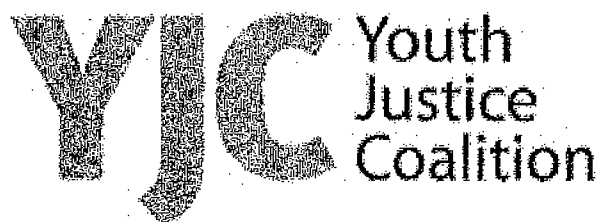


Submission

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

18 February 2011

Mark Patrick
Convenor, Youth Justice Coalition



About the Youth Justice Coalition

The Youth Justice Coalition (YJC) is a network of youth workers, children's lawyers, policy workers and academics working to promote the rights of children and young people in New South Wales.

The YJC aims are to promote appropriate and effective initiatives in areas of law affecting children and young people; and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate.

How the Youth Justice Coalition was formed

The YJC was formed in early 1987 under the auspices of NCOSS to work around the children's criminal, care and protection legislation introduced in that year. The YJC has been active since 1987 advocating for young people, particularly those involved in the criminal justice or welfare systems.

Membership of the YJC

- Barnardos Belmore (incorporating the Reconnect program, Streetwork program and Post Release Options Program)
- Bondi Outreach Project
- Catholic Care Sydney
- Central Illawarra Youth Services
- Council of Social Service of New South Wales (NCOSS)
- Crime and Justice Research Network
- Dr Dorothy Bottrell, Lecturer and Convenor, University of Sydney Network for Childhood and Youth Research
- Elaine Fishwick
- Illawarra Legal Centre
- Inner West Community Development Organisation
- Justice Action
- Liverpool Youth Accommodation Assistance Company
- Jenny Barga, Adjunct Lecturer, Sydney Law School
- Joanne Morrison, Youth Development Officer – Canterbury City Council
- Jodie Grundy, Community Project Officer (Youth) – Camden Council
- Macarthur Legal Centre
- Marrickville Legal Centre
- Marrickville Youth Interagency

- Marrickville Youth Resource Centre
- National Children's and Youth Law Centre
- Professor Chris Cunneen, NewSouth Global Chair in Criminology, Faculty of Law, University of New South Wales & James Cook University
- Public Interest Advocacy Centre
- Redfern Legal Centre
- Rosemount Youth and Family Services
- Shire Wide Youth Services
- Shopfront Youth Legal Centre
- South Sydney Youth Services
- The Crossing, Mission Australia
- Uniting Care Burnside
- Western NSW Community Legal Centre
- YFoundations
- Youth Action and Policy Association (YAPA)

Acknowledgements

The YJC wishes to acknowledge the contribution of Gemma Lardner, Mark Patrick, Jenny Bergen and Giselle Kenny in the drafting of this submission.

Recommendations

Recommendation 1: that there be a presumption of unconditional bail for all young people.

Recommendation 2: If Recommendation 1 is not adopted, that there be a presumption of unconditional bail for children and young people who are reported to have or identify as having a cognitive or mental health impairment.

Recommendation 3: that only bail conditions relating to the offence with which they are charged should be imposed on a child or young person.

Recommendation 4: that systems and protocols be established to ensure that:

- (1) the young person understands their bail conditions;
- (2) the young person can comply with their bail conditions;
- (3) the young person's family and support network understand and agree to their bail conditions; and
- (4) the young person's family and support network can assist them to comply with their bail conditions.

Recommendation 5: that the *Bail Act 1978* (NSW) incorporate criteria applying specifically to young people with cognitive and mental health impairments

Recommendation 6: that decision makers consider the nature of a bail breach committed by a young person with a cognitive or mental health impairment.

Recommendation 7: that young people be exempted from s22A of the *Bail Act 1978* (NSW), allowing young people to re-apply for bail after incidences of breach.

Recommendation 8: that police be provided with training to identify and appropriately deal with young people with cognitive and mental health impairments.

