



**Human  
Services**

## Submission to the Law Reform Commission

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

*March 2011*

**Law Reform Commission Consultation Paper 11: *Young people with cognitive and mental health impairments in the criminal justice system***

**Submission from the Department of Human Services, including submissions prepared by Juvenile Justice, Community Services, Aboriginal Affairs NSW and Ageing Disability and Home Care divisions.**

**SUMMARY**

Key issues identified in the following submission include:

- widespread agreement that young people with cognitive and mental health impairments should be afforded additional support and legislative protection, distinct from that afforded to adults
- the need for additional early intervention and diversion strategies, together with increased support systems for young people with cognitive and mental health impairments
- that the current *Bail Act* does not sufficiently consider the specific needs of children and young people and therefore those with cognitive and mental health impairments are at an even greater disadvantage
- that the *Bail Act* should clearly incorporate the principle of remand for all young people as a last resort, and that if imposed, bail conditions should be relevant, achievable and understood by the young person and take into account special circumstances such as cognitive and mental health impairments
- the need to clearly distinguish between young people with cognitive impairments and young people with mental illness.

**Juvenile Justice division submission – Law Reform Commission Paper 11: *Young people with cognitive and mental health impairments in the criminal justice system***

**General Comments:**

Research indicates that youth offending is generally related to a number of social and economic factors. Juvenile Justice has established, through the Juvenile Justice 2003 and 2009 *Young People in Custody Health Surveys* and the 2006 *Young People on Community Orders Health Survey*, that young people with mild to severe mental health disorders and cognitive disability are highly over-represented in the criminal justice system.

Young people with cognitive and mental health impairments have particular difficulty in understanding and remembering material that includes a lengthy list or that are phrased in complex language (such as bail or legal order conditions). There is extensive research that indicates young offenders have great difficulty understanding the complex language of the court system. This results in young offenders being seen as non-compliant. This is also relevant to young offenders with poor narrative skills in respect to information transfer during interviews with police and cross-examination in a courtroom (Humber and Snow 2001).

Young offenders are most likely to find that complying with a range of social contracts or court ordered conditions, as well as achieving academically, are beyond their reach (Humber and Snow 2001).

The recent findings of a project assembling life course institutional pathways for people with mental health disorders and cognitive impairment into the criminal justice system undertaken by the Eileen Baldry, Leanne Dowse and Melissa Clarence from UNSW indicates that those with complex (that is, referring to two or more issues) cognitive disability are significantly more likely to have earlier contact with police, more police episodes and are more likely to have been clients of juvenile justice. They also have more police episodes through life and more prison episodes than those with a single or no diagnosis and for this ongoing contact with the criminal justice system locks them into the criminal justice system very early rather than rehabilitates them. Their offences are almost all in the lowest 10% of seriousness.

The findings also highlight that appropriate supportive intervention can assist these persons to a significant degree, those becoming clients of Ageing Disability and Home Care after going to prison fared much better than those who did not become clients. This appears to be the case because they were afforded case-managed supported accommodation with appropriate disability service support. (E Baldry, L Dowse, M Clarence 2010)

Juvenile Justice notes there is a lack of mental health placements available across NSW to accommodate the needs of children and young people. It

would be counterproductive for courts to enhance their referral capacities with no enhancements to existing adolescent mental health and disability services.

Juvenile Justice believes that the *Bail Act* should recognise the special needs of **all** children and young people, and provide appropriate provisions for determining bail and the most appropriate bail conditions. Juvenile Justice also advocates that the *Bail Act* should incorporate the principle of remand as a last resort for police and the courts (consistent with the *Children (Criminal Proceedings) Act 1987*).

Juvenile Justice's data show that 80% of young people remanded in custody do not go on to receive a custodial sentence. Further, the average length of stay in custody on remand in 2009/10 was 10.5 days. Young people should not be remanded for breaching bail granted for an offence for which there is no custodial penalty.

The current Bail Act does not sufficiently consider the specific needs of children and young people and therefore those with cognitive and mental health impairments are at a greater disadvantage. Juvenile Justice would endorse any modifications that would help to divert these young people from the criminal justice system.

Juvenile Justice would welcome a complete review the *Bail Act 1978* in relation to young people with cognitive and mental impairments and the systems that interface with this cohort of offenders. Recent research highlights the importance of urgently addressing their needs and diverting them from the criminal justice system.

#### **Comments re Overview:**

Paragraph 1.28: Young people entering custody will soon be screened by Justice Health for potential intellectual disability within the first seven days of custody. Young people will then be referred to the Juvenile Justice Psychologist for assessment of intellectual disability.

Paragraph 1.53: The Adolescent Court and Community Team does not currently screen for intellectual disability. If it was to introduce such a screen, it would be indicative only as a full psychological assessment is needed to identify intellectual disability. It is not possible to provide such an assessment on the same day as the young person appears at court.

Paragraph 1.55: It is noted that background reports are generally completed by juvenile justice officers (JJOs). Whilst JJOs are not able to provide assessment of cognitive and mental health impairment, they could be asked to administer a screen for intellectual disability. A request for a psychological report would be needed to provide assessment of cognitive or mental health impairment.

Paragraph 1.62: Liaison between Ageing Disability and Home Care and Juvenile Justice has removed the issues with the eligibility criteria for the Community Justice Program and has improved the response by this program to consideration of referrals. Other issues relating to appropriate models of service provision for adolescents and timeliness of service delivery to this group with complex needs are the subject of ongoing discussion between these two agencies.

## **Specific Comments:**

### **Chapter 2 – Bail**

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

To a greater extent as these young people may be significantly less able than the average young person to comprehend the legal process and their rights and responsibilities, including any bail conditions placed upon them.

**11.1 (2)** How can the number of young people with cognitive and mental health impairments held on remand be reduced, while also satisfying other considerations, such as:

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

The most significant steps would be to enhance the capacity of police to identify these young people prior to arrest or charge, and of courts at the pre-sentencing stage, to enable the provision of appropriate family and community services and safeguards.

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

The early identification of a young person with a cognitive or mental health impairment would allow for bail, as well as diversionary measures, to be tailored to the young person. In practical terms, this could mean ensuring the presence of a support person who could assist a young people in meeting their bail obligations, the use of appropriate language to ensure that conditions are understood and appropriate, and the provision of additional court or legal supports to ensure that the young person remains aware of, and is meeting, their obligations. Further consideration would be required in relation to the agency with which such responsibilities would reside and the resources required for such an initiative.

**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?

As noted above, Juvenile Justice believes that the *Bail Act* should recognise the special needs of **all** children and young people, and provide appropriate provisions for determining bail and the most appropriate bail conditions.

The Act should have a general requirement that bail conditions be relevant, achievable and understood by the accused, taking into account special circumstances such as cognitive and mental health impairments.

Young people with cognitive and mental health impairments have particular difficulty in understanding and remembering bail conditions that include a lengthy list or that are phrased in complex language. Young people are often subject to more conditions than those imposed on adults with more serious offences.

Seemingly straightforward bail conditions may disadvantage young people with an impairment. For instance, the person may not be able to read the time and therefore cannot easily comply with a curfew condition.

Young people with an impairment may have difficulty in applying bail conditions to their decisions on a day-to-day basis. For instance, they may not be able to properly plan requirements for multiple appointments (for example school, police reporting, psychological assessment, curfew) on the one day.

Some cognitive impairments, such as acquired brain injury, result in an impaired memory to the extent that a person may be able to repeat back the bail conditions just explained but be unable to recall them at a later point in time.

Overall, bail conditions need to be kept to a minimum and be clearly explained to young people.

Juvenile Justice supports the approach taken by the Victorian Law Reform Commission referred to at paragraph 2.40 in the Consultation Paper, which appears to be more appropriate as it takes into account the capacity and maturity of young people, and is based on the **least disruption to the young person's pro-social relationships and lifestyle.**

**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?

Young people with cognitive impairment will often have the capacity to learn / understand material if allowances are made, such as more time / repeated messages / visual presentation. In the case of an adolescent, consideration needs to be given as to whether a legal guardian has a role in assisting the young person and what the limitations of that role may be. The legal guardian needs to be, at least, notified of proceedings and outcomes (as in the *Mental*

*Health Act*). A guardian may also be able to assist the young person with an impairment.

**11.4** Does the meaning of “special needs” in s32 of the *Bail Act 1978* (NSW) need to be clarified? If so, how should it be defined?

Some guidelines for police officers and courts may be appropriate and should definitely include possible indications of a mental health or cognitive impairment.

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

Yes, and also where a young person has a cognitive impairment.

**11.5 (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?

Conditions should be considered on a case-by-case basis and should always be appropriate to the individual, regardless of their mental or cognitive state.

**11.6** Should s50 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 in all cases. Juvenile Justice believes that the *Bail Act 1978* should be reviewed to ensure the special needs of children and young people are taken into account. This is particularly important for those with cognitive and mental health impairments. The *Bail Act 1978* needs to provide appropriate provisions for determining bail and the most appropriate, without being unreasonably restrictive, conditions of bail.

The agency strongly recommends that an escalating series of interventions be articulated within the *Bail Act 1978* for Police when dealing with children and young people who breach bail conditions, starting from referral to the Bail Assistance Line, then the issuing of a CAN, then the issuing of a warrant, with bail refusal being the option of last resort. The level of seriousness of the



alleged breach of bail would determine the appropriate course of action. The legislation should be reviewed to stipulate that an officer cannot move up the scale of action without first having determined that the preceding options were not appropriate in that case. A breach of bail should not result in a young person being remanded in custody for an offence that does not carry a custodial penalty.

Failure to comply with bail conditions is not a criminal offence or a 'charge'. As such, police are not bound by *Law Enforcement (Powers and Responsibilities) Act 2002* or the *Children (Criminal Procedures) Act 1987* to first consider other alternatives to arrest, and they do not have the option of using the warning and caution diversionary options canvassed in the *Young Offenders Act 1997*. The *Bail Act 1978* could be amended to allow for the use of warnings and cautions to divert young people from custody for breach of bail.

