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Mr Jonathan Elliott
Committee Director
Legislative Assembly
Committee on Law and Safety
Parliament House
6 Macquarie Street
Sydney NSW 2000

By email: lawsafety@parliament.nsw.gov.au

Dear Mr Elliott,

Inquiry into the adequacy of youth diversionary programs in NSW

Thank you for the opportunity to provide a submission to the Legislative Assembly's Committee on Law and Safety's Inquiry into the adequacy of youth diversionary programs in NSW. The Children's Legal Issues and Indigenous Issues Committees have contributed to this submission.

1. Summary of the Law Society's position

We fundamentally support measures to divert young offenders from the formal criminal justice system. As a party to the UN Convention on the Rights of the Child¹ Australia has committed to implement appropriate diversionary programs:

State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and in particular:

- (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

In our view, a review of the adequacy of youth diversionary programs should take a holistic view of the factors pushing children and young people into contact with the juvenile justice system, together with a recognition that because of a child's dependence and immaturity, special guidance and assistance is required to navigate the justice system. Access to legal advice and health and welfare support services is crucial to increasing the protective factors and addressing criminogenic risks associated with youth offending.²

¹ Convention on the Rights of the Child, opened for signature 20 November 1989, 44 UNTS 25 (2 September 1990) art 40(3)(b).

² See s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) which sets out the principles for dealing with children under the Act, including the need for children, because of their state of dependence and immaturity, to have guidance and assistance.

The Law Society would like to acknowledge at the outset that assumptions are often made about children in the implementation of diversionary measures. For example, that they have parental support. Where parental support is unavailable, or is lacking, a child (through no fault of their own) will face greater barriers than adults with access to justice. A 12 or 13 year old young offender is required to travel to attend a court date or to receive a caution from police, however, such a child is too young to work to earn money to pay for their own transport. A child may lack the knowledge and maturity to navigate mental health services to obtain a mental health diagnosis necessary to justify to the court the need for a diversionary option under mental health legislation.³ For these reasons, proper funding of support services for young offenders is crucial to ensuring that the legislation and policies underpinning diversionary efforts are effective and the underlying causes of youth offending addressed. This is a recurring theme throughout this submission.

We are particularly concerned about the overrepresentation of Aboriginal and Torres Strait Islander young people in the criminal justice system and note the rise in the incarceration rate of Indigenous young people (10 – 17 years) who make up approximately 4 per cent of the NSW population but make up approximately 51 per cent of the NSW juvenile detention population (persons in full-time custody).⁴ We strongly support initiatives to expand the Youth Koori Court, together with a greater focus by government on justice reinvestment initiatives that are community-led to ensure Indigenous self-determination and culturally responsive approaches.

2. Overview of diversionary legislation in NSW for young offenders

Young Offenders Act 1997 (NSW) and Children (Criminal Proceedings) Act 1987 (NSW)

The *Young Offenders Act 1997 (NSW)* ('YOA') is the principle diversionary legislation for young offenders in NSW. The YOA, which drew on the New Zealand model set out in the *Children, Young Persons and their Families Act 1989 (NZ)*, became law in April 1998, and sets out a graduated hierarchy of responses to young offenders (warnings, cautions and youth justice conferences; with court as the last resort). The YOA also contains general principles of young people's rights to legal advice, victims' entitlement to information and family and community involvement. The YOA has now been law for 20 years, and over that period many of the strengths of the legislation and commitment to collaborative working practices have been weakened. In some cases, this has occurred through legislative change and in other cases through changes in commitment to the operation of the YOA by the principle agencies involved.

The second important piece of legislation in NSW covering diversionary principles is the *Children (Criminal Proceedings) Act 1987* ('CCPA'). The CCPA governs the conduct of criminal proceedings against young people, and was amended at the time of the introduction of the YOA to permit courts to administer a YOA caution, and refer young offenders to youth justice conferences.

Implementation of recommendations from previous government review in 2011

The NSW government initiated a review of the YOA and the CCPA in 2011 and at the time the Law Society prepared a comprehensive submission to the Consultation Paper released by the Department of Attorney General and Justice (**enclosed**). The Law Society's Children's Legal Issues Committee (formerly the Juvenile Justice Committee) is disappointed that the final report on the review of the YOA and the CCPA was never released by the

³ *Mental Health (Criminal Procedure) Act 1990 (NSW)*, s 32.

⁴ Just Reinvest NSW, *A Justice Reinvest Approach for NSW: 2015 Election Policy*, (2015), accessed at: <http://www.justreinvest.org.au/wp-content/uploads/2016/02/2015-Election-Policy-Doc-Final-1.pdf>, 6.

Department. A number of the Law Society's recommendations remain relevant. We submit that the following recommendations remain applicable to supporting the diversion of children out of the criminal justice system:

1. The general exclusion of all strictly indictable offences from the YOA is inappropriate;
2. The range of offences covered by the YOA should be extended to cover all offences for which the Children's Court has jurisdiction to deal with to finality.
3. Traffic matters should be able to be dealt with under the YOA and the CCPA. We also submit that it is artificial to argue that traffic matters are more "adult like" than other offences, and should be dealt with by the adult jurisdiction where the child is of licensable age. We note that the YOA covers significantly more serious matters such as offences of break and enter, obtain financial advantage by deception type matters or serious offences of violence.
4. Offences under the *Crimes (Domestic and Personal) Violence Act 2007* (NSW) should be able to be dealt with under the YOA in appropriate circumstances. We also submit that it is an anomaly that a charge of breaching an AVO is excluded from the YOA, whereas a charge of assault (even assault occasioning actual bodily harm or recklessly inflicting grievous bodily harm), constituted by the same conduct, can be dealt with under the YOA.
5. Warnings should be available for a broader range of offences.
6. The provisions governing a child's entitlement to a warning need to be extended.
7. The provisions limiting the number of occasions on which a caution can be given should be repealed.
8. More guidance should be provided under the YOA on what constitutes an admission for the purposes of the eligibility requirements for cautions and youth justice conferences.

Cautions

The Law Society would like to repeat and reinforce its previous views on the use of cautions and its support for the removal of limitations on the number of occasions on which a caution can be given by police and by courts. We are also concerned with anecdotal reports that cautions are increasingly being used on younger children (particularly Aboriginal children and children in regional and remote areas) for relatively minor offences and are drawing children into the criminal justice system at an earlier age. At a minimum, we suggest that the Children's Court should have broader discretion under the YOA to award more cautions than the current limit of three cautions afforded under s 20(7) of the YOA.

The Law Society notes that the YOA also provides that a police officer may caution a child if the child admits the offence.⁵ We are concerned by reports that some police are under a misapprehension that for a child to make an admission they must make this on an electronic recording of interview of suspected persons (ERISP). To effect the ERISP, a child is likely to have increased contact with police (as they will oftentimes need to be taken to the police station – which in rural areas might require significant travel – and may remain locked in a cell while waiting to be interviewed via a ERISP). We are particularly concerned that obtaining a caution from the court by a young offender stating "I admit" is a much simpler process than obtaining a caution by police.

The Law Society notes that a further concern raised by the use of ERISPs is that some police utilise the ERISP as an investigative tool, which we submit may work against the principles and philosophy of the YOA to promote diversion.⁶ We understand that s 67 of the YOA was drafted to provide protections for admission made during the giving of a caution (i.e. to make such statements inadmissible). Our view is that the increased use of ERISPs in unnecessary situations erodes the original intent of the YOA.

⁵ *Young Offenders Act 1997* (NSW), s 19(b).

⁶ For example, under an ERISP a child may disclose other alleged offences that they have committed or other persons have committed, thus drawing them into the criminal justice system further.

We support an amendment to the YOA to expressly provide that for the purposes of a caution it is not necessary to use an ERISP, or any other form of interview, to record a child's admission. The Law Society considers that the promotion of diversionary efforts when receiving a caution are assisted where a simpler process is facilitated for the recording of an admission (for example, a child could sign a standard form or a notebook which merely states that they admit the offence).

Other offences

The Law Society considers that there are other offences which could be appropriately dealt with under the YOA. We submit it may be appropriate for children to be able to benefit from the diversionary provisions afforded under the YOA for the following offences:

1. The Law Society submits that there are circumstances where sexual offences should be dealt with under the YOA on the basis that in the experience of some legal practitioners the offending may be the result of sexual experimentation and exploration, and may not be an indication of any propensity towards harmful behaviour.⁷ In particular we note that certain sexual offences committed consensually by similar age children are nevertheless not currently eligible for the YOA; for example, some sexual intercourse with a child under 14, acts of sexual touching with children under 16, and certain State and Commonwealth sexting offences.
2. We submit that graffiti offences for young offenders be dealt with under the YOA, rather than under the *Graffiti Control Act 2008* (NSW). Practitioners have reported that young offenders are being brought to court and sentenced with a fine (whereas under the YOA, a caution could have been used as an appropriate diversionary measure). We recommend removing the prohibition on diverting offences under the *Graffiti Control Act 2008* (NSW) to be dealt with under the YOA.

Youth Justice Conferences

The Law Society remains committed to the effective operation of youth justice conferences ('YJC'). We are pleased that research indicates that offenders and victims report high levels of satisfaction with the conference process.⁸ We have some concerns with reports that YJCs are being underutilised, and outcome plans are not being properly developed and resourced, particularly in regional areas.⁹

Research published in 2017, which involved interviewing all 12 Children's Court magistrates in NSW, found that some magistrates are hesitant to refer young offenders to diversionary programs if they perceive them to be poorly resourced and implemented.¹⁰ We submit that better resourcing would enable more individualised responses to young people's offending and may in turn address the concerns of magistrates about limitations of YJC.

Inconsistent use of diversionary legislation by police

The Law Society is concerned about anecdotal reports that there is a current widespread police practice of arresting a young person whose offending may come within the scope of the YOA (and before giving them the opportunity to seek legal advice and to make admissions). It is our view that this is contrary to the spirit of the YOA, and it is well

⁷ See for example, *Crimes Act 1900* (NSW), s 66C (sexual intercourse) – where there is consensual sex between two children of a similar age who cannot legally consent because one or both are under the age of 16 years.

⁸ Paul Wagland, Bianca Blanch and Elizabeth Moore, 'Participant satisfaction with Youth Justice Conferencing' *NSW Bureau of Crime Statistics and Research* (June 2013), accessed at: <http://www.bocsar.nsw.gov.au/Documents/CJB/cjb170.pdf>

⁹ Kelly Richards, Lorana Bartels and Jane Bolitho, 'Children's Court Magistrates' Views of Restorative Justice and Therapeutic Jurisprudence Measures for Young Offenders' (2017) *Youth Justice*, 17(1) 22-40.

¹⁰ *Ibid* 35.

established that ill-advised arrests may escalate conduct by young people, which may have the effect of drawing young people into the criminal justice system, rather than diverting them. The Law Society suggests that there is a need for a specific provision in the YOA clarifying that a young person must not be arrested unless there is no other appropriate way of dealing with them. This would bring the YOA more in line with the Convention on the Rights of the Child (in particular, Article 37(b) which states that arrest should be a measure of last resort).