Recommendation 9: that the *Bail Act 1978* (NSW) contain guidelines for decision makers when granting conditional bail

Recommendation 10: that section 50(1A) be included in the *Bail Act 1987* (NSW) requiring police to take into account:

- (a) age
- (b) cognitive and mental health impairments; and/or
- (c) the nature of the breach

before requiring a person to appear before a court for breach of bail conditions.

Recommendation 11: that section 51(1A) be included in the *Bail Act* requiring courts to take into account:

- (a) age
- (b) cognitive and mental health impairments; and/or
- (c) the nature of the breach

when dealing with a person for failure to comply with bail conditions.

Recommendation 12: that the *Children (Criminal Proceedings) Act 1987* (NSW) take precedence over the *Bail Act 1978* (NSW) in instances where there is an inconsistency.

Recommendation 13: that diversionary options such as Young Offenders Act warnings and possibly cautions be made available to police to deal with breaches of bail conditions.

Recommendation 14: that research is undertaken to determine whether young people with cognitive and mental health impairments are disproportionately being remanded or remaining in custody because of difficulty in accessing suitable accommodation or mental health or disability services

BACKGROUND TO THE SUBMISSION

The current *Bail Act 1978*

The numerous amendments to the *Bail Act 1978* (NSW) ("the *Bail Act*") have progressively placed less emphasis on the rights of defendants, particularly those who are most vulnerable in the community. This approach has been consistent with law and order platforms adopted by governments to date, but is *inconsistent* with the primary principles of juvenile justice outlined in domestic law and international instruments that aim to protect young people and people with cognitive and mental health impairments. This has significantly impacted on the rights of young people, culminating in the high numbers of young people on remand in Juvenile Justice Centres in NSW.² Amongst these large numbers of young people on remand, the high percentages of those with cognitive and mental health impairments indicate that insufficient consideration is given to the particular vulnerabilities of these young people throughout the criminal justice process.

The YJC welcomes the attempt to assess the needs of young people with cognitive and mental health impairments in this consultation and believes that significant legislative amendment is required to protect the rights and interests of these young people.

Bail Me Out: NSW Young People and Bail

In February 2010, the YJC released its report '*Bail Me Out: NSW Young People and Bail*' ("Bail Me Out Report") in response to the alarming rise in the number of young people being held on remand in juvenile detention centres. The Bail Me Out Report identified the two most significant factors leading to this increase in the remand population as:

- Changes to the *Bail Act* that made it harder for young people to be granted bail, specifically s22A; and
- Proactive policing of young people on conditional bail, leading to the arrest of many young people for minor breaches of bail conditions.

After recording the data of 145 young people in Parramatta Children's Court over two weeks in August 2008 and January 2009, the report found:

- 60% of young people were detained for breach of bail conditions;
- Over half of these young people did not commit new offences;
- Of these young people who were in court for breaching bail, 60% were granted bail by the court again;
- 8% of those granted bail could not meet the conditions of their bail, usually because of lack of accommodation, and so had to remain in detention;
- Young people had an average of three conditions imposed upon them, the most common being a curfew, a reside as directed condition and an obey a reasonable direction condition.

This research indicated that most young people were arrested for breaches of bail that did not involve the commission of a new offence and were therefore minor or technical breaches of bail conditions. The high percentage of young people who were granted bail again indicates that these breaches were not severe enough to warrant detention.

The YJC made a number of recommendations in its report. Those relevant to bail include:

² In 2008 the Department of Juvenile Justice identified that the numbers of young people on remand had increased by 32% in the previous twelve months.

