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23 February 2011

Mr Paul McKnight
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New South Wales Law Reform Commission
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Dear Mr McKnight,

Young people with cognitive and mental health impairments in the criminal justice system

The Law Society's Criminal Law Committee and Juvenile Justice Committee (Committees) have reviewed the consultation paper on young people with cognitive and mental health impairments in the criminal justice system.

The Committees have commented on the issues raised in the consultation paper in the attached submission.

Should any further information be required in regard to this submission, please contact Ms Rachel Geare, Executive Member, Criminal Law Committee, on 9926 0310.

Yours sincerely,

Stuart Westgarth
President

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YOUNG PEOPLE WITH COGNITIVE AND MENTAL HEALTH IMPAIRMENTS IN THE CRIMINAL JUSTICE SYSTEM

The Committees call for agencies involved in the assessment, reporting and treatment stages to be granted a legal mandate for their involvement with young people with cognitive and mental health impairments, together with resources to enable them to provide their much-needed services. It is arguably the case that young people with cognitive and mental health impairments come into contact with the criminal justice system because the public health and other social systems have failed them. As a consequence, it is important to ensure that a treatment-oriented approach is encouraged at every point of their contact with the criminal justice system, and that this process is adequately resourced. The role of legislation in relation to young people with cognitive and mental impairments must be focused on treatment as a first priority, and service provision resourced so that it may follow where the law leads.

Abuse and neglect of young people with cognitive and mental health impairments requires strategies to deal with these young people outside of the criminal justice system. This is an area of therapeutic need. Much of the behaviour by a young person with a cognitive or mental health impairment is inappropriately labeled as offending behaviour and criminalised. The Committees response to the issues raised in the consultation paper are made in this context.

BAIL

11.1 (1) To what extent do problems and concerns identified in relation to bail and young people apply to young people with cognitive and mental health impairments?

The *Bail Act 1978* applies equally to children and adults, prevailing over children's legislation where there is an inconsistency (section 5 *Bail Act 1978*, section 50 *Children (Criminal Proceedings) Act 1987*),
Discrimination is pronounced in the reluctance of police and courts to release young people on their own undertaking, and the imposition of more onerous bail conditions on young people than adults including place restrictions, non-association orders, residential conditions and curfews. It is accompanied by zero tolerance policing which means that young people are often arrested for minor breaches.

The problems and concerns that relate to bail and young people are compounded when they apply to young people with cognitive and mental health impairments. Young people with cognitive and mental health impairments have an even greater lack of understanding of bail conditions than a young person without cognitive and mental health impairments.

There is a greater inclination for carers and others to override legal issues with social issues in relation to the imposition of bail conditions. This would rarely happen to an adult and is less likely to happen to a young person without a cognitive or mental health impairment.

(2) How can the number of young people with cognitive and mental health impairments held on remand be reduced, while also satisfying other considerations, such as:
(a) ensuring that the young person appears in court;
(b) ensuring community safety;

(c) the welfare of the young person; and
(d) the welfare of any victims?

The number of young people held on remand is contrary to the principles of the Children's Court and the juvenile justice system that gives special recognition and treatment to young people, as required by the International human rights instruments to which Australia is a signatory.

The Law Reform Commission refers to the limited amount of existing research and information concerning young people with cognitive and mental health impairments in the criminal justice system. The percentage of the remand population that has cognitive and mental health impairments is not known. This lack of information needs to be addressed. Better data is required and regular accounting for children in this category is needed.

The high percentage of young people in custody with cognitive and mental health impairments is of great concern. Preliminary results from the *2009 Young People in Custody Health Survey* indicate that 87% of young people in custody sampled had at least one psychological disorder and 73% had two or more disorders.

Reducing the number of young people with cognitive and mental health impairments held on remand requires appropriate placement for such young people. It is always difficult to achieve a placement for a young person, and it is even more difficult to do so for a young person with a cognitive or mental health impairment. The Committees are concerned that Community Services views remand as a placement.

The Committees are concerned about the deliberate criminalisation of young people with cognitive and mental health impairments in care, e.g. when staff in a group home call the police when property is damaged. This is difficult and predictable behaviour displayed by a young person with a cognitive or mental health impairment and should not be criminalised. A proactive response based on effective preventive and remedial measures is required. This would include following properly constructed practices and policies for staff dealing with the challenging behaviour of young people in a group home. There is a current lack of resources to train and implement programs for staff working with young people with cognitive and mental health impairments in group homes. It is therefore crucial that police properly assess the requests made by staff, and exercise their discretion to direct these young people away from criminal justice responses and into appropriate services.

