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

Submission to NSW Law Reform Commission on Consultation Paper 11

Shopfront Youth Legal Centre, March 2011

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under.

Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront employs 4 solicitors (3.1 full-time equivalent), 3 legal assistants (2.4 full time equivalent), a paralegal and a social worker (on secondment from the Public Interest Advocacy Centre Mental Health Legal Services Project). We are also assisted by a number of volunteers.

The Shopfront represents young people in criminal matters, mainly in the Local, Children's and District Courts. We prioritise young people who are the most vulnerable, including those in need of more intensive support and continuity of representation than the Legal Aid system can provide. Our solicitors have extensive experience in making s32 and 33 applications in the Local and Children's Courts.

The Shopfront also assists clients to pursue victims' compensation claims and deal with unpaid fines. We also provide advice and referrals on range of legal issues including family law, child welfare, administrative and civil matters.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Moreover, most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Scope of this submission

We refer to our preliminary submission to this reference, dated 15 May 2007, and our submission in relation to *Consultation Paper 7: Diversion*, dated June 2010.

We have also had the benefit of reading draft submissions from the NSW Law Society and The Youth Justice Coalition. We share most of the views raised in these submissions.

We would be happy to comment further on any aspect of this submission, or attend any relevant consultations. In this regard please feel free to contact Jane Sanders, Principal Solicitor, on 9322 4808 or at jane.sanders@freehills.com.

Chapter 2: Bail

Question 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?

We share the concerns in relation to young people and bail expressed by organisations such as the Youth Justice Coalition and referred to in your consultation paper. We do not consider it necessary for us to spell out these concerns in detail.

It is well-documented that children are often subject to overly onerous bail conditions. Sometimes these conditions are imposed due to a genuine but misguided concern about the child's welfare. Such welfare-based conditions are not supported by the *Bail Act* and are often more onerous than is warranted by the nature and seriousness of the alleged offence. Moreover, in our experience, these conditions are often age-inappropriate and are very difficult for young people to comply with. The practical effect is that young people are being arrested for breaching these conditions, and are being criminalised or punished for health or welfare problems that are largely beyond their control.

Problems in relation to young people and bail are exacerbated if the young person has a cognitive impairment, a mental illness or behavioural problems which may be linked to the onset or prodromal phase of a mental illness.

In our experience, a person with a mental illness or cognitive impairment often finds it more difficult to get bail than other alleged offenders, particularly if the alleged offence is a violent one. Lack of appropriate accommodation, treatment and care may make it difficult to address the court's concerns about the protection of the community.

If bail is granted, a young person with a cognitive impairment or mental health problem is likely to find it even more difficult to understand and comply with bail conditions, or to seek a variation of unsuitable conditions. In turn, they are more likely to be arrested for breach of bail.

(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?

While there may be some young people for whom custodial remand is the only appropriate option, we suggest that these represent a tiny minority.

In most cases, we believe that concerns about attendance at court, community protection and the like can be addressed by the provision of appropriate support services in the community, without the need for remand or for onerous bail conditions. Without these support services, sadly, juvenile detention becomes the inappropriate alternative to Children's Courts

It is supportive rather than punitive measures that are most likely to ensure a child attends court when required and does not offend in the interim. It is a well-established principle of children's sentencing that rehabilitation should generally prevail over punishment and deterrence. This is a sound principle based on an understanding of young people's development and what works best to prevent young people re-offending. Further, section 6 of the *Children (Criminal Proceedings) Act* sets out a number of important principles that courts must observe when dealing with criminal matters (including bail applications) involving children. Regrettably, these principles often seem to be forgotten when it comes to imposing and enforcing bail conditions.

Ideally, we would like to see a presumption that bail be dispensed with for children. Section 8 of the *Children (Criminal Proceedings) Act*, while quite outdated in its terminology, effectively creates a presumption that bail should be dispensed with for children. It provides that, unless there are real concerns about violence, re-offending or non-attendance at court, children should generally be dealt with by court attendance notice rather than being arrested and put through the charge process. We are of the view that section 8 needs to be updated and strengthened.

We note that, where a child is referred by a court to a Youth Justice Conference, or placed on a Youth Conduct Order, bail is generally dispensed with.

More specialised mental health and disability services for young people are part of the solution. These would include adolescent psychiatric facilities, early intervention teams based at community mental health centres, and targeted programs within ADHC.

