Treatment and care over punishment and detention – even more critical for young people

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1. Introduction

1.1 The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

1.2 PIAC's work on people with cognitive and mental health impairments in the criminal justice system

PIAC is concerned about the disproportionate number of people with mental illness who are in custody in NSW and the number of accused persons with cognitive impairments that are in one form of detention or another in NSW, and have not been subject to an order that diverts them from the criminal justice system for treatment and rehabilitation.

PIAC has had a considerable history in acting for people with cognitive impairments or their carers and family. In 2006,for example, PIAC represented the family of Scott Simpson at the Coronial Inquest into his June 2004 death in custody whilst awaiting mental health treatment at Long Bay Prison Hospital. Mr Simpson was a forensic patient at the time of his death. Deputy State Coroner Dorelle Pinch found that Justice Health had failed to prevent the ongoing deterioration of Mr Simpson's mental health over an extended period whilst he was held in custody. Coroner Pinch also made wide-ranging recommendations about forensic patients, and the treatment of prison inmates with mental illnesses more broadly.

In 2006, PIAC established the Mental Health in Prisons Network for consumers, health professionals, lawyers and advocates to examine the issues of mental illness in NSW prisons.

In July 2007, Legal Aid NSW provided two years funding for PIAC to commence a project to develop effective responses to the unmet legal needs of people with mental illness in NSW. The Mental Health Legal Services (MHLS) Project aimed to develop and implement sustainable legal solutions for people with mental illness. Four pilot projects and two training modules have been devised, with an emphasis on prevention, early intervention and working holistically and collaboratively within a social inclusion framework. PIAC received separate funding from the NSW Public Purpose Fund for these pilots to be implemented and evaluated over a two-year period. The NSW Attorney General officially launched the pilot projects in November 2009.

A particularly relevant (to this submission) pilot project is the position of Social Worker within the Mental Health Legal Services based at the Shopfront Youth Legal Service. The purpose of the Social Worker position is to establish a dedicated point of contact for young people who are homeless or at risk of homelessness to access support to complement the legal representation in minor criminal matters offered by solicitors at The Shopfront.

An essential function of the role is to provide case management and care co-ordination for Shopfront's young, homeless, mentally ill clients. Previously, Shopfront's lawyers had extremely limited capacity to negotiate essential services for their clients beyond the legal matters at hand, even though the lack of services such as housing, medical and employment support often adversely impacted upon the outcomes achieved by those clients.

Three important outcomes of the position are:

- providing tangible access to justice for people with mental illness who are in need of legal and other support services;
- identifying the systemic barriers that people with mental illness face when trying to access justice; and
- devising strategies to overcome those systemic barriers and thereby achieving positive systemic change.

This submission has been significantly informed by the experiences and observations of the social worker occupying this position.

PIAC's recent work with young people and their wrongful detention under the *Bail Act 1978* (NSW) (the Bail Act) is set out in the submission below.

1.3 Summary of Recommendations

The principles set out in section 6 of the Children (Criminal Proceedings) Act 1987 (NSW) *should have the necessary legal force to ensure that they are taken into account when any decision is made about a young person who is an accused person in the criminal justice system.*

The human rights principles that apply in relation to children and young people should also be incorporated into the Bail Act 1978 *as matters to be considered in relation to the consideration of bail.*

The NSW Government put in place plans to realise the aims in the Guidelines for disability action planning by NSW Government Agencies to protect the rights of young people in the juvenile justice system.

The principle of detention as a last resort in relation to young people should be included as an operating principle under the Bail Act 1978*.*

The Bail Act 1978 *should be amended to include an objects clause that states that the objectives of bail are to:*

- *Ensure the attendance of the accused person at the next set court appearance;*
- *In serious criminal matters, to ensure the safety of members of the public, in particular to avoid intimidation of victims and possible witnesses;*
- *In some circumstances, to ensure the attendance of the accused person at treatment services or rehabilitation services, before sentencing or before a formal decision to divert without recording a conviction.*

The Bail Act 1978 *should be amended so as to make it clear that bail should not be used:*

- *As punishment or for deterrence purposes;*
- *To impose onerous and inappropriate conditions where these conditions have no relevance to the risk of non-appearance in court or public safety;*
- *In the case of young people, contrary to the principle of detention as a last resort.*

The NSW Judicial Commission should commission or undertake research on which to base advice to the Children's Court and police about the setting of appropriate bail conditions that will meet the objectives of the Court and the rights of young people.

The ten recommendations in PIAC's 2010 'Updating Bail' submission should be adopted to reform NSW bail law.

The Bail Act 1978 *should be amended to prevent a young person from being held in custody on remand simply because a bail condition is not, or cannot be, imposed on the young person under ss 36A(6) and/or 37(2A).*

The Bail Act 1978 *should be amended to state that the* Children (Criminal Proceedings) Act 1987 *(NSW) takes precedence over the Act in the case of any inconsistency, and to also include section 6 of the* Children (Criminal Proceedings) Act 1987 *(NSW).*

Forms should be developed for use by young people: one that shows any altered bail conditions and the date of their alteration, and one that shows that all bail conditions have been dispensed with at the finalisation of the matter.

The NSW Police Commissioner should ensure that NSW police officers carefully exercise their discretion to arrest young people for breach of bail conditions and then subsequently refuse police bail. If young people are arrested in these circumstances, bail should be continued, unless there is evidence that suggests more than a suspicion that there has been a serious breach of bail conditions. Minor or technical breaches of bail conditions and/or breaches of bail conditions where, if convicted, the young person would not expect to be given a custodial sentence, should be dealt with by a court attendance notice.

The Bail Act 1978 *should be amended to exempt persons less than 18 years of age from the provisions of s22A of that Act.*

The Bail Act 1978 *should be amended to exempt persons less than 18 years of age from the provisions of s22A of that Act.*

The Bail Act 1978 *should include the development of a list of factors to be taken into account for*

(a) persons under the age of 18 years, or

(b) Aboriginal person or Torres Strait Islander people, or

(c) persons of a non-English speaking background, or

(d) people with a mental illness or any other disability (whether physical, intellectual or otherwise).

The recommendations set out in the 'Bail Me Out' *study should be adopted by the appropriate NSW departments or agencies.*

The Children and Young Persons (Care and Protection) Act 1998 *should require NSW Community Services to provide accommodation in the community if a young person is granted bail with a 'reside as directed' condition, and this is the only condition preventing a young person from meeting their bail conditions.*

The Bail Act 1978 *should be amended to require notice to be given to the Children's Court every 48 hours, until the issue of a young person being in custody on remand, due to an inability to meet a 'reside as directed' condition, is resolved by the young person being released from custody.*

The Children and Young Persons (Care and Protection) Act 1998 *should require NSW Community Services to provide accommodation in the community if a young person is granted bail with a 'reside as directed' condition, and this is the only condition preventing a young person from meeting their bail conditions.*

Relevant legislation should be amended to limit to 12 months' duration AVOs placed on persons under 18 years of age.

'Griffiths-type' adjournments, such as orders under s 11 of the Crimes (Sentencing Procedure) Act 1999*, should be encouraged as part of the diversionary options available to NSW courts. However, there should be a presumption of bail where matters are adjourned for this purpose, and the* Bail Act 1978 *should be amended to clearly state that bail should not be refused solely for the purpose of assessment or treatment.*

2. Summary and Statement of General Principles

PIAC welcomes the opportunity to make a submission in response to the NSW Law Reform Commission's Consultation Paper *Young people with cognitive and mental health impairments in the criminal justice system* (the Consultation Paper)[1].

PIAC made a submission in July 2010, *Treatment and care rather than crime and punishment*[2] (PIAC's 2010 submission), in response to the various papers released in 2010 on the reference: 'People with cognitive and mental health impairments in the criminal justice system'.

In that submission PIAC set out ten principles that should drive any interaction between the criminal justice system and people with cognitive and mental health impairments. PIAC is strongly of the view that these principles should apply also to young people with cognitive and mental health impairments who come into contact with the criminal justice system.

The principles are:

- The principle of least restriction.
- The principle that diversion and treatment should be the first response.
- The principle that mental illness and cognitive impairment should be a key factor in sentencing decisions.
- The principle that all defendants should be able to raise the defences of mental illness or intellectual impairment in all courts.
- The principle that if a person is not fit to stand trial because of mental impairment he/she should not be forced to enter a plea in any court.
- The principle that all prisoners, correctional patients and forensic patients should have access to quality health care, including proper psychiatric and psychological services.
- The principle that persons who are not convicted of an offence should not be held or treated in a correctional facility.
- The principle that every person who is charged with a criminal offence should have access to appropriate and effective legal representation.
- The principle that diversionary programs and options must be properly co-ordinated and properly resourced in order to be effective.

PIAC believes that there are important principles that apply to young people in the criminal justice system. These principles are reflected in s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) (the Children (Criminal Proceedings) Act). They were endorsed by the NSW Law Reform Commission report, *Young Offenders*, in 2005[3] and, more recently by Noetic Solutions Pty

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1 NSW Law Reform Commission, *Young people with cognitive and mental health impairments in the criminal justice system,* Consultation Paper 11 (2010).

2 Peter Dodd, Robin Banks, Julie Hourigan Ruse, *Treatment and Care rather than crime and punishment* (2010) Public interest Advocacy Centre. <http://www.piac.asn.au/publication/2010/09/treatment-and-care> at 10 March 2011.

3 NSW Law Reform Commission, *Young Offenders*, Report 104, December 2005, 244.

Limited in the 2010 report, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister of Juvenile Justice* (the Noetic Report).[4] These principles are:

1. children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them;
2. children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance;
3. it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption;
4. it is desirable, wherever possible, to allow a child to reside in his or her own home,
5. the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind;
6. it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties;
7. it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions;
8. subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

These legislated principles should be the basis of the law and practice of juvenile justice in NSW. Where relevant, s 6 should be taken into account when a young person is arrested, when determinations of bail are made about a young person, when diversionary options are considered for a young person and in trials and hearings and the sentencing of young persons. PIAC submits that the principles of s 6 of the *Children (Criminal Proceedings) Act* should have the necessary legal force to ensure that they are taken into account when any decision is made about a young person who is an accused person in the criminal justice system.

