NSW Police Force response on the 2011 LRC Young Persons with MHCD in CJS – February 2011

Introduction

The NSW Police Force considers that in general, young people with cognitive and/or mental health impairments should be treated the same as other young people, with particular allowances made to ensure their safety and understanding of processes and relevant legislation and policies.

In this regard attention is drawn to the NSW Police Force's 2010 advice to the Law Reform Commission on the Consultation Papers regarding *the law and practice and policy applying to people with cognitive and mental health impairments in the criminal justice system*: In this advice NSW Police Force noted that police actively employ (where applicable) diversion options for persons with cognitive impairment and/or mental illness from the criminal justice system. In those cases where persons with cognitive impairment and/or mental illness do enter the criminal justice system, police are committed to their being treated equitably.

It is important to avoid stigma for people with cognitive and/or mental health impairments by unnecessarily identifying them in legislation. For example, many mental illnesses are managed by medication and may not be relevant to the commission of an offence. That said, police acknowledge that there is a need for any review of an offence to consider how impairment affects a young person's offending behaviour.

Finally, the NSW Police Force is taking steps to ensure that persons with cognitive impairment and/or mental illness are either appropriately diverted from, or equitably dealt under, the criminal justice system. For example, in 2008 the NSW Police Force introduced the Mental Health Intervention Team (MHIT), as well as an intensive four day training package for officers. To date over 470 operational police have received training. The program has received positive feedback from community stakeholders.

The NSW Police Force is open to feedback and comment from community organisations, and is committed to ongoing review and improvement of police practice.

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?

The NSW Police Force notes that there is no data in its Computerised Operational Policing System (COPS) system that identifies whether a young person has cognitive and/or mental health impairment. Accordingly, only anecdotal evidence is available and feedback from operational officers has not identified that there are specific bail issues for youth with cognitive and/or mental health impairments.

As to more general concerns raised with respect to bail and young people, the NSW Police Force remains concerned that apparent problems and concerns identified in relation to bail and young people are not based on reliable verifiable data.

It is not conceded that police practices relating to ensuring bail compliance and the effect of s.22A of the *Bail Act* has had an adverse effect on the juvenile remand population. The NSW Police Force maintains the view that police activities in relation to breach of bail and the introduction of s.22A have not put upward pressure on the juvenile remand population.

11.1(2): How can the number of young people with cognitive and mental health impairments held on remand be reduced, while also satisfying other considerations, such as:
a. ensuring that the young person appears in court;
b. ensuring community safety;
c. the welfare of the young person; and
d. the welfare of any victims?

The NSW Police Force has an important role in the criminal justice system by ensuring community safety, reducing fear of crime and ensuring the welfare of victims. Ensuring that that accused persons appears in court is part of this role. Any proposed changes to remand for young people need to be carefully considered in light of these factors, and balanced against the offending behaviour of the young person. However, our observations in point 11.1 (1) concerning the lack of available and accurate data make it difficult to identify the number of young people with cognitive and/or mental health impairment. Consequently, it is difficult to identify measures that might reduce these numbers.

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?

No comment.

11.2: Should the *Bail Act 1978 (NSW)* incorporate criteria that apply specifically to young people with cognitive and mental health impairments? What relationship, if any, should this have to diversionary mechanisms?

No. The NSW Police Force has robust systems in place to deal with persons who are deemed vulnerable persons. 'Vulnerable person' includes children, people with impaired intellectual functioning, people who have impaired physical functioning, Aboriginal or Torres Strait Islanders and persons from non-English speaking backgrounds.

When young persons are admitted into police custody they are provided with access to a parent, guardian or support person, access to the juvenile Legal Aid and/or access to a legal representative.

Police ensure young persons are made aware of their rights whilst in custody. If charges are preferred or bail conditions imposed they are provided a copy of this documentation. Details of any imposed bail conditions are explained to the young person in the presence of their support person, parent or guardian.

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?

The question presupposes the need for change. At present Determinations regarding the granting of bail and the appropriate conditions, if any, to place on a grant of bail, are not made lightly by the courts or police. In making determinations, the decision maker must assess the risk to the community including whether or not the accused will appear as required at court, whether further offences may be committed or if witnesses or evidence will be interfered with. The decision maker is however also required under the *Bail Act* to take into account the personal circumstances of the accused.