It is, of course, possible for police to convey a young person to hospital under s22 of the *Mental Health Act*, and also for a court to send a defendant to hospital under s33 of the *Mental Health (Forensic Provisions) Act*, if the person is thought to be a "mentally ill person". However, these provisions only apply where a person is acutely ill and posing an immediate risk to themselves or others. They do not cover a situation where a person has a less acute form of mental illness, or a cognitive impairment, and requires intervention in the community rather than in a hospital.

It would be helpful if the police or Children's Court were able to refer a young person directly to a community-based service and (if necessary) impose a bail condition that the young person participate in assessment, treatment or case management with that service.

We are very concerned about the use of coercive sanctions on children in the early stages of a matter (when they are still presumed to be innocent or, even if they have admitted guilt, have yet to be sentenced). However, bail conditions requiring a young person to engage with services are preferable to the kind of bail conditions that are currently routinely imposed upon our most vulnerable children.

We also support the increased use of interlocutory orders under s32 (we note that, currently, magistrates are often reluctant to make interlocutory orders under s32, unless the matter has been formally listed for a lengthy s32 application). If a young person is thought to have a mental illness or cognitive impairment, they could be referred for assessment (or, if already assessed, for treatment or case management) on an interlocutory basis under s32 and bail dispensed with. A young person who fails to engage with the service offered would not be breaching bail (with all the consequences that may entail, including arrest and detention on remand) but would still be subject to court scrutiny the next time the matter is listed.

We also suggest that the development of a MERIT or CREDIT type program for juveniles, including those with cognitive and mental health impairments, would help address the need for appropriate support services. Please see our comments elsewhere in this submission, and in our earlier submission in response to Consultation Paper 7.

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

As discussed in our response to the previous question, we support the increased use of interlocutory orders under s32 and the establishment of a MERIT or CREDIT type program which would provide appropriate support services to young people who are awaiting the finalisation of their court matters.

When referred to these programs, the monitoring of compliance is conducted flexibly by people with specialist skills, as opposed to the narrow approach generally adopted by police when enforcing bail conditions.

In appropriate cases, successful completion of such a program could lead to the dismissal of the charge (either outright, as with a youth conduct order, or youth justice conference or under s32).

Question 11.2

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

a) **Why is this change required?; and**

b) **What specific provisions should be incorporated?**

We are of the view that there should be special provisions in the *Bail Act* relating to young people in general. Although s6 of the *Children (Criminal Proceedings) Act* is applicable to bail decisions involving children, it would be of some benefit to add a provision to the *Bail Act* clarifying that this is the case.

There are already provisions in the *Bail Act* requiring the decision-maker to take into account any special needs of the defendant arising from a cognitive impairment or mental illness. Unfortunately this does not seem to have assisted in achieving favourable bail decisions for these people.

There appears to be a need for legislative amendment to better address the needs of this vulnerable group. Perhaps this could be partly achieved by defining "special needs", as discussed in question 11.4.

However, we are of the view that special provisions in the *Bail Act* will be of limited assistance without the provision of better support services and court-mandated programs.

Question 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?

There may be some benefit in an amendment to s32 to place greater emphasis upon the court's power to make interlocutory orders under that section, so as to encourage magistrates to make interlocutory orders under s32 rather than simply impose conditions under the *Bail Act*.

Question 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?

Attempts to exhaustively define terms in legislation may lead to a more restrictive interpretation that would otherwise be the case. If "special needs" is to be defined, it is important that the definition be non-exhaustive. Examples of some factors that could be taken into account include:

- The fact that people with cognitive impairments and mental health problems are more vulnerable in custody;
- The lack of specialist mental health and disability services within the custodial environment (this is not to say that they do not exist, but they are less readily available in custody than in the community);
- The fact that disruption to a person's routine occasioned by a period on remand is likely to have a more significant impact on a young person with a measure of cognitive impairment, not only because it is likely to be distressing but because it disrupts established treatment and support networks.

Special needs are also relevant to any conditions imposed on bail, in particular the person's ability to understand and comply with conditions.

Question 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 of the accused person to understand or comply with the bail conditions, where the accused is a young person and/or has a cognitive or mental health impairment?

We strongly support such an amendment in relation to all young people, particularly those who have 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?

Guidance about appropriate conditions for young people, including those with a cognitive or mental health impairment, could be enacted as a schedule to the *Bail Act*, or as a regulation.

Such guidelines could also be included in a Children's Court practice direction. While practice directions do not have the status of law, our experience suggests that they are generally followed by magistrates. Of course, a practice direction would not address the setting of bail

conditions by police and, in this regard, some legislative guidance would be helpful. It must also be accompanied by comprehensive training.

Question 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, absolutely.