Recommendation

The principles set out in section 6 of the Children (Criminal Proceedings) Act 1987 *(NSW) should have the necessary legal force to ensure that they are taken into account when any decision is made about a young person who is an accused person in the criminal justice system.*

2.1 Children's Rights

PIAC submits that the *Bail Act* also needs to mandate the specific needs and rights of children.

PIAC submits that human rights principles that apply in relation to children and young people should also be incorporated into the *Bail Act* as matters to be considered in relation to bail. Principles that are consistent with Australia's obligations under the *Convention on the Rights of*

[4] Noetic Solutions Pty Ltd, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister of Juvenile Justice,* April 2010, 50-51.

the Child[5], such as that detention should only be used as a measure of last resort and for the shortest appropriate period of time, should always be a primary consideration in relation to bail.

Recommendation

The human rights principles that apply in relation to children and young people should also be incorporated into the Bail Act 1978 *(NSW) as matters to be considered in relation to the consideration of bail.*

Part 3 of this submission highlights the particular reasons why the general principles set out in PIAC's 2010 submission apply to young people, as well as why s 6 of the *Children (Criminal Proceedings) Act* must be taken into account when young people are involved with the juvenile justice system.

Part 4 of this submission discusses the application of NSW government disability policy to the Consultation Paper.

Part 5 of this submission discusses the issue of bail and the essential need for reform of the bail laws in NSW, in particular as they apply to young people who may have a cognitive and/or mental health impairments.

Part 6 sets out PIAC's response to the questions asked in the Consultation paper. Many of these responses are extensions of the responses to questions asked on the same topics in the previous Consultation papers on this reference. This part of the PIAC submission, in particular, should be read with PIAC's 2010 submission.

3. Why young people with cognitive disabilities have special needs

The Consultation Paper asks: are young people different from adults? It concludes that they are not 'little adults' and therefore require separate and distinct treatment. The Paper mentions the fact that a young person's brain continues to develop in ways that may affect their impulse control.

PIAC submits that the matters raised in pages 6-9 of the Consultation Paper affect the interaction of young people with cognitive disabilities in the juvenile justice system in several practical ways.

The first is that diagnoses of mental illnesses and mental disorders for young people are often varied and, as a consequence of the continuing development of their cognitive functioning, are never likely to be as precise as a physically mature adult. This has consequences in a system where to qualify for diversionary options, the law requires a certain diagnosis and a detailed treatment plan to fit the diagnosis. Law and policy should adjust to take account of this

[5] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3, art 37(b), (c) (entered into force 2 September 1990), ratified by Australia 17 December 1990 (entered into force for Australia on 16 January 1991), chiefly Article 37.

conundrum. Any accused person, particularly a young accused person, should not be disqualified for diversionary programs because of perceived imprecise or uncertain diagnoses.

This problem is further complicated by the prevalence among young people of co-morbidities of early stages of several or more mental illnesses or mental disorders, the most common instance being drug or alcohol addiction or abuse coupled with another disorder. The health system usually has different paths of treatment and care for drug and alcohol problems as distinct from the treatment of mental illness. These different paths are usually reflected in different diversionary options available in the criminal justice system and the juvenile justice system.

Although these are often problems found in the adult systems as well, the fact that early treatment is seen to be crucial for young people with a mental illness, means that the long term welfare and health of young people (as well as the public interest in reducing recidivism) depends on laws and policies that reflect the special needs of young people with cognitive disabilities. This requires, not so much changes in statute law, but changes in the way treatment programs are designed and a consequent recognition by the courts that treatment and care under diversionary programs more often than not requires a multi-disciplined and multi-stranded approach.

A recent paper from the Australian Institute of Criminology, *What makes juvenile offenders different from adult offenders?*[6] in a comprehensive way sets out the differences between the offending patterns of young people and sets out their different and varied 'criminogenic' needs.

The paper observes that crime (or detected crime?) is disproportionally committed by young people[7]. It notes that offending usually peaks when people are aged 18 to 19 years[8]. However, A small proportion of juveniles continue offending into adulthood and a small core of juveniles have repeated contact with the criminal justice system and are responsible for a disproportionate amount of crime.[9]

This should lead law and policy makers to develop laws and policies that keep vulnerable young people out of custody and away from members of this 'core'. These laws and policies should have a primary purpose of keeping young people with cognitive disabilities out of custodial settings whilst encouraging treatment (and if necessary, obligating treatment under the *Mental Health Act 2007* (NSW) (the Mental Health Act)).

Richards also suggests that very serious offences, such as homicide and sexual offences, are rarely perpetrated by juveniles and that juveniles are more frequently apprehended by the police in relation to offences against property than offences against the person.[10] This is in sharp contrast with the fact that juvenile offenders are increasingly held in custody on remand or on sentence, ostensibly on the basis of protection of the public from violent crime and public

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6 Kelly Richards *What makes juvenile offenders different from adult offenders?* Australian Institute of Criminology 2011.

7 Ibid 1.

8 Ibid 2.

9 Ibid 2.

10 Ibid 3.

disorder, and particularly on the basis of protecting victims of crime and family members from further offences of violence.

4. Application of NSW Government Disability Policy

PIAC raises the question whether the juvenile justice system has any responsibility to comply with NSW government policy and programs that aim to improve service delivery to people with disabilities. PIAC submits it should do so.

The NSW Government publication, *Guidelines for disability action planning by NSW Government agencies*[11] (the Guidelines), states that 'all NSW Government agencies' have a responsibility to meet the needs of people with disabilities.

The Guidelines adopt the very broad definition of disability used in the *NSW Disability Services Act 1993* (NSW), and includes disability attributable to an intellectual or psychiatric impairment. The disability may presently exist, have previously existed or may exist in the future. The majority of young people in the juvenile justice system fall into this definition of disability.

Under the Guidelines, the plans developed by NSW Government Departments are expected to aim to eliminate, as far as possible, discrimination in universal mainstream services, programs and facilities. The result for the young person should be an increased level of independence. The plan is expected to reduce all barriers to services including: physical barriers (eg, building access), procedural (eg, information not only in writing) and social (eg, staff attitudes).

The policy makes it clear that the needs of people with a disability, wherever possible, should be met through services that are available to the whole population. This is commonly referred to as 'mainstreaming', a policy that requires services that are available to the general population to adapt to the needs of people with disability. Disability specific services are reserved for 'highly specialised services for small numbers of people with high-level support needs'.

The juvenile justice system, including the police and courts, should apply the NSW Government disability policy and put in place plans to realise the aims in the Guidelines to protect the rights of young people in the juvenile justice system. The plan should include the three levels of planning:

- Level 1 – improving access to mainstream services
- Level 2 – influencing other government agencies and sectors to improve services to people with disability
- Level 3 – provision of specialised and adapted services.

Recommendation

[11] NSW Department of Ageing, Disability and Home Care *Guidelines for disability action planning by NSW Government Agencies* 2008 <http://www.dadhc.nsw.gov.au/dadhc/People+with+a+disability/disability_action_planning.htm> at 9 March 2011.

The NSW Government put in place plans to realise the aims in the Guidelines for disability action planning by NSW Government agencies to protect the rights of young people in the juvenile justice system.

5. Bail

This section of the submission is informed by PIAC's work undertaken as part of the Children in Detention Advocacy Project[12] (CIDnAP), a joint project with the Public Interest Law Clearing House and Legal Aid NSW. CIDnAP aims to challenge the unlawful and unnecessary detention of young people through policy work and litigation, and to find appropriate solutions to systemic problems that contribute to the over-representation of juveniles in the criminal justice system.

CIDnAP provides legal representation on a pro bono or Legal Aid grant basis to young people who may have a cause of action arising from a false arrest, unlawful detention, malicious prosecution and/or the use of excessive force by police, transit authorities and/or private security companies. The project also works with relevant organisations to identify and rectify the causes of these detentions. In 2009, PIAC worked with the Youth Justice Coalition to produce the report *Bail Me Out*, which compiled and analysed data from observations at Parramatta Children's Court regarding bail conditions imposed on young people.

The submission is also informed by the previous PIAC submission written by Laura Brown, Solicitor, Indigenous Justice Program, *Updating Bail: Submission on the draft NSW Bail Bill 2010*[13], and the authors acknowledges the use of text from this submission in PIAC's current submission.

5.1 Overall response

The following is in response to the question asked in the Consultation paper:

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

PIAC in its 2010 submission set out its position in relation to bail and persons with cognitive disabilities.

One of the key principles set out in the submission was the 'Principle of least restriction':

> Every patient shall have the right to be treated in the least restrictive environment and with the least restrictive or intrusive treatment appropriate to the patient's health needs and the need to protect the physical safety of others.[14]

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12 Children in Detention (CIDnAP) project description, http://www.piac.asn.au/project/cidnap-unlawful-detention-young-people at 25 February 2011.

13 Laura Brown, *Updating Bail: Submission on the draft NSW Bail Bill 2010* (2010) Public Interest Advocacy Centre <http://www.piac.asn.au/publication/2010/11/updating-bail> at 10 March 2011.

