additional case volume expected to materialize under this Commission's proposals would be manageable for the Family Courts. The Commission's modeling projects an additional 6,840 delinquency filings annually in Family Court once the new age of juvenile jurisdiction is fully implemented. With 20 new Family Court judgeships being established in January of 2015 and an additional five Family Court judgeships scheduled for January 2016, the Family Court will have adequate capacity to manage the influx of new 16- and 17-year-old misdemeanor and non-violent felony cases.

The Commission recommends providing the additional procedural safeguard of bail for 16- and 17-year-olds for those cases handled in Family Court. It also recommends that OCA be authorized to allow and facilitate Family Court judges in certain counties to "ride circuit" in different parts of the county to address the fact that certain cases that are now handled in towns or villages around the state would, under the Commission's reforms, be handled only in the county seat where the Family Court resides.

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<sup>2</sup> Non-violent felonies would exclude all homicide offenses; class A felonies; Juvenile Offender crimes, Violent Felony Offenses, sexually motivated felonies, crimes of terrorism, felony vehicular assaults, aggravated criminal contempt; and conspiracy to commit or tampering with a witness related to any of the above offenses.

**13. Begin judicial processing in criminal court for current Juvenile Offender crimes as well as all violent felony offenses; all homicide offenses; Class A felonies; sexually motivated felonies; crimes of terrorism; felony vehicular assaults; aggravated criminal contempt; and conspiracy to commit any of these offenses and tampering with a witness related to any of these offenses for 16- and 17-year-old offenders.**

While nearly every state has an older age of juvenile jurisdiction than New York, every state also retains some capacity to try certain of the most serious offenses committed by young people in criminal court. New York has an existing Juvenile Offender structure that currently accomplishes that end for youth of ages 13 through 15. The Commission finds that retaining the initiation of serious crimes of violence in criminal court, with the option for transfer to Family Court as under current law, would best protect public safety. This structure will result in only 14 percent of 16- and 17-year-old arrests originating in criminal court. In addition, the recommendations that follow would substantially reform the criminal court processing of these offenses to address young offenders' specific needs and improve their outcomes through: the use of juvenile probation assessment and intervention while cases are pending, the opportunity for removal of cases to the Family Court (or for processing under the Family Court Act in the criminal court) with a new presumption of removal for violent felonies that are not Juvenile Offender crimes (see below), reduced sentencing for most youth offenses in appropriate circumstances, and use of youth facilities for confinement of minors. In addition, expansion of opportunity for Youthful Offender status and creation of a new capacity to seal one conviction if the young person turns away from crime would reduce any negative collateral consequences of criminal court processing.

**14. Apply current standards for removal from criminal to Family Court of Juvenile Offender cases to those cases against 16- and 17-year-olds that would originate in criminal court, except for subdivision two of second degree robbery (a Juvenile Offender crime) and the Violent Felony Offenses that are not Juvenile Offender crimes. For these latter offenses, create a new rebuttable presumption for removal to Family Court. Such cases would be removed to Family Court unless the prosecutor demonstrates that criminal prosecution is in the interests of justice, considering the current criteria for removing a case to Family Court and whether the youth either played a primary role in commission of the crime or aggravating circumstances, including but not limited to the youth's use or handling of a weapon, are present.**

While the Commission proposes originating the serious crimes of violence outlined above in criminal court, stakeholder feedback and the research into practices in other states support using a presumption for removal to Family Court for the violent felony offenses that are not current Juvenile Offender crimes. In addition, many stakeholders raised significant concern about the current second degree robbery offense that is a Juvenile Offender crime. Youth can find themselves charged with this offense because they were part of a group that committed a robbery that resulted in physical injury or involved use of a weapon even though that youth himself did not cause injury or brandish a weapon. New York should acknowledge that only the most serious crimes for 16- and 17-year-olds should be processed in criminal court by imposing a new presumption for removal to Family Court for the violent felony offenses that are not existing Juvenile Offender crimes and for the Juvenile Offender crime of second degree robbery.

Notably, under existing law approximately one third of all Juvenile Offender cases that are initiated in criminal court are later transferred to Family Court. Contrary to popular conceptions, Family Court is already handling some of the most serious cases against older adolescents. Under the Commission's recommendations, the

criminal court judge would make that transfer determination as it does currently and would retain those cases that are appropriately handled in criminal court.

**15. Create new Youth Parts, with specially trained judges, in criminal court for processing those cases against 16- and 17-year-olds and other Juvenile Offenders who remain in criminal court.**

Many stakeholders emphasized the need to build youth expertise for cases that are processed in criminal court. Consolidation of these cases under one judge with specialized training would build expertise in effective resolution of adolescent cases and reap the crime reduction benefit of this special expertise regarding evidence-based interventions that reduce recidivism among teenagers. While Youth Parts would be housed in the criminal court, they would provide distinct settings to focus on using youth-specific, community-based and residential interventions instead of the existing adult interventions.