The *Children (Criminal Proceedings) Act (C (CP) Act)* requires a court exercising jurisdiction under that Act to be governed by the principles set out in section 6, which are uniquely applicable to children. Decisions under the *Bail Act* are one determination made by a court exercising jurisdiction under the *C (CP) Act*. The principles set out in section 6 therefore apply except to the extent that there is any inconsistency with the *Bail Act*. In addition the *Bail Act* itself provides additional protection to children and explicitly requires the decision maker to take into consideration any special needs of the offender arising from the fact that they are under 18 (section 32(1)(b)).

The Government has put in place a number of support services and strategies to assist young people in meeting their bail conditions, including legislative requirements relating to young people in police custody, advice services and

legal representation. The Bail Act also enables a person to seek a review of a bail decision in the Supreme Court. This includes seeking a review of a decision to impose bail conditionally. This provision enables the Supreme Court to exercise a supervisory role over lower courts and other bail decision-makers as a means of ensuring that the law is properly adhered to, including requirements under the *Bail Act* that conditions must be commensurate with the offence and no more onerous than required under the Act.

Legislation also currently provides that children in police custody must have the benefit of a support person to whom any bail conditions can be explained and that the person responsible for the welfare of the child must be contacted upon arrest. Legal Aid NSW also provides a telephone advice line which can be contacted at any time by children who are under arrest. Children in the custody of a court are entitled to a lawyer provided by Legal Aid NSW if they do not have their own lawyer. The lawyer has a duty to explain to their client any bail conditions.

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

No. Defining what special needs means will limit its application. To add "clarification" to s.32 would unnecessarily further complicate the section and would have the effect of negating the effort of clarification.

The NSW Police Force notes that s32 of the *Bail Act 1978 (NSW)* includes 'intellectual disability' and 'mental illness' as categories. There is no need to create an additional definition around 'special needs'. The current definition provides enough scope for police to deal appropriately with young people with cognitive and/or mental health impairments, and allows for discretion when making decisions around bail.

11.5(1) Should the *Bail Act 1987 (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?

Section 32(1)(b)(v) of the *Bail Act 1987 (NSW)* requires police officers to have regard to special needs of people who are under 18 and people with an intellectual disability or a mental illness. Section 39B of the *Bail Act 1987 (NSW)* requires police to take all reasonable steps to ensure that an accused person is aware of their obligations and the consequences of failing to meet their obligations.

In crafting bail conditions, police officers are aware of the need for appropriate conditions, and ensuring that the accused person understands these conditions. The accused person must sign a document that states they understand their bail conditions and will comply with them. If the accused person is accompanied by a support person, the bail conditions will be explained to them as well.

Because police are not clinicians it is impossible for police to be completely satisfied that any accused person understands their bail conditions. Any requirement on police to ensure this would mean that it offenders could later avoid responsibility for breaching bail by claiming that they did not understand their bail conditions. Any concerns over bail conditions should be raised by the accused person's legal representative when the matter is before the court.

The NSW Police Force considers that no amendments to the *Bail Act 1987 (NSW)* are necessary on this subject.

If any amendment is considered, it is imperative that the Bail Act would not require the release of the person in circumstances where the proposed bail condition was appropriate to ensure the person's appearance at court; the protection of any victim, witness, their close relatives or any other person requiring protection; and protection and welfare of the community including the preservation of evidence as explained in s.32 of the current *Bail Act 1978.*

11.5(2): Should the *Bail Act 1978 (NSW)* contain guidance about the conditions that can be attached where a young person with cognitive or mental health impairment is granted conditional bail? If so, what should this guidance include?

Police officers need to be able to exercise discretion in determining the appropriate bail conditions for offenders. As such, any proposed changes to the process should not be mandated in legislation, but might be considered for inclusion in police practice and training.

11.6: Should s50 of the *Bail Act 1978 (NSW)* require the police to take into account:
a. age;
b. cognitive and mental impairments; and/or
c. the nature of the breach
before requiring a person to appear before a court for breach of bail conditions?

No. The status-quo should remain.

Prior to the breach taking place, magistrates/judicial officers, authorised justices and Bail Sergeants should have taken the matters (a) to (c) in the question into account at the time of either granting bail or continuing bail. Further Legal Practitioners should be mindful of these matters when making a decision not to seek to vary bail conditions at subsequent court appearances. As such, consideration of these matters should take place before any breach.

