



New South Wales  
Law Reform Commission

Consultation  
paper

**11**

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

December 2010  
[www.lawlink.nsw.gov.au/lrc](http://www.lawlink.nsw.gov.au/lrc)



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## CP 11 **Young people with cognitive and mental health impairments in the criminal justice system**

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We seek your views on the issues raised in this paper and on any other matters you think are relevant to the review.

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## Participants

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The Hon Gregory James QC  
The Hon Harold Sperling QC  
The Hon James Wood AO QC (Chairperson)

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## Terms of Reference

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Pursuant to s 10 of the *Law Reform Commission Act 1967* the Law Reform Commission is to undertake a general review of the criminal law and procedure applying to people with cognitive and mental health impairments, with particular regard to:

1. s 32 and s 33 of the *Mental Health (Criminal Procedure) Act 1990*;
2. fitness to be tried;
3. the defence of "mental illness";
4. the consequences of being dealt with via the above mechanisms on the operation of Part 10 of the *Crimes (Forensic Procedures) Act 2000*; and
5. sentencing.



## Abbreviations

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<b>ACCT</b>	Adolescent Court and Community Team
<b>ADVO</b>	Apprehended Domestic Violence Order
<b>ALRC</b>	Australian Law Reform Commission
<b>APVO</b>	Apprehended Personal Violence Order
<b>ASPD</b>	Antisocial Personality Disorder
<b>AVO</b>	Apprehended Violence Order
<b>BOCSAR</b>	Bureau of Crime Statistics and Research
<b>CP</b>	Consultation Paper
<b>CREDIT</b>	Court Referral of Eligible Defendants into Treatment
<b>CROC</b>	Convention on the Rights of the Child
<b>DJAG</b>	Department of Justice and Attorney General
<b>ISP</b>	Intensive Supervision Program
<b>JIRS</b>	Judicial Information Research System
<b>JJAC</b>	Juvenile Justice Advisory Council
<b>MERIT</b>	Magistrates Early Referral into Treatment
<b>MHRT</b>	Mental Health Review Tribunal
<b>VLRC</b>	Victorian Law Reform Commission
<b>YDAC</b>	Youth Drug and Alcohol Court
<b>YJC</b>	Youth Justice Coalition

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## Preface

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- 0.1 This is the fifth consultation paper in the Commission’s reference on people with cognitive and mental health impairments in the criminal justice system. This paper looks at young people with cognitive and mental health impairments and what distinguishes their engagement with the criminal justice system, with a particular focus on bail, Apprehended Violence Orders (“AVOs”), diversion, fitness to be tried, the defence of mental illness and sentencing.
- 0.2 The first four consultation papers in this reference were released concurrently, and deal with the following subjects:
- an overview of the laws affecting people with a cognitive or mental health impairment when they become involved as defendants in the criminal justice system (“CP 5”);<sup>1</sup>
  - the laws governing fitness to be tried and the defences relating to mental impairment (that is, the defence of mental illness, the defence of substantial impairment, and infanticide), which apply primarily to criminal proceedings in the Supreme and the District Courts, and the sentencing of offenders with a mental illness or cognitive impairment (“CP 6”);<sup>2</sup>
  - the laws relating to the diversion of offenders with a mental illness or cognitive impairment, focusing on the diversionary mechanisms available to the Local Court (“CP 7”); and<sup>3</sup>
  - the use of forensic samples taken from a defendant who is diverted from the criminal justice system, unfit to be tried or not guilty by reason of mental illness (“CP 8”).<sup>4</sup>
- 0.3 Our consultation papers can be found online at [www.lawlink.nsw.gov.au/lrc](http://www.lawlink.nsw.gov.au/lrc) or requested from the Commission.

## This paper in context

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- 0.4 A number of the issues and topics addressed in this consultation paper elaborate on discussion and issues raised in CPs 5-8. Therefore, this paper should be read in conjunction with preceding consultation papers. The table below illustrates where there is overlap, and highlights the relevant chapters or papers where background information can be located.

- 
1. NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: an overview*, Consultation Paper 5 (2010).
  2. NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: criminal responsibility and consequences*, Consultation Paper 6 (2010).
  3. NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: diversion*, Consultation Paper 7 (2010).
  4. NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: forensic samples*, Consultation Paper 8 (2010).

Table 1: Relationship to preceding consultation papers

Chapter	Overlap	Consultation paper(s)
1. Overview	Definition of cognitive and mental health impairment and the operation of the criminal justice system.	CP 5: Overview.
2. Bail	Significance of bail determinations and conditions.	CP 7: Diversion. See especially Chapter 2 <i>Pre-court diversion</i> .
3. AVOs	-	-
4. Diversion	Concept of diversion generally, and diversion under s 32 and 33 of the <i>Mental Health Forensic Provisions Act 1990</i> (NSW).	CP 7: Diversion. See especially: (a) Chapter 1 <i>The concept of diversion</i> . (b) Chapter 3 <i>Diversion under section 32</i> . (c) Chapter 4 <i>Diversion under section 33</i> . (d) Chapter 5 <i>Enhancing diversion to superior courts</i> .
5. Fitness and the defence of mental illness	Fitness to be tried, the defence of mental illness and the mental health framework.	CP 6: Criminal responsibility and consequences, and CP 8: Forensic Samples. See especially: (a) CP 6, Chapter 1 <i>Fitness for trial</i> . (b) CP 6, Chapter 2 <i>Procedure following a finding of unfitness</i> . (c) CP 6, Chapter 3 <i>The defence of mental illness</i> . (d) CP 6, Chapter 6 <i>Powers of the court following a qualified finding of guilt at a special hearing or a verdict of not guilty by reason of mental illness</i> . (e) CP 6, Chapter 7 <i>Management of forensic patients following court proceedings</i> .
6. Sentencing	Sentencing options and principles. Identification of cognitive or mental health impairment prior to sentencing.	CP 6: Criminal responsibility and consequences, and CP 5: Overview. See especially: (a) CP 6, Chapter 8 <i>Sentencing: principle and options</i> . (b) CP 5, Chapter 5 <i>Identifying the existence of a cognitive or mental health impairment</i> .

# 1. Overview

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<b>What group does this paper seek to address?</b> .....	<b>4</b>
<b>How are young people different from adults?</b> .....	<b>6</b>
Multiple disorders .....	8
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1.1 Young people are different from adults and may require different care and management in the criminal justice system.<sup>1</sup> A review of criminal law and procedure applying to people with cognitive and mental health impairments in the criminal justice system must therefore consider if particular legislative and policy change is required to respond to the needs of young people.

1.2 This chapter provides contextual information - a “snap shot” - to illustrate why young people with cognitive and mental health impairments in the criminal justice system have different qualities and needs from adults. Topics covered in this chapter include:

- characteristics of young people with cognitive and mental health impairments;
- international instruments that apply to young people;
- policy and reports that are of special relevance to young people;
- sources of law that apply specifically to, or are of particular relevance to, young people in the criminal justice system;
- courts and their relationship to young people; and
- services, treatment and programs directed at young people with cognitive and mental health impairments.

These contexts are represented diagrammatically in Figure 1. We conclude this chapter with an overview of the structure of this consultation paper.

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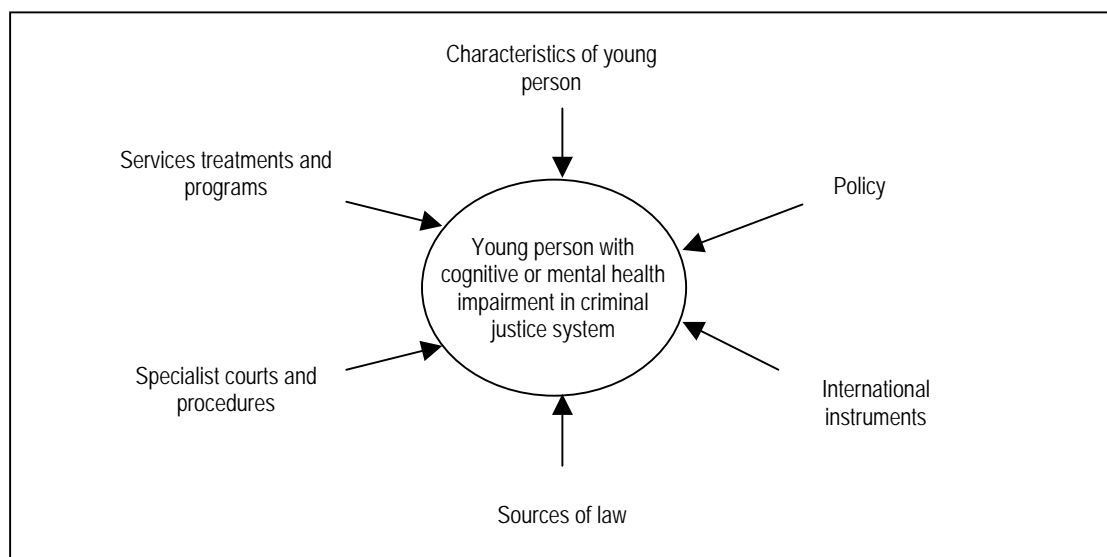
1. See NSW Legislative Council Standing Committee on Social Issues, Parliament of New South Wales, *Juvenile Justice in New South Wales* (1992) 11; Youth Justice Coalition, *Kids in Justice a blueprint for the 90s: Full Report of the Youth Justice Project* (1990) 35-36.



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- 1.3 A key question is whether the different qualities and needs of young people with cognitive and mental health impairments necessitate a distinct criminal justice response and, if so, what changes are required in light of this?
- 1.4 While the focus of this inquiry is a review of criminal law and procedure it is frequently necessary in this consultation paper to address the context in which that law operates. There is a very limited amount of existing research and information concerning young people with cognitive and mental health impairments in the criminal justice system. In order to ensure that we have properly identified the nature of the issues relevant to this group of people in this context, and understood the extent to which these concern law and procedure, it has sometimes been necessary to ask questions of a broad general nature. Any recommendations that the Commission makes as a result of this inquiry will concern law and its procedural and regulatory context.

Figure 1: Key dimensions of the criminal justice system as it applies to young people with cognitive and mental health impairments.



### What group does this paper seek to address?

- 1.5 In the context of the criminal law, a “child” generally refers to a person above the age of 10 (the age of criminal responsibility) and under the age of 18.<sup>2</sup> Special rules or procedures may apply to this group when they encounter the criminal justice system, both in legislation and by virtue of the common law. However, there are some variations to the definition of “child” in legislation.<sup>3</sup> Further, the language used in the framework that applies to young people with cognitive and mental health

2. *Young Offenders Act 1997* (NSW) s 4; *Children (Criminal Proceedings) Act 1987* (NSW) s 3, s 5; *Children (Detention Centres) Act 1987* (NSW) s 3.

3. See for example, definition of “child” under *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 3; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3 (defined as a person under the age of 16).

impairments is not always consistent. Other terms used include “young”, “youth”, “adolescent” and “juvenile”.<sup>4</sup> Additionally, within the operation of the criminal justice system there are varying degrees of criminal responsibility between the ages of 10-18; this is reflected in the presumption of *doli incapax* (a rebuttable presumption that a child aged between 10 and 14 does not have the mental capacity to form the intent required for criminal liability) and the varying sentencing considerations that can apply where a young person under the age of 18 is acting “as an adult”.<sup>5</sup>

- 1.6 In this paper we use the terms “young people” or “young person” to refer to children and young people above the age of 10 and under the age of 18. However, while the focus of this paper is people that fall into this age group with cognitive and mental health impairments, we acknowledge that some of the issues raised in this paper may be relevant beyond this group. Of particular relevance may be those individuals transitioning from adolescence to adulthood, as this is often “the period when mental illness commonly develops and first contacts with the criminal justice system occur”.<sup>6</sup>
- 1.7 As discussed in CP 5, concepts such as “mental illness” and “cognitive impairment” are multi-faceted, and encompass medical, scientific and social criteria.<sup>7</sup> In practical terms, a mental illness or disorder is a dysfunction affecting the way in which a person feels, thinks, behaves and interacts with others. The term covers a vast group of conditions, ranging in degree from mild to very severe, episodic to chronic. Common forms of mental disorder include depression, anxiety, personality disorders, schizophrenia and bipolar mood disorder.<sup>8</sup>
- 1.8 Generally, a cognitive impairment or disorder means a loss of brain function affecting judgment, resulting in a decreased ability to process, learn and remember information. A cognitive impairment may manifest itself in conditions such as Alzheimer’s, dementia, autism and autistic spectrum disorders, multiple sclerosis, and acquired brain injury. The term also encompasses intellectual disability, interpreted to mean a permanent condition of significantly lower than average intellectual ability, or a slowness to learn or process information.<sup>9</sup>

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4. For example, the title of the “Young Offenders Act”; “Youth Conduct Orders” used in Part 4A of the *Children (Criminal Proceedings) Act 1987* (NSW); “Adolescent Court and Community Team” in relation to court liaison services; and “Juvenile Justice”, the department responsible for the supervision of young offenders who receive community based or custodial sentences.
5. See para 6.20.
6. Justice Health, Victorian Government Department of Justice and the National Chief Executive Officers’ Group, *Diversion and support of offenders with a mental illness: Guidelines for best practice* (2010) 80.
7. CP 5, [1.26]-[1.33].
8. CP 5, [1.28]-[1.29]. See Australian Health Ministers, *National Mental Health Plan 2003-2008* (2003), 5; Council of Australian Governments, *National Action Plan on Mental Health 2006-2011* (2006), 1; K Freeman, *Mental Health and the Criminal Justice System*, Crime and Justice Bulletin No 38 (Bureau of Crime Statistics and Research, 1998) 1-2.
9. CP 5, [1.30]. See also American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, APA Press, 2000); Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Framework for Compulsory Care*, Report (1993) [1.7], Recommendation 82; NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996) [3.2]; Judicial Commission of NSW, *Equality Before the Law Bench Book* (2006) 5204-5205.

## CP 11 Young people with cognitive and mental health impairments in the criminal justice system

- 1.9 The concepts of cognitive impairment and mental illness are often confused and conflated. An important difference is that “intellectual disability is not an illness, is not episodic and is not usually treated by medication”.<sup>10</sup> The inconsistent terminology adopted in the law to address cognitive and mental health impairments is an issue that is specifically addressed in CP 5, and raised throughout CP 6 and CP 7.<sup>11</sup>
- 1.10 Here, as in CP 5, we use the terms “cognitive and mental health impairments” to refer to a broad spectrum of conditions that can result in a reduced capacity for mental functioning or reasoning. These conditions may be congenital or acquired and encompass both chronic and episodic conditions, as well as those that may improve over time with treatment.<sup>12</sup> As we discuss below, definitions or diagnoses that may apply to adults, can, for various reasons, be difficult to apply to young people.

### How are young people different from adults?

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- 1.11 Young people are not “little adults” and therefore require separate and distinct treatment.<sup>13</sup> There are particular characteristics of “young people” that justify separate consideration in the context of the criminal justice system as it applies to people with cognitive and mental health impairments.
- 1.12 First, there may be age-related neurological differences that raise particular issues for young people in the context of our inquiry.<sup>14</sup> Adolescence is a period of great biological, psychological and social change.<sup>15</sup> It is:
- an important formative period, during which many developmental trajectories become firmly established and increasingly difficult to alter. Events that occur in adolescence often cascade into adulthood, particularly in the realms of education and work, but also in the domains of mental and physical health, family formation, and interpersonal relationships. As a consequence, many adolescent experiences have a tremendous cumulative impact.<sup>16</sup>
- 1.13 On the one hand, this presents particular challenges because a young person’s brain is “still developing in ways that affect their impulse control and their ability to

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10. CP 5, [1.31]; Intellectual Disability Rights Service, *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System* (2008) 30.

11. CP 5, Chapter 4.

12. See CP 5, [1.26]-[1.33].

13. Noetic Solutions Pty Limited, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister for Juvenile Justice* (2010) (“Noetic review”) vi, [15].

14. See Noetic review, [15]; NSW Auditor-General’s Report, *Addressing the Needs of Young Offenders* (Audit Office, 2007) 14.

15. A Day, K Howells and D Rickwood, *Current Trends in the Rehabilitation of Juvenile Offenders, Trends and Issues in Crime and Criminal Justice* 284 (Australian Institute of Criminology, 2004) 4.

16. L Steinberg and E Cauffman, “A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles be Treated as Adults?” (1999) 63(2) *Federal Probation* 52, 53.

choose between anti-social behaviour and socially acceptable courses of action".<sup>17</sup> This may be compounded where the young person has a cognitive or mental health impairment, or an emerging impairment. For example, it has been observed that considerations of the impact of mental illness need to "recognise the developmental context" and "if the developmental context creates a specific vulnerability in its own right, then the impacts of even moderate mental illness may be magnified".<sup>18</sup>

- 1.14 On the other hand, age-related neurological differences may lead to a potentially higher capacity for rehabilitation due to ongoing development. This capacity for rehabilitation because a young person's character is "not yet fully formed" has been described as a "fundamental tenet of the juvenile justice system".<sup>19</sup> Evidence suggests that the earlier the intervention in relation to mental illness, the better the outcome.<sup>20</sup> The same has also been argued with respect to intellectual disability.<sup>21</sup> This implies that there may be the opportunity for early intervention in emerging impairments to which attention has been drawn by associated offending behaviours. Nevertheless, it has also been argued that the capacity for rehabilitation of young offenders, and the nature of such interventions, need to be assessed on a case-by-case basis, focused on other contexts instead of, or in addition to, chronological age. This is because an "offender may be at a point in development where he or she is still malleable, but may have little likelihood of desisting from crime given the individual's life circumstances".<sup>22</sup>
- 1.15 Secondly, mental disorders may also lead to "delays in normal cognitive and psychosocial development, especially if the illness is chronic".<sup>23</sup> It has been noted that:

Children with intellectual deficits, learning disabilities, emotional disturbances, and/or less educational and social opportunities generally have a slower pace of cognitive and psycho social development and therefore might not develop skills related to competency in legal settings until later in their teens or in adulthood.<sup>24</sup>

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17. New South Wales, *Government Response to Juvenile Justice Review* (2010) 3. See also T Grisso, "Juvenile Offenders and Mental Illness" (1999) 6(2) *Psychiatry, Psychology and Law* 143, 145.
18. C Lennings, "Assessment of Mental Health Issues with Young Offenders" (Paper presented at the Juvenile Justice: From Lessons of the Past to a Road for the Future Conference, Sydney, 1-2 December 2003) 4. See also NSW Auditor-General's Report, *Addressing the Needs of Young Offenders* (Audit Office, 2007) 14.
19. L Steinberg and E Cauffman, "A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles be Treated as Adults?" (1999) 63(2) *Federal Probation* 52, 55.
20. R Hayes, O Nielssen, D Sullivan, M Large and K Bayliff, "Evidence-Based Mental Health Law: The Case for Legislative Change to Allow Earlier Intervention in Psychotic Illness" (2007) 14(1) *Psychiatry, Psychology and Law* 35, 40. See also R Kessler, P Berglund, O Demler, R Jin, K Merikangas and E Walters, "Lifetime Prevalence and Age-of-Onset Distributions of DSM-IV Disorders in the National Comorbidity Survey Replication" 62(6) *Archives of General Psychiatry* 593.
21. M Guralnic, "Early Intervention for Children with Intellectual Disabilities: Current Knowledge and Future Prospects" (2005) 18(4) *Journal of Applied Research in Intellectual Disabilities* 313.
22. L Steinberg and E Cauffman, "A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles be Treated as Adults?" (1999) 63(2) *Federal Probation* 52, 56-57.
23. T Grisso, "Juvenile Offenders and Mental Illness" (1999) 6(2) *Psychiatry, Psychology and Law* 143, 146.
24. M Zavez, "Kids and the Criminal Justice System: Questions of Capacity and Competence" (2000) 20(1) *Children's Legal Rights Journal* 2, 9. See also T Grisso, "The Competence of Adolescents as Trial Defendants" (1997) 3 *Psychology, Public Policy, and Law* 3, 21.

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- 1.16 Thirdly, there may be difficulties in the identification and assessment of a cognitive or mental health impairment or a reluctance to diagnose due to age.<sup>25</sup> Issues may also be encountered due to the more limited availability of medical history or, particularly in the case of intellectual disability, attempts by the person to disguise their disability.<sup>26</sup> A young person's brain may still be developing, with some mental health problems only fully emerging in late adolescence.<sup>27</sup> Additionally, deficits of adaptive behaviour, which can be a component of intellectual disability, manifest during the developmental period, before the age of 18.<sup>28</sup> Recognition of impairments can be further hampered where there are multiple impairments (for example intellectual disability and mental illness) and/or substance abuse.<sup>29</sup>
- 1.17 Yet, identification and assessment of mental health impairments are particularly important in a criminal law context. Acute episodes of psychotic illness during the early phases of illness have been associated with higher risk of violence. Additionally, "[i]ncreased aggression and violence is often observed during the prodrome of mental illness" and the "prodrome of psychotic illness usually presents with a range of behavioural and emotional disturbance that is amenable to therapeutic intervention".<sup>30</sup>
- 1.18 Impairments may also take a different form from those commonly faced by adults in the criminal justice system. Further, symptoms related to an impairment are more likely to vary from year to year as the young person develops. It has been argued that "we have tried to understand childhood psychopathology based on our understanding of psychopathology in adulthood, while the phenomenon in childhood and adolescence is fundamentally different".<sup>31</sup>

### Multiple disorders

- 1.19 It should be noted that there are some young people in the criminal justice system that may have multiple impairments or disorders. For example:
- both a cognitive impairment and a mental illness;

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25. See Department of Human Services (Juvenile Justice), *Submission MH28-2*, 6-7.

26. Justice Health, Victorian Government Department of Justice and the National Chief Executive Officers' Group, *Diversion and support of offenders with a mental illness: Guidelines for best practice* (2010) 80; S Hayes, "A Review of Non-custodial Interventions with Offenders with Intellectual Disabilities" (2005) 17(1) *Current Issues in Criminal Justice* 69, 71.

27. Legislative Council, Select Committee on Juvenile Offenders, *Report on the Inquiry into Juvenile Offenders* (2005) [9.21]; T Grisso, "Juvenile Offenders and Mental Illness" (1999) 6(2) *Psychiatry, Psychology and Law* 144. See also, *R v H* [2005] NSWCCA 282, [87].

28. S Hayes, "Learning and Intellectual Disabilities and Juvenile Crime" in A Borowski and I O'Conner (eds), *Juvenile Crime, Justice and Corrections* (Longman, 1997) 190.

29. S Hayes, "A Review of Non-custodial Interventions with Offenders with Intellectual Disabilities" (2005) 17(1) *Current Issues in Criminal Justice* 69, 71.

30. R Hayes, O Nielssen, D Sullivan, M Large and K Bayliff, "Evidence-Based Mental Health Law: The Case for Legislative Change to Allow Earlier Intervention in Psychotic Illness" (2007) 14(1) *Psychiatry, Psychology and Law* 35, 36, 39. The "prodrome" is used to describe the period between observations of behavioural change and emergence of acute symptoms of psychosis.

31. T Grisso, "Juvenile Offenders and Mental Illness" (1999) 6(2) *Psychiatry, Psychology and Law* 143, 144-145.

- multiple types of mental illness;<sup>32</sup> and
  - a cognitive or mental health impairment coupled with another disorder such as substance or alcohol abuse.
- 1.20 In such cases, the difficulties faced when navigating the criminal justice system may be compounded. For instance, the young person may encounter problems accessing particular services because a particular disorder or impairment may make the young person ineligible to utilise a service or participate in a program: we note in paragraph 4.39 that where a young person has a severe mental illness or intellectual disability they may not be suitable to participate in the Youth Drug and Alcohol Court (“YDAC”) program.