**16. Clothe judges in criminal court Youth Parts with concurrent criminal court and Family Court jurisdiction to allow Youth Parts to retain cases removed to Family Court under the new presumption for removal and to handle them under the Family Court Act where appropriate.**

While the capacity for the removal of a case from criminal court to the Family Court building itself would be preserved under the Commission's proposal, court stakeholders and district attorneys emphasized the value of allowing the criminal court Youth Part to function as a Family Court in certain cases that are removed. Clothing the Youth Part criminal court judge with concurrent Family Court and criminal court jurisdiction would allow the Youth Part to retain the case and apply the Family Court Act after deciding to remove the case. In this way, the case could be readily transitioned to a Family Court model, overcrowded Family Court buildings would not be overtaxed, and District Attorneys should grow increasingly comfortable with having appropriate cases handled under the Family Court Act.

**17. Provide juvenile probation case planning and services for cases pending in criminal court.**

Criminal court processing for minors should also be improved by adding juvenile probation assessment and the potential for service intervention pending trial and sentencing for any minors whose case is being processed in criminal court. Provision of juvenile probation assessment and interventions prior to trial could significantly enhance case outcomes for youth cases retained in criminal court through successful intervention prior to sentencing. Youth who successfully engage in these evidence-based services have been shown to be less likely to reoffend.

## **REMOVING YOUTH FROM ADULT JAIL & PRISON FACILITIES**

The harms to youth detained or incarcerated in adult facilities across the country are well documented. As a result, one of the most critical system changes to accomplish in raising the age of juvenile jurisdiction in New York State will be to remove young people under age 18 from adult facilities, including both local jails and state prisons. The Commission assessed and compared New York's adult and juvenile confinement systems, addressed the fiscal and logistical challenges to shifting minors out of adult jails and prisons, and provided recommendations to reduce unnecessary use of juvenile detention and placement.

**18. Prohibit confinement of any minor in an adult jail or prison and, to the extent funding and operational considerations allow, permit youth to remain in youth settings until age 21.**

Under current law, 16- and 17-year-olds can be held in the custody of either the local county jail or the New York State Department of Corrections and Community Supervision (DOCCS). Young people who are detained while their case is proceeding in court are held in local county jails, as are those who receive custodial sentences less than one year in length. Those who receive sentences greater than one year are committed to the custody of DOCCS and housed in state prison facilities. On any given day in New York State, there are approximately 700 16- and 17-year-olds held in local jails and about 100 more in State prisons.

The impact of incarceration of 16- and 17-year-olds in adult facilities falls primarily on youth of color: Black and Hispanic youth receive 82 percent of sentences to confinement statewide. In New York City, Black and Hispanic youth account for more than 95 percent of prison sentences for 16- and 17-year-olds.

Research has demonstrated that the use of adult prisons and jails as compared to juvenile facilities results in worse outcomes for juveniles and for community safety. A comprehensive study of youths processed in New York as adults and nearly identical youths processed in New Jersey as juveniles found that the percentage of re-arrest for youth charged with robbery and processed in adult court was 25% higher than those charged with robbery and processed in juvenile court. A follow-up study looking at the same comparison of youth further substantiated this outcome, finding a 26% higher likelihood of re-incarceration for youths adjudicated and sanctioned in the criminal court, including those that spent time in adult facilities.

Research has also shown that incarceration of minors in adult facilities places them at substantial risk of harm. Studies have found that youth under 18 represented 21 percent of all sexual violence victims in jails in 2005 and 13 percent in 2006 despite only making up 1 percent of the entire jail population. Congressional findings have concluded that juveniles are 5 times more likely to be sexually assaulted in adult rather than juvenile facilities—often within the first 48 hours of incarceration. Other forms of physical violence are also greater for youth in adult facilities, as they are twice as likely to be beaten by staff and 50 percent more likely to be attacked with a weapon than youth in juvenile facilities.

Current conditions of confinement for minors in New York State jails and prisons are substantially more correctional and less rehabilitative than youth facility settings. While local jails are required to house 16- and 17-year-olds separately from people 18 and older, minors generally have poor access to mental health services, are subject to potentially long periods in solitary confinement, and often do not have access to quality education services in jail. Minors in DOCCS facilities are currently housed together with older inmates, often share group showers, are likewise subject to potentially long periods in solitary confinement, and must often wait long periods of time to access vocational and therapeutic programming.

Removing minors from adult confinement settings presents challenges in terms of cost and capacity. Modeling conducted in support of the Commission suggests that there will be a need for 558 new secure detention beds, an additional 749 voluntary agency placement beds, and an additional 38 OCFS limited secure beds and 192 OCFS secure beds.

However, there is good reason to believe that this new detention and placement need may not materialize as expected. Counter to expectations prior to raising the age in Connecticut and Illinois, neither state experienced

the expansion in detention and placement that was expected. The average daily population in Connecticut's pretrial detention centers fell from 132 in 2006 to 94 in 2011; the year after 16-year-olds entered the juvenile system, allowing the state to close one of its three state-operated detention centers. Illinois likewise saw an 18 percent decline in its juvenile detention system following expansion of juvenile jurisdiction to 17-year-old youth who committed misdemeanors. Placement need also did not expand as predicted in either state. In Connecticut, total commitments to its juvenile placement settings began to decline prior to raise the age and continued to decline even after 16-year-olds were added. Placements in Illinois were down 22.4 percent from the time the age was raised in 2010 and the beginning of 2013. The recommendations below are designed to mitigate the need for new detention and placement capacity by reducing the current unnecessary use of those settings.