We also submit that the current legislative references in the YOA to actions by the NSW Director of Prosecutions ('DPP') reflected an intention for the DPP to undertake a further screening of police YOA diversion decisions prior to the court listing. These provisions allow for the DPP to review a charge decision by police (where a matter has been referred to court and prior to its listing at court) and refer the matter to a youth justice conference.¹¹ We understand that the YOA was drafted in this way in the context of discussions at the time about the DPP replacing police prosecutors in appearing in Local and Children's Courts in NSW, which had been a recommendation of the Royal Commission into the New South Wales Police Service (Wood Royal Commission). If this change had occurred the DPP, when preparing matters for court, would have considered eligible YOA matters prior to court listing and possibly made some further diversionary decisions. That this change did not come about means that an intended additional diversionary step, which would have been an intermediary decision between police and court, has not been activated.

We are also concerned about the use of the Suspect Targeting Management Plan ('STMP') which is a preventative crime tool administered by the NSW police which aims to prevent future offending by targeting repeat offenders and people police believe are likely to commit a crime.¹² Under the STMP individuals are targeted by police for increased home attendances and police powers to stop, search and direct an individual to move on wherever police encounter the individual.¹³

Concerns with the STMP were highlighted by the Public Interest Advocacy Centre and the Youth Justice Coalition report '*Policing Young People in NSW: a study of the Suspect Targeting Management Plan*' ('the STMP report') which indicated that young people and Aboriginal people are being targeted unfairly, often in circumstances where the reasons for targeting were not disclosed and were unclear to those young persons. Empirical data indicates that 48.82% (104 out of 213) of all the targets were young people and 44.1% (94 out of 213) of those young people targeted identified as Aboriginal. We are particularly concerned about reports that the STMP has been used against children as young as eleven.¹⁴ The Law Society's views regarding the STMP are set out below:

1. The STMP appears to run counter to the current legislative and policy framework dealing with juveniles in NSW and may undermine diversionary efforts and a therapeutic approach to juvenile justice.
2. NSW police should discontinue applying the STMP to children under 18.
3. Those young people considered to be at medium or high risk of re-offending should be directed to evidence-based prevention programs that address the cause of re-offending, rather than placement on an STMP.

¹¹ See for example, *Young Offenders Act 1997* (NSW), s 40.

¹² Youth Justice Coalition, '*Policing Young People in NSW: A Study of Suspect Targeting Management Plan*' (25 October 2017), available at: <https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf>, 1.

¹³ Ibid.

¹⁴ Ibid 11.

3. Increasing the age of criminal responsibility

Increasing the age of criminal responsibility in NSW would mean that fewer children would be brought into the criminal justice system, and would also reflect the current research about adolescent brain development. Research indicates that there is a strong link between encountering the justice system at a young age and reoffending later in life.¹⁵ Studies have shown that children first supervised at 10–14 years old were more likely to experience all types of supervision in their later teens, particularly the most serious type – sentenced detention (33% compared to 8% for those first supervised at older ages).¹⁶

In NSW there is a conclusive presumption that a child under the age of ten cannot commit an offence.¹⁷ Under the common law, children aged between 10 and 14 who commit criminal offences are presumed to be incapable of committing a crime because they lack the necessary knowledge to have a criminal intention. To rebut this presumption, the prosecution must prove that the child did the act charged and that when doing the act, the child knew that the act was seriously wrong in the criminal sense.¹⁸

The United Nations Committee on the Rights of the Child has repeatedly criticised countries including Australia, England, Wales and Northern Ireland for having an age of criminal responsibility of ten years old,¹⁹ and has recommended that it should be raised.²⁰ The United Nations Committee on the Rights of the Child concluded:

... that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.²¹

We note that the UN Committee will be looking at the age of criminal responsibility in Australia this year given Australia needs to report back on its progress on the Convention on the Rights of the Child.²²

In 'The age of criminal responsibility: developmental science and human rights perspectives' Farmer concludes that research suggests that:

...children aged ten and 11 are most definitely not competent to participate effectively in the legal system and have reduced culpability. Additionally, those particular ten and 11 year olds who come into contact with the YJS are likely to be especially vulnerable.²³

An international study of 90 countries found that 68% had a minimum age of 12 or higher, with the most common age being 14 years.²⁴ We submit that NSW (and Australia in general)

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ *Children (Criminal Proceedings) Act 1987*, s 5.

¹⁸ For further discussion in relation to *doli incapax* in NSW see 'Doli Incapax – the criminal responsibility of Children', Matthew Johnston, paper prepared for the Children's Magistrates' Conference, 1 February 2006.

¹⁹ United Nations Committee on the Rights of the Child, 'Concluding Observations: United Kingdom and Northern Ireland', September 2008, [77(a)].

²⁰ Ibid, [78(a)].

²¹ United Nations Committee on the Rights of the Child, General Comment No.10, Children's Rights in Juvenile Justice (2007), [32].

²² Attorney-General's Department, *United Nations human rights reporting*, available at: <https://www.ag.gov.au/RightsAndProtections/HumanRights/United-Nations-Human-Rights-Reporting/Pages/default.aspx>

²³ Elly Farmer, 'The age of criminal responsibility: developmental science and human rights perspectives', *Journal of Children's Services*, Vol 6 No 2 2011, 91.

lags behind international best practice in this area. The Law Society notes that the National Children's Commission's 2016 statutory report²⁵ and the Northern Territory Royal Commission into the Protection and Detention of Children in the 2017 final report²⁶ have each recommended that the minimum age for criminal responsibility be increased to 12 years.

The Law Society similarly does not support the current age of criminal responsibility. The Law Society endorses recommendations by the National Children's Commissioner that the age of responsibility should be increased to an absolute minimum of 12 years, however, our preference would be for the minimum age to be 13 years (when the child is in high school rather than primary school).²⁷

4. Diversion of young people with drug and alcohol dependence

Diversionary options in NSW Children's Courts are largely restricted to the measures legislated in the YOA, that is, police cautioning or youth justice conferencing. We submit that additional community based options should be considered, that address the concern that many young people with specific criminogenic issues are drawn into the criminal justice system. To be effective, diversionary measures require the provision of viable community based options.

In our view, there appears to be a gap in the provision of pre-sentence programs that focus on the particular vulnerabilities of many young offenders, such as drug and alcohol abuse, that contribute substantially to their offending. For those children and young people who are not diverted from the Children's Court into youth justice conferencing, there appears to be no clear way to address these welfare issues at the pre-sentence stage. A concerted focus on the provision of a supported plan of rehabilitation prior to sentence will serve to demonstrate a commitment to the principle that detention of young people is considered an option of last resort, and that the juvenile justice system places weight on the importance of diversion and rehabilitation for children and young people.

Magistrates Early Referral into Treatment (MERIT) for young offenders

A program, such as the Magistrates Early Referral into Treatment ('MERIT') program, currently operating in the adult jurisdiction in New South Wales, is an opportunity to identify and treat problems that are often contributing to a young person's offending behaviour.²⁸ This model need not be confined to young people with substance abuse problems, but could possibly be extended to young people who appear to have undiagnosed cognitive or mental health impairments, young people with diagnosed impairments, or who have other support needs that are not being met by their families or communities.

Legal practitioners who have experience working with young adults in the Local Court jurisdiction have reported that the MERIT program can have a substantial and positive

²⁴ Nean Hazel, 'Cross-national comparison of youth justice' (2008), Youth Justice Board for England and Wales, United Kingdom, available at: http://dera.ioe.ac.uk/7996/1/Cross_national_final.pdf

²⁵ Australian Human Rights Commission, National Children's Commissioner, 'Children's Rights Report 2016' (2016)

https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRR_2016.pdf

²⁶ Royal Commission into the Protection and Detention of Children in the Northern Territory, 'Final Report' (Volume 2B) <https://childdetentionnt.royalcommission.gov.au/Documents/Royal-Commission-NT-Final-Report-Volume-1.pdf>, 47.

²⁷ However, the Law Society supports the retention of the rebuttable presumption against criminal responsibility, to the age of 14 (regardless of the raising of the age of criminal responsibility).

²⁸ Department of Justice, *The Merit Program* (accessed on 14 February 2018), available at: <http://www.merit.justice.nsw.gov.au/magistrates-early-referral-into-treatment/the-merit-program>

impact on their path toward rehabilitation. Although MERIT is a three month program, and successful rehabilitation can take a longer time for young people presenting with complex issues, often the program provides an entry point for these offenders to community programs and later referral to appropriate agencies at the completion of MERIT. For example, a young person presenting with substance abuse problems may also have underlying trauma or undiagnosed mental health issues. The MERIT program may provide an opportunity for these underlying issues that are linked to drug and alcohol abuse to be identified and appropriate referrals for treatment to be made.

We understand that the program typically takes a holistic approach as to the causal connection between substance abuse, homelessness, unemployment, lack of income and refer these offenders to ongoing support agencies. When the matter is finalised in the Local Court at the completion of the MERIT program, offenders can demonstrate participation in a program of rehabilitation, and future referrals to community support; these subjective factors can then be taken into account by the judicial officer in sentencing proceedings.²⁹

The Law Society submits that MERIT is an effective pre-sentence program of rehabilitation that often sets young adults with complex criminogenic issues on a path to recovery, even if that path is a longer one than the three month program and even if there are some relapses along the way. It is viewed as a program that has the effect of diverting many young adults from the criminal justice system into community based support. The Law Society submits that consideration should be given to introducing a pre-sentence program such as MERIT in the Children's Court for children and young people with, at least initially, drug and alcohol dependency problems.

Reinstatement of the Youth Drug Court

In July 2012 the Youth Drug Court ('YDC') was 'closed down at short notice'.³⁰ The decision was met with significant criticism.³¹ The Law Society in principle supports the reinstatement of the YDC, however, we submit that to be an effective diversionary measure, some changes to the previous model are required. While the YDC was generally seen as a positive diversionary option to deal with the underlying cause of involvement in crime, legal practitioners held real concerns that under the legislative regime, the 'failure' to complete the program could potentially result in a greater sentence being handed down to young offenders, than if the matter had not proceeded through the YDC.³² This situation arose because the scheme operated as a 'pre-sentence' program allowing the court to exercise flexibility in handing down the final sentence. Conversely, in the Adult Drug Court ('ADC'), the program operates as a 'post-sentence' scheme (as an alternative to prison). At the end of the ADC program, the participant will not be penalised with an increased sentence if their participation in the ADC was inadequate, whereas in the YDC it was possible for a young offender to receive a worse off sentence than if they had not participated in the program at all. Accordingly, if the YDC is reinstated, the Law Society submits that legislative protections

²⁹ Judicial Commission, *Local Court Bench Book: case management of criminal proceedings in the Local Court* (24 April 2012), available at:

https://www.judcom.nsw.gov.au/publications/benchbks/local/practice_note_crim_01.html

³⁰ *Sydney Morning Herald* (SMH) (2012) Editorial: *Quiet death of the Youth Drug Court* (9 July 2012), available at : <http://www.smh.com.au/federal-politics/editorial/quiet-death-of-the-youth-drug-court-20120708-21p7h.html>

³¹ Kelly Richards, Lorana Bartels and Jane Bolitho, 'Children's Court Magistrates' Views of Restorative Justice and Therapeutic Jurisprudence Measures for Young Offenders' (2017) *Youth Justice*, 17(1) 22-40.