## International Instruments

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- 1.21 The criminal justice response to young people with cognitive and mental health impairments is influenced by a number of international instruments. Australia is signatory to a range of international instruments that are relevant to the context of this review. In CP 5 we consider a number of instruments applicable to people with cognitive and mental health impairments, including the *International Covenant on Civil and Political Rights*, the *Declaration on the Rights of Disabled Persons*, and the *Convention on the Rights of Persons with Disabilities*.<sup>33</sup> Of particular relevance to this consultation paper is that Australia is a signatory to the United Nation’s *Convention on the Rights of the Child* (“CROC”).<sup>34</sup> CROC recognises that young people may require special safeguards and protections due to their vulnerability. For example, CROC states that “[i]n all actions concerning children whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. It also addresses matters such as detention and punishment.<sup>35</sup> Further, CROC recognises the rights of mentally and physically disabled children, as well as a general right to health care and treatment.<sup>36</sup>
- 1.22 The United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (“Beijing Rules”) highlight the importance of treating young people differently to adults in the criminal justice system, for example, through the application of young person-specific laws and rules.<sup>37</sup> Additionally, the United Nations *Guidelines for the Prevention of Juvenile Delinquency* encompass issues such as socialisation, the administration of juvenile justice as well as research and policy development. The United Nations *Rules for the Protection of Juveniles Deprived of their Liberty*

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32. See Table 2, where we note that 73% of young people in custody had two or more psychological disorders.

33. CP 5, [1.42]-[1.50].

34. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

35. Articles 3 and 37. See also art 40.

36. Articles 23-25.

37. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR, 40th sess, 96th plenary meeting, UN Doc A/RES/40/33 (1985) (“*Beijing Rules*”) art 2.3.

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address areas such as juveniles under arrest and awaiting trial as well as the management of juvenile facilities.<sup>38</sup>

- 1.23 As noted in CP 5, ratification of international treaties does not mean that provisions are automatically incorporated into Australian law. However, jurisdictions may be required to review and report on implementation regularly. Reference to these treaties may be made when assessing legislation.<sup>39</sup> For example, the NSW Legislation Review Committee, in considering legislative amendments establishing a youth conduct orders scheme, expressed concern that some aspects of the scheme may not comply with CROC.<sup>40</sup> The content of international instruments may also affect the approach of judges in individual cases.<sup>41</sup>
- 1.24 Additionally, under particular instruments, complaints may be made to the United Nations Human Rights Committee. In certain circumstances, the Committee can consider whether an instrument has been violated and can present its views to the relevant country and complainant.<sup>42</sup> The Committee has, for example, examined complaints regarding violations of the *International Covenant on Civil and Political Rights*. One complaint was made in relation the treatment of a 16-year-old Indigenous man, who had a mild intellectual disability and exhibited behaviours which led to the prescription of anti-psychotic medication. This young man was transferred to an adult correctional centre, where he was segregated from other inmates and where he attempted suicide on several occasions. It was also alleged that he was stripped of all clothing (except underwear) while in extended confinement. The Committee identified violations of Article 10 and Article 24(1) of the Covenant (not treated appropriately in light of age and legal status) and noted:

extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt.<sup>43</sup>

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38. *United Nations Guidelines for the Prevention of Juvenile Delinquency*, GA Res 45/112, UN GAOR, 68th plenary meeting, UN Doc A/RES/45/112 (1990).

39. See CROC, art 44; Commonwealth Attorney-General's Department, *Australia's Combined Second and Third Reports under the Convention of the Rights of the Child* (2003).

40. Legislation Review Committee, *Legislation Review Digest*, No 12 of 2008, 15-19. Youth conduct orders are discussed in para 4.17-4.22.

41. See *Mabo v Queensland (No 2)* (1991-1992) 175 CLR 1, 42; *Minister for Immigration and Ethnic Affairs v Teoh* (1994-1995) 183 CLR 273, 287, 291; *Dietrich v The Queen* (1992) 177 CLR 292, 360, 372-3; *Polites v The Commonwealth* (1945) 70 CLR 60, 68-69.

42. See, for example, *Optional Protocol to the International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

43. United Nations Human Rights Committee, *Brough v Australia Communication No 1184/2003* CCPR/C/86/D/1184/2003, [9.4].

## Policy

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### State plan

- 1.25 The NSW State Plan plays an important role in identifying government service delivery goals, and ways in which such goals can be achieved and measured. The NSW State Plan has a number of listed priorities that may impact on young people with cognitive and mental health impairments that come into contact with the criminal justice system. Examples include “reduced rates of crime, particularly violent crime”, “reduce re-offending”, “reduce levels of antisocial behaviour” and “improve outcomes in mental health”. The plan identifies diversionary mechanisms and early intervention (such as youth conduct orders) as methods of reducing re-offending.<sup>44</sup>

### Reviews

- 1.26 Reviews conducted or reports produced in the area of juvenile justice are significant because they can help highlight issues, or propose reforms that improve the juvenile justice system. Ultimately, this can lead to potential legislative change or changes to services and programs. In CP 5 we consider significant inquiries that have taken place in relation to mental health and disability services.<sup>45</sup> Below, we consider key reviews that have been conducted in relation to young people and the criminal justice system.

#### *Past reviews*

- 1.27 In 1990 the Youth Justice Coalition produced *Kids In Justice: a blueprint for the 90s*. The Youth Justice Coalition is now a “network of youth workers, children’s lawyers, policy workers and academics who work to promote the rights of children and young people in NSW and across Australia”.<sup>46</sup> *Kids in Justice* was funded by the Law Foundation of NSW<sup>47</sup> and was described as “undoubtedly the most comprehensive report on the New South Wales Juvenile Justice System yet released”.<sup>48</sup> It highlighted many issues including the lack of reliable data available in the area of juvenile justice, the relationship between crime and age, compliance with international instruments and overrepresentation of Indigenous people in the juvenile justice system.<sup>49</sup> Recommendations emerging from this report included the

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44. NSW Government, *NSW State Plan* (2010) 56, 62, 66, 68. It has been argued that the aim of reducing re-offending is contradictory to other aims such as tightened monitoring of those at high risk of re-offending: K Wong, B Bailey, D Kenny (Youth Justice Coalition), *Bail Me Out: NSW Young People and Bail* (2010) (“YJC Report”) 1.

45. CP 5, [1.57]-[1.66].

46. YJC Report, i.

47. Youth Justice Coalition, *Kids in Justice a blueprint for the 90s: Full Report of the Youth Justice Project* (1990). The YJC was then described as “an informal group of workers in youth, welfare and legal sectors concerned about juvenile justice issues”: ix.

48. NSW Legislative Council Standing Committee on Social Issues, Parliament of NSW, *Juvenile Justice in New South Wales* (1992) 8.

49. Youth Justice Coalition, *Kids in Justice a blueprint for the 90s: Full Report of the Youth Justice Project* (1990) 22-23, 107-108, 177-182.



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formation of the Juvenile Justice Advisory Council and the creation of an Office of Juvenile Justice and Crime Prevention.<sup>50</sup>

- 1.28 A NSW Legislative Council Standing Committee on Social Issues report followed the Youth Justice Coalition report. The Committee report was referred to the Juvenile Justice Advisory Council (“JJAC”). The JJAC produced a *Green Paper* in 1993, and the government responded to this with a *White Paper* in 1994.<sup>51</sup> The *Green Paper* highlighted concerns such as the ad hoc and non-specialist nature of psychiatric services provided to young offenders. Additionally, the JJAC expressed concern that limited specialist resources were available to young people with mental health problems.<sup>52</sup> The JJAC also noted the difficulty of identifying young people with intellectual disabilities in the criminal justice system.<sup>53</sup> Recommendations from JJAC included specialist mental health services, integrated service delivery and screening of juveniles entering into custody.<sup>54</sup>
- 1.29 The *White Paper* explored a number of aspects of the juvenile justice system, including community alternatives to court processing and community based sentencing options.<sup>55</sup> The paper also considered health and mental issues that apply to juvenile offenders. The government signalled that specialist adolescent mental health services would be made available for young offenders, as well as specialist medical and psychiatric services in rural areas for young people on community based orders. The importance of a coordinated and integrated response from relevant government departments was highlighted, the government noting that a “continuum of services is what these young people need”.<sup>56</sup>
- 1.30 While the juvenile justice system has significantly evolved since these earlier reviews, the issues highlighted in them demonstrate the persistent and complex nature of the problems encountered by young people with cognitive and mental health impairments in the criminal justice system.

### *Recent reviews*

- 1.31 More recently, a number of reviews have been conducted that are relevant to this consultation paper. These include *Young Offenders*; published by this Commission

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50. Youth Justice Coalition, *Kids in Justice a blueprint for the 90s: Full Report of the Youth Justice Project* (1990) Recommendations 20 and 26.

51. Juvenile Justice Advisory Council of NSW, *Green Paper: Future Directions for Juvenile Justice in New South Wales* (1993); New South Wales, *White Paper, Breaking the Crime Cycle: New Directions for Juvenile Justice in NSW* (1994).

52. Juvenile Justice Advisory Council of NSW, *Green Paper: Future Directions for Juvenile Justice in New South Wales* (1993) 229.

53. Juvenile Justice Advisory Council of NSW, *Green Paper: Future Directions for Juvenile Justice in New South Wales* (1993) 236.

54. See Juvenile Justice Advisory Council of NSW, *Green Paper: Future Directions for Juvenile Justice in New South Wales* (1993) 228-237.

55. New South Wales, *White Paper, Breaking the Crime Cycle: New Directions for Juvenile Justice in NSW* (1994) 13-19.

56. New South Wales, *White Paper, Breaking the Crime Cycle: New Directions for Juvenile Justice in NSW* (1994) 21.

in 2005. This report addressed sentencing, bail and diversionary mechanisms under the *Young Offenders Act 1997* (NSW).<sup>57</sup>

- 1.32 Additionally, the *Special Commission of Inquiry into Child Protection Services in New South Wales*, conducted by the Hon James Wood AO QC, was established in 2007. The report emerging from this inquiry was released in 2008. Part of the report specifically considers child protection and the criminal justice system, and makes recommendations with respect to bail.<sup>58</sup> The government has developed an action plan in response to this Report.<sup>59</sup>
- 1.33 In Chapter 2 we consider a number of recent reports that discuss the issue of bail and young people.<sup>60</sup> The Youth Justice Coalition report, *Bail me out: NSW Young People and Bail*, addresses what the Coalition has identified as a “priority policy area”, specifically “the issue of bail and its impact on young people in the juvenile justice system” as well as the issue of bail and accommodation. The report raises questions, such as the relationship between bail conditions and re-offending, the impact of service availability and “[w]hat community services and models of therapeutic interventions can support young people whilst on bail”?<sup>61</sup> The Youth Justice Coalition report makes recommendations to help direct further reform, for example, the implementation of residential bail support programs, modifications to provisions of the *Bail Act 1978* (NSW) and increased training for police.<sup>62</sup> The report by UnitingCare Burnside, *Releasing pressure on remand: Bail support solutions for children and young people in New South Wales*, was produced after a roundtable discussion of the Council of Social Service of NSW. The UnitingCare Burnside report argues, “in order to effectively divert young people from the juvenile justice system, a range of support services must be available”, and recommends the implementation of a residential bail support program, changes to court processes and increased resources for early intervention programs.<sup>63</sup> Recently, the Criminal Law Review Division of the Department of Justice and Attorney General released a review of the *Bail Act 1978* (NSW) and an accompanying public consultation draft of the Bail Bill 2010.<sup>64</sup>
- 1.34 Earlier this year Noetic Solutions Pty Ltd was commissioned by the then Minister for Juvenile Justice, the Hon Graham West MP, and Juvenile Justice (within the Department of Human Services) to “undertake a strategic and comprehensive

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57. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005).

58. J Wood, *Special Commission of Inquiry into Child Protection Services in New South Wales* (2008) Recommendation 15.1.

59. NSW Government, *Keep Them Safe: A shared approach to child wellbeing* (2009).

60. YJC Report; UnitingCare Burnside, *Releasing pressure on remand: Bail support solutions for children and young people in New South Wales* (2009).

61. YJC Report, iv-v.

62. YJC Report, v-vii.

63. UnitingCare Burnside, *Releasing pressure on remand: Bail support solutions for children and young people in New South Wales* (2009) 4-7. UnitingCare Burnside also developed a background paper for purpose of this Roundtable discussion: UnitingCare Burnside, *Locked into remand: Children and young people on remand in New South Wales, Background paper* (2009).

64. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010).

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review of juvenile justice in New South Wales” (“Noetic review”).<sup>65</sup> Issues addressed by the Noetic review include:

- adoption of a bipartisan approach to juvenile justice “based on a recognition that children and young people are both important and different, that rehabilitation and diversion underpin the State’s approach to juvenile justice and that criticism of the government of the day on the issue be evidence based”,<sup>66</sup>
- recommendations aimed at establishing an evaluation framework around juvenile justice programs;<sup>67</sup>
- recommendations aimed at addressing the application of bail legislation and diversionary mechanisms to young people;<sup>68</sup>
- development of a strategy or framework, setting out a philosophical approach, long term goals and bringing together a range of services, projects and programs available to young people;<sup>69</sup>
- recommendations aimed at intervening early in the lives of “children at risk”;<sup>70</sup>
- recommendations aimed at making the application of diversionary options consistent;<sup>71</sup>
- review of the role of police;<sup>72</sup>
- the difficulty in accessing the services of, and sentencing options available to, the Children’s Court in regional and rural areas;<sup>73</sup>
- addressing the increasing number of young people in detention; and<sup>74</sup>
- effective reintegration of young people following release from custody.<sup>75</sup>

1.35 The review also notes the prevalence of intellectual disability and mental illness in the juvenile justice system, recommending that existing programs for identification, assessment and early intervention for young people with intellectual disability and mental illness be expanded.<sup>76</sup>

1.36 The government has responded to the Noetic review, noting support for certain key recommendations such as the development of a bipartisan approach to juvenile justice.<sup>77</sup> The government further indicated that it would keep some of the

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65. Noetic review, iv-v.

66. Noetic review, vi-vii, Recommendations 1-4.

67. Noetic review, vi-vii, Recommendations 1-4.

68. Noetic review, vii, Recommendations 6-14, 17-24.

69. Noetic review, vii, Recommendations 26-30.

70. Noetic review, vii. Recommendations 32-34, 52.

71. Noetic review, vii-viii, Recommendations 39-40.

72. Noetic review, vii-viii, Recommendations 35-41.

73. Noetic review, viii, Recommendations 46-48.

74. Noetic review, viii, Recommendations 52-53.

75. Noetic review, viii.

76. Noetic review, Recommendations 59-62.

77. NSW Government, *Government Response to Juvenile Justice Review* (2010) 3.

recommendations under consideration, listed current initiatives that the government regarded as consistent with recommendations and also noted that it did not accept some of the recommendations.<sup>78</sup>

- 1.37 One aspect of the criminal justice system that is of particular relevance to young people with cognitive and mental health impairments is penalty or infringement notices. The Commission is currently conducting a review of penalty notices, and the consultation paper produced as part of that review addresses issues relevant to vulnerable people, including young people and people with cognitive and mental health impairments.<sup>79</sup>

### *Indigenous young people*

- 1.38 A number of reports have also considered issues encountered by Indigenous young people with cognitive or mental health impairments.<sup>80</sup> These reports highlight the importance of culturally appropriate assessment tools and intervention noting, for example, that the “Indigenous view of health, including mental health, is a holistic one”.<sup>81</sup> The reports also discuss the particular disadvantage encountered by Indigenous people. Such disadvantage includes, for example, increased likelihood of having an intellectual disability when compared with non-Indigenous young people, as well as general overrepresentation in the juvenile justice system.<sup>82</sup>
- 1.39 The overrepresentation of Indigenous young people is also specifically addressed in a number of the reviews discussed above.<sup>83</sup>

### **Bodies**

- 1.40 Organisations or groups such as the NSW Commission for Children and Young People and the Young Offenders Advisory Council are specifically tasked with

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78. NSW Government, *Government Response to Juvenile Justice Review* (2010) 7, 17.

79. See NSW Law Reform Commission, *Penalty Notices*, Consultation Paper 10 (2010).

80. Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008); Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Indigenous young people with cognitive disabilities and Australian juvenile justice systems* (2005).

81. Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Indigenous young people with cognitive disabilities and Australian juvenile justice systems* (2005) 6; Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008) 65.

82. Australian Human Rights Commission, *Preventing Crime and Promoting Rights for Indigenous Young People with Cognitive Disabilities and Mental Health Issues* (2008) 11-12; Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, *Indigenous young people with cognitive disabilities and Australian juvenile justice systems* (2005) 8.

83. See Noetic review, [432]-[494], Recommendations 66-75; J Wood, *Special Commission of Inquiry into Child Protection Services in New South Wales* (2008) Chapter 18.

providing independent advice to the government on issues that impact on young people.<sup>84</sup>

## Sources of law

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1.41 The law has responded to the particular needs of young people in a number of contexts. Different, or additional, legislative provisions may apply to or affect a young person with a cognitive or mental health impairment in the criminal justice system. Significant reform of the system as it applies to young people occurred in 1987 when care and welfare matters were separated from criminal proceedings, the Children's Court was established, non-custodial sentencing options for young people were widened and the age of criminal responsibility was confirmed.<sup>85</sup> Specific legislation relevant to young people now include:<sup>86</sup>

- **Children (Criminal Proceedings) Act 1987 (NSW):** covers areas such as criminal proceedings generally, the conduct of proceedings in the Children's Court, the age of criminal responsibility, penalties, and youth conduct orders.
- **Children's Court Act 1987 (NSW):** addresses the constitution of the Children's Court of NSW and matters such as the Children's Court advisory committee.<sup>87</sup>
- **Children (Community Service Orders) Act 1987 (NSW):** deals with young people's community service orders made by the court, and the administration and variation of such orders.
- **Children (Detention Centres) Act 1987 (NSW):** establishes detention centres and outlines requirements regarding the administration of the centres.
- **Young Offenders Act 1997 (NSW):** establishes a system of warnings and cautions, as well as a youth justice conferencing scheme, described as a "graduated hierarchy of interventions"<sup>88</sup> for young people. The Act provides an alternative process to court proceedings and allows young people to be diverted out of the criminal justice system in certain circumstances.<sup>89</sup> The Act contains a number of guiding principles relevant to diversion; these are listed in paragraph 4.3.

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84. See *Commission for Children and Young People Act 1998* (NSW) s 11; NSW Juvenile Justice, "Young Offenders Advisory Council Terms of Reference", <[http://www.djj.nsw.gov.au/pdf\\_htm/YOAC%20TOR%20Final%20Dec%2009.pdf](http://www.djj.nsw.gov.au/pdf_htm/YOAC%20TOR%20Final%20Dec%2009.pdf)>.

85. *Children (Criminal Proceedings) Act 1987* (NSW); *Children (Care and Protection) Act 1987* (NSW); *Children (Community Service Orders) Act 1987*; *Children (Detention Centres) Act 1987* (NSW); *Children's Court Act 1987* (NSW). NSW Legislative Council Standing Committee on Social Issues, *Juvenile Justice in New South Wales* (1992) 7.

86. Also see *Children's (Detention Centre) Regulation 2005* (NSW); *Children (Interstate Transfer of Offenders) Act 1988* (NSW); *Children's Court Rule 2000* (NSW).

87. This was not the first piece of legislation establishing a Children's Court in NSW: See *Neglected Children and Juvenile Offenders Act 1905* (NSW).

88. J Chan (ed), *Reshaping Juvenile Justice: The NSW Young Offenders Act 1997* (Sydney Institute of Criminology, 2005) 21.

89. See *Young Offenders Act 1997* (NSW) s 3; J Chan (ed), *Reshaping Juvenile Justice: The NSW Young Offenders Act 1997* (Sydney Institute of Criminology, 2005) 21.

- ***Children and Young Persons (Care and Protection) Act 1998 (NSW)***: provides for the care and protection of, and the provision of services to, young people as well establishing principles and responsibilities governing child protection intervention.
- ***Children (Criminal Proceedings) Regulation 2000 (NSW)***: deals with youth conduct orders, and other matters under the *Children (Criminal Proceedings) Act 1987* (NSW).

1.42 Primarily, this paper concerns the *Children (Criminal Proceedings) Act 1987* (NSW) and the *Young Offenders Act 1997* (NSW). Importantly, s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) contains a series of principles that apply to all courts (or bodies) that exercise criminal jurisdiction with respect to young people:<sup>90</sup>

- (a) that 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,
- (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
- (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
- (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
- (e) that 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,
- (f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,
- (g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,
- (h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

1.43 The *Children (Criminal Proceedings) Act 1987* (NSW) also provides that criminal proceedings should be commenced against a young person by way of a court attendance notice, instead of charge and arrest. Some exceptions apply, for example, for certain types of offences or in cases of likely non-compliance with a notice.<sup>91</sup>

1.44 We also consider the *Bail Act 1978* (NSW), which applies to both adults and young people, and contains provisions relating to the power of the police and courts to grant bail. Recent changes to the *Bail Act 1978* (NSW) have been identified as

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90. *Children (Criminal Proceedings) Act 1987* (NSW) s 4, s 6. See Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2006-07* (2008) 109.

91. *Children (Criminal Proceedings) Act 1987* (NSW) s 8; Noetic review, [245].

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having unintended consequences for the juvenile justice system.<sup>92</sup> This is discussed in greater detail in Chapter 2.<sup>93</sup>

- 1.45 In addition to legislative provisions, there has also been longstanding judicial recognition that the community interest in trial and punishment of criminal offences is tempered by other factors. For example, the recognition that offending by young people may reflect a lack of maturity rather than deliberate criminality and the community interest in promoting the rehabilitation and positive development of young people.<sup>94</sup> This is reflected in special sentencing principles that apply to young people (discussed in Chapter 6).

### Courts

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- 1.46 The NSW Children's Court is a specialist court which handles criminal cases that concern young people as well as matters regarding the care and protection of young people. The establishment of the Children's Court recognises, and responds to, the special needs of children in the legal system:

The need for such a court grew out of late nineteenth century thinking that, having regard to the age (immaturity) and often poor health and socio-economic status of young offenders, care and protection, rehabilitation and reform, rather than the application of deterrent and retributive sanctions, provided the best prospects of saving young offenders from a life of crime.<sup>95</sup>

- 1.47 In general, children's courts assist in keeping young people separate from adults and attempt to apply speedier, age-appropriate procedures when dealing with young people.<sup>96</sup> It has been argued that attempting to define rigidly the functions of children's courts is unwise, and that they are best viewed as part of a broader system, which should "seek to provide flexibility and a variety of responses to youthful offending".<sup>97</sup>
- 1.48 The Children's Court deals with young people who are under the age of 18 (or who were under the age of 18 when the offence was committed). The Children's Court

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92. Noetic review, vii.

93. There is other legislation and regulations targeted at young people that are not discussed here, see Noetic review, [165] for more examples.

94. See *R v GDP* (1991) 53 A Crim R 112; *R v Hawkins* (1993) 67 A Crim R 64, 66; *R v Pham* (1991) 55 A Crim R 128, 135; *R v Gordon* (1994) 71 A Crim R 459, 469; *R v Tran* [1999] NSWCCA 109, [9]-[10]. See also generally NSW Law Reform Commission, *Young Offenders*, Report 104 (2005); S Vignaendra and G Hazlitt, *The Nexus Between Sentencing and Rehabilitation in the Children's Court of NSW*, Judicial Commission of NSW Research Monograph 26 (2005).

95. S Vignaendra and G Hazlitt, *The Nexus Between Sentencing and Rehabilitation in the Children's Court of NSW*, Judicial Commission of NSW Research Monograph 26 (2005) vii. All states and Territories either have specialist courts or divisions with Children: Magistrates Court of Tasmania (Children's Division), Children's Court of Victoria, Children's Court of Western Australia, Children's Court in the Magistrates Court and the Children's Court of Queensland, Youth Court of South Australia, Youth Justice Court in the Northern Territory and the Magistrates Courts can act as a Children's Court in the ACT.