To ensure the welfare of young people with cognitive and mental health impairments, and prevent further over-reliance on criminal justice measures, efforts should be made to establish and apply programs aimed at strengthening social assistance. These measures would allow for the diversion of these young people from the criminal justice system as well as improving the application of non-custodial measures and reintegration programs. This would require close cooperation between Ageing, Disability and Home Care, Juvenile Justice, Community Services and various services in social welfares and education sectors.

An increase in resources is needed to improve strategies which are aimed at increasing access to justice for young people with cognitive and mental health impairments. Increased training for advocates, support people and 'independent third persons' will assist young people with cognitive and mental health impairments to effectively engage with the legal system.

The number of young people with cognitive or mental health impairments held on remand can be reduced by the proper application of the *Bail Act 1978*, the use of arrest as a last resort and diversion to appropriate programs. Sufficiently skilled staff are required to care for these young people. The inappropriate reliance on bail conditions as a tool for behaviour modification and control is also required (see discussion below).

(3) What interventions are required at the stage that bail determinations are made that could help reduce re-offending by a young person with cognitive and mental health impairments? What relationship, if any, should this have to diversionary mechanisms?

The Committees agree that with the Law Reform Commission's observation that the power to grant bail can be a means of diverting people out of the criminal justice system and into programs for treatment as well as to support services.

A review of existing procedures should be undertaken and, where possible, diversion or other alternative initiatives should be developed to avoid recourse to the criminal justice system for young persons with cognitive and mental health impairments accused of an offence. Appropriate steps should be taken to make a broad range of alternative and educative measures available at the pre-arrest, pre-trial, trial and post-trial stages, in order to prevent recidivism and promote the social rehabilitation of these young people.

Whenever appropriate, mechanisms for the informal resolution of disputes in cases involving a young person should be utilised, including restorative justice practices. In the various measures to be adopted, the family should be involved, to the extent that it operates in favour of the good of the young person with cognitive or mental health impairments.

Priority should be given to setting up agencies and programs to provide legal and other assistance to young people with mental health or cognitive impairments. A large number of young people with emerging mental health issues are not linked to any services.

The Committees suggest the following intervention model.

<u>Proposed intervention model</u>

The Committees suggest that an agency should be mandated with appropriate resources to provide services and intervention programs to young people with cognitive and mental health impairments. The Committee notes the importance of providing culturally appropriate assessment tools and intervention for Indigenous young people with cognitive and mental health impairments.

This new court outcome could be similar to the Drug Court of MERIT program and would be aimed at young people with cognitive or mental health impairments. Young people would be referred pre-plea and bail would be dispensed with.

A young person could be diverted to the care of an appropriate agency mandated by the court to provide the services. The agency would need to be resourced to provide access to therapeutic interventions aimed at developing and maintaining the skills and functions of young people with cognitive and mental health impairments who have high and complex needs.

Once the young person is diverted there would be no further Court involvement and no potential for penalties or for the young person to return to court.

When applied in suitable circumstances, such a legislative scheme could spare a young person with a cognitive or mental health impairment from being disproportionally dealt with in the later stages of the criminal process, which rather than rehabilitate, is more likely to exacerbate the adverse effects of their condition.

The Committees would like to emphasise that such a model should be the result of further consultation and must be carefully drafted, and developed with close attention to the rights of vulnerable people.

11.2 Should the Bail Act 1978 (NSW) incorporate criteria that apply specifically to young people with cognitive and mental health impairments?

Yes.

If so:

(a) why is this change required;

Young people with cognitive and mental health impairments encounter barriers in obtaining bail as highlighted by the Department of Justice and Attorney General's 2010 Review of the Bail Act. The difficulties include:

- lack of suitable accommodation options in the community;
- lack of support services that would provide supervision whilst on bail;
- reduced level of community ties;
- a history of itinerant accommodation/homelessness;
- a history of breached bail conditions/warrants or failures to appear; and
- likelihood of a history of prior convictions and classification as a repeat offender.

These difficulties, combined with the restrictive amendments to bail legislation over the past decade, have made it very hard for young people with cognitive and mental health impairments to obtain bail.

(b) what specific provisions should be incorporated?

Criteria that apply specifically to young people with cognitive and mental health impairments should be incorporated into the *Bail Act 1978*.

The committee proposes that the term "intellectual disability" in section 32 (1)(b)(v) of the *Bail Act 1978* should be replaced with the term "cognitive impairment" to provide an updated definition. As defined in section 61H(1A) of the *Crimes Act 1900* a person has a "cognitive impairment" if a person has:

> (a) an intellectual disability; or
> (b) a developmental disorder (including autistic spectrum disorder); or
> (c) a neurological disorder; or
> (d) dementia; or
> (e) a severe mental illness; or
> (f) a brain injury,
> that results in the person requiring supervision or social habilitation in connection with their daily life activities

Bail conditions must be clearly understood and appropriate having regard to the capacity of a young person with a cognitive or mental health impairment. Breaches of bail should be considered differently when the young person has a cognitive or mental health impairment.