## **19. Reduce unnecessary use of detention and placement through:**

- a. Prohibition of detention and placement for youth adjudicated for first-time or second-time misdemeanors that do not involve harm to another person, and who are low-risk, except where the court finds a specific imminent threat to public safety.**

Data analyzed by the Commission revealed that custodial interventions are often used for youth who commit low-level, non-violent offenses in New York. For example:

- ▶ About 2,200 minors receive sentences to jail or time served following a misdemeanor arrest, and 80% of those involved non-violent arrest charges.
- ▶ Last year more than 250 Juvenile Delinquent youth were sent to out of home placement as a result of a case that was initially petitioned as and adjudicated for a nonviolent misdemeanor.
- ▶ In New York City, 59 percent of detention admissions are for youth charged with misdemeanor offenses.
- ▶ Over half (53%) of youth in OCFS non-secure and limited-secure care were placed as a result of a misdemeanor-level finding.

Commission analysis revealed that several other states have placed restrictions on the use of out-of-home placement for misdemeanors. Specifically, Texas, Ohio, Georgia, Mississippi, Kentucky and Florida, have enacted legislation that bans custodial options for specific categories of youth, particularly misdemeanants. Similar restrictions on the use of juvenile placements for low-risk youth who have not committed significant crimes are warranted in order to reserve confinement for only the most serious young offenders.

This balanced recommendation would prohibit out-of-home detention or placement of youth who (a) screen low risk on a validated risk assessment tool; (b) have been adjudicated for only one or two misdemeanor offenses; (c) have not caused physical harm to another person; and (d) in the court's view, pose no imminent risk to public safety. This approach would protect public safety while avoiding unnecessary, counter-productive, and costly use of confinement.

**b. Prohibition of placement for technical probation violations alone, except where 1) the court finds a specific imminent threat to public safety or 2) the youth is on probation for a violent felony offense and the use of graduated sanctions have been exhausted without successful compliance.**

Technical violations of probation supervision involve breaking rules set as a condition of probation supervision, but not commission of a new crime. For example, a youth may return home after curfew or skip school, violating terms of his probation. The use of out-of-home placement for these kinds of non-criminal rule violations was identified by stakeholders as an area ripe for reduction. Data on the number of New York State youth who are placed solely because of a technical violation of probation are inconsistently kept. However, in a survey administered to probation departments across New York State for this Commission, those that responded estimated that in 2013, 270 youth in the juvenile justice system were sent to placement solely as a result of technical violations of probation. Nationally, OJJDP reports that 16% of youth in juvenile placement had a technical violation of supervision recorded as their most serious offense leading to placement.

Several states have implemented the use of graduated sanctions to reduce the use of placement in response to technical probation violations. Hawaii, Kentucky, Kansas, and Florida all implemented formal sanctions as an alternative to placement to respond to technical probation violations. The Commission's recommendation would reserve placement only for youth who present a risk to public safety by limiting its use in response to technical probation violations. In most cases, graduated sanctions would instead be used to improve compliance with the terms and conditions of probation.

**c. Implementation of weekend arraignment for Family Court cases statewide where adult arraignment already occurs.**

Adult system processing is currently structured to arraign adults over the weekend in courts across the state. However, this kind of court access is not available in cases against juveniles outside of New York City. Instead, youth arrested and detained as juveniles must wait until Monday to see a Family Court judge if they are arrested after the Family Court closes on Friday afternoon. Shifting 16- and 17-year-olds to Family Court without implementing weekend arraignment for Family Court cases would therefore leave these youth more subject to incarceration than they currently are. Twenty-three percent of youth detained outside of New York City spend one to three days in detention, many of them waiting over the weekend in detention only to be released as soon as they are before a judge. Weekend arraignment for juveniles was implemented in New York City in 2008, using the existing adult weekend arraignment structure to hear juvenile cases. This form of weekend arraignment for juveniles should be implemented statewide where ever adult weekend arraignment already occurs.

**20. Establish family Support Centers in high-PINS referral localities to provide more robust community-based PINS services, and then eliminate detention and placement of PINS.**

PINS are youth ages 17 and under who have engaged in non-criminal "status offenses" such as truancy and running away. While these young people do not stand accused of any crime, they can be confined in non-secure detention and placement settings. In 2013, there were 1,574 PINS detention admissions and 627 admissions to out-of-home placement. The bulk of detention and placement for PINS occurs outside of New York City: in 2013, 89 percent of PINS placements and 83 percent of PINS detention admissions were ordered in counties outside of New York City.

Analysis completed by the Office of Children and Family Services in support of the Commission's work showed that New York State spends over \$100 million annually to hold PINS youth in detention and placement. This expensive practice is contrary to best practice standards for these youth who have not committed any offense. The most effective interventions for PINS youth have been shown to include: diversion from court, immediate response, a triage process, accessible services that engage the entire family, and ongoing quality assurance of program effectiveness.