Due their lack of insight and tendency for high-risk behaviour, this group of young people is at greater risk of coming to the attention of police and therefore breaching conditions of bail. It is widely recognised that young people with cognitive and or mental health impairment have limited interpersonal resources and a tendency to be labelled rude and unco-operative. This can often lead to being found guilty of further offences whilst on bail.

In many cases these young people are remanded in a detention centre due to lack of supports and therefore increasing their risk of re-offending as a result of contact with high risk offenders. The agency recommends that NSW Police recognise that breach of bail conditions often results in unnecessary incarceration of young people and in particular those with cognitive and or mental health impairment.

The 2009 Bureau of Crime Statistics and Research (BOCSAR) study identified that police activity, in relation to breach of bail and the amendment to section 22A of the *Bail Act* resulted in upward pressure on the juvenile remand population.

The 2009 BOCSAR study also found that only 34% of juveniles who breached bail had committed further offences. The remainder (66%) had only breached a condition of their bail. The most common bail conditions breached were not complying with a curfew order (35 out of 50 cases) and not being in the company of a parent (29 out of 50 cases). This highlights an urgent need to re examine *Bail Act 1978* to consider the impact of bail conditions and breaches on young people with cognitive and mental impairment.

The agency also recommends that NSW Police make all efforts to consider the nature of the violation prior to issuing a breach. The Youth Liaison Officer or specialist support staff must be given discretion to continue bail without issuing a breach. Where a breach does not constitute a further criminal offence, then Police should seriously consider whether it is necessary to bring the young person before court.

In some situations there is no access to a specialist Youth Liaison Officer. In these cases the general duty police officers should undertake training in how to engage and work with young people with cognitive and mental impairment. Arrest and breach should always be a last resort as stated in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW).

Juvenile Justice has recently implemented a Bail Assistance Line (BAL) that is being piloted in Dubbo, Metropolitan Sydney and Newcastle. The BAL provides a single point of contact for NSW police in matters where police and/or court staff may be considering remand of a young person outside business hours.

Expansion of the Bail Assistance Line could provide the police with specialist support to assist in making an appropriate bail determination based on the young persons individual circumstances.

- 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?

Yes in all cases. Juvenile Justice recommends that the *Bail Act 1978* be reviewed to ensure that children and young people with cognitive and or mental impairment are not further disadvantaged due to their inability to consent or comply with bail conditions. The court must ensure that young person's capacity is foremost in decisions around breach of bail.

The granting of or breaching of bail by the court must first consider how the offence with which the accused has been charged is classified under the *Bail Act 1978*. Unless the charge is a serious one, such as violent robbery or drug supply, bail should be granted unconditionally. Conditions should only be imposed for juveniles based on the seriousness of the offence.

That the bail conditions imposed on children and young people are often more onerous than those imposed on adults is also a factor in the increasing juvenile remand numbers. Although section 37(2) of the *Bail Act 1978* states that "[c]onditions shall not be imposed that are any more onerous for the accused person than appear to the authorised officer or court to be required (a) by the nature of the offence", often conditions imposed are unrelated and are, rather, designed to exercise control over the child or young person's behaviour or address welfare needs and are therefore outside the objects of the current Act.

Juvenile Justice also recommends that all courts in NSW recognise that breach of bail conditions often results in unnecessary incarceration of young people and in particular those with cognitive and or mental impairment. Young

people and children are not adults and should not be dealt with in the same way. Recent advances in neuro-scientific research have confirmed that young people's brains are not fully developed until they reach their early twenties (Amicus Brief to the US Supreme Court 2005).

As a result, children may be more impulsive and use less conceptual thinking. Therefore, they may not have as full a realisation of the consequences of their actions as an adult. This emerging research establishes a medical basis for applying a different standard of responsibility to children than to adults.

**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?

Young people placed on bail with cognitive and or mental impairment are at a disadvantage in that they are often unable to understand the implications of a bail undertaking and are therefore at greater risk of failing to attend court as required.

Where a young person has been identified as having a cognitive or mental health impairment, consideration would have to be given to whether the young person fully understood their obligations in relation to their bail conditions.

The legislation is not explicit about how the court ensures that the young person actually comprehends the conditions of bail prior to leaving court. Simply explaining the conditions may not be adequate for this cohort of offenders. Strategies for ensuring that assistance is provided to these young people at court need to be considered further. For example, greater use of the Criminal Justice Network at court.

A mechanism trialled previously was electronic messaging service to remind young people to attend court as required. If introduced, this system could reduce the incidence of failure to appear that wastes both court time and resources.

However, it should be noted that statistics for 2006/07 showing the outcomes of appearances at the Children's Court by bail status provide strong evidence that the risk of young people absconding whilst on bail is very low. Of the 87% of young people granted bail or for whom bail was dispensed with, fewer than 2% of those young people failed to appear at court or had arrest warrants issued in the same year (2010 Youth Justice Coalition – Bail Me Out Report)

**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?

The agency strongly suggests that bail conditions should reflect the circumstances and seriousness of the offence. Often the type of bail conditions imposed by the police or court reflects a welfare approach, with conditions such as curfew or place restrictions, which are often in stark contrast to the objective severity of the offence before the court.

The NSW Police reported to the Attorney General's Department Bail Review in December 2008 that there has been a 348% increase in the number of bail breaches recorded since 2000. NSW Police reported that this increase is partly attributed to tougher policing around and enforcement of bail conditions.

Policing of bail conditions such as curfews or place restrictions often results in young people being remanded in custody. Given that young people have difficulty complying with social contracts or court-ordered conditions there must be provisions within the act to restrict the use of conditional bail to only serious offenders.

There should be a specific section of the *Bail Act* relating to juveniles and those with cognitive and or mental impairment, given the research indicating that young people are clearly different to adults and have less capacity to abide by onerous bail conditions.

**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?

The agency is concerned about the number of young people in custody (regardless of their legal status) who have either mental health or cognitive impairments. According to the Juvenile Justice 2003 and 2009 *Young People in Custody Health Surveys* there are high levels of intellectual disability and mental illness for this specific group of young people.

| <b>Profile of Young People in Custody Health Surveys</b> |                   |                |                   |                |
|--|-------------------|----------------|-------------------|----------------|
| <b>Characteristics</b>                                   | <b>03 Overall</b> | <b>03 ATSI</b> | <b>09 Overall</b> | <b>09 ATSI</b> |
| IQ 69 and under  | 13%               | 17%            | 13.6%             | 20.3%          |
| IQ 70-79   | 27%               | 32%            | 32.2%             | 38.5%          |
| Any Psychological Disorder                               | 88%               |                | 86.7%             | 92.1%          |
| Ever placed in care under 16                             | 28%               |                | 27.2%             | 38.3%          |
| Average age left school                                  | 14.5              | 14.0           | 14.4              | 14.0           |

The Health Surveys indicated that young offenders are often from disadvantaged backgrounds, characterised by poor educational attainment, disrupted families and engagement in regular risk-taking behaviour. The challenge is that these young people may be more likely to re-offend due to a lack of family and social supports.

The surveys also show high rates of borderline intellectual ability among detainees. Education levels are commonly low, with three-quarters of detainees having left school before finishing Year 9, and over 90% having been suspended at one time or another.

Juvenile Justice does not identify in its regular statistical gathering whether a young person on remand has a cognitive and or mental impairment. However, at any time around 6% of all children and young people who are on remand have been deemed eligible by the court for bail but are unable to meet the conditions (most often access to suitable accommodation). A dearth of appropriate services for adolescents (often with complex needs) exacerbates the time spent in custody.

In 2000/01, six percent of all children and young people on remand were in custody for breach of bail conditions only rather than for fresh offences. This has increased significantly over the past decade to 23% in 2009/10. This trend is likely to continue while the *Bail Act 1978* does not require specific consideration for children and young people.

Being unnecessarily remanded in custody is a costly exercise when resources should be diverted to appropriate accommodation and support services for those with cognitive and or mental impairments.

**11.10 (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?

Young people may face more onerous bail conditions than adults due to the presence of 'social' conditions attached to their bail, such as 'reside as directed' orders. Young people should not be treated more harshly than adults due to a lack of social supports such as suitable accommodation. However, as an issue revolving around funding and availability of social services, this may be beyond the scope of a legislative review.

Courts will often impose a bail condition that a young person reside as directed by Juvenile Justice, where there are concerns about a lack of suitable accommodation. Clearly, the courts expect that a young person be held in custody until Juvenile Justice can locate suitable accommodation in which to place the young person. However, recent advice from the Crown Solicitor indicates that if a person in custody has been granted bail with a condition imposed that the person is to reside as directed by Juvenile Justice, that person should be released from custody upon entering into that

undertaking, notwithstanding that no direction has been given by Juvenile Justice. Failure to do so may render the Crown liable in a claim for damages for false imprisonment. Juvenile Justice is raising this issue with the Department of Justice and Attorney General to propose amendments to the Bail Act that would clarify a reside as directed, conduct requirement in a bail condition.

### **Chapter 3 – Apprehended Violence Orders**

- 11.11** Is it common for young people with cognitive and mental health impairments to have AVOs taken out against them? If so:
- (a) Who applies for the AVO and what is the relationship between the young person and the protected person?
  - (b) What conditions are normally attached to these AVOs?
  - (c) How often do breaches occur?
  - (d) Is the behaviour that attracts the AVO or subsequent breach related to the young person's age and/or impairment?
  - (e) How is a young offender with a cognitive or mental health impairment dealt with after a breach occurs?
  - (f) What alternatives are available to deal with the issue of adolescent violence against guardians or carers, where violence is related to a cognitive or mental health impairment?
  - (g) Are there particular problems of understanding or compliance with conditions of AVOs for young people with cognitive and mental health impairments?
  - (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?

(d) Yes. Impulsivity resulting in aggressive acts can occur more frequently amongst this population.

(g) Yes. As with all court matters, young people with cognitive and mental health impairments have particular difficulty in understanding and remembering conditions contained in an AVO that include a lengthy list or that are phrased in complex language.