Supreme Court bail applications should be expedited for young people, or indeed anyone, with a cognitive or mental health impairment.

11.3 What other changes to law could be introduced to ensure that young people with cognitive and mental health impairments are dealt with under bail legislation in ways that appropriately take into account their age and impairment?

The *Bail Act 1978* should include an express provision requiring the court or police to take account of a young person's cognitive or mental health impairment when deciding whether or not to grant bail. This is required because a grant of bail can be the first step of not only diverting alleged offenders with cognitive and mental impairments away from the criminal justice process, but can also be the first step in a successful rehabilitation process. Where the applicant for bail has a cognitive or mental impairment, the order is usually subject to a range of conditions which, when tailored carefully to the circumstances, can act as a framework for rehabilitation.

The introduction of an intervention program as outlined in 11.1(3) above would also assist.

11.4 Does the meaning of "special needs" in s 32 of the Bail Act 1978 (NSW) need to be clarified? If so, how should it be defined?

The term "special needs" should be given more weight and clarified to provide more guidance to decision makers. The "special needs" of a young person with a cognitive or mental health impairment facing custody must be given greater weight because they are more vulnerable than other young people.

The legislation should be amended to specify that it is a mandatory requirement to consider the young person's special needs. This involves recognising that there are particular challenges in relation to the treatment of young people with cognitive and mental health impairments. An additional provision should be inserted to monitor the impact of the amendments.

11.5 (1) Should the Bail Act 1978 (NSW) be amended to require police officers and courts to be satisfied that bail conditions are appropriate, having regard to the capacity of the accused person to understand or comply with the bail conditions, where the accused is a young person and/or has mental health impairment?

Yes. Young people with cognitive and mental health impairments are more prone to breach bail conditions imposed on them than other young people. This is because they are not always adequately supported to ensure they understand and comply with their bail conditions. Accordingly, provisions such as section 8(2)(a)(i) of the *Bail Act 1978* adversely affect the chances of young people with cognitive or mental health impairments successfully applying for bail. Section 8(2)(a)(i) provides that bail which may have otherwise been granted may be refused if a person has previously failed to comply with a bail undertaking or bail condition in respect of the offence.

The Committees are concerned about the practice of imposing punitive and inappropriate bail conditions on young people. This concern is even greater when the young person has a cognitive or mental health impairment as they often find it hard to understand and comply with the conditions. This can result in a breach of bail and may lead to remand in custody.

Proper application of the *Bail Act 1978* by decision makers is essential. Section 37(1) provides that where bail is granted it should be granted unconditionally, unless the decision-maker is of the opinion that one or more conditions should be imposed for the purpose of:

(a) promoting effective law enforcement, or
(b) the protection and welfare of any specially affected person, or
(c) the protection and welfare of the community, or
(d) reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person.

Section 37(2) provides that such conditions should not be more onerous for the accused person than required:

(a) by the nature of the offence; or
(b) for the protection and welfare of any specially affected person (such as a victim); or
(c) by the circumstances of the accused person.

Each individual bail condition should relate to the offending behaviour and the objects of the *Bail Act 1978*. Bail conditions should not be used as a punitive measure or for behaviour modification as is often the case. Multiple and onerous bail conditions set all young people up for failure, not just young people with a cognitive or mental health impairment.

(2) Should the Bail Act 1978 (NSW) contain guidance about the conditions that can be attached where a young person with a cognitive or mental health impairment is granted conditional bail? If so, what should this guidance include?

Yes. The police and the courts should not impose a bail condition if they do not believe a young person can understand the condition or comply with it.

The *Bail Act 1978* should contain specific provisions for the imposition of conditions on young people with cognitive and mental health impairments. Given the difficulties and lack of support faced by persons with a cognitive or mental impairment, the *Bail Act 1978* should provide that the number of conditions imposed should be kept to a minimum, and should only be directed at what is necessary to achieve the object of bail (namely the attendance of the defendant at court and the minimisation of the risk of re-offending). Such a provision may lead to a reduction in breaches of bail which are not related to re-offending.

When considering the bail conditions to be imposed on these young people, a decision maker should take into account:

- the need to strengthen and preserve the relationship between the young person with a cognitive or mental health impairment and the young person's family;
- the desirability of allowing the young person with a cognitive or mental health impairment to live at home;

- the desirability of allowing the education, training or employment of the young person with a cognitive or mental health impairment to continue without interruption or disturbance; and
- the need to minimise the stigma to the young person with a cognitive or mental health impairment resulting from a court determination.