96. A Borowski and I O'Conner (eds), *Juvenile Crime, Justice and Corrections* (Longman, 1997) 304.

97. A Borowski and I O'Conner (eds), *Juvenile Crime, Justice and Corrections* (Longman, 1997) 305-306.

has jurisdiction to hear and determine proceedings in respect of any offence other than a “serious children’s indictable offence”. Matters before the Children’s Court are to be dealt with summarily.<sup>98</sup> While “serious children’s indictable offences” are excluded from the jurisdiction of the Children’s Court, the Court has jurisdiction to hear and determine committal proceedings in respect of such offences.<sup>99</sup> The District Court or Supreme Court deals with serious children’s indictable offences, which include, for example, homicide and offences punishable by imprisonment for life or for 25 years.<sup>100</sup> Additionally a young person may elect to appear in a superior court in certain circumstances, or the Children’s Court may determine that it would not be appropriate to proceed summarily.<sup>101</sup> Certain traffic offences are also excluded from the jurisdiction of the Children’s Court.<sup>102</sup>

- 1.49 The NSW YDAC is a program aimed at reducing drug and alcohol related crime by young people under the age of 18.<sup>103</sup> If a young person with a drug or alcohol problem meets particular criteria, such as pleading guilty to an offence and ineligibility for diversion under the *Young Offenders Act 1997* (NSW), they can be referred to the YDAC. The program utilises both judicial and therapeutic interventions that are intended to reduce or manage drug and/or alcohol usage. This could include, for example, the imposition of bail conditions or access to a case worker and health services.<sup>104</sup>

## Services, treatment and programs

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- 1.50 Many agencies and organisations deliver services to young people with cognitive and mental health impairments in the criminal justice system, including Juvenile Justice, Community Services, Housing NSW, Corrective Services, NSW Police, and the Commission for Children and Young People.<sup>105</sup> Some organisations may have specialist staff dealing with young people such as Youth Liaison Officers within NSW Police, or the Children’s Legal Service within Legal Aid.
- 1.51 Service delivery can be complex, in part due to the rapid development of young people, the fast pace at which a young person may navigate the criminal justice system, and difficulties ensuring continuity of service delivery. Below we provide a non-exhaustive overview of various services and programs that could apply to young people with cognitive and mental health impairments when encountering the criminal justice system.

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98. *Children (Criminal Proceedings) Act 1987* (NSW) s 28, s 31(1).

99. *Children (Criminal Proceedings) Act 1987* (NSW) s 28.

100. See *Children (Criminal Proceedings) Act 1987* (NSW) s 3.

101. *Children (Criminal Proceedings) Act 1987* (NSW) s 31. See also s 16, s 18.

102. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(2).

103. Participation in the program is not necessarily voluntary.

104. The Children’s Court of NSW, *Practice Note 1: Practice Note for Youth Drug and Alcohol Court* (2009) 1. See para 4.38-4.44.

105. See Noetic review, [69]-[143], for a comprehensive overview of stakeholders in this area.



## Identification

- 1.52 As we note in para 1.16 identification of cognitive and mental health impairments in young people may be particularly difficult. Yet identification is vital, because it can lead to appropriate treatment, helps to determine effective and efficient allocation of resources, demonstrates eligibility for diversion, triggers different sentencing considerations and potentially reduces the “cycles of admissions to the criminal justice system”.<sup>106</sup>
- 1.53 There is no systematic screening for either mental health or intellectual disability at the police or court stage of the juvenile justice process.<sup>107</sup> However, the Adolescent Court and Community Team (“ACCT”) operate in several Children’s Courts across NSW. The team is run by the Justice Health Adolescent Health Service and staffed by psychiatrists, nurses and mental health clinicians. The service is targeted at 12-18 year-olds who have committed non-indictable offences.<sup>108</sup> It provides community based assessment and court liaison services.<sup>109</sup> Additionally, a Children’s Court magistrate has the power to order a clinical assessment of a young person by the Children’s Court Clinic.<sup>110</sup>
- 1.54 A young person’s legal representative may also arrange psychological or psychiatric assessment. However, a cognitive or mental health impairment may be missed. It has been noted, “only those young people displaying ‘obvious’ signs of cognitive/intellectual disability or mental illness, will be referred for assessment.”<sup>111</sup>
- 1.55 If a court is considering sentencing a young offender to detention (a “control order”) or imprisonment, it must first obtain a background report.<sup>112</sup> The background report must address matters that are “relevant to the circumstances surrounding the commission of the offence concerned”, including “the person’s disabilities”.<sup>113</sup> We discuss background reports in Chapter 6.

## Young people in custody and on community orders

- 1.56 The following Table provides a snapshot of information relevant to young people in the criminal justice system with cognitive and mental health impairments.

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106. J Ogloff, M Davis, G Rivers and S Ross, *The Identification of mental disorders in the criminal justice system*, Trends and Issues in Criminal Justice 334 (Australian Institute of Criminology, 2007) 2.

107. NSW Audit Office, *Addressing the Needs of Young Offenders* (2007) 18-21; J Ogloff, M Davis, G Rivers and S Ross, *The Identification of Mental Disorders in the Criminal Justice System* (2006) 30-31, Recommendations 5, 6, 7.

108. D Bradford and N Smith, *An Evaluation of NSW Court Liaison Services* (NSW Bureau of Crime Statistics and Research, 2009) 11.

109. NSW Health, Justice Health, *Adolescent Health*, <<http://www.justicehealth.nsw.gov.au/our-services/adolescent-health.html>>.

110. *Children’s Court Rule 2000* (NSW) cl 34.

111. Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Young People with Cognitive Disabilities and Australian Juvenile Justice Systems* (2005) 26.

112. *Children (Criminal Proceedings) Act 1987* (NSW) s 25.

113. *Children (Criminal Proceedings) Regulation 2005* (NSW) cl 31. See para 6.2.

Table 2: Young people in custody and on community orders

Key figures
<p>Young people in custody:</p> <ul style="list-style-type: none"> <li>▪ In the year 2008-2009 the average daily number of young people in custody was 427 (205 were of Indigenous background). There were 5,345 admissions into juvenile justice centres during the course of that year.<sup>114</sup></li> <li>▪ In a 2003 survey of young people held in custody, 88% "reported mild, moderate or severe symptoms consistent with a clinical disorder".<sup>115</sup> Preliminary results from the <i>2009 Young People in Custody Health Survey</i> indicate that 87% of people sampled had at least one psychological disorder and 73% had two or more disorders.<sup>116</sup></li> <li>▪ 48% percent of male, and 61% of female young people in custody reported <i>severe</i> symptoms consistent with clinical disorder.<sup>117</sup></li> <li>▪ 35% of young offenders had mild, moderate or severe symptoms consistent with personality disorder; 79% reported mild, moderate or severe symptoms consistent with psychosocial problems.<sup>118</sup></li> <li>▪ In a 2003 survey 17% of young people in custody had cognitive functioning "consistent with a possible intellectual disability", however a "culture fair" estimate of results consistent with intellectual disability was found to be 10%.<sup>119</sup> Preliminary results from the <i>2009 Young People in Custody Health Survey</i> indicate that 13.6% of young people in custody scored in the Extremely Low Range for IQ (less than 70). A further 32% were found to have an IQ between 70-79, a score that indicates borderline intellectual disability.<sup>120</sup></li> <li>▪ Indigenous young people are over-represented within the juvenile justice system, representing nearly 50% of the juvenile detention population. Indigenous young people are 28 times more likely to be detained than non-Indigenous young people (and twice as likely to have matters proceed to court).<sup>121</sup></li> </ul> <p>Young people on community orders:</p> <ul style="list-style-type: none"> <li>▪ 4,007 young offenders were supervised in the community in the year 2008-09.<sup>122</sup></li> <li>▪ 90% of young people under Juvenile Justice supervision are dealt with in the community and are not in custody.<sup>123</sup></li> <li>▪ In a 2003-2006 survey of young people serving community orders with the NSW Department of Juvenile Justice "40% reported severe symptoms on the Adolescent Psychopathology Scale consistent with a clinical disorder".<sup>124</sup></li> <li>▪ In 2003-2006 it was also found that 15% of young people serving community orders had IQ scores consistent with possible intellectual disability, and 11% met "both IQ and adaptive behaviour deficits consistent with DSM-IV criteria for (possible) intellectual disability" or 8% based on a "culture fair" assessment.<sup>125</sup></li> </ul>

114. NSW Department of Juvenile Justice, *Annual Report 2008-2009* (2009) 51-52.

115. NSW Department of Juvenile Justice, *2003 NSW Young People in Custody Health Survey: Key Findings Report* (2003) 22.

116. Department of Human Services (Juvenile Justice), *Submission MH28-2*, 2. Note that the 2009 information is diagnostic whereas the 2003 data is not.

117. NSW Department of Juvenile Justice, *2003 NSW Young People in Custody Health Survey: Key Findings Report* (2003) 22.

118. NSW Department of Juvenile Justice, *2003 NSW Young People in Custody Health Survey: Key Findings Report* (2003) 23.

119. NSW Department of Juvenile Justice, *2003 NSW Young People in Custody Health Survey: Key Findings Report* (2003) 21. The results were adjusted due to the percentage of the sample from Aboriginal or Torres Strait Islander and non-English speaking backgrounds. The report noted that young people from these categories would be expected to have lower verbal scores than those from an English speaking background, Therefore a "culture fair" estimate of numbers of young people with intellectual disability "could be based on numbers of ATSI and NESB young people scoring less than 70 on the WASI Performance IQ Scale, and the number of ESB young people scoring 70 or below on the WASI Full Scale IQ".

120. Department of Human Services (Juvenile Justice), *Submission MH28-2*, 2.

121. Department of Human Services (Juvenile Justice), *Submission MH28-2*, 2-3; Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2009* (Productivity Commission, 2009).

122. NSW Department of Juvenile Justice, *Annual Report 2008-2009* (2009) 40.

123. NSW Government, *Government Response to Juvenile Justice Review* (2010) 2.

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- 1.57 There are nine juvenile justice centres across NSW operated by Juvenile Justice.<sup>126</sup> Additionally, the Kariong Juvenile Correctional Centre is operated by Corrective Services. Juvenile Justice and Justice Health assess and treat young people with mental health issues in custody and in the community.<sup>127</sup> When a young person is admitted into a juvenile justice centre they undergo a screening process to identify mental health, suicide, self-harm and drug-related risks. Further assessment, intervention or referral may occur as a result of this assessment.<sup>128</sup>
- 1.58 The Justice Health, Statewide Mental Health Service has the responsibility for providing comprehensive mental health care to all forensic patients in the NSW correctional system. This can occur in “ambulatory, hospital, courts and community settings”.<sup>129</sup> Additionally a new forensic hospital, which has recently been opened in Malabar, contains an adolescent unit (“the Bronte unit”) providing specialist health care to patients aged between 14 and 21.<sup>130</sup> The unit provides educational and social activities, which may be especially important for young people because of their particular developmental needs. Justice Health notes that at the Bronte adolescent unit “[p]articular care is taken in the areas of child protection, consent and respect for the rights and needs of children and young persons”.<sup>131</sup>

### Service delivery before/after custodial sentences

- 1.59 Coordinated service delivery is a key issue when dealing with young people with cognitive and mental health impairments. Problems can be encountered because:
- Traditionally young offenders are not engaged by mainstream, clinic based services, and their treatment needs are difficult to negotiate across sectors. This gap in service delivery clearly identifies the need for the forensic mental health service to develop a collaborative emphasis with those services already engaged with this client group.<sup>132</sup>
- 1.60 Continuity of care is a significant issue for young people with a cognitive or mental health impairment. For example, it has been noted that 65% of young people in custody have a length of stay of up to one week and only 2.5% of young people

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124. DT Kenny, P Nelson, T Butler, C Lennings, M Allerton, and U Champion, *NSW Young People on Community Orders Health Survey 2003-2006: Key Findings Report* (The University of Sydney, 2006) 6, 25.

125. DT Kenny, P Nelson, T Butler, C Lennings, M Allerton, and U Champion, *NSW Young People on Community Orders Health Survey 2003-2006: Key Findings Report* (The University of Sydney, 2006) 6, 24.

126. This includes an emergency short-term accommodation unit at Broken Hill.

127. NSW Juvenile Justice, *Annual Report 2008-2009* (2009) 24; Justice Health, *Area Health Service Plan 2010 and Beyond* (2009) 53. Note that in 2003 the administration and delivery of health services to young people in detention was transferred from Juvenile Justice to Justice Health within the Department of Health: Noetic review, [40].

128. NSW Juvenile Justice, *Annual Report 2008-2009* (2009) 24.

129. Justice Health, “Statewide Mental Health Directorate”, <<http://www.justicehealth.nsw.gov.au/our-services/mental-health-directorate.html>>.

130. Justice Health, *Area Health Service Plan 2010 and Beyond* (2009) 81.

131. Justice Health, *Area Health Service Plan 2010 and Beyond* (2009) 81.

132. S Hicks, C McCormack, “A Collaborative Approach to the Delivery of Mental Health Services to Juvenile Offenders” (Paper presented at the Juvenile Justice: From Lessons of the Past to a Roadmap for the Future Conference, Sydney, 1-2 December 2003) 6.

stay for longer than 6 months.<sup>133</sup> Service coordination has proven to be particularly challenging.<sup>134</sup>

- 1.61 The “Community Integration Team” is a pre and post release program that offers continuity of care to recently released adolescents. It is targeted at young people “with an emerging or serious mental illness and/or problematic drug and alcohol use or dependence”.<sup>135</sup> Care is co-ordinated prior to, as well as during, the “critical” post release period and links the young person to specialist and general community services.<sup>136</sup> The ACCT also provide discharge planning for those in custody or occupying a mental health inpatient bed as well as case management.<sup>137</sup>
- 1.62 The Department of Ageing, Disability and Home Care run the Community Justice Program, to assist people with an intellectual disability exiting custody and who have a high risk of re-offending. The program provides casework, clinical and accommodation services.<sup>138</sup> The Noetic review noted that approximately 12 out of the 105 people currently on the program are young people.<sup>139</sup> The review also noted concerns expressed by stakeholders including low referrals to the program by Juvenile Justice, low acceptance rates into the program, delays in receiving services, and issues with the eligibility criteria.<sup>140</sup>
- 1.63 The Anti-Social Behaviour Pilot Project (commenced 2006) attempts to improve case coordination across participating agencies, which includes Juvenile Justice, Human Services, NSW Police, among many others. The project is targeted at managing “complex cases and crisis cases involving children, young people and families who live in, or are habitual visitors” to particular NSW Police administrative areas.<sup>141</sup> The program utilises the development of integrated case plans and behaviour restrictions. The focus is on young people who are at risk of engaging in criminal activity rather than those who have committed an offence. The government will evaluate this program as part of its evaluation of the youth conduct orders scheme.<sup>142</sup>
- 1.64 The Intensive Supervision Program (“ISP”) was launched in 2008 and attempts to reduce re-offending by utilising a multi-systemic therapy model. This model has proven successful in other jurisdictions. The program is targeted at young people

133. Justice Health, *Area Health Service Plan 2010 and Beyond* (2009) 8, 54.

134. Legislative Council, Select Committee on Mental Health, *Mental Health Services in New South Wales*, Final Report, Parliamentary Paper 368 (2002) [13.26].

135. Justice Health, “Community”, <<http://www.justicehealth.nsw.gov.au/locations/community.html>>. The service is offered in the Orana, Riverina and Central Coast regions.

136. Justice Health, *Area Health Service Plan 2010 and Beyond* (2009) 58.

137. Justice Health, “Adolescent Health”, <<http://www.justicehealth.nsw.gov.au/ourservices/adolescent-health.html>>.

138. Department of Aging, Disability and Home Care, *Annual Report 08/09* (2009) 63.

139. Noetic review, [405].

140. Noetic review, [405]. For example, the definition of “intellectual disability” means that clients are limited to those with an IQ of less than 70 and “deficits in two functional domains where the onset of the disability was during the developmental period, before 18 years of age”: NSW Department of Aging, Disability and Home Care, *Part D Service Specification, DADHC 07.68 Invitation to Pre-qualify: Panel of Providers Accommodations Support Services for People with a Disability* (2009) 10.

141. Privacy NSW, *Direction relating to the Case Coordination Partnership Project* (2006).

142. NSW Government, *Government Response to Juvenile Justice Review* (2010) 33.

who commit serious or repeat offences, “or whose severe anti-social behaviour increases their likelihood of offending”.<sup>143</sup> The program deals with behavioural problems, as well as tackling underlying problems such as substance abuse, financial problems, housing, family conflict, peer pressure and community ties.<sup>144</sup> The team meets with the young person and their family to assist them in addressing anti-social behaviour. The team also works with schools and police. Early indicators suggest a drop in offending rates of 60% while receiving ISP services, and then a further drop of 74% six months after ISP services were terminated. The program is currently being evaluated by the Bureau of Crime Statistics and Research (“BOCSAR”), the evaluation is due for completion in 2013. The government will consider expansion following this evaluation.<sup>145</sup>

### Mainstream programs – early intervention

1.65 The government has identified a range of mainstream programs that “involve early intervention and support services for young people with mental illness, or at risk of developing mental illness”.<sup>146</sup> Such programs may assist in addressing mental health issues and other issues prior to offending, or provide more community alternatives to criminal justice interventions. These programs are targeted at:

- improving links between inpatient and community services for young people and their families (Child and Adolescent Mental Health Services);
- providing mental health services for young people between 14-24 in a “youth friendly” setting, co-located with other services (Youth Mental Health Service Model);
- enabling partnerships between health and education providers (eg NSW School-Link Initiative);
- the development of a Youth Mental Health Facility providing clinical services as well as conducting research during early stages of mental illness;
- improving school attendance;
- strengthening overall family functioning and reducing risk of harm to young people (Family Case Management); and
- provision of support to vulnerable families.<sup>147</sup>

### Structure of this consultation paper

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1.66 This chapter has provided a brief overview of the criminal justice system as it applies to young people with cognitive and mental health impairments and

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143. Noetic review, [390].

144. NSW Juvenile Justice, *Annual Report 2008-2009* (2009) 44.

145. NSW Government, *Government Response to Juvenile Justice Review* (2010) 32.

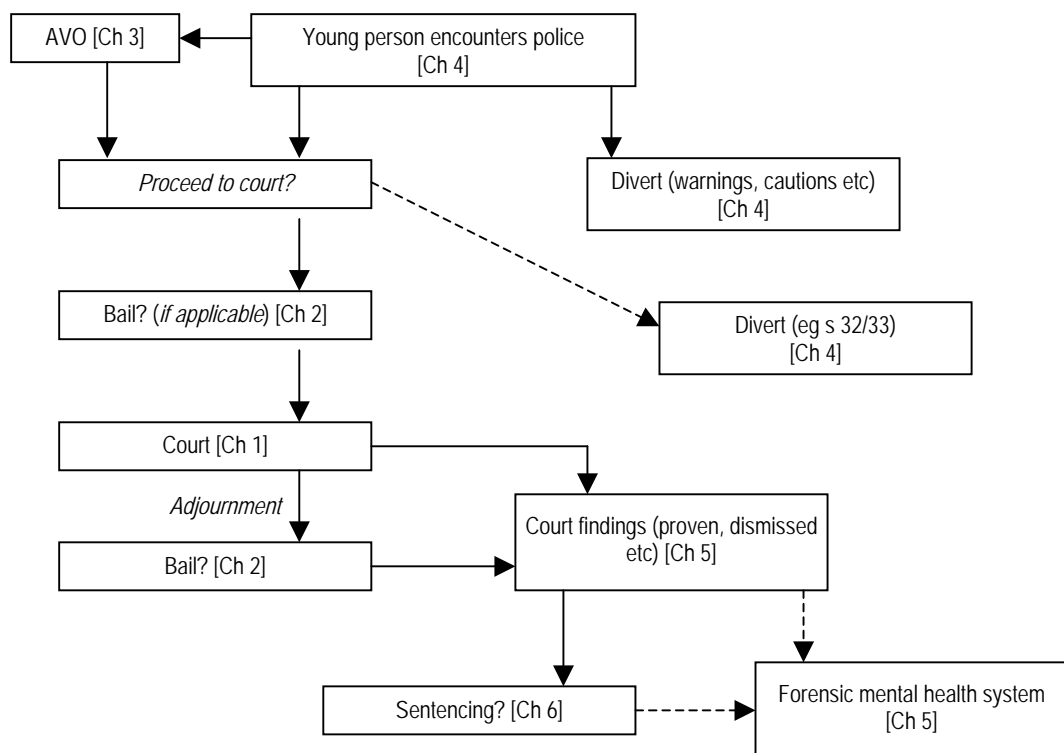
146. NSW Government, *Government Response to Juvenile Justice Review* (2010) 22.

147. NSW Government, *Government Response to Juvenile Justice Review* (2010) 22-24.

demonstrated why this group may have different needs from adults. Subsequent chapters highlight particular issues within the criminal justice system. Chapter 2 discusses bail legislation and how the application of this legislation might be problematic for young people with cognitive and mental health impairments. Chapter 3 explores the issue of AVOs taken out against young people and the potential impact of a cognitive and mental health impairment. Chapter 4 considers various diversionary options available to young people and asks whether these options are being applied appropriately where a young person has a cognitive and mental health impairment. Chapter 5 examines fitness to stand trial, the defence of mental illness and the forensic mental health system. The final chapter considers sentencing options available to different courts that have jurisdiction with respect to young people and the principles that apply.

1.67 The figure below illustrates how a young person with cognitive or mental health impairment might navigate the criminal justice system. It also outlines the structure of this consultation paper and where each element of the system is considered.

Figure 2: Progression through the criminal justice system



## Further issues?

1.68 The Commission is conscious of the limited information available in this area. We ask stakeholders to advise of any additional issues within the Commission’s terms of reference, which have not been identified in this consultation paper.

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## 2. Bail

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- 2.1 The *Bail Act 1978* (NSW) applies to all people, regardless of age.<sup>1</sup> The Act is utilised by NSW Police and courts when making determinations in relation to bail. As we note in CP 7, the power to grant bail can be a means of diverting people out of the criminal justice system and into programs for treatment as well as to support services.<sup>2</sup> Additionally, the impact of being refused bail and held on remand may have severe consequences for vulnerable groups:

Some patients are more vulnerable from a psychological, psychiatric and physical perspective in prison compared with other patients. The stress of incarceration can precipitate acute psychological decompensation and, in some cases, psychotic illness. Some prisoners are emotionally immature and may be adversely influenced by the hard-core prison population, and this may have a detrimental affect on their personality and subsequently their risk of re-offending. Other prisoners, possibly because of their age, physical stature or sexual orientation, may be victims of sexual abuse within the prison and this may also be a factor which a court considers during a bail application.<sup>3</sup>

- 2.2 In CP 7 we ask whether the provisions in the *Bail Act 1978* (NSW) setting out the conditions for the grant of bail make it harder for a person with a mental illness or cognitive impairment to be granted bail than other alleged offenders. We also ask if the Act should include an express provision requiring police or the court to take account of a person’s mental illness or cognitive impairment when deciding whether or not to grant bail.<sup>4</sup>
- 2.3 The Noetic review has identified the *Bail Act 1978* (NSW) as “a key piece of legislation affecting juvenile justice in NSW”.<sup>5</sup> There have been repeated calls for the review and modification of the application of bail to young people.<sup>6</sup> Here, we

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1. *Bail Act 1978* (NSW) s 5.

2. CP 7, [2.11]. As we have noted in a previous review, decisions relating to bail may significantly impact whether a young person progresses further into the system or is successfully diverted from it: NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) [10.3].

3. D Howard, B Westmore, *Crime and Mental Health Law in New South Wales* (LexisNexis Butterworths, 2nd ed, 2010) 569.

4. CP 7, Issues 7.6-7.7.

5. Noetic review, [242].

6. Youth Justice Coalition, *Kids in Justice a blueprint for the 90s: Full Report of the Youth Justice Project* (1990) Recommendations 153-156.



