Children's Court of New South Wales

31 March 2011

Ms Hilary Astor
Commissioner
New South Wales Law Reform Commission
GPO Box 5199
Sydney NSW 2001

Dear Ms Astor

Re: Young People with Cognitive and Mental Health Impairments in the Criminal Justice System

Thank you for providing the Children's Court of NSW with an opportunity to make submissions with regards to the *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System* consultation paper. I would like to apologise for the delay in providing our response and wish to thank you for granting us an extended period to make our submission.

Below are the Children's Court's views in relation to the questions that you have raised;

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?

In the Court's experience young people with cognitive and mental health impairments have greater problems complying with bail conditions than their peers. This is due to a number of problems including comprehending the seriousness of bail conditions, remembering and understanding what those conditions are, and greater vulnerability to the influence of others who may encourage them to break those conditions.

(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?

2 George Street Parramatta, NSW 2124
PO Box 5113, DX 8257
Chambers: (02) 8688 1463 Fax: (02) 8688 1663

There is no simple answer to this question. Much will depend on the extent and effectiveness of family and other support. Engagement in positive activity such as school and recreation will also be a significant.

The support to young people in the justice system provided by Ageing, Disability and Home Care (ADAHC) has improved considerably in recent times.

Young people with mental health problems do not receive adequate support in many instances from community-based mental health services. The Children's Court regularly sees young people with serious mental health disturbances who have committed criminal offences being discharged from hospitals on the grounds that they are not mentally ill. One wonders whether these decisions are being made because of resource constraints at hospitals, including inadequate facilities to deal with violent young people, rather than a proper determination of the young persons mental state.

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

The presence of Justice Health consultants at some Children's Court's has had a significant effect in improving the situation for young people with cognitive and mental health impairments. The consultants are able to inform the court of relevant information that has sometimes resulted in matters being dealt with pursuant to s32 of the Mental Health (Forensic Provisions) Act 1990 (MHFPA) without the need for further adjournment. They can also provide a more seamless referral to ADAHC, Headspace, ICAHMS and other services. Efforts to make this service available in other locations, including through the use of video link technology, will be important to ensure that young people in regional and rural areas are not disadvantaged.

Question 11.2

Should the Bail Act 1978 (NSW) incorporate criteria that apply specifically to young people with cognitive and mental health impairments? If so:

(a) why is this change required; and
(b) what specific provisions should be incorporated?

The Court understands that the *Bail Act* 1978 (NSW) already does in s32 (see below). An amendment to include acquired brain injury or other cognitive impairment may provide greater clarity.

32 Criteria to be considered in bail applications

(1) In making a determination as to the grant of bail to an accused person, an authorised officer or court shall take into consideration the following matters (so far as they can reasonably be ascertained), and the following matters only:
(b) the interests of the person, having regard only to:

(v) *if the person is under the age of 18 years, or is an Aboriginal person or a Torres Strait Islander, or has an intellectual disability or is mentally ill, any special needs of the person arising from that fact*

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?

The Court recommends that the *Bail Act* should be amended to contain a provision that a bail condition is not to be imposed if it appears to the bail authority that it is more onerous than necessary, having regard to the following;

a) the object of the Act, and
b) the nature of the offence, and
c) the protection and welfare of any victim, and
d) the circumstances of the person granted bail.

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?

The Court believes that attempted clarification may have the unintended consequence of unduly restricting the circumstances which can be taken into account. This should be left within the discretion of the judge, magistrate or other decision maker.

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?

Please refer to our answer to question 11.3.

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?

The Court is of the view that each of these factors should be taken into account by police when determining what action to take concerning a breach of a bail undertaking, as they are matters referred to in section 32 of the MHFPA. It is the experience of the Children's Court, however, that these factors are not often addressed. Numerous young people who breach bail undertakings are arrested and brought before a court with bail having been refused by an authorised police officer only to be granted bail by the court on the basis of information which was available to the authorised officer. Many of these will be young people who have forgotten about a curfew or poorly planned their travel home. Others will be young people who have forgotten about a requirement to report to police and had later reported to the police station shortly afterwards only to then be arrested. It would appear that many authorised officers, as a matter of course, refuse bail to every young person who is alleged to have breached their bail.

