Legal Aid
NEW SOUTH WALES

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

Response to Consultation Paper 11

March 2011

Submission on behalf of Legal Aid NSW to the New South Wales Law Reform Commission

Introduction

The Legal Aid Commission of New South Wales ("Legal Aid NSW") is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres. Our criminal law practice represents clients in all criminal jurisdictions from the Children's and Local Courts to the High Court.

One of our specialist units is the Children's Legal Service (CLS). Lawyers working with the CLS advise and represent children and young people under 18 involved in criminal cases in the Children's Court. Our aim is to ensure that children and young people have access to professional, face-to-face or telephone-based legal advice at any stage of their legal proceedings. Another specialist unit is our Mental Health Advocacy Service ("MHAS"), which provides and coordinates duty representation in metropolitan and regional NSW for people who are subject to involuntary treatment or detention under the *Mental Health Act 2007* ("MHA") and represents forensic patients under the *Mental Health (Forensic Provisions) Act 1990* ("MHFPA").

The interaction between young people with cognitive and mental health impairments and the criminal justice system is a topic area of particular significance to Legal Aid NSW. Legal Aid NSW has just completed a study analysing the 50 highest users of our services between July 2005 and June 2010. The study, soon to be published, found that 80% of the group were in the 15 to 19 years of age range. Additionally, the study found that 46% of the 50 highest volume service users had a diagnosis of mental illness.

This snapshot of Legal Aid NSW service users suggests that the number of young people with a cognitive or mental health impairment in the criminal justice system is significant. It also indicates that the impact on Legal Aid NSW of managing clients with mental illness is substantial.

Legal Aid NSW does not necessarily have the resources or the expertise, as lawyers, to be working effectively with these complex clients, and the challenges we face in this respect are not unique to our organisation. The problem is exacerbated by the fact that, in our observation, the criminal justice system is increasingly being used to "deal with" young people with cognitive and mental health impairments because of a lack of resources within the public health and welfare systems. For example, inappropriate bail and AVO conditions are regularly imposed on juveniles not to ensure the safety of the community or attendance at court, but rather to control a young person's behaviour. This is especially the case for young people with cognitive and mental health impairments who display problematic behaviours as a result of their impairment.

We have had an opportunity to consider the views expressed by the Law Society of NSW in its submission to this inquiry, and endorse the policy proposals expressed in that submission. We also refer you to our previous submission in response to consultation papers 5 to 8. Additional comments relating to some of the specific issues raised in Consultation Paper 11 are attached.

Legal Aid NSW is grateful for the extension of time granted to provide these comments, and we would welcome the opportunity to comment further if necessary. Should you have any queries in relation to any aspect of this submission, please contact Debra Maher, Solicitor in Charge, Childrens Legal Service [redacted] or Erin Gough, Senior Solicitor, Legal Policy Branch at [redacted]

CONSULTATION PAPER 11 - ISSUES

BAIL

Inappropriate use of bail conditions

One of the questions the Commission asks in its Consultation Paper is whether the law should require police officers and courts to be satisfied that bail conditions are appropriate where the accused is a young person and/or has a mental health impairment.

While the *Bail Act 1978* applies equally to adults and children, it is the experience of Legal Aid NSW that bail laws are used differently in relation to children. A paternalistic, welfare-based approach by the police and courts means that it is more common for children to be released on bail subject to onerous conditions such as curfews, requirements to be in the company of a parent, requirements to follow the directions of a parent, and place restrictions. Because of the stringency of such conditions, the likelihood they will be breached is increased. Due perhaps to the NSW State Plan criminal justice priorities, there also appears to be an increased amount of attention given by the NSW Police Force to bail compliance checking in relation to young people.

The stringency of such bail conditions is not appropriate. One potential consequence of a young person breaching bail is that he or she will end up on remand. Another consequence is that, if the young person comes into contact with the adult criminal justice system at a later stage having breached bail multiple times as a juvenile, that person is treated by the courts as a person with a lengthy criminal history, which, among other things, decreases the chances of that person being granted bail in the future. In this way the criminalisation of children's problematic behaviour in adolescence has consequences for them as adults. This is arguably contrary to the philosophy of the *Children (Criminal Proceedings) Act 1987*.

These problems experienced by young people generally in relation to bail are intensified for young people with cognitive and mental health impairments. This group is more likely to have difficulty understanding bail conditions, and is therefore more likely to breach conditions inadvertently. It is also more likely that the interests of carers are inappropriately reflected in bail conditions (and sometimes charge decisions as well) with the hope of controlling difficult behaviour.