Connecticut has developed a promising model that reflects these best practices to respond to the needs of families of status-offending youth who were previously served through the courts. In October, 2007, Family Support Centers (FSCs) opened in the four jurisdictions with the highest numbers of status offense complaints. In lieu of court referrals, those status-offending youth who are in crisis or deemed high-risk after being screened by a probation officer are referred to a FSC. The FSC multiservice model requires caseworkers to contact families within three hours of receiving a referral. They conduct an initial screening to determine the appropriate next step for families, including a comprehensive assessment and planning of services that can be offered within the center. FSC officials work to strengthen families, provide treatment services, reconnect youth with family and schools (in cases of truancy), and increase the skills of youth and family in managing status offense behavior. Services provided to youths and families diverted to FSC include counseling, mediation, mental health, and respite care.

During the first six months after the 2007 implementation of FSCs, the number of status offense court referrals fell by 41%, and more than one year later no youth charged with a status offense had been securely detained. From 2007 to 2009, 81% of youths who successfully completed an FSC program had no further involvement in the juvenile justice system.

The Commission recommends that New York reinvest some of the resources currently used for PINS out-of-home detention and placement to support this robust model of effective community-based intervention. As this service capacity is developed, the detention and placement of PINS youth should be prohibited, reserving these costly settings only for youth who present a significant risk to public safety.

## EFFECTIVE SENTENCING, PLACEMENT, & PROBATION SERVICES

Providing access to effective interventions for 16- and 17-year-olds whose cases result in either an adjudication of delinquency or a criminal finding is critical to successfully raising the age of juvenile jurisdiction. The Commission's recommendations below address the need to shift to a determinate sentencing structure for minors who are sentenced in the criminal courts, recommend community-based supervision and custodial settings that would provide the most effective interventions for 16- and 17-year-olds, and identifies a continuum of effective interventions for those youth who may age into the DOCCS system.

**21. Use statutory Juvenile Offender and Youthful Offender sentences for offenses committed at ages 16 and 17 that are sentenced in criminal court, except for Class A felony offenses that are not Juvenile Offender crimes. For Class B violent felony offenses, the court should have statutory discretion to impose a longer adult sentence if the prosecution shows aggravating circumstances, including severity of injury or gravity of risk to public safety.**

Supreme Court jurisprudence has established that the most extreme adult sentences are rarely, if ever, appropriate for youth under age 18. Through a ban of the juvenile death penalty as well as a ban on automatic

life without parole for minors, the Supreme Court has applied a developmental approach to sentencing of minors for the most egregious offenses. Reform of New York's sentencing structure for 16- and 17-year-olds would enshrine in law the reality that sentences in the upper range of adult sentencing are rarely appropriate for a teenager who retains a real capacity for rehabilitation. In addition, sentences for violent felony offenses that are not Juvenile Offender crimes for 16- and 17-year-olds should not be longer than existing Juvenile Offender sentences that would apply to 16- and 17-year-olds under these reforms.

At the same time, however, stakeholders consulted in support of the Commission's work pointed to those very rare, but egregious cases where a 16- or 17-year-old presented a major, ongoing threat to public safety. To account for those cases, the Commission concluded that it makes sense to retain the current sentencing structure solely for Class A felonies that are not Juvenile Offender crimes and to provide an option for longer sentences if a 16- or 17-year-old commits a Class B violent felony and the prosecution can make a showing of aggravating circumstances, including severity of injury or gravity of risk to public safety.

## **22. Use determinate sentencing for youth sentenced under Juvenile Offender or Youthful Offender statutes, including 16- and 17-year-olds.**

Stakeholder interviews and focus groups, as well as extensive discussions with experts in this area, identified serious concerns about the impact of the current *indeterminate* Juvenile Offender and Youthful Offender sentences on youth. In particular, stakeholders highlighted the uncertainty that results from indeterminate sentencing and the challenges that such uncertainty creates for effective programming and re-entry planning during placement. Because youth can be released by the Board of Parole at different points over a period of years, or not at all, under the indeterminate sentencing structure, there is no capacity to know when release will occur, to create an institutional case plan structured to complete programming in a timely manner, or to develop a strong plan for re-entry supports.

It is also difficult to help youth serving indeterminate sentences to set personal goals and motivate them to focus on their education and training when the timing of their release is so uncertain. Under the determinate sentencing structure, good behavior is guaranteed to reap the benefit of an early release and therefore provides strong motivation for completing programming and following rules while confined. However, under the indeterminate structure, youth may do everything required of them while confined and still not be released by the Board of Parole. This inability to tie good behavior to certainty of an early release can serve as a disincentive for good behavior and, at times, leave youth feeling that there is no reward for following the rules and completing programs. This is particularly inapt for adolescents who are otherwise often more susceptible to rehabilitation than adults.

Shifting to a determinate structure would facilitate certainty in release planning and create motivation for youth to behave while in custody, as they would know with certainty when they can be released if they follow the rules. The Sentencing Commission recently completed several years of analysis on how to best shift from an indeterminate to a determinate sentencing structure and their recommendations should be considered when developing a determinate range in Juvenile Offender and Youthful Offender sentencing.