³² See, for example, the discussion about the difference between 'pre-sentence' and 'post-sentence' schemes on pages 145 to 147 of the 'Evaluation of the New South Wales Youth Drug Court Pilot Program: final report' (2004) by the Social Policy Research Centre at the University of New South Wales, available at: https://www.sprc.unsw.edu.au/media/SPRCFile/Report8_04_YDC_Pilot_Program_Evaluation.pdf

are required to ensure that children do not receive a greater sentence if they fail to complete the YDC program, than if they had not participated in the YDC at all.

Increased drug and alcohol age-appropriate rehabilitation services

Diversionary efforts require increased funding for age-appropriate alcohol and drug rehabilitation services, including 'dual diagnosis' rehabilitation services (for the many instances where mental health and dependency issues overlap). It is concerning that most alcohol and drug addicted teens in NSW who want to detox must do so at home or wait for a bed in a public hospital or an adult detox facility.

The Law Society endorses the 12 week Triple Care Farm youth rehabilitation and treatment program in Robertson, NSW, as a holistic program for young people with co-occurring mental illness and drug and alcohol problems. Reported outcomes from that program have been positive with only 4% reporting criminal activity six months post program.³³ In June 2017, a new facility (on the same property as Triple Care Farm) called David Martin Place was opened as a youth drug and alcohol detox facility, which was the first of its kind in New South Wales.³⁴ Currently, both of these programs have very limited places (100 young people per program per year) and a greater level of funding of these programs is needed to reach more young people in NSW.

5. Diversion of young people with cognitive and mental health concerns

The prevalence of cognitive and mental health impairments among young people who come in contact with the juvenile justice system is high. The Law Society has previously submitted that strategies which seek to deal with this group of vulnerable young people must prioritise a therapeutic approach.³⁵ In 2017, the Mental Health Commissioner called for a large-scale investment in NSW for effective diversionary programs for people with mental health problems.³⁶

The latest study by Justice Health and Juvenile Justice '2015 Young People in Custody Health Survey: Full Report', published in December 2017, found that 83.3% of young people in custody met the threshold for a psychological disorder.³⁷ However, despite the high rates of mental health illness for juveniles in the criminal justice system, rates of diversion in the Children's Court for young offenders with mental health problems are low.³⁸ In 2012, the NSW Law Reform Commission found that diversion legislation for people with cognitive and mental health impairments was not effectively utilised due to a perceived lack of accountability for defendants who are diverted and a lack of programs and services to which

³³ Sir David Martin Foundation, *Triple Care Farm Outcomes 2016* (accessed on 10 February 2018), available at: <https://www.sdmf.org.au/news-events/news/238-triple-care-farm-outcomes-2016>

³⁴ Sir David Martin Foundation, *David Martin Place* (accessed on 10 February 2018), available at: <https://www.sdmf.org.au/youth-programs/david-martin-place>

³⁵ Law Society of NSW, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System* (22 February 2011) available at: <https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicy submissions/435800.pdf>

³⁶ NSW Mental Health Commissioner, 'Towards a Just System: mental illness and cognitive impairment in the criminal justice system' (July 2017), available at: https://nswmentalhealthcommission.com.au/sites/default/files/documents/justice_paper_final_web.pdf

³⁷ Justice Health & Forensic Mental Health Network and Juvenile Justice NSW, '2015 Young People in Custody Health Survey: Full Report' Sydney, New South Wales, Australia: Justice Health and Forensic Mental Health Network, available at: <http://www.justicehealth.nsw.gov.au/publications/2015YPICHSReportwebreadyversion.PDF>, 65.

³⁸ Rosemary Sheehan and Allan Borowski, 'Australia's Children's Courts Today and Tomorrow. Children's Well-Being: Indicators and Research' vol 7. Springer, Dordrecht, 165 - 185.

courts can turn to support a diversion order.³⁹ The Law Society suggests that these findings are likely to be similarly applicable to juvenile offenders.

Court diversion under ss 32 and 33 of the *Mental Health (Criminal Procedure) Act 1990* (NSW)

The Law Society supports greater use of the *Mental Health (Criminal Procedure) Act 1990* (NSW) ('MHCPA') for young offenders with mental health problems. The advantages for juvenile offenders diverted under the MHCPA is that they have an opportunity to be diagnosed, to have a treatment plan formulated and given appropriate referrals to care and treatment providers. Sections 32 and 33 of the MHCPA are the key provisions utilised to divert young offenders with a mental illness or condition away from the criminal justice system. The provisions provide the courts with greater flexibility to deal with juvenile offenders (for example, they may dismiss the charges and discharge a young person on the condition they obtain a mental health assessment or treatment).

However, the Law Society submits that there are practical difficulties with implementing these legislative provisions. We are of the view that obtaining a mental health diagnosis, followed by a well-resourced therapeutic and treatment program, are the keys to the effective use of diversion legislation for young offenders with mental health issues. We understand that the Adolescent Court and Community Team ('ACCT') (run by Justice Health) is physically based in some Children's Courts, and facilitates audio-visual linking or teleconferencing to the other Children's Courts. However not every local court which sits as a Children's Court has access to this service.⁴⁰

We also note that there is an inconsistency amongst magistrates as to the use of a diversion under s 32, particularly where there may not be an appropriately qualified ACCT clinician to assist the court, and there is a lack of appropriate therapeutic services available. While the Law Society submits that there is a need for funding for more ACCT practitioners (preferably with formal training as a psychologist or psychiatrist) to be located at more Children's Courts, this must also be attached to more funding for adequate services to which mental health referrals can be made, including specialist forensic psychiatric hospitals for children.

The Law Society notes that in 2017 the NSW Government launched an adult pilot diversion program to help adult defendants with a cognitive impairment charged with low-level offences access services that address the underlying causes of their offending behaviour.⁴¹ The Cognitive Impairment Diversion program is a joint initiative between the Department of Justice and NSW Health and also provides assistance for defendants to link with the National Disability Insurance Scheme ('NDIS') and other services. The Law Society strongly supports the introduction of a similar program in the Children's Court to help identify juveniles with cognitive and mental health impairments, help prevent further contact with the criminal justice system, and help access funding under the NDIS.

³⁹ NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System – Diversion* (2012), Report 135.

⁴⁰ The ACCT clinicians provide a specialised mental health court diversion and consultation liaison service.

⁴¹ Department of Justice, *Court project to help people with a cognitive impairment* (4 December 2017), available at: <http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/court-project-to-help-people-with-a-cognitive-impairment.aspx>

6. Diversion of young people in Out-of-Home Care

The Law Society is concerned with the over-representation of children in out-of-home care ('OOHC') in the criminal justice system in NSW.⁴² We submit that a multi-disciplinary and multi-agency approach is needed to address the underlying causes contributing to this issue and to promote diversionary measures.

The findings from Dr Katherine McFarlane's extensive research paper, "Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system"⁴³ sets out some of the factors contributing to poor criminal justice outcomes for children in care in NSW. We submit that policymakers should consider these findings when developing future initiatives to address 'care-criminalisation':

1. Children in OOHC involved in Children's Court proceedings were adversely affected by agency practices and systemic institutional factors such as limited high-quality placements, and a lack of support from health, education and justice services.
2. Workers lack of awareness of the role of other agencies meant that children were left to 'drift' from care to the criminal justice system.
3. Poor police relations particularly impacted upon the OOHC cohort and the state's historical reliance on police to enforce government policies implanted a mistrust of authority.
4. The imposition of welfare-focused bail and probation conditions drove some children deep into the justice system.

The Law Society submits that the 'drift' from care to crime is best prevented by a strong commitment from agencies to avoid a young person's contact with the criminal justice system in the first place. In this regard, the Law Society strongly supports the interagency Joint protocol to reduce the contact of young people in residential out-of-home-care with the criminal justice system ('the joint protocol').⁴⁴ The joint protocol was published in 2016 and applies to children under 18 years of age living in residential out of home care in NSW. The joint protocol acknowledges the need for interagency collaboration and has been developed in conjunction with both justice oriented and care focused agencies.⁴⁵ Some of the key aims of the protocol are to 'reduce the frequency of police involvement in responding to behaviour by young people living in residential services, which would be better managed solely within the service'; to encourage 'criminal charges not to be pursued against a child if there is an alternative and appropriate means of dealing' with the incident; to 'promote the safety, welfare and wellbeing' of children in out-of-home care; to facilitate a 'collaborative early intervention approach'; and to 'enhance diversion of young people from the criminal justice system'.⁴⁶

⁴² See, for example, Legal Aid NSW, *The Drift from Care to Crime: A Legal Aid NSW Issues Paper* (October 2011); The report highlighted that the drift from care to crime was a growing issue and that 80% of Legal Aid's high service users had some history of out-of-home care.

⁴³ Katherine McFarlane, "Care-criminalisation: the involvement of children in out of home care in the NSW criminal justice system" (unpublished thesis) (2016) available at: <http://www.unswworks.unsw.edu.au/primolibrary/libweb/action/diDisplay.do?vid=UNSWORKS&docId=unsworks38185>

⁴⁴ Department of Family and Community Services, *Joint protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system* (2016), available at: <http://www.community.nsw.gov.au/?a=408679>

⁴⁵ The implementation of the protocol is also overseen by a State-Wide Steering Committee comprised of organisations including NSW Police Force, Family and Community Services, Department of Justice, Legal Aid, Office of the Children's Guardian, Association of Children's Welfare Agencies, and Aboriginal Legal Service.

⁴⁶ Above n 44.

While some members of the Law Society have reported positive outcomes from the joint protocol (for example, the withdrawal of police charges after consideration of the protocol), other members are aware of instances where OOHC case workers and police have either not been aware of the joint protocol or have lacked an understanding of its operation. This has led to OOHC workers contacting the police without consulting the joint protocol and considering whether there is an alternative and appropriate means of dealing with an incident. We submit that such instances undermine the prior and continuing efforts by government agencies to promote the diversion of vulnerable children in OOHC away from the criminal justice system. The Law Society understands that training on the joint protocol is still being rolled-out by the Department of Families and Communities ('FACS'). We suggest that training of all the relevant stakeholders involved in the joint protocol (particularly casual care workers and the police) be prioritised by the government, so that the joint protocol can be effectively utilised.

The Law Society also remains concerned about anecdotal reports received that there are a high number of police events arising from children in OOHC. We continue to support interagency collaboration to prevent children in care being drawn into the criminal justice system, particularly where a therapeutic approach may better assist to resolve conflict and address the underlying causes of youth offending.

The Law Society also looks forward to reviewing the results of the independent review of the joint protocol which FACS has commissioned.

7. Diversion of young people through improving access to education

Research demonstrates that increasing a person's education attainment level is the most effective way to reduce the risk factors associated with criminal behaviour.⁴⁷ We note that s 6(c) of the CCPA provides that it is desirable for a court exercising criminal jurisdiction to allow the education of a child to proceed without interruption.