14 GA Res 46/119 (1991).

The submission went on to assert that this principle should apply to:

> All courts when dealing with applications for bail for people with cognitive and mental health impairments, in particular when seeking assessments under section 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW).[15]

The submission went on to comment in relation to bail:

> The only question to be considered on the question of bail should be the question of whether the defendant is likely to attend a court to answer the charge. Bail should not be part of punishment or sentencing. Bail can however be used in conjunction with diversionary options to avoid sending people with a mental illness, or cognitive impairment to a correctional setting, either on sentence or on remand.
>
> PIAC supports the use of 'Griffiths bonds' or orders under s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) as part of the system of diversionary options and notes that Section 36A of the *Bail Act 1978* (NSW) gives courts the power to impose additional bail conditions for persons subject to such orders.
>
> It is often more difficult for a person with a mental illness or cognitive impairment to comply with the conditions of bail once granted, such as conditions on residence, reporting, etc. A person's capacity to understand the conditions of bail, and the consequences of breach of those conditions, may be affected by their mental illness or cognitive impairment. PIAC is concerned that if too specific bail conditions are imposed, persons with mental illness or cognitive impairments may, simply by not completing a recommended treatment regime, not only be brought back to the court on a warrant for breach of bail, but also, as a consequence, face a charge under the *Bail Act*.
>
> Further, there is sometimes conflict in the bail conditions making it difficult for a person to comply with bail conditions plus comply with obligations imposed by Centrelink and job service provider obligations, community treatment orders, drug and alcohol treatment programs, etc PIAC submits that there should be a provision in the *Bail Act 1978* (NSW) that the person or court granting bail should take into account:
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> - The cognitive capacity of the person on bail conditions to understand those conditions and their cognitive capacity to remember and carry out conditions imposed on their bail.
> - Other legal obligations that the person on bail might be required to carry out that might affect their capacity to comply with bail conditions.[16]

PIAC submits that these comments and recommendations have even more force when applied to young people.

The Consultation Paper provides an excellent summary of the recent reviews and inquiry reports about juvenile justice matters. In reviewing the material, the Consultation Paper refers to significant practices and laws in relation to bail that adversely affect all young people. PIAC continues to witness these problems when representing clients as part of its CIDnAP work. In summary, the issues are:

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15 Dodd, Banks and Hourigan Ruse, above n 2, 5.

16 Ibid 39-40.

- policing practices – detaining a young person in custody rather than issuing a court attendance notice;17
- application of the Bail Act, removing the presumption in favour of bail in many cases and s 22A reducing the right to re-apply for bail;18
- the large number and restrictive nature of bail conditions – homelessness and reside as directed orders, understanding bail conditions;19
- police monitoring of bail conditions;20
- unlawful arrests (breaches on out of date bail conditions), contradictory bail conditions, and the number and complexity of bail conditions; and21
- lack of suitable accommodation and support services.[22]

The Consultation Paper also notes the lack of available research and data about young people with cognitive disabilities and how they experience the justice system. This lack of research makes it difficult to draw conclusions about whether young people with cognitive disabilities are at increased risk of finding their way into the criminal justice system or fair worse once in the system. PIAC puts forward the view that as young people already experience difficulty obtaining bail, meeting bail conditions and accessing support services[23], this situation is intensified if the young person is living with a cognitive disability.

In Australia, it is known that young people with intellectual disabilities and mental health issues are over represented in the juvenile justice system, compared with the general population. Just three percent of the general population has an intellectual disability; compared with 17 percent of young people in detention have an IQ below 70. Eighty-eight percent in custody report symptoms of mild or severe psychiatric disorder.[24]

A study into health needs of young offenders in NSW reported an American study that found that 75 percent of young people in the juvenile justice system had a diagnosed mental disorder, compared with 29 percent of a comparable group in the community.[25] The same report compared a sample of young people in the NSW juvenile justice system who had an intellectual disability (ID) with those in the study group without a disability. The study reported that:

> Intellectual disability offenders had significantly more court dates and recorded offences than nonID offenders. They also received more bonds, probations etc than nonID offenders…there

17 NSW Law Reform Commission, above n 1, 33.

18 Ibid 37.

19 Ibid 41.

20 Ibid 46.

21 Ibid 37.

22 Ibid 48.

23 The Hon James Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, Vol. 2, (2008), Chapter 15, 555-584.

24 Kelly Richards, *What makes juvenile offenders different from adult offenders?* Trends and Issues in criminal Justice, No 409 (2011) Australian Institute of Criminology.

25 Dianna T Kenny and Paul K Nelson, *Young Offenders on Community Orders: Health, Welfare and Criminogenci Needs*, University of Sydney, (2008) 7.3.

> were no differences between IQ categories with respect to violent offences or traffic offences.[26]

The Consultation Paper refers to the *Bail Me Out* report published by the Youth Justice Coalition (YJC)[27], which examines breach of bail matters in the Parramatta Children's Court. Data on the cognitive status of the study subjects were not routinely collected in the study, as the methodology did not allow for routine collection of this variable. This raised the general issue of data collection and the need for improved reporting for each authority involved – Police, Department of Juvenile Justice and the Children's Court.

However, nine of the 140 cases in the *Bail Me Out* study[28] recorded a mental health issue and/or an intellectual disability. In three of these cases, it was also noted that a parent had a mental illness and was unable to care for the young person.

Of the nine cases with recorded cognitive disabilities, two were bail refused, four had bail granted/continued, one case was dismissed, one sentenced, and one young person was detained as unable to meet bail conditions. In the study, most young people arrested for breach of bail were released with no changes to their conditions. The reasons for breach of bail included: spitting, failing to reside as directed and failing to follow direction of a carer.

In relation to the matters where unlawful arrests were made due to police records being out of date, improvements have now been made to the electronic transfer of information between courts and police.[29] However, PIAC has continued to receive cases about unlawful detention of young people since the introduction of the changes to the transfer of data.

The appendix to this submission includes two case studies from CIDnAP. The first example describes how a young person with an intellectual disability was expected to have the capacity to understand, remember and have evidence of their bail conditions when approached by police. In this case, the young person was unable to convince the police on three occasions that he was not subject to bail conditions when approached by police. He was subsequently arrested each time, held in detention and appeared in court for breaching non-existent bail conditions.

5.1.1 Detention as a last resort

The first principle of 'detention as a last resort' is described in Article 37(b) of the *Convention of the Rights of the Child*:

> The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.[30]

Australia is a signatory to this convention. PIAC believes there should be an obligation on all State agencies to protect the rights of children and that the above principle should be entrenched

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26 Ibid 6.12.

27 Katrina Wong, Brenda Bailey, Dianna T Kenny, *Bail Me Out*, Youth Justice Coalition (2009), 13.

28 Ibid, Appendix 1 Case studies summary, 25-29.

29 Letter from the Hon. John Hatzistergos, NSW Attorney General, to PIAC, 7 Feburary 2011.

30 *Convention on the Rights of the Child*, above n 5.

in NSW statute law.

Recommendation

The principle of detention as a last resort in relation to young people should be included as an operating principle under the Bail Act 1978 (NSW).

5.1.2 Adverse effects of holding young people in custody

The principle of detention as a last resort is based on an accepted observation that holding a young person in custody is rarely in the interests of the welfare of the young person. The NSW LRC report *Young Offenders* provides a list of reasons why refusing bail to a young person is detrimental.[31] A recent review by the Australian Institute of Criminology reported a Canadian study that found that contact with the juvenile justice system increased the risk of a young person finding themselves in an adult prison by a factor of seven.[32]

PIAC in its 2010 submission set out the adverse effects of being held in a custodial environment for people with a mental illness. It is worth repeating the quotation from Professor Mullen:

> There is always a problem with providing mental health care within the context of a prison. The culture of prisons inevitably is a culture of observation and control. The culture of therapy for mental disorder is a culture—or should be—of communication and enablement of people to begin to stretch their capacities and begin to move. You see it very clearly when you come across suicide risk. The response of a prison to suicide risk is to restrict the possibilities of suicide. At the grossest end, you put people in a plastic bubble, take all their clothes away and watch them. That does prevent suicide but it also, in my view, produces enormous destruction to the psychological and human aspects of that individual, and it is not the way to go.[33]

These comments equally apply to juvenile detention centres as they do to adult prisons, particularly if the very particular therapeutic and criminogenic needs of young people, referred to above, are also taken into consideration.

5.1.3 The objects of bail

The aim of bail conditions is to ensure appearance at court at a future date and, in some circumstances, ensuring the safety of members of the public.

However, there appears to be a temptation to use bail as a punishment by those who make bail determinations and a tendency to use custodial remand periods as an opportunity to provide treatment. A 2005 report about bail decision making in Australia noted:

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31 NSW Law Reform Commission, above n 3.

32 Kelly Richards, *What makes juvenile offenders different from adult offenders?* Trends and Issues in criminal Justice, No 409 (2011) Australian Institute of Criminology.

33 Prof Paul Mullen Evidence to Senate Select Committee on Mental Health, Parliament of Australia, Canberra, 6 July 2005, 49.

> Some bail decision-makers suggested that, on occasion, such defendants were remanded in custody because there was a better prospect of defendants accessing some form of treatment than if they were released on bail [34]

Given the adverse effects of custody on young people with a mental illness or a cognitive impairment, PIAC submits that, diversion, possibly enforced by bail conditions, is almost always a better option than holding a young person in custody. Section 33 *Mental Health (Forensic Provisions) Act 1990* (NSW) provides courts with the opportunity of sending a young person to hospital for compulsory detention and treatment. This option should satisfy concerns about public safety in the vast majority of cases where young people are both mentally ill and a threat to the safety of others.

At least three conditions are usually imposed upon young people when granted bail - such as comply with a curfew, reside as directed or specified, non-association with particular people and reporting to police. This reflects a welfare-based approach to supervision on bail,[35] as well as performing a punitive function of limiting the freedom and movement of the young person to a greater extent than usually required by the nature of the offence.

The goal of the system should be to ensure that onerous or inappropriate conditions are not imposed, by a more thorough consideration of the circumstances of each individual case. There are multiple problems regarding the imposition of bail conditions on young people, including the lack of proportionality with the crime or the future sentence to be imposed. For example, requiring a young person who has shoplifted a lipstick worth $5 in the afternoon, to not be out of the house after 6pm, not associate with a particular person, not be in public without their parent and report to the police station. This is a misuse of the discretion to impose conditions upon the liberty of an alleged offender, and acts as a punishment far greater than the crime itself, particularly as an accused person is presumed innocent until proven guilty.