Authorised officers in many instances do not consider that a young person with a cognitive or mental impairment may require greater support from a parent or other carer and make a condition of bail requirement that an acceptable person make an acknowledgement or agree to forfeit a sum of money.

If these factors were specifically referred to in section 50 this may go some way to remedying the situation without causing difficulties in dealing with serious breaches of bail.

Question 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?

Yes. See response to 11.6 above.

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?

Yes, the Court believes that it does as the section provides that the young person is only guilty of the offence if he or she fails to appear "without reasonable excuse".

Question 11.9

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

The Court notes that most young people remanded in custody are there between the time that they are refused bail by police and the time that they are able to enter bail granted by a court. Implementing steps that will improve the ability of police to identify a young person who has a cognitive or mental impairment would significantly improve the situation. Also, better training of authorised officers would improve the situation as it would lead to the granting of bail conditions that are not unreasonably onerous and are more likely to result in bail compliance as well as protecting the interests of the community.

There are a small number of young people with serious problems, a part of which is a cognitive or mental impairment, who have real difficulty complying with appropriate bail conditions. Often they are unable to reside with their family either because of the circumstances of the family or because of the family's inability to deal with the young person's behaviour. There is a shortage of supported accommodation for young people in difficult family circumstances and the shortage is even greater for young people with special needs. The provision not only of accommodation but also carers who are able to support and manage the behaviour of young people in this situation needs to be increased.

A small but significant number of young people who appear before the Children's Court are young people under the parental responsibility of the Minister for Human Services. Many of these young people will be in supported accommodation and some will repeatedly commit offences whilst in that accommodation against property or carers. In a significant number of these situations it is because there is a lack of adequate behaviour management plans, insufficient staff training to deal with a particular young person, placement together of young people who are likely to be in conflict with each other and limited access to psychologists, psychiatrists, and other mental health professionals. Of course, in the longer term, better preventive action in relation to these young people would also avoid these problems.

There also appears to be a few young people who have got to the point where they have great difficulty controlling their behaviour and need to spend at least some time in a controlled therapeutic environment. There is a significant gulf between supported accommodation and a controlled regime of a detention centre. Serious consideration needs to be given to the provision of accommodation which is not a form of detention but is nevertheless a situation where staff are able to exercise control over the movement in and out of the accommodation by the young person in question.

The young people referred to in the latter categories are few in number but occupy a significant amount of time and resources of carers, welfare agencies, Community Services, police and the courts. For many of these young people serious psychological and behavioural problems are dealt with by the blunt instrument of arrest and remand in custody because adequate therapeutic alternatives are not available.

Question 11.10

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

(2) Are additional legal and/or procedural measures required to avoid young people with cognitive and mental health impairments being held on remand because of problems accessing accommodation and/or services? If so, what measures should be implemented?

Please refer to our answer to question 11.9. The Court is of the view that the needs are not legal or procedural but rather therapeutic and caring.

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?
(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?

Although no statistics are available to the Court it appears that young people with mental or cognitive impairments are more likely to be the subject of applications for apprehended violence orders.

(a) Usually the police but also neighbours or others who are affected by their behaviour.
(b) There is a wide range of conditions imposed. Sometimes only the mandatory orders are imposed and on some occasions significant restrictions are imposed on the young person.
(c) We do not have these statistics as they would be recorded by the Bureau of Crime Statistics and Research.
(d) Often this will be the case as the behaviour will be impulsive which is a characteristic of some young people with cognitive or mental impairments.