The Law Society supports progressive behavioural management prevention policies which recognise that labelling a young person as "deviant", "delinquent" or "pre-delinquent" often contributes to the development of a consistent pattern of undesirable behaviour.⁴⁸ We further submit that children are best supported when agencies have an awareness that conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood.⁴⁹

The experience of members of the Law Society is that alienation from school significantly escalates the risk of a young person or child disengaging from their community and makes them vulnerable to anti-social or criminal conduct. The NSW Ombudsman in its August 2017 report on its inquiry into behaviour management in schools found that:

The NSW Bureau of Crime Statistics and Research (BOCSAR) found that not being in school, having being suspended or expelled from school, and having had several prior contacts with the criminal justice system all independently increased the likelihood of another conviction. The 2009 NSW Young People in Custody Health Survey found that

⁴⁷ Associate Professor Kitty te Riele and Karen Rosauer, 'Education at the heart of the children's court: evaluation of the education initiative final report' (December 2015), available at: <https://www.vu.edu.au/sites/default/files/victoria-institute/pdfs/Education-at-the-Heart-of-the-Children's-Court-Final-Report-web.pdf>

⁴⁸ *United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)* (General Assembly resolution 45/112, annex, rule 5(f)).

⁴⁹ *United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)* (General Assembly resolution 45/112, annex, rule 5(e)).

'the majority of young people in the 2009...sample had been suspended from school at least once (88%). Two-thirds (66%) reported being suspended three or more times.'⁵⁰

The Law Society is concerned with reports that, anecdotally, roughly 40% of children coming before the Children's Court in its criminal jurisdiction are not attending and are totally disengaged from school.

In 2017, the Law Society made a submission to the Minister of Education on amendments to the *Education Act 1990* (NSW), raising concerns with the increased powers given to the Minister to exclude children from attending school upon issuing a 'non-attendance directive' where the child's conduct is deemed as 'serious violent conduct'.⁵¹ The non-attendance directive appears to capture a very wide range of conduct and gives a child a limited opportunity to respond to allegations against them. The Law Society remains concerned that the amendments could have a deleterious impact on children, particularly on vulnerable children from a disadvantaged background who are at greater risk of contact with the criminal justice system. We note the relevance of the views of the NSW Ombudsman that 'suspensions which simply exclude students from school for a period of time may remove the protective factor offered by school, placing vulnerable young people at risk of either engaging in, or becoming the victims of criminal behaviour'.⁵²

The Law Society is aware that the Children's Court is particularly keen to engage the Department of Education in discussions about how justice agencies and education agencies can work together to divert children from long-term involvement with the justice system. We support the efforts of the Children's Courts to adopt a similar model to the Victorian Education Justice Initiative whereby officers of the Department of Education are placed in the Children's Court to assist in identifying those children who are not attending school and to help them to re-engage in school.

8. Aboriginal over-representation in the Juvenile Justice system

The Law Society is concerned with the overrepresentation of Aboriginal young people in the justice system, including the alarming high levels of contact that Aboriginal young people continue to have with police. We find the following situation described by Weatherburn to be completely unacceptable:⁵³

By the time they reached the age of 23, more than three quarters (75.6%) of the NSW Indigenous population had been cautioned by police, referred to a youth justice conference or convicted of an offence in a NSW criminal court.

The Law Society has previously committed to advocating for legislative and policy reform to address the over-representation of Indigenous people in the criminal justice system, including the support of justice-specific targets in respect of indigenous incarceration rates.⁵⁴ We are disappointed that there has been a failure to establish justice targets in the Prime Minister's 2018 Closing the Gap report.⁵⁵

⁵⁰ NSW Ombudsman, 'Inquiry into behaviour management in schools' (August 2017), available at: https://www.ombo.nsw.gov.au/data/assets/pdf_file/0018/47241/NSW-Ombudsman-Inquiry-into-behaviour-management-in-schools.pdf, 37.

⁵¹ Law Society of NSW, *Education Amendment (School Safety) Bill 2017* (10 November 2017), available at: <https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicy submissions/1417607.pdf>

⁵² Above n 50, 51.

⁵³ Don Weatherburn, 'Arresting Incarceration: pathways out of Indigenous Imprisonment' (2014), Aboriginal Studies Press, Canberra, 5.

⁵⁴ Law Society of NSW, *Indigenous incarceration rates and justice targets* (28 April 2017), available at: <https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicy submissions/1310525.pdf>

⁵⁵ Department of the Prime Minister and Cabinet, 'Closing the Gap: Prime Minister's Report 2018', available at: <https://closingthegap.pmc.gov.au/>

Our view is that addressing the complex issue of Aboriginal overrepresentation in the juvenile justice system requires a holistic, multi-pronged approach. Resources must be directed towards early intervention, prevention and diversion along with strategies that strengthen communities. It is critical that diversionary programs for young Indigenous offenders are community-led to ensure Indigenous self-determination and culturally responsive approaches.

Early intervention

We submit that effective early intervention should address risk issues arising for the child well before contact with the criminal justice system. As discussed above, the 'drift' between the care and protection jurisdiction into juvenile justice is well known, and Aboriginal and Torres Strait Islander children are significantly overrepresented in the care and protection jurisdiction. The Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory gave particular consideration to the crossover between OOHC and criminal justice. It noted research demonstrating the significantly increased risk of offending for children who have been in OOHC, both as juveniles and as adults.⁵⁶

These risk factors for Aboriginal children in OOHC coming into contact with the juvenile justice system include the alarming rates of school attendance for children in OOHC. The NSW Ombudsman's 2017 inquiry report (discussed above) found that for 295 school age children and young people who had been in out of home care for three or more months in 2016, 43% (128) missed 20 or more school days in 2016 for reasons other than illness. About one third (42) of these children were Aboriginal. These 128 children missed an average of 44% of the school year.⁵⁷ The poor outcomes that result from non-attendance at school are myriad, not least of which is the fact that it is a risk factor for children in respect of entering the juvenile justice system.⁵⁸

We provide further comments on two initiatives for young Indigenous offenders that involve a diversionary element at different stages in the juvenile justice process.

Just Reinvest NSW

The Law Society supports a justice reinvestment framework to address the overrepresentation of Aboriginal and Torres Strait Islander children and young people in the criminal justice system. The Law Society notes that Just Reinvest NSW has been working in partnership with the Bourke Aboriginal community since 2013 to implement the first major trial in Australia; the Maranguka Justice Reinvestment project.

As part of the Maranguka Justice Reinvestment project, we understand that specific justice 'circuit breaker' initiatives for young people have been introduced.⁵⁹ Two of these programs include the Warrant Clinic and the Driver's Program. The Warrant Clinic is for young

⁵⁶ Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, 'Final Report', Volume 3B, Chapter 35, available at: <https://issuu.com/ntroyalcommission/docs/3b-final?e=31933818/55836170>, 7.

⁵⁷ NSW Ombudsman, 'Inquiry into behaviour management in schools' (August 2017) available at: https://www.ombo.nsw.gov.au/data/assets/pdf_file/0018/47241/NSW-Ombudsman-Inquiry-into-behaviour-management-in-schools.pdf, 46

⁵⁸ Children's Court, 'Cross-over Kids – the drift of children from the child protection system into the criminal justice system' (August 2016) available at: <http://www.childrenscourt.justice.nsw.gov.au/Documents/ALS%20CONFERENCE%202016%20CROSS%20OVER%20KIDS%20JULY%203.pdf>

⁵⁹ Just Reinvest NSW, *Justice 'circuit breakers' launched in Bourke* (accessed on 10 February 2018), available at: <http://justreinvest.org.au/justice-circuit-breakers-launched/>

offenders 10 to 25 years of age and, rather than being taken into custody when a warrant is issued, the Aboriginal Legal Service will make an application for a warrant to 'lie in office' for 14 days, to be followed with a meeting with a support team to make a plan to submit to the court on sentence or in relation to bail. The driver licensing program is for those who have committed a driving offence. The program involves case management of a participant's needs, together with removal of barriers to identify documents and a more permanent and appropriately resourced driver licensing education program.⁶⁰

We understand that anecdotally these programs have seen early signs of positive impacts and we support further efforts to expand a reinvestment approach to juvenile diversionary programs for young Indigenous offenders in other regions beyond Bourke.

Youth Koori Court

The Law Society supports the work of the Youth Koori Court in NSW as a measure to assist with supporting young Indigenous offenders. The Aboriginal Legal Service represents all children in the Youth Koori Court Pilot Program. This program, although not an early intervention program, nor strictly a diversionary program, uses creative mechanisms to achieve positive results. The Youth Koori Court focuses on a therapeutic model with input of Aboriginal Elders and an informal setting to achieve this. We are informed that young people who regularly would not attend court, who spent many months in custody and who did not trust the system have attended court of their own volition, achieved bail and built trust in the system.

The Law Society was pleased that the Government provided some more funding to this court in June 2017, noting that the NSW Attorney General's view on the court is as follows: "Conducted in a relatively informal setting, the Youth Koori Court increases Aboriginal involvement in the delivery of justice, ensuring outcomes are culturally relevant and have more impact on the offender."⁶¹ We continue to support efforts for the expansion of the Youth Koori Court, particularly to areas such as Dubbo and central Sydney. However, further funding is needed for the expansion of the Youth Koori Court, the Aboriginal Legal Service and many of the other services that work with this model, together with legislative backing to ensure the court continues.

9. Bail issues

The Law Society would like to note its concern with the way bail conditions are often imposed on young offenders which do not meet the criteria set out in s 20A of the *Bail Act 2013* (NSW), particularly the requirement that bail be no more onerous than necessary to address the bail concern. We submit that where young offenders are unable to meet their bail conditions they are driven further into the criminal justice system. We also note with concern research indicating that the most common reason children are remanded is for breach of bail conditions (typically a breach of a curfew condition), rather than the commission of a new offence.⁶² Our view is that education is required for police and judicial officers in relation to what appropriate bail conditions should entail. We also support a legislative provision which explicitly states that refusal of bail is a matter of last resort for young people.

⁶⁰ Ibid.

⁶¹ Attorney General of NSW, *\$220,000 funding boost for Youth Koori Court* (16 June 2017), available at: [http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/\\$220000-fundingboost-for-Youth-Koori-Court.aspx](http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2017/$220000-fundingboost-for-Youth-Koori-Court.aspx)

⁶² Above n 43, 135.

10. Youth on Track

The Law Society supports the initiative by the Department of Justice to develop early intervention schemes such as Youth on Track which respond to young people at risk of long-term involvement in the criminal justice system.⁶³ The objectives of Youth on Track are diversionary in nature as they include reducing young people's contact with police and the juvenile justice system and addressing a young person's individual criminogenic needs and risks. A 2017 evaluation report 'Youth on Track Social Outcomes Evaluation' noted that there was a high level of satisfaction with the program by participants. However, we suggest that it would be more culturally appropriate for Aboriginal caseworkers to be employed to work with Aboriginal young offenders given that feedback on the program was that this would assist Aboriginal young offenders to build rapport and a willingness to participate in the program.⁶⁴

The evaluation report also noted that local schools were the least likely to refer a young person to Youth on Track. A possible explanation posited was that schools may be out of touch with young people who would benefit from the program due to poor school attendance rates, related to regular suspensions or expulsions.⁶⁵ We therefore suggest that the Department of Justice should increase education to schools regarding the Youth on Track program and the parameters for referrals to the scheme.