Bail conditions should not relate to the desires of the young person's carer.

11.6 Should s 50 of the Bail Act 1978 (NSW) require the police to take into account:
(a) age;
(b) cognitive and mental impairments; and/or
(c) the nature of the breach before requiring a person to appear before a court for breach of bail conditions?

Yes. A breach should not be automatic.

A breach can be dealt with by a CAN and the *Bail Act 1978* should be amended to specify that police must consider alternatives before arresting a person for breach of bail. The drafting could be similar to section 99(3) of the *Law Enforcement (Powers and Responsibilities) Act 2002* which highlights that the power of arrest should only be exercised as a last resort where alternatives are impractical.

11.7 Should s 50 of the Bail Act 1978 (NSW) specifically require courts to take into account:
(a) age;
(b) cognitive and mental impairments; and/or
(c) the nature of the breach when dealing with a person for failure to comply with bail conditions?

Yes. Section 50 should positively state that welfare issues are not to be taken into account. The actual offence should be taken into account, for instance, it is unlikely that a young person will receive a custodial sentence for an offence such as shoplifting.

11.8 Does s 51 of the Bail Act 1978 (NSW), dealing with failure to appear before a court in accordance with a bail undertaking, operate appropriately where a young person has a cognitive or mental health impairment? If not, what modifications are required to improve the operation of this provision?

The police should consider alternatives when there is a failure to appear before the court. More effort should be required to get the young person to court before issuing a warrant for arrest, or the matter could be adjourned.

11.9 What other approaches might be adopted to avoid remand in custody in appropriate cases where a young person with a cognitive or mental health impairment breaches a bail condition as a result of their impairment?

Where it is clear that a young person is having difficulty complying with bail conditions, or is breaching bail conditions, police and the court should look at the possibility of revising or removing the conditions. Police and the courts should be legally mandated to reconsider the conditions in light of the cognitive or mental health impairment. The court should be advised of other ways to deal with the behaviour. This does not represent a failure of the young person to adhere to the court's authority, but reflects an inability to follow conditions due to a cognitive or mental health impairment.

11.10 (1) Are young people with cognitive and mental health impairments remanded or remaining in custody because of difficulty in accessing suitable accommodation or mental health or disability services?

Yes. It is difficult to access suitable accommodation for any young people. It is even more difficult to find suitable accommodation for young people with cognitive and mental health impairments.

Young people with cognitive and mental health impairments will usually answer their bail if they have adequate support (e.g. from a social worker or welfare agency) and have supported accommodation.

The Committees propose an amendment to the *Bail Act 1978* to expressly provide that a young person with a cognitive and mental health impairment should not be refused bail solely on the ground that he or she does not have adequate accommodation.

(2) Are additional legal and/or procedural measures required to avoid young people with cognitive and mental health impairments being held on remand because of problems accessing accommodation and/or services? If so, what measures should be implemented?

Yes. The government needs to clearly specify in legislation which department deals with accommodation issues for young people. This would resolve the current tension between Juvenile Justice and Community Services.

If a young person with cognitive and mental health impairments is held on remand because of problems accessing accommodation and/or services, the courts should be legislatively required to regularly bring the young person back to court to monitor the situation.

APPREHENDED VIOLENCE ORDERS

11.11 Is it common for young people with cognitive and mental health impairments to have AVOs taken out against them?

Yes. It is common for young people with cognitive or mental health impairments to have AVOs taken out against them. The legislation does not take into account whether or not the defendant has a cognitive or mental health impairment.

Young people with cognitive and mental health impairments have little or no understanding of the court process of the explanation of AVOs given by a Magistrate. It is therefore the view of the Committees that AVOs should not be able to be taken out against a person with cognitive and mental health impairments.

(a) Who applies for the AVO and what is the relationship between the young person and the protected person?

The Committees understand that the police initiate the majority of AVOs against young people. The protected person is often the young person's carer, parent, neighbour or another young person.

The legislation should be varied so that if the defendant is a young person with a cognitive or mental health impairment it is a mandatory requirement to move the matter out of the criminal justice system and into mediation or counselling.

The result of well-intentioned changes to the *Crimes (Domestic Violence) Act 2007* has been an increase in orders taken out against vulnerable people in care. The intent of the legislation was for orders to be taken out to protect the vulnerable person from carers. The outsourcing of care by Community Services has resulted in the department having an arm's length relationship with carers, and it is often the carers who taken out AVOs against a young person with a mental health or cognitive impairment.

(b) What conditions are normally attached to these AVOs?

Conditions prohibiting the young person from accessing his or her home/placement are often attached to AVOs (in addition to the mandatory conditions in s 36 *Crimes (Domestic Violence) Act 2007*).