Often multiple and contradictory conditions are imposed for different offences, which result in young people having to comply with very restrictive and onerous conditions despite the nature of the offence being relatively minor. The burden on families and parents in particular, for conditions that include accompaniment to public places and granting permission for activities, are often not taken into account when these sorts of conditions are imposed.

PIAC notes that, unlike other examples of modern legislation, the Bail Act does not have an objects clause. Although perhaps going beyond the possible scope of the current NSW LRC reference, PIAC believes that the *Bail Act* should have an objects clause that states that the objectives of bail are to:

- ensure the attendance of the accused person at the next set court appearance;
- in serious criminal matters, to ensure the safety of members of the public, in particular to avoid intimidation of victims and possible witnesses;

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34 King, Sue, David Bamford, and Rick Sarre, *Factors That Influence Remand in Custody: Final Report to the Criminology Research Council* Criminology Research Council (2005) 96. <http://www.criminologyresearchcouncil.gov.au/reports/2005-11-remand.html >at 2 March 2011.

35 King, Bamford, and Sarre, above n 34,15.

- in some circumstances, to ensure the attendance of the accused person at treatment services or rehabilitation services, before sentencing or before a formal decision to divert without recording a conviction.

Any such legislative change should also make it clear that bail should not be used:

- as punishment or for deterrence purposes;
- to impose onerous and inappropriate conditions where these conditions have no relevance to the risk of non appearance in court or public safety;
- in the case of young people, contrary to the principle of detention as a last resort.

Recommendations:

The Bail Act 1978 *(NSW) should be amended to include an objects clause that states that the objectives of bail are to:*

- *Ensure the attendance of the accused person at the next set court appearance;*
- *In serious criminal matters, to ensure the safety of members of the public, in particular to avoid intimidation of victims and possible witnesses;*
- *In some circumstances, to ensure the attendance of the accused person at treatment services or rehabilitation services, before sentencing or before a formal decision to divert without recording a conviction.*

The Bail Act 1978 should be amended so as to make it clear that bail should not be used:

- *As punishment or for deterrence purposes;*
- *To impose onerous and inappropriate conditions where these conditions have no relevance to the risk of non-appearance in court or public safety;*
- *In the case of young people, contrary to the principle of detention as a last resort.*

The NSW Judicial Commission should commission or undertake research on which to base advice to the Children's Court and police about the setting of appropriate bail conditions that will meet the objectives of the Court and the rights of young people.

5.1.4 Young People as Carers

While the focus of this Consultation Paper is on young people with a cognitive disability, it should be noted that young people in the juvenile justice system might also be a carer of a parent with a cognitive disability or be unable to return home because a carer has a cognitive disability and is unable to understand and help support the young person. In one case in the *Bail Me Out* study, a young person was breached for failing to comply with his bail conditions because he went home to attend his mother who had threatened suicide. He was arrested when he returned to his out-of-home care home for failing to request permission from his carer to visit his mother.[36]

Young carers of people with cognitive disabilities have difficulty being recognised as such by both the health system and the criminal justice system. Health providers are unlikely to provide the

[36] Wong, Bailey and Kenny, above n 27, 13.

information on discharge necessary for appropriate post discharge care, if the carer is under 18. Courts inevitably assume that a parent is the carer and the young person is the recipient of that care. If in fact these roles are reversed, but not recognised, resulting bail conditions, conditions of bonds in criminal matters and orders discharging a person into another's care, are not only doomed to fail, but also may lead to both lack of further necessary treatment and further criminal activity.

Further study is clearly required as to how many young people in NSW are partially or wholly caring for a parent, sibling or other relative who has a physical and/ or a cognitive disability. If, as anecdotal evidence suggests, this research indicates that this phenomena is more widespread than currently recognised by government and non-government service providers, including the Courts and police, then changes in the law, policy and practice should follow.

5.2 Response to questions asked in the Consultation Paper about bail

Question 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;
(d) and the welfare of any victims?

PIAC submits that, because of the adverse effects on young people set out above, there are far too many young people in NSW being held in custody on remand.

For the general population of young people in the juvenile justice system, the number of young people who fail to appear in court is small – less than three percent failed to appear and had arrest warrants issued. The majority of those who appeared for their court date were not held in custody (87%).[37]

The Consultation Paper notes that between 2006-2009,190 young people were charged with failing to appear.[38] PIAC suggests more work is needed to be undertaken in order to provide the courts and the NSW Judicial Commission with evidence-based practice guidelines to determine which young people are more likely to fail to appear, whether cognitive disability is a risk factor and how the young person can have their needs met in order to meet their bail date and not reoffend.

PIAC agrees that bail determinations should take into account protection of the public, in particular risks to victims and potential witnesses or the possibility of further violent crimes being committed on bail. However, most young people commit offences that are minor and do not attract a custodial sentence and as the Consultation Paper notes, only 2.5 percent of young

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37 Australian Bureau of Statistics, *Criminal Courts*, NSW Children's Criminal Courts Statistics, July 2006 to June 2007.

38 NSW Law Reform Commission, above n 1, 46.

people are in custody for more than six months.[39] This suggests that most bail refusals are not based on public safety and protection criteria.

The Consultation Paper also notes the Government's refusal to amend s 22A of the *Bail Act* was to protect victims from the stress of repeated bail hearings but this argument does not apply to young people, as 'very few victims will be aware of bail conditions made to the Children's Court',[40] because the Children's Court is a closed court.

In October 2010, PIAC made a submission in response to the NSW Government's review of the *Bail Act 1978* (NSW).[41]

PIAC made ten recommendations in relation to bail reform in NSW. All are relevant to the question of bail and to any person with a cognitive disability and bail.

The ten recommendations are:

- A general inquiry into the *Bail Act 1978* (NSW), with clear terms of reference and an appropriate timeframe for public submissions and consultations, should be instituted by the NSW Government immediately.

- The proposed section 5 of the Bill[42] should be amended to state that the *Children (Criminal Proceedings) Act 1987* (NSW) takes precedence over the Act in the case of any inconsistency, and to also add section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) to the Bill.

- Following the implementation of Current Review Recommendation 2, a suitable agency should work with the courts and the police to assess the effectiveness of the JusticeLink system.

- The inquiry as established in Recommendation 1 should include the development of a list of factors to be taken into account for each group mentioned in the proposed section 48(2) of the Bill.

- Two additional forms should be developed for use by young people: one that shows any altered bail conditions and the date of their alteration, and one that shows that all bail conditions have been dispensed with at the finalisation of the matter.

- The proposed section 94 should be amended to require police to issue a court attendance notice in relation to all young people suspected of committing a 'technical breach' of their bail conditions.

- Further research should be conducted into alternative accommodation options for those who cannot meet the 'reside as directed' criterion of their bail conditions, including bail hostels or residential bail support programs.

- The proposed section 41(4) of the Bill should be amended to require additional notice to be given to the court every 48 hours in the case of people under the age of 18, until the

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39 Ibid 22.

40 Ibid.

41 Brown, above n 13.

42 NSW Government Public Consultation Draft *Bail Bill 2010* <http://www.legislation.nsw.gov.au/exposure/archive/b2008-092-d14.pdf> at 9 March 2011.

issue of being on remand due to an inability to meet a 'reside as directed' condition is resolved.

- An Indigenous Bail Working Group should be established in consultation with communities and stakeholders, to propose changes to the Act that will assist Indigenous people with their interactions with the criminal justice system.

- The proposed section 36 of the Bill should be amended to either exempt young people appearing in the Children's Court entirely, or to allow the Children's Court greater discretion in relation to bail applications at first instance as well as any additional applications.

- The proposed section 60 should require a reason to be given and recorded for each condition imposed upon a young person, directly referable to the Objects of the Act.

PIAC submits that, if the ten recommendations were implemented, then there would be a significant reduction in the numbers of young people, particularly those with a cognitive disability, held in custody on bail.

Recommendation

*The ten recommendations in PIAC's 2010 '*Updating Bail' *submission should be adopted to reform NSW bail law.*

Question 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?

PIAC submits that there should not be any impediments to young people participating in diversionary programs before and after sentencing (or the Court exercising a discretion under section 32 of *the Mental Health (Forensic Provisions) Act 1990* (NSW)(hereafter referred to as 's 32')

Provisions of the *Bail Act*, such as s 36A(6) and s 37(2A), have the intention of protecting young people with limited intellectual capacity from undertakings that they may not have the capacity to understand or carry out. However, if the outcome of applying these sections is that bail is not granted at all, and the young person is detained in a custodial setting, then the outcome will be worse for the young person, particularly if the young person has a mental illness or a cognitive impairment. PIAC believes the public interest of keeping a young person with a mental illness or cognitive impairment out of a custodial setting and in a therapeutic environment outweighs the public interest in ensuring total understanding and comprehension of bail conditions, if these conditions are deemed as absolutely necessary for the granting of bail.

This is consistent with the principle that the best interest of the young person should be paramount in bail applications (and reflected in the *Bail Act*). It is also consistent with the principle of 'detention as a last resort' (see above).

International research indicates that programs at the point of bail are the 'optimal time for

effective intervention'. Programs that are coordinated, adaptable, developed at the initial bail assessment point and provided immediately are the most effective in meeting social and welfare needs of young people. This has a direct and long-term impact on whether a young person will continue to have contact with the justice system, as a juvenile and an adult. [43]

An inquiry in 2007 found that the risk of reoffending is high if the needs of young people are not met.[44] The report described an important role for NSW Police at the first contact with a young person and made several recommendations about improving police practices to identify needs, recording and monitoring their practices. The report also made recommendations for government to improve coordination of support services.