Case study 1 – inadvertent breach of onerous bail condition

Jenna is fourteen years old and has been diagnosed with having a developmental delay. She has been assessed as having a mental age of eight. Jenna also has a mental illness. On New Year's Eve she was at her Aunt's house with a number of other children. During this time she was on conditional bail. The conditions of her bail included that she remain with her grandmother or her aunt at all times. While at her aunt's house Jenna called an ambulance for herself because she felt that she was having a breakdown. Her aunt could not accompany her to hospital because of the other children in her care.

The hospital would not admit Jenna because it was not able to identify her medical problem. As a result, Jenna started running amok in the hospital waiting room. Police, who had brought in an unrelated person for treatment, arrested Jenna for breach of bail (for not being in the company of her grandmother or aunt) and offensive behaviour. She spent a night in custody before being released from court the next morning on the same bail conditions.

Case study 2 – bail condition reflecting interest of carer

Carl is twelve years old and has a cognitive impairment that means he often misbehaves and is difficult to control. As a result he lives in supported housing, where those caring for him find him hard to discipline. Carl was arrested for assault and at the request of his carer, one of the conditions of his bail was that he eat his dinner every night. If Carl fails to do so, he breaches his bail and could be placed on remand.

Case study three – criminalisation of young people by carers seeking to control their problematic behaviour

Amir is a fourteen year-old with a mental health impairment living in supported housing. Eighteen months ago he had a clean criminal record; he now has a ten-page record. All of the offences on his record stem from carer-related incidents, or for breach of subsequent bail conditions. For example, Amir has been charged with assaulting his carer on a number of occasions. All matters Amir has been charged with have been dealt with by the court under s 32.

Recently Amir was wrongfully arrested by police for breaching his bail. He was in fact not on bail at the time. Because he was aware he was not on bail he resisted the arrest and expressed anger towards police at the station.

When coming to pick him up his carer, who was also under the mistaken belief that Amir was on bail, requested that the police charge him. Amir was subsequently charged with assault police and intimidate police.

Possible legislative responses

Legal Aid NSW supports the recommendations for legislative review made by the Law Society of NSW in its submission. Additionally, Legal Aid NSW is of the view that the following amendments to the *Bail Act 1978* would improve its operation in relation to young people with cognitive and mental health impairments, including reducing the number of such young people held on remand.

- *Exempt all juveniles from the application of section 22A*

In its Consultation Paper the Commission refers to the introduction of s 22A of the Act and the 2009 BOCSAR finding that s 22A "significantly impacted on the average length of stay of a young person in remand."

Recent amendments to s 22A of the Act have clarified the scope of the section to make clear that an accused person can make a fresh application for bail if they have new information to present to the court. Even with these clarifications, it is our view that juveniles should be exempted from the operation of the section. There should be no restrictions on a juvenile's right to apply for bail, particularly when one considers the low proportion of juveniles on remand that ultimately receive a custodial sentence. Restricting a juvenile's rights to apply for bail is also inconsistent with the principles that underlie the *Children (Criminal Proceedings) Act 1987*.

Exempting juveniles from the application of certain criminal provisions is not unprecedented. For example, the Standard Non-Parole Period scheme in the *Crimes (Sentencing Procedure) Act 1999* that was introduced in 2002 does not apply to juveniles. Section 22A of the Act should likewise exempt juveniles from its operation.

- *Dispense with bail for "fine only" offences*

The Consultation Paper states: "One aspect of the criminal justice system that is of particular relevance to people with cognitive and mental health impairments is penalty or infringement notices." Of similar import are fine only offences.

Currently the Act categorises "fine only" offences as minor offences in relation to which bail must be granted unconditionally or subject to minimal conditions. Despite this requirement, Children's Legal Service solicitors regularly represent young people, including young people with cognitive and mental health impairments, who have been refused bail for a fine only offence such as a failure to comply with a move-on direction or an offensive language offence. Our solicitors also report regularly seeing young people who have breached a curfew condition imposed in relation to a fine only offence and who are refused bail as a result.

The fact that in such cases a young person can end up spending time in custody for an offence that does not carry a custodial sentence is inappropriate. Therefore, rather than being in a category of offence to which bail can be granted, "fine only" offences should be a category of offence in relation to which bail is automatically dispensed with.

- *Import into Act special principles that relate to young people*

Legal Aid NSW supports the Commission's recommendation to amend the *Bail Act 1978* to provide that conditions attaching to the grant of bail in the case of a young person must be reasonable having regard to principles from section 6 of the *Children (Criminal Proceedings) Act 1987*. Guidance could also be drawn from Article 37 of the United Nations Convention on the Rights of the Child.