Section 50 of the *Bail Act* provides police with a discretion whether to arrest for breach of bail conditions. In the past, many police officers exercised this discretion appropriately and did not take action on minor and one-off breaches. However, in most Local Area Commands there now seems to be a "zero discretion" policy on breaches of bail, which leads to many inappropriate arrests, especially of children.

We find that sometimes young people who attend police stations to explain the reason why they missed reporting are arrested, taken into police custody and then put before the court (often after an overnight stay in custody). What seemed a reasonable excuse in the mind of the young person is often not tolerated by police, particularly in those cases where young people lack adult support.

In our view, a police officer who reasonably believes a person had breached (or is about to breach) bail should have the discretion to:

- take no action;
- issue an informal warning;
- issue a Court Attendance Notice without arresting the person; or
- (only in the most serious cases where there is a risk of flight or a significant and continuing breach of bail) arrest the person and immediately place them before the court.

It is important that, if a person is arrested for breach of bail, police have an express power to discontinue the arrest (for example, if the person provides a reasonable excuse for having breached bail, or if the police made the arrest based on incorrect information about the bail conditions).

We note the Youth Justice Coalition recommends the option of a warning caution under the *Young Offenders Act* in relation to a breach of bail. While we usually find ourselves in agreement with the Youth Justice Coalition, we disagree on this point. Breach of bail ii not an offence and it should not be treated as one.

Question 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?

In practice, courts often take these considerations into account. However, this is not universal and therefore we support a legislative provision.

Question 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?

In our experience, only a minority of people who fail to appear in response to a bail undertaking are actually charged with a separate offence of "fail to appear". It is to be hoped that police officers would use their discretion when considering laying such a charge against a person with a cognitive or mental health impairment. Similarly, it is hoped that a court would deal with such a charge in an appropriate way, for example, dismissing the charge under s 32, or accepting the person's cognitive or mental health impairment as a reasonable excuse for failing to appear and finding the accused not guilty.

Question 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?

As previously mentioned, we believe that appropriate support services in the community are a large part of the solution to this problem.

We also suggest there may be a need for closer court scrutiny of bail conditions, and a greater readiness to review bail conditions. Currently, most Local and Children's Courts will only vary bail conditions upon application of the defendant (and often this requires a application to be filed and the prosecution put on notice). For young people, especially those with cognitive and mental health impairments, the barriers to having a bail variation listed are considerable.

Further, in practice there is usually an onus on the defendant to satisfy the court as to why the bail condition is onerous or unreasonable. For example, we have encountered numerous situations where a curfew condition has been imposed in relation to a relatively minor offence alleged to have taken place in the middle of the day. Rather than considering whether a curfew is necessary and appropriate in the circumstances, many children's magistrates will approach the matter by asking the defendant "why do you need to be out in the middle of the night?".

Additionally, there appears to be a widely-held attitude among magistrates that young people should not be "rewarded" for breaching their bail conditions. There is thus a propensity to continue (or even toughen) onerous bail conditions rather than make a realistic assessment of the appropriateness of the condition and the young person's ability to comply.

There are, of course, magistrates who take a different approach, often reviewing bail conditions of their own motion and being prepared to vary or delete inappropriate conditions. We would like to see this approach adopted across the board, although we are unsure how this could be achieved by legislation. The *Bail Act* already provides that bail conditions are not to be more onerous than necessary, having regard to certain objectives, but in our view this section is not as rigorously applied in the Children's Court as it should be.

Question 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?

Anecdotal evidence would suggest yes. We also note the concern expressed by the Law Society that some young people with cognitive or mental health impairments (particularly those with intellectual disabilities who are in the care of Community Services) are being placed in, and returned to, inappropriate accommodation services. The lack of skilled staff and the absence of an appropriate behaviour management policy, at these services means that young people are often being criminalised for difficult behaviour that is often a manifestation of their cognitive or mental health impairment, and that would more appropriately be addressed without police intervention. Further, some of these services appear to be advocating for the imposition of bail conditions to assist them in managing the young person's behaviour. In many cases this is inappropriate and is setting vulnerable young people up for failure.

(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?

As previously discussed, we believe a large part of the solution lies in provision of better accommodation and support services in the community; also in mandating agencies such as Community Services to provide appropriate accommodation for young people involved with the Juvenile Justice system.

Appropriate procedural measures include regular reviews by the court where a young person remains in custody because of inability to find appropriate accommodation. Currently s54A of the *Bail Act* provides for the matter to be re-listed after 8 days; however, in our view, such a review needs to happen more promptly (we suggest 2-3 days) and may need to happen more than once if the young person remains in custody. If the court has imposed a residential condition such as "reside as directed by Community Services", the court should have power to order an Community Services staff member to attend and explain why the condition has not been met.