## **23. Develop a continuum of effective community-based services at the local level to be used by probation, including expansion of JRISC, to maintain more high-risk youth in the community and reduce recidivism.**

Community-based supervision provided to 16- and 17-year-olds, whether adjudicated in Family Court or sentenced in the criminal court, should provide supervision with evidence-based interventions individually

tailored to reduce the risks and address the needs presented by the youth. While some counties have a robust continuum of evidence based interventions for youth on probation, the survey of probation departments conducted for the Commission showed that service capacity varies greatly across county lines, both in terms of range of services and current capacity to expand services to a new population of youth. For example, while all counties that responded to the survey reported access to psychological evaluation, nearly half of them also reported a waiting list to access that service. In addition, while probation departments in larger counties tended to report access to evidence-based therapeutic interventions, over half of the 52 localities that provided information on these services reported fewer than three evidence-based services and six counties reported no evidence-based services for use during probation supervision.

The Juvenile Risk Intervention Services Coordination (JRISC) Program is an existing State initiative that links enhanced probation supervision with evidence-based programs, providing an effective model designed to reduce recidivism among high-risk youth and, in turn, reduce the need for detention, placement, and incarceration. The program began in 2010 and, in its first four years, has served just almost 1,000 youth across the seven participating counties at a total cost of about \$3.5 million. Outcomes of the program are promising, with a 71% rate of program completion in 2013, and within those cases, a 74% rate of risk reduction. JRISC has been shown to maintain high-risk youth in the community effectively and the Commission recommends that these services should be expanded beyond the seven participating counties.

Availability of these kinds of evidence-based services is critical to the success of any justice system for youth, as they reduce recidivism, produce better outcomes for youth in terms of education and substance abuse, and even result in a positive preventive impact for other youth in the family. Expanding access to these kinds of effective programs for 16- and 17-year-old youth is necessary to improve outcomes for youth and the community.

#### **24. Develop residential facilities using best practices models to support the needs of older adolescents, including:**

##### **a. For newly required placement capacity, establish a network of new, small facilities with staffing and programming consistent with the Missouri approach;**

Development of juvenile residential capacity to meet the new demand that would result from raising the age provides New York a unique opportunity to create new residential programs from the ground up. The Commission's review of the most promising models for residential placement of older adolescents brought focus to the model implemented in Missouri. In 2001, the American Youth Policy Center identified the Missouri approach as a "guiding light" for reform in juvenile justice. Over the past two decades, Missouri's Division of Youth Services (DYS) has developed a model of care deeply rooted in rehabilitation with extraordinary results. Key components of the model include: smaller facilities located near the youths' homes and families; closely supervised small groups and a rigorous group treatment process offering extensive and ongoing individual attention; emphasis on keeping youth safe not only from physical aggression but also from ridicule and emotional abuse through constant staff supervision and supportive peer relationships; development of academic, pre-vocational, and communications skills that improve their ability to succeed following release; involvement of parents and family members as partners in the treatment process and as allies in planning for success in the aftercare transition; and considerable support and supervision for youth transitioning home from a residential facility. Over two-thirds (67.1 percent) of youth discharged from the Missouri facilities remain law-abiding. In addition, an overwhelming majority of youth exiting custody were productively engaged in

school or employment at discharge. New York should replicate this model in developing new placement capacity for 16- and 17-year-olds in different regions across the state.

**b. Expansion of the August Aichhorn RTF model for justice-involved youth with serious mental health disorders; and**

The current model of care provided by the August Aichhorn Center for Adolescent Residential Care is a promising model that should be expanded to meet new need for 16- and 17-year-old youth with serious mental health disorders who are sent to juvenile placement. A partnership between the Office of Mental Health (OMH) and the Office of Children and Family Services (OCFS), August Aichhorn operates a Residential Treatment Facility (RTF) for youth in OCFS custody. The RTF provides the highest level of mental health care available in the State system and is reserved for youth with serious mental health disorders. The program provides a kind of care and supervision that is significantly different than traditional correctional settings. The model does not use room seclusion or mechanical restraints, provides full-day education in a classroom setting, engages youth in positive activities in a community room or outdoors when school is not in session, houses youth in rooms that resemble a dormitory setting, offers the constant support of therapists, and operates on the philosophy that the program cannot achieve success by excluding, transferring, or discharging the most troublesome youth on the basis of their special needs. The model has produced promising outcomes in terms of public safety as well as positive outcomes for youth. The recidivism rate for youth who completed the program is only 39 percent compared to a recidivism rate of 60 percent among a control group. The program has accomplished this with no transfers to psychiatric centers or other hospitals, no run-aways from the building, no sexual assaults or deaths and only one serious self-inflicted injury in 23 years.

**c. Programs that meet the specialized needs of LGBTQ youth.**

Like all youth, LGBT youth also need access to appropriate programs and services prior to placement through all phases of system involvement. A continuum of appropriate programs and services should be available from initial system contact through re-entry. If justice systems do not simultaneously assure that community-based alternatives and diversion programs are affirming environments, LGBT youth may be set up to fail, leading to placement. The Commission supports careful consideration of the needs of LGBTQ youth in development of community-based and institutional programming to meet the needs of 16- and 17-year-olds.