- *Provide for the expiry of bail conditions on the first mention date*

As already mentioned, a significant pattern in the juvenile remand population in particular is the high proportion of offenders who have been refused bail as a result of breaching bail conditions. It is our experience that the bail conditions imposed upon juveniles at first instance often do not take into account the realities of the young person's life, including the difficulties that might be faced by a young person as a result of a cognitive or mental health impairment. Moreover, contrary to the rule in s 37(2) of the Act, conditions are often more onerous than what is required to ensure the young person's attendance at Court and to protect alleged victims and the community from further offending.

While one way of addressing this issue is to prohibit police from imposing certain conditions, police may then feel obligated to refuse bail in more cases. A better solution would be to provide in the legislation that any police bail conditions, other than residence and reporting conditions, automatically expire on the first mention date. The court would then have to specifically remake those conditions for them to continue to apply. This would give the court an opportunity to ensure that the conditions are not overly onerous, and an opportunity for it to take into account the particular circumstances facing the young person due to a cognitive or mental health impairment.

- *Impairment as a factor to rebut a presumption against bail*

The fact that an accused person has a mental illness or cognitive impairment should be a factor that is capable of rebutting a presumption against bail. Often the defence are in possession of documents and information that can confirm that impairment and would be able to present that information to the court.

APPREHENDED VIOLENCE ORDERS

It is the experience of Legal Aid NSW that it is increasingly common for young people with cognitive and mental health impairments to have AVOs taken out against them with often disastrous consequences. Two possible reasons for this are the recent well-intentioned changes to the *Crimes (Domestic Violence) Act 2007* that limit the discretion available to police when responding to a domestic violence situation, and the outsourcing of care work to non-government organisations.

Young people with cognitive or mental health impairments are more likely to be placed in care as a consequence of the problematic behaviour resulting from their impairment. Unfortunately, despite the fact that such behaviour is a predictable result of a young person's condition, Legal Aid NSW solicitors often hear of care workers using occupational health and safety mandates to apply for AVOs against young people as a way of dealing with their behaviour. As the Consultation Paper notes, breaches are common because young people with cognitive and mental health impairments often lack the capacity to understand the conditions attached to AVOs.

Alternatives need to be found within the Disability and Community Services system to deal with the issue of adolescent violence against guardians or carers so that predictable behaviour displayed by young people with cognitive or mental health impairments is not criminalised. AVO legislation was developed for a completely different set of circumstances and is ill-suited to these types of matters. Such behaviour should in any case be treated as a health and welfare issue and not a legal issue.

It is not only professional care workers who are resorting to the use of AVOs. Parents of young people with cognitive or mental health impairments are also using AVOs to discipline children who they cannot control, and for whom there are no supported housing options or health services to offer adequate assistance, often with a mistaken understanding of the role of the criminal justice system.

Case study 4 – use of AVO by parents to control child

Jonah is a teenager with a cognitive impairment. He has a mental age of four or five, and is often violent towards his parents. He lives in supported housing, but regularly runs away and returns home. To stop him coming home, his parents were granted an AVO against him that included the condition that he could not come within five metres of their house. Every time he breaches that condition, he commonly spends a few days on remand.

Case study 5 – use of criminal justice system by parent as 'last resort'

John is a 16 year old who was living with his mother and father. He was diagnosed with ODD and ADHD and intellectual limitations however does not have an intellectual disability. Aspergers has also been queried but not substantiated by any professionals. Formal testing has not been completed for autism. His paediatrician believes that John suffers from a mood disorder. However, when he was referred to the Adolescent Mental Health Team psychiatrists within the service found no evidence of mental illness.

John was attending a standard high school four days a week and on the other day a behavioural school, until he was suspended from school for behavioural issues.

John has a tendency to be violent towards his parents. John was charged with common assault and breaching an AVO that his parents had been granted against him. The court

made an order for a treatment plan under s 32 of the Mental Health (Forensic Provisions) Act 1990. The treatment plan was that:

- *John return to school once the suspension ended;*
- *John and his family engage in therapeutic and behavioural intervention with a social worker at the Mental Health Adolescent Team;*
- *John continue to take his prescribed medication; and*
- *John visit his paediatrician for regular reviews.*

At court, John was discharged officially into the care of the social worker.

Not long after the s 32 order was made, John began to breach the terms of the order. He was running away from home, failing to attend school and failing to honour appointments with the Mental Health Adolescent Health Team.

John's mother has over the last few months repeatedly phoned Legal Aid NSW seeking assistance from us to report to the court that John has breached his s 32 order. The request appears to stems from her view that the criminal justice system is the only means left for her to get appropriate assistance for her son. She is concerned that he cannot be compelled to comply with the treatment. Our solicitors have had to explain to her that, given that John is a Legal Aid client it is inappropriate for Legal Aid NSW to report his breaches to the court, and that it is not the role of the criminal justice system to provide therapeutic assistance to John.