Chapter 3: Apprehended Violence Orders

Question 11.11

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

In our experience it is common for young people, including those with cognitive and mental health impairments, to have AVOs taken out against them. In many cases these AVOs are inappropriate and difficult for the young person to comply with.

If so:

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

AVOs are often applied for by police and in many cases it is mandatory for them to do so (e.g. under s49 of *The Crimes (Domestic and Personal Violence) Act,* if a person has been charged with a domestic violence offence).

We suggest that *The Crimes (Domestic and Personal Violence) Act* is in need of review, particularly when it comes to mandatory provisions requiring AVOs to be sought or made against children and/ or people with cognitive and mental health impairments.

AVOs are often taken out for the protection of parents against alleged violence by their teenage children. In some cases there are legitimate fears about such violence. However, in our experience, the alleged violence by the young person is often a response to a long-standing pattern of violence and abuse by the parent.

Sometimes parents make private AVO applications against their children. In some cases this appears to be more of a behavioural management tool rather than due to any real need for protection from violence.

AVOs are sometimes also taken out by, or on behalf of, classmates, ex-boyfriend/girlfriends and friends who have fallen out. While some of these applications are appropriate, the conditions imposed can often set a young person up for a breach by prohibiting contact in circumstances where the parties attend the same school, are part of the same circle of friends, or frequent the same places.

b) What conditions are normally attached to these AVOs?

Conditions vary, and may include prohibitions on approaching or contacting the protected person or going to their home, school or workplace. Sometimes these conditions can be problematic from the outset – for example, if the parties live in the same area, attend the same school, or frequent the same locations.

Sometimes the conditions may be reasonable at first but become unworkable due to changes in circumstances. A common problem is where an AVO is taken out for the protection of a parent and the order includes a condition that the young person not attend a family home. The parents and child later reconcile and the parents invite the child home without taking steps to have the AVO varied or revoked. Consent is no defence to a breach, and a protected person cannot be found guilty of inciting a breach, and therefore it is the young person who suffers, with no consequence to the parents. Young people, especially those with cognitive or mental health problems, often have great difficulty comprehending that, even if the protected person is not seeking to enforce the AVO (or, indeed, did not want an AVO in the first place) the young person can still be guilty of a breach.

To their credit, most Children's Court magistrates have adopted a careful approach when dealing with AVO applications involving young people. The Children's Court tends to make interim orders for up to six months, allowing them to lapse if there is no further incident rather than making final orders of long duration. Most Children's Court magistrates also take care to avoid imposing conditions which may be inadvertently breached, such as prohibiting the young person from having contact with a classmate.

However, even a cautious approach by the court does not always prevent inappropriate conditions from being imposed, as the Act does not impose a requirement that the conditions must be reasonable having regard to the defendant's ability to comprehend and/or comply with them.

c) How often do breaches occur?

This varies from case to case. We have worked with a few clients who are repeatedly charged with breaching AVOs; this is nearly always in the context of an ongoing relationship where the protected person has in some way incited or contributed to the breach.

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

In our view, much of the behaviour that is sought to be prevented by AVOs is "normal" adolescent behaviour, or predictably difficult behaviour arising from a mental illness or cognitive impairment, that would be more appropriately dealt with in other ways.

For young people, particularly those with cognitive and mental health impairments, breaches are often strongly linked with their age and/or impairment. For example, they may have difficulty understanding the conditions, and have particular difficulty with the concept that consent is no defence to a breach. Young people usually have limited control over their personal circumstances, such as where they reside or attend school, and may therefore have difficulty staying away from protected persons.

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

This depends on the circumstances of the individual case. As with other criminal charges, a breach of an AVO may be dealt with under s32 of the *Mental Health (Forensic Provisions) Act.* However, if there are repeated breaches (even if this is due to the defendant's inability to understand or comply with the conditions) there is often some reluctance on the part of the magistrate to continue applying s32.

It is a matter of some concern that there is no presumption in favour of bail for a charge of breach AVO where the alleged breach involves violence. Children may end up being detained on remand for breaches that are in fact relatively minor.

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

While we do not condone violence, and we do not suggest that parents and carers should have to accept it on a daily basis, we do not believe that criminal justice interventions or AVOs are always an appropriate response.

As previously stated, where a young person is in out-of-home care, better staff training and appropriate behaviour management policies are likely to assist in preventing violence (for example, by training staff to de-escalate potentially violent situations) and in responding appropriately when violence does occur.