(h) It is noted that paragraph 3.2 of the Consultation Paper articulates three main areas of concern. Any changes in law or procedure need to address these areas of concern.

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

**11.12 (2)** What issues arise?

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

It is widely recognised that young people with cognitive and mental impairments are vulnerable to exploitation and harassment. Therefore the

court needs to ensure that when imposing an AVO against such a young person, it does not unreasonably interfere with their autonomy and ability to participate in community life. The court should always be satisfied the applications also take into account the best interests of the young person.

In AVO matters where the young person is subject to the order the onus should be on the court to ensure that the child or young person has the capacity to understand or comply. If the victim is at serious risk there must be a guardian or carer that is prepared to assist the young person to provide ongoing support for the duration of the order.

## **Chapter 4 – Diversion**

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

Juvenile Justice is responsible for the administration of Part 5 - Youth Justice Conferences, of the *Young Offenders Act 1997*.

A referral for youth justice conference will be made by the court, NSW Police Force or the Office of the Director of Public Prosecutions after a young person has:

- made an admission to an offence or,
- entered a plea of guilty or,
- had a finding of guilt made against them and,
- consented to participate in a youth justice conference.

Upon receipt of a referral for youth justice conference Juvenile Justice will check that all legal requirements have been met and, where necessary, facilitate additional measures to ensure a young person's admission and consent have been informed and the implications understood.

Juvenile Justice has no legislative authority to reject a referral for youth justice conference and in cases where a youth justice conference is not deemed the most appropriate option relies upon the referring body to withdraw a referral based on information provided by Juvenile Justice.

A key principle of youth justice conferencing is related in section 34(1)(c)(iii), which provides for meeting the needs of any children with disabilities, especially those with communication and cognitive difficulties.

Section 48(1) of the Act requires a conference convenor to conduct a youth justice conference in a way that helps reach an agreement that complies with the principles of the Act.

Juvenile Justice will not only arrange support for a young offender with a disability but will also offer support to victims of crime.

The Act refers to the term 'communication disability' but offers no further definition. Juvenile Justice interprets this term widely and offers support to conference participants when their disability has potential to cause them difficulties in their communication during the conference preparation stage and youth justice conference.

Such difficulties include speech /language impairments arising out of:

- neurological conditions such as cerebral palsy / head injury;
- sensory conditions such as hearing impairments / vision impairments;
- physical conditions such as cleft palates and strokes;
- non-organic conditions such as learning disabilities / literacy difficulties;
- developmental disorders e.g. autism spectrum disorders.

People with a cognitive disability are defined as those who have:

- an intellectual disability, that is, significantly below-average intellectual functioning existing with problems in two or more of these adaptive skill areas:
  - communication
  - self care
  - home living
  - social interaction
  - community use
  - decision making
  - health and safety
  - functional academics
  - leisure
  - work
- an acquired brain injury caused by trauma, illness, alcohol / other drug abuse / accidents unrelated to individual's early developmental period that has resulted in deterioration in cognitive, physical, emotional / independent functioning

Cognitive impairments are not always "global" in nature (as is the case with acquired brain injury), so flexibility in response to a young person is needed. Whilst young people with cognitive and mental health impairments may have more difficulty with these cognitive requirements, this is assessed on a case-by-case basis. In most instances, procedures can be adapted to ensure this understanding is developed.

Section 47(2) (c) enables a conference convenor to arrange for an 'appropriately skilled person' to attend a conference. The phrase 'appropriately skilled person' (section 47(2)) isn't defined in legislation. The chief role of this support person is to:

- help the person understand conference proceedings;
- participate in the process to maximum extent of their capacity;
- support the person to be understood by others and,
- provide emotional support.

Juvenile Justice has collaborated extensively with the Intellectual Disability Rights Service in developing the 'Additional Support Needs Checklist' that



assists convenors to identify both young offenders and victims of crime who may need additional support during the youth justice conference process.

The Community Justice Support Network (CJSN) is engaged when a person with an intellectual disability is referred to a youth justice conference. Juvenile Justice has developed a Fact Sheet and Referral form in partnership with the CJSN.

The objects of the *Young Offenders Act 1997* may be better served by procedural protections as they allow for more flexibility in application.

The Act requires Police to consider diversion for all young people, ensuring that those with impairments are not excluded from these diversionary options. However, the Act could require what is currently included in Youth Justice Conferencing procedures. That is, that those providing conferencing services include consideration of cognitive and mental health impairments in their procedures – including capacity to accept responsibility and understand harm caused to others.

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

Proposed amendments include:

*Inclusion of a mandatory 'cooling off' period for young people who are eligible for a caution or referral to a Youth Justice Conference who have not admitted the offence*

Section 37(4) of the *Young Offenders Act 1997* (the Act) provides that a Specialist Youth Officer (SYO) must make a determination on a matter involving a young person within fourteen days.

This section means that a SYO can make a determination using this fourteen day 'cooling off' period to gather or clarify relevant information and the young person can be released from Police custody before a determination is made.

This 'cooling off' period can be used to allow the young person to seek legal advice, engage a responsible adult or 'appropriately skilled person' so the young person can participate in a Police interview. This practice is known colloquially as 'tag and release'.

Prior to being released, the young person is asked to present to the designated officer (usually the investigating officer) and police station within 10 days, accompanied by a responsible adult.

The Young Offender Legal Referral (YOLR) Scheme was introduced into policing practice at Darling River Local Area Command as a response to the low number of Aboriginal young people being eligible to be dealt with by way of caution or youth justice conference in that area. The use of the YOLR

scheme is limited. State-wide application of this scheme would be highly advantageous.

To be eligible for caution or youth justice conference under the Act, young people must first admit the offence and then consent to being dealt with by way of caution or conference. In the majority of circumstances legal advice is offered to young people over the telephone at the Police station.

The YOLR scheme was specifically targeted at Indigenous young people but would be equally advantageous for application to all young people, and in particular those with a communication or cognitive disability.

#### *Definition of 'appropriately skilled person'*

The phrase 'appropriately skilled person' (section 47(2)) is not defined in legislation. As a consequence people acting in this role may not have the required skill to appropriately support a conference participant with a communication or cognitive disability.

#### *Section 10 Admissions*

Section 10 states an admission by a child of an offence is not an admission for the purposes of this Act unless it takes place in the presence of:

- (a) a person responsible for the child, or
- (b) an adult (other than an investigating official) who is present with the consent of a person responsible for the child, or
- (c) if the child is 14 years or over, an adult chosen by the child, or
- (d) an Australian legal practitioner chosen by the child.

Juvenile Justice recommends that an additional category is included of 'an appropriately skilled person in the case of young people with a communication or cognitive disability'.

**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?

Juvenile Justice would seek to ensure that, where a support person is required for a young person with a cognitive or mental health impairment, the support person be drawn wherever possible from the Criminal Justice Support Network run by the Intellectual Disability Rights Service. The provision of a specialist support person would ensure the treatment afforded the young person was appropriate to the young person's situation.

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

While there is no simple screening tool that definitively identifies intellectual impairments, the application of a simple checklist such as that used in the Youth Justice Conferencing scheme would assist policy in identifying cases where this may be a factor. Police can then seek information from support people and respond appropriately to the likely presentation of those with impairments. Such a requirement would also assist in increasing police knowledge and understanding of these issues.

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

The purpose of a Youth Conduct Order (YCO) is to impose restrictions on the behaviour and movement of young offenders who have been charged with, admitted to or been found guilty of certain less serious offences.

While the Youth Conduct Order scheme aims to provide a holistic approach to address the underlying causes of criminal behaviour, it remains at its core a court-based criminal justice response and as such is not a diversionary program. The imposition of bail conditions while a young person completes a Youth Conduct Order can also impact adversely if these bail conditions are breached.

Therefore, it would be preferable that greater efforts are directed towards preventing these children from entering the criminal justice system in the first instance through existing diversionary schemes such as Youth Justice Conferencing.

Juvenile Justice has some concerns about the ability of children and young people with cognitive and mental impairments to provide informed consent to participate in the scheme, given their intellectual and developmental capacity. However, this issue should be fully addressed during the assessment process.

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

Youth Conduct Orders are based on a case coordination model whereby the young person is managed by a local senior officers group comprising police, Juvenile Justice, Ageing and Disability, Community Services, the Department of Education and Training, and the Department of Health. This group is referred to as the Coordination Group or the CCSOG.

A young person with a cognitive and or mental impairment may access services that assist them to address the causes of their behaviour if they are subject to a conduct order. The process requires the young person to attend court to consider the proposed YCO plan and to make an informed decision about what it is they are or are not consenting to comply with. This may include participation in a disability or mental health program.

Juvenile Justice recommends that it would be more appropriate for a young person with a cognitive and or mental impairment to be referred to the Anti Social Behaviour Pilot Project (ASBPP). This process does not include attendance at court and provides the young person and their family with access to services that may be provided by a range of agencies.

As previously stated, it is preferable for the young person to have access to appropriate services without involvement in the criminal justice system. The Youth Justice Conferencing scheme is beginning a trial whereby a young person participating in the scheme can also be referred to an ASBPP where the need is indicated.

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

Adapting a Youth Conduct Order for a young person with cognitive and or mental health impairment would not impact on the young person's ability to fully participate in the order. This group of young people clearly lacks the capacity to abide by onerous and restrictive conditions, but as noted at 11.15(1), this should be addressed during the assessment process.

**11.16** Does s22 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?

**11.17** Are the existing categories of eligibility for diversion under s32 and/or s33 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?

**11.18** Should s32 and s33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) contain particular provisions directed at young people? If so, what should these provisions address?

The greatest need for legislative change in this area is the need to clarify definitions of "developmental disability", "mental condition" and "mental illness". It may be most helpful if the terms are limited to "cognitive impairment" and "mental illness". Definitions can then be drawn from psychiatric / psychological diagnostic criteria. This should enable legal terms to be clinically informed and diagnoses by both psychiatrists and psychologists to be adequate for both legal and clinical purposes.