11. Diversion of sexual offending – New Street Adolescent Service

New Street Services⁶⁶ provide therapeutic services for children and young people aged 10 to 17 years who have engaged in harmful sexual behaviours towards others. Research shows a high incidence of harmful sexual behaviour in this age group. New Street Service is the only service in NSW that solely focuses on this cohort who have high needs and complex trauma backgrounds.

New Street Services focus on early intervention and prevention to educate children to understand, acknowledge, take responsibility for and cease the harmful sexual behavior. A priority for New Street Services is Aboriginal children, young people and communities.

We note that in order to be eligible for New Street the child must not have been charged with the sexual offence. We commend the diversionary work of New Street but are concerned that there is no equivalent diversionary option available for a child who has been charged. We are also concerned that children are inhibited from participating in full and honest therapy with New Street counsellors because there have been instances where police have then charged the child, obtained New Street's counselling notes and used those notes as evidence against the child. We recommend consideration of a specific legislated counsellor/client privilege which would protect against the use of New Street's counselling notes.

12. Criminal Records and the Child Protection Register

Criminal records can have far ranging, lifelong adverse impacts upon a child. Whilst there are specific provisions which limit when a child may receive a disclosable criminal record, we note with concern that many children (and indeed many legal practitioners and the court) are not fully aware of how these provisions operate and whether the child has a criminal record or not and for how long.

⁶³ Cultural & Indigenous Research Centre Australia, *Youth on Track Social Outcomes Evaluation 2017*, available at: <http://www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf>

⁶⁴ Ibid 58.

⁶⁵ Ibid 53.

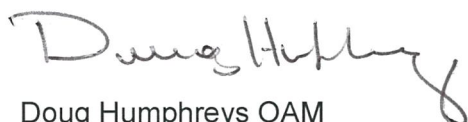
⁶⁶ Department of Health, *New Street Services* (accessed on 10 February 2018), available at: <http://www.health.nsw.gov.au/kidsfamilies/protection/Pages/New-Street-Services.aspx>

We also note that children receive disclosable records even though they have been diverted. For example, children who receive a caution or conference under the YOA do not receive a 'criminal record'. Many do not realise that their offence will nevertheless still constitute a police record which is disclosable for certain job applications listed in s 66 of the YOA, including employment as a teacher or teacher's aid and any working with children check. Hence, a child who is diverted under the YOA may still find that their matter adversely affects a working with children check conducted decades later (for example, when they seek to coach their grandchildren's soccer team). We recommend that there should be legislative amendments so that YOA records are not disclosable.

Many sexual offences by children are against similar aged children and hence are different in nature to sexual offences by adults against children. Children are still prosecuted for underage consensual sex and also for sexting. We note with concern that many sexual offences lead to a lifelong criminal record, regardless of whether the offender was a child and regardless of whether the offence involved consensual sex.⁶⁷ We note that such sexual offences will also place the child on the Child Protection Register.⁶⁸ We submit that these consequences are contrary to the principles of rehabilitation and diversion. In the Law Society's submissions to the statutory review of the *Child Protection (Working with Children) Act 2012* (NSW)⁶⁹ and the Department of Justice's discussion paper 'Strengthening child sexual abuse laws in NSW'⁷⁰, we have supported a three year age difference for a similar age defence in NSW where a child is under the age of consent and where the intercourse is consensual. The Law Society has also previously supported consideration of a defence to decriminalise consensual 'sexting' involving persons under 16 years.⁷¹

Thank you for considering this submission. Should you have any questions or require further information, please contact Amelia Jenner, Policy Lawyer on (02) 9926 0275 or email amelia.jenner@lawsociety.com.au.

Yours sincerely,



Doug Humphreys OAM
President

⁶⁷ *Criminal Records Act 1991* (NSW), s 7.

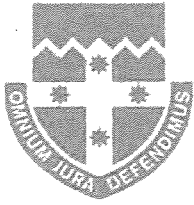
⁶⁸ *Child Protection (Offender Registration) Act 2000* (NSW).

⁶⁹ Law Society of NSW, *Statutory Review of the Child Protection (Working with Children) Act 2012* (7 June 2017), available at:

<https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1409268.pdf>, 7.

⁷⁰ Law Society of NSW, *Strengthening child sexual abuse laws in NSW* (5 October 2017), available at: <https://www.lawsociety.com.au/cs/groups/public/documents/internetpolicysubmissions/1418187.pdf>, see answer to question 28.

⁷¹ *Ibid*; see answer to question 29.



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: rbg578180

8 December 2011

Ms Kathrina Lo
Director
Review of the YOA and the CCPA
Legislation, Policy and Criminal Law Review
Department of Attorney General and Justice
DX 1227 SYDNEY

Dear Ms Lo,

**Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings)
Act 1987**

The Law Society's Juvenile Justice Committee (Committee) welcomes the review of the *Young Offenders Act 1997* (YOA) and the *Children (Criminal Proceedings) Act 1987* (CCPA).

The Committee has reviewed the Consultation Paper and has responded to the issues raised in the attached submission.

Should you have any questions please contact the policy lawyer with responsibility for this matter, Rachel Geare, who can be contacted on 9926-0310 or by email at rachel.geare@lawsociety.com.au.

Yours sincerely,

Stuart Westgarth
President

Question 1

(a) Does NSW's legislative framework take the right approach to offending by children and young people?

Apart from the suggestions for change made in this submission, the Committee is of the view that the legislative framework for responding to young people in trouble with the law is largely 'fit for purpose' and generally consistent with Australia's international obligations under the relevant United Nations instruments. The Committee's concerns are principally directed towards the operation of the laws in practice, and the absence of ongoing monitoring and research about most aspects of the operation of the laws. The Committee notes in particular the paucity of research in New South Wales that specifically seeks the views of the children and young people who are drawn into the ambit of juvenile justice responses.

(b) Are there any other models or approaches taken by other jurisdictions that this review should specifically consider?

The welfare based model in countries such as Scotland and Sweden is worth considering. In Sweden only 7 to 14 children and young people receive prison sentences a year, and the prosecution undertakes specialised training and has broad powers to waive prosecution. New South Wales could learn something from these models, without going down the vexed path of the old *Child Welfare Act (1939)* which had the effect of criminalising children brought to court (not alleged to have committed offences), but for welfare issues.

The models discussed in the consultation paper appear to have a different basis. That is, for children (in Sweden for example) who are alleged to have committed offences their best interests or needs take priority, rather than a focus on the offence. A model that focuses on the needs and best interests of the child and young person without losing sight of the fundamental importance of due process, the presumption of innocence and a child's right to proper legal advice and representation would indeed be interesting. It is arguable that this does not occur in New South Wales, given the rates of children and young people in detention, in particular those from Aboriginal and Torres Strait Islander backgrounds. The number of children who come before the courts with obvious, unaddressed care issues is always confronting to Children's Court practitioners, and is well documented. The drift of children from care to crime, despite the repeal of the *Child Welfare Act 1939*, continues to be an entrenched problem. In Sweden the focus appears to be on diversion from prosecution and attention to underlying causes of offending.

Young Offenders Act 1997

Question 2

(a) Are the objects of the YOA valid?

The objects of the YOA remain valid.

(b) Are any additions or changes to the objects of the YOA needed?

The objects of the YOA do not require amendment.

(c) Should reducing re-offending be an objective of the YOA?

The purpose of the YOA is to divert young offenders away from formal court processes through the use of warnings, cautions and youth justice conferences. Reducing re-offending should not be an objective of the YOA.

Question 3

(a) Are the principles of the YOA valid?

The principles of the YOA remain valid.

(b) Are any additions or changes to the principles of the YOA needed?

The principles of the YOA could perhaps be more closely correlated with those of the CCPA.

(c) Should reducing re-offending be addressed in the principles of the YOA?

The purpose of the YOA is to divert young offenders away from formal court processes through the use of warnings, cautions and youth justice conferences. Reducing re-offending should not be addressed in the principles of the YOA .

Question 4

Are the persons covered by the YOA appropriate?

The persons covered by the YOA set out in section 7A are appropriate.

Question 5

Should the YOA apply to all offences for which the Children's Court has jurisdiction, unless specifically excluded?

Yes. The Committee agrees with the NSW Law Reform Commission that the general exclusion of all strictly indictable offences from the YOA is 'inappropriate'¹. The Committee continues to support the recommendation of the 2002 statutory review of the YOA that the range of offences covered by the YOA be extended to cover all offences for which the Children's Court has jurisdiction to deal with to finality².

Question 6

(a) Is the current list of offences specifically excluded from the YOA appropriate? Is there justification for bringing any of these offences within the scope of the YOA?

Traffic matters should be able to be dealt with under the YOA and the CCPA (see Question 3.3).

Offences under the *Crimes (Domestic and Personal Violence) Act 2007* should be able to be dealt with under the YOA in appropriate matters. The Committee notes that many

¹ NSW Law Reform Commission, *Report 104: Young Offenders* (2005), para 4.22

² Recommendation 1, *Report on the Review of the Young Offenders Act 1997*, NSW Attorney General's Department, October 2002, pp 5 and 41.

children in care have AVOs taken out against them by their carers. There are multiple breach proceedings against children, many of which are insignificant, and could be dealt with appropriately by a conference or a caution. In nearly all matters the young person will have an on-going relationship with the family members or carers and institution involved in the breach. For all parties who will continue to have a relationship then a youth justice conference can be an excellent opportunity in a controlled environment to address the past problems and lay down ground rules for the future. Most times the young person will not have an alternative but to go back to the family or the care givers. A conference may be the only chance for them to voice issues that affect them and have them addressed.

Breaches of orders between siblings, or between children and their parents or carers raise different policy considerations than breaches of orders between domestic adult partners. Children and young people often lack the capacity to understand conditions of an AVO and the consequences of a breach, which can result in a criminal conviction. Penalties for breaches by children and young people should be different than penalties for adults and should focus on diversionary options.

Consistent with the response to Question 5, the Committee submits that the YOA should cover all drug offences capable of being dealt with by the Children's Court.

Question 7

Should warnings be available for a broader range of offences, a more limited range of offences, or are the current provisions of the YOA appropriate?

Warnings should be available for a broader range of offences. The Committee agrees with Law Reform Commission recommendation 4.4³ that warnings should be given for all offences covered by the YOA unless an offence is specifically excluded by regulation.

The Committee strongly supports the recommendation of the 2002 statutory review of the YOA that warnings should be able to be given for larceny involving theft from a shop – a recommendation that was proposed and strongly supported by NSW Police in their submission to the review.⁴

Question 8

Are the current provisions governing children's entitlement to warnings appropriate?