The support of young people, particularly those with cognitive disabilities, on bail with onerous or complex conditions, is essential to both the individual welfare of the young person in keeping them out of custody and to reduce future recidivism.

The above are the reasons why PIAC accepts that on some occasions it is appropriate to use bail for reasons other than to ensure Court attendance or to protect members of the public such as victims or witnesses. The use of 'Griffiths bonds', which are now have legislative basis in NSW, are an example of this use of bail.

In summary, the best way to ensure all of the outcomes set out in the question are achieved is to keep a young person out of custody and to ensure that the young person has appropriate treatment or rehabilitation. This can be achieved by using bail conditions to ensure the young person seeks that treatment or rehabilitation when appropriate, particularly if this is an alternative to a custodial remand.

The *Bail Act 1978* should be amended to prevent a young person from being held in custody on remand simply because a bail condition is not, or cannot be, imposed on the young person under ss 36A(6) and/or 37(2A).

Recommendation

The Bail Act 1978 *should be amended to prevent a young person from being held in custody on remand simply because a bail condition is not, or cannot be, imposed on the young person under ss 36A(6) and/or 37(2A).*

Question 11.2
Should the *Bail Act 1978 (NSW)* incorporate criteria that apply specifically to young people with cognitive and mental health impairments? If so:
(a) why is this change required; and
(b) what specific provisions should be incorporated?

5.2.1 Proposed changes relevant to all people with cognitive disability

As referred to above, the 2010 PIAC submission recommended that:

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43 Gabrielle Denning-Cotter, *Bail support in Australia*, Indigenous Justice Clearinghouse (2008) Brief 2.

44 NSW Auditor-General, Performance Audit, *Addressing the Needs of Young Offenders* (2007).

PIAC submits that there should be a provision in the *Bail Act 1978* (NSW) that the person or court granting bail should take into account:

- The cognitive capacity of the person on bail conditions to understand those conditions and their cognitive capacity to remember and carry out conditions imposed on their bail.
- Other legal obligations that the person on bail might be required to carry out that might affect their capacity to comply with bail conditions.[45]

5.2.2 Proposed changes to the Bail Act relevant to all young people

The Noetic Report makes the following comments:

> The *Bail Act* prevails over special children's criminal legislation where there is an inconsistency, which means that the *Bail Act* takes precedence over the *Children (Criminal Proceedings) Act 1987* (C (CP) A).
>
> The principles for dealing with young people outlined in the C (CP) A do not apply to the determination of bail. It also means that changes to the *Bail Act*, whether intended for adults or children, will have an impact on children and young people without considering their specific needs. This is different to Victoria, where the *Children, Youth and Families Act 2005*, prevails over the *Bail Act.*
>
> There is a strong case to be made that changes made to the *Bail Act* have had unintended consequences on children and young people. This case is laid out in the *Bail Act* section of the report. It is the opinion of the Review that these unintended consequences on children and young people can best be overcome by having the C (CP) A take precedence over the *Bail Act*. This will ensure that the specific principles for dealing with children and young people are considered for the determination of bail.[46]

The Report makes the recommendation:

> Amend the *Children (Criminal Proceedings) Act 1987* (Section 50) and *Bail Act 1978* (Section 5) to reverse the precedence so that children specific legislation applies to all aspects of bail proceedings.[47]

PIAC strongly supports this recommendation.

Recommendation

The Bail Act 1978 *should be amended to state that the* Children (Criminal Proceedings) Act 1987 *(NSW) takes precedence over the Act in the case of any inconsistency, and to also include section 6 of the* Children (Criminal Proceedings) Act 1987 *(NSW).*

5.2.3 Bail forms and Court Attendance Notices

Bail forms and court attendance notices should be redrafted by the appropriate agencies to make them clearer and more accessible, as these forms have traditionally been confusing and inaccessible for many people, particularly young people and disadvantaged groups.

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45 Dodd, Banks and Hourigan Ruse, above n 2, 39.

46 Noetic Solutions Pty Ltd above n 4, 50.

47 Ibid Recommendation 6, 50.

A copy of the bail notice should be provided at each proceeding by court staff. In addition, two additional forms should be developed (and clearly marked to be easily identifiable) to assist young people in their interactions with police:

(a) a form that shows any bail conditions that have been altered and the date of their alteration, and
(b) a form that shows that all bail conditions have been dispensed with at the finalisation of a matter.

If police find their records are inconsistent with a young person's record, police should have the responsibility for checking the information prior to arrest for breach of bail.

Through its work in CIDnAP, PIAC is aware that the data on police computer systems in relation to bail status are inconsistent with the data on court systems. As a result, young people are frequently arrested for breaching bail conditions that are no longer current, based on the reliance by police on information on their computer system, which is often out of date. PIAC received advice from the NSW Attorney General that this situation was corrected in February 2011, however, PIAC continues, to this day, to receive cases of young people arrested based on incorrect information.

In PIAC's experience, many police officers will not accept information from a young person or the young person's family members, which challenges the arrest on the basis that the police system is incorrect. As a result, PIAC is aware anecdotally that many criminal lawyers will often advise their juvenile clients to carry their bail undertaking forms with them at all times, so that if the police ever challenge them about the status of their bail conditions, they can produce documentation from the court which shows the current conditions.

The over-policing of breaches of bail has contributed to the situation in NSW in which the number of children on remand for breach of bail has dramatically increased, and this stems in part from the historical policies of the NSW Government in relation to reducing crime. The *NSW State Plan* (the State Plan), released in 2006, aimed to reduce re-offending by 10 per cent by 2016 through 'proactive policing of compliance with bail conditions' and 'extended community monitoring of those at high risk of re-offending, through more random home visits and electronic monitoring'.[48] The State Plan does not distinguish between adult and juvenile offenders or acknowledge the need for a different approach to be used to reduce juvenile offending.

Recent studies have shown that up to 71 per cent of the juveniles on remand are detained for breaching their bail conditions, for reasons such as not complying with their curfew, not residing in the place directed, not being in the company of the directed parent or guardian, or being in the company of someone listed on a non-association order.[49] These breaches are often relatively minor, such as being 10 minutes late for curfew, or being with a different family member rather

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48 NSW Government, *NSW State Plan* (2006) [30] <http://more.nsw.gov.au/StatePlan2006%20> at 25 October 2010.

49 S Vignaendra and J Fitzgerald, *Reoffending among young people cautioned by police or who participated in a youth justice conference* (2006), 3.

than the parent specified on the bail condition, which can be described as 'technical breaches',[50] this term describing circumstances in which a young person is arrested for a breach of a bail condition which in itself is not a new offence, and does not harm the young person, another person or the community.

There is rarely a custodial or other penalty imposed for such 'technical breaches' once the matter comes before the court, and often juveniles are again granted bail on the same or similar conditions. Therefore in NSW, a situation has arisen in which children are arrested and often kept overnight on remand for breach of a bail condition, in circumstances where they would not receive a custodial sentence for the substantive offence for which they have been bailed or for the technical breach of bail, as 'about 84 per cent of young people remanded to custody do not go onto received a custodial order after sentencing.'[51]

The case of Jenny,[52] a young Indigenous girl who was arrested for breaching a bail condition that no longer existed, provides an example of this serious problem from PIAC's own experience in representing young people as part of CIDnAP. Jenny had been on bail on conditions that included being with her mother at all times. Jenny was then sentenced to a youth justice conference that finalised her matter and removed all bail conditions. Approximately two weeks later, Jenny was in the city with her friends in the afternoon, and was arrested by police for not being with her mother. She informed them that her bail conditions were no longer in force, but the police officers did not believe her as their computer said that her conditions still applied. Her mother rang the police station; offering to fax over the order that showed that the bail conditions were no longer applicable, but was told that if she had been wrongly arrested it was the court's fault for not updating the system. Her mother tried calling the juvenile detention centre where Jenny had been taken, and was told that she would have to wait until morning to sort it out. When the young girl appeared before the magistrate early the next morning, after spending the night in a juvenile detention centre, the prosecutor told the magistrate that the computer system had not been updated, and that the girl was not subject to any bail conditions. She was therefore released without further penalty.

In this case, if Jenny had been able to show the police a form from the court that clearly showed that her bail conditions had been dispensed with weeks earlier, this could have avoided an unnecessary night in custody. PIAC submits that the court forms may assist young people in assuring police that they are not breaching any bail conditions when such disputes arise, and could therefore reduce the number of young people unnecessarily kept in custody for breaches of bail conditions.

The NSW Police officers have discretion as to how to deal with a situation where they have a reasonable suspicion of a breach of bail conditions. Police also must exercise their discretion whether to grant bail under the *Bail Act* after any arrest, including after arrest for breach of bail. The NSW Police Commissioner should ensure that NSW police officers carefully exercise their discretion to arrest young people for breach of bail conditions and then subsequently refuse

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50 Wong, Bailey and Kenny, above n 27, 16-17. PIAC uses this term and its definition in this submission.

51 The Hon James Wood AO QC, above n 23, 559.

52 Names have been changed to protect the privacy of the individuals involved.

police bail. If young people are arrested in these circumstances, bail should be continued, unless there is evidence that suggests more than a suspicion that there has been a serious breach of bail conditions. Minor or technical breaches of bail conditions and/or breaches of bail conditions, where if convicted, the young person would not expect to be given a custodial sentence, should be dealt with by court attendance notice.