We acknowledge there may be some cases where an AVO application is warranted. However, we would support these matters being referred to mediation with the aim of resolving the matter without the need for a continuing AVO.

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

As mentioned above, young people in general have problems understanding and complying with particular types of conditions. These problems are exacerbated if a young person has a cognitive or mental health impairment.

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?

We support an amendment to the *Crimes (Domestic and Personal Violence) Act* to the effect that an AVO may not be made unless the court is satisfied that the respondent has the capacity to understand the effect of the order. This would mean amendments to sections 39 and 40 so that AVOs are not always mandatory upon charge or conviction for certain offences.

Further, if the court is minded to make an order, we would like to see a requirement that the court be satisfied as to the appropriateness of each individual condition, including the defendant's ability to understand and comply.

We currently have the anomalous situation where a person who could not be found guilty of a criminal offence (e.g. because of doli incapax or a defence of mental impairment) can have an enforceable AVO against them.

Question 11.12

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

We do not have much experience of AVOs being used for the protection of young people with cognitive and mental health impairments.

(2) What issues arise?

The main issue arising is that AVOs are perhaps under-utilised when it comes to protecting young people with cognitive and mental health impairments.

(3) Are any changes to the law required to improve such protections?

It is worth considering amending the *Crimes (Domestic and Personal Violence) Act* to allow a carer to apply for an AVO on behalf of a young person with a cognitive or mental health impairment.

Currently the only person who can apply for an order on behalf of a young person is a police officer, a parent who is a protected person under an AVO and seeks to have the child included, or (if the young person is aged 16 or over) the young person in his/her own right.

Unfortunately, police may not always be proactive in making applications, or a young person may be reluctant to involve the police, particularly if the young person has had negative experiences with police in the past. Young people over 16, particularly if they have a cognitive or mental health impairment, may find it very difficult to apply for an AVO in their own right.

Chapter 4: Diversion

Question 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?

The objects of the *Young Offenders Act* include diverting young people away from the court system through the use of warnings, cautions and conferences. We suspect that *Young Offenders Act* options are being under-utilised for young people with cognitive and mental health impairments. This could be due to a number of factors, including perceived unsuitability and instability, past behaviour which has led to involvement with the juvenile justice system and breaches of bail conditions. There is also a very understandable reluctance on the part of children's lawyers to advise a young person to admit a offence (a pre-condition for a caution or conference) where the lawyer is concerned about the young person's mental state or cognitive ability.

Conversely, there may be young people being inappropriately dealt with under the *Young Offenders Act*, for example, admitting to offences for which they had no mens rea and would not be found guilty by a court.

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

While we believe this issue needs attention, we are not sure what kind of legislative amendment would help overcome the problem. In our view this issue needs more discussion among relevant experts and practitioners.

Question 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?

Firstly, additional protections are required to ensure that young people with cognitive and mental health impairments are not arrested in the first place. Arrest is a measure of last resort (this is made clear by the common law and by section 99 of the *Law Enforcement (Powers and Responsibilities) Act*. Section 8 of the *Children (Criminal Proceedings) Act*, while quite outdated in its terminology, contemplates that children should be dealt with by court attendance notice rather than being arrested and put through the charge process. However this section does not interact very well with the *Young Offenders Act*.

There is an incorrect but widely-held belief among police that it is necessary to arrest a young person in order to deal with them under the *Young Offenders Act*. Many police officers are of the view that a formal electronically recorded interview needs to be conducted in order to obtain the requisite admission. A young person also needs an adult present when they admit the offence, and they must be given the opportunity to get legal advice before making any decision. While it is no doubt convenient for police to have all this take place at the police station, this is not essential and was not what was contemplated by the *Young Offenders Act*.

Even if it is more convenient for all this to take place at the police station, a young person should be able to attend the station voluntarily without being placed under arrest when they get there. As Justice Smart said in the case of *DPP v Carr* (2002) 127 A Crim R 151:

> "This court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear."

Fortunately there are police officers who do apply the *Young Offenders Act* in the spirit in which it was intended. This means giving the young person an opportunity to obtain legal advice, find a support person and speak with the police if they wish to do so (either at the police station or at another place such as the child's home, at the time of the child's own choosing). The offence can be admitted without the need for a lengthy and formal interview, and can be recorded in a police officer's notebook (or using a portable dictaphone, which many officers now carry).

Preferably a young person with a cognitive or mental health impairment should not be questioned by police without being accompanied by an appropriate mental health or disability specialist, or at least the young person must be afforded the opportunity to consult with such a specialist as well as a lawyer before agreeing to any interview.