The provisions governing a child's entitlement to a warning need to be extended.

The limitation on a child's entitlement to be dealt with by way of a warning when the circumstances of the offence involve violence precludes the use of warnings for trivial actions (for instance a push or shove) that are categorised by law as assaults, and that are not uncommon in police interactions with some children and young people.

The legislation is silent on the meaning of the phrase 'in the interests of justice' in section 14(2)(b) and 14(4). The Committee considers that more guidance should be provided for police officers on the practical application of this limitation on the entitlement of children and young people to be dealt with by way of a YOA warning.

³ Report 104: Young Offenders (2005) para 4.48-4.50.

⁴ Recommendation 2, *Report on the Review of the Young Offenders Act 1997*, NSW Attorney General's Department, Sydney, October 2002, pp 5 and 41.

Question 9

Are the provisions governing the giving of warnings appropriate and working well in practice?

To the knowledge of the Committee, no research has ever been undertaken on the operation in practice of warnings under Part 3 of the YOA. For this reason, the Committee is not in a position to comment on this question. The Committee strongly suggests that properly formulated research should be undertaken on the operation in practice of this important part of the YOA, and that this research should include the views of children, young people and their carers.

The Committee suspects that Aboriginal young persons do not receive warnings on appropriate occasions when a non-Aboriginal young person may receive a warning in similar circumstances. The research suggested above would shed light on the situation.

Question 10

Are the provisions governing the recording of warnings appropriate? Are there any concerns with their operation in practice?

Yes, the provisions governing the recording of warnings are appropriate. The Committee cannot comment about their operation in practice.

Question 11

Are the current provisions governing the conditions for giving a caution appropriate? Are there any concerns with their operation in practice?

The limit of three on the number of occasions on which a caution can be given inappropriately limits the flexibility of the YOA, and is inconsistent with the original intent of the YOA, and with the principle of the YOA that a child is entitled to the least restrictive form of sanction⁵. All provisions⁶ relating to the limit should be repealed.

The Committee has concerns that the provisions governing the conditions for giving a caution are not always complied with.

Question 12

Are the provisions that govern the process of arranging and giving cautions appropriate? Are there any concerns with their operation in practice?

The legislative provisions that govern the process for arranging and giving a caution are appropriate.

The issue is not with the legislative provisions; the concern lies with their operation in practice. While there is no research on the matter, anecdotal evidence from practitioners suggests that the requirements relating to timeframes and notification of the child are often not complied with. Police should not arrest young people for the purpose of dealing with them under the YOA. A young person should have a right to legal advice *before* being asked to make any admissions. Although current practice is that legal

⁵ Section 7(a), *Young Offenders Act* 1997.

⁶ Sections 20(7), 31(5), *Young Offenders Act* 1997.

advice is provided before an admission, the legislation currently provides for legal advice before a caution or conference.

The Committee considers that research on the practical operation of the provisions on cautions should be undertaken as a matter of urgency.

Question 13

Are the provisions that govern the consequences of a caution appropriate? Are there any concerns with their operation in practice?

The provisions that govern the consequences of a caution are appropriate. The Committee has not been informed of any concerns with their operation in practice.

Question 14

(a) Are the principles that govern conferencing still valid?

The principles that govern conferencing remain valid.

A referral to a youth justice conference under the YOA or as a sentencing option under the CCPA (sections 40 YOA, section 33(1)(c1) CCPA) is overtly intended to keep young people out of custody. Youth justice conferences are designed to include the child's family and support people in the process, to reinforce respect for human rights and ensure that the child can assume a constructive role in society (sections 3 and 34 YOA). A properly convened youth justice conference also provides victims of offences committed by children and young people with the opportunity to appropriately participate in the decision making process.

(b) Are any additions or changes needed?

No additions or changes to the principles are required.

Question 15

Are there any concerns with the comparative rate of conference referrals from Police and the Courts? If so, how should these concerns be addressed?

The Committee is pleased with the number of Court referrals to conferences. The Committee is concerned that there are not more police referrals to conferences. This requires renewed police commitment to the effective operation of the YOA, under the leadership of the Youth Issues Sponsor, and in collaboration with youth justice conferencing staff and convenors in Juvenile Justice and with children's lawyers, particularly those in the Children's Legal Service of Legal Aid and the Aboriginal Legal Service Custody Notification Scheme who provide telephone advice to children in police custody.

One reason often advanced for the low rate of police referrals is that young people do not make admissions. In the Committee's view, there would be more police referrals to conferences (and cautions) if police did not arrest young people up-front, but gave them the opportunity to get legal advice (with the benefit of a written outline of allegations) first.

These concerns need to be addressed administratively, rather than by legislation.

Question 16

Are the above provisions governing conferencing appropriate? Are there any concerns with their operation in practice?

The Committee submits that the requirement for court approval of the outcome plan for court referred youth justice conferences should be removed. There is not a similar requirement for youth justice conferences that are referred by police. Alternatively, more guidance should be provided, perhaps in the *Young Offenders Regulation 2010*, for Magistrates and conference administrators on the intent and purpose of section 54(2) of the YOA.

The time limits⁷ for the holding of a conference after receipt of a referral remain problematic. The first review of youth justice conferences by the NSW Bureau of Crime Statistics and Research⁸ found that, on average, the time between acceptance of referral by a conference administrator and the holding of a conference was 40.3 days. The Committee understands that conferences are still not complying with the 28 days (if practicable) time line. There are often very good reasons for not meeting this suggested time limit, particularly where victims need to be given time to consider whether to accept the invitation to participate, and where a large number of potential participants need to be prepared for the conference by the convenor. The Committee awaits the findings of the evaluation of youth justice conferencing currently being undertaken by the Bureau of Crime Statistics and Research before making further comment on this point.

Question 17

Should the YOA specify what constitutes an admission for the purposes of the YOA? If so, what form should an admission take?

Yes, more guidance should be provided to police, lawyers, and courts on what constitutes an admission for the purposes of the eligibility requirements for cautions and youth justice conferences⁹ under the YOA.

In New Zealand, children are not formally arrested unless the offence is serious and it is in the interests of justice to do so¹⁰, and are not required to make formal admissions to be eligible to be dealt with by way of a family group conference. Rather, the child is required to state at the conference that they do not deny the offence¹¹ – a less stringent requirement than a formal admission.

The Committee is very concerned about the widespread police practice of arresting young people before giving them the opportunity to seek legal advice and to make admissions.

A formal admission should not involve a record of interview. After a young person has been apprehended and has obtained legal advice they should be able to make admissions by acknowledging in writing that they admit each element of the offence. This can be done by signing a police notebook in the field or at a police station. Young

⁷ Section 43, *Young Offenders Act 1997*.

⁸ Trimboli, L, *An evaluation of the NSW Youth Justice Conferencing Scheme*, NSW Bureau of Crime Statistics and Research, Sydney, 2000, pp 62-63

⁹ Sections 10, 19(b), 31(1)(b) 36(b) and 40(1)(b), *Young Offenders Act 1997*.

¹⁰ See Part 4, *Children, Young Persons and Their Families Act 1989* (NZ) for the legal requirements for youth justice in New Zealand.

¹¹ See sections 245 and 246, *Children, Young Persons and Their Families Act 1989* (NZ).

people should only be required to admit their involvement and not be questioned on the actions of any other person.

At present, police are subjecting children who are eligible to be dealt with under the YOA to a full interview, on the assumption that the matter may ultimately proceed to court. Section 10 of the YOA requires only that an adult be present when a child makes an admission for the purposes of the YOA, not that the child be subject to a full interrogation. It is unfair to subject young people to a full interview - young people are immature, usually with low levels of comprehension, are often daunted by the whole process in an unfamiliar environment, where a real power imbalance exists.

The Committee considers that consideration should be given to the provision of training for police on the less stringent requirements that were intended for YOA eligibility by the framers of the legislation.

Question 18

Are the provisions governing the provision of legal advice to children under the YOA appropriate? Are there any concerns with their interpretation, or operation in practice?

The provisions governing the provision of legal advice to children under the YOA are appropriate. Section 7(b) sets out the principle that children are entitled to be informed about their right to legal advice, and to be given an opportunity to obtain that advice, and sections 22 and 39 clearly state that children must be informed by the investigating officer, *before* a caution is arranged or a conference referral is made, that this entitlement exists, and where the advice may be obtained. The Legal Aid Youth Hotline was specifically established in 1998 to ensure that legal advice could be obtained in practice by all children who are entitled under the YOA to be dealt with by way of caution or referral to a youth justice conference. The Aboriginal Legal Service Custody Notification Scheme has been operating since 2000 and ensures that all Aboriginal young persons who are apprehended by a police officer are given legal advice to obtain their entitlements under the YOA.

However, the Committee has some serious concerns about the operation of these provisions in practice. Members of the Committee have reported that police may not always clearly advise children about the availability of the Youth Hotline, and that some police do not ensure that the child can access the Hotline in private and at the earliest possible time. Anecdotal evidence available to the Committee indicates that some police do not provide solicitors with sufficient information about the nature of the offence or the facts of the matter to be able to properly advise the child. This can and does result in the claims made by some police that solicitors always advise the child not to make an admission, and contributes to the reluctance of some police to comply with the requirements of the YOA. The Committee is pleased that Legal Aid, the Aboriginal Legal Service and the NSW Police Force are working together to address the challenges from their respective positions in the provision of legal advice.

Question 19

Are the provisions that govern the disclosure of interventions under the YOA appropriate?

The general rule that a warning, caution or conference does not have to be disclosed, including as criminal history is appropriate.

The exceptions to this rule relating to disclosure of a caution or conference contained in section 68(2) should be reconsidered. One of the benefits of diverting children from formal court proceedings is avoiding or reducing the stigmatisation of the child. Adults applying for certain employment opportunities should not have to disclose cautions or conferences from their childhood.

The interventions under the YOA should not be disclosed or taken into account in proceedings before the Children's Court (including sentencing proceedings).

Question 20

(a) Is diversion still a legitimate aim of the YOA?

Diversion from the formal court process is the key aim of the YOA.

(b) If not, how could court processes and interventions be structured so as to better address re-offending amongst children?

(c) If so, is it still adequate and appropriate to divert children to warnings, cautions and conferences?

(d) What changes could be made to the interventions under the YOA, to better address re-offending amongst children and young people?

Questions 20(b)-(d) are premised on the wrong assumption. The legislation is not designed to address re-offending.

(e) Do the interventions under the YOA adequately cater for the needs of victims?

Only youth justice conferences were *designed* to cater for victims and they do so for those victims who agree to voluntarily participate in a conference. One of the strengths of a properly prepared and conducted conference is victim involvement. Where substantial harm has been suffered by a victim, this can be considered by a specialist youth officer when deciding whether the child should be dealt with by way of caution or referral to a youth justice conference (section 20(4) YOA). Following a recommendation made in the review of the YOA¹², the views of victims can now be relayed to a child by the person who delivers a YOA caution (section 24A).

Question 21

(a) What changes to the YOA, or its implementation, could be made to ensure that Aboriginal and Torres Strait Islander children have equal access to diversionary interventions under the YOA?