**25. Reduce recidivism among the 18 – 24 population in the criminal justice system by:**

**a. Using data-driven, risk-based methodology to prioritize DOCCS inmates aged 18-24 for effective programs;**

While the Commission recommends use of juvenile facilities for all minors and supports retention of youth in those facilities until the age of 21 to the extent resources allow, some youth would inevitably still shift into the adult prison system as a result of their age at sentencing and their sentence length. In addition, there is currently a substantial population of 18- to 21-year-olds at DOCCS (1,982 inmates as of 8/1/14), the vast majority of whom committed their offenses when they were over 17. These young people screen exceptionally high risk, with the majority of 18- and 19-year-olds at DOCCS scoring at the highest level of risk on the COMPAS risk instrument used in the adult system. However, research has also shown this population to be particularly amenable to intervention. New York State-specific analysis found high-risk offenders and offenders under the age of 25 have larger decreases in recidivism upon receipt of many types of effective programming, and consistently show larger reductions in victimization, than those over 25. DOCCS should therefore prioritize effective interventions for this population.

**b. Using technology to expand educational opportunities for 18-21-year-olds in DOCCS custody; and**

General education and vocational education have been shown to significantly reduce recidivism among the high risk prison population, with general education producing a 13 percent reduction in recidivism and vocational education producing a 12 percent reduction in recidivism. DOCCS should expand capacity to provide the crime-reducing interventions to their youngest population through the use of technology and distance learning.

**c. Considering use of discrete housing units for youth transitioning from juvenile facilities to DOCCS and for older adolescents at DOCCS.**

Because a small subset of youth are likely to transition from a juvenile setting to a prison setting, it is important to draw attention to programmatic continuity that supports this transition. Because DOCCS is currently building discrete units to come into compliance with PREA's separation requirements for 16- and 17-year-olds, unique discrete housing capacity may be available within selected DOCCS facilities after minors are removed as a result of raising the age. These discrete units could provide an opportunity for specialized programming and structure for older adolescents at DOCCS and to target transition services to older adolescents moving from juvenile to adult confinement.

## **RE-ENTRY TO THE COMMUNITY**

Implementation of the reforms already discussed to raise the age will fail to reach their full potential for crime reduction and youth success if re-entry planning and services are not central to the effort. The Commission focused on reforms to re-entry planning and implementation that would best foster successful returns to the community for 16- and 17-year-olds. The Commission recommends several actions to move New York State practice closer to the best practice model.

**26. Establish and implement new OCFS regulations requiring evidence-based risk-needs-responsivity (RNR) framework for case planning and management in private- and State-operated placement.**

Research has shown that specific practices and interventions designed to address criminogenic risk and needs are highly effective in reducing recidivism among youth after they return to the community. Existing juvenile placement settings do not use the kind of risk assessment and case planning central to targeting and reducing criminogenic risk. Regulations and policies should be changed to require this effective case assessment and intervention model in order to reduce recidivism among youth returning from placement.

**27. Require that youth sentenced in the criminal courts and released from an OCFS facility receive post-release supervision from OCFS, instead of DOCCS, to facilitate better re-entry planning and implementation.**

Continuity of care is critical for effective reentry. However, the current system for Juvenile Offenders bifurcates responsibility for residential care (OCFS) and community supervision (DOCCS), creating enormous challenges for continuity of care. The Commission recommends reform to ensure that planning for and supervision of community-based interventions are provided by the agency responsible for residential care.

**28. Replicate the Monroe County juvenile reentry task force in counties with highest juvenile case volume.**

Best practice in adolescent reentry calls for coordination of reentry supports and services beginning during placement and continuing after youth return home. The Monroe County Reentry Task Force is a promising model for the complex coordination needed for successful reentry and should be replicated. The Task Force has a wide range of reentry services – substance abuse, mental health, housing, literacy, employment skills, education, etc. – as formal members or partners to ensure youth returning to Monroe County get the services they need. Task Force members come together with the family before youth are released to set up a supportive plan for reentry and youth continue to be supported by the Task Force after returning home. In the first 19 months of the initiative, the Task Force served over 90 youth and families, and youth who participated in the program had a recidivism rate of 20%, compared to a norm of 63%.

**29. Require reasonable efforts to establish at least one connection between placed youth and a supportive adult in the home community before leaving placement.**

Providing youth a different set of connections in their home communities than those they left can sometimes be the key to a successful return. Whether it is a relationship with a faith-based community, a neighborhood recreation center, a community garden, a center for the arts, or another positive local resource, supports from peers or adults with positive attitudes who engage in law-abiding activities can provide youth critical support once they are no longer in a program. Placement settings should be working during placement to foster these relationships for youth in order to strengthen their attachment to positive supports at home and increase likelihood that youth will connect with them after they return to the community.

**30. Expand availability of supportive housing for older youth at release.**

Many stakeholders emphasized the unique need that older adolescents have for supportive housing when they return to the community. As 16- and 17-year-olds become 18- and 19-year-olds while in placement, their capacity to return to their family of origin may change. In addition, return to the home they left may not be the best plan to support successful reentry as families may be experiencing housing instability or the youth may need to return to a neighborhood with more positive supports than those he had in the neighborhood he left. Further, some youth do not have a family to whom they can return. Supportive housing is an important resource to provide a community-based residential option for older adolescents who need a housing resource at reentry as it combines permanent, affordable housing with services supports to achieve housing stability and independence in the community.