Part 9 of LEPRA and the accompanying regulations already provide for protection for "vulnerable people" under arrest (or deemed arrest) at a police station. However, these protections are sometimes not afforded due to a lack of appropriate support people or the inability of the police to identify cognitive impairments and mental disorders.

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

In our experience, police are not always effective at screening for cognitive and mental health impairments. It is clear that improved training is required. There may be some benefit in the adoption of a screening questionnaire, as suggested in the Law Society submission.

Additionally, as suggested in our submission to your Consultation Paper 7 (see response to question 7.2), we believe it would be of assistance to have a mental health or disability liaison service who police may call upon for assistance where they suspect a person has a cognitive impairment or mental health problem.

Question 11.15

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

No. Like the Law Society, we are of the view that the current youth conduct orders system has serious flaws.

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

Only a very small number of youth conduct orders have been made to date. We do not know if any have been made in relation to a young person with a cognitive or mental health impairment.

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

We regard youth conduct orders as an inappropriate means of dealing with young people and do not support them being adapted to the needs of young people with cognitive and mental health impairments.

(4) How can the youth conduct order scheme be improved for young people with cognitive and mental health impairments?

We support the abolition of the youth conduct order scheme and its replacement with a MERIT or CREDIT type programme for young people.

Question 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?

We refer to our submission in relation to your Consultation Paper 7 and in particular our response to questions 7.3 and 7.4.

The application of s22 is likely to be more problematic in relation to children and young people for whom it is often too early to make a definitive diagnosis.

Question 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?

As discussed in our submission in response to your Consultation Paper 7, (see in particular Section 3: Diversion under s32), we are of the view that the existing categories of eligibility for diversion under s32 and s33 could benefit from being broadened.

We support the application of s32 (and, where appropriate, s33) to young people with substance abuse disorders, personality/conduct disorders (which are often linked to conditions such as post-traumatic stress disorder) and young people in the prodromal phase of a mental illness.

We also support the application of s33 to serious children's indictable offences at committal stage (see our response to question 7.41 in our submission in response to your Consultation Paper 7).

Question 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?

We do not see a need for particular provisions directed at young people except to the extent that young people in the prodromal phase of a mental illness, or who are exhibiting symptoms that lack a clear diagnosis, should be eligible for diversion under these sections.

Question 11.19

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

The current provisions refer to the Probation and Parole Service, but in practice they appear to have no role in supervising s32 orders.

In any event, we suggest that the Probation and Parole Service is probably not the most appropriate agency to monitor compliance with s32 orders, even for adults. It is certainly not appropriate for children. It is our view that a more specialist service would be more appropriate to supervise compliance. Ideally this would be an independent body with a legal mandate to supervise orders.

Currently, case workers and treatment providers (who could be independent practitioners or employees of agencies such as ADHC) are expected to supervise clients' compliance with s32 orders. They have no legal mandate to do so and are often very reluctant to do so, seeing it as being in conflict with their therapeutic goals. For this reason it is sometimes difficult to get carers or treatment providers to support s32 applications.

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

We do not support a greater supervisory role by the Mental Health Review Tribunal.

Question 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 presently available are fairly broad in scope and are broad enough to be applied to children and young people. However, we believe that some amendments are necessary to make s32 and s33 more workable and inclusive.

In this regard, we refer to our submission in relation to Consultation Paper 7, and in particular our response to questions and in particular our response to questions 7.23 and 7.24.

We also refer to our comments about interlocutory orders in our response to questions 11.1-11.3 in this submission.

Question 11.21

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

Yes - We refer to our submission in relation to your Consultation Paper 7, and in particular our response to issue 7.35. We note that our suggestion of a MERIT type program has been picked up in your consultation paper at paragraph 4.48. Your consultation paper also discusses the Youth Drug & Alcohol Court (YDAC) and CREDIT Program.

If so:

a) Who should supervise the program?

The programme should be supervised by a team of suitably qualified professionals who have a legal mandate, and the appropriate resources, to supervise the programme. We would envisage something like a MERIT team or the Youth Drug and Alcohol Court team (which is a multi-disciplinary team made up of representatives from different agencies).

b) Should the program be voluntary?

Yes. Voluntariness is all the more important if the programme is to be available to young people who have not pleaded guilty or made any admissions to the charge.

c) Should guidance be included in legislation regarding when it would be appropriate to refer a defendant to the program?