(e) According to their personal circumstances and the need to protect the person or people in need of protection. There is no standard treatment.
(f) The most desirable treatment will enable young people to remain with family or carers but support the young person and their family or carer in managing their behaviour. In some situations the last resort of preventing or severely restricting contact between the young person and their family or carer will be necessary.
(g) Yes. This is a similar problem to that which applies to such young people understanding and complying with bail conditions.
(h) The problem lies with the availability of appropriate services, not with the law or the procedure.

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?

Our only comment here is that the effectiveness of AVOs is often related to the likelihood of the order being enforced. A young person with a mental or cognitive impairment may have greater difficulty identifying behaviour that falls within the restrictions of an order. They are likely to have greater difficulty than others in reporting breaches to police and providing adequate information to enable any breach to be dealt with.

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?

Yes, the Court believes that they are.

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

No, the Court believes that the legislation is appropriate.

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?

In our experience the legal protections provided by s.13 *Children (Criminal Proceedings) Act* 1987 and the *Law Enforcement (Powers and Responsibilities) Act* 2002 are sufficient in most circumstances.

The greatest difficulty is in the ability of police to recognise that a young person may have a cognitive or mental impairment, and to know how to deal with that young person in accordance with their impairment. This is not a criticism of police as in many instances the behaviour of the young person will be the sum total of a number of factors including their state of maturity, alcohol or other drugs, peer influences, etc.

Often the police will have information available to them indicating that the young person does have a cognitive or mental impairment via COPS or criminal records. This does not necessarily assist them in knowing how to deal with the young person. More focused police training in this area is therefore required.

Question 11.15

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

Youth Conduct Orders are aimed at providing intensive and co-ordinated services to young people with particular needs and who are at high risk of offending. For some young people the combination of a greater level of service provision and enforceable restrictions on their behaviour will benefit both the young person and the community without inappropriately restricting their liberty. However, given that few youth contact orders have been made, it is unclear at this stage whether these interventions are appropriate and effective for 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?

At present there have been very few Youth Conduct Orders imposed either as interim or final orders, so it is too early to provide a helpful answer this question.

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

It is of the essence of a Youth Conduct Order that it is tailored to the needs of the young person. No extra legal requirement should be necessary.

Question 11.16

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?

The Court does not have information about the frequency or effectiveness of the use of these provisions and so we are unable to comment.

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?

A copy of this Court's submission to the New South Wales Law Reform Commission enquiry regarding *People with Cognitive and Mental Health Impairments in the Criminal Justice System* is attached, which includes an answer to this question.

As there is some debate about whether people with acquired brain injuries are covered by this legislation, this should be put beyond doubt by specifically including such people.

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?

The Court is of the view that sections 32 and 33 are appropriately drafted to deal with young people in the criminal justice system.

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?

Please see the attached submission.

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?

Please see the attached submission.

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?

The Court strongly believes that appropriate services including rehabilitation should be available to young people with cognitive and mental impairments. Courts and other justice agencies should only become involved with such programs where necessary. The question seems to assume that there will be a program which will meet the needs of all young people concerned rather than recognising that there will need to be a wide range of services available because of the different needs of these young people. A multiplicity of programs is what is required. It is likely that most of the services will be the same services available to young people who are not in contact with the criminal justice system.

For some young people there will be a need to compel them to be involved in rehabilitation because their failure to do so means they are likely to commit criminal offences. Whether the provisions of the MHFPA, the *Bail Act*, or sentencing legislation is appropriate will depend upon the circumstances of the young person, including the severity of their offending and the likelihood of re-offending.

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?

Yes, the Court supports this proposal.

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?

The Court is of the view that there needs to be greater clarity concerning the powers and procedures dealing with unfit defendants in the Children's Court. The Court supports a simplified fitness procedure being introduced in the Children's Court. Those procedures should be framed differently from those available in the higher courts because in most cases the severity of the offending and the need to protect the public is considerably different. Laws and procedures which would result in all or most young people who are unfit being required to go into custody would be draconian and counter-productive.