The Committee is very concerned that the diversion rates for Indigenous children and young people continue to be lower than those for non-Indigenous children and young people.

'The evidence .. shows that Indigenous young people are treated differently from non-Indigenous young people in the juvenile justice system, tending to receive more punitive outcomes when discretionary decisions are being made.'¹³

The evaluation of the Aboriginal Over-Representation Strategy found that:

¹² Recommendation 19, *Report on the Review of the Young Offenders Act 1997*, NSW Attorney General's Department, October 2002, pp 7, 53, and 54.

¹³ Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (4th edition) Oxford University Press, Melbourne, 2011, p157.

‘...there are still significant differences in the type of police intervention depending on whether the young person is Aboriginal or not. The most common outcome for a non-Aboriginal young person is a formal warning, while for an Aboriginal young person it is arrest and charge.’¹⁴

Changes to the legislation are not required; the issue relates to the operation of the YOA. There is a need for increased police awareness and training in relation to diversionary options such as cautions, warnings and conferences and a better understanding of the principles contained in the YOA.

(b) What changes to the YOA, or its implementation, could be made to better address the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system?

The provisions of the legislation do not require amendment. The issue lies with ensuring proper compliance with the provisions. Compliance with the YOA by police, in particular when dealing with Indigenous children and young people, should be subject to ongoing monitoring, review and report to Parliament.

The Committee is of the view that continued reliance on criminal justice responses will never be sufficient to reduce the overwhelming number of Indigenous children and young people in the juvenile justice system. The issues surrounding the high level of involvement of Indigenous children and young people in the juvenile justice system are complex. The Committee refers the review to the extensive research undertaken by the NSW Bureau of Crime Statistics and Research on Indigenous over-representation in the criminal justice system, and to the large volume of work published by Harry Blagg, Chris Cunneen and Larissa Behrendt. This research has identified and analysed the social and political conditions under which the level of involvement of Indigenous children and young people in the criminal justice system has continued to increase, and the suggestions and recommendations made by these writers about appropriate avenues, often outside criminal justice, to address this complex set of issues and to reduce Indigenous contact with and engagement with police and other justice agencies.

Question 22

(a) Are the interventions under the YOA adequate and appropriate for children with cognitive impairments or mental illness?

Yes. If a young person has a mental illness, a mental condition or developmental disability it is still generally the case that intervention under the YOA is preferable to Children’s Court proceedings and a section 32 order under the *Mental Health (Forensic Provisions) Act 1990*.

There can be difficulties for a solicitor to provide thorough legal advice (particularly by telephone) to a young person who might be suffering from one of these conditions, unknown at that point, to the solicitor. Mental Health issues and intellectual disability are not always obvious to police and advising solicitors, but still impact on capacity to instruct, capacity to understand advice and interaction by the child and young person with the police or the solicitor. Children and young people who experience these conditions have great difficulty articulating what condition they have, or in many cases have not been properly diagnosed. Often the diagnosis comes when they are more entrenched in the juvenile justice or criminal system. The problem is often the lack of

¹⁴ Chris Cunneen, Garth Luke and Nina Ralph, *Evaluation of the Aboriginal Over-Representation Strategy, Report to the NSW Department of Juvenile Justice*, Sydney Institute of Criminology, Sydney, 2006, p11.

diagnosis or understanding of the issues the young person is dealing with at the early stages of their contact with the legal system.

(b) If not, what changes could be made to better address offending by these children?

As outlined in our response to questions 17 and 18, the Committee is of the view that police do not need to conduct a formal interview with a child who is eligible and entitled to be dealt with by way of caution or referral to a youth justice conference under the YOA, or to undertake an investigative process. The YOA should be amended to provide more guidance on what is required to constitute an "admission" under the legislation (see Questions 17 and 18). This would assist in increasing access to cautions and conference referrals under the YOA for children with cognitive impairment and mental health impairment.

The Committee notes that, while the YOA provides an unusual degree of guidance on the exercise of police discretion, the Act is not intended to completely fetter its exercise¹⁵. Police use the legislation when it would be more appropriate to use a non-legislative solution, for instance when warnings are used prematurely. It is a principle¹⁶ of the scheme under the YOA that the legislation is not intended to usurp the use of police discretion, where appropriate, to deal with matters other than by reference to the legislation.

Question 23

Is there a need to reintroduce a body with an ongoing role to monitor and evaluate the implementation of the YOA across the state?

Yes, there is a need to reintroduce a body with an ongoing role to monitor and evaluate the operation of the YOA across the state. The body should have a legislative basis, membership that draws from agencies with responsibility for the effective operation of the YOA, victim and youth advocacy organisations, and be chaired by a well informed independent chair, and report regularly to Parliament.

General comment: Given that the YOA has now been law in NSW since April 1998, the Committee considers that the implementation phase is long over, so that references to implementation in the questions posed in the review seem curious and inappropriate, when the concern is, or now should be, with the *operation* of and compliance with the provisions of the YOA.

Children (Criminal Proceedings) Act 1987

Question 21

Should the age of criminal responsibility be changed? If so, why, and to what age?

In NSW there is a conclusive presumption that a child under the age of ten cannot commit an offence.¹⁷

¹⁵ See, for example, Chan, J et al, 'Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997' (2004) 28 (2) *Criminal Law Journal* 72-92

¹⁶ See sections 7(c) and 7(d), *Young Offenders Act 1997*.

¹⁷ Section 5 *Children (Criminal Proceedings) Act 1987*.

Under the common law, children aged between 10 and 14 who commit criminal offences are presumed to be incapable of committing a crime because they lack the necessary knowledge to have a criminal intention. To rebut this presumption, the prosecution must prove that the child did the act charged and that when doing the act, the child knew that the act was seriously wrong in the criminal sense.¹⁸

The United Nations Committee on the Rights of the Child has repeatedly criticised England, Wales and Northern Ireland for having an age of criminal responsibility of ten years old,¹⁹ and has recommended that it should be raised.²⁰ The United Nations Committee on the Rights of the Child concluded:

‘... that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.’²¹

The Consultation Paper refers to research into adolescent brain development that links psychological development and offending; and has found that 10-14 year olds are prone to risk-taking behaviours, are impulsive, short-sighted and are particularly vulnerable to peer pressure.

In ‘*The age of criminal responsibility: developmental science and human rights perspectives*’ Farmer concludes that research suggests that:

‘...children aged ten and 11 are most definitely not competent to participate effectively in the legal system and have reduced culpability. Additionally, those particular ten and 11 year olds who come into contact with the YJS are likely to be especially vulnerable’.²²

The Committee does not support the current age of criminal responsibility. Research into brain development and a child’s rights perspective is inconsistent with an age of criminal responsibility of ten years old. The Committee fails to see how a primary school aged child has the capacity to form the necessary intent. The Committee submits that the age of responsibility should be a minimum of 13 (when the child is in high school rather than primary school).

Question 22

Could the structure of the CCPA be improved? If so, what other structure is recommended?

The Committee does not have an opinion on this issue; it is a matter for the legislators.

Question 23

(a) Are the guiding principles set out in the CCPA still valid and are any changes needed?

¹⁸ For further discussion in relation to *doli incapax* in NSW see ‘Doli Incapax – the criminal responsibility of Children’, Matthew Johnston, paper prepared for the Children’s Magistrates’ Conference, 1 February 2006.

¹⁹ United Nations Committee on the Rights of the Child, ‘Concluding Observations: United Kingdom and Northern Ireland’, September 2008, para 77(a).

²⁰ Ibid, para 78(a).

²¹ United Nations Committee on the Rights of the Child, General Comment No.10, Children’s Rights in Juvenile Justice (2007), Para 32.

²² Elly Farmer, ‘The age of criminal responsibility: developmental science and human rights perspectives’, *Journal of Children’s Services*, Vol 6 No 2 2011, p91.

The original guiding principles and paragraphs (a) to (f) are valid and are broadly reflective of what came later in the Convention on the Rights of the Child.

The principles are watered down by the addition of (g) and (h). These principles should be deleted.

The principles should give less weight to general and specific deterrence and greater weight should be given to rehabilitation.

Article 37(b) of the Convention on the Rights of the Child states that arrest, detention or imprisonment of a child shall be used only as a measure of last resort. A statement to this effect should be included in the principles listed in section 6.

Section 6 should also include a principle that children should be assisted by the State.

(b) Should the principles of the CCPA be the same as the principles of the YOA?

Assuming that there are two separate Acts, there should be commonality between the principles of the two pieces of legislation, but they should also reflect the different purposes of the Acts.

(c) Should the CCPA include an objects clause? If so, what should those objects be?

The Committee does not consider that the CCPA needs an objects clause.

Question 24

(a) Are the processes for commencing proceedings against children appropriate?

Article 37(a) of the Convention on the Rights of the Child provides that arrest and detention should be a last resort. The legislation should clarify the presumption that children should not be detained or bailed to appear at court.

Section 8 of the CCPA needs to be updated to reflect the original intention of the section. The section states that criminal proceedings should not be commenced against a child other than by way of a CAN. Section 8 is referring to a "no bail", "field" or "future" CAN rather than a bail CAN and the section should be amended accordingly.

Section 8(1) should also be amended to replace 'should not' with 'must' so that the section reads: 'Criminal proceedings must not be commenced against a child otherwise than by way of court attendance notice'.

The experience of Committee Members suggests that police continue to arrest and question young suspects, and to refuse bail or impose unreasonable or impracticable conditions at unnecessarily high rates. On some occasions, police may charge a young person with an offence/s so that they can then be placed on strict bail conditions. Bail should not be used as a social control mechanism by police on some young persons.

The Committee also notes with concern that Indigenous young people are more than twice as likely to be proceeded against by way of arrest and charge than non-Indigenous young people (46.8% compared to 21% in 2004).²³

²³ Chris Cunneen, Garth Luke and Nina Ralph, *Evaluation of the Aboriginal Over-Representation Strategy, Report to the NSW Department of Juvenile Justice*, Sydney Institute of Criminology, Sydney, 2006, p21.

(b) Is the different process for serious children's indictable offences and other serious offences appropriate?

The offences contained in section 8(2)(a) are appropriate, however section 8(2)(a)(ii) should be amended so as to only relate to offences involving a "commercial quantity" of a prohibited drug.

Section 8(2)(b) should be deleted.

Section 8(2)(c)(i) relating to the child's violent behaviour should be deleted. It is appropriate for the violent nature of the offence to be considered under section 8(2)(c)(ii).

Question 25

(a) Are the provisions for the conduct of hearings appropriate?

Section 10(1)(a) provides that any person not 'directly interested in the proceedings' should be excluded from the court. This provision needs to be strictly enforced and upheld to exclude the media and the police who have no interest in the matter.

The protection relating to the admissibility of evidence in section 13 needs to be strengthened so that the protection is effective. The discretion in section 13(1)(b) is too broad, and Magistrates too readily admit statements, confessions and information when the person responsible for the child or the child's solicitor was not present at the time the statement was made. The limits on the exercise of this discretion need to be tightened.