Clinically informed definitions would also allow for their application to the adolescent stage of development. At this stage mental illness may be emerging but a diagnosis is not yet confirmed. Legislation needs to allow for this possibility, particularly in the case of juveniles.

The *Mental Health Act 1990* goes some way towards clarification of terms. Consistency of terminology between Acts would simplify the application of different legislation.

Legislation needs to clarify which clinical disorders are applicable for consideration under sections 32 and 33. Acute mental illness is episodic in nature and symptoms will go into remission with appropriate treatment. However, other diagnoses (such as conduct disorder) are considered to be stable and enduring and less amenable to treatment.

“Cognitive disability” is generally defined clinically as an IQ two standard deviations below the mean plus adaptive functioning deficits. Measures of intellectual and adaptive functioning require significant training and expertise in psychology. Juvenile Justice and Ageing Disability and Home Care employ specialist psychologists who are able to provide such assessments.

Please also see Juvenile Justice’s response to Consultation Paper 7: Diversion.

**11.19 (1)** How, if at all, should s32 or s33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) be amended to clarify who is responsible for supervision of orders?

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

The *Mental Health (Forensic Provisions) Act 1990* does need to clarify who is responsible for supervision of orders and for advising the court if a breach has occurred. Given that sections 32 & 33 are options for diversion away from the criminal justice system, it may be more appropriate that agencies other than Juvenile Justice have this responsibility.

The greater involvement of the Mental Health Review Tribunal where there is a mental illness would be desirable.

**11.20** Are the orders presently available under s32 and s33 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?

Please see comment to questions 11.17 and 11.18.

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

- (a) Who should supervise the program?
- (b) Should the program be voluntary?

- (c) Should guidance be included in legislation regarding when it would be appropriate to refer a defendant to the program?
- (d) How should eligibility for the program be determined?
- (e) How could such a program appropriately address the needs of young people with cognitive impairments?
- (f) What should be the consequences of completion of the program?
- (g) Should a supervised program be formulated as an extension of s32 or s33 diversion under the *Mental Health (Forensic Provisions) Act 1990* (NSW) or should it be separate?

While the expansions of options available to courts when dealing with young people are welcomed, the system of diversion developed under the *Young Offenders Act 1997* needs to be preserved.

The statistics on juvenile offending are very clear that the vast majority of young people who offend do not progress into the criminal justice system. One of the strengths of the NSW system is that the use of police discretion under the YOA to issue a warning or caution is a valid intervention for those in the vast majority of cases. The remainder of the system should be developed in such a way to ensure this vital early diversion system remains in place and is used in the appropriate circumstances.

Consideration should therefore be given to the possibility that any expansion of available court-ordered interventions may actually draw more young people unnecessarily into the criminal justice system in order to have their welfare issues addressed, rather than as a result of the seriousness of their criminal act.

Further, if such a supervised treatment or rehabilitation program were considered, it would have serious implications for agency finances. Extra funding would need to be provided sufficient for the purposes of the program. If the program were a diversion under section 32 or 33, then it would be undesirable for responsibility to rest with Juvenile Justice.

Nevertheless, Juvenile Justice would support a MERIT-style program for young people with cognitive and mental impairments if it were developed within a therapeutic jurisprudence framework. This framework encourages the judiciary and associated participants to undertake relevant assessments and develop interventions that assist the young person to receive the services they require.

Dr Effie Zafirakis notes the application of therapeutic jurisprudence principles in the context of mental health courts that the process offers new insights and a sense of “renewal” by critically focusing on how legal processes can impact on the well being of offenders. As a primary focus, therapeutic jurisprudence therefore adopts a new “lens” which allows us to examine how the law in its application can affect therapeutic outcomes (Dr Effie Zafirakis from RMIT 2010).

It is important to note that this cohort of offenders is extremely challenging and therefore the court would need to ensure that the processes are extremely flexible and responsive to the individual. These young people present with limited capacity to understand the requirements of a court order.

Agencies such as ADHC and Health would need to ensure that relevant services were made available to these young people. Throughout the program the young person must have secure accommodation and a specialist advocate with extensive experience in mental health or intellectual disability.

**11.22** If diversionary provisions under s32 and s33 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?

Juvenile Justice would support the extension of these provisions, would comment that Juvenile Justice may need to have a role in supervising the young person given the seriousness of the offending behaviour in these jurisdictions.

## **Chapter 5 – Fitness and the defence of mental illness**

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

It would be desirable for the Children's Court to have the appropriate powers to deal with questions of fitness. Early assessment and intervention is crucial to ensure these young people are diverted from the adult criminal justice system. The focus of legislative change should be to identify problems early and expedite the treatment of the young person. They should receive treatment including medication and other relevant therapy that is based in a community setting.

Where there are concerns that the defendant is unfit, the magistrate or judge has the capacity to order a forensic assessment. The Children's Court should have the legislative power to make decisions in consultation with the Mental Health Review Tribunal.

Procedural powers should be in place at the Children's Court that aim to address the young person's mental health or disability in order to prevent future offending. Young people should be diverted to an appropriate service or facility and not be made subject to criminal sanctions in response to behaviours arising from their disability.

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

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

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

The *Presser* criteria are comprehensive in terms of mental capacity but do not note impulse control and judgment, which are the last aspect of the brain's development. Young people, regardless of their capacity, are not fully functional until adulthood. Therefore there must be specific reference to these matters when considering specific criteria for young people.

Children and young people lack the capacity for adult level reasoning or a full realisation of the consequences of their actions. This forms the basis for applying a different standard of responsibility to children than to adults.

The proceedings of a trial need to be more carefully explained to a young person with cognitive or mental health impairment in order to ascertain that they understand the process.

Where there is an emerging mental illness, there may need to be some clarification of the nature of this illness before proceeding. This may take some period of time and needs to be balanced with the impact of a delayed hearing on the young person's prospects for a pro-social lifestyle. A legal guardian may assist in the process.

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

*Doli incapax* needs to be applied on a case-by-case basis. As noted, it is possible for a young person with a cognitive impairment to operate independently in the community.

No special consideration should need to be enshrined in legislation if the court follows existing legislation by making appropriate allowances where a cognitive or mental health impairment is recognised.

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

The defence of mental illness and the *M'Naghten Rules* face the previously-discussed difficulties around the definition of mental illness. The underlying intentions of *doli incapax* and the variables for determining the competence of a young person need to be clarified. As noted in the Consultation Paper's



Overview, when compared to adults, young people present particular difficulties with issues of emerging mental illness, early detection and definitive diagnosis.

One option for understanding a young person's criminal responsibility could be achieved by assessing component parts of responsibility such as cognitive development, the level of receptive language understanding and the degree of impulsivity.

Dalby (1985, Criminal Liability in Children. *Canadian Journal of Criminology*, 27 (2), 137-145) refers to three areas in developmental psychology relating to criminal competence:

- cognitive development – knowing the wrongfulness of acts;
- moral development – moral reasoning, self-evaluation and a behavioural component;
- conative development – self-control and resistance of impulses.

**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?

Yes.

**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?

Juvenile Justice has no comment.

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

**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?

Juvenile Justice would support any moves by courts to make proceedings more age-appropriate and comprehensive for young people, particularly those young people who may have a cognitive or mental impairment.

The Children's Court is currently an intimidating environment for children and young people. In many other jurisdictions the court environment is more informal and therefore encourages participation and understanding of the legal process. The Youth Drug and Alcohol Court in New South Wales and the Victorian Koori Court provide examples of how the court environment can promote a better understanding of what is happening throughout the court hearing. Juvenile Justice would support any move toward a more informal court environment for children and young people.

- 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?

In its submission to Consultation Paper 8: Forensic Samples, Juvenile Justice supported the automatic destruction of forensic samples as soon as practicable following a diversionary order issued under s32 or s33 of the *Mental Health (Forensic Provisions) Act 1990*, or a verdict of not guilty on the ground of mental illness, or where a young person has been found unfit to be tried at a special hearing.

## **Chapter 6 – Sentencing**

- 11.32** Should the *Children (Criminal Proceedings) Act 1987* (NSW) be amended to provide for psychological, psychiatric or other assessments of young offenders prior to sentencing? If so:
- (a) Should assessment be mandatory in all cases?
  - (b) Should assessment be mandatory where a young offender appears to have a cognitive and/or mental health impairment?
  - (c) What should an assessment report contain?
  - (d) Who should conduct the assessment?
  - (e) Should any restrictions be placed on how the information contained in an assessment report should be used?
  - (f) Should this power be available to all courts exercising criminal jurisdiction?
  - (g) Should there be the power to remand young people for the purposes of assessment? If so, should there be a presumption against custodial remand?

Mandating an assessment would not be desirable given that the majority of young people are not impaired and that there are already too few assessment providers available to be contracted in a timely manner. The court currently has the option of requesting psychological or psychiatric assessments where a potential impairment is identified.

The *Children's (Criminal Proceedings) Act 1987* should be amended to allow the option of psychological, psychiatric and disability assessments prior to administering a sentence. Such assessment should be mandatory (and would be particularly relevant) where a young person has a suspected cognitive or mental health impairment. The issue of resources to support such a move would also need to be considered.

The Act should include a section allowing magistrates to adjourn the matter until they are satisfied the young person does not have a cognitive or mental impairment, when this issue is relevant. The principle behind such an inclusion would be to divert young offenders from the criminal justice system and into appropriate treatment and support programs in the community.

Any assessment should contain an assessment of the young person's cognitive or mental condition and information as to how they may have impacted upon their criminal behaviour, a treatment plan for the young person (where required), along with recommendations to the court on which diversionary or treatment programs would be most appropriate for the young person.

Unless the young person is already on remand or in custody for other reasons, it is not acceptable to place a young person in custody solely for the purpose of assessment.

- 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?

The sentencing principles that the *Children (Criminal Proceedings) Act 1987* applies to young people differ significantly from the sentencing principles applied to adults. These principles reflect the nature of adolescence as a stage of development. In accordance with this principle, Juvenile Justice supports an amendment to the *Children (Criminal Proceedings) Act 1987* to include a specific section relating to young people with cognitive or mental impairment.