Section 22A of the *Bail Act* provides that anyone applying for bail (including children and young people) can apply only once for bail, unless special circumstances exist, such as the lack of legal representation during the first bail application, or unless the court is satisfied that new facts or circumstances have arisen since the first application. Since its introduction in 2007, this section has led to a direct increase in the number of children remanded in custody until their charges are finalised, when previously they might have only been in custody for a few days until they had mounted a successful bail application.[53] Although initially aimed at adult repeat offenders, this section has had a far more significant impact (albeit unintended) on young people than on adult offenders, as young people are often unfamiliar with the legal system and unable to adequately instruct a legal representative in the time required to make a successful bail application.[54] As a result of the high volume of cases that duty solicitors handle on a daily basis, these solicitors sometimes do not have the time or resources to adequately address all the circumstances of the young offender that will impact on their ability to comply with bail conditions.[55]

PIAC notes that s 22A was amended in 2009 to include s 22A(1A)(b), which allows a further application for bail if information relevant to the grant of bail is to be presented in the application that was not presented to the court in the previous application. However, PIAC submits that while this may soften some of the effect of s 22A, it does not go far enough to reduce the numbers of young people held on remand. PIAC recommends that the *Bail Act* should be amended to exempt persons under 18 years of age from the provisions of s 22A of that Act.

Recommendations

Forms should be developed for use by young people: one that shows any altered bail conditions and the date of their alteration, and one that shows that all bail conditions have been dispensed with at the finalisation of the matter.

The NSW Police Commissioner should ensure that NSW police officers carefully exercise their discretion to arrest young people for breach of bail conditions and then subsequently refuse police bail. If young people are arrested in these circumstances, bail should be continued, unless there is evidence that suggests more than a suspicion that there has been a serious breach of bail conditions. Minor or technical breaches of bail conditions and/or breaches of bail conditions where, if convicted, the young person would not expect to be given a custodial sentence, should be dealt with by a court attendance notice.

The Bail Act 1978 *should be amended to exempt persons less than 18 years of age from the provisions of s22A of that Act.*

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53 S Vignaendra *et al*, 'Recent trends in legal proceedings for breach of bail, juvenile remand and crime' (2009) 128 *Crime and Justice Bulletin* 3.

54 Wong, Bailey and Kenny, above n 27, 4.

55 UnitingCare Burnside, *Releasing the pressure on remand: Bail support solutions for children and young people in New South Wales* (2009) 4.

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

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

PIAC recommends redrafting s 32 of the *Bail Act 1978*, grouping offences into four clearly defined levels of seriousness, and regulating the presumptions in favour of or against bail based on these levels.

The Bail Act should also ensure:

> a bail authority must have regard to any special needs arising from the fact that the person to whom the bail decision relates:
> (a) is under the age of 18 years, or
> (b) is an Aboriginal person or Torres Strait Islander, or
> (c) is of a non-English speaking background, or
> (d) has a mental illness or any other disability (whether physical, intellectual or otherwise).

This highlights the importance of considering the specific needs of these particular groups by making it a separate section of the Act. However, particularly in the case of young people, PIAC suggests that outlining some of the special needs which may arise in relation to these groups (without aiming to provide an exhaustive list) would aid decision makers to impose more appropriate bail conditions.

Recommendation

The Bail Act 1978 *should include the development of a list of factors to be taken into account for*
(a) persons under the age of 18 years, or
(b) Aboriginal person or Torres Strait Islander people, or
(c) persons of a non-English speaking background, or
(d) people with a mental illness or any other disability (whether physical, intellectual or otherwise).

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

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

See text and recommendations above.

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

As suggested above, the *Bail Act* should state in an object clause that, in determining bail for persons less than 18 years of age, both the courts and police should comply with the principle of detention as the last resort. If this principle is given legislative force, read together with other sections of the Bail Act, those determining bail would have to take into account these factors in deciding whether to grant bail and what, if any, bail conditions were appropriate.

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

The issue of failing to appear in court is discussed above. Broadly speaking, the problem could be ameliorated by more appropriate use of police discretion, in accordance with the general principles referred to in this submission, rather than one that requires a legislative change.

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

The *Bail Me Out* study makes recommendations for each government agency that has responsibilities for young people that would assist the police and courts to provide alternatives to custody.[56] PIAC refers the Commission to this report for recommendations including: better coordination of services, information sharing between services, policing practices and culturally appropriate support services.

The recommendations of the Youth Justice Coalition in the *Bail Me Out* study are:

1. The Youth Justice Coalition recommends that the NSW government:
1.1 Commit to reducing the numbers of young people remanded in custody and adhere to the principles of detention as a last resort.
1.2 Exempt young people from the operation of s 22A of the *Bail Act 1978* (NSW).
1.3 Amend ss 50 and 51 of the *Bail Act 1978* (NSW) to ensure that police first consider alternatives to arrest in relation to failures to comply with bail, or failures to appear before the Court whilst on bail.
1.4 Fund a residential bail support program to assist young people in meeting their bail conditions, particularly 'reside as directed' conditions and placement conditions.
1.5 Fund the youth services sector with expertise in out-of-home care services to establish a residential service for young people granted bail with 'reside as directed' conditions.
1.6 Increase resources for Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT) to support young people at bail hearings.

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56 Wong, Bailey and Kenny, above n 27.

1.7 Designate the Young Offenders Advisory Committee to review and monitor referral rates to diversionary options, particularly those set out in the *Young Offenders Act 1997* (NSW).

2. The Youth Justice Coalition recommends that the NSW Police Force in each local area command:

2.1 Commit to better compliance with the *Young Offenders Act 1997* (NSW) and to monitoring such compliance. These measures should be incorporated in the NSW State Plan.

2.2 Maintain a full time Youth Liaison Officer.

2.3 Ensure general duty police officers undertake specific training on how to engage and work with young people.

2.4 Undertake further training on police obligations with respect to arrest being used as a last resort as stated in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW).

2.5 Develop and implement a best practice model for engaging and working with young people, consistent with existing legislation and frameworks.

2.6 Update the Youth Policy Statement to ensure consistency with existing legislation and policies, particularly in relation to the exercise of discretionary powers and referrals to diversionary options.

3. The Youth Justice Coalition recommends that:

3.1 Services approved and funded by the Department of Community Services be permitted to provide accommodation services to young people released on bail without a referral from DoCS. Caps on the number of referrals agencies can accept from court without referral by DoCS should be removed.

3.2 The NSW government should increase resourcing of early intervention programs for young people at risk of entering the juvenile justice system. Organisations working with young Aboriginal people should be a target for these programs.

4. The Youth Justice Coalition recommends that DoCS and DJJ cooperate to meet the needs of young people by:

4.1 Sharing information (through data matching) to assist the court and to develop joint accommodation and intervention options.

4.2 Ensuring there are formal arrangements to secure consistent practices and service delivery from other portfolios, including the NSW Police Force, NSW Health, Departments of Education and Training, Corrective Services, Disability and Housing.

4.3 Funding a DoCS officer position at the Children's Court to assist young people with accommodation and welfare related issues.[57]

Recommendation

The recommendations set out in the 'Bail Me Out' *study should be adopted by the appropriate NSW departments or agencies.*

Question 11.10

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

PIAC believes there is considerable evidence to suggest that this question should be answered in the affirmative.

[57] Ibid.

Justice Wood included, in his report inquiring into Child Protection Services, a report from the Juvenile Justice NSW that in a survey over a three month period in 2006-2007 that between 50 and 75 percent of the detention centre population were on remand, 90 percent of this group were remanded because they could not meet bail conditions. The most common bail condition young people could not meet (95 percent of those not able to meet conditions) was a 'reside as directed' order – meaning suitable accommodation was not provided by Community Services NSW or Juvenile Justice.[58]

The *Bail Me Out* report found a statistically significant difference between the numbers of girls remaining in detention with reside as directed orders compared with boys. It is speculated that there is a higher proportion of girls remaining in detention because of care and protection issues.[59]

NSW overhauled its child protection laws in 1987 to separate proceedings for children in need of care and protection from children in the criminal jurisdiction. At the time the new Act was introduced, the NSW Parliament made it clear that this was to prevent young homeless people from being refused bail due to welfare reasons, acknowledging that 'once children are incarcerated in a detention centre, the probability of them committing further offences is very high'. [60]

Despite the aims of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) to divert young homeless people into care and out of the criminal jurisdiction, young people continued to be detained because they were homeless. As a result, amendments were made via the *Bail Amendment (Repeat Offenders) Act 2002* (NSW), to give the Children's Court options to consider bail accommodation when granting bail. The Attorney General reported to Parliament at the time that diversion at the point of a bail hearing was very important,

> particularly for vulnerable accused persons such as juveniles, intellectually or mentally disabled persons or persons of an Aboriginal or Torres Strait Islander background [61]

The amendments allowed the Children's Court to impose a 'reside as directed' bail condition, but there is no legal requirement for Community Services NSW or Juvenile Justice NSW to find community based accommodation. The amendments draw attention one of the reasons why a young person is often remanded in custody – the need for accommodation – but do not mandate any agency to provide any such accommodation.

NSW Community Services has argued that if a young person cannot meet bail conditions, it is not a 'circumstance to which the Care Act applies' and there is no 'legally enforceable obligation upon the child welfare agency'.[62] NSW Community Services argues that this is in keeping with the principle that welfare matters should be kept separate from criminal proceedings. However, the strict application of this principle results in young people remaining in detention.

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58 The Hon James Wood AO QC, above n 23, 558.

59 Wong, Bailey and Kenny, above n 27, 13.

60 Katherine Boyle, 'The More Things Change… Bail and the Incarceration of Homeless Young People' (2009) 21 (1) *Current Issues in Criminal Justice*.

61 NSW Parliament *Parliamentary Debates* (Hansard) Legislative Assembly 20 March 2002: 819-820.

62 Boyle, above n 60, 65.

Any definition of young people's welfare needs should include access to safe and culturally appropriate accommodation. Yet the outcome of NSW Community Services' policy is to deny young people access to accommodation in the community and to cause an otherwise unnecessary period in custody, which is potentially harmful to a person with cognitive disabilities.

Therefore, PIAC remains concerned that the lack of suitable accommodation options for young people frequently leads to situations in which children are left on remand because Community Services NSW and/or Juvenile Justice NSW cannot find them appropriate accommodation in the community.