(c) How often do breaches occur?

The Committees are aware that breaches occur regularly. Young people with congnitive and mental health impairments generally lack the capacity to understand the conditions attached to AVOs.

Breaches result in criminal charges. While those charges can be defended on the basis that the young person with a cognitive or mental health impairment did not "knowingly" contravene the order (section 14 *Crimes (Domestic Violence) Act 2007*), these matters should not be before a court.

(d) Is the behaviour that attracts the AVO or subsequent breach related to the young person's age and/or impairment?

Yes, almost always.

The Committees again make the point that carers need to be better trained at identifying and responding to difficult behaviour displayed by young people with cognitive and mental health impairments, rather than criminalising it. Police require the same awareness and appropriate training to respond appropriately.

(e) How is a young offender with a cognitive or mental health impairment dealt with after a breach occurs?

A young person with a cognitive or mental health impairment is dealt with in the same way as other young people after a breach occurs, and this can include serious penalties. The Committees note that following a breach the sentencing provisions do allow for more consideration of a person's cognitive state than the *Bail Act 1978* or at an AVO hearing.

(f) What alternatives are available to deal with the issue of adolescent violence against guardians or carers, where violence is related to a cognitive or mental health impairment?

Health-based and therapeutic approaches should be considered as a more appropriate alternative to AVOs.

(g) Are there particular problems of understanding or compliance with conditions of AVOs for young people with cognitive and mental health impairments?

Yes. The wording of an AVO is extremely difficult for a young person with a cognitive or mental health impairment to understand e.g. the prohibition on assaulting, threatening, intimidating or stalking a protected person.

(h) What changes to law or procedure are required to meet the legitimate interests of young people with cognitive and mental health impairments as respondents to AVOs?

Amendments to the *Bail Act 1978* and the *Crimes (Domestic Violence) Act 2007* are required. In deciding whether it is appropriate to make an AVO the Court needs to take into account the young person's age and cognitive and mental health impairment.

The Court should have the ability to override the defendant's consent to the AVO in appropriate circumstances.

11.12 (1) How are AVOs used for the protection of young people with cognitive and mental health impairments?

AVOs are rarely used for the protection of young people with cognitive and mental health impairments.

(2) What issues arise?

The Committees cannot provide examples of situations when AVOs have been used for the protection of young people with cognitive and mental health impairments. The Committees are therefore not in a position to provide examples of issues that may arise.

DIVERSION

11.13 (1) Are the objects of the Young Offenders Act 1997 (NSW) being achieved with respect to the application of the Act to young people with cognitive and mental health impairments?

No. The Committees note that the *Young Offenders Act 1997* is not intended to replace police discretion. Police use the legislation when it would be more appropriate to use a non-legislative solution, for instance when formal warnings are used prematurely.

(2) Is any amendment required, having regard to the applicability of the Act to young people with cognitive and mental health impairments?

There is tension between the requirement that the young person admit the offence and the inclination of solicitors to advise their clients not to, so that the solicitor can make a section 32 application.

The objects of the *Young Offenders Act 1997* should be clarified. It would be useful to highlight that the legislation is not meant to usurp police discretion to deal with matters informally without reference to the legislation.

The principles in the *Young Offenders Act 1997* relating to youth justice conferences in section 34 should be incorporated into the general principles in section 7.

11.14 (1) Are additional protections required where young people with cognitive

and mental health impairments are arrested and/or questioned by police? If so, what changes are required?

Yes. The *Law Enforcement (Powers and Responsibilities) Act 2002* should contain a provision prohibiting police from questioning a young person with a cognitive or mental health impairment.

Police do not need to conduct an interview to access the diversionary options under the *Young Offenders Act 1997*. Nor are police required to undertaken an investigative process or conduct an ERISP.

The *Young Offenders Act 1997* should be amended to provide more guidance as to what is required to constitute an "admission" under the legislation.

(2) Are police able to screen effectively for cognitive and mental health impairments in young people? If not, how can this be improved?

No. The Committees recognise that this is a difficult area, and that there have been attempts by police to screen for cognitive and mental health impairments in young people. However, police require further training to be adequately furnished with the knowledge and skill to identify a young person with a cognitive or mental health impairment.

Police should exercise discretion and err on the side of caution when dealing with young people who may have cognitive and mental health impairments. Appropriate checklists should be available for police. Once police have identified that a young person has a cognitive or mental health impairment they should not proceed with an interview.

11.15 (1) Are youth conduct orders an appropriate way of dealing with young people with cognitive and mental health impairments?