Especially in circumstances where a magistrate/judicial officer or authorised justice either makes a decision on bail or continues police bail, to require police officers to then adjudicate on such a decision, essentially on the run, is

inappropriate and diverts ultimate responsibility as to the appropriateness of a bail condition to operational police. The current *Bail Act* does not allow police officers of lesser rank than the Sergeant or officer for the time being in charge of a police station setting the bail conditions to review them. It is incongruous that the Bail Act would prohibit such review in one section and allow for it in another in extraneous circumstances.

It is not and should not be an operational police officer's role to second guess the appropriateness of a bail condition put in place by a member of the judiciary at the time of breach. This is not the role of a police officer. Moreover, extending police discretion this far invites allegations of improper conduct in the exercise of such discretion.

The *Bail Act 1978 (NSW)* clearly states that it is the responsibility of police to deal with any breaches of bail, and to put the accused person before a court. Any decisions around the nature of the breach and amendments to any restrictions should be made by a judicial officer.

11.7 Should s 50 of the *Bail Act 1978* (NSW) specifically require courts to take into account:
(a) age;
(b) cognitive and mental impairments; and/or
(c) the nature of the breach
when dealing with a person for failure to comply with bail conditions?

The Court is already in a position to do this. S.50(2)(b) allows the court to revoke previous bail conditions and put in place new or substituted conditions having regard to s.32 of the Act. This is done in practice.

s.32 of the Act already allows the court to take into account the (a) age; (b) cognitive and mental impairments; and, arguably, (c) the nature of the breach.

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 cognitive or mental health impairment of a young person should be taken into account at the front end of the process when bail conditions are set, not when dealing with "failure to appear".

If a young person with a cognitive or mental health impairment does not attend court at the time the proceedings are at sentencing stage, it is overwhelmingly likely that the proceedings will be adjourned allowing the child to attend or a representative from Children's Legal Services of the Legal Aid Commission will have the juvenile's file and will explain to the court the reason

for their absence. The court will take into account the juveniles condition prior to dealing with the matter ex-parte.

If such support is not available from Children's Legal Services or they are not informed by either Juvenile Justice or some other support agency of the subject juvenile's condition or position, the breakdown in communication here is not due to the operation of s.51 of the *Bail Act 1978*.

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?

If a Magistrate or police officer put in place appropriate conditions and these conditions reflect the risk the juvenile poses to the community or the risk they will not attend court – then arresting the person for breaching their conditions and bringing them back to court to have their bail status re-determined is the only appropriate option.

In circumstances where a member of the judiciary has continued or put in place bail conditions, to have police second guess the appropriateness of the condition at the time of making a decision to arrest is placing too large a burden on operational police and inappropriate. The time for determination of the appropriateness of the bail conditions is at the time of setting the conditions or continuing them, not at the time of breach.

11.10(1): Are young people with cognitive and mental health impairments remanded or remaining in custody because of difficulty in accessing suitable accommodation or mental health or disability services?

The NSW Police Force is not in a position to provide an answer to the question posed. However, it is noted that there is a current strategy to deal with the provision of services in such circumstances – the Bail Assistance Line.

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?

Perhaps a review of the Bail Assistance Line would better serve to answer this question.

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

No, based on largely anecdotal information and the low rate of recorded proceedings for AVO Breaches for juveniles in general, the NSW Police Force believes it is not common.

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 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?

See answer to 11.11.

(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?

No change is required. S.35 of the *Crimes (Domestic and Personal Violence) Act 2007* allows a court to impose such prohibitions or restrictions on the behaviour of a young person with cognitive and mental health impairments as appear necessary or desirable to the court. As such the court, in exercising its discretion, is already in a position to take into account the legitimate interests of such persons whilst balancing these interests with the objects of the said Act.

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

Police have an obligation under s49 of the *Crimes (Domestic & Personal Violence) Act, 2007* to make application for AVOs when a domestic violence offence is suspected or believed to be committed. This obligation does not change because the young person for whose protection an order is sought has cognitive or mental health impairments. In actual fact it increases the likelihood that an AVO would be applied for by police.

Further to that, s16 of the *Crimes (Domestic & Personal Violence) Act, 2007* relates to the circumstances when a court may make an order. Subsection (2) makes specific reference to both children and persons of appreciably below general average intelligence.