While there are pilot programs in relation to bail placement currently operating in certain areas of NSW, these are not widespread and accessible to all young people. PIAC is concerned that alternatives such as residential bail support programs, such as that proposed by UnitingCare Burnside,[63] are not being seriously considered by the NSW Government as an alternative to what Justice Wood described as the 'warehousing' of juveniles on remand,[64] and that while projects such as the Bail Assistance Line are a positive step, other alternatives and accommodation options should continue to be considered.

Recommendation:

The Children and Young Persons (Care and Protection) Act *1998 should require NSW Community Services to provide accommodation in the community if a young person is granted bail with a 'reside as directed' condition, and this is the only condition preventing a young person from meeting their bail conditions.*

Question 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?

The Wood Report, while stating that it was unacceptable for a young person to be held in detention because accommodation was unavailable did not go on to make recommendations that would either give the power to the courts to direct that assistance be provided or require government agencies to provide appropriate services.[65]

The inadequacy of accommodation options for young people in NSW has a long history of short-term pilot projects funded by the Juvenile Justice NSW, restricted access to emergency accommodation through the Supported Accommodation Assistance Program (SAAP), under resourced out-of-home-care services and unhelpful eligibility requirements for public housing.[66]

The issue of accommodation was examined and recommendations made in the *Releasing the Pressure on Remand* position paper.[67] PIAC refers this report to this inquiry. The

63 UnitingCare Burnside, above n 55, 6.
64 The Hon James Wood AO QC, above n 9, 559.
65 Ibid 558.
66 Ibid.
67 UnitingCare Burnside, NCOSS and PIAC, *Releasing the pressure on remand* (2009).

recommendations include the need for a court support program at which the needs of the young person can be determined. The needs of young people with cognitive disabilities should be taken into account when determining accommodation needs as part of a mainstream service.

PIAC recommends that the *Bail Act* be amended to increase the notifications that must be given to a court if a person who has been granted bail but remains in custody due to a failure to meet a bail condition that imposes specific residential requirements. Currently, under section 54A, the notice must be given within eight days, and is only required to be given to the Court once.

Consistent with the recommendations of the Noetic Report, PIAC recommends that Juvenile Justice NSW review the situation of all young people remanded in custody because of a lack of suitable accommodation every 48 hours[68]. The *Bail Act 1978* should be amended to require notice to be given to the Children's Court every 48 hours, until the issue of a young person being on in custody on remand due to an inability to meet a 'reside as directed' condition, is resolved by the young person being released from custody. This would increase the pressure on Community Services NSW and Juvenile Justice NSW to find a place for these young people to reside, or apply to the court to alter the condition, thus reducing the length of time that young people are unnecessarily kept on remand.

Recommendation

The Bail Act 1978 *should be amended to require notice to be given to the Children's Court every 48 hours, until the issue of a young person being in custody on remand, due to an inability to meet a 'reside as directed' condition, is resolved by the young person being released from custody.*

6. Responses to other questions in the paper

6.1 Apprehended Violence Orders

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

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68 Noetic Solutions Pty Ltd, above n 3, 72.

(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?

Question 11.12
(1) How are AVOs used for the protection of young people with cognitive and mental health impairments?
(2) What issues arise?
(3) Are any changes to the law required to improve such protections?

PIAC is aware, particularly through the work of the Mental Health Legal Services Project, that it is relatively common for young people with cognitive and mental health impairments to have Apprehended Violence Orders (AVOs) taken out against them. PIAC recognises that the AVOs can be effective in protecting potential victims of violence and/or harassment.

However, PIAC is concerned that the conditions of AVOs placed on young people are often too broad and complex. They are often more than is necessary to 'keep the peace' or protect potential victims.

AVOs can be perplexing to a young person with a cognitive impairment. A family member may welcome contact on some occasions and not choose to enforce the AVO. If the young person is however, in an acute phase of a mental illness, they may call the police and have the young person arrested for the breach. This, to a young person subject to an AVO, is neither fair nor the law acting consistently.

AVOs taken out by health providers may have the effect of restricting or preventing the subject person's access to health care. If there are exacerbating factors such as young person who has no independent means of transport outside their immediate neighborhood or who lives in an area where there are few, if any, medical services, then the AVO can effectively deny the subject person vital medical care and treatment. Being banned, with an AVO to enforce the ban, from the only doctor in a small town who bulk bills, can effectively stop a person with limited income from accessing primary health care. If that person is young and has a cognitive impairment, the possibility of them successfully negotiating with the GP and the police to again access the GP's services is low.

The duration of AVOs can also be problematic. Anecdotal evidence suggests there is little understanding by family members as to how to withdraw an AVO when reconciliation occurs with the subject of the AVO. This leaves the subject person open to a breach at any time they come under notice by the police or if there is conflict with a family member. PIAC submits that Courts should not order AVOs on young people for more than 12 months duration. This would allow for regular review of orders that can have a significant effect on the welfare, health and wellbeing of young people.

Recommendation

Relevant legislation should be amended to limit to 12 months' duration AVOs placed on persons under 18 years of age.

6.2 Diversion

Question 11.13
(1) Are the objects of the *Young Offenders Act 1997 (NSW)* being achieved with respect to the application of the Act to young people with cognitive and mental health impairments?
(2) Is any amendment required, having regard to the applicability of the Act to young people with cognitive and mental health impairments?

Question 11.14
(1) Are additional protections required where young people with cognitive and mental health impairments are arrested and/or questioned by police? If so, what changes are required?
(2) Are police able to screen effectively for cognitive and mental health impairments in young people? If not, how can this be improved?

Question 11.15
(1) Are youth conduct orders an appropriate way of dealing with young people with cognitive and mental health impairments?
(2) How are youth conduct orders currently applied to young people with cognitive and mental health impairments?
(3) How can the conditions of youth conduct orders be adapted to the needs of young people with cognitive and mental health impairments?

PIAC's experience through the work of the Mental Health Legal Services project leads PIAC to support the use of youth justice conferences as an alternative to traditional criminal justice outcomes for young people, particularly young people with cognitive disabilities. PIAC is less enthusiastic generally about youth conduct orders, but does not submit that they cannot apply to a young person with a cognitive disability.

The caveat to this position is that young people with cognitive disabilities will need inevitably need extra support both in understanding the nature of a youth justice conference or a youth conduct order, and particularly with a youth justice conference, the outcome of a conference. PIAC submits that whatever the nature if this support, it has to be properly resourced to both reduce recidivism and to protect the rights and welfare of the young person involved.

Question 11.15
Does s 22 of the *Mental Health Act 2007* (NSW) operate satisfactorily in relation to young people with cognitive and mental health impairments? If not, how should it be modified?

PIAC is not aware, nor has been made aware, with any particular difficulties in relation to young people being taken to a hospital under s 22 of the *Mental Health Act.*

In relation to the issue of the police informing family, other health providers, guardians or welfare agencies, it should be remembered that s 22 is an emergency power often requiring a quick response to protect the young person from self harm. The police, under s 22, take a person to a hospital for assessment with the possibility of an involuntary admission to follow. It is more appropriate that, if other persons or authorities should be advised, this should be undertaken by the hospital after assessment and admission (or discharge).

However, the public interest in informing guardians or family etc of a young person's admission should be balanced against the young person's right to confidentiality and privacy with regard to personal health information. Recent trends in law and practice in NSW has been to give older adolescents more autonomy over medical decisions and to confirm their right to confidentiality and privacy about medical information about themselves. There is no reason that an exception should be made to this general principle when dealing with mental illness as against physical illness and when it concerns young people with cognitive disabilities.

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

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

Question 11.19
(1) How, if it all, should s 32 or s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) be amended to clarify who is responsible for supervision of orders?
(2) Would a greater supervisory role by the Mental Health Review Tribunal be desirable in this context?

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

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

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

Question 11.22
If diversionary provisions under s 32 and s 33 of the *Mental Health (Forensic Provisions)*

***Act 1990* (NSW) are not extended to the District and Supreme Courts generally, should they be extended where the subject is a young person?**

PIAC's 2010 submission stated as a general principle:

> Diversion and treatment (if possible) should be the first response of the police and the judiciary to criminal suspects with mental illness and cognitive impairment, rather than punishment or penalties that attempt specific deterrence.[69]

PIAC submits that this principle applies with even greater force in relation to young people, particularly when considered together with the principle of detention as a last resort in juvenile justice matters.

PIAC believes that the greatest concern with regard to the operation of s 32 is the resourcing and the coordination of the preparation of treatment plans before the Court makes the orders. This applies to both the Children's Court and the Local Court.

Reluctance of health providers to provide the necessary reports required under s 32, either in a timely manner, or at all, may be partly attributed to a reluctance to supervise the orders under

s 32 after they are made. Anecdotal evidence suggests that many, but certainly not all, health providers do not think the preparation of reports under s 32 and the subsequent supervision of s 32 orders are not part of their core work. Private psychiatrists and psychologists are, more often than not, reluctant to supervise s 32 orders, which puts the entire burden for reports and supervision on the public sector and NGOs. This cause delays and bottlenecks in the functioning of s 32.

PIAC believes that if the Courts make an order under s 32, they should remain responsible if that order is breached. The Mental Health Review Tribunal (MHRT) has a different role and does not have the expertise to engage in the sentencing process. If a person is a mentally ill person under the *Mental Health Act*, then they cannot be dealt with under s 32. If a person is not a mentally ill person under the *Mental Health Act*, then they should not be subject to an order for involuntary treatment, which are the only orders the MHRT can make and has the expertise to make. The Local Court or the Children's Court does, however, have the power to make a Community Treatment Order (CTO) under s 33 of the Mental *Health (Forensic Provisions) Act 1990* (hereafter referred to as 's 33') where a person is a' mentally ill person' under the *Mental Health Act*. The MHRT then deals with any consequent applications for further CTOs on the person.