Another issue that arises with AVOs is when a young person is granted an AVO against another young person; for example, someone in their class at school. If such an AVO is made final, it will be considered a relevant factor by the Commission for Children and Young People when it carries out a "Working with Children Check" under the *Commission for Children and Young People Act 1998.* As a result, a young person's future job prospects will be affected.

DIVERSION

The use of legal sanctions in conjunction with diversionary mechanisms

Despite the legislative intention that sections like s 22 of the *Mental Health Act 2007* and s 32 of the *Mental Health (Forensic Provisions) Act 1990* be used to divert people out of the criminal justice system, Legal Aid NSW solicitors often see these diversionary mechanisms being used in conjunction with legal sanctions by both police and the courts. This approach undermines the purpose of these sections.

For example, Legal Aid NSW lawyers are increasingly observing that police are using s 22 to take a person to a declared mental health facility, but then charging that person with an offence as well.

Three recent examples where such action was taken involved the following scenarios:

- A young person who called Lifeline to say he had killed his family and needed help was dealt with by way of s 22 and also charged with making a false call to emergency services.
- A suicidal young person who damaged a wall at his parents' house, then armed himself with a knife with the intention of stabbing his parents and himself. He then called the police, and was dealt with by way of s 22 and also charged with assault and damaging property.
- A young person who punched his mother, then locked himself in a room with a knife and threatened to kill himself, was conveyed to hospital under s 22 and also charged with assault.

Often in these situations parents call the police for assistance as a last resort, and without any desire to see their child charged. In these same situations, it is common for young people to confess to their actions in the understanding they will be treated, not charged. Nevertheless, the result is often the criminalisation of the young person.

The following case study gives an example of a matter where a legal sanction was employed in addition to s 32 of the *Mental Health (Forensic Provisions) Act 1990* in relation to a juvenile with a mental health impairment.

Case study 6 – use of legal sanctions in conjunction with diversionary mechanisms

Kale is a juvenile with a conduct disorder, adjustment disorder, ADHD and depression. He has a history of severe behavioural problems that are the likely result of significant childhood physical and sexual abuse.

Kale was charged with a number of substantive matters, some of which arose out of an incident during which he threw stones at his carer. All matters were dealt with by the court by way of a s 32 order in recognition of his mental health impairment. However, at the same time the court dismissed the matters under s 32 it made a final AVO order in relation to Kale, thus criminalising future problematic behaviour.

Limitations of section 22 of the Mental Health Act 2007

One of the questions asked in the Consultation Paper is whether s 22 of the *Mental Health Act 2007* operates satisfactorily in relation to young people with cognitive and mental health impairments. As mentioned by the Law Society of NSW in its submission, one limitation of s 22 is that it does not appear to apply to people with a cognitive impairment. In its submission the Law Society suggests drafting additional definitions into s 22 to expand its application to persons with cognitive impairments.

Such an amendment would only prove significant, however, if Disability Services are funded to provide services over the longer term and if the referral criteria used by Disability Services are expanded to include people with cognitive impairments. Given the current lack of facilities for such people, the suggested legislative change would have no impact on its own.

A quasi-sentencing approach by the courts when making s 32 orders

While in the experience of Legal Aid NSW orders made under section 32 are generally appropriate, our solicitors have encountered instances where the terms of orders are made by reference to the apparent criminality of the behaviour rather than the therapeutic benefit. For example, in one case a Community Treatment Order was made for two years because it was the magistrate's view that this was appropriate given the seriousness of the "offence".

Proposal regarding s 32 eligibility criteria

As noted in the Consultation Paper, the application of s 32 to young people can be problematic for a number of reasons, including the difficulty in identifying emerging cognitive and mental health impairments in a young person when it is too early for a formal diagnosis. Legal Aid NSW would like to see introduced a new diversionary mechanism, similar to s 32, that can be used in such cases and at a time before a s 32 order is appropriate.

This new diversionary mechanism's eligibility criteria could capture children who present with early signs of impairment. Treatment plans made under the section could include, where appropriate, counselling instead of medical treatment, and could aim to address any other factors that are seen as contributing to the behavioural problems of the young person; for

example, domestic violence. Community Services could be given a broad discretion to put mechanisms in place which do not involve the criminal justice system to address such issues.

Limitations of the Youth Conduct Orders scheme

Legal Aid NSW is of the view that youth conduct orders are an inappropriate means of dealing with young people with cognitive and mental health impairments, at least in their current format. Not only do young people with cognitive and mental health impairments have difficulty understanding the terms of an order, the idea that behaviour can be changed by an order demonstrates a misunderstanding of the nature of intellectual disability and other cognitive impairments. A scheme more akin to s 32 orders for young people with cognitive and mental health impairments, which focused on a realistic treatment or case management plan, would be more effective.