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consider the operation of the *Bail Act 1978* (NSW) with respect to young people with cognitive and mental health impairments.

2.4 Bail is a significant issue for young people with cognitive and mental health impairments. It raises challenging and contested legal policy issues.

(1) Approximately 55-60% of detainees held in juvenile detention centres are held on remand<sup>7</sup> and remand numbers have been steadily increasing.<sup>8</sup> While we do not know the percentage of the remand population that have cognitive or mental health impairments, figures outlined in Table 2 illustrate the prevalence of mental health and cognitive impairment of young people in custody generally, and these figures include young people remanded in detention.

(2) The refusal of bail can disrupt education, disconnect the young person from family and community,<sup>9</sup> and may, in certain circumstances impact on the content and severity of the sentence.<sup>10</sup> The Noetic review argues that remand could be a “significant factor in increasing the likelihood of recidivism”.<sup>11</sup>

(3) Practices and policies in relation to bail have been criticised for contravening the principle of using detention as a last resort, as contained in international instruments.<sup>12</sup> It is difficult to determine the number of young people held on remand that do not go on to receive custodial sentences. For example, it has been indicated that:

(a) Approximately 84% of young people remanded in custody “do not go onto receive a custodial order after sentencing”.<sup>13</sup>

(b) 78.3% of young people with a “remand episode” do not receive a control order within 12 months.<sup>14</sup>

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7. J Wood, *Special Commission of Inquiry into Child Protection Services in New South Wales* (2008) vol 2, [15.12] quoting NSW Juvenile Justice submission. “Remand” refers to where a person is held in a detention centre or prison but where the person has not yet been sentenced: Noetic review, [226].
  8. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 79.
  9. J Wood, *Special Commission of Inquiry into Child Protection Services in New South Wales* (2008) vol 2, [15.18]. See also S Vignaendra, S Moffat, D Weatherburn and E Heller, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, Crime and Justice Bulletin No 128 (Bureau of Crime Statistics and Research, 2009) 1; J Bargaen, “Embedding Diversion and Limiting the Use of Bail in NSW: A Consideration of the Issues Related to Achieving and Embedding Diversion in Juvenile Justice Practices” (2010) 21(3) *Current Issues in Criminal Justice* 467, 469.
  10. There is evidence that people who are held on remand may be disadvantaged when the matter proceeds to trial. For example due to fewer resources to prepare a defence, a less favourable impression when appearing in court, unable to demonstrate that they have the capacity to meet bail conditions: G Brignell, *Bail: An Examination of Contemporary Issues*, Sentencing Trends and Issues 24 (Judicial Commission of NSW, 2002) 3; NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) [10.4].
  11. Noetic review, [229] citing B Holman and J Ziedenburg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities* (Justice Policy Institute, 2006) 4-5.
  12. YJC Report, 1; CROC, art 37(b).
  13. Submission by Juvenile Justice to J Wood, *Special Commission of Inquiry into Child Protection Services in New South Wales* (2008) vol 2, [15.12].

- (c) 92.3% of “remand episodes” did not end with the young person being sentenced to detention.<sup>15</sup>

These figures may not include the number of young people who did not receive a custodial sentence because the time spent on remand was taken into account when sentencing. However, we know that at least half of young people spend only one day in custody on remand, and the average length of stay for young people on remand is 10.5 days. Therefore, the majority of young people do not spend enough time on remand to offset the average custodial sentence of 189 days.<sup>16</sup> This might suggest that the number of young people who do not receive a custodial sentence due to time spent on remand is small.

We also know that 8.5% of young people in custody (bail refused) with a matter before the Children’s Court have their charges dismissed. A further 9.3% have their charges “otherwise disposed of”.<sup>17</sup> “Otherwise disposed of” could include matters where the young person has been diverted out of the criminal justice system. It is arguable that remand in custody was not appropriate in cases where a custodial sentence has not been imposed, where charges have been dismissed or where the young person has been diverted out of the criminal justice system. However there may also be cases where a custodial sentence was not imposed, but remand was still appropriate. The Commission is interested to receive additional information on the issue of remand of young people with cognitive and mental health impairments, the circumstances surrounding remand and the outcome of charges.

- (4) Holding young people in custody is expensive.<sup>18</sup> The Youth Justice Coalition have argued that if young people were assisted in meeting bail conditions, “it could free up to over \$5 million a year” in Juvenile Justice’s budget.<sup>19</sup>
- (5) BOCSAR found that there was no significant association between the growth in the remand numbers of young people and the fall in property crime,<sup>20</sup> so remand may not be effective in reducing offending.

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14. NSW Juvenile Justice, *Annual Report 2008-2009* (2009) 54.

15. The same study indicated that 75.9% of “remand episodes” ended because the young person was released on bail: Australian Institute of Health and Welfare, *Juvenile Justice in Australia 2006-07* (2008) 86.

16. The median number of days spent on remand is one day and the average number of days spent on remand is 10.5 days. This is compared to a median of 120 days for sentenced detention, and an average of 189 days: Figures provided by NSW Juvenile Justice for year 2009-2010 on 19 August 2010.

17. 6.1% proceeded to a defended hearing with all charges dismissed, 2.4% had all charges dismissed without hearing and 9.3% had “all charges otherwise disposed of”: Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 2008* (2009) 62.

18. See Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 79; D Weatherburn, S Vignaendra, A McGrath, *The specific deterrent effect of custodial penalties on juvenile re-offending* (Criminology Research Council, 2009) 3; NSW Department of Juvenile Justice, *Annual Report 2008-2009* (2009) 22.

19. YJC Report, 24, this was based on the number of young people detained in 2007-2008 who were unable to meet bail conditions by the average number of days young people were held in custody on remand; J Bargaen, “Embedding Diversion and Limiting the Use of Bail in NSW: A Consideration of the Issues Related to Achieving and Embedding Diversion in Juvenile Justice Practices” (2010) 21(3) *Current Issues in Criminal Justice* 467, 469.

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(6) It has been observed that the growing Indigenous remand population is a “major driver” of the increased incarceration and over-representation of Indigenous young people. Further concerns have been expressed that “many of those refused bail and remanded in custody are under 15 years of age”.<sup>21</sup>

2.5 In this chapter we consider:

- the provisions that deal with bail determination, conditions and breach, and how these provisions interact; and
- the application of bail legislation to young people with cognitive and mental health impairments.

2.6 We seek views regarding whether bail legislation has been appropriately applied to young people with cognitive and mental health impairments, and how the operation of this legislation can be improved with respect to young people with such impairments.

Table 3: Young people and bail

Key figures
<ul style="list-style-type: none"><li>▪ 55-60% of detainees held in juvenile detention centres are held on remand.<sup>22</sup></li><li>▪ In the year 2008-09, 87% of admissions to juvenile justice centres were people on remand.<sup>23</sup></li><li>▪ In the year 2008-09, 855 young people remained in custody after being granted conditional bail, but being unable to meet conditions. The average number of days spent in custody after the young person is unable to meet conditions is nine days.<sup>24</sup></li><li>▪ 66% of young people remanded after breaching bail restrictions, breached bail by some means other than the commission of a further offence.<sup>25</sup></li><li>▪ Of the 2,363 Aboriginal young people who came into detention in the year 2007-08, 85% were held on remand.<sup>26</sup></li></ul>

## Operation of the Bail Act

2.7 Decisions in relation to bail can lead to a number of outcomes, including the grant of bail with conditions, unconditional bail, and refusal of bail. If bail is refused, the

20. S Vignaendra, S Moffat, D Weatherburn and E Heller, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, Crime and Justice Bulletin No 128 (Bureau of Crime Statistics and Research, 2009) 4.
21. C Cuneen, G Luke and N Ralph, *Evaluation of the Aboriginal Over-Representation Strategy: Final Report* (Institute of Criminology, University of Sydney Law School, 2006) 10, 129-130, Figure 6.10. See also Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 74.
22. J Wood, *Special Commission of Inquiry into Child Protection Services in New South Wales* (2008) vol 2 citing NSW Juvenile Justice submission, [15.12].
23. NSW Juvenile Justice, *Annual Report 2008-2009*, 52.
24. 2008-09 financial year: NSW Department of Juvenile Justice, *Annual Report 2008-2009* (2009) 54.
25. S Vignaendra, S Moffat, D Weatherburn and E Heller, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, Crime and Justice Bulletin No 128 (Bureau of Crime Statistics and Research, 2009) 3.
26. Human Services (Juvenile Justice), *Submission MH28-2*, 3.

young person will be held on remand. The *Bail Act 1978* (NSW) also permits a court to dispense with the requirement for bail; however, the Act does not indicate when it would be appropriate for a court to dispense with bail requirements. Bail may not be dispensed with for certain serious offences.<sup>27</sup>

2.8 Bail decisions and remand are relevant to various phases of the criminal trial process. For example, a person may be held on remand:

- after being charged with an offence, but prior to the person's first court appearance;
- adjournments during the course of a trial;
- the period between committal for trial or sentence and the person being brought before the District or Supreme Courts consequent on the committal; and
- the period between lodging an appeal and its determination.<sup>28</sup>

2.9 Bail decisions can be critical for people navigating the forensic mental health system. For example, under the *Mental Health (Forensic Provisions) Act 1990* (NSW) courts have the power to grant bail in accordance with the *Bail Act 1978* (NSW):

- prior to a fitness inquiry;<sup>29</sup>
- if the court refers a person to the Mental Health Review Tribunal ("MHRT") following a finding that the person is unfit to be tried;<sup>30</sup> and
- if the court is notified by the MHRT of its determination that a person will, on the balance of probabilities, become fit to be tried within 12 months.<sup>31</sup>

If, for example, a court wishes to release a person on bail following a finding of unfitness, "a court may consider imposing bail conditions requiring compliance with treatment or assessment".<sup>32</sup> The nature of conditions that can be imposed is discussed in para 2.19.

2.10 In this part we consider the operation of various aspects of the *Bail Act 1978* (NSW). In the next part we explore criticisms of the application of bail legislation that may be relevant to young people with cognitive and mental health impairments and possibilities for reform. The figure below illustrates the various stages of bail determinations and the relevance of cognitive and mental health impairments.

27. *Bail Act 1978* (NSW) s 8A-8F, s 10.

28. The *Bail Act 1978* (NSW) s 6 lists the periods where bail can be granted.

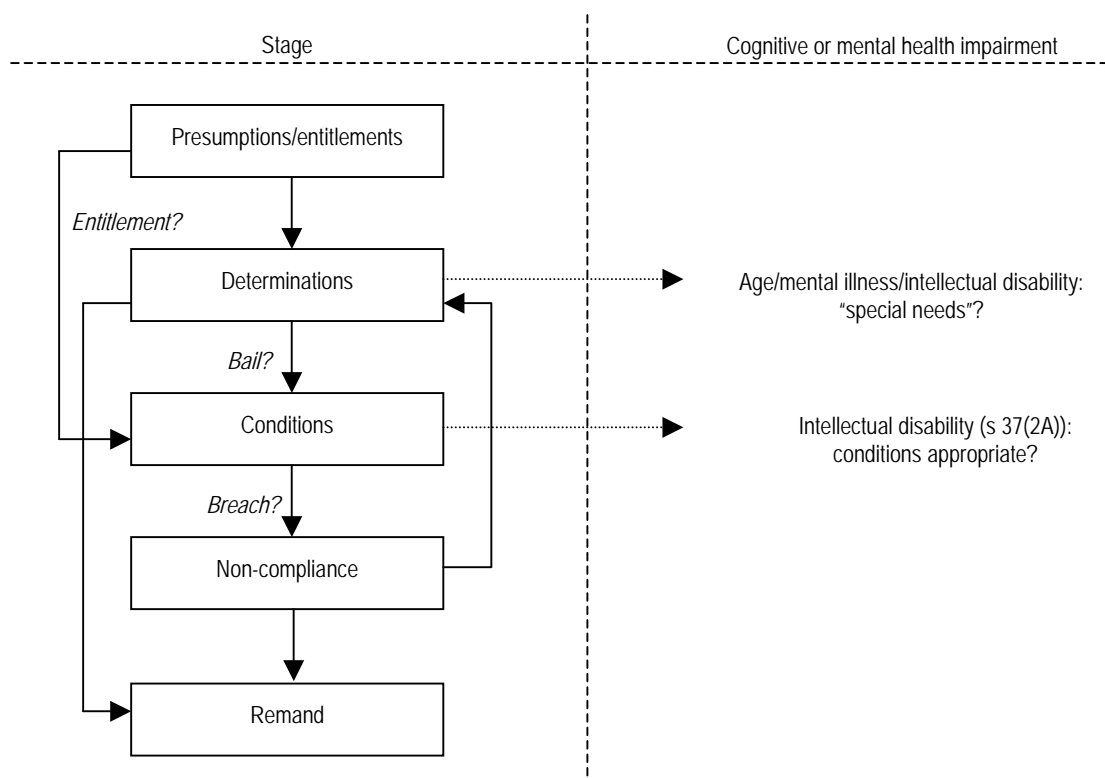
29. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 10.

30. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 14(b).

31. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 17.

32. D Howard, B Westmore, *Crime and Mental Health Law in New South Wales* (LexisNexis Butterworths, 2nd ed, 2010) 170.

Figure 3: Operation of the Bail Act



## Entitlements and presumptions

- 2.11 Generally, a court must determine whether a person should be held on remand or released on bail under s 32 of the *Bail Act 1978 (NSW)*. However, s 32 does not apply where a person is entitled to bail under s 8.<sup>33</sup> Section 8 provides that there is a right to be released on bail for “minor offences” including offences that are not punishable by a sentence of imprisonment and offences under the *Summary Offences Act 1988 (NSW)* that are punishable by a sentence of imprisonment.<sup>34</sup> A person accused of an offence to which s 8 applies is entitled to be granted bail, either conditionally or unconditionally, unless for example, the person has previously failed to comply with a bail undertaking or condition, or the person is in danger of physical injury.<sup>35</sup>
- 2.12 Additionally, the *Bail Act 1978 (NSW)* contains different presumptions with respect to bail depending on the nature of the offence or the criminal history of the alleged offender. These include:<sup>36</sup>
- for many offences, a presumption in favour of bail;

33. *Bail Act 1978 (NSW)* s 31.

34. *Bail Act 1978 (NSW)* s 8(1).

35. *Bail Act 1978 (NSW)* s 8(2).

36. *Bail Act 1978 (NSW)* s 8A-s 9D.

- for particular offences, for example certain drug offences, domestic violence offences, as well as for certain repeat offenders, no presumption in favour of bail;
- for particular offences, such as serious firearms and weapons offences, repeat property offenders, a presumption against bail;
- for murder, and serious repeat offenders, bail is to be granted in “exceptional circumstances” only.<sup>37</sup>

## Determinations

- 2.13 As outlined in s 32 of the *Bail Act 1978* (NSW), bail determinations include consideration of:
- the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered (taking into account matters such as the seriousness of the offence);
  - the protection of certain specified people;
  - the interests of the person; and
  - the protection and welfare of the community.<sup>38</sup>
- 2.14 Section 32 lists a number of criteria that must be taken into account when assessing the above considerations. Of particular relevance to our inquiry is the requirement that when considering the “interests of the person” a police officer, or court, can consider “special needs” arising from the fact that a “person is under the age of 18 years, or is an Aboriginal person or Torres Strait Islander, or has an intellectual disability or is mentally ill”.<sup>39</sup> We discuss clarification of “special needs” below, at para 2.42.
- 2.15 The legislation also provides that when taking into account the “details of the person’s residence” – which forms part of the assessment of the probability of the person appearing in court as directed<sup>40</sup> – where the accused is under the age of 18, the fact that the accused does not reside with a parent or guardian should be ignored.<sup>41</sup>
- 2.16 Note that there is a general requirement under s 8 of the *Children (Criminal Proceedings) Act 1987* (NSW) that criminal proceedings should not be commenced against a young person otherwise than by way of court attendance notice. Exceptions apply depending on the type of offence; the likelihood of the young person to comply with the notice or commit further offences; and the violent behaviour of the child or nature of the offence. Additionally, there is a requirement that where criminal proceedings are to be commenced against a child otherwise

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37. The need to access medical treatment may be considered exceptional circumstances: *R v Hantis* [2004] NSWSC 153.

38. *Bail Act 1978* (NSW) s 32(1).

39. *Bail Act 1978* (NSW) s 32(1)(b)(v).

40. *Bail Act 1978* (NSW) s 32(1)(a).

41. *Bail Act 1978* (NSW) s 32(4).

than by way of court attendance notice, and the child is held on remand and not released on bail, the child should be brought before the Children's Court "as soon as practicable".<sup>42</sup> The relationship between this legislation and the *Bail Act 1978* (NSW) is discussed below.

## Conditions

2.17 Section 37 of the *Bail Act 1978* (NSW) indicates that where bail is granted it should be granted unconditionally, unless the decision-maker is of the opinion that one or more conditions should be imposed for the purpose of:

- (a) promoting effective law enforcement, or
- (b) the protection and welfare of any specially affected person, or
- (c) the protection and welfare of the community, or
- (d) reducing the likelihood of future offences being committed by promoting the treatment or rehabilitation of an accused person.<sup>43</sup>

2.18 However, such conditions should not be more onerous for the accused person than required: by the nature of the offence; for the protection and welfare of any specially affected person (such as a victim); and by the circumstances of the accused person.<sup>44</sup>

2.19 Examples of conditions that can be imposed include:<sup>45</sup>

- **Behavioural conditions:** curfews, area restrictions or non-association restrictions.
- **Monitoring:** reporting to police.
- **Financial conditions:** security or agreement to forfeit a specified amount upon failure to comply with a bail undertaking.
- **Welfare conditions:** reside as directed or requirement to attend school.
- **Treatment or rehabilitation:** participation and assessment for participation in an "intervention program" or other program for treatment or rehabilitation, where the person to whom the application relates would benefit from such program. The person must agree to subject themselves to an assessment of their capacity and prospects for participation in the program, and agree to participate in the program. However, under s 36A(6), there are restrictions on the imposition of conditions relating to prescribed "intervention programs" on people under the age of 18. Prescribed programs include a circle sentencing

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42. *Children (Criminal Proceedings) Act 1987* (NSW) s 9.

43. *Bail Act 1978* (NSW) s 37(1).

44. *Bail Act 1978* (NSW) s 37(2).

45. *Bail Act 1978* (NSW) s 36(2), s 36A, s 36B.

intervention program, forum sentencing intervention program and traffic offender intervention program.<sup>46</sup>

- 2.20 Importantly, s 37(2A) of the *Bail Act 1978* (NSW) requires that prior to imposing bail conditions on an accused person who has an intellectual disability, the police officer or court must be satisfied that bail conditions are “appropriate” having regard to “the capacity of the person to understand or comply with” bail conditions. We discuss possible expansion of s 37(2A) to apply to young people and/or people with mental health impairments at paragraph 2.43-2.48.
- 2.21 It is important that courts are able to craft bail conditions which young people with cognitive and mental health impairments are able to comply with and understand. If appropriately framed bail conditions are not available, or courts do not apply appropriate conditions, there is a danger that a young person with cognitive and mental health impairments will be remanded in custody in circumstances where feasible and effective alternatives to detention are available.
- 2.22 A police officer or court, to whom a bail undertaking is given, must take all reasonable steps to ensure that any person who enters into a bail agreement (a component of bail conditions), is made aware of the obligations incurred by the person under that agreement and, in particular, the consequences that may follow if the accused person fails to comply with that undertaking.<sup>47</sup>

### Non-compliance

- 2.23 Under s 51 of the *Bail Act 1978* (NSW) it is an offence for a person to fail to appear before a court in accordance with his or her bail undertaking (without reasonable excuse). Additionally, under s 50, where a police officer believes, on reasonable grounds, that a person who has been released on bail has failed to comply (or is about to fail to comply) with bail conditions a police officer may arrest the person without warrant and take the person “as soon as practicable” before a court. Alternatively, an “authorised justice” may issue a warrant to apprehend the person and bring that person before a court or issue a summons requiring that person to appear before a court.<sup>48</sup> The court may either release the person on their original bail or revoke the person’s original bail and “otherwise deal with the person according to law”. If the original bail is revoked, the court may grant bail in accordance with legislation or may refuse to grant bail to the person “and by warrant commit the person to prison”.<sup>49</sup> Revocation of bail should not occur unless the court is satisfied that the person has failed, or was about to fail, to comply with his or her bail undertaking or agreement.<sup>50</sup>

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46. See *Criminal Procedure Act 1986* (NSW) s 347; *Criminal Procedure Regulation 2010* (NSW).

47. *Bail Act 1978* (NSW) s 39B.

48. *Bail Act 1978* (NSW) s 50(1).

49. *Bail Act 1978* (NSW) s 50(2)-50(3).

50. *Bail Act 1978* (NSW) s 50(4).



## Application to young people with cognitive and mental health impairments – issues and problems

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- 2.24 A number of concerns have been identified regarding the application of bail legislation to young people with cognitive and mental health impairments, including that the application of bail legislation may impact differently and adversely on these young people and ultimately lead to their remand in custody. Particular concerns include the relationship between bail legislation and other legislation that specifically applies to young people, the nature of bail conditions imposed on these young people; monitoring and the impact of non-compliance with bail conditions and difficulty accessing appropriate accommodation and services.
- 2.25 Below, we consider these concerns in turn, and ways in which specific aspects of the operation of the legislation may be improved. However, we also seek views regarding broader aspects of the bail framework which applies to young people with cognitive and mental health impairments. As we note in CP 7, the allocation of resources is a matter for government and is not within the terms of this reference. However, we can seek to identify where there are problems with legislation and procedure and make recommendations to help ensure that bail legislation operates fairly and as effectively as possible for young people with cognitive and mental health impairments.

### 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?
- (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?
- (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?

## Evolution of the Bail Act

- 2.26 The *Bail Act 1978* (NSW) prevails over criminal legislation that specifically applies to children, to the extent that there is an inconsistency.<sup>51</sup> This situation has been

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51. *Children (Criminal Proceedings) Act 1987* (NSW) s 50. See Noetic Review, [167]-[168]; YJC Report, 3.

criticised in the Noetic review because amendments may be made to the *Bail Act 1978* (NSW) without proper consideration of the needs of young people.<sup>52</sup> For example, under s 22A, courts must “refuse to entertain an application for bail by a person accused of an offence if an application by the person in relation to that bail has already been made and dealt with by the court” unless particular grounds for further application apply. In 2009 BOCSAR identified that s 22A significantly impacted on the average length of stay of a young person on remand.<sup>53</sup> However, the grounds for further application have recently been expanded, and clarified. Grounds for further application now include absence of legal representation during a previous application, or new information, or circumstances relevant to bail changing since the previous application.<sup>54</sup> The Youth Justice Coalition have suggested that these changes do “not go far enough” and that:

The nature of bail conditions imposed on a young person and the combined effect of police monitoring has had a significant impact on the number of young people entering juvenile detention. Many young people who are arrested for ‘technical’ breaches, or remanded due to homelessness, find that s 22A has made it more difficult to make a subsequent application for bail, given that they are reliant on resources in the community to meet the requirements in s 22A ... In addition, there is no longer an opportunity for scrutiny by the court of young people who are being detained because they are unable to meet bail conditions due to resources and support services being unavailable.<sup>55</sup>

- 2.27 The Youth Justice Coalition have recommended that young people be exempted from the operation of s 22A of the *Bail Act 1978* (NSW).<sup>56</sup> This approach was rejected by the government when s 22A was amended on the basis that it is stressful for victims to appear at repeat bail hearings, that it may facilitate “judge shopping” and that the amended operation of s 22A provides sufficient opportunities for additional bail applications.<sup>57</sup> It has been argued, however, that these considerations do not have as much force in relation to young people, because very few victims will be aware of bail applications made to the Children’s Court, there is little opportunity for magistrate “shopping” and because s 22A does not adequately take into account issues related to immaturity.<sup>58</sup>
- 2.28 It is also possible that changes to the general presumption in favour of granting bail may unfairly impact on young people and/or people with cognitive and mental health impairments.<sup>59</sup> In the report on *Young Offenders*, this Commission expressed concern that amendments to bail legislation have “eroded the applicability of the

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52. Noetic review, [168].