Juvenile Justice considers it desirable for courts to have a wider range of sentencing options available to them, including an ability to refer for assessment or to direct / divert into treatment. However, there is a chance that too great an increase in such powers may lead to net-widening and the capture of young people within the formal criminal justice system for 'treatment', who may otherwise have been diverted.

These options should also be available in relation to serious children's indictable offences.

Prior to sentencing the magistrate or judge should consider issuing a court referral to an appropriate service whereby the young offender can undertake assessments, treatment and support as required. For example, the Justice Health Community and Court Liaison Service organises clinical nurse consultants and forensic psychiatrists to provide mental health assessments for those who are before the children's court. The principles of the service are to provide clinical recommendations and to endeavour to link young people with appropriate care.

Referral could also be made to the Ageing Disability and Home Care Criminal Justice Program model, which provides a continuum of support enabling clients to live in the least restrictive alternative, whilst receiving sufficient support to minimise their risk of re-offending. These models range from intensive high support, onsite support or drop-in support as required.

However, in rural and remote courts there are few services for this client group in terms of immediate access to appropriate assessments at the time of trial. Court Liaison Services should be available to all young people attending court.

Juvenile Justice also works closely with Justice Health Community Integration Teams, which coordinate the transition of health care for young people in custody with significant mental health and/or problematic drug and alcohol issues when released from detention. Care is coordinated prior to and during the critical post-release period with links made to appropriate specialist and general community services.

**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?

The rationale of the juvenile justice system is diversion, rehabilitation, reintegration and addressing the needs of young people who offend. The available sentencing options under the *Children (Criminal Proceedings) Act 1987* (NSW) currently considers lack of maturity of young offenders but gives no more detailed guidance in this regard other than "such other matters as the court considers relevant" and makes no reference to those with a cognitive or mental impairment.

Juvenile Justice would support an amendment providing further guidance specifically requiring courts to take into account special or mitigating circumstances, such as cognitive impairment or mental health issues.

**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?

In the case of serious offenders (where a control order is being considered), courts are already required to obtain a background report, which should indicate the possible presence of a mental illness or cognitive impairment. Any information in this respect should already, therefore, be utilised by higher courts.

It is in cases of lesser seriousness that this information may not be readily available. Greater identification and assessment of these young people is therefore desirable in the lower courts, which would lead to a greater consideration of mental illness and cognitive impairment as mitigating factors in sentencing.

**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?

Juvenile Justice acknowledges the pros and cons of provisional sentencing and sees some merit in allowing a young person time to further develop, thereby allowing for a more definitive understanding/diagnosis of any emerging mental or cognitive issues. This information could then in turn provide a more appropriate and considered final sentence.

However, such a scheme would need to be closely monitored and regulated to ensure that young people subject to a provisional sentence were no worse off than they would have been via a traditional, definitive sentence.

## **Community Services division submission – Law Reform Commission Paper 11: *Young people with cognitive and mental health impairments in the criminal justice system***

### **Introduction**

Community Services welcomes the NSW Law Reform Commission's inquiry which looks at young people with cognitive and mental health impairments in the criminal justice system and appreciates the opportunity to comment on the Commission's consultation paper, *Young people with cognitive and mental health impairments in the criminal justice system*.

Community Services recognises that young people are different from adults and for the most part require different care and management in the criminal justice system. In particular, Community Services is of the view that young people with cognitive and mental health impairments who find themselves involved in criminal proceedings require both multi disciplinary and multi agency responses to their circumstances. For many, their inability to understand and/or comply with court orders means they are more likely to find themselves the subject of further criminal proceedings e.g. for offences of breach of bail or breach of an apprehended violence order (AVO).

Early intervention strategies and diversion from the criminal justice system wherever possible, are the preferred options to ensure that young people with cognitive and mental health impairments have their behavioural needs addressed and that adequate supports are put in place for these young people and their families.

### **Areas of interest for Community Services**

From a client perspective, the issues raised in the Consultation Paper which are of most interest to Community Services are those issues relating to Bail and Apprehended Violence Orders. Community Services also makes a number of recommendations in respect of the sentencing of young people with cognitive and mental health impairments.

### **General Comment about young people in the criminal justice system**

A 2005 study by Michael Tarren-Sweeney of 347 children aged 4-11 years in out-of-home care in NSW concluded that children in care were found to have multiple and complex mental health problems<sup>1</sup>. Children in this study were reported as having exceptionally poor mental health and social competence, relative to the general population and to other populations of children in care. Some of the factors that contributed to these relative high levels of mental health disturbance for these children included higher exposures to social and

---

<sup>1</sup> Tarren-Sweeney, M., & Hazell, P. (2006). The mental health of children in foster and kinship care in New South Wales, Australia. *Journal of Paediatrics & Child Health*, 42, 91-99.

biological adversity prior to entering care, particularly emotional deprivation and maltreatment relative to normative and in-care samples.

This study is particularly relevant as the 2008 *Special Commission of Inquiry into Child Protection Services in NSW* noted that between 21 and 39 per cent of young people within the Juvenile Justice system have experienced placement in out-of-home care.

Community Services supports the findings of the *Special Commission of Inquiry into Child Protection Services in NSW* (the Wood Report) relating to children and young people involved in the Juvenile Justice system. In particular, any attempt to work with young people in the juvenile justice system requires a multi-agency approach, and that coordinated supports are made available to the young person and their significant others at every stage of their trajectory through the system. This is especially true for young people in out-of-home care.

It is considered that there is a need for more early intervention mental health strategies for children and young people with cognitive and mental health impairments to prevent these children and young people's contact with the criminal justice system. Additionally, more diversionary options are needed for children and young people from the criminal justice system, with a greater focus on mental health.

It is noted that the consultation paper acknowledges that some of the issues related to the focus group of the paper (10 year olds up to the age of 18) may be relevant beyond this group in particular those youth transitioning from adolescence to adulthood. Community Services is particularly concerned about young people transitioning from out-of-home care. This group is particularly vulnerable to contact with the criminal justice system and poor mental health or cognitive impairment only exacerbates the issues that the young person may face in this transition period. It is considered that more attention needs to be given to this particular group of young people and Correctional Services involvement may be warranted in this consultation exercise.

A Memorandum of Understanding currently exists to define the scope of cooperation between Community Services and Juvenile Justice in cases where young people who are under the parental responsibility of the Minister or Director General are involved with both agencies. This includes that the two agencies should perform joint case planning, and that young people who are "joint clients" have equal access to support from both agencies simultaneously – including that Community Services must make every effort to secure a suitable bail placement for the young person. It details a number of principles, including that "the importance of maintaining the [young person's] identity, their relationships with family, significant others and the community is recognised.

Under *Keep Them Safe: A Shared Approach to Child Wellbeing*, the NSW Government has committed to piloting an Integrated Case Management

response system, where the Department of Premier and Cabinet, Department of Human Service Agencies including Community Services, Juvenile Justice, Housing, and NSW Health and NSW Police will collaborate to provide services to families with multiple needs in a coordinated fashion.

Additionally, Community Services and Juvenile Justice jointly commenced a pilot program in March 2010 for children and young people on remand. Attached to Parramatta Children's Court, the pilot provides an interagency casework response to young people under 16 years who are being held on remand due to homelessness. An interagency committee of representatives from Community Services, Juvenile Justice, Ageing Disability and Home Care, Justice Health, NSW Health and the Department of Education and Training, will provide tailored support for children and young people, referred by Juvenile Justice. As mental health is often a contributing factor to the homelessness of young people on remand it will be a focus of casework provided to the young person.

It is noted that the role of Justice Health is not referenced in the consultation paper. It is understood that this agency's role is not only to ensure appropriate treatment of young offenders, but to assess young people who have been charged with an offence to ensure proper consideration of cognitive and mental health impairment during court hearings and sentencing. Community Services would support any effort to increase the availability of this service to young offenders.

Community Services makes the following specific comments in relation to bail, AVOs and sentencing.

## **Chapter 2 – Bail**

### **General comments**

In its recent submission to the Review of the *Bail Act 1978* and the Bail Bill 2010, Community Services submitted that the Bail Bill should include a provision which clearly stipulates that detention of a child or young person should be a matter of last resort.

Community Services is greatly concerned about remand admissions for children and young people in light of Juvenile Justice estimates referred to in the Review of the Bail Act 1978 Report that 76% of young people remanded in custody do not receive a custodial sentence within 12 months following a remand period.

Alternatives to remand for children and young people need to be found wherever possible in order to maximise their prospects for rehabilitation. Legislative amendment which places an obligation on bail authorities to explore every available option other than remanding a child or young person in custody has to be in the best interests of children and young people. Even more so for those young people with a cognitive or mental health impairment,



whose ability to understand the criminal justice process is limited, as is their capacity to comply with police directions and court orders.

Community Services supports an approach which would see more resources directed to early intervention programs for young people with a cognitive and mental health impairment such as the Intensive Supervision Program (ISP) referred to in the consultation paper.<sup>2</sup> This program, which has proven successful in other jurisdictions, attempts to reduce reoffending by utilising a multi-systemic therapy model that targets young people who commit serious or repeat offences or whose severe antisocial behaviour increases their likelihood of reoffending.

**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 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?**

Some of the central problems that arise for young people in respect of bail that Community Services is aware of are the difficulties in complying with bail conditions, in particular residential requirements, which in turn results in young people being unnecessarily held on remand. The central issue here is homelessness and insufficient accommodation services available for young people who should be granted bail. As noted in the above commentary, Community Services, Juvenile Justice and other agencies are attempting to address these difficulties although finding suitable accommodation for some of these young people remains a problem.

Another key area of concern for young people in out of home care is the ramifications of non-compliance with bail conditions. A bail condition for a young person might include a residential requirement and the imposition of a curfew which means that the young person has to be at their out of home care accommodation by a certain time in the afternoon or evening. The young person may for a multitude of reasons not return home by the required time and then stay away for a few days. By that time, caseworkers will have reported the young person to the police as a missing person. When the young person returns, the police are contacted and they are required to sight the young person. This can and does lead to the young person being charged with a breach of bail, which further entrenches their participation in the criminal justice system.