The Committee notes that the increased use of AVL is problematic. Time-pressed courts often deal with the matter before the AVL commences. This is in conflict with section 12 of the CCPA that states that the court must take such measures as are reasonably practicable to ensure that the child involved understands the proceedings and is given 'the fullest opportunity practicable to be heard, and to participate, in the proceedings'.

(b) Are the limitations on use of evidence of prior offences, committed as a child, appropriate?

The current legislation provides that the Court may refuse to record a conviction for children aged 16 and over against whom an offence is proved. This provision is often not brought to the attention of the Court and the conviction is automatically recorded, which is not the intention of the legislation.

Section 14(b) should be amended so that there is a presumption that a conviction of 16-18 year old is not recorded unless ordered by the Court.

(c) Should the wording of section 15 be amended to make it easier to understand?

Section 15 needs to be clarified; it is often misinterpreted. A literal reading of the section means that if an offence is committed more than two years after a non conviction in the Children's Court, the offence the subject of the non conviction is not admissible in proceedings. However, if a further offence is committed within 2 years of that other offence the protection of the section is interrupted, and the admissibility of the non conviction in the Children's Court is revived. The Committee is of the view that Section

15 should be amended to ensure that if there is a two year crime free period since the offence the subject of the non conviction in the Children's Court, then that Children's Court offence should not be admissible in *any* subsequent criminal proceedings.

Question 26

Is it appropriate for courts other than the Children's Court, when dealing with indictable offences, to impose adult penalties or Children's Court penalties?

The Courts should be compelled to use Children's Courts penalties. The Court should have the choice to remit the matter back to the Children's Court or deal with the matter using the Children's Court penalties.

Question 27

Is there any need to amend the list of factors to be taken into account when deciding whether to impose adult penalties or Children's Court penalties where they have committed a non-serious indictable offence?

The focus of section 18(1)(A) is primarily on the offence. There should be more focus and comment on the person's subjective factors, e.g. progress with rehabilitation, or the need for further rehabilitation.

Question 28

Does the list of special circumstances that can justify certain offenders aged 18 to 21 being placed in juvenile detention remain valid?

No, the list of special circumstances does not remain valid.

As a consequence of the amendment larger number of juveniles aged between 18 and 21 are being held in inappropriate placements. It is now harder to convince Magistrates to make section 19 orders since the special circumstances factors were inserted. The list is far too restrictive and should be deleted. The factors in place have worked against section 19 orders being granted.

Question 29

(a) What should the content of the background reports be?

The legislation requires better guidance against the inclusion of objectionable material and reports, e.g. allegations of uncharged offences.

The courts are not using background reports as intended by the legislation. Magistrates are ordering background reports for young people who have committed offences that would never realistically attract a control order. Juvenile Justice prepared 5150 background reports in 2010-11, even though less than 600 control orders were made in that period.²⁴

The legislation should clarify that a full background report should only be ordered where the court is seriously considering a control order, or on application by the solicitor for the child for a report to address a specific area to assist in the sentencing process.

(b) Should the contents be prescribed in legislation?

The contents should be prescribed in legislation to ensure consistency. Some mention should also be made of a child's general health history; in particular, reference should be made to any mental health issues suffered by the child.

²⁴ Consultation Paper, p38.

(c) Should other reports be available to assist in sentencing?

The capacity for psychological assessments of a child should be increased. The Magistrate should have the ability to make the order on application, with the consent of the child a prerequisite to a psychological assessment.

The Committee notes the importance of maintaining medical confidentiality to protect the integrity of medical treatment of a child in custody.

Question 30

Should a court have the power to request a report from relevant government agencies in order to determine whether a young person is at risk of serious harm (and in need of care and protection) and/or whether they are homeless?

Yes. The Committee supports the Court having the power to request a report from relevant government agencies in order to determine whether a young person is at risk of serious harm (and in need of care and protection) and/or whether they are homeless.

A report that determines that a young person is homeless would trigger the process under section 120 of the *Children and Young Persons (Care and Protection) Act 1998*. Section 120 would be more effective if it compelled the Director General to arrange for the provision of services including residential accommodation, rather than giving the Director General the discretion to do so.

Question 31

Is the list of serious children's indictable offences appropriate? If not, what changes need to be made?

Yes.

Question 32

Is the current approach to dealing with two or more co-defendants who are not all children appropriate?

Yes. The legislative provisions work to protect the child.

Question 33

Should the Children's Court hear all traffic offences allegedly committed by young people?

Yes. The Children's Court should be able to hear all traffic matters. The different considerations and treatment that apply to children in the criminal justice system apply equally to traffic offences. The argument that a child who is old enough to drive should be dealt with as an adult is inconsistent with the principles of the CCPA.

Question 34

Should the CCPA clarify whether a child can be sentenced to a control order for a traffic offence?

No. The Committee does not want the Local Court to have jurisdiction to hear traffic matters allegedly committed by young people. The Committee's position is that the matter should be dealt with in the Children's Court, where there are factors relevant to the age and circumstances of the young person and the aims of the CCPA that should be considered when deciding penalties.

Question 35

(a) Are there any concerns with these provisions? In particular:

i) is it appropriate that Children's Court magistrates have such a discretion, rather than having the election decision rest solely with the prosecution and/or defence as is the case with the adult regime?

The decision should be up to the Magistrate, but only on the application of the prosecution, not of the Magistrate's own volition.

ii) should there be a more restricted timeframe for the defendant (or the Court) to make an election?

The timeframes should be a maximum of 14 days after the first appearance, but preferably shorter.

(b) Should the CCPA include any guidance about the circumstances in which the Children's Court may form the opinion that the charge may not be disposed of in a summary manner (as it does for indictable offences set out in s18(1A))?

Yes. The provisions are not detailed enough. There needs to be clear guidance for Magistrates and a very high threshold to establish that a charge may not be disposed of in a summary manner.

Question 36

(a) Are the penalty provisions of the CCPA appropriate?

Section 33 should be amended to state:

'before imposing any of the penalties in this section, the Court must consider the options under section 31 or section 40 of the Young Offenders Act'.

The court should have the ability to backdate a bond or probation order. This would enable the Court to take into account any period of supervision that the child has been subject to e.g. where the child has already been subject to the Youth, Drug and Alcohol Court or Griffiths remand supervision.

The Committee has concerns about the inappropriateness of place restriction and non-association orders. They are overly punitive and often unfair to a child or young person. Young person's lives can change quickly, particularly in country areas. These orders often set up a young person for breach. The Review would benefit from detailed research on the use of the conditions and the results of any breaches. The Committee suspects that Aboriginal young persons, who rely so strongly on family connections, are disadvantaged by the sections.

(b) Are there any concerns with their operation in practice?

The Committee is concerned about the lack of availability of Community Service Orders in regional and remote areas. The Standing Committee on Law and Justice's 2006 report *'Community based sentencing options for rural and remote areas and disadvantaged*

populations' raised concerns about the lack of community based sentencing options in many regional and remote areas.²⁵

The experience of Committee Members is that the lack of availability of Community Service Orders in regional and remote areas pushes sentences up, so that a rural or remote young person receives a suspended sentence or a control order when a metropolitan young person would receive a less severe order.

The Committee has concerns about the length of bonds imposed on children and young people. Often the length reflects the perceived welfare needs of the child rather than the criminality of the offence. The time of the bond should be linked to the age of the child and the nature of the offence. In determining the length 2 steps are required; 1) determine the bond that is appropriate and 2) consider the length with reference to the sentencing principles.

(c) Should the penalty options be clarified or simplified in the Act?

Section 33(1) should be renumbered. The section has become unwieldy and difficult to read.

Question 37

(a) Are the provisions for the destruction of records appropriate?

The provisions are appropriate.

The Committee suggests a legislative amendment to require the destruction of photographs, fingerprints and palm prints following the successful completion of an outcome plan from a police referred youth justice conference, similar to those for YOA cautions²⁶.

(b) Are there any concerns with their operation in practice?

The Committee recently made inquiries to the NSW Police Force in relation to the destruction of finger-prints, palm-prints and photographs of young people.

The NSW Police Force advised that it had identified compliance issues with some of the legislative requirements to destroy forensic material, and work is underway to rectify the problem.

(c) Should the presumption for destruction of records be reversed in relation to proceedings where a child or young person pleads guilty, or the offence is proved but the Court dismisses the charge with or without a caution?

Yes, there should be a presumption that the material is destroyed automatically.

Question 38

(a) Are the provisions for terminating and varying good behaviour bonds and probation orders, and for dealing with breaches of such orders, appropriate?

²⁵ Standing Committee's 2006 report: *Community based sentencing options for rural and remote areas and disadvantaged populations*, NSW Parliament Sydney.

²⁶ See section 33A, *Young Offenders Act 1997*.

No. The provisions require amendment as detailed in (c) below.

(b) Are there any concerns with their operation in practice?

Yes, see (c) below.

(c) Should there be a wider discretion to excuse a breach of suspended control order?

Yes. The Committee supports a more flexible approach to breaches of suspended control orders.

Young persons are treated differently by the criminal justice system and are subject to their own legislation. However, at the point of time when young offenders are before a court for a breach of a suspended control order they are in a worse position than adults who are before a court for breaching a suspended prison sentence.

An adult who breaches a suspended sentence and the bond is revoked, is able to be assessed for an Intensive Corrections Order (previously periodic detention) that is they may not have to undertake a full time jail sentence.

A young person who breaches a suspended control order and the bond is terminated has no options other than being sentenced to a full time control order.

The legislation that relates to a failure to comply with the suspended prison or control order is very similar (section 41A CCPA and section 98(3) of the *Crimes (Sentencing Procedure) Act 1999*).

The Court of Appeal in *DPP v Cooke & Anor* [2007] NSWCA 2 outlines the approach on breaching section 12 bonds for non-trivial breaches. Normally a further offence would result in the bond being revoked and any consideration of the subjective circumstances of the offender at the time of the proceedings for the breach will not be relevant nor will the consequences of revoking the bond.

Justice Howie differentiates a more favourable South Australian decision against revocation in *R v Marston* (1993) 60 SASR 320 on the basis that 'secondly, and perhaps more significantly, the impact of the revocation of the bond can be ameliorated in this State by ordering that the sentence that is enlivened by the breach be served by periodic detention or home detention.'

As stated above, these options are not available for revocation of suspended control orders.

When one looks at the guiding principles of the CCPA and the vast research material on young persons the legislation should allow the court to take into account a wider range of considerations when looking at breaches of suspended control orders.

The court should be able to take no action on a wider set of reasons than only that the breach is considered trivial. The court, when deciding whether or not to revoke a suspended control order, should look at the actions of the young person whilst on the suspended control order; how far into the ordered before there were problems; the effect on the young person's present and future development if a control order is imposed; whether the breaches are the result of activities or issues that are out of the control of the young person.

Question 39

Should the YOA and CCPA be merged? If so, what should be the objects of any new Act?

The Committee is concerned that a merger of the legislation may affect the integrity of the YOA. The Committee considers that, rather than a merger, more overt connections between the two pieces of legislation should be included in the CCPA, as suggested in our response to question 36.