53. S Vignaendra, S Moffat, D Weatherburn and E Heller, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, Crime and Justice Bulletin No 128 (Bureau of Crime Statistics and Research, 2009) 3; Noetic review, [234].

54. *Bail Act 1978* (NSW) s 22A(1A).

55. YJC Report, 5 (citations omitted).

56. YJC Report, Recommendation 1.2.

57. NSW Parliament, *Parliamentary Debates*, Legislative Council, 29 October 2009, 18984 (John Hatzistergos, Attorney General).

58. J Bargaen, “Embedding Diversion and Limiting the Use of Bail in NSW: A Consideration of the Issues Related to Achieving and Embedding Diversion in Juvenile Justice Practices” (2010) 21(3) *Current Issues in Criminal Justice* 467, 473.

59. *Bail Act 1978* (NSW) s 8.

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overarching presumption in favour of bail”.<sup>60</sup> Some amendments have reversed the presumption,<sup>61</sup> while others have removed the presumption.<sup>62</sup> Several submissions to our previous inquiry argued that there should be a general statutory presumption in favour of bail for all young people. The Commission balanced the interests of the young person with the safety of the community and indicated that we did not support a blanket presumption. Instead, we favoured “the development of specific bail criteria that address the needs of young people, as well as measures that protect the young person’s welfare and safety if he or she is detained”.<sup>63</sup> This, we argued, would be achieved by our recommendations to:

- include principles from s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) in bail legislation;
- require courts to have regard to the nature of the place where the young person will be detained in custody if bail is refused; and
- require that young people must be granted bail if no appropriate place of detention is available.

2.29 Additionally, this Commission recommended that s 9B of the *Bail Act 1978* (NSW), which removes the presumption in favour of bail for classes of repeat offender, be amended so as not to apply to young people.<sup>64</sup> This was because:

the law should allow individualised responses to individual offences by young persons. The fact that a young person is already on bail, on parole, on a good behaviour bond, or serving a non-custodial sentence should not remove any presumption in favour of bail in relation to a subsequent alleged offence. Young people should be held in remand as a last resort. Accordingly, we do not believe that s 9B should apply to young people.<sup>65</sup>

2.30 Broadly, reforms proposed to resolve the issue of legislative interaction and/or the relationship between bail and young people include:

- Incorporating criteria in the *Bail Act 1978* (NSW) that apply specifically to young people.<sup>66</sup>
- Reversing the precedence of legislation so that the *Children (Criminal Proceedings) Act 1987* (NSW) prevails where there is an inconsistency with the *Bail Act 1978* (NSW).<sup>67</sup> This is the approach adopted in Victoria.<sup>68</sup>

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60. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) [10.27]. See also Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 29.

61. *Bail Act 1978* (NSW) s 8A-8F.

62. *Bail Act 1978* (NSW) s 9(1), s 9B.

63. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) [10.31], Recommendations 10.2-10.4.

64. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) Recommendation 10.9.

65. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) [10.88].

66. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) Recommendations 10.2-10.4. See also Noetic Review, [169]-[170], Recommendation 7.

67. Noetic review, Recommendation 6.

68. *Children, Youth and Families Act 2005* (Vic) s 346(6).

- A requirement that the NSW Government and the Legislative Review Committee “introduce a children and young person’s impact statement into legislation and policy development and amendment processes”. The government responded by noting that the Commission for Children and Young People “ensure[s] that the needs and interests of children are fully taken into account in Government decision making”.<sup>69</sup>
- 2.31 Recently, the Criminal Law Review Division of the Department of Justice and Attorney General released a review of the *Bail Act 1978* (NSW) (“DJAG review”). The DJAG review notes that the Act has undergone 12 major amendments which have “mostly been ad hoc and have led to a disjointed and poorly structured legislative scheme”.<sup>70</sup> The aim of the review was to improve consistency, transparency, simplicity and the application of the Act.<sup>71</sup> The review highlights concerns about the impact of bail legislation on young people and people with special needs, such as those who suffer from mental illness.<sup>72</sup> Significantly, the review recommends that a new Act be drafted “in plain English”. A public consultation draft of the Bail Bill 2010 has been released with the review.
- 2.32 The DJAG review highlights the difficulties encountered by people with an intellectual disability or mental illness in obtaining bail, including:
- lack of suitable accommodation options in the community;
  - lack of support services that would provide supervision whilst on bail;
  - reduced level of community ties;
  - a history of itinerant accommodation/homelessness;
  - history of breached bail conditions/warrants or failures to appear; and
  - likelihood of history of prior convictions and classification as a repeat offender.<sup>73</sup>
- 2.33 Of particular relevance to this Commission’s review are the following recommendations:
- BOCSAR work with Courts and NSW Police to collect bail statistics on the “effect of participation in drug intervention or treatment programs undertaken whilst on bail”.<sup>74</sup>
  - Introduction of a tiered classification system for offences, to help clarify presumptions in relation to bail.<sup>75</sup>

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69. New South Wales, *Government Response to Juvenile Justice Review* (2010) 5.

70. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 3.

71. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 3.

72. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 4.

73. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 84.

74. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) Recommendation 2.

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- The removal of restrictions to the right to bail under s 8 (entitlement to bail for certain minor offences) where there has been a previous failure to comply with bail conditions, thereby making the Act “more flexible for persons with disabilities who may fail to appear or comply with conditions”.<sup>76</sup>
- The development of a risk assessment checklist for bail determinations under s 32 for domestic violence matters; risk factors could include “mental health issues”.<sup>77</sup>
- The development of a system of electronic monitoring of accused people who would otherwise be remanded in custody.<sup>78</sup>
- Making Court Attendance Notices and bail forms more “user friendly” to those from disadvantaged backgrounds and people who have a disability.<sup>79</sup>
- The establishment of a Bail Working Group to develop a program to assist accused people to comply with bail conditions, including those with special needs.<sup>80</sup>
- Ensuring bail conditions are not imposed on the grant of bail to a person under the age of 18; an Aboriginal or Torres Strait Islander person; a person from a non-English speaking background; or a person who has a mental illness or other disability (whether physical, intellectual or otherwise) unless the bail condition is appropriate having regard to the capacity of the person granted bail to understand or comply with the bail condition.<sup>81</sup>

The DJAG review makes no recommendations with respect to the operation of s 22A.<sup>82</sup>

### 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?

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75. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) Recommendation 3.
  76. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 47-48, Recommendation 5.
  77. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 49-50, Recommendation 6.
  78. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 60-61, Recommendation 10.
  79. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 62, Recommendations 11-12.
  80. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 65, Recommendation 13.
  81. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 84, Recommendation 22; Consultation draft of the Bail Bill 2010 (NSW) cl 60(4).
  82. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 55-56.

**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?

**Bail conditions***Criticisms of current approach*

- 2.34 As identified by this Commission in our previous report on *Young Offenders*, “[t]he practice of imposing harsh and inappropriate bail conditions on young people has been the subject of repeated concern over the last decade or more”.<sup>83</sup> The Australian Law Reform Commission (“ALRC”) and the Human Rights and Equal Opportunity Commission have warned:

Bail conditions vary but most children are required to agree to meet certain conditions rather than post money as security. This is appropriate. However, conditions imposed on young suspects must not be unreasonable or unrealistic. For example, 24 hour curfews are tantamount to detention, disrupt education and may exacerbate problems in the home. Some government submissions supported curfews. Bail conditions should not criminalise a young person's non-offending behaviour. For example, police should not attempt to deal with anti-social behaviour such as petrol or glue sniffing by requiring children to avoid that behaviour as a bail condition.<sup>84</sup>

- 2.35 From 2008-2010, the Youth Justice Coalition conducted research aimed at identifying and examining the impact of bail on young people, and the circumstances surrounding young people being held on remand.<sup>85</sup> The Coalition argued that bail conditions imposed on young people “are numerous and often prescriptive as to behaviour and conduct”.<sup>86</sup> Similarly, the Noetic review also indicated that where a young person is granted bail, the bail is often conditional.<sup>87</sup> There have been suggestions that the conditions attached to bail for young people may be more onerous than those imposed on adults for a similar offence.<sup>88</sup>

83. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) [10.54]. See Australia, *Royal Commission into Aboriginal Deaths in Custody*, National Report Vol 5 (Australian Government Publishing Service, Canberra, 1991) Recommendations 90 and 91; Juvenile Justice Advisory Council of NSW, *Green Paper: Future Directions for Juvenile Justice in New South Wales*, (1993) Section 2.5; NSW Legislative Council Standing Committee on Social Issues, Parliament of NSW, *Juvenile Justice in New South Wales* (1992) 75-76.

84. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process*, Report 84 (1997) [18.159].

85. YJC Report, iv.

86. YJC Report, 2; *Bail Act 1978* (NSW) s 37(2). See also NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) [10.25]; NSW Legislative Council Standing Committee on Social Issues, *Juvenile Justice in New South Wales* (1992) 75.

87. Noetic review, [212].

88. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) [10.25]; Standing Committee on Social Issues, Parliament of NSW, Legislative Council, *Juvenile Justice in New South Wales*, Report 4 (1992) 77; Noetic review, [223].

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2.36 Further, the Noetic review has argued that young people may “not fully understand their conditions and may unintentionally breach bail”.<sup>89</sup> Young people, especially with a cognitive or mental health impairment, may find it difficult to comply with numerous, and prescriptive, bail conditions. This could result in court appearances for breach of bail conditions and subsequent remand.<sup>90</sup> Juvenile Justice have observed that:

It is not uncommon for a young person with complex needs to be unaware of their bail obligations, often resulting in breaches to bail conditions, further Court appearances and risking additional time in custody.<sup>91</sup>

2.37 A criticism of the conditions imposed with Anti-Social Behaviour Orders on young people in the United Kingdom (which can have similar characteristics to bail conditions imposed here) was that:

It has been shown that people with learning and communication difficulties frequently experience problems in understanding the prohibitions of orders, which can relate to memory difficulties, problems with interpretation of the prohibitions, and so on.<sup>92</sup>

2.38 A recent BOCSAR publication noted that “[a]mong those juveniles who were remanded solely for not meeting bail conditions, the most common bail condition that was breached was a failure to adhere to curfew conditions and not being in the company of a parent”.<sup>93</sup> A pilot survey conducted by the Youth Justice Coalition indicated that 67% of young people granted bail receive three or more bail conditions, further noting:

Bail conditions were framed around what would normally be considered part of a case management plan (for instance, attending counselling, residing as directed). However, the conditions imposed by the court were made with no consultation with families and with little assessment of the young person. The appropriateness of the court or police imposing such conditions without any consideration of a young person’s particular circumstances is questionable and may be especially disadvantageous to that individual.<sup>94</sup>

2.39 The Youth Justice Coalition expressed particular concern that, not only is it difficult for young people to comply with multiple and complex bail conditions, but also that bail conditions place pressure and responsibility on the young person’s family or carer to assist in compliance. The Youth Justice Coalition argued that this approach can be particularly problematic for disadvantaged families, for example with low

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89. Noetic review, [223].

90. See YJC Report, 2, 16.

91. Human Services (Juvenile Justice), *Submission MH28-2*, 1.

92. J Donoghue, *Anti-Social Behaviour Orders: A Culture of Control?* (Palgrave Macmillan, 2010) 126.

93. S Vignaendra, S Moffat, D Weatherburn and E Heller, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, Crime and Justice Bulletin No 128 (Bureau of Crime Statistics and Research, 2009) 4.

94. YJC Report, 16.

incomes.<sup>95</sup> The same argument may apply where the young person has a cognitive or mental health impairment.

- 2.40 In response to concerns about inappropriate and punitive bail conditions imposed on young people (sometimes more onerous than sentencing orders imposed on young people), the Victorian Law Reform Commission (“VLRC”) noted that these conditions “while well meant, may not take into account the child’s age and maturity and ability to comply”. The VLRC subsequently recommended that:

the Bail Act should contain a specific provision for the imposition of conditions on children. When considering the bail conditions to be imposed on a child, a decision maker must consider:

- the need to strengthen and preserve the relationship between the child and the child’s family;
- the desirability of allowing the child to live at home;
- the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
- the need to minimise stigma to the child resulting from a court determination.<sup>96</sup>

### *Potential legislative response*

- 2.41 As outlined above, under s 32 of the *Bail Act 1978* (NSW), when making determinations with respect to whether or not bail should be granted, a police officer or a court is to consider “the interests of the person” (among other matters). In doing so, they are to have regard to:

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.

- 2.42 As raised by this Commission in our report on *Young Offenders*, the scope of “special needs” is not defined. This can have advantages; for example, it allows judicial officers to interpret requirements on a case-by-case basis.<sup>97</sup> Conversely, it does not provide guidance to decision makers. Its application in cases involving disability is unclear and it may lead to inconsistency in application.

#### **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?

- 2.43 It is possible that the provisions that guide the conditions that can be attached once bail is granted need to take into account the particular needs of young people with

95. YJC Report, 16.

96. Victorian Law Reform Commission, *Review of the Bail Act – Final Report* (2007) 158, Recommendation 129.

97. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) [10.33]-[10.35]; Noetic review, [216].



cognitive and mental health impairments. As discussed, s 37(2A), which imposes restrictions on the imposition of bail conditions, provides that:

Before imposing a bail condition on an accused person who has an intellectual disability, the authorised officer or court is to be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the accused person to understand or comply with the bail condition.

- 2.44 This protection is important because, as identified by this Commission in our 1996 report on *People with an Intellectual Disability in the Criminal Justice System*, conditions “such as reporting weekly to a police station or limitations on movement, may be more difficult to comprehend and comply with for accused with an intellectual disability”.<sup>98</sup> Additionally:

the person’s likely low income or reliance on social security benefits may disadvantage him or her, as few of the possible conditions under which bail can be granted are non-monetary. Of the non-monetary conditions which may be imposed, one provides for an “acceptable person”, acquainted with the accused, satisfying the police that he or she considers the accused to be responsible and likely to comply with any imposed conditions. A lack of community ties and an unwillingness to disclose intellectual disability may restrict the number of persons that an accused with an intellectual disability would be willing to nominate as an acceptable person.<sup>99</sup>

- 2.45 The VLRC has also warned that, with respect to cognitive impairment, a decision maker may grant bail on conditions “which set an accused up to fail”. This, the VLRC reasoned, could occur if the accused person is not provided with support to assist compliance with conditions, or they did not understand the conditions.<sup>100</sup>

- 2.46 As evidenced by the discussion above, these issues may not be unique to people with an intellectual disability. It has been recommended by this Commission in *Young Offenders* and by the Noetic review that:

The *Bail Act 1978* (NSW) should be amended so that, before imposing a bail condition on a young person, the authorised officer or court must be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the young person to understand and comply with the bail condition.<sup>101</sup>

- 2.47 Similarly, the DJAG review has highlighted the difficulties in “applying the Act to some person whose special needs influence their offending or inability to comply with some conditions of any bail set”.<sup>102</sup> The review recommends that s 37(2A) of *Bail Act 1978* (NSW) be amended to include people who suffer from mental illness, young people, and Aboriginal and Torres Strait Islander people. The review further

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98. NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996) [4.74].

99. NSW Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996) [4.74].

100. Victorian Law Reform Commission, *Review of the Bail Act – Final Report* (2007) 204.

101. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) Recommendation 10.8; Noetic review, Recommendation 19.

102. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 84.

recommends that a Bail Working Group “examine options for assisting people with special needs to comply with bail conditions”.<sup>103</sup>

- 2.48 Factors such as age, intellectual disability and mental illness impact on the ability of the accused to comply with particular bail conditions. We therefore ask whether s 37 of the *Bail Act 1978* (NSW) should 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. Intellectual disability is already a consideration under the Act.

#### 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?

### Ramifications of non-compliance with bail conditions

- 2.49 Non-compliance with bail conditions may lead to remand in custody. There is a question of whether remand can be avoided by improvements to the law or its application.
- 2.50 In para 2.23 we discuss s 50 and s 51 of the *Bail Act 1978* (NSW) which apply to non-compliance with bail conditions. Section 50 provides that “[w]here a police officer believes on reasonable grounds that a person who has been released on bail has, while at liberty on bail, failed to comply with, or is, while at liberty on bail, about to fail to comply with, the person’s bail undertaking or an agreement entered into by the person pursuant to a bail condition ... a police officer may arrest the person without warrant and take the person as soon as practicable before a court”. In contrast, under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), where a police officer suspects on “reasonable grounds” that an offence has occurred, he or she may only arrest a person without warrant in certain circumstances and to achieve particular purposes. Purposes include, for example, to ensure the person appears in court or to prevent concealment or loss of evidence.<sup>104</sup> Such limitations with respect to arrest are not present in s 50 of the *Bail Act 1978* (NSW).<sup>105</sup>

103. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) Recommendations 22-23.

104. *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99.

105. J Barga, J Sanders, C Blakemore, C Hammer (Legal Information Access Centre) “Police and young people” (2010) 73 *Hot Topics* 7, 9.

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- 2.51 BOCSAR has identified increased police enforcement activity (eg monitoring of compliance with conditions) in relation to bail as a key factor “putting an upward pressure on the juvenile remand population”, both in increasing the number of young people placed on remand and increasing the average stay of people on remand.<sup>106</sup>
- 2.52 The Youth Justice Coalition, in their pilot survey of young people appearing in the Children’s Court at Parramatta, noted that s 50 fails to distinguish different types of breaches. For example, “technical” breaches that are not breaches related to the commission of further criminal offences and do not put the community in danger.<sup>107</sup> The survey also identified young people in custody due to “administrative errors” or unlawful arrest (3%).<sup>108</sup> Administrative errors occurred where one or more conditions were contradictory (eg directed to live at a house that the young person was prohibited from visiting due to an AVO), or where the young person was arrested for a breach without any cases pending or bail conditions currently imposed (eg due to out of date information).<sup>109</sup>
- 2.53 The distinction between breach of bail through the commission of a further offence, and other types of breaches has been considered by BOCSAR. BOCSAR identified that 66% of young people remanded after breaching bail restrictions had breached their bail by some means other than the commission of a further offence. Of this group, the most common breaches were failure to comply with a curfew and not being in the company of a parent.<sup>110</sup> Additionally, 81% of juveniles who had breached their bail by committing an offence were subsequently remanded in custody; 71% who breached bail only through not complying with bail conditions were subsequently remanded in custody.<sup>111</sup>
- 2.54 As discussed in para 2.23, breach of s 51, failure to appear in court in accordance with a bail undertaking without reasonable excuse, is an offence. According to the Judicial Information Research System (“JIRS”), from January 2006 to December 2009, 190 young people in the Children’s Court were found to breach s 51. Of this group, 37% had the charge dismissed under s 33(1)(a) of the *Children (Criminal Proceedings) Act 1987* (NSW), a further 21% entered into a bond under s 33(1)(b), 9% were fined, and 7% were subject to control orders.<sup>112</sup>

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106. S Vignaendra, S Moffat, D Weatherburn and E Heller, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, Crime and Justice Bulletin No 128 (Bureau of Crime Statistics and Research, 2009) 4. See also NSW Ombudsman, *Annual Report 2008-2009* (2009) 77.

107. YJC Report, 3.

108. YJC Report, 14.

109. YJC Report, 20.

110. S Vignaendra, S Moffat, D Weatherburn and E Heller, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, Crime and Justice Bulletin No 128 (Bureau of Crime Statistics and Research, 2009) 3.

111. S Vignaendra, S Moffat, D Weatherburn and E Heller, *Recent trends in legal proceedings for breach of bail, juvenile remand and crime*, Crime and Justice Bulletin No 128 (Bureau of Crime Statistics and Research, 2009) 3.

112. Judicial Commission of New South Wales, Judicial Information Research System, *Sentencing Statistics* (at September 2010). Other outcomes include sentenced to the “rise of the court”,

- 2.55 The Youth Justice Coalition has recommended that s 50 and s 51 of the *Bail Act 1978* (NSW) should be amended to ensure that police first consider alternatives to arrest where there is a failure to comply with bail conditions or failure to appear before the court while on bail.<sup>113</sup>
- 2.56 The Commission asks whether amendments to s 50 and s 51 would help ensure that young people with cognitive and mental health impairments who breach bail conditions avoid remand where appropriate.

#### 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?

#### 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?

#### 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?

#### 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?

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cautions, dismissal after youth justice conference, community service orders, suspended control orders and probation.

113. YJC Report, Recommendation 1.3.

## Accommodation and services

- 2.57 The impact of bail legislation on young people has been identified as problematic due to the number who are held on remand because of a shortage of suitable accommodation<sup>114</sup> or mental health or disability services.<sup>115</sup> For example, one case study in the *Special Commission of Inquiry into Child Protection Services in New South Wales* concerns a young girl (“A”) with Attention Deficit Hyperactivity Disorder. A’s mother had made numerous reports to Community Services “expressing her inability to cope with A’s behaviours”. It was reported that A assaulted her mother a number of times. A was eventually arrested, the conditional bail undertaking was that she “remain in custody until suitable accommodation is found in the community eg DoCS/Juvenile Justice”. The mother indicated that A could not return home, and no placements could be located.<sup>116</sup>
- 2.58 Juvenile Justice has implemented a statewide Intensive Bail Supervision Program aimed at reducing the number of young people held on remand. Bail support staff help ensure that a young person in custody meet the requirements of their bail. This process may require a number of bail applications. The priority group for bail interventions are young people under the age of 14, young people of Aboriginal background and those young people “who are at significant risk of being remanded in custody due to lack of stable accommodation or are in need of other supports in the community”.<sup>117</sup> Juvenile Justice provide:

resources for community-based staff to arrange accommodation, material aid and specialist services not otherwise available to support the young person’s compliance with their bail conditions. Resources are also allocated for the purposes of assisting individuals gain access to mental health and Alcohol and Other Drug services.<sup>118</sup>

The DJAG review notes that Juvenile Justice considers the program to be successful and would consequently like to expand the program.<sup>119</sup> The review highlights that while there is “general agreement that bail hostels are desirable”, the issues surrounding this are complex. These issues go beyond the operation of the criminal justice system and also relate to the “provision of housing and adequacy of

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114. See J Wood, *Special Commission of Inquiry into Child Protection Services in New South Wales* (2008) vol 2, 558; NSW Legislative Council Standing Committee on Social Issues, Parliament of NSW, *Juvenile Justice in New South Wales*, Report 4 (1992) 76; UnitingCare Burnside, *Releasing the pressure on remand: Bail support solutions for children and young people in New South Wales* (2009) 3. See also K Boyle, “The More Things Change ...”: Bail and the Incarceration of Homeless young People” (2009) 21(1) *Current Issues in Criminal Justice* 59.

115. Shopfront Youth Legal Centre, *Review of Bail in NSW – Submission by Shopfront Youth Legal Centre* (2005) 11. See also Intellectual Disability Rights Service, *Enabling Justice: A Report on Problems and Solutions in relation to Diversion of Alleged Offenders with Intellectual Disability from the New South Wales Local Courts System* (2008) 14; YJC Report, 1, 23 or 20-21 discussing drug and alcohol programs and 23.