---

<sup>2</sup> Consultation Paper p. 23, para 1.64

These problems are relevant to young people with cognitive and mental health impairments whose situation is made more difficult by their inability to understand what bail conditions they are required to comply with. The likelihood of their being charged with breach of bail offences therefore increases.

Community Services is of the view that a reduction in numbers on remand might be achieved through increasing resources available for appropriate accommodation services to be provided to young people with cognitive and mental health impairments.

Community Services also supports more resources being dedicated to services such as Juvenile Justice's state wide bail supervision program which has taken steps to ensure that homelessness and lack of adequate accommodation do not prevent a young person from being granted bail, when bail would otherwise be granted.

The priority group for bail interventions are young people under 14 years, ATSI young people and those who are at significant risk of being remanded in custody due to the lack of stable accommodation or are in need of other supports in the community. Community Services is of the view that the Bail Supervision Program should be expanded, and if possible, apply to all children and young people.

It is noted that considerable resources may be needed to achieve this program expansion. However Juvenile Justice estimates that the daily cost per juvenile in custody is \$556; where as the daily cost per juvenile in community based services was \$35. Hence, it is likely that the costs of expanding the bail supervision program would be offset as the reduction in the numbers of children and young people in remand decreases.

**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?**

Community Services is concerned that the application of bail conditions to young people with a cognitive and mental health impairment is simply setting them up to fail. Serious consideration needs to be given as to whether any bail conditions are appropriate with the obvious exception being a requirement to attend court at a future date. Limiting the application of bail conditions in respect of this vulnerable group of young people would ensure that they do not find themselves in breach of bail conditions that may be unduly onerous and incomprehensible given the young persons capacity to understand the conditions.

A simple requirement to attend court on a given date would also be more easily monitored by agencies like Community Services and Juvenile Justice

who have direct contact with these young people. Efforts could be made to remind the young person of their obligation to attend court and where necessary provide support for the young person to attend court.

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

Amending the Bail Act to require police officers and the courts to be satisfied that bail conditions are appropriate having regard to the capacity of the accused to understand or comply with bail conditions is inherently problematic. This would require all police officers and courts to have expertise firstly in identifying that the young person has a cognitive or mental health impairment and then be able to make an assessment as to the ability of that young person to understand or comply with any bail conditions set.

Education and training will certainly assist Police, Magistrates and Judges to become aware that a young person might have a cognitive or mental health impairment; however making an assessment of a young person's capacity to understand their bail conditions is probably outside the scope of any short term training program. The result being that a young person's ability to understand and comply with certain bail conditions is inaccurately assessed by either a police officer or Magistrate, which could then have dire consequences for the young person should they fail to comply with their bail conditions.

**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?**

**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?**

As indicated in the response to question 11.2, Community Services would prefer that bail conditions for young people with a cognitive and mental health impairment be limited to the requirement to attend court at a future date. In the event that this position is not accepted, Community Services would support amendment to section 50 of the Bail Act to ensure that the age,

cognitive and mental impairments and/or the nature of the relevant breach be taken into consideration by police and the courts.

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

The failure of a young person with a cognitive or mental health impairment to appear at court is probably more reflective of the young person's inability to understand what is required of them than any deliberate attempt to ignore the authority of the court. Accordingly, Community Services is of the view that it is inappropriate to further punish the young person because of their failure to appear.

At the very least, section 51 should be amended to ensure that the Court takes into consideration the age; cognitive and mental impairments; and/or the reason for the young persons failure to appear at court.

**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 indicated above, Community Services is of the view that detention of a young person should always be a last resort. The inability of young people with a cognitive or mental health impairment to understand their bail conditions, much less comply with them should not result in that young person being held on remand. Rather, the young person needs to be provided with support services, such as the Juvenile Justice Bail Supervision Program to ensure that they are able to comply with their bail conditions. It is inevitable that many of these young people will require supervision to ensure compliance with the obligations placed on them by the criminal justice system. Hence adequate services are needed to undertake this function, which might simply involve reminding the young person to attend court on a specific date.

**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?**

See discussion above in response to question 11.1 and the general comments about bail.

### **Chapter 3 – Apprehended Violence Orders**

The consultation paper notes the lack of research and writing regarding issues relevant to AVOs and young people with cognitive and mental health impairments.<sup>3</sup> Whilst Community Services is unable to provide specific statistics about the numbers of clients aged 10 to 18 with cognitive and mental health impairments who are either a victim or respondent in AVO proceedings, the issue of AVOs often arises in the context of residential services for children and young people in out of home care.

Community Services both provides and funds residential care services for children and young people in out of home care who are unsuited to family-based placements with relatives or un-related foster carers. The reason for placing these children in residential services is either because of their extremely challenging behaviours and high support needs or their strongly expressed preference not to live with a family.

Some of these residential facilities provide an intensive residential treatment program to a group of children and young people in out of home care with high needs and complex behaviours who require more intensive therapeutic, programmed support than can be offered in other general forms of residential care services.

The minimum age of entry into these residential services is generally 12 years of age, although younger children could be considered for admission if comprehensive assessment indicated they had special needs that could not be adequately met in a home based option.

The children and young people living in these residential services will have in many cases experienced multiple and/or traumatic placement disruption and abuse histories, and may present a range of challenging behaviours and social/emotional difficulties, often in combination.

These difficulties may include one or more of the following:

- poor impulse control and/or stress intolerance
- high risk-taking behaviours
- alcohol and other substance abuse
- poor self image
- self-harming behaviours
- social isolation and limited capacity to form relationships with peers and/or adults
- sexually inappropriate behaviour
- anti-social behaviours, including aggression and or violence towards people, and,  
in some instances, criminal behaviour

---

<sup>3</sup> Consultation Paper p.53, para 3.2.

- mental health issues
- physical health issues
- intellectual disability
- educational difficulties.

The frequency and intensity of the challenging behaviours presented by these children and young people can lead to multiple, crisis-related placement changes that often exacerbate underlying behavioural and emotional issues. The behaviours presented by the target group are likely to be chronic, long-standing and resistant to interventions.<sup>4</sup>

As noted in the consultation paper, the *Crimes (Domestic and Personal Violence) Act 2007* places an obligation on police to obtain an AVO on behalf of young people if they are under the age of 16.<sup>5</sup> In the residential settings referred to above, altercations arising between residents and between a resident and a carer may result in the police being called.

Invariably this will result in the police taking out an AVO against one of the residents who is very likely to have a cognitive or mental health impairment. The victim may be another young resident with a cognitive or mental health impairment or one of the carers. As indicated in the consultation paper this is of great concern to Community Services as these young people often do not understand what an AVO is, much less comprehend what they are required to do in order to comply with any conditions of an AVO.

This in turn creates further problems as the young person's inability to comply with the AVO's conditions can lead to their being charged with a breach of an AVO. Hence, once an AVO is taken out against a young person living in one of these residential settings, the likelihood of further engagement with the criminal justice system increases.

### **Community Services view:**

Community Services is of the view that placing an AVO on a young person with a cognitive or mental impairment living in these residential services is unnecessary and unlikely to lead to any behaviour change on the part of the respondent young person.

A far better approach is for resources to be made available to increase the training available to carers in these residential settings to ensure that responses to potentially violent incidents assist in calming the situation and not escalating the problem. Resources are also needed to ensure that the residents are able to undertake appropriate treatment and education programs aimed at addressing their behaviours.

There is no doubt that Police will continued to be called to these residential services where staff are fearful for their safety or the safety of the other

---

<sup>4</sup> Out Of Home Care Service Model: Residential Care and Out of Home Care Service Model: Intensive Residential Treatment Program Policy documents April 2007

<sup>5</sup> Consultation Paper, p.53 para 3.10 and p.54 para 3.15

residents. However, the current mandatory requirement for police to take out an AVO for the protection of an under 16 year old in these residential services is not supported, especially where both the respondent and victim are under 16. Rather, Community Services would prefer that the police be able to exercise their discretion in respect of whether an AVO be taken out and respect the wishes of carers who do not want an AVO taken out on their behalf.

In stating this, Community Services is not suggesting that the mandatory requirement for police to take out an AVO on behalf of a person under 16 be dispensed with. Rather, that the police be able to exercise discretion regarding taking out an AVO in respect of the young people living in these residential facilities primarily because of:

- the challenging behaviours of the residents referred to above, which will often include a cognitive or mental health impairment
- the inability of these residents to always be in control of their behaviour
- the inability of the residents to understand what an AVO is and what it means, and
- the ramifications of breaching the AVO for these residents, resulting in their further involvement in the criminal justice system.

## **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?**

Yes, where the young offender appears to have a cognitive and/or mental health impairment – see response to question 11.32(b) below.

**If so:**

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

Assuming this question relates to all young offenders, a mandatory requirement to assess all young offenders prior to sentence is not supported, especially where the young person has been found guilty of a minor offence. It is noted that currently, background reports are mandatory in NSW if a court is considering sentencing a young offender to detention or imprisonment.

However, there will be a number of young people whose brush with the criminal law may be short lived and arise from circumstances involving peer pressure, ignorance, or where their behaviour arose whilst under the influence of alcohol and/or other drugs e.g. their mates dared them to shoplift or they used offensive language in a public place. These young people will find themselves before a criminal court because they have made a mistake and do not have any underlying cognitive and/or mental health impairment.

Requiring an assessment to be carried out in these circumstances would be an unnecessary waste of resources. Further, requiring an assessment for all

young people who are to be sentenced may lead to the unnecessary labelling of some of these young people, irrespective of any restrictions placed on the use of an assessment report.

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

Yes. Courts required to sentence a young offender with a cognitive or mental health impairment would be better placed to choose an appropriate sentencing option if the Court is aware that such an impairment exists; how that impairment impacts on the young person's behaviour and its potential role in contributing to the young persons offending behaviour.

However, the difficulty here lies in the ability of those involved in the criminal justice system to be able to make the assessment that a young person could potentially have a cognitive or mental health impairment.