It is worth considering providing guidance in legislation, but we do not see this as absolutely necessary. We note the Adult Drug Court is covered by its own legislation, but the Youth Drug and Alcohol Court has run successfully for years based on a practice direction without the need for legislation. On balance, we believe it may be more desirable to regulate such a scheme by means of practice direction; this would provide for greater flexibility and would allow the programme to be better tailored to the needs of young people.

d) How should eligibility for the program be determined?

We suggest that a young person who appears to meet the criteria in s32 would be prima facie eligible for the programme. A young person would not need a definitive diagnosis (otherwise the programme would be excluding some of the young people who need it most) but should at least be showing signs of cognitive impairment or experiencing symptoms consistent with a mental illness.

The young person's willingness to participate in some form of treatment or case management would also be an eligibility criterion.

We do not believe that young people should be excluded based on criminal history or the seriousness of the alleged offence, except in the case of the most serious offences.

e) How could such a program appropriately address the needs of young people with cognitive impairments?

The programme team would have to include psychologists and case workers who specialise in working with young people with cognitive impairments and developmental disabilities. For young people in this category, the programme would not be aimed at case management and support rather than "treatment".

What should be the consequences of completion of the program?

Where a young person's charges are relatively minor, completion of the programme should result in the dismissal of the charge, as is currently the case when a young person completes a youth justice conference outcome plan or (in most cases) a youth conduct order. If the charges are not dismissed outright, an unconditional dismissal under s32 may be appropriate.

For more serious charges, we suggest that successful completion of the programme would result in the charges being dismissed under s32, subject to conditions which would be in place for the next six months.

For very serious offences which are not appropriate to be dealt with under s32, completion of the programme would be taken into account on sentence if the child pleads or is found guilty.

We acknowledge it will be a challenge to draw the line between these three tiers of offences, but do not see this as an insurmountable barrier.

f) Should a supervised program be formulated as an extension of a s 32 or s 33 diversion under the Mental Health (Forensic Provisions) Act 1990 (NSW) or should it be separate?

It would make sense for such a programme to be an extension of a s32 or s33 diversion, using the interlocutory orders available to the court under those sections.

Question 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?

We believe that diversionary procedures under s32 and s33 should be available to young people in superior courts. As the Law Society points out in its submission, there are powerful arguments in favour of treating young people differently to adults.

Chapter 5: Fitness and the defence of mental illness

Question 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 high courts?

We refer to our general comments at the end of our submission on Consultation Paper 7.

In our opinion there is some role for the application of these procedures to the Children's Court, but in a very limited way.

We strongly believe that diversion under s32 or s33 should be the primary option in the Children's Court. Only after diversion has failed or been deemed inappropriate should the fitness and not guilty by reason of mental impairment provisions come into play.

We are strongly opposed to lengthy or indefinite detention for young people who are found unfit, found to have committed the offence after a special hearing, or found not guilty by reason of mental impairment. In nearly all cases, such outcomes would be disproportionately harsh, having regard to the usual sentencing patterns in the Children's Court.

Question 11.24

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

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

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

We refer to the comments of the Law Society on this issue. We are of the view that the *Presser* criteria may require some modification for children and young people. This would require input from experts drawn from the judiciary, the legal profession and adolescent psychiatry.

Question 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 impairments?

Yes, issues undoubtedly do arise in some cases. *Doli incapax* (which focuses on the child's capacity, at the time of the alleged offence, to understand that their actions were seriously wrong in a criminal sense) and fitness (which relates to a child's capacity to understand and participate in a criminal proceeding) are different concepts and do not always interrelate well.

We would comment that the situation in *R v AN* [2005] NSWCCA 239 strikes us as anomalous. It is difficult to see how a child who was found unfit to be tried due to an intellectual disability (which would have been present at the time of the alleged offence, unlike a transient mental illness which could have developed later) was not found to be *doli incapax*.

Question 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?

We refer to the Law Society's comment on this issue, and suggest that there may need to be some modification to take into account the fact that children are still in a developmental phase and may be significantly mentally impaired without a clear diagnosis.

Question 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?

The defence of mental illness should be available in the Children's Court, but only in a very limited way. Diversion under s32 or s33 should be the primary option in Children's Court. Only after diversion has failed or be deemed wholly inappropriate should this defence come into play. As with young people who are found unfit to be tried, we strongly oppose lengthy or indefinite periods of detention for young people. Where it is necessary to detain or confine young people for the purposes of treatment, this must take place in a therapeutic facility appropriate for adolescents.

Question 11.28

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

We refer to our response to question 11.25 above and to the Law Society's comment on this issue.