116. J Wood, *Special Commission of Inquiry into Child Protection Services in New South Wales* (2008) vol 2, 560.

117. NSW Department of Juvenile Justice, *Annual Report 2006-2007*, 38.

118. NSW Department of Juvenile Justice, *Annual Report 2006-2007*, 38.

119. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 71.

health services for people suffering from a mental illness in the community”.<sup>120</sup> Consequently, the DJAG review recommends that the proposed Bail Working Group consider expansion of the Bail Supervision Programs to both adults and other young people.<sup>121</sup>

- 2.59 The government has also responded to concerns regarding accommodation by committing to the establishment of an after hours bail placement service (the Bail Assistance Line) for young people between the age of 10 and 18 “who are at risk of being remanded in custody, or who require bail accommodation”.<sup>122</sup> The service aims to improve adherence to bail conditions, increase attendance at court, reduce the time spent on remand, reduce length of stay outside the family home or other safe appropriate accommodation, divert a person from custody where appropriate and increase community re-integration.<sup>123</sup> Bail Assistance Line services have commenced and are supported by NSW Police, Juvenile Justice and NGOs.<sup>124</sup> Services can include locating suitable accommodation, locating a “responsible person” to attend the police station and organising transportation where required.<sup>125</sup>
- 2.60 Problems accessing accommodation and services have been identified as a factor leading to remand in custody for young people generally. The Commission is interested in any further information about the impact, in this context, of problems in accessing accommodation and services for young people who have cognitive and mental health impairments.

#### 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?

120. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 71-72.

121. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 72, Recommendation 17.

122. NSW Government, *Keep Them Safe: A shared approach to child wellbeing* (2009) 14.

123. NSW Department of Juvenile Justice, *Annual Report 2008-2009* (2009) 21.

124. B Perry (Minister for Juvenile Justice), “New service to support police and young offenders in NSW” (Media release, 15 July 2010); B Perry (Minister for Juvenile Justice), “After-hours bail assistance service for young people launches in Dubbo” (Media release, 21 June 2010); B Perry (Minister for Juvenile Justice), “New service to support Aboriginal young offenders in Western Sydney” (Media release, 15 June 2010)

125. Criminal Law Review Division, Department of Justice and Attorney General, *Review of Bail Act 1978 (NSW)* (2010) 82.



### 3. Apprehended Violence Orders

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- 3.1 AVOs are court orders that are directed at protecting a person by prohibiting or restricting another person from engaging in specified conduct.<sup>1</sup> Procedures and obligations with respect to AVOs are contained in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). The Act contains a number of objectives such as reducing and preventing violence by a person against another person where a domestic relationship exists, ensuring the safety and protection of people who experience personal violence outside a domestic relationship, and enactment of provisions consistent with CROC.<sup>2</sup>
- 3.2 Very little research and writing appears to deal with issues relevant to AVOs and young people with cognitive and mental health impairments. Issues that were raised during the course of our preliminary consultations include:
- Potential difficulties for young people, particularly with cognitive or mental health impairments, in complying with conditions attached to an AVO.
  - AVOs are taken out for the protection of guardians or carers of young people with cognitive and mental health impairments, sometimes against the wishes of their guardians or carers.
  - Lack of schooling or housing for young people who have had AVOs taken out against them and are unable to return to their school or residence as a result.
- 3.3 Figures regarding the number of people with cognitive or mental health impairments who have had AVOs taken out against them are difficult to obtain. It has, however, been suggested that “many AVOs are taken out against family members and neighbours who have untreated mental disorder”.<sup>3</sup>
- 3.4 In this chapter we briefly consider the operation of legislation guiding the application of AVOs and consider the possible impact on young people with cognitive and mental health impairments.

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1. C Hammer, Legal Information Access Centre, “Apprehended Violence Orders” (2008) 66 *Hot Topics* 7, 7.

2. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9, s 10.

3. R Hayes, O Nielsens, D Sullivan, M Large and K Bayliff, “Evidence-Based Mental Health Law: The Case for Legislative Change to Allow Earlier Intervention in Psychotic Illness” (2007) 14(1) *Psychiatry, Psychology and Law* 35, 43.



## Applying for an AVO

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- 3.5 AVOs are the primary legal means by which people may seek protection against actual (or threatened) violence, stalking and intimidation.<sup>4</sup> The orders seek to stop ongoing violence, as well as address potentially violent behaviour before it escalates.<sup>5</sup> AVOs may operate to protect the individual seeking protection (the “protected person”), as well as young people under the age of 16 with whom the protected person has a domestic relationship.<sup>6</sup> The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) is designed to tackle domestic violence, and therefore requires recording of criminal offences that are designated domestic violence offences and automatically triggers the protection of AVOs in certain circumstances.<sup>7</sup>
- 3.6 There are two types of AVOs, Apprehended Domestic Violence Orders (ADVOs) and Apprehended Personal Violence Orders (APVOs). An ADVO applies where the person seeking protection has been in a “domestic relationship” with the defendant (this includes where the person is a relative of the protected person, or is living in the same household).<sup>8</sup> An APVO applies where there is no domestic relationship. The two types of orders are similar. However, there are a number of differences including differences in the obligations of police officers and the court; the discretion exercised by an authorised officer or registrar; the availability of alternative dispute resolution mechanisms; and costs.<sup>9</sup>

### Who can make an application?

- 3.7 AVOs are made by application.<sup>10</sup> AVOs are relevant to young people with cognitive and mental health impairments in two ways. In some cases, they may require protection from violence; in other cases they may be the respondent in an application for an order. If a respondent is under the age of 18 when an application is made, the proceedings must be heard in the Children’s Court.<sup>11</sup>
- 3.8 Applications can be made by a person seeking protection, or in certain circumstances, a police officer. However, where the person seeking protection is

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4. NSW Law Reform Commission, *Apprehended Violence Orders*, Report 103 (2003) [1.1].

5. NSW Law Reform Commission, *Apprehended Violence Orders*, Report 103 (2003) [1.1].

6. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 38.

7. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12, s 16(2)(c), s 39. See also New South Wales, *Parliamentary Debates*, Legislative Council, 29 November 2007, 4652-4653.

8. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5.

9. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21, s 39, s 40, s 43, s 49, s 53, s 99; C Hammer, Legal Information Access Centre, “Apprehended Violence Orders” (2008) 66 *Hot Topics* 7, 10-11.

10. Except when the court is mandated to make an order: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16(2)(c).

11. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 91.

under the age of 16, only a police officer may make an application.<sup>12</sup> An applicant between the age of 16 and 18 has full capacity to make an application.<sup>13</sup>

3.9 Additionally, an application for an order:

- may be made by more than one person;
- where made by a police officer, may be made on behalf of more than one person; and
- may be made by the applicant on behalf of any other person with whom the applicant has a “domestic relationship”.<sup>14</sup>

3.10 Police officers must apply for an order where, for example, they suspect a “domestic violence offence” or stalking or intimidation offence has been committed, or is likely to be committed, against the person for whose protection an order would be made.<sup>15</sup> Police officers do not need to make an application if there is a “good reason not to make an application”, however this does not apply where the person requiring protection is under the age of 16.<sup>16</sup> The reluctance of a person to make an application does not, on its own, constitute a good reason for a police officer not to make an application if the police officer reasonably believes that: the person has been the victim of violence; there is a significant threat of violence to the person; or the person has an intellectual disability and has no guardian.<sup>17</sup>

3.11 When making an application, the person applying for an AVO needs to provide details such as the nature of the relationship, recent incidents that have caused them to fear for safety, reports and treatment by medical practitioners and prior AVOs.<sup>18</sup>

3.12 Upon application, the defendant has the option of consenting to the AVO without admitting to any wrongdoing.<sup>19</sup> The defendant can also contest the AVO and ask for a formal hearing.

### Granting an AVO

3.13 A court may make an ADVO or APVO (upon application) where it is satisfied, on the balance of probabilities, that the person seeking protection fears:

- the commission of a “personal violence offence”; or
- stalking or intimidation.<sup>20</sup>

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12. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 48(3).

13. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 48(6).

14. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 48(4).

15. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49.

16. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49(4).

17. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49(6).

18. C Hammer, Legal Information Access Centre, “Apprehended Violence Orders” (2008) 66 *Hot Topics* 7, 8.

19. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 78.

20. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16, s 19.

Where the person seeking protection is a young person under the age of 16, or “suffering from an appreciably below average general intelligence function”, it is not necessary for the court to be satisfied that the person in fact fears that such an offence will be committed. This requirement is also waived (in the case of an ADVO) when the court considers that the person seeking protection has been subjected to a personal violence offence and the order is necessary to protect the person from the reasonable likelihood of a further violent offence.<sup>21</sup>

### Young people with cognitive or mental health impairments

3.14 Essentially, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) includes a number of protections where an AVO is required for the protection of a person with an intellectual disability. Specifically:

- Encouraging police to apply for an AVO on behalf of a person with an intellectual disability where the person with an intellectual disability is exhibiting reluctance to make an application.<sup>22</sup>
- Dispensing with the requirement that the court be satisfied that the person fears an offence will be committed before granting an AVO where the person is “suffering from below average general intelligence function”.<sup>23</sup>

Similar protections are not available where the person has a mental illness.

3.15 As discussed, the Act also has a number of provisions aimed at assisting young people in need of protection. For example, young people may be included in AVOs where they are in a domestic relationship with the protected person, police are required to obtain an AVO on behalf of young people if they are under the age of 16, and the requirement to prove apprehension of fear where the protected person is a young person under the age of 16 is removed.<sup>24</sup>

3.16 Arguably, extra protections, or a different approach, may be required to deal with respondents who are young people with cognitive and mental health impairments.

## Conditions

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3.17 In deciding whether to make an AVO the court must consider the safety and protection of the person for whose protection the order would be made. Additionally, the court should consider:

- the effects and consequences on the safety and protection of the protected person if an order prohibiting or restricting access to the residence is not made;
- hardship that may be caused by making or not making an order (particularly to the protected person);

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21. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16(2), s 19(2).

22. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 27, s 49.

23. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16, s 19.

24. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 38, s 48(3), s 16(2), s 19(2).

- the accommodation needs of all relevant parties (particularly the protected person); and
  - any other relevant matter.<sup>25</sup>
- 3.18 There are a number of prohibitions contained in every AVO, including prohibitions on assaulting, threatening, intimidating or stalking a protected person.<sup>26</sup> Additional orders that can be made by the court include exclusion orders (prohibiting the person from entering or going within a certain distance of particular locations); orders restricting contact with the protected person (for example, by phone); and orders prohibiting the defendant from destroying or damaging the property of the protected person.<sup>27</sup>

## Breach

- 3.19 A breach of an AVO is a criminal offence.<sup>28</sup> Unless a court otherwise orders, a person who is convicted for breach of an AVO must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence against a person.<sup>29</sup> However, this does not apply where the person was under the age of 18 when the alleged offence was committed.<sup>30</sup>

Table 4: Young people and AVOs

Key figures
<p>Figures extracted from the JIRS indicate that between March 2008 and December 2009:</p> <ul style="list-style-type: none"> <li>▪ 281 young people have been found guilty of breaching an AVO and were dealt with in the Children's Court.</li> <li>▪ 23% of this group had the charges dismissed.</li> <li>▪ 44% of this group entered into bond under s 33(1)(b) of the <i>Children (Criminal Proceedings) Act 1987</i> (NSW).</li> <li>▪ 4% of this group were subject to control orders.</li> <li>▪ At least 78% of breaches were breaches of ADVOs.<sup>31</sup></li> <li>▪ The Children's Court dealt with 170 young people found guilty of stalking or intimidation under s 13(1) of the <i>Crimes (Domestic and Personal Violence) Act 2007</i> (NSW).</li> <li>▪ 48% of this group entered into a good behaviour bond under s 33(1)(b) of the <i>Children (Criminal Proceedings) Act 1987</i> (NSW).</li> <li>▪ 6% of this group were subject to control orders.</li> </ul>

25. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 17, s 20.

26. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 36.

27. See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35; C Hammer (Legal Information Access Centre), "Apprehended Violence Orders" (2008) 66 *Hot Topics* 7, 9.

28. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

29. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(4)

30. *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(5).

31. 220 were breaches of ADVOs, 50 were breaches of APVOs and 11 were listed as "type unknown".

BOCSAR have indicated that:

- There were 11,815 recorded incidents of breach of an AVO between January 2009 and December 2009 (based on information derived from the NSW Police Force Computerised Operational Policing System (COPS)).<sup>32</sup>
- 530 young people have been proceeded against by police for breach of an AVO in the year 2009-2010.<sup>33</sup>
- 141 young people had charges of breach of an ADVO finalised in the Children's Court in 2008, of which 125 had the offence proven.<sup>34</sup>

## Young people with cognitive or mental health impairments and AVOs in practice

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- 3.20 Very little information or data appears to be available that addresses the use of AVOs in relation to young people with cognitive and mental health impairments. The Commission is interested to be referred to any material, whether Australian or overseas on this issue.

### Young people with cognitive or mental health impairments as respondents

- 3.21 While the issue of young people and violence against guardians has been identified, it has been noted that there “are few overseas and no Australian statistics on the prevalence of adolescent violence against parents”.<sup>35</sup>
- 3.22 NSW Police Force policy reveals a proactive approach to taking out AVOs against young offenders where appropriate. This is tempered by consideration of the impact that AVO conditions may have on a young person:

The NSW Police Force is committed to using all lawful means to policing domestic and family violence. This includes wherever possible, removing offenders from the victim, taking out an AVO on behalf of victims and any children living or spending time with the victim (whether they are by consent or not), investigating breaches of AVOs, and developing solutions to managing repeat offenders.

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This proactive approach should also apply to young offenders. This includes taking out an AVO against the young offender, however where exclusion conditions are necessary, duty of care towards the young offender must be

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32. D Goh, S Moffat, *New South Wales Recorded Crime Statistics 2009* (Bureau of Crime Statistics and Research, 2010) 16, 44.

33. J Holmes, NSW Bureau of Crime and Statistics Research, “Juvenile Offending: What are the facts? (according to NSW Police and NSW Criminal Court Data)” (Paper presented at Juvenile Offending – What are the Facts?, University of Sydney, 11 November 2010).

34. NSW Bureau of Crime and Statistics Research, *New South Wales Criminal Court Statistics 2008* (2009) 61.

35. N Bobic, “Adolescent Violence Towards Parents” (Australian Domestic and Family Violence Clearinghouse, 2004) 3; Anglicare Victoria, “Breaking the Cycle Adolescent Violence: Women’s Stories of Courage and Hope” (2001).

taken, and all efforts must be taken to ensure that the young offender is accommodated appropriately.<sup>36</sup>

3.23 Note that offences under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) are not eligible for diversion under the *Young Offenders Act 1997* (NSW).<sup>37</sup>

3.24 Additionally, the Department of Community Services (now Community Services) have raised the problem of AVOs taken out on behalf of care workers and in doing so raises the problem that people with intellectual disability may not understand the meaning of AVOs:

The Department of Community Services mainly raised concerns regarding the use of AVOs against children or carers in residential facilities ... Using discussions with seven NGOs and DoCS regional teams, it was advised that most agencies discouraged staff from pursuing AVOs against children/young people in residential settings, for a variety of reasons. These tended to be the need to maintain a relationship, the need for agencies to work closely with the Police, and the need for Police to build stronger relationships with children and staff.

However, police initiated the majority of AVOs against children in this situation, often against the wishes of staff members. Not only can many of the children not understand AVOs, especially those with intellectual disabilities, but also AVOs often adds to the child's feeling of abandonment in a crucial stage of creating bonds with a carer.<sup>38</sup>

#### 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?

36. NSW Police Force, "Domestic and Family Violence Policy" (2009) 14.

37. *Young Offenders Act 1997* (NSW) s 8.

38. "Domestic Relationship" definition working party, *Discussion paper for the Apprehended Violence Legal Issues Coordinating Committee Meeting* (2009)

### Young people with cognitive and mental health impairments as applicants

- 3.25 Very little data is available on AVOs granted for the protection of young people with cognitive and mental health impairments. Young people with cognitive and mental health impairments need protection from violence in the same way as other young people, and the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) does advert to the needs of people with cognitive impairments. It would seem likely that young people with cognitive and mental health impairments might be at risk, for example, from family members who might resort to violence to deal with challenging behaviours. Young people in institutional care may be at risk of abusive behaviours by carers.
- 3.26 The Commission is interested in how AVOs are used for protection of young people with cognitive or mental health impairments, what particular issues arise in this area and whether any changes to the law are required.

#### **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?

## 4. Diversion

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- 4.1 The particular importance of early intervention and diversion of young people with cognitive and mental health impairments from the criminal justice system has frequently been highlighted.<sup>1</sup> Diversionary schemes should aim to identify underlying causes of criminal conduct as well as provide a means of overcoming these underlying causes. Diversion could help prevent people from having further or repeated contact with the criminal justice system at a young age with consequent benefits for both the individual and the community.<sup>2</sup> Diversionary mechanisms are of particular relevance to young people with cognitive and mental health impairments. Justice Health in Victoria (along with other key stakeholders) have highlighted that:

Mental health diversion and support programs that engage with young people should consider the following key issues:

- offending behaviour often signals an emerging mental illness
- family involvement is often essential
- services should be inclusive, youth friendly and age appropriate
- continuity between adolescent services and adult services is critical.<sup>3</sup>

- 4.2 Diversion is discussed in detail in CP 7. In this chapter we:

- (a) discuss additional diversionary options available to young people, such as diversion under the *Young Offenders Act 1997* (NSW) and youth conduct orders; and

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1. New South Wales, *NSW State Plan* (2010); NSW Government, *Government Response to Juvenile Justice Review* (2010) 21.

2. CP 7, [1.6]-[1.7].

3. Justice Health, Victorian Government Department of Justice and the National Chief Executive Officers' Group, *Diversion and support of offenders with a mental illness: Guidelines for best practice* (2010) 80.



## CP 11 Young people with cognitive and mental health impairments in the criminal justice system

- (b) consider how diversionary provisions discussed in CP 7 apply to young people with cognitive and mental health impairments.

In particular we ask whether diversionary options available to young people sufficiently take into account the needs of young people with cognitive and mental health impairments, and if not, how this can be improved. We also ask whether additional diversionary options are necessary and consider whether s 32 and s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) requires amendment to deal with specific issues encountered by young people.

### Young Offenders Act

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- 4.3 The *Young Offenders Act 1997* (NSW) establishes a scheme to divert young people away from the formal court system in certain circumstances. The principles that guide the operation of the Act include:

- (a) The principle that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, having regard to matters required to be considered under this Act.
- (b) The principle that children who are alleged to have committed an offence are entitled to be informed about their right to obtain legal advice and to have an opportunity to obtain that advice.
- (c) The principle that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.
- (d) The principle that criminal proceedings are not to be instituted against a child solely in order to provide any assistance or services needed to advance the welfare of the child or his or her family or family group.
- (e) The principle that, if it is appropriate in the circumstances, children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties.
- (f) The principle that parents are to be recognised and included in justice processes involving children and that parents are to be recognised as being primarily responsible for the development of children.
- (g) The principle that victims are entitled to receive information about their potential involvement in, and the progress of, action taken under this Act.
- (h) The principle that the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system should be addressed by the use of youth justice conferences, cautions and warnings.<sup>4</sup>

- 4.4 The Act requires police to consider whether young people are eligible for diversionary options.<sup>5</sup> Diversion applies to summary offences and particular

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4. *Young Offenders Act 1997* (NSW) s 7.

5. *Young Offenders Act 1997* (NSW) s 7.

indictable offences that may be dealt with summarily.<sup>6</sup> The diversionary options available under the Act are:

- **Warnings:** a warning can only be issued for summary offences.<sup>7</sup> A young person is not entitled to a warning where the offence involves violence or where the “investigating official” (a police officer or prescribed person) is of the opinion that it is more appropriate to utilise other means because it is not in the interests of justice to deal with the matter by way of warning.<sup>8</sup>
- **Cautions:** a caution can be issued where the child admits to the offence and consents to the caution.<sup>9</sup> Cautions cannot be issued where an investigating officer is of the opinion that it is not in the interests of justice to issue a caution.<sup>10</sup> Cautions are generally issued by Youth Liaison Officers. When issuing a caution the Officer may consider: any matter they consider appropriate in the circumstances, and must also consider the seriousness of the offence, degree of violence, harm caused to the victim, previous offences and previous diversion under the *Young Offenders Act 1997* (NSW).<sup>11</sup> If a child receives three or more cautions they are no longer entitled to be dealt with by way of caution.<sup>12</sup>
- **Youth justice conferences:** conferencing is a “community based” way of dealing with young people who have committed crimes.<sup>13</sup> Conferencing is only available where the young person admits to an offence and consents to a conference.<sup>14</sup> The process brings together a young offender (and their family and supporters) with the victim (and their support people). Specialist police officers, the Department of Public Prosecutions, or a court, can make referrals to a conference. Juvenile Justice manages youth justice conferencing, and recruits, selects and trains Conference Convenors to facilitate conferences.<sup>15</sup> During the conference, participants can agree on an “outcome plan”.<sup>16</sup> The plan can include an apology, reparation, participation of the young person in an “appropriate program” and actions directed towards reintegration of the child into the community.<sup>17</sup> Juvenile Justice works with nominated community members to monitor completion.<sup>18</sup>

4.5 Where a police officer is not satisfied that a young person is eligible to be dealt with by way of warning or caution, the matter is referred to a Specialist Youth Officer

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6. Under Chapter 5 of the *Criminal Procedure Act 1986* (NSW) or another prescribed law: *Young Offenders Act 1997* (NSW) s 8(1).
  7. *Young Offenders Act 1997* (NSW) s 13.
  8. *Young Offenders Act 1997* (NSW) s 4, s 14(2).
  9. *Young Offenders Act 1997* (NSW) s 19.
  10. *Young Offenders Act 1997* (NSW) s 20(1)-(2).
  11. *Young Offenders Act 1997* (NSW) s 20(3); J Chan (ed), *Reshaping Juvenile Justice: The NSW Young Offenders Act 1997* (Sydney Institute of Criminology, 2005) 22. Youth Liaison Officers are specially trained officers attached to each Local Area Command in NSW.
  12. *Young Offenders Act 1997* (NSW) s 20(7).
  13. NSW Juvenile Justice, *Annual Report 2008-2009* (2009) 32. A Specialist Youth Officer from NSW Police, the Department of Public Prosecutions or a Court may refer a matter to conferencing: NSW Department of Juvenile Justice, *A guide to youth justice conferencing*.
  14. *Young Offenders Act 1997* (NSW) s 36.
  15. NSW Juvenile Justice, *Annual Report 2008-2009* (2009) 32.
  16. Some, or all, of the “outcome plan” can be vetoed by the offender or the victim: *Young Offenders Act 1997* (NSW) s 52(4).
  17. *Young Offenders Act 1997* (NSW) s 52(5).
  18. NSW Juvenile Justice, *Annual Report 2008-2009* (2009) 32.

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who decides whether it should be referred to a youth justice conference or whether criminal proceedings should be commenced.<sup>19</sup> Cautions and youth justice conferences are also available as a diversionary or sentencing option for the court.<sup>20</sup>

Table 5: Diversion under the Young Offenders Act

Key figures
Young Offenders Act: <ul style="list-style-type: none"><li>▪ Warnings identified as 30%, cautions 17% and youth justice conferences 3% of outcomes of police contact with recorded juvenile persons of interest.<sup>21</sup></li></ul>
Youth Justice Conferencing: <ul style="list-style-type: none"><li>▪ 1,441 conferences were facilitated in the year 2008-09.<sup>22</sup></li><li>▪ Approximately 95% of young offenders complete the tasks required in an outcome plan.<sup>23</sup></li><li>▪ In 2000 the largest category of offences for which youth justice conferences were conducted was theft and related offences (30.4%), the second largest was unlawful entry with the intent to commit an offence (18.7%).<sup>24</sup></li><li>▪ In 2000 92% of offenders agreed when surveyed, that they "understood what was going on in the conference".<sup>25</sup></li><li>▪ A 2006 study indicated that 58% of young people re-offend at least once in the five years following a conference, compared with 63% of young people who had subsequent court appearances within 5 years of their initial court appearance prior to the introduction of youth justice conferencing.<sup>26</sup> A 2002 study indicated that youth justice conferencing produced a reduction in re-offending.<sup>27</sup></li></ul>
Cautions: <ul style="list-style-type: none"><li>▪ 42% of young people cautioned re-offend within five years.<sup>28</sup></li></ul>

### Cognitive and mental health impairments

4.6 The diversionary options available under the *Young Offenders Act 1997* (NSW) are often utilised by police when dealing with young people – identified as totalling 50%

19. J Chan (ed), *Reshaping Juvenile Justice: The NSW Young Offenders Act 1997* (Sydney Institute of Criminology, 2005) 24.