(2) What issues arise?

Issues only arise when the defendant named in the order is the actual carer / person responsible for the young person. In these circumstances AVO conditions may be impacted on. Circumstances surrounding the care of the young person may inhibit the court issuing an AVO with conditions that limited contact between the two parties or exclusion from certain premises.

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

No. Part 8 and Part 9 of the *Crimes (Domestic and Personal Violence) Act 2007* adequately allow for sufficient protection of young people with cognitive and mental health impairments.

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?

No data is available for the application of the *Young Offenders Act 1997* to young people with cognitive and mental health impairments. Consequently, specific comment cannot be made.

In general however, it is the view of the NSW Police Force that procedural issues do adversely impact upon the achievement of the objectives of the *Young Offenders Act 1997*. Analysis of 2008-2009 COPS data indicates that the NSW Police Force diverted 12,068 (57%) individual juveniles under the Young Offenders Act 1997 through police-initiated Warnings, Cautions and Conferencing. The remaining 9,210 (43%) individual juveniles were charged and referred to court.

The primary impediment to police initiated diversions is that many juveniles do not make admissions. 63% of all juvenile charges had the reason "Did not admit to all offences".

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?

No additional protections are required. The NSW Police Force has robust systems in place to deal with persons who are deemed vulnerable persons. Vulnerable person include children, people with impaired intellectual functioning, people who have impaired physical functioning, Aboriginal or Torres Strait Islanders and persons from non English speaking backgrounds.

When young persons are admitted into police custody they are provided access to a parent, guardian or support person, access to the juvenile Legal Aid and/or access to a legal representative.

Police ensure young persons are made aware of their rights whilst in custody. If charges are preferred or bail conditions imposed they are provided a copy of this documentation. Details of any imposed bail conditions are explained to the young person in the presence of their support person, parent or guardian.

The NSW Police Force considers that these protections are adequate to safeguard the rights of young people with cognitive and/or mental health impairments.

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

Police officers are not clinicians; they are law enforcement officers. As such, it is not appropriate for police to purport to 'screen' for, or diagnose a mental illness or cognitive impairment.

The NSW Police Force does not consider it is the responsibility of police to seek to diagnose mental illness or cognitive impairments. However, police officers continue to use their best judgement to identify where a person may have a cognitive impairment or mental illness.

Police officers have access to relevant NSW Police Force policy documents and Standard Operating Procedures on dealing with young offenders, and offenders with cognitive and/or mental health impairments, including indicators of these impairments. Police also receive training on a range of relevant areas, including:

- training on vulnerable communities, including disability issues;
- Mental Health Intervention Team training;
- The inclusion of intellectual disability and mental health issues in the 'Safe Custody' course.

When a person is taken into custody, the Custody Manager must make an assessment of the person. There are two factors to consider in custody:

- the safety and welfare of the person;
- the capacity of the person to understand the process.

Cognitive and mental health impairments can directly impact on these areas.

As part of this process, police will make observations and ask questions to identify whether the person is at risk of self harm, is taking medication, or appears to have a mental illness. The Custody Manager will go through a caution with the accused person, which notifies them of their right to a support person if they have an intellectual impairment or a mental illness.

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?

11.15(1): In circumstances where *positive conduct orders* require the child to meet with health professionals or other persons with backgrounds or experience that may assist the child to engage in socially acceptable behaviour, yes.

11.15(2): Data is not currently available; however anecdotal evidence suggests that in the main, applications under s.32 of the *Mental Health (Forensic Provisions) Act 1990* are the more common approach.

11.15(3): No comment

11.16: Does s22 of the *Mental Health Act 2007 (NSW)* operate satisfactorily in relation to young people with cognitive and mental health impairments? If not, how should it be modified?

The NSW Police Force believes that it operates satisfactorily. The object of the section is to divert people with mental illness from the criminal justice system in circumstances where the person is an immediate danger to themselves and the public. The section does not need modification.

Section 22 empowers police to apprehend a person who appears to be mentally disturbed, and has committed an offence, or is likely to cause harm to themselves or another person. Police are able to take such a person to a declared mental health facility. S22 is aimed at persons who are mentally disturbed, and or appear to be mentally ill (not persons with cognitive impairments).