No. The Committees have serious reservations about the youth conduct orders scheme as it currently stands. It is not appropriate for youth conduct orders to deal with a young person with a cognitive or mental health impairment.

(2) How are youth conduct orders currently applied to young people with cognitive and mental health impairments?

It is difficult for the Committees to make detailed comments on youth conduct orders as so few orders have been made.

(3) How can the conditions of youth conduct orders be adapted to the needs of young people with cognitive and mental health impairments?

The Committees note that youth conduct orders were based on a United Kingdom model, and that jurisdiction is now moving away from this type of scheme.

11.16 Does s 22 of the Mental Health Act 2007 (NSW) operate satisfactorily in relation to young people with cognitive and mental health impairments? If not, how should it be modified?

No. The wording of section 22 of the *Mental Health Act 2007* appears to make it inapplicable to people with a cognitive impairment. From this standpoint, it does not seem to benefit people with intellectual disabilities. The definitions used in its

provisions, "mentally ill" and "mentally disturbed," have been suggested as not being broad enough to encompass offenders with a cognitive impairment. For this reason, the scope of section 22 should be expanded to encapsulate people with significant cognitive impairments whose behaviour is such that they need to be strictly supervised or detained in a secure facility. This could be done by drafting additional definitions into section 22 to expand its application to persons with cognitive impairments.

Furthermore, the Committees are of the view that section 22 is practically ineffective due to a severe lack of resources in the NSW mental health system. The Committees note that this is a matter of crucial concern. The Committees understand that health service providers will often interpret the terms "mentally ill person" and "mentally disturbed person" differently, depending on the number of beds that are available at the time.

11.17 Are the existing categories of eligibility for diversion under s 32 and/or s 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW) adequate and appropriate in the context of young people with cognitive and mental health impairments? If not, how should the criteria be modified?

No. Section 33 should be amended to apply to serious children's indictable offences at committal stage.

11.18 Should s 32 and s 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW) contain particular provisions directed at young people? If so, what should these provisions address?

Sections 32 and 33 should be clarified. Any matter that can be dealt with to finality in the Children's Court should be covered by the sections.

11.19 (1) How, if it all, should s 32 or s 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW) be amended to clarify who is responsible for supervision of orders?

Greater clarity relating to responsibility for supervision of orders would be desirable.

The Committees note that the medical profession is reluctant to become involved in the legal process. Any requirement that the medical profession become more involved in the legal process is likely to result in less involvement in treatment plans.

(2) Would a greater supervisory role by the Mental Health Review Tribunal be desirable in this context?

No.

11.20 Are the orders presently available under s 32 and s 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW) appropriate for young people with cognitive and mental health impairments? If not, how should the orders be modified?

The orders under section 32 are generally appropriate. It is important to remember that section 32 is diversionary and not punitive. There is often a leap to an incorrect assumption that the person has committed an offence and is guilty.

11.21 Should a supervised treatment or rehabilitation program be implemented for young people with cognitive and mental health impairments? If so:

(a) Who should supervise the program?
(b) Should the program be voluntary?
(c) Should guidance be included in legislation regarding when it would be appropriate to refer a defendant to the program?
(d) How should eligibility for the program be determined?
(e) How could such a program appropriately address the needs of young people with cognitive impairments?
(f) What should be the consequences of completion of the program?
(g) Should a supervised program be formulated as an extension of s 32 or s 33 diversion under the Mental Health (Forensic Provisions) Act 1990 (NSW) or should it be separate?

See the suggested intervention program outlined at 11.1(3) above.

11.22 If diversionary provisions under s 32 and s 33 of the Mental Health (Forensic Provisions) Act 1990 (NSW) are not extended to the District and Supreme Courts generally, should they be extended where the subject is a young person?

Yes. It is a generally recognised principle that young people should be dealt with differently from adults in the legal system with a particular focus on early intervention and rehabilitation.

Young people should be able to be dealt with under section 32 for much more serious offences than adults including any offences that can be dealt with to finality in the Children's Court.

FITNESS AND THE DEFENCE OF MENTAL ILLNESS

11.23 Should legislative powers and procedures dealing with unfit defendants be extended to the Children's Court? If so, should they be framed in a different manner from those available in the higher courts?

Yes. Fitness procedures should apply in the Children's Court. While a defendant can make a section 32 application, the Magistrate is required to exercise their discretion having regard to not only the nexus between the mental illness and the offending behaviour, but also treatment plans and appropriateness in the light of matters such as the seriousness of the offence and criminal history. Although a client may be unfit, where a Magistrate determines that a section 32 application is inappropriate, the matter is subject to a criminal justice response as there is no other diversionary procedure.

Legislative powers and procedures to deal with unfit defendants in the Children's Court should be framed in a different manner from those available in the higher courts.