1. That the NSW Government:
 - 1.1 Commit to reducing the numbers of young people remanded in custody and adhere to the principles of detention as a last resort.
 - 1.2 Exempt young people from the operation of s22A of the *Bail Act 1978* (NSW).
 - 1.3 Amend ss 50 and 51 of the *Bail Act 1978* (NSW) to ensure that police first consider alternatives to arrest in relation to failures to comply with bail, or failures to appear before the Court whilst on bail.
 - 1.4 Fund a residential bail support program to assist young people in meeting their bail conditions, particularly 'reside as directed' conditions and placement conditions.
 - 1.5 Fund the youth services sector with expertise in out-of-home care services to establish a residential service for young people granted bail with 'reside as directed' conditions.
 - 1.6 Increase resources for Legal Aid NSW and the Aboriginal Legal Service to support young people at bail hearings.
 - 1.7 Designate the Young Offenders Advisory Committee to review and monitor referral rates to diversionary options, particularly those set out in the *Young Offenders Act 1997* (NSW).

2. That the NSW Police Force in each local area command:
 - 2.1 Commit to better compliance with the *Young Offenders Act 1997* (NSW) and to monitoring such compliance. These measures should be incorporated in the NSW State Plan.
 - 2.2 Maintain a full time Youth Liaison Officer.
 - 2.3 Ensure general duty police officers undertake specific training on how to engage and work with young people.
 - 2.4 Undertake further training on police obligations with respect to arrest being used as a last resort as stated in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW).
 - 2.5 Develop and implement a best practice model for engaging and working with young people, consistent with existing legislation and frameworks.
 - 2.6 Update the Youth Policy statement to ensure consistency with existing legislation and policies, particularly in relation to the exercise of discretionary powers and referrals to diversionary options.

Whilst the YJC did not examine the cognitive and mental health impairments of the young people in the survey, many of the problems facing young people in relation to bail that arose in the Bail Me Out Report and throughout the consultation would inevitably be exacerbated for young people with cognitive and mental health impairments.

The YJC was encouraged by the numerous references to the issues raised in the Bail Me Out Report in chapter 2 of the Consultation Paper. For this reason, the YJC's submission will focus on the issues surrounding bail faced by young people with cognitive and mental health impairments, and will respond to those questions outlined in chapter 2 of the Consultation Paper.

SUBMISSION OF THE YOUTH JUSTICE COALITION

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?**
- (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 the young person appears in court;**
 - (b) ensuring community safety;**
 - (c) the welfare of the young person; and**
 - (d) the welfare of any victims.****
- (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?**

Bail Conditions and Young People

The major concerns in relation to bail and young people, identified by both the YJC and the New South Wales Law Reform Commission ("NSWLRC") may be summarised as:

- Understanding bail conditions;
- Compliance with bail conditions;
- Provision of accommodation; and
- Service and support availability for young people on bail.

A failure to meet any one of these four requirements will likely lead to a young person breaching a bail condition and spending unnecessary time in detention on remand. However, these issues remain unaddressed in respect of young people in the current legislation.

Young people with cognitive and mental health impairments

The YJC's concern is that these factors are even more relevant to young people with cognitive and mental health impairments who may be granted conditional bail. By virtue of their impairment they are less likely to be able to understand the often numerous conditions placed on them by police or a court and consequently less likely to be able to comply with those conditions.

The YJC established in the Bail Me Out Report that there is a clear link between homelessness and the numbers of young people held on remand for their inability to be able to comply with a 'reside as directed' bail condition.³ Young people with cognitive and mental health issues are more likely to experience some level of homelessness and therefore more likely to be unable to meet such a bail condition. There is also currently little or no support available to young people who are on conditional bail to assist them in meeting their bail conditions. Young people with cognitive and mental health impairments are more likely to require such assistance in order to comply.

³ The Youth Justice Coalition, 'Bail Me Out: NSW Young People and Bail', (February 2010) ("Bail Me Out"), 20-21.