It should be noted that the legislation does not require police to make or be aware of any diagnosis that the person may have. The definition clearly focuses on a person's behaviour, and is framed around identifying dangerous behaviour and assessing risk. In exercising powers under s22, operational police are aware of risks facing young people, and make their assessment of risk with a person's age being considered.

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?

Please see NSW Police Force's 2010 advice on the Consultation Papers regarding the law and practice and policy applying to people with cognitive and mental health impairments in the criminal justice system. Specifically, please see NSWPF's advice on Consultation Paper 7 – Diversion.

In *R v Mailes* (2001) 53 NSWLR 251 the Court of Criminal Appeal held that it was appropriate to have regard to both the *Mental Health Act* and the *Mental Health (Criminal Procedure) Act* for the purpose of construing expressions used in either act because they formed part of the same legislative scheme and were assented to on the same day.

The definition of *mental condition* in the said Act plus the interpretation of *developmentally disabled, mental illness* and *mentally ill person* allows for sufficient latitude to deal with young people with cognitive and mental health impairments under the said sections

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?

In circumstances where s.6 of the *Children (Criminal Proceedings) Act 1987* applies, notwithstanding any other law to the contrary, there is no need for s.32 or s.33 to contain particular provisions directed at young people.

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?

Please see the NSW Police Force's 2010 advice on the Consultation Papers regarding the law and practice and policy applying to people with cognitive and mental health impairments in the criminal justice system. Specifically, please see NSWPF's advice on Consultation Paper 7 – Diversion.

Under s.32(3) the magistrate may discharge the defendant into the care of a responsible person. However, there is no requirement that such person supervise the order or report breaches.

At present, under s.32A, any person may report a failure to comply with a condition under s.32. Such clarification should not limit who can report such a failure.

The NSW Police Force considers that, if the Mental Health Review Tribunal (as opposed to the lower courts) had a greater supervisory role over persons under supervision orders under s 32 or s 33 of the *Mental Health (Forensic Provisions) Act 1990* this may enable better outcomes assuming such oversight results in more close supervision and specialised management of orders.

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?

Orders under s.32 can already be sufficiently wide enough to allow for treatment to be appropriate for young people with cognitive and mental health impairments. S.32(3)(b) does not limit what orders as to treatment may be made.

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?

(a) Yes, but only in circumstances where appropriate as contemplated in the reasoning within *Perry v Forbes & Storey*; *The Director of Public Prosecutions v Sami El Mawas*; *Confos v DPP*.[1]

Proceedings should not be dismissed until there is evidence that a treatment program is either being complied with or completed. The court should supervise the program. A process whereby, after a successful application to enter into a treatment program, the mental health professional providing treatment reports back to the magistrate who may deal with such reports in chambers may be appropriate. Where there is non-compliance with the treatment program, the Court may re-list proceedings to order the young person back to court.

[1] (Unreported, Supreme Court of NSW, 21 May 1993, Smart J); [2006] 66 NSWLR 93; [2004] NSWSC.

Where the court determines it is more appropriate to deal with the matter by way of a supervised treatment or rehabilitation program, a similar scheme as is adopted in the use of Youth Conduct Orders may be appropriate.

(b) In circumstances where such treatment would be by way of court order, no.

(c) s.32(1)(b) allows the magistrate to take into account such other evidence as the Magistrate may consider relevant. There is already case law on when it would and would not be appropriate to refer a defendant to a treatment program.[2] Mental Health experts already include a lot of material in reports to assist magistrates on this point and if they do not, a magistrate can adjourn proceedings seeking that such information be provided. The normal rules of evidence do not apply to applications under ss. 32 or 33 of the Act because s.36 of the Act says the Magistrate may inform himself or herself in the as he or she thinks fit as long as by doing so will not require the defendant to incriminate themselves.

(d) In the same way as applications under s.32 are determined in line with the said cases of *Perry v Forbes & Storey*; *The Director of Public Prosecutions v Sami El Mawas*; *Confos v DPP*.[3]

(e) By monitoring treatment programs.

(f) Currently, under s.32 proceedings are dismissed prior to their being any evidence of any treatment program being completed. Dismissal of proceedings could perhaps be the consequence of successful completion of a treatment program.