The primary consideration should be section 32. If section 32 is not appropriate because the offence is too serious, consideration should then be given to the issue of fitness.

11.24 (1) Are the Presser criteria suitably framed for application to young people?

The Presser criteria are not framed as well as they might be for young people. As the Committees have commented elsewhere in this submission, young people with cognitive and mental health impairments face difficulties in cases where mental health

professionals are unwilling to pronounce diagnoses given the age of the person concerned. This means that they may not have the illness labels they need to convince the courts of their vulnerability in this regard.

In addition, as the Law Commission for England and Wales recently noted in relation to proposed reform of the 'Pritchard criteria', young people are at a unique time of rapid change, adding to their vulnerability to the onset of mental health issues. The suggestion that both Magistrates and Crown courts should have a discretion to switch to fact-finding hearings when someone is incapacitous, is arguably more vital for young people than adults. In recommending change in the law to a system more akin to civil law tests of capacity, the Commission stated that if their proposals for a decision-making capacity test are adopted then in so far as trials on indictment are concerned, it may be that young people who are presently found to be fit to plead are in future found to lack decision-making capacity.

(2) If not, should the criteria be expanded or modified?

As a protection for an accused person, and due to its intimate connection to the integrity of the trial process, it is in the interests of justice that the standard for determining fitness to be tried remains sufficiently robust in the current era. In this respect, the criminal law standard now falls short, particularly when compared with the standard for decision-making competency adopted in the civil law. The development of a more robust set of criteria for a finding of unfitness would ensure that a larger number of defendants would be able to rely on the protection offered by the law on unfitness.

(3) Should particular criteria relevant to young people be developed? If so, what should they be?

Yes, particular criteria for young people should be developed to take into account their lack of maturity and life experience.

11.25 Do any issues arise with respect to the operation of doli incapax and an assessment of fitness to stand trial where a young person suffers from cognitive or mental health impairments?

Yes. The presumption of doli incapax is a chronological "line in the sand". If a 15 year old is psychologically assessed as having a mental age of a 7 year old he or she should fall under the protection of doli incapax.

11.26 Does the current test for the defence of mental illness adequately and appropriately encompass the circumstances in which a young person should not be held criminally responsible for his or her actions due to an impaired mental state? If not, should the circumstances be differently defined for young people than they are for adults?

The test does not adequately and appropriately encompass the circumstances in which a young person should not be held criminally responsible for his or her actions due to an impaired mental state. This is due to the reticence of medical practitioners to diagnose anyone under the age of 18, and even more so if they are under the age of 16, with any mental condition.
Legal practitioners confronted with a young person with an emerging psychosis face difficulties in that they are not yet labelled and do not fit within strict guidelines which require a doctor to provide a definitive diagnosis.

11.27 Should the defence of mental illness be available in the Children's Court?

If so, should processes following a finding of not guilty by reason of mental illness be different to those available in the higher courts?

If the defence of mental illness is made available in the Children's Court the process following a finding of guilty or not guilty by reason of mental illness should be different to those available in the higher courts. It is noted that a finding of not guilty by reason of mental illness can result in serious penalties including indefinite detention.

11.28 Does the interaction of doll incapax and the defence of mental illness present any particular issues? If so, how should these issues be addressed?

Doli incapax and the defence of mental illness are quite different in terms of where they fit within the legal system. *Doli incapax* is not a defence, but is rather a rebuttable presumption.

The most common way for the Crown to rebut *doli incapax* is by questioning the young person or having the young person examined. In order to access the defence of mental illness, a psychiatric report is required where the young person must be interviewed. Any discussion by the young person in the context of that report may lose them their protection under *doli incapax* and provide the Crown with the evidence to rebut the presumption. This is as a result of the young person being forced to discuss both their offences and their motivation within the context of the psychiatric report.

11.29 Should the Mental Health (Forensic Provisions) Act 1990 (NSW) be amended to provide additional protections for young people and/or other provisions that meet their needs? If so, what principles should these amendments reflect and how should they be incorporated into the Act?

Yes. Additional protections are required that recognise the difficulties of a young person being definitively diagnosed with a mental illness. As such, young people should be able to access the provisions if they have an 'emerging psychosis'.

11.30 How can the application of the forensic mental health framework to young people be improved?
Particularly:
(a) What problems arise in relation to young people who are found unfit to stand trial, or found not guilty by reason of mental illness?
(b) Is there a need for specific forensic provisions that apply to young people? If so, what should these provisions address?

See 11.29 above.

11.31 Should the rules governing destruction of forensic samples collected from a young person following:
(a) a finding of unfitness to be tried;
(b) a finding of not guilty by reason of mental illness; or
(c) the making of a diversionary order, be different from rules applicable to adults? If so, how?