Between 2003 and 2009 the number of young people in custody or on community orders who presented with symptoms of at least one clinical psychological disorder, has remained stable at 87-88%.⁴ In addition, 45.6% of the young people interviewed in the most recent *Young People in Custody Health Survey* had an IQ indicating borderline intellectual disability or lower.⁵ This figure stands in stark contrast to the 9% of young people with the same IQ amongst the general population.⁶

These statistics, coupled with the acknowledgment in the NSWLRC Consultation paper that 55-60% of detainees held in juvenile detention centres are held on remand⁷, suggest that a large proportion of young people on remand in NSW detention centres suffer from some form of cognitive or mental health impairment. It is crucial that these numbers are reduced.

Bail considerations

The Consultation Paper suggests that these numbers should be reduced whilst also ensuring that:

- the young person returns to court;
- the community is safe; and
- the welfare of both the young person and the victim is safeguarded.

However, it is worth noting that although the purpose of bail is to ensure an accused returns to court on the allocated date, the reality is that the risk of a young person absconding is very low. Of those young people granted bail or where bail was dispensed with, less than 2% fail to appear in court.⁸ Thus the rationale for bail conditions imposed on young people to ensure their attendance at court is an erroneous one.

In respect of the welfare of a young person, in almost all cases it is better for the welfare of the young person that they remain in the community, rather than in detention. This principle is enshrined in section 6 of the *Children (Criminal Proceedings) Act 1987 (NSW)* and yet is absent from consideration in the *Bail Act*.

In considering community safety, it is important to acknowledge the prevalence of technical breaches⁹ of bail conditions that do not involve the commission of a new offence and that the majority of breaches are not deemed serious enough to warrant detention. The YJC found in the *Bail Me Out Report* that of the young people who were in custody for breaching their bail:

- 56% did not commit a new offence; and
- nearly 60% were granted bail again.¹⁰

These findings indicate that the majority of young people who breach bail conditions do not pose a significant threat to the community.

Presumption of unconditional bail

⁴ Consultation Paper, 21.

⁵ Peter Muir, Director General, Department of Juvenile Justice, 'Presentation at National Juvenile Justice Conference', Melbourne (25-26 February 2010).

⁶ Peter Muir Presentation at National Juvenile Justice Conference.

⁷ Consultation Paper, 28.

⁸ Department of Justice and Attorney General, *NSW Criminal Court Statistics 2008* (BOCSAR, Sydney 2009).

⁹ defined by the YJC as a breach of a bail condition which of itself is not a criminal offence and does not place the young person or the community in danger, *Bail Me Out*, 3.

¹⁰ *Bail Me Out*, v.

One way in which the numbers of young people with cognitive and mental health impairments on remand could be reduced is by creating a presumption of bail for all young people, unless the offence is of a sufficiently serious nature. Currently, only section 8 of the *Bail Act* provides that a person accused of a minor offence is entitled to be granted bail. However, an exception to this presumption is if "the person has previously failed to comply with a bail undertaking given or bail condition imposed in respect of the offence."¹¹ This provision does not distinguish between breaches of bail that amount to commissions of a new offence and technical breaches.¹²

In light of the observation made in the Noetic Report that unconditional bail for children and young people is a "thing of the past,"¹³ the YJC believes that there should be a presumption of unconditional bail for all young people. This is even more critical for those with a cognitive or mental health impairment as many of them are either undiagnosed, or alternatively reluctant to share such information with police or a court. In such circumstances, police and the court would have no way to discover the existence of an impairment that could impede a young person's ability to comply with bail conditions.

Unconditional bail gives the young person the best chance to remain at liberty, continue in education and maintain contact with their family and community whilst on bail. It is clear that the more bail conditions imposed on a young person with cognitive and mental health issues, the more likely they are to breach one because they may not understand it, forget about it, or it may conflict with other conditions.

In the event that a presumption of unconditional bail for all young people is not supported, the YJC recommends that there be a presumption of unconditional bail for those young people who are reported to have or identify as having a cognitive or mental health impairment.

Recommendation 1: that there be a presumption of unconditional bail for all young people.

Recommendation 2: If Recommendation 1 is not adopted, that there be a presumption of unconditional bail for children and young people who are reported to have or identify as having a cognitive or mental health impairment.