20. *Young Offenders Act 1997* (NSW) s 31, s 40.

21. Noetic review, 15. Source: adapted from BOCSAR data file 2008.

22. NSW Department of Juvenile Justice, *Annual Report 2008-2009* (2009) 34.

23. NSW Department of Juvenile Justice, *Annual Report 2008-2009* (2009) 33.

24. L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (NSW Bureau of Crime Statistics and Research, 2000) 29.

25. L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (NSW Bureau of Crime Statistics and Research, 2000) 35.

26. S Vignaendra and J Fitzgerald, *Reoffending among young people cautioned by police or who participated in a youth justice conference*, Crime and Justice Bulletin 103 (NSW Bureau of Crime Statistics and Research, 2006) 12.

27. G Luke and B Lind, *Reducing Juvenile Crime: Conferencing versus Court* (NSW Bureau of Crime Statistics and Research, 2002).

28. S Vignaendra and J Fitzgerald, *Reoffending among young people cautioned by police or who participated in a youth justice conference*, Crime and Justice Bulletin 103 (NSW Bureau of Crime Statistics and Research, 2006) 12.

of all outcomes.<sup>29</sup> There are provisions in the Act which relate explicitly to young persons with cognitive and mental health impairments or which may be utilised by them. First, where a child who is being cautioned has a communication or cognitive disability, the person giving the caution must, as far as practicable, give the caution in the presence of an interpreter or other appropriately skilled person and where necessary, obtain their assistance in giving the caution.<sup>30</sup>

- 4.7 Secondly, in relation to youth justice conferencing, any measures dealing with, or sanctions imposed on, children who are alleged to have committed offences should take into account “the needs of any children with disabilities, especially those with communication and cognitive difficulties”.<sup>31</sup> Additionally, where a conference convenor believes it is appropriate (a) an appropriately skilled person can be invited to attend a conference if the child has a communication or cognitive disability; or (b) a social worker or other health professional can attend a conference where the child is under care.<sup>32</sup>
- 4.8 The Noetic review noted that when a matter is referred to a conference, a general screening process for “risk factors” is conducted. These risk factors include mental health and intellectual disability.<sup>33</sup> The review recommended that the youth justice conferencing process incorporate “improved risk and needs assessment”. This would involve establishing “necessary systems (people, process and technology) to allow information to be gathered, and where appropriate, action taken to provide additional support to individuals and families”.<sup>34</sup>
- 4.9 It appears that the way in which the legislation addresses the issue of young people with cognitive and mental health impairments is primarily through procedural protections (for example, the requirement of a support person) arising from diversionary mechanisms. There is a further question of whether the legislation takes into account the needs of people with cognitive and mental health impairments appropriately. There is little available evidence in the area, but extrapolating from existing data:
- Limiting the number of cautions that may be given could disadvantage young people with cognitive and mental health impairments whose prior offending is associated with their impairment.
  - Effective youth justice conferencing requires a young person to accept responsibility for the offence and understand the harm that was caused by the offending. The ability to do so will be impacted by age as well as cognitive skills.<sup>35</sup>

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29. Noetic review, [58].

30. *Young Offenders Act 1997* (NSW) s 29(2). Further, an “appropriately skilled person” is on the list of people that may be present where a caution is given to a child with communication or cognitive disability. Where a child is under care, a “social worker other health professional” may be present: s 28.

31. *Young Offenders Act 1997* (NSW) s 34(1)(c).

32. *Young Offenders Act 1997* (NSW) s 47(2).

33. Noetic review, [196].

34. Noetic review, Recommendation 12.

35. Queensland Government, Department of Communities, *Youth Justice Conferencing Queensland: Restorative Justice in Practice* (2010) 98.

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A young person with an intellectual disability may have difficulty appreciating wrongdoing and harm caused by offending.

- 4.10 We seek views regarding the efficacy of the *Young Offenders Act 1997* (NSW) in its application to young people with cognitive and mental health impairments, and input regarding how the application of the legislation can be improved.

### 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?

## Support person

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- 4.11 The *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) provides that vulnerable people are entitled to have a support person present during any investigative procedure.<sup>36</sup> Under the Regulation a vulnerable person includes both young people and people with impaired intellectual functioning.<sup>37</sup> A young person cannot waive their entitlement to a support person.<sup>38</sup> The investigative procedure is normally suspended so that a vulnerable person can be informed of their right to a support person, and make arrangements for the support person's attendance.<sup>39</sup> However, the custody manager is not required to defer the investigation if they believe, on reasonable grounds, that doing so will result in:
- an accomplice of the vulnerable person avoiding arrest;
  - concealment, fabrication or loss of evidence or the intimidation of a witness;
  - hindering the recovery of any person or property; or
  - the safety of another person being jeopardised.<sup>40</sup>
- 4.12 The *NSW Police Force Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* ("the Code") sets out procedures which must be followed by police officers when arresting, detaining and investigating suspects. The Code states that, when arresting a young person, police are to "take reasonable steps to tell the parent or guardian immediately".<sup>41</sup> Once a person has been taken into custody, the custody manager should take immediate steps to

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36. *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 27(1).

37. *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 24.

38. *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 29.

39. *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 27(3)–(5).

40. *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl (7).

41. NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2010) 19.

contact a support person where they suspect that the person is a vulnerable person.<sup>42</sup> If the person is a young person, the custody manager should specifically contact the young person's parent or guardian and advise them of the reason for the arrest and where the child is being detained.<sup>43</sup>

- 4.13 Schedule 2 to the Regulation sets out a series of indicators to be considered by the custody manager in determining whether the detained person has impaired intellectual functioning. For example, the officer is to have regard to whether the person appears to have difficulty understanding questions and instructions, has a short attention span, or receives a disability support pension (among other criteria).<sup>44</sup> The Code also adds indicators, such as the person identifying themselves as someone with impaired intellectual functioning, acting much younger than their age group or having difficulty reading and writing.<sup>45</sup>
- 4.14 All NSW Police officers are required to know and comply with all relevant policies, procedures and guidelines.<sup>46</sup> Failing to do so may result in "management action", which is determined by a supervisor, manager or commander.<sup>47</sup>
- 4.15 Police should not question a child that they suspect of committing a criminal offence unless a support person is present. Statements made by a child during questioning in the absence of an appropriate support person are inadmissible in criminal proceedings.<sup>48</sup>
- 4.16 There is no other statutory or regulatory provision for enforcement of the foregoing safeguards.

#### 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?

## Youth conduct orders

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- 4.17 Youth conduct orders are aimed at diverting a young person from the "mainstream criminal justice system through participation in a diversionary program that will focus

42. NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2010) 26.
43. NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2010) 27.
44. *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) sch 2(3).
45. NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2010) 144.
46. NSW Police Force, *Code of Conduct and Ethics*, cl 3.
47. NSW Police Force, *Standards of Professional Conduct*, 9.
48. NSW Police Force, *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2010) 84; *Children (Criminal Proceedings) Act 1987* (NSW) s 13.

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on addressing the reasons for their antisocial behaviour".<sup>49</sup> The framework for the scheme is contained in Part 4A of the *Children (Criminal Proceedings) Act 1987* (NSW). The objects of Part 4A include: the establishment of a scheme to deal with children who have been charged with offences covered by the *Young Offenders Act 1997* (NSW), but for whom diversionary options under that Act are not appropriate; to address the underlying causes of anti-social behaviour by means of orders that operate to prohibit or restrict negative behaviours and to promote socially acceptable behaviours through participation in anti-social behaviour programs; and to provide for a coordinated multi-agency approach to the administration of the scheme.<sup>50</sup>

4.18 The pilot of youth conduct orders commenced on 1 July 2009.<sup>51</sup> The scheme applies to young people between 14-18 years old and operates in three NSW Police Local Area Commands.<sup>52</sup> Participation in the scheme can be through police or court referral. Involvement in the scheme includes a number of possible steps, including:

- The Children's Court making a suitability assessment order where the young person is eligible for the scheme (consent is required if they have not pleaded guilty or been found guilty of an offence).
- Adjourning the matter while the Coordination Group (representatives from human services and justice agencies) performs a suitability assessment. This assesses the young person's suitability to participate in the scheme. If suitable, an interim conduct plan is prepared.
- If assessed as suitable, the interim conduct plan is put before the court, as well as an assessment report. Submissions can be made regarding the appropriateness of the plan, and the court can then make an interim youth conduct order (operates up to 2 months).
- Where appropriate, a final conduct plan can be created and the Children's Court can make a final youth conduct order (operates for up to 12 months). Conduct plans provide for the kinds of conduct that a child must, or must not, engage in while an order is in effect.
- If a child complies with a youth conduct order, this is taken into account when dealing with the child for the relevant offence.<sup>53</sup>

4.19 In conducting a suitability assessment:

Assessment will also be based on consideration of how the YCO diversionary model can assist the child or young person to address the underlying causes of

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49. New South Wales, *Parliamentary Debates*, Legislative Council, 23 October 2008, 10488 (John Hatzistergos, Attorney General).

50. *Children (Criminal Proceedings) Act 1987* (NSW) s 48A.

51. Noetic review, [392].

52. *Children (Criminal Proceedings) Regulation 2005* (NSW) cl 5, cl 4.

53. *Children (Criminal Proceedings) Act 1987* (NSW) s 48F; NSW Legal Aid, *Youth Conduct Orders: A Guide for Practitioners*, < <http://lacextra.legalaid.nsw.gov.au/Publications/FileUpload/Doc/ImprintFile552.pdf>>.

their offending. These may include homelessness, truancy, drug and alcohol abuse, mental illness, family dysfunction, and unemployment.<sup>54</sup>

4.20 The scheme is in its early stages, however a number of concerns have been raised regarding the potential operation of the scheme, including the:

- Lack of requirement for an admission of guilt prior to participation – this is in contrast to other diversionary mechanisms such as cautions and youth justice conferencing.<sup>55</sup>
- Sanctions available under the youth conduct order scheme, such as non-association requirements, are akin to sentencing options available to the Children’s Court (non-association and place-restriction orders) which are only available for offences punishable by imprisonment for 6 months or more, “the implication is that young people who have not yet been convicted of any offence may ... be subject to the same sanctions presently reserved ... for more serious offences and which require a conviction”.<sup>56</sup> However, as discussed in paragraph 2.19, it should also be noted that similar restrictions could be imposed in relation to the grant of bail.
- Possible difficulty in complying with conditions – as raised above in relation to bail.<sup>57</sup>

4.21 The government has noted that the youth conduct orders scheme is being independently evaluated (final report due September 2011). This evaluation will collect and interpret statistical and comparative baseline data, measure impacts of the program, consider the impact on the operation of the *Young Offenders Act 1997* (NSW) and compare local rates of police and court referral to conferencing prior to the commencement of youth conduct orders and examine changes in referral rates against regional and state trends.<sup>58</sup>

4.22 We are seeking views regarding the appropriateness of the application of the youth conduct order scheme to young people with cognitive and mental health impairments.

**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?

54. NSW Government, *Youth Conduct Orders: Guidelines* (2009) 19. See also New South Wales, *Parliamentary Debates*, Legislative Council, 23 October 2008, 10488 (John Hatzistergos, Attorney General).

55. Noetic review, [394].

56. B Shin, “Pilot scheme for youth conduct orders” (2008) 46(10) *Law Society Journal* 57.

57. Noetic review, [394].

58. New South Wales, *Government Response to NSW Juvenile Justice Review* (2010) 33.



(4) How can the youth conduct order scheme be improved for young people with cognitive and mental health impairments?

## Section 22 of the Mental Health Act

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- 4.23 Section 22 of the *Mental Health Act 2007* (NSW) authorises a police officer to take a person to a mental health facility if the person appears to be “mentally ill” or “mentally disturbed” in certain circumstances associated with the commission of offences, attempted suicide, or violence to himself or herself or others.<sup>59</sup> In CP 7, we ask whether s 22 works well in practice.<sup>60</sup> We seek additional information regarding how this provision is applied to young people with cognitive and mental health impairments, whether there is a need for improvement, and what the nature of such improvements might be. For example, it might be appropriate to include a requirement to contact a young person’s guardian or, possibly, a relevant agency, in certain circumstances, prior to transporting a young person to a mental health facility.

### 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?

## Section 32 and 33 of the Mental Health (Forensic Provisions) Act

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- 4.24 The jurisdiction of the Children’s Court, in the context of young people with cognitive and mental health impairments, is similar to that of the Local Court with respect to adults. Sections 32 and 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) allow magistrates to dismiss charges against defendants, either conditionally or unconditionally. Section 33 is designed to apply to acute forms of mental illness and allows magistrates to divert a defendant into treatment in the civil mental health system.<sup>61</sup> Section 32 is broader in scope, and allows a magistrate to divert where a defendant is developmentally disabled, or suffering from a mental illness or “mental condition”<sup>62</sup> and the magistrate considers it more appropriate to deal with the defendant in accordance with diversionary provisions than “otherwise in accordance with the law”.<sup>63</sup>

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59. See CP 7, [2.4].

60. CP 7, Issue 7.3.

61. See CP 7, Chapter 4.

62. See CP 7, Chapter 3.

63. The defendant must be suffering from a “mental condition” for which treatment is available in a mental health facility: *Mental Health (Forensic Provisions) Act 1990* (NSW) s 32(1)(a)(iii).

## Assessment

- 4.25 The Adolescent Court and Community Team (“ACCT”) operates in six Children’s Courts in NSW, but is currently being expanded to 11 Children’s Courts across NSW, particularly in rural and remote areas.<sup>64</sup> Under this program “clinicians based at court accept referrals from other court-based agencies for the purpose of performing clinical assessments for young people showing signs of possible mental illness or emerging mental disorder”.<sup>65</sup> Following an assessment, a report is prepared outlining mental health issues and potential options for dealing with the young person in both custodial and community settings.

## Application to young people

- 4.26 A 2009 BOCSAR evaluation found that general positive views were held regarding the impact of diversion services offered by the ACCT, especially in identifying mental health issues, liaising with agencies and services, timeliness and facilitating diversion into treatment services.<sup>66</sup> However, concerns that have been raised in relation to the ACCT in this evaluation also highlight issues that may be relevant with respect to young people and diversion under the *Mental Health (Forensic Provisions) Act 1990* (NSW) generally. These include:<sup>67</sup>

- Level of service responsiveness and availability of the ACCT could be improved.
- Improvements could be made to the process of identifying mental issues, particularly with respect to Indigenous young people.
- Since no treatment is provided as part of the program (simply referrals), there is no formal mandated follow-up regarding process or outcomes.
- A lack of appropriate community treatment services for adolescents as well as challenges in accessing existing mental health services, particularly those based in hospitals.
- Community services having exclusion criteria that relate to offending behaviours or particular diagnoses, precluding young people referred from the court diversion program.
- Decisions by magistrates not to support diversionary options.
- Challenges of conducting clinical assessment through Audio Visual Link.
- Referral to the service is limited by the ability of court personnel to identify appropriate young people for diversion.
- With respect to s 33, there is a general difficulty accessing hospitals for mentally ill young people, transportation of young people to hospital, and ambiguity

64. New South Wales, *Government Response to Juvenile Justice Review* (2010) 21.

65. D Bradford and N Smith, *An Evaluation of NSW Court Liaison Services* (NSW Bureau of Crime Statistics and Research, 2009) 11.

66. D Bradford and N Smith, *An Evaluation of NSW Court Liaison Services* (NSW Bureau of Crime Statistics and Research, 2009) 59.

67. D Bradford and N Smith, *An Evaluation of NSW Court Liaison Services* (NSW Bureau of Crime Statistics and Research, 2009) 40-41, 44, 46, 50-53.

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regarding whether a successfully admitted young person should be brought back before a court following discharge from a treating facility.

- With respect to s 32, a minority of participants in the BOCSAR survey noted that reports prepared by diversion nurses may fall short of diagnostic criteria to be considered for s 32, misunderstanding regarding the role of the diversion service in compiling treatment plans (this is the role of the treating community agency) and insufficient community resources.

Table 6: The Adolescent Court and Community Team

Key figures
<ul style="list-style-type: none"><li>▪ In the 2007 calendar year, service statistics indicate that 212 assessments were completed by the ACCT, 80% of these young people were identified with mental health issues and 127 young people were diverted into community settings/facilities.<sup>68</sup></li></ul>

4.27 The Noetic review recommended that the ACCT develop an action plan to address the issues raised in the BOCSAR evaluation, and that court liaison and diversion services be expanded.<sup>69</sup>

4.28 Similar issues to those identified by the BOCSAR evaluation emerged during the course of the Commission's preliminary consultations regarding the application of s 32 and s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) to young people, specifically:<sup>70</sup>

- Difficulty identifying cognitive and mental health impairments.
- Difficulty obtaining psychological/psychiatric reports and treatment plans where the young person has emerging mental health issues but not a fully manifested mental illness in respect of which a definitive diagnosis can be made.
- Difficulty finding qualified individuals to write reports and plans and a shortage of specialist services, especially in regional or rural areas.
- A lack of dedicated adolescent mental health facilities, which could make the application of s 33 problematic.

Similar issues have also been identified with respect to adults, and are highlighted in CP 7.<sup>71</sup>

4.29 Appropriately framed eligibility criteria for diversion are important because of the diagnostic challenges for young people. For example, diagnoses such as personality disorder are uncommon for young people, and Antisocial Personality

68. D Bradford and N Smith, *An Evaluation of NSW Court Liaison Services* (NSW Bureau of Crime Statistics and Research, 2009) 11.

69. Noetic review, Recommendations 61 and 62.

70. See also C Lennings, "Assessment of Mental Health Issues with Young Offenders" (Paper presented at the Juvenile Justice: From Lessons of the Past to a Road for the Future Conference, Sydney, 1-2 December 2003).

71. CP 7, [3.74]-[3.84].

Disorder (“ASPD”) cannot be diagnosed until adulthood.<sup>72</sup> Further, the diagnosis of Conduct Disorder is commonly found amongst young offenders<sup>73</sup> and is often a precursor to the diagnosis of ASPD. Juvenile Justice have argued:

There needs to some clarity around the status of personality disorders for adults and Conduct Disorder for adolescents. These constructs are highly predictive of re-offending. Yet if they were included in a diversionary provision under the MHFPA, then approximately 60% of adolescents in custody could potentially be eligible for diversion. If substance-related disorders were included under the MHFPA, then 63.5% of young people in custody could be eligible. 73% of young people in custody have two or more mental disorders, most often Conduct Disorder together with a substance-related disorder. There has been at least one occasion in the Children’s Court where this combination led to a matter being dismissed under [s 32] in recent years.<sup>74</sup>

4.30 Cognitive impairments, however, may be more reliably diagnosed during adolescence.<sup>75</sup>

**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?

**Orders**

4.31 As we discuss in CP 7, a number of orders are available under s 32 and s 33. Section 32(3) empowers a court to dismiss the charges against the defendant and:

- discharge the defendant into the care of a responsible person, unconditionally or subject to conditions;
- discharge the defendant on the condition that the defendant attend on a person or at a place specified by the magistrate for assessment of the defendant’s mental condition or treatment or both; or
- discharge the defendant unconditionally.

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72. Human Services (Juvenile Justice), *Submission MH28-2*, 7. See *Roper v Simmons* (2005) 543 US 551, 573.  
 73. See Chapter 1; D Howard, B Westmore, *Crime and Mental Health Law in New South Wales* (LexisNexis Butterworths, 2nd ed, 2010) 6.  
 74. Human Services (Juvenile Justice), *Submission MH28-2*, 7.  
 75. Human Services (Juvenile Justice), *Submission MH28-2*, 8.

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- 4.32 The court can make four types of orders when granting an application under s 33. It can order that the defendant:
- be taken to, and detained in, a mental health facility for assessment and treatment (if required);
  - be taken to, and detained in, a mental health facility for assessment and treatment on the condition that, if the mental health facility finds that the defendant is not a “mentally ill person” or a “mentally disordered person”, the person be brought back to court;
  - be discharged, either conditionally or unconditionally, into the care of a responsible person; or
  - be placed under a community treatment order.
- 4.33 In CP 7, we note that one way of extending the powers of the court to deal with defendants with a cognitive or mental health impairment would be to include a power to refer a defendant to the MHRT.<sup>76</sup> Additionally, we ask whether the MHRT should have the power to deal with breaches of orders made under s 32 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) instead of, or in addition to, the Local Court.<sup>77</sup> We further ask whether there should be a provision for the Local Court, or the MHRT to adjust conditions attached to s 32 orders if a defendant has failed to comply with the order.<sup>78</sup> The Commission is interested to hear if there are any issues particular to young people that it should take into account in relation to these questions.
- 4.34 Juvenile Justice has expressed concern about the clarity of their role with respect to s 32 orders. Where a court indicates that supervision by Juvenile Justice is a condition of a s 32 order then Juvenile Justice has a responsibility to advise the court if a breach has occurred. However, “the legislation is silent as to who is responsible for ensuring that a young person complies with any other conditions imposed by a Magistrate if there is a no specified condition naming Juvenile Justice”.<sup>79</sup>
- 4.35 Further, Juvenile Justice expressed concern that there is no legislative basis for them to supervise young people under s 32.<sup>80</sup> This is in contrast to, for example, the *Young Offenders Act 1997* (NSW) which outlines the responsibilities of the Director General of the Department of Human Services (within which Juvenile Justice is located) with respect of Youth Justice Conferencing.<sup>81</sup>

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76. CP 7, [3.63].

77. CP 7, Issue 7.27.

78. CP 7, Issue 7.28.

79. Human Services (Juvenile Justice), *Submission MH28-2*, 16.

80. Human Services (Juvenile Justice), *Submission MH28-2*, 16.

81. See *Young Offenders Act 1997* (NSW) s 46(1), s 47(2)(e), s 48(2), s 49, s 60(1). See also *Young Offenders Regulation 2010* (NSW).

- 4.36 Section 33 explicitly provides that an order under that section may provide that a defendant who is a juvenile, be taken to or from a place by juvenile justice officer employed in the Department of Human Services.<sup>82</sup>

#### Question 11.19

- (1) How, if at 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?

## Supervised treatment or rehabilitation programs

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- 4.37 Another means of addressing issues related to treatment or access to support services where young people with cognitive and mental health impairments commit particular offences is through the implementation of a treatment scheme supervised by a court or tribunal, for example, the Children's Court or MHRT.

### Youth Drug and Alcohol Court

- 4.38 One such example is YDAC. As discussed in paragraph 1.49, YDAC is a program aimed at reducing drug and alcohol related crime by young people under the age of 18. Eligibility for YDAC requires that a young person:

- was between 14 and 18 years of age when the offence was committed;
- pleads guilty or admits to the offence, or the referring court and YDAC exercise their discretion to refer and accept a child who has pleaded "not guilty" to some offences (where "the overall penalty will not alter significantly if the child is found guilty of those defended matters") ;
- is charged with an offence that can be dealt with by the Children's Court
- has a demonstrable drug and/or alcohol problem;
- lives, or meets other criteria, within program catchment area;
- is ineligible for diversion under the *Young Offenders Act 1997* (NSW).<sup>83</sup>

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82. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 33(5A)(a).