The rules should require the destruction of forensic material taken from a young person in the circumstances listed in (a)-(c) as soon as practicable.

SENTENCING

11.32 Should the Children (Criminal Proceedings) Act 1987 (NSW) be amended

to provide for psychological, psychiatric or other assessments of young offenders prior to sentencing? If so:

(a) Should assessment be mandatory in all cases?
(b) Should assessment be mandatory where a young offender appears to have a cognitive and/or mental health impairment?
(c) What should an assessment report contain?
(d) Who should conduct the assessment?
(e) Should any restrictions be placed on how the information contained in an assessment report should be used?
(f) Should this power be available to all courts exercising criminal jurisdiction?
(g) Should there be the power to remand young people for the purposes of assessment? If so, should there be a presumption against custodial remand?

No. The current system of background reports by Juvenile Justice works wells.

If psychological or psychiatric assessments of young people are to occur, then Legal Aid NSW and the Aboriginal Legal Service should receive separate funding to pay for the psychological and psychiatric assessments to pay for the assessment reports, with the option to use Court Liaison Service.

Such reports breach confidentiality and health confidentiality rights. The reports often contain information that is highly prejudicial to the young person. A young person should not lose their legal rights because of a cognitive or mental health impairment. If such a system is introduced it would remove an important legal protection that people without cognitive and mental health impairments enjoy.

The Committee is strongly opposed to a power to remand young people for the purposes of a psychiatric or psychological assessment.

The Committees emphasise that putting a young person in a juvenile justice centre is not a medical placement, it is detention.

11.33 Should special sentencing options be available for young offenders with a cognitive or mental health impairment?

Yes.

If so:

(a) How should existing options be modified or supplemented?

An additional non-custodial sentencing option for young people with cognitive and mental health impairments should be introduced. An option should be available, before a section 32, which recognises less serious matters specifically for young people with cognitive and mental health impairments.

(b) Should these options be available for serious children's indictable offences?

Yes, these options should be available for serious children's indictable offences.

11.34 Should the Children (Criminal Proceedings) Act 1987 (NSW) be amended

to provide specific principles relating to the sentencing of young people with cognitive and mental health impairments? If so, what principles should be included?

Yes. The Committees support the inclusion of the principles contained in Recommendation 249 of the Australian Law Reform Commission's *Seen and Heard: Priority for Children in the Legal Process* Report No 84 (1997):

- Magistrates and judges considering sentences for young people with a mental illness or severe emotional or behavioural disturbance should obtain and give appropriate consideration to specialist psychiatric reports prior to making any decisions about sentencing.
- Sentences should, where appropriate, provide for systematic and continuing assessment and treatment for young offenders affected by mental illness or severe emotional or behavioural disturbance. This should apply to both custodial and non custodial sentencing programs.
- Courts, detention centres and other agencies with responsibility for sentencing and post-sentencing arrangements for juvenile offenders should ensure that relevant staff are provided with appropriate training in the assessment, treatment and support of young people affected by mental illness or severe emotional or behavioural disturbance.

11.35 Is the current approach to sentencing young people with cognitive or mental health impairments adequate and appropriate? If not, how should the approach be modified?

No. The Children's Court has too few options available. The use of section 32 in the Children's Court is restricted by legislative requirements and the hesitancy of the Court to use it. The Court would be assisted by explicit encouragement to use section 32 and the availability of alternative sentencing options.

11.36 Should the option of provisional sentencing be made available when dealing with young offenders who have, or may have, cognitive or mental health impairments? If so, what criteria should apply to, or guide, the use and structure of provisional sentences?

The Committees acknowledge that it can be difficult to sentence adolescents who are still in their developmental stage and may be suffering from an emerging mental illness.

The Committees had some reservations about the concept of provisional sentencing for young people when preliminary comments were first sought by the Sentencing Council in 2007. However, having carefully reviewed the Sentencing Council's Report in 2010, the Committees supported the proposed model which only applies in very limited circumstances.

The Report concluded that a scheme of provisional sentencing should be available in respect of those children aged between 10 and 14 years who have been convicted for the offence of murder, where the information available, at the time of sentencing, does not permit a proper assessment to be made in relation to the presence or likely development in the offender of a serious personality and psychiatric disorder, and as a consequence an assessment as to their potential for future dangerousness or rehabilitation.

If a legislative scheme of provisional sentencing is going to be introduced, it is essential that the legislation addresses the important aspects of the model as set out in the Report, including:

- circumstances in which provisional sentencing will be available;
- the imposition of a provisional sentence;
- review of the provisional sentence and head sentence;
- the final determination of the sentence, and
- rights of appeal.