Imposition of bail conditions

The YJC also proposes that the only conditions that be imposed on young people with cognitive and mental health impairments are those that relate to the offence for which they have been charged. For instance, if a young person is charged with a theft offence that occurred at midday, a curfew should not be imposed.

The numerous conditions placed on young people tend to be welfare-based. However, where these conditions lead to breaches and time spent in custody, they are clearly no longer in the best interests of the welfare of the child or young person. Those with cognitive and mental health impairments are likely to find it more difficult and traumatising to spend time in detention, away from their families, communities and support services.

¹¹ s8(2)(a)(i)

¹² Bail Me Out, 3.

¹³ Noetic Solutions Pty Ltd, A Strategic Review of the New South Wales Juvenile Justice system: a report for the Minister of Juvenile Justice (2010) ("Noetic Review"), 66.

Recommendation 3: Only bail conditions relating to the offence with which they are charged should be imposed on a child or young person.

Intervention at bail determination stage

The Shopfront Youth Legal Centre's submission to the NSW Law Reform Commission Report 104: Young Offenders 2005, expressed the concern that many young people do not understand the bail conditions that are imposed upon them. As a result, the Noetic review recommended that systems and protocols be established to ensure that all children and young people have the capacity to understand and comply with bail conditions before they are imposed.¹⁴

The YJC supports this recommendation and emphasises that it is insufficient for a decision maker to merely ask the young person if they understand. Many young people, especially those with cognitive and mental health impairments who are attempting to cover them up or may be undiagnosed, agree with authority figures because they believe that is what they want to hear. Simply eliciting a 'yes I understand' does not guarantee that the young person fully understands their bail conditions or is able to comply with them.

Case Study 1

Jeremy is a 17 year old with delusional disorder and an intellectual disability. He is on a community treatment order with his local mental health service. He has at various times also had bail conditions including requirements to report to police and obey residence as directed orders. He is also on a bond and supervised by Probation and Parole and subject to two Apprehended Violence Orders. Jeremy has a lot of difficulty remembering and understanding all of his orders and conditions.

Jeremy recently had to go to the central coast as a witness in a court matter and had his conditions changed at the last minute to accommodate this. However it is only through the work of Jeremy's lawyer, mental health professionals and community workers that Jeremy has not yet been breached on his bail.

The YJC recommends that the decision maker engage the young person in more detailed interview that could include but is not restricted to the following:

- Asking the young person to explain the conditions to the decision maker;
- Asking the young person to outline how they will make sure their day-to-day behaviour is in compliance with the conditions;
- Presenting the young person with hypothetical behaviours and asking the young person to determine whether certain behaviours would be in breach of their bail conditions;
- Asking the young person what they think would happen if they fail to comply with any of the conditions

It is vital that the young person both understands AND can comply with the bail conditions, and accordingly, these two questions should be considered separately by the decision maker. If a decision maker cannot be sure that a young person both understands and is able to comply with bail conditions, they should not be imposed on the young person.

The YJC also believes that such an assessment should be extended to the family and support framework around the young person concerned, especially if they have a cognitive and/or mental health impairment. The conditions placed on young people on bail are akin

¹⁴ Noetic Review, 67.

to those placed on parolees, however there is no support provided to young people to assist them with compliance with the conditions.

As noted in the Consultation Paper at 2.45, the Victorian Law Reform Commission has expressed a similar concern that if decision makers do not consider the nature of a young person's support network in the context of the young person's cognitive or mental health impairment, there was a serious risk that setting bail conditions would certainly result in breach.¹⁵ Thus the family or support network should be assessed to ensure that bail conditions are appropriate.

For instance, if it appears that there is domestic violence in the home, a curfew may be problematic and lead to a breach if the young person needs to leave the premises for their own safety. Alternatively, a young person with a cognitive impairment may not understand the importance of being accompanied at all times by a parent and instead attempt to leave the house with an aunt or uncle. Similarly, if a young person has a mental incapacity that makes full time attendance at school difficult or impossible, a condition to attend school full time should not be imposed as it is setting up the young person to fail.