Community Services recommends that appropriate training resources be developed and delivered to all those involved in the criminal justice system including, but not limited to the Police, Magistrates, Judges and Legal Officers to assist in raising awareness about cognitive and mental health impairments. Education enabling these personnel to be in a position to identify persons with suspected mental health or cognitive impairments will lead to improved long term outcomes for these young people.

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

Community Services is of the view that the assessment report should at the very least include:

- details of the young persons background with respect to family, education, social and community involvement (if any)
- the nature and degree of the young person's impairment
- the impact the impairment has on the young persons behaviour
- whether the impairment has contributed to their criminal behaviour
- what impact the impairment has on the young person's ability to understand the criminal proceedings and comply with possible orders of the court
- what services and supports would be needed for the young person to comply with any orders made by the court
- relevant sentencing options available to the court, with a focus on diversionary options, and
- a treatment plan and available treatment services.

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

Community Services recommends that the jurisdiction of Justice Health and the Mental Health Review Tribunal be extended to allow these organisations



where appropriate to conduct a pre-sentence assessment. Alternatively, a registered list of appropriately qualified independent psychiatrists and psychologists could be utilised by the Courts to refer these young people for assessment.

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

Yes – the assessment report should be able to be utilised by the Court to reach a decision about an appropriate sentence and for the purpose of putting in place a treatment program for the young person consistent with the recommendations of the expert who conducted the pre-sentence assessment for the Court. Ideally this treatment program should be community based wherever possible.

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

Yes. All courts involved in sentencing young people with an apparent cognitive or mental health impairment should have the power to order a pre-sentence assessment.

**(g) Should there be the power to remand young people for the purposes of assessment?**

No. Community Services' position is that the detention of children and young people should always be a last resort. Strategies need to be developed to ensure that these assessments take place in the community and in the least coercive setting as possible.

**Aboriginal Affairs NSW division submission – Law Reform Commission Paper 11: *Young people with cognitive and mental health impairments in the criminal justice system***

It is noted that consultation paper 11 clearly states how many reports, such as the Australian Human Rights Commission 2008 report on *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues*, highlights the overrepresentation of Aboriginal young people in the Justice system and how Aboriginal young people have an increased likelihood of having an intellectual disability compared to non-Aboriginal young people.

Aboriginal young people compared to the general population are overrepresented in the criminal justice system as outlined in the *Two Ways Together Report on Indicators 2009*. According to the *Two Ways Together Report on Indicators 2009* the rate of remand among Aboriginal people is 19.6 times that of non-Aboriginal people. Additionally, Aboriginal people will experience higher mental health issues compared to the general population. In the *Two Ways Together Report on Indicators 2009* nearly 31% of Aboriginal people reported experiencing high or very high levels of psychological distress compared with 9.6% of all Australians. Aboriginal people in NSW are twice as likely to be hospitalised for self-harm than the total population. Hospitalisation rates for self-harm are substantially higher in the 15 to 24 year old age group than for older age groups, for both the Aboriginal and total population. Underlying sources for psychological distress reported by Aboriginal people in 2004/05 include:

- 42% of respondents aged 18 years and over reported that they, their family and/or friends had experienced the death of a family member or close friend in the previous year
- 28% indicated serious illness or disability
- 20% reported alcohol related problems
- 19% reported that a member of their family had, or was currently, serving a custodial sentence
- 17% reported not being able to find a job
- 17% reported overcrowding at home

Also noted in the Australian Human Rights Commission 2008 report, Indigenous young people with a disability are more vulnerable than other detainees, they can face additional difficulties in adapting to a custodial environment rarely able to meet their needs and they are ridiculed and receive adverse attention by other detainees who do not understand their medical predicament.

The proposed review of the *Bail Act 1978*, with particular emphasis on improving its operation in relation to young people with cognitive disabilities and mental health issues is supported.

The Aboriginal Justice Advisory Council (AJAC) report on Aboriginal People and Bail Courts in NSW examines why there is such a high number of Aboriginal people on remand and why Aboriginal defendants may breach bail conditions. This report also suggested amending the bail system to ensure it works more effectively for Aboriginal communities.

The AJAC report highlights the heavy reliance on police information and lack of independent information in order to grant Aboriginal young people bail from court. Those with a disability and or mental illness would have further difficulty to comprehend the provision of such information.

The AJAC report also highlights a range of additional issues which may impact on the ability of Aboriginal people to meet bail conditions. These include an inability to get to court because of lack of available transport, communication barriers and a lack of understanding of bail conditions and physical and mental disability. These are all factors which are likely to have a further disproportionate impact on Aboriginal young people with cognitive or mental health issues.

The *Young Offenders Act 1997* (NSW) (YOA) establishes an alternate regime of dealing with young persons who commit certain offences by diverting them from the children's court. It also provides the legislative framework for the giving of warning, cautions and youth justice conferences.

Research indicates that Aboriginal young people are afforded diversionary options under that Act at a lower rate than non-Aboriginal people. Consideration should be given, as part of this review, to identifying opportunities to strengthen the application of this Act to ensure that it provides Aboriginal young people with cognitive disabilities and mental health issues, the necessary support and opportunities to be diverted from ongoing contact with the criminal justice system.

**Ageing, Disability and Home Care division submission – Law Reform Commission Paper 11: *Young people with cognitive and mental health impairments in the criminal justice system***

The NSW Law Reform Commission (LRC) notes that there is considerable overlap between Consultation Paper 11 with previous consultation papers 5, 6, 7, 8 and 9 *People with cognitive impairments in contact with the criminal justice system*. Ageing, Disability and Home Care (ADHC) prepared a submission in response to these consultation papers on 6 August 2010 (DHS10/228) and the feedback provided below bears a strong correlation to the points raised previously.

ADHC continues to support the position that there must be a clear legislative distinction between young people with cognitive impairments and young people with a mental illness. Without this separation, inconsistent interpretation and determination will continue to affect many areas, including consideration of fitness to plead, basis for defence against charges, review, and referral to diversionary programs.

The *Mental Health (Forensic Provisions) Act 1990* (NSW), *Mental Health Act 2007* and the Mental Health Review Tribunal (MHRT), as their titles suggest, are weighted towards people with mental illness. Thorough re-examination of the legislation and a better understanding of the differing characteristics of this population is therefore required to redress this inferred imbalance and ensure that the needs of young people with cognitive impairments are given due consideration.

**Chapter 1 - Overview**

The needs of young people with cognitive impairments in contact with the criminal justice system are different to those of adults and require a different style of support and management. Moreover, the needs of young people with a cognitive impairment may differ greatly to those of a young person with mental illness.

Clauses 1.7 to 1.10 distinguish between cognitive impairment and mental illness and clause 1.9 makes the point that the two should not be confused. However, it is not uncommon for a young person with a cognitive impairment to also have a diagnosed mental illness.

It should be noted that intellectual disability is only one form of cognitive impairment. Cognitive impairment might also be experienced by people with an acquired brain injury or borderline intellectual functioning. Diagnosis of an intellectual disability is an eligibility criterion for accessing ADHC-direct services; however some non-government organisations funded by ADHC do provide services for people with other forms of cognitive impairment.

The key risk factors for young people with a cognitive impairment who have contact with the criminal justice system continue to be where key agencies:

- are unable to identify a person with a cognitive impairment;
- lack the capacity to support people with cognitive impairments;
- do not distinguish between cognitive impairment and mental illness; and
- do not know how to divert young people away from the criminal justice system through diversionary options and link into appropriate services.

The LRC notes (clause 1.35) a recommendation from the 'Noetic review' (Noetic review, Recommendations 59-62):

*“The review also notes the prevalence of intellectual disability and mental illness in the juvenile justice system, recommending that existing programs for identification, assessment and early intervention for young people with an intellectual disability and mental illness be expanded.”*

No single agency can or should be expected to deliver the full array of services to this complex population. What is clear is that inter and cross-agency collaboration, with clearly defined roles and responsibilities, is a key variable affecting outcomes for young people with cognitive impairments. The LRC identifies at clause 1.50 a number of agencies that deliver services and notes that the list is by no means exhaustive. ADHC is a key agency in the provision of services to young people with an intellectual disability and should be mentioned in this clause.

ADHC supports the LRC position that early intervention with fast and effective service support will promote better outcomes for all young offenders with cognitive impairments.

Early intervention in this context refers to intervention early in the pathway towards establishment of challenging and offending behaviours; this may or may not mean early in life. The nature and timing of the intervention depends not just on the person's age and intellectual development, but also on the identified pathways to acquiring an emerging or entrenched pattern of challenging behaviour and the critical transition and pivot points that characterise those pathways.

The absence of appropriate diversionary services was noted as an issue, particularly where identification and assessment issues limit the range of available and alternate options.

ADHC supports priority being given to the development and promotion of additional early intervention and diversionary services to assist people potentially at risk, to choose not to offend.

## **Chapter 2 - Bail**

Young people with cognitive impairments are more likely to breach bail conditions compared to young people without cognitive impairments. Subsequently, they are less likely to be granted bail when there is a recurrence of the offending behaviour. A young person's compliance with any court imposed bail conditions is often dependent on the young person being fully informed of the conditions and the consequences of breaching those conditions in a communication style they can understand. The LRC notes that the *Bail Act 1978 (NSW)* states that prior to imposing bail conditions on an accused person who has an intellectual disability, the police officer or court must be satisfied that bail conditions are "*appropriate having regards to the capacity of the person to understand or comply with bail conditions.*"

ADHC supports the LRC argument that unless the courts can create bail conditions in a manner that a young person with a cognitive impairment can understand and comply with, there is a danger that these young people will be remanded in custody when other more effective support services and treatment options may be available. Strategies for young people with cognitive impairments to promote better understanding and compliance include:

- bail conditions written in plain English and/or use of augmentative measures, such as pictures or symbols where the young person has a functional communication impairment; and
- the support person being provided with a copy of the bail conditions so they can convey the information to the young person.