(g) Yes, however, Sections 32 and 33 are two separate and distinct sections dealing with separate and distinct situations, yet the questions posed appear to look at them as falling within the same category. Without going into the category of persons that s.32 can deal with, s.33 only deals with persons who are *mentally ill persons*, i.e. the persons current predicament is such that there are reasonable grounds for believing that care, treatment or control of the person is necessary for the person's own protection from serious harm, or for the protection of others from serious harm.[4] S.32 does not deal with persons that pose such immediate risk to themselves and/or the community. Further s.33 results in the defendant being detained in a mental health facility or brought back to court, s. 32 does not. A person dealt with under s.33 would automatically be supervised whilst being detained.

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[2] *Perry v Forbes & Storey* (Unreported, Supreme Court of NSW, 21 May 1993, Smart J); *The Director of Public Prosecutions v Sami El Mawas* [2006] 66 NSWLR 93; *Confos v DPP* [2004] NSWSC

[3] (Unreported, Supreme Court of NSW, 21 May 1993, Smart J); [2006] 66 NSWLR 93; [2004] NSWSC.

[4] *Mental Health Act 2007* s.14

It has often been the case that persons dealt with under s.33 have been released once the immediate threat they pose to themselves or the community is no longer in effect due to the treatment they receive in hospital. This, at times, has happened in a short space of time. Such process may not adequately deal with the criminality of the offence charged or adequately deal with the ongoing care and treatment of the person for the purposes of ensuring their criminal behaviour is curtailed. Still, such concerns may currently be abated by re-institution of proceedings under s.33(2) within six months of the order. This then allows for the proceedings to ultimately be dealt with under s.32.

However, it is more often the case that proceedings are not resurrected under s.33(2). As such, for persons dealt with under s.33 and released from a mental health facility there is either no ongoing care and treatment provided for them (certainly no court order requiring same) or no supervision of such ongoing care and compliance with treatment programs that may have been put in place by the mental health facility prior to release. This evidences a gap between the treatment of persons dealt with under s.33, who arguably have a greater need for ongoing care and treatment, and those dealt with under s.32. As such, it is suggested that there be some legislative reporting mechanism that will require mental health facilities to notify the registrar of the local court that made the original s.33 order that a person previously dealt with under s.33 has been released within 6 months of the order being made so that the registrar may automatically resurrect proceedings. The Registrar would perhaps then to notify the informant and either the defendant or her/his carer/responsible person that the proceedings have been resurrected. This will allow for the matter to return to court to perhaps be dealt with under s.32 and provide for ongoing treatment.

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?

No, by virtue of the nature and seriousness of proceedings dealt with in these jurisdictions where the accused person is a young person, it would not be appropriate to deal with them under s. 32 or s.33.

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?

The NSW Police Force does not support the introduction of 'fitness to plead' procedures in the Children's Courts.

Subject to previous comments made, current arrangements under sections 32 and 33 of the MHFPA provide a convenient and practical method of dealing with young persons affected by mental disorders.

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?

(1) Yes. The current approach in relation to 'fitness to be tried' has evolved from the common law and has been in existence for some 50 years. The 'Presser test' (formulated by Smith J in *R v Presser [1958] VR 45)* has been widely applied in most Australian jurisdictions and has been endorsed and adopted by the High Court of Australia. The 'Presser test' emphasises the capacity of the accused to understand the proceedings at trial so as to be able to mount a proper defence. The capacity to understand test may be applied to juveniles and the expert evidence that is available on the question.
(2) No. See 11.24(1)
(3) No. See 11.24(1)

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?

It is conceivable that issues relevant to a juvenile with cognitive or mental health impairment would be relevant to the issue of *doli incapax*.

However, there is a difference between an onus on the prosecution to rebut the presumption that a child under the age of 14, but not under 10 (where the presumption is irrefutable), is not capable of forming the intent necessary to commit a crime, as compared to a finding as to a person's fitness to plead which is determined on the balance of probabilities and is available to all juveniles in the legislated jurisdictions regardless of their actual age. Even if there were correlating issues, the application of the law to them would differ. The question of fitness does not relate to criminal proceedings heard in the Children's Court.

If this is seen as an issue and a recommendation put forward that the prosecution should bear the onus of proving, beyond a reasonable doubt, in all jurisdictions that all young persons are fit to plead, such recommendation is opposed without proper reasoning based on empirical data. Such recommendation would act to extend the proposed onus on the prosecution relevant to *doli incapax* to all young persons between the ages of 10 to 17 who suffer from a cognitive impairment or mental illness. This is too large a shift in the current operation of the law.

ss.32 and 33 of the *Mental Health (Forensic Provisions) Act* adequately deal with all young persons who suffer from a cognitive impairment or mental illness and provide a regime where the juvenile will receive treatment. The

operation of s.32 and s.33 is far simpler than the processes that must be adopted after a finding that a person is unfit to be tried.