Recommendation 4: that systems and protocols be established to ensure that:

- (1) the young person understands their bail conditions;**
- (2) the young person can comply with their bail conditions;**
- (3) the young person's family and support network understand and agree to their bail conditions; and**
- (4) the young person's family and support network can assist them to comply with their bail conditions.**

¹⁵ Consultation Paper, 44, citing Victorian Law Reform Commission, 'Review of the *Bail Act* – Final Report' (2007), 204.

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?

The YJC believes that the *Bail Act* must incorporate criteria applying specifically to young people with mental health impairments to guide police and courts in making bail determinations in order to address this overrepresentation.

Recommendation 5: that the *Bail Act* incorporate criteria applying specifically to young people with cognitive and mental health impairments.

Why this change is required

Young people with cognitive and mental health impairments are at an extremely high risk of entering the criminal justice system and are also the most vulnerable once they do.¹⁶ By virtue of their cognitive and mental health impairment, they not only require special protection but also particular services in order for their basic needs to be met.

There is also a wealth of evidence indicating that young people tend to have more bail conditions that are welfare-related and have little or no correlation with the offence with which they have been charged.¹⁷ This treatment is an implicit acknowledgement that children and young people should be treated differently to adults. But at present this treatment is not meeting the particular needs of the young people.

Young people, and especially those with cognitive and mental health impairments require support. This support is often required of parents who must accompany them outside, or of an accommodation agency, which is required to assist a young person with compliance with a 'reside as directed' condition. The quality and reliability of this support must be considered before setting bail conditions with which the young person cannot comply on their own.

In view of these factors, and the low risk of a young person absconding before a trial date, it is clear that there are distinct considerations that must be applied to young people, as opposed to adults, in setting their bail conditions. The YJC recommends that decision makers be provided with guidelines to ensure that the particular needs of young people are met.

Specific provisions

The YJC believes that specific provisions relating to young people with cognitive and/or mental health impairments should include those laid out in Recommendations 2, 3 and 4.

Nature of breach

The YJC also recommends that provision be made for consideration of the nature of a breach of bail conditions, specifically if it is a technical breach. In such situations, where no new offence has been committed, police could and should adopt a proactive policy that requires the arresting officer to issue a warning (or, in the last resort and for more serious

¹⁶ Peter Muir Presentation at National Juvenile Justice Conference.

¹⁷ Bail Me Out, 16.

offences, a caution) and release the young person back into the community immediately. Far too many young people are being detained for technical breaches of their bail conditions and being remanded in custody overnight, only to be re-released by the courts the next day because the breach is minor.

Case Study 2

Mohammed is a 15 year old who was subject to a number of bail conditions. Mohammed was very confused about his reporting dates. When he arrived at the police station to report one day, he was arrested for missing a reporting date and remanded in custody. The next morning at court he was re-released.

This provision would obviously require that young people are exempted from s22A of the *Bail Act 1978 (NSW)* to avoid conflict with that section, which currently requires that no further bail applications can be made if someone breaches a bail condition. This change would reflect the use of detention as a last resort, as stipulated in:

- Section 7(c) of the Young Offenders Act 1997;
- Sections 6(c) and (d) of the Children (Criminal Proceedings) Act 1987; and
- Article 37(b) of the Convention on the Rights of the Child 1989.

Recommendation 6: that decision makers be required by law to consider the nature of a bail breach committed by a young person with a cognitive or mental health impairment before taking any action on the alleged breach.

Recommendation 7: that children and young people be exempted from the application of s22A of the *Bail Act 1978*, allowing young people to reapply for bail after incidences of breach.

Question 11.3

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

It is clear that cognitive and mental health impairments are prevalent amongst children and young people in the care of Juvenile Justice and it can safely be presumed that many of those who come into contact with police may also have some level of impairment, whether they are aware of it or not.