Question 11.29

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

There may be benefit in providing additional legislative provisions to address the special needs of young people. Any such provisions should reflect the principles of rehabilitation, detention as a last resort, and the fact that young people's cognitive and mental health impairments cannot always be categorised in a similar manner to adults. What form such provision should take is, we suggest, a matter for a working group made up of appropriate experts from the field of children's law and mental health.

Question 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?**

These issues are complex and beyond our expertise. We would comment that the lack of appropriate adolescent psychiatric facilities, and the attempt to deal with young people within an adult model, poses serious problems.

Question 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?

We are of the view that forensic material should be destroyed after a matter is dismissed under s 32 or s 33, if the proceedings are not brought back to court within 6 months. An order under s 32 or s 33 is not equivalent to a finding of guilt, and the defendant may in fact be innocent.

We acknowledge that there may be cases involving serious charges where the prosecution case appears strong, or where the defendant is diverted under s32 or s 33 after an admission of guilt.

In these situations, we would suggest that there be a procedure where the police may apply to the court for an order that forensic material be retained.

In our submission relating to Consultation Paper 7, we recommended that the above should apply to adults and we maintain this position. However, should the above not be adopted in relation to adults, we strongly believe that it should apply to children. Just as children are in a different category to adults when it comes to the recording and duration of convictions, we believe children should be in a special category when it comes to the retention of forensic material.

Chapter 6: Sentencing

Question 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?

We do not see the need for such a legislative amendment; however, it could be included in the provision relating to background reports.

If so:

a) **Should assessment be mandatory in all cases?**

No.

b) **Should assessment be mandatory where a young offender appears to have a cognitive and/or mental health impairment?**

No. As with the ordering of a background report, this should be left to the discretion of the magistrate.

c) **What should an assessment report contain?**

The contents of an assessment report would depend on the circumstances of the young person and the nature of their disability or mental condition. It should provide recommendations as to care, support, case management or treatment, but – as a background report would presumably also be prepared – it need not contain recommendations as to sentencing options.

d) **Who should conduct the assessment?**

Currently, psychological assessments are sometimes conducted by specialist psychologists employed by Juvenile Justice. Where there is a lack of specialist expertise within Juvenile Justice, the preparation of a report may need to be outsourced to an agency such as ADHC

(in a case of a young person with a developmental disability or cognitive impairment) or Justice Health (in a case of a young person with a mental illness).

e) Should any restrictions be placed on how the information contained in an assessment report should be used?

Yes; the contents of such an assessment may often be very sensitive. We note that the question is framed in terms of "an assessment prior to sentencing", so presumably there will already have been an admission or finding of guilt. If court-ordered assessments are to be prepared in circumstances where there has not been a finding of guilt, it is extremely important that any admissions purportedly made by the child during the course of the assessment should not be contained in the report.

f) Should this power be available to all courts exercising criminal jurisdiction?

Yes.

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?

We strongly oppose the creation of power to remand a young person for the purposes of an assessment, except in an appropriate psychiatric facility pursuant to an order under s33 of the *Mental Health (Forensic Provisions) Act.*

Question 11.33

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

a) How should existing options be modified or supplemented?

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

We do not see the need for special sentencing options, at least in the Children's Court. The availability of s32 and s33 of the *Mental Health (Forensic Provisions) Act*, together with the diversionary provisions of the *Young Offenders Act* and the sentencing options in s33 of the *Children (Criminal Proceedings) Act* provide the Children's Court with sufficient flexibility.

However, there may be some merit in special sentencing options, and/or the extension of the availability of s32 and s33, for serious children's indictable offences.

Question 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?

We do not see the necessity for such a provision, as we believe these principles are adequately set out in current legislation and current common law.

Question 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?

The current approach to sentencing young people with cognitive and mental health impairments is not always adequate and appropriate.

Firstly, the fact that so many of these matters are proceeding to sentence at all (as opposed to being diverted under s32 or s33) is itself a problem. In our view, magistrates should be encouraged (possibly through legislative amendment) to use the diversionary options under s32 and s33, even in the case of relatively serious offences.

Diversionary and sentencing practices would also be improved by the provision of further resources for assessment, care and treatment of young people with cognitive and mental health impairments.

Question 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?

We acknowledge that it is often difficult for a court to sentence a young person who may be showing signs of mental illness but where it is too early to tell how this will develop. We have reservations about provisional sentencing, in that it creates uncertainty and may lead to children receiving longer sentences than warranted, but we suggest it may be appropriate in the limited circumstances proposed by the Sentencing Council.

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March 2011

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