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

The current M'Naghten Rules have existed for over 100 years and are adequate. The NSW Police Force does not support legislative change to an extensive body of established law.

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?

No, the current application of s.32 and s.33 to juveniles is adequate.

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

See response to 11.25.

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?

Please refer to response to questions 11.20 and 11.21(c).

The NSW Police Force notes that section 6 of the *Children (Criminal Proceedings) Act 1987,* by virtue of section 4 of that Act, would apply regardless (please see response to question 11.18). As such, there is no need for amendment.

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?

(a) This is not a matter for the NSW Police Force to comment on. The Director of Public Prosecutions may be able to respond to this question.

(b) There is no need for specific forensic provisions that apply to young people. Please see response to questions 11.20 and 11.21(c).

11.31 Should the rules governing destruction of forensic samples collected from a young person following:
(a) a finding of unfitness to be tried;
(b) a finding of not guilty by reason of mental illness; or
(c) the making of a diversionary order,
be different from rules applicable to adults? If so, how?

See previous NSW Police Force advice in LRC Consultation Paper 8 – People with cognitive and mental health impairments in the criminal justice system: forensic samples

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?

Such an amendment does not seem to be required. All juveniles in the Children's Court are legally represented and therefore have an opportunity to seek an adjournment to obtain these reports in appropriate circumstances.

Psychological, psychiatric and other assessments of young offenders should not be mandatory in all cases. Apart from the obvious intrusion that they would impose upon the young person, mandatory reports would increase the

period of time from the date that criminal proceedings were commenced to finalisation of those proceedings.

If it was considered appropriate to seek assessments:

- Assessment reports should include an indication of whether there is a likelihood that the young offenders will engage in further criminal conduct in the next three, six and 12 months.
- Assessments should be conducted by a psychiatrist or a psychologist. They should not be conducted by mental health nurses.
- The permissible uses of information contained in an assessment report should include "for the use of the court". As such, if the information discloses that the young offender is likely to commit further offences then it may be taken into consideration in any subsequent bail hearings for a further offence.

This power does not need to be available to all courts exercising criminal jurisdiction. The young person's legal representative may make an application for the court to view such reports if required.

Section 33 of the *Mental Health (Forensic Provisions) Act* provides that the Magistrate may order an assessment of a person whether by way of adjournment, the granting of bail, or otherwise. This degree of discretion should apply to ordering an assessment of a young offender under the *Children (Criminal Proceedings) Act*. The NSW Police Force does not support a blanket presumption either in favour of or against remand as this will depend on the offence, the likelihood of a custodial sentence, and the myriad factors that are relevant to a decision on bail.

11.33 Should special sentencing options be available for young offenders with a cognitive or mental health impairment? If so:
(a) How should existing options be modified or supplemented?
(b) Should these options be available for serious children's indictable offences?

The NSW Police Force does not see the need for special sentencing options to be available for young offenders with cognitive or mental health impairment.

The *Young Offenders Act* provides for a sufficient range of diversionary options to deal appropriately with these young offenders. If the matter has progressed to youth justice conferencing, there is sufficient flexibility, and opportunity to exercise discretion, in the conferencing process and the conference outcomes to accommodate such offenders. If the matter progresses to court and is dealt with under the *Children (Criminal Proceedings) Act*, sufficient sentencing options are available to the magistrate or judge, including youth conduct orders, to deal appropriately with offenders with cognitive or mental health impairment.

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

The NSW Police Force has no comment on this issue.

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?

There is no reason to view the current manner of sentencing such people to be inadequate. Children's Court magistrates are generally extremely meticulous, not only when sentencing young people but also in taking into close consideration in the sentencing process all relevant factors including the subjective characteristics of the person being sentenced.

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?

The NSW Police Force considers it appropriate to decline to make comment of a general nature on sentencing options in such matters. There may certainly be circumstances when a provisional sentence provides utility with respect to the young person's rehabilitation but this will turn upon the circumstances of each particular case.