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?

The guidelines provided by **R v Presser** are adequate when applied in a " common sense fashion" as suggested in **R v Ngatyi** (1980) 147 CLR 1.

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?

Yes, the court believes so. A young person's general capacity to understand will be relevant to their understanding of the seriousness of their behaviour. It should be remembered that the onus is on the prosecution to overcome the doli incapax presumption and it will be incumbent on the prosecution to produce evidence that the young person's understanding was not affected by a cognitive or mental health impairment.

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?

The *McNaghton* rules as they apply to the defence of mental illness are appropriate as they have elements similar with those in the test of *doli incapax*. These rules should continue to apply whether they are for an adult or a young person.
The circumstances should not be differently defined for young people. The Court notes that it is often difficult to diagnose a mental illness in a young person but we believe that there should be appropriate diversions where such a diagnosis has not been made. Such appropriate diversions include appropriately re-drafted ss32 and 33 of the MHFPA – Please see our attached submission.

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?

Yes. Our comments regarding fitness to plead also apply to this situation.

Question 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?

No, we don't believe so. As the prosecution needs to rebut the presumption of *doli incapax* this will need to be done before consideration of whether the young person is not guilty by virtue of mental illness.

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?

The Court has made submissions on a more simplified fitness procedure as well as amendments to ss32 and 33 in previous submissions – please see attached submission.

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?

The Court has previously addressed this issue; please refer to our attached submission. Our recommendation is that amendments to sections 32 and 33 of the MHFPA would adequately provide for the special requirements of young people.

Question 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?

We do not see the need for any different rules or provisions.

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?

(a) No, the Court does not support assessment in every case. Most young offenders do not suffer from mental conditions and so universal testing would be extraordinarily intrusive, expensive and unproductive.
(b) No. For most of these young people there will already have been some form of assessment and many will be under the treatment of a mental health professional. The court should have the power to require assessment in circumstances where there is no or inadequate information available, no or inadequate engagement with treatment or support, and where the criminal offending is serious or persistent.
(c) An adequate report should include a diagnosis of the condition or conditions, a prognosis of the condition or conditions, information about treatment, support, education or other services which would assist the young person, comments about the interaction between the young person's condition and the criminal offending, the sources of information on which the report was based and the qualifications and expertise of the report writer.
(d) The Court is of the view that in most situations Justice Health should be the body responsible for arranging the assessment. Some form of "triage" would be necessary to determine who the appropriate assessor or assessors should be.
(e) The law of evidence and the requirements of procedural fairness as well as the particular provisions relating to non-publication in Children's Court proceedings would apply. It would be necessary for arrangements to be made for the report to be made available to appropriate people such as treatment providers and custodial authorities.
(f) Yes, the Court supports this proposal.
(g) Yes, but only in exceptional circumstances. There should be a strong presumption against remand for this purpose. The provisions of s33 of the MHFPA will also be relevant here.

Question 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 needs for young offenders with cognitive and mental health impairments would usually be relevant to the availability of services rather than the availability of some form of special sentencing options.

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?

No, the Court is not in support of this proposal. The general law provisions which require cognitive and mental health impairment to be taken into account in sentencing are no less relevant in the Children's Court.

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?

As the body responsible for most of the sentencing of young people we believe that it is.

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?

We agree with the recommendations contained in the report of the Sentencing Council, "Provisional Sentencing for Children" (September 2009).

Other Comments

Patrick McGorry, Professor of Youth Mental Health at Melbourne University and Australian of the Year for 2010 has said that in Victoria only a third of young people with serious mental illness were getting access to proper care[1]. The situation would be similar or worse in NSW. The greatest need is for the provision of more and better targeted services. Changes to legal provisions will only be a very small part of adequately addressing the needs of young people with mental and cognitive impairments who are involved in the criminal justice system.

Yours sincerely,

His Honour Mark Marien SC
President

[1] The Age, Melbourne. 13 March 2009