## **ADDRESSING THE COLLATERAL CONSEQUENCES OF A CRIMINAL RECORD**

Every society must strike a balance between, on the one hand, affording young people a “second chance” to rebound from transgressions to become productive adults and, on the other hand, ensuring that offenders can be prosecuted and sentenced effectively for their crimes against a community. At present, New York is essentially failing on both counts.

Unlike many states, except for the Youthful Offender statute discussed below, New York has no other meaningful way for someone who committed a non-violent felony or misdemeanor at a young age to have that conviction expunged or sealed even after a lifetime free of any other crimes. The negative collateral consequences that result from a criminal record are serious. From opportunities for education and employment

to barriers in housing and public benefits, people with criminal histories can face a myriad of challenges that compromise their capacity to maintain stability in the community. That is a problem not only for the individual in question, but also for the community itself that suffers mightily when a former offender cannot get an education, serve in the armed forces, or find gainful employment. The Commission found this to be one of the areas in most pressing need for change.

At the same time, the current laws deprive law enforcement officials and judges of the information they need to charge and sentence properly the few repeat violent offenders that can plague a community. In particular, if a minor commits a violent felony offense and receives a Youthful Offender adjudication, that information cannot be used in sentencing if that person commits subsequent violent felony offenses. This information gap undermines capacity to protect public safety by recognizing the significant threat posed by such a rare, persistent violent offender.

The Commission recommends reforms to make New York a leader instead of a laggard in the efforts to reduce collateral consequences of a criminal record while more effectively protecting public safety against persistently violent offenders.

**31. Create a new presumption to grant Youthful Offender status in criminal cases against offenders who are under 21 if the youth has no previous felony finding. Allow the presumption to be rebutted by the district attorney in the interest of justice. While Youthful Offender eligibility should be extended to 19- and 20-year-olds, current adult sentencing should be retained for 19- and 20-year-old Youthful Offenders.**

The Youthful Offender statute provides the opportunity for any youth under the age of 19 to have a criminal conviction substituted with a non-criminal adjudication at sentencing. It allows for reduced sentences and provides confidentiality to the record of adjudication. Youthful Offender status is currently used extensively in cases of 16- and 17-year-olds – converting 75 percent of criminal convictions to Youthful Offender adjudications. There is currently no opportunity for 19- and 20-year-olds to receive Youthful Offender status and Youthful Offender status does not have to be granted on first-time felony cases. This tool should be expanded to all people under age 21 and should be presumptive for all first offenses (other than for Class A felonies, armed felonies, first degree rape, criminal sexual act in the first degree, and aggravated sexual abuse cases – which are currently restricted from Youthful Offender status) in recognition of the solid research showing that people under 21 are all in a developmental stage that makes them amenable to change. In appropriate cases, that new presumption could be rebutted upon a showing by the district attorney.

**32. Require all accusatory instruments in Youthful Offender eligible cases, except sex offenses, to be filed as sealed instruments prior to trial.**

Modern technology has compromised the capacity for Youthful Offender status to provide true confidentiality for youth. The advent of internet search engines has resulted in a functional record of criminal involvement for youth whose names are in the press regardless of the subsequent confidentiality of the official record. While the current Youthful Offender statute provides for sealed accusatory instruments in apparently Youthful Offender-eligible misdemeanor cases, there is no analogous protection for felony level offenses. Therefore, a youth who is ultimately granted confidential Youthful Offender status at sentencing, or whose case ends in dismissal or acquittal, may still be readily connected to the offense through an internet search. Accusatory instruments should be filed as sealed in all Youthful Offender-eligible cases, except for sex offenses, in order

to preserve the intended confidentiality of the Youthful Offender status and protect those defendants whose cases end in dismissal or acquittal.

**33. Allow youth who receive Youthful Offender status on a drug offense to be eligible for conditional discharge as those adults who are convicted of these offenses are so eligible.**

The current Youthful Offender structure prohibits youth who receive Youthful Offender status for drug offenses to receive a conditional discharge while adults convicted of the same offense are eligible for a conditional discharge. Youthful offenders should not be penalized for their status through prohibition of the possibility of a conditional discharge.

**34. Allow violent felony Youthful Offender adjudication for anyone 16 or over to be used as a predicate in sentencing for subsequent violent felony charging and sentencing only.**

As currently structured, the Youthful Offender law can prevent appropriate intervention in the wake of repeated violent crimes committed by an offender. New York State Law allows for enhanced sentencing for repeat violent felony offenders. But because these sentences require a previous conviction for a violent felony offense, a Youthful Offender adjudication for a violent felony offense does not count as a predicate at sentencing on a subsequent violent felony. Analysis of the 10-year reconviction rates for 3,088 youth who received Youthful Offender status for a violent felony offense in 2002 and 2003 showed that 19 percent of those youth were convicted for a new violent felony offense within 10 years. For that small but dangerous group of offenders, the current law prevents law enforcement agencies and courts from protecting public safety by using the knowledge of prior violent felony offenses to inform charging and sentencing decisions.