The LRC highlights an important issue regarding the court's understanding of the role of the support person/s in supporting the young person to comply with their bail requirements. The LRC quotes a recent Bureau of Crime Statistics and Research publication (p.42):

*"Bail conditions were framed around what would normally be considered part of a case management plan (for instance, attending counselling, residing as directed). However, the conditions imposed by the court were made with no consultation with families..."*

With this in mind, ADHC is also concerned that inadequate consultation often occurs between the court and the disability case manager when conditions are imposed. It should be clearly understood that clients must consent to receiving an ADHC service, ADHC cannot guarantee supervision, and compliance recording is not within ADHC's service scope.

ADHC staff provide support to service users to help them understand and comply with the terms and conditions attached to bail, Section 32 orders, parole or any other court orders (*ADHC Justice Services Policy 2009*). However, this is written in the context of the professional and ethical duty of disability staff rather than a strict legal obligation. There is no general legal responsibility on ADHC staff to assist service users to adhere to conditions attached to parole, bail or Section 32 orders. These orders cast an obligation

on the young person who has been charged with the offence, and on no one else.

### **Chapter 3 – Apprehended Violence Orders**

It is evident from the LRC consultation paper that there is very little information and empirical data relating to Apprehended Violence Orders (AVOs) relating to young persons with cognitive impairments. ADHC supports the view that further research is required to examine the efficacy and application of AVOs in regard to this population.

ADHC's position echoes the concerns of Community Services regarding AVOs being taken out by care workers against children, particularly in residential facilities (clause 3.24). Along with court imposed conditions, there is the fear that unless AVO conditions are practical and able to be understood by the young person with a cognitive impairment, there is a greater chance of non-compliance and a subsequent breach.

While the safety of care workers is paramount and any acts of aggression that threaten the safety of staff is treated with the greatest concern and diligence, it is neither fair nor practical for a care worker to take out an AVO against a service user for whom they elect to continue providing primary support in a paid professional capacity. Conversely, if the police decide to take out an AVO on behalf of the care worker against his/her wishes, this in turn compromises the worker's ability to maintain rapport and continue in a supportive relationship with the person.

### **Chapter 4 – Diversion**

Chapter 4 considers the *Young Offenders Act 1997*, Youth Conduct Orders, Section 22 of the *Mental Health Act 2007*, Section 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990*, supervised treatment options and diversion by superior courts.

As one of the main overarching principles of the ADHC *Justice Services Policy*, ADHC advocates for diversion away from the criminal justice system into programs with specialised case management and treatment options in order to provide better outcomes for young people with cognitive impairments.

#### **4.4 Warnings, cautions and youth justice conferences**

ADHC supports the practice that where the young offender is adequately informed and understands the extent and meaning of the diversionary options, a formalised process of warnings, cautions and participation in youth justice conferences should apply. ADHC notes that the LRC (clause 4.6) has detailed the importance of including skilled support:

*“Where a child who is being cautioned has a communication or cognitive disability, the person giving the caution must, as far as practicable, give the caution in the presence of an interpreter or other*

*appropriately skilled person and where necessary, obtain their assistance in giving the caution.”*

It should be understood that all people with cognitive impairments also have a degree of communication impairment. Significant consultation has occurred between ADHC and NSW Police to ensure that all vulnerable young people with cognitive impairments are treated appropriately during police contact.

The Senior Officers’ Group on People with an Intellectual Disability and the Criminal Justice System has highlighted some of the issues faced by police in the NSW *Interagency Service Principles and Protocols* (SPPs). Section 9.3.2 provides:

*“The police regularly come into contact with people with an intellectual disability in the course of performing their duties. Contact may be with people with an intellectual disability causing nuisance or engaged in anti-social behaviour, as well as in cases of crime or suspected criminal activity where an alleged perpetrator or victim has an intellectual disability. Police may also be called upon to assist in circumstances where a person with an intellectual disability is facing difficulties or causing disruption to others and a more suitable organisation cannot be identified or contacted. Such cases, though not involving a crime, can take up police time and may escalate into criminal activity.*

*The ability to identify people with an intellectual disability and guide them to appropriate support services will help to reduce impacts on police work and help to avoid circumstances where challenging behaviour or other problems can lead to criminal behaviour. Where criminal conduct is involved, police need the capacity to access diversionary opportunities for less serious cases and/or to call appropriate supports for individuals concerned.”*

The SPPs provide the agreed framework for human services and justice agencies to work together to support people with a cognitive impairment in, or at risk of, contact with the criminal justice system. The SPPs have been endorsed by the Human Services and Justice CEOs’ Committee and by the NSW Cabinet.

The SPPs set out roles and responsibilities aimed at ensuring that a system of warnings and cautions can work in practice and assist proper identification of a person suffering from a cognitive impairment. They include:

- *Members of the police force will continue to work with the wider disability service system towards ensuring that people with an intellectual disability are not subjected to the criminal justice system inappropriately. This includes ensuring the use of a support person when interviewing people with an intellectual disability.*
- *The police will continue to implement their Disability Action Plan and in*



*consultation with ADHC, develop disability awareness training materials and include in training their operational and administrative personnel to:*

- i. appreciate the distinction and inter-relationship between intellectual disability and mental illness and dual diagnosis and criminality;*
  - ii. be conscious of the possibility that a person with an intellectual disability may not want them to know that he/she has an intellectual disability or wishes to hide the effect of the disability;*
  - iii. identify indicators of intellectual disability that can be gleaned from careful questioning – questions about school (school history, number of schools attended, special school placement, school attendance record, teaching and learning outcomes);*
  - iv. undertake questioning in a way that enhances the likelihood of detection of slow speech, poor memory, poor sequencing of events, childhood history of hospitalisation or other institutional placement; and*
  - v. deal with people suspected of having an intellectual disability in a way that accommodates that possibility. This training will recognise the range of factors which the Police use to identify people with an intellectual disability.*
- When members of the police force reasonably suspect that a person alleged to have committed a crime has an intellectual disability, they will:
    - i. take reasonable steps to contact a support person where one is known or available; and*
    - ii. bring this to the attention of other police through appropriate record keeping, in particular the COPS system.<sup>6</sup>**
  - With the support of ADHC, the police force will develop a service referral pamphlet that provides general information on the types of assistance available from the disability service system and how to enquire about obtaining a service.*
  - The police force and ADHC will jointly investigate ways to establish a pathway, consistent with privacy protection and informed consent requirements, for direct referral of people who may have an intellectual disability to ADHC.*
  - The police force will actively participate in local area networks with other relevant agencies to co-ordinate timely and effective responses for people with an intellectual disability.*
  - Where the police force knows a person is identified as having an intellectual disability, the police will liaise with their family, carer and/or service provider before putting forward to a Magistrate, a proposed course of action regarding a breach of bail. This will occur in a way that reflects a collaborative, interagency approach.*

---

<sup>6</sup> Computerised Operational Policing System.

## **Chapter 5 – Fitness and the Defence of Mental Illness**

ADHC notes that the court processes in place are geared towards young people with a mental illness that may be short-term and responsive to treatment, whereas a young person with a cognitive impairment, in most cases, has a permanent impairment.

The rules and conditions pertaining to fitness to be tried for young persons and adults with a cognitive impairment appear to be the same. A Section 32 application cannot be lodged in the District and Supreme Courts for a young person with a cognitive impairment. Only the defence of mental illness is available and to trigger the defence (clause 5.15):

*“...the defendant, during the commission of an offence, must be labouring under a ‘defect of reason’ caused by a ‘disease of the mind’ and because of that disease not known the nature or quality of the act, or that the act was wrong.”*

The Children’s Court may elect to transfer more serious and indictable matters to superior courts. Diversionary options may not be as available to young people with cognitive impairments, and these higher courts and ADHC support the *Mental Health (Forensic Provisions) Act 1990* that requires the court to consider the issues of fitness when it appears that the accused young person may be unfit to be tried.

ADHC supports the creation of legislation recognising cognitive impairment as a basis for acquitting a defendant during criminal proceedings. A person with a cognitive impairment will, in most cases, maintain a permanent disability throughout their life. Young people with cognitive impairments, unless there is also a diagnosis of mental illness, do not qualify for mental health services. The defence of mental illness with the hope of diversion into a treatment facility is redundant in such cases.

ADHC supports the establishment of specialist treatment options, both custodial and non-custodial while noting the resource implications for this approach and the need for cross-agency collaboration between ADHC, Juvenile Justice, Justice Health, Corrective Services and the MHRT.

ADHC supports the suggestions that:

*‘Special consideration may need to be given to the notification and participation of guardians and/or carers of young people in relation to court or Tribunal proceedings involving young people who are unfit or not guilty by reason of mental illness (5.35).’*

## **Chapter 6 – Sentencing**

ADHC supports the mandatory provision of pre-sentencing reports if a court is considering sentencing a young offender to detention or imprisonment. ADHC is committed to providing the courts with assessment and report information

that not only informs of the nature and degree of the young person's cognitive impairment but other key domains, including:

- developmental history, including the impact the impairment has on the individual's day to day life;
- communication skills, specifically the individual's ability to process information;
- support history;
- medical history;
- current functioning, including peer/social network, accommodation and living skills;
- behaviour support, including strategies or plans in place to deal with behaviour; and
- support/treatment plan(s).

While acknowledging that consideration of sentencing options should occur on a case-by-case basis, ADHC is concerned that 'provisional sentencing' allows a notional sentence to be imposed at first instance (clause 6.28),

*“with the ability to later vary or adjust the sentence during the course of the sentence, according to a variety of factors that might include assessments as to the offenders’ capacity to rehabilitate, and as to future dangerousness, and to take into account a better understanding of any mental health conditions that may have emerged or become apparent as the child matures.”*

While this sentencing option may benefit a young person with a temporary and treatable mental illness, its application for a young person with life-long cognitive impairment is not appropriate.

ADHC concurs with the highlighted LRC concerns relating to provisional sentencing (clause 6.3). ADHC remains firm in its commitment to ensuring the courts are supplied with relevant and accurate information prior to sentencing to alleviate unfair or misinformed sentencing outcomes for young people with an intellectual disability.