Given this prevalence, and likelihood that young people coming into contact with police will either not disclose that they have a cognitive or mental health impairment, or will not know that they have one, it is important that police are able to identify a possible impairment. Legislation should make provision either for additional training in the police academy and/or ongoing training within individual Local Area Commands so that police officers are better equipped to identify and cater for young people with cognitive and mental health impairments.

Such training should be provided to specialist officers such as Youth Liaison Officers and School Liaison Police Officers as well as General Duties Officers and Crime Management Officers.

As the gatekeepers to the criminal justice system, police officers must be adequately trained to identify and deal appropriately with vulnerable young people.

Recommendation 8: that police be provided with initial and ongoing training in identifying and dealing with young people with cognitive and mental health impairments.

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

As noted above, the problem of young people not understanding the bail conditions imposed on them was identified by the Noetic Review.¹⁸ The court is currently required to consider the capacity of children and young people with an intellectual disability to understand or comply with bail conditions¹⁹ but this does not extend to children and young people with a mental health problem. This is problematic as a mental health problem can have a significant impact on a young person's capacity to comply with bail conditions.

Thus the YJC believes that, pursuant to Recommendation 4, police officers and the courts should be required to consider a young person's ability to understand AND comply with bail conditions, with specific reference to any cognitive or mental health impairment that has been identified.

In instances where a police officer or court deems it necessary to impose conditions on a young person with a cognitive or mental health impairment, it is important that they are provided with detailed guidelines as to the considerations they should bear in mind so they can better determine the appropriateness of any conditions imposed on the young person.

The YJC recommends that the decision maker should be required to ask 'is this condition appropriate in light of this young person's cognitive or mental health impairment?' In answering this question, the guidelines provided to the decision maker should include but not be limited to:

- Impose the minimum number of bail conditions as possible on the young person;
- Confine bail conditions to those relevant to the circumstances of the alleged offence (see Recommendation 3);
- Provide a detailed explanation of the conditions and what they mean to the young person (see Recommendation 4);
- Require a police or court officer to ascertain whether the young person completely understands the bail condition and consequences of breaching that condition. In the event that they cannot be sure of comprehension, the condition should not be included.
- Consider whether the young person will require assistance from any person or organisation in order to be able to comply with these bail conditions and whether such assistance is readily available to the young person; and
- Consider whether the young person is already subject to any legal orders, such as a Community Treatment Order.

Recommendation 9: that the *Bail Act* contain guidelines for decision makers to consider when granting conditional bail

¹⁸ Noetic Review, 67.

¹⁹ The *Bail Act* s37(2)(a).

Question 11.6

Should s50 of the *Bail Act 1978 (NSW)* require police to take into account:

- (a) age**
- (b) cognitive and mental health impairments; and/or**
- (c) the nature of the breach**

before requiring a person to appear before a court for breach of bail conditions?

Question 11.7

Should s50 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?

Question 11.8

Does s51 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 YJC believes that s50 of the *Bail Act* should require both police and courts to take into account the age, cognitive and mental health impairments; and/or the nature of the breach when dealing with a young person who has failed to comply with bail conditions.

It is important that the young person's age is taken into account as, in the first instance this factor clearly distinguishes young people from adults. By virtue of their age, young people are necessarily more immature and cognitively less able to foresee or understand the consequences of their actions compared to adults. Moreover, whilst it is more likely that young people can be effectively rehabilitated with the right support, young people are also the most susceptible to the inherent harms of detention.