PIAC submits that there should be adequate resourcing of health providers if they are required to provide reports and plans under s 32. NSW Health should provide appropriate background information and training to assist health practitioners in preparing appropriate and timely reports to the Local Court and the Children's Court.

PIAC's concern is that the existing funding and support provided to the public sector mental health system to assess and supervise orders under s 32 is not adequate. PIAC would welcome the development of additional diversionary programs for young people, but only if they are much better coordinated and better funded than the existing system.

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69 Dodd, Banks and Hourigan Ruse, above n 2,16.

Finally, PIAC would comment that it is not realistic to see orders under s 32 as ever totally voluntary. The consequences of a breach of the conditions of the order highlight the involuntary aspects of the order. Magistrates have the power to encourage voluntary treatment under s 32 by discharging the alleged offender without conditions. They have the power to do this, but rarely do so.

6.3 Fitness to plead, the mental illness defence and young people as forensic patients

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

Question 11.27
Should the defence of mental illness be available in the Children's Court? If so, should processes following a finding of not guilty by reason of mental illness be different to those available in the higher courts?

Question 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?

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

PIAC set out in its 2010 submission the following principles:

> All defendants should be able to raise the defences of mental illness and intellectual impairment in all courts
>
> If a person is not fit to stand trial through mental impairment he/she should not be forced to enter a plea in any court[70]

These principles should apply also to the Children's Court. Further, because the Children's Court deals with more serious criminal matters than Local Courts, it is all the more imperative that young people's rights to fairness in the criminal justice system are preserved.

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70 Ibid 4.

Section 32 remains an alternative in the Local Court and the Children's Court to determining fitness issues as this section does not require a plea. PIAC submits that the use of s 32 or s 33 should provide adequate safeguards for accused young people where there may be doubts about the young person's fitness to stand trial or enter a plea (as well as providing adequate protection for members of the public) for all but a very small minority of criminal cases that come before the Children's Court.

For the small minority of cases where it might not be thought appropriate to use the diversionary mechanisms in this situation (that is, where the young person has committed an offence said to be not appropriate because of the seriousness of the offence to exercise discretion under s 32 or where the young person is not a 'mentally ill person' under the *Mental Health Act* so therefore not eligible for an order under s 33), there may need to be changes to the law. In serious cases, there might be a need for a magistrate to have the power to remit the matter of fitness to a higher court; either before or after the question of fitness is judicially determined.

There is no reason why a young person should not be able to rely on a defence of mental illness in a hearing in the Children's Court. The Children's Court, as in questions of fitness, always has the option to use s 33 as an alternative to proceeding to a hearing. The outcome of a not guilty finding due to mental illness should not be problematic. Section 33 says that a Magistrate can exercise their discretion under that section 'at the commencement or at any time during the course of the hearing of proceedings'. If there are issues of public safety, then the young person could be held in a secure therapeutic setting under an order under the *Mental Health Act*. The detention and treatment of the young person would then be monitored by the Mental Health Review Tribunal under that Act. PIAC notes that the Forensic Hospital at Long Bay has a separate ward for persons under 18.

If it was considered necessary, the relevant legislation could be amended to clarify these powers.

PIAC would be very concerned if all alternative options were not considered before making a young person a Forensic Patient. If the District or Supreme Court deals with the young person, this outcome could still occur. PIAC strongly recommends that the relevant legislation should mandate that in no circumstances should a juvenile forensic patient be held in a custodial setting or treated or co-located with adult forensic or correctional patients.

Question 11.24
(1) Are the Presser criteria suitably framed for application to young people?
(2) If not, should the criteria be expanded or modified?
(3) Should particular criteria relevant to young people be developed? If so, what should they be?

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

In relation to these issues, PIAC sees the same principles applying to young people as to adults.

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

PIAC supports the principles behind the operation of doli incapax as a presumption in criminal matters[71] and would not support any proposal that would change the current law in NSW in this regard.

6.4 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? 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?

PIAC expressed general misgivings about mandatory assessments in criminal cases in its 2010 submission. Generally the need for assessments should be considered on its merits for each individual matter before a court. PIAC fears that, particularly in matters involving young people, accused persons would be unnecessarily kept in custodial remand while a compulsory, but unnecessary, report was being prepared. PIAC has already noted the difficulty in obtaining timely reports and plans under s 32.

As stated above, PIAC does not object to adjournments with bail conditions to seek treatment or assessment, although these conditions otherwise would not be consistent with the primary purposes of bail. However, PIAC would certainly support legislative change that introduced a presumption against custodial remand in these circumstances. Bail should not be refused solely for the purpose of assessment or treatment.

Recommendation

'Griffiths-type' adjournments, such as orders under s 11 of the Crimes (Sentencing Procedure) Act 1999*, should be encouraged as part of the diversionary options available to NSW courts.*

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[71] See Thomas Crofts 'Doli Incapax: Why Children Deserve its Protection' (2003) 10 (3) *Murdoch University Electronic Journal of Law* <http://www.murdoch.edu.au/elaw/issues/v10n3/crofts103_text.html> at 2 March 2011.

However, there should be a presumption of bail where matters are adjourned for this purpose, and the Bail Act *should be amended to clearly state that bail should not be refused solely for the purpose of assessment or treatment.*

Question 11.33
Should special sentencing options be available for young offenders with 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?

Question 11.34
Should the *Children (Criminal Proceedings) Act 1987* (NSW) be amended to provide specific principles relating to the sentencing of young people with cognitive and mental health impairments? If so, what principles should be included?

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

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

PIAC stated the following principle in its 2010 submission:

> The principle that mental illness and cognitive impairment should be the key factor in sentencing decisions.[72]

PIAC submits that increasing the opportunity for diversionary options for young people, not requiring a finding of guilt, would be more appropriate than developing special sentencing options.

The 2010 PIAC submission recommended that NSW adopt sentencing options similar to the Victorian Hospital Security Orders and Residential Treatment Orders. These would also be appropriate, in serious matters only, as sentencing options in the juvenile justice jurisdiction in NSW.

However, PIAC would be concerned with any situation where young offenders were housed with adult offenders. Once again, to make such options safe and effective for young people, they would have to be appropriately resourced.

PIAC generally has concerns with provisional sentencing. PIAC believes that this concept would be particularly inappropriate for young offenders who need both certainty in outcome and need time to undergo rehabilitation, with pre-determined positive outcomes if they succeed.

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[72] Dodd, Banks and Hourigan Ruse, above n 2,4.

7. APPENDIX

7.1 Case Studies from the Children in Detention Project

John

In early 2010, when he was 14 years old, John was charged with an offence. The court imposed various bail conditions on the client, including a curfew. John has a mild intellectual disability.

A few months later, a Children's Court directed the matter to Youth Justice Conferencing and dispensed with bail conditions.

The next day, John was arrested by police at 11.00 pm for breach of bail curfew. ZZ informed the Police that 'bail was stopped', the police tried to have this confirmed by John's mother, but she had not been present at the court at the time bail was granted and was not able to confirm any conditions. The client was taken to the police station where he was placed in custody, COPS was checked and COPS indicated that bail conditions were current. John appeared in the same Children's Court the following day, which determined that bail had been dispensed with two days prior and apologised for John's arrest.

On a Thursday shortly after, John was again arrested by police from the same station at 6:30pm. Police felt they were 'aware' of his bail conditions, and placed him under arrest for breach of bail conditions. John informed the police that his bail was no longer current; however, COPS listed it as current till mid next month. John and his mother could not locate any paperwork regarding his amended bail, so John was placed in custody. John again appeared in the same Children's Court the following day, which determined that bail had been dispensed with two weeks prior and directed the client to be discharged.

The following week, John was again arrested by the same police at 9:15pm, for breach of curfew bail condition, as police were again 'aware' of his bail conditions. John was taken to the same police station and held in custody. The next day, the same Children's Court had it emphasised for the Court that bail had been dispensed with and the client was released.

It is particularly concerning that the same police station should continue to arrest the same individual despite multiple court appearances, and that the onus is being placed on the child and his mother to prove that bail has been dispensed with, rather than the police to prove that bail conditions are still current.

Peter

Peter[73] is a young man who was assessed by a Clinical Psychologist as intellectually disabled. Peter was stopped on a public street in Punchbowl by three NSW Police Officers who were driving an unmarked vehicle and in plain clothes. These Police officers failed to adequately identify themselves and provide their names upon Peter's request as required by law.

[73] Names have been changed to protect the privacy of the individuals involved.

Peter was a suspect in an arson investigation. The fire in question occurred over 40 hours prior to Peter being stopped and Peter was not in the vicinity of the offence. The Officers questioned Peter about his whereabouts at the time of the fire and Peter supplied the officers with an alibi. Nonetheless the Officers told Peter that they knew it was him who did it. They told Peter they were going to search him and did not ask him for his consent, even though there were no reasonable grounds to do so. After finding nothing incriminating in Peter's pockets the Officers directed Peter to remove his clothing to be strip-searched. Peter refused to participate in a strip search however the Officers informed him that they had the right to strip search him. The strip search was conducted on a public street and a number of people, including women, laughed at Peter. This made Peter feel ashamed and embarrassed.

The Officer's actions were in complete disregard of the laws governing police practices, searches, and strip searches. Their actions were unjustified as there were no reasonable grounds to conduct such a search and there was no relevant component of seriousness and urgency to require a strip search. Further, there was no need for the search to be carried out on a public street in the view of people not connected with the investigation and in the view of the opposite sex.

This is further exasperated because Peter was a minor with impaired intellectual functioning at the time of the strip search. In these circumstances the search must be conducted in the presence of a parent or guardian. The Officers were a few streets from Peter's home and thus it was reasonably practical for his parents to be present. This case shows that when Officers engage in unlawful conduct the impact on the individual is heightened where the person involved is vulnerable due to both his or her age and disabilities.