**35. Create the capacity to seal one conviction (excluding violent felonies, Class A felonies, homicides, and sex offenses) for crimes committed under age 21.**

Youth under 21, convicted in criminal court, who do not get the benefit of a Youthful Offender status at sentencing, have no capacity to get relief from their criminal record for the rest of their lives. Similarly, youth convicted as Juvenile Offenders and those over the age of criminal responsibility with an adult conviction have no capacity to obtain relief from their criminal record, even if they never commit another offense. A criminal record often results in a variety of negative collateral consequences, including detrimental effects on housing, employment, education, public benefits, and family rights. At the same time, research has shown that if a first-time offender goes three to four years without recidivating, the likelihood that he will recidivate in the future is actually lower than the general population.

When compared with national practices on criminal record sealing, New York State's policies appear very restrictive. Thirty-one states provide some capacity to seal misdemeanor records and 27 states provide some capacity to seal felony records. The Commission recommends that New York allow for sealing after two years without a conviction (or after release from probation supervision without a new conviction if the term of probation was beyond two years) for a misdemeanor conviction. The waiting period for a felony conviction should be five years. The nature of the seal would prevent disclosure of the conviction for any civil purpose, but would continue to allow law enforcement and the courts to have access to the record solely for law enforcement purposes.

Significantly, the process for obtaining these seals would be a simple administrative application to the Division of Criminal Justice Services (online or via mail), eliminating the need for people to obtain counsel or engage in a judicial process. If, however, the judge decides at sentencing that it is in the interests of justice to require the

youth to return to court to request the seal, the sentencing judge could mandate use of a judicial process with district attorney notice to request the seal. This comprehensive sealing regime would place New York at the forefront of efforts to help young offenders to get back on the right track while protecting the safety of the community.

**36. Create the capacity to seal one Juvenile Offender conviction (excluding Class A felonies, homicides, and sex offenses) upon application to the court, if the person remains conviction-free for 10 years after release from confinement.**

Record relief should also be available to youth who receive a criminal conviction for a Juvenile Offender crime. However, given the severity of those offenses, a ten-year waiting period should be required. In addition, because of the severity of Juvenile Offender crimes, the Commission concluded that requests for the seal of a Juvenile Offender conviction should be made through the sentencing court. A very small number of youth receive a criminal conviction as Juvenile Offenders (2,992 between 1979 and 2013), and of those youth, only 20% do not reoffend. Therefore, adding capacity to seal Juvenile Offender records through a judicial process would not generate a significant new case load in the criminal courts.

**37. Allow any person whose conviction occurred prior to the effective date of the law passed to implement these reforms, and who would be otherwise eligible for a seal as described above, to apply to the Division of Criminal Justice Services to obtain that seal, with notice of that application to the district attorney and opportunity for the district attorney to require the seal request to be considered by the court in particularly egregious cases.**

The Commission considered carefully the wisdom of applying this new sealing policy retroactively to those who would otherwise be eligible but who committed their offenses prior to the proposed date for raising the age of criminal responsibility (*i.e.*, January 1, 2017 or 2018). Data analysis revealed 102,901 individuals who received one criminal conviction in New York State for a non-violent felony (excluding Class A felonies, which are not classified as violent felony offenses) or a misdemeanor between the ages of 16 and 20 and who have no subsequent conviction and no arrests that are pending. This number likely overestimates the number of people who would actually apply for a seal as it does not take into account people who have not yet reached the end of the required waiting period as well as those who may no longer reside in New York, aged out of the workforce, or simply do not feel the need to have their conviction sealed.

The Commission concluded that there is no sound reason not to apply the proposed sealing policy to those whose convictions occurred prior to the passage into law of the reforms proposed in this report. Indeed, the same compelling reasons for making the proposed seal available to future offenders apply equally to those whose offenses have occurred already. Nor are there insurmountable barriers to retroactive implementation in this manner. Retroactive application of the opportunity to seal one criminal conviction during adolescence should be an administrative process handled by DCJS that does not require people to obtain counsel or to petition the court. However, it is important to establish an orderly system to notify the applicable district attorney when a request for a retroactive seal is received and to provide the district attorney the opportunity to require particular requests to be made through the court in particularly problematic cases. Implementation of a process to provide this kind of criminal record relief should not await implementation of the other reforms proposed by the Commission and should be put in place as soon as is administratively practicable.

**38. Automate information exchanges between entities necessary to ensure that juvenile records are destroyed as required by statute**

Accuracy of juvenile delinquency records is dependent on many different entities that may dispose of a youth's case timely providing such case processing outcomes to DCJS. Local probation departments, presentment agencies, the courts, OCFS and local departments of social services all play a role in providing the information necessary for destruction of juvenile records in various circumstances. There are currently no automated systems in place to facilitate these notifications. While these processes have been sufficient to maintain the current volume of delinquency records, the Commission's proposed expansion of delinquency case volume will demand an automated delinquency record maintenance process to ensure that juvenile records are destroyed as currently required by the Family Court Act and accurate information is maintained.