To assist police officers and the court to divert young people with mental health and/or cognitive impairments from custody, a section could be included after s50(1) which currently provides that a police officer *may* arrest a person who they believe on reasonable grounds has failed to comply with their bail conditions. A new section 50(1A) could provide that: 'In deciding whether or not to arrest the person, the police officer must have regard to' the three factors suggested. Similarly, a new s51(1A) could be inserted providing that: 'In determining whether a person has a 'reasonable excuse' for failing to comply with their bail condition the court must have regard to' the three factors suggested. As noted in the Consultation Paper at 2.50, similar limitations with respect to arrest exist under the *Law Enforcement (Powers and Responsibilities) Act 2002*.²⁰

The YJC believes that it is in the best interests of young offenders that the circumstances in which a young person can be arrested in relation to breach of bail conditions be restricted.

²⁰ Consultation Paper, 45.

Many young people arrested for breach of bail have only committed technical breaches rather than a new offence. Provision for consideration of the nature of such a breach gives decision makers the option of diverting the young person from custody where a minor breach has occurred and detention would be inappropriate and harmful.

Recommendation 10: Section 50(1A) be included in the *Bail Act* requiring police to take into account:

- (a) age;**
 - (b) cognitive and mental health impairments; and/or**
 - (c) the nature of the breach;**
- before requiring a person to appear before a court for breach of bail conditions.**

Recommendation 11: Section 51(1A) be included in the *Bail Act* requiring courts to take into account:

- (a) age;**
 - (b) cognitive and mental health impairments; and/or**
 - (c) the nature of the breach;**
- when dealing with a person for failure to comply with bail conditions.**

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?

It is important that the police be educated as to the nature of cognitive and mental health impairments pursuant to recommendation 8 and be empowered to exercise discretion and decide not to remand a young person in custody for breach of a bail condition. The *Children (Criminal Proceedings) Act 1987* should take precedence over the *Bail Act* in instances where there is conflict between the two. This would enable the police to take into account the considerations in s6 of the *Children (Criminal Proceedings) Act 1987*, which include using detention as a last resort, in accordance with our international obligations.²¹

In the event that a young person breaches their bail conditions for whatever reason, police should be enabled to use the diversionary options in the *Young Offenders Act 1997*. As the *Bail Act* and *Young Offenders Act 1997* currently stand, because breach of a bail condition is not an offence to which a young person can make an admission, police are not currently able to use measures such as warnings.²² These are an important and valuable tool in diverting young people from custody and should therefore be made available where a bail condition has been breached.

Recommendation 10: that the *Children (Criminal Proceedings) Act 1987* take precedence over the *Bail Act* in instances where there is an inconsistency.

Recommendation 11: that diversionary options available under the *Young Offenders Act* such as warnings (and cautions for more serious alleged offences) be utilised by police to deal with breaches of bail conditions.

²¹ See for instance the United Nations Convention on the Rights of the Child 1989, Article 37(b).

²² See Part 3, *Young Offenders Act 1997*.

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?**
- (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?**

The YJC established that a significant number of young people are remanded in detention when bail has been granted, because they are unable to find accommodation or meet 'reside as directed' conditions.²³ Statistics are also available to estimate the number of young people in detention who have a cognitive or behavioural impairment.²⁴ However no statistics are readily available to demonstrate the number of young people with cognitive or mental impairments who have difficulty accessing appropriate services. This is an area that should be explored by the Bureau of Crime Statistics and Research in collaboration with Juvenile Justice NSW.

Although research is not yet available to indicate more precise numbers, it is clear that far too many children and young people with cognitive and/or mental health issues are caught up in criminal justice system, including breaches of bail and being held on remand. Appropriate measures must be put in place to prevent young people with cognitive and/or mental health impairments being held on remand because of problems accessing accommodation and/or services.

Case Study 3

Jenny is a 16 year old who was granted conditional bail by the court. The court imposed a condition that Jenny had to participate in a drug and alcohol program. However no places were available for Jenny so she had to remain in custody.

Recommendation 14: that research is undertaken to determine whether young people with cognitive and mental health impairments are disproportionately remanded or remaining in custody because of difficulty in accessing suitable accommodation or mental health or disability services.

²³ Bail Me Out, 20-21.

²⁴ Peter Muir Presentation at National Juvenile Justice Conference.