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- 4.39 Referral can be made upon application to the court by a young person or by the court with the consent of the young person.<sup>84</sup> Where a young person is eligible for the program (following submissions from both sides and review of initial assessment), the matter is adjourned so the Joint Assessment and Review Team (JART) can conduct a Comprehensive Assessment and develop a Program Plan.<sup>85</sup> JART consists of representatives from NSW Health, Community Services, Education and Juvenile Justice.<sup>86</sup> Program plans can require a young person to, for example, reside as directed; participate in counselling, educational programs, health assessments or intervention, recreational programs; submit to urinalysis; and attend YDAC report back sessions. Where a young person has a severe mental illness or intellectual disability they may not be suitable for program participation.<sup>87</sup>
- 4.40 Where a suitable Program Plan is developed and the young person consents, YDAC may either determine immediately that the young person is accepted into the program, or may stand the matter over for consideration and decision. Report back sessions with the YDAC Court Team (judicial officer, registrar, legal representatives etc) occur regularly and “provide an intensive monitoring process and continuing supervision of the child’s progress and general compliance with the Program Plan”. Such sessions occur with little formality. Program Plans are normally completed within 6 months but may be extended.<sup>88</sup>
- 4.41 Where a young person breaches their YDAC program, the manager of JART assesses whether the breach is serious or minor. Serious breaches may lead to arrest and/or discharge from the program.<sup>89</sup> Where minor breaches occur, the manager of JART can require the young person to attend the next sitting of YDAC.<sup>90</sup>
- 4.42 When sentencing a young person, YDAC takes into account the young person’s participation in the program, and where applicable, their completion. Such a sentence can be no more punitive than if the young person did not participate in the program. The sentence may require participation in the after-care phase of a Program Plan.<sup>91</sup>

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83. The Children’s Court of NSW, *Practice Note 1: Practice Note for Youth Drug and Alcohol Court* (2009) 2.

84. The Children’s Court of NSW, *Practice Note 1: Practice Note for Youth Drug and Alcohol Court* (2009) 1.

85. The Children’s Court of NSW, *Practice Note 1: Practice Note for Youth Drug and Alcohol Court* (2009) [6.1]-[7.7].

86. Youth Drug and Alcohol Court, “Policy and Programs”, <[http://lawlink.nsw.gov.au/lawlink/drug\\_court/ll\\_drugcourt.nsf/pages/ydrgcrt\\_policy](http://lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/ydrgcrt_policy)>.

87. Youth Drug and Alcohol Court, “Policy and Programs”, <[http://lawlink.nsw.gov.au/lawlink/drug\\_court/ll\\_drugcourt.nsf/pages/ydrgcrt\\_policy](http://lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/ydrgcrt_policy)>.

88. The Children’s Court of NSW, *Practice Note 1: Practice Note for Youth Drug and Alcohol Court* (2009) [8.1]-[10.8].

89. The Children’s Court of NSW, *Practice Note 1: Practice Note for Youth Drug and Alcohol Court* (2009) [12.1]-[13.3].

90. The Children’s Court of NSW, *Practice Note 1: Practice Note for Youth Drug and Alcohol Court* (2009) [14.1]-[15.3].

91. The Children’s Court of NSW, *Practice Note 1: Practice Note for Youth Drug and Alcohol Court* (2009) [18.1]-[18.2].

- 4.43 YDAC is administered by the Children’s Court and operates within the existing framework of the *Children (Criminal Proceeding) Act 1987* (NSW), supplemented by Practice Directions.<sup>92</sup>
- 4.44 A 2003 evaluation of YDAC (then the Youth Drug Court) identified positive outcomes such as decreased drug use and improved mental health.<sup>93</sup> While data problems made it difficult to assess the levels of re-offending, the “overall view of the evaluators is that the program is having an important, positive impact on the lives of many of those participating”.<sup>94</sup>

## MERIT/CREDIT

- 4.45 The Magistrates Early Referral into Treatment Program (“MERIT”) is a voluntary pre-plea drug treatment and rehabilitation program based in the Local Court and is available to adults. The program is aimed at breaking the crime cycle associated with substance abuse.<sup>95</sup> A defendant who enters this program must meet particular eligibility criteria. Solicitors and magistrates may make referrals to the program.<sup>96</sup> Under the MERIT program matters are adjourned until the program is completed. Defendants are monitored by the MERIT team throughout the process. The team reports back to the magistrate who reviews the case on a regular basis to assess continuing suitability for the program and capacity for treatment and rehabilitation. The magistrate can consider the defendant’s response to the treatment when sentencing.<sup>97</sup> The scheme operates within the framework of the *Bail Act 1978* (NSW), which allows defendants to be temporarily diverted out of the criminal justice system into treatment.<sup>98</sup> MERIT has been estimated to reduce the number of defendants who re-offend by 12%.<sup>99</sup>
- 4.46 Other similar programs include the Court Referral of Eligible Defendants into Treatment (“CREDIT”). A trial of CREDIT commenced in 2009. The program is targeted at adult defendants and addresses a variety of issues that may directly or indirectly relate to offending behaviour. As such, participants are offered facilitated

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92. Youth Drug and Alcohol Court, “About us”, <[http://lawlink.nsw.gov.au/lawlink/drug\\_court/ll\\_drugcourt.nsf/pages/ydrgcrt\\_aboutus](http://lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/pages/ydrgcrt_aboutus)>.

93. Social Policy Research Centre, University of New South Wales, *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report for the NSW Attorney-General’s Department* (2003/2004) iii-iv.

94. Social Policy Research Centre, University of New South Wales, *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report for the NSW Attorney-General’s Department* (2003/2004) 182.

95. Local Court of NSW, *Annual Review 2009*, 30.

96. K Martire and S Larney, “Magistrates Early Referral into Treatment: An overview of the MERIT program as at June 2009” (2009) 9(8) *Crime Prevention Issues* 1, 1.

97. K Martire and S Larney, “Magistrates Early Referral into Treatment: An overview of the MERIT program as at June 2009” (2009) 9(8) *Crime Prevention Issues* 1, 1.

98. See *Bail Act 1978* (NSW) s 36A; L Barnes and P Poletti, *MERIT Magistrate Early Referral Into Treatment Program: A Survey of Magistrates* (Judicial Commission of New South Wales, 2004) 15.

99. R Lulham, *NSW Bureau of Crime Statistics and Research, The Magistrates Early Referral into Treatment Program: Impact of program participation on re-offending by defendants with a drug use problem*, *Crime and Justice Bulletin* 131 (Bureau of Crime Statistics and Research, 2009).



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access to, for example, mental health assessment, accommodation, financial counselling and drug and alcohol treatment.<sup>100</sup>

### Other programs for young people with cognitive and mental health impairments

4.47 Programs similar to YDAC, MERIT and CREDIT, but formulated for young people with cognitive and mental health impairments might be effective because:

- young people have a potentially higher capacity for rehabilitation due to ongoing development;
- a court or tribunal is able to monitor the young person's progress and potentially assess capacity for rehabilitation or treatment, and determine suitability for diversion; and
- an agency or group of agencies is given the responsibility of performing an assessment for suitability and for formulating a case or treatment plan – whereas under s 32 diversion the defendant may need to obtain their own psychological or psychiatric reports and access a treatment plan.

4.48 The Shopfront Youth Legal Centre have noted:

We would be interested in exploring the possibility of a MERIT type program for people with intellectual disabilities or mental health problems. This would allow them to be diverted at an early stage, and have access to a team of clinicians to perform assessments, develop case plans and oversee their implementation. Such a program could run for several weeks or months (the MERIT program generally runs for 3 months), with a report back to the court after this period. If a successful case plan has been developed, the court could then consider a final order under section 32.<sup>101</sup>

4.49 A key issue is how such a program would be framed and what legislative change would be required to enable it. A further question is whether it would be appropriate to extend current s 32 or s 33 powers to dismiss a charge (or implement similar but separate provisions) to allow for diversion out of the criminal justice system prior to sentencing or whether, as is with the case with YDAC and MERIT, participation in, or completion of, the program should simply be a factor when sentencing.

#### 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?

100. G Henson, "Diversionary and other intervention programmes within the Local Court of New South Wales" (Paper presented at NSW Bar Association Local Court Diversionary Schemes seminar, Bar Association, 18 March 2010).

101. Shopfront Youth Legal Centre, *Submission MH7*, 12.

- (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?

## Enhancing diversion by superior courts

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- 4.50 Currently, diversion under s 32 and s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) is available at the Local Court and Children's Court. In CP 7 we consider whether these diversionary provisions should be extended to superior courts.<sup>102</sup> As we have noted, young people have a special status in the legal system, and there is a particular focus on early intervention and rehabilitation. Even if it is not considered appropriate to extend diversionary provisions to superior courts for adults we ask whether it would be appropriate to extend them in relation to young people.

### 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?

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102. CP 7, Chapter 5.

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## 5. Fitness and the defence of mental illness

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- 5.1 In this chapter we discuss fitness to be tried and the defence of mental illness as it applies to young people with a cognitive or mental health impairment. We note that the general rules that apply to adult defendants also apply to young people. We consider how these rules have been applied to young people and ask whether improvement is required, and how this can be achieved.
- 5.2 Under the *Children (Criminal Proceedings) Act 1987* (NSW) there is no criminal liability for a person under the age of 10.<sup>1</sup> Additionally, there is a rebuttable presumption that a child aged between 10 and 14 does not have the mental capacity to form the intent required for criminal liability.<sup>2</sup> This is referred to as the presumption of *doli incapax*. The presumption can be rebutted by the prosecution if it establishes, beyond a reasonable doubt, that the defendant knew, at the time of the offence, that the act was “seriously wrong, as distinct from an act of mere naughtiness or mischief”.<sup>3</sup> The “presumption of incapacity recognises that many young people (due to developmental, social and familial factors) lack the cognitive maturity of legally recognised adults”.<sup>4</sup> *Doli incapax* has repercussions for both fitness to be tried, and the defence of mental illness.

### Fitness

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- 5.3 We discuss fitness to be tried in CP 6. The *Mental Health (Forensic Provisions) Act 1990* (NSW) does not define fitness to be tried. However, the Act does set out procedures surrounding a finding of unfitness, including when the question of fitness

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1. *Children (Criminal Proceedings) Act 1987* (NSW) s 5.  
2. *R v BP; R v SW* [2006] NSWCCA 172, [27].  
3. *R v BP; R v SW* [2006] NSWCCA 172, [27]; *C v Director of Public Prosecutions* (1996) 1 AC 1, 38; *R v CRH* (unreported, New South Wales Court of Criminal Appeal, Smart, Newman and Hidden JJ, 18 December 1996).  
4. T Bartholomew, “Legal and Clinical Enactment of the Doli Incapax Defence in the Supreme Court of Victoria, Australia” (1998) 5(1) *Psychiatry, Psychology and Law* 95, 98.

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can be raised, procedures following a finding of unfitness (for example, a special hearing), the functions of the MHRT and verdicts available at a special hearing.<sup>5</sup>

5.4 At common law, a person is fit to plead if he or she is sufficiently able to comprehend the nature of the trial so as to make a proper defence to the charge.<sup>6</sup> There is no separate law in NSW for young people who are, or may be, unfit to be tried. Consequently, in the District and Supreme Courts the adult (*Presser*) definition of fitness, and the special hearing and other procedures that follow a finding of unfitness, apply to young persons.<sup>7</sup> The *Presser* standards require that the accused be able to:

- understand the offence with which he or she is charged;
- plead to the charge;
- exercise the right to challenge jurors;
- understand generally the nature of the proceeding as an inquiry into whether he or she committed the offences charged;
- follow the course of proceedings so as to understand what is going on in a general sense;
- understand the substantial effect of any evidence that may be given against him or her;
- make a defence or answer to the charge;
- where the accused is represented, give necessary instructions to counsel regarding the defence, and provide his or her version of the facts to counsel and, if necessary, the court; and
- have sufficient mental capacity to decide what defence he or she will rely on and to make that known to counsel and the court.<sup>8</sup>

These criteria are to be applied with regard to the particular circumstances of the defendant and the trial.

### Children's Court

5.5 The Children's Court, like the Local Court, has no specific powers to determine questions of fitness or to deal with an unfit defendant. Fitness procedures in the *Mental Health (Forensic Provisions) Act 1990* (NSW) only apply in the District and Supreme Courts. This approach may be justified because of the cost and other

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5. *Mental Health (Forensic Provisions) Act 1990* (NSW) pt 2.

6. See *R v Pritchard* (1836) 7 C & P 303, 173 ER 135; *Ngatayi v The Queen* (1980) 147 CLR 1, 6-7; *Kesavarajah v The Queen* (1994) 181 CLR 230, 245; *Eastman v The Queen* 203 CLR 1.

7. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 4, pt 2; *R v Presser* [1958] VR 45, 48 and see for example the cases of *R v AN* [2005] NSWCCA 239 and *R v AN (No 2)* (2006) 66 NSWLR 523.

8. See *R v Presser* [1958] VR 45, 48; CP 6, [1.9].

burdensome aspects of those procedures, which may be appropriate for serious offences, but may be disproportionate in relation to minor offences.<sup>9</sup>

5.6 However, the Children's Court may, in some cases, rely on the diversionary measures outlined in Chapter 4.<sup>10</sup> Arguably, the Children's Court may also, in certain circumstances, be able to transfer an indictable matter involving an apparently unfit defendant to the District or Supreme Court. This is because the Children's Court may determine that it is more appropriate, or the young person may elect, to proceed according to law, in which case the Children's Court conducts a committal hearing.<sup>11</sup>

5.7 However, the case of *Police v AR* is illustrative of the issues encountered by the Children's Court when dealing with defendants who are unfit to be tried and the exercise of the Court's powers. AR had committed a number of offences ranging from possession of prohibited drugs to aggravated robbery (when he was 17). It was noted that:

There is a considerable body of expert medical evidence before me which clearly establishes that under the tests expounded in *R v Presser* [1958] VR 45 the defendant is unfit to plead. It is to be borne in mind, however, that when I say that the evidence establishes that the defendant is unfit to plead there is no statutory procedure or regime in the Local Court or the Children's Court, as exists in the District Court and the Supreme Court, with respect to trials on indictment for a hearing to be conducted to determine whether a defendant is fit to plead. Accordingly, when I say in these reasons that on the evidence before me I am satisfied that the defendant is unfit to plead, I am indicating that if the defendant was standing trial in the District Court or the Supreme Court, under the applicable procedures and legal tests to be applied in those courts the defendant, would in my view be found unfit to plead.<sup>12</sup>

5.8 The Court came to the view that while diversion under s 32 was appropriate for some of the offences, for various reasons, it was not appropriate for some of the more serious offences.<sup>13</sup> In relation to the more serious offences, the Court noted that "if the defendant is incapable of understanding and participating in the proceedings the summary proceedings under s 31 [of the *Children (Criminal Proceedings) Act 1987* (NSW)] cannot even commence".<sup>14</sup> This would preclude conducting a committal hearing. As a result, the more serious charges against the defendant were dismissed. However, the finding did "not preclude the Crown,

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9. See CP 6, [1.47].

10. *Children (Criminal Proceedings) Act 1987* (NSW) s 27(1); *Mental Health Forensic Provisions) Act 1990* (NSW) s 4, 31; and see *Mantell v Molyneux* (2006) 165 A Crim R 83, 92-93; *Pioch v Lauder* (1976) 13 ALR 266, 270-271; *Ebatarinja v Deland and Others* (1998) 194 CLR 444, 455-456.

11. *Children (Criminal Proceedings) Act 1987* (NSW) s 31(2)-(3); and see *Criminal Procedure Act 1986* (NSW) ch 3 pt 2 div 2-3.

12. *Police v AR* (unreported, Children's Court of New South Wales, Marion J, 18 November 2009) [13]; See Children's Court of New South Wales, *Children's Law News*, Number 8 (May 2010) 15-16.

13. *Police v AR* (unreported, Children's Court of New South Wales, Marion J, 18 November 2009) [52]; See Children's Court of New South Wales, *Children's Law News*, Number 8 (May 2010) 23.

14. *Police v AR* (unreported, Children's Court of New South Wales, Marion J, 18 November 2009) [58]; See Children's Court of New South Wales, *Children's Law News*, Number 8 (May 2010) 24.

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should it see fit, from laying an *ex officio* indictment against the defendant with respect to those charges in the District Court”.<sup>15</sup>

- 5.9 The broad jurisdiction of the Children’s Court, which extends to all offences, except serious children’s indictable offences, means that it may require appropriate powers to deal with questions of fitness and consequential dispositions.<sup>16</sup>

### 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?

### Presser criteria - application to young people

- 5.10 In CP 6 we consider whether the *Presser* criteria remain relevant and sufficient for determining fitness to stand trial.<sup>17</sup> Here we consider whether it is appropriate to apply the adult fitness provisions to young people. Young people’s brains are still developing, with consequent differences in cognitive functioning compared with adults. As discussed in paragraphs 1.12-1.18, these developmental differences may be further complicated by the existence of a cognitive or mental health impairment, or an emerging impairment. In light of those differences, a question arises as to whether the *Presser* criteria are suitably framed for application to young people.
- 5.11 In *R v JH*, there was some disagreement between psychiatrists regarding whether 14 year-old JH, who was charged with the murder of his father, was fit to stand trial. All of the psychiatrists agreed that JH suffered from both a psychotic illness and intellectual disability. However, there was disagreement regarding the application of the *Presser* criteria and “the nature of understanding”.<sup>18</sup> An adolescent and child psychiatrist presented evidence that:

any individual matter relating to JH’s fitness has elements lacking precision when assessing them and which, taken alone, might not remove the presumption of fitness. Taking all of these issues into account together (i.e. an intellectually impaired, hitherto extremely socially isolated, emotionally vulnerable, mentally ill young man who has been cared for and cosseted away by a mentally ill mother who, even still, continued to have a determinative emotional currency in his beliefs and decision making), it seems unlikely that he is fit to stand trial.<sup>19</sup>

15. *Police v AR* (unreported, Children’s Court of New South Wales, Marion J, 18 November 2009) [62]: See Children’s Court of New South Wales, *Children’s Law News*, Number 8 (May 2010) 25.

16. The Children’s Court “has jurisdiction to hear and determine ... proceedings in respect of any offence (whether indictable or otherwise) other than a serious children’s indictable offence” or a “traffic offence”: *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1)(a), (2) and see s 3(1). Compare the jurisdiction of Local Court: see *Criminal Procedure Act 1986* (NSW) s 5-7, sch 1.

17. CP 6, Issue 6.2.

18. *R v JH* [2009] NSWSC 551, [30].

19. *R v JH* [2009] NSWSC 551, [28].

- 5.12 In arriving at a finding that JH was unfit to stand trial, the court took into account the “fact that the accused’s overall condition is affected by a unique range of matters including his mental illness, his intellectual disability, his highly unusual background and of course his age”.<sup>20</sup> *R v DMA* also highlighted the impact of intellectual disabilities combined with social and intellectual immaturity in relation to young defendants found unfit to be tried.<sup>21</sup>
- 5.13 It has also been suggested that the “fact that adolescence may be a time when mental illness is emerging and a definitive diagnosis is difficult may impact on the application of the *Presser* standards”.<sup>22</sup>

**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?

**Doli incapax**

- 5.14 Another aspect of the special legal status of young people is the presumption of *doli incapax*. The presumption of *doli incapax* relates to the age of the young person at the time of the alleged offence, not at the time of the trial. Nevertheless, the presence of a cognitive or mental health impairment that gives rise to a question as to fitness may also be relevant to determining whether or not the prosecution has successfully rebutted the presumption.<sup>23</sup> In *R v AN*, the District Court, during the course of a special hearing, considered whether the presumption of *doli incapax* had been rebutted. AN was aged 13 years and 9 months at the time the offences were committed and in considering whether the presumption was rebutted, the Court took into account AN’s intellectual disability.<sup>24</sup> It was noted that in relation to learning ability, AN was equivalent in age to someone much younger. However it was considered that due to “life experiences”, he operated in the community at a more advanced level.<sup>25</sup> Therefore, it was found that AN, despite the additional factor of his intellectual disability, knew that what he was doing was not only wrong, but seriously wrong.<sup>26</sup> The length of the “limiting term” (the best estimate of the sentence the court would have imposed if the person had been fit to be tried and had been found guilty of the offence at an ordinary trial), imposed on AN after this

20. *R v JH* [2009] NSWSC 551, [36]-[39].

21. *R v DMA* [2000] NSWSC 1051, [6].

22. Human Services (Juvenile Justice), *Submission MH28-2*, 12.

23. See for example *R v AN* [2005] NSWCCA 239, [19], [22]-[32], [39], [60].

24. Transcript of proceedings, *R v AN* (District Court of NSW, No 01/11/1234, McGuire J, 14 November 2003) 7.

25. Transcript of proceedings, *R v AN* (District Court of NSW, No 01/11/1234, McGuire J, 14 November 2003) 30.

26. Transcript of proceedings, *R v AN* (District Court of NSW, No 01/11/1234, McGuire J, 14 November 2003) 32.



finding of guilt at the special hearing was the subject of a successful appeal, this is discussed below.<sup>27</sup>

### 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?

## The defence of mental illness

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### The general test

- 5.15 The defence of mental illness is discussed comprehensively in CP 6.<sup>28</sup> The *Mental Health (Forensic Provisions) Act 1990* (NSW) sets out the framework for the operation of the defence of mental illness in the Supreme and District Courts.<sup>29</sup> Section 48(1) provides that where evidence demonstrates that a person was mentally ill at the time an offence was committed, so as not to be responsible, “according to law” a special verdict of “not guilty by reason of mental illness” must be returned. Responsibility “according to law” incorporates what are commonly known as the *M’Naghten* rules, which constitute the common law test for the defence of mental illness.<sup>30</sup> To trigger the defence, the defendant, during the commission of an offence, must be labouring under a “defect of reason” caused by a “disease of the mind” and because of that disease not know the nature or quality of the act, or that the act was wrong.
- 5.16 In CP 6 we examine this test for the defence of mental illness and ask if, and how, it might be reformulated.<sup>31</sup> A further question also arises as to whether the defence of mental illness, developed largely in relation to adult defendants, adequately encompasses all the circumstances in which a young person might, by reason of a cognitive or mental health impairment, experience a mental state that is (or should be) inconsistent with criminal responsibility.

### Application to young people

- 5.17 The defence of mental illness is available to young people tried in the District or Supreme Courts. There appear to be only a small number of cases where the defence has successfully been raised for a young person below the age of 18. This could be, in part, due to the risk of indefinite detention that arises where the defence is successfully raised.<sup>32</sup> The risk of prolonged detention is now reduced by

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27. *R v AN* [2005] NSWCCA 239. See para 6.26.

28. CP 6, Chapters 3, 6 and 7.

29. *Mental Health (Forensic Provisions) Act 1990* (NSW) pt 4.

30. *R v M’Naghten* (1843) 8 ER 718. See CP 6, [3.19]-[3.29].

31. See CP 6, Issues 6.20-6.36.

32. See CP 6, [3.7].

decisions concerning release of those detained as a consequence of raising this defence being vested in the MHRT, and would be further reduced if a limiting term were introduced, as suggested in CP 6.<sup>33</sup> It is possible, therefore, that in the future there may be an increase in the incidence of the defence.

- 5.18 What is the relevance of the young person's age to the defence of mental illness? The nature, type or characterisation of mental illness identified might be different. For example, in *R v SE* the accused was a 16 year-old boy who attacked his mother, and killed his father. The Court found that SE was not guilty by reason of mental illness due to his developing psychosis.<sup>34</sup> Evidence placed before the Court noted that his behaviour was consistent with him "suffering from an early stage of psychosis in the form of schizophrenia".<sup>35</sup> We note that obtaining historical information about mental development of a young person may be difficult. In this particular case, SE had created many documents (hand written and computer generated) as well as audio files where he recorded his thoughts, including his intention to kill particular people and then himself. These documents and other materials were used to assist psychiatrists and psychologists in forming their views and presenting their opinion to the Court. This helped to confirm SE's emerging mental illness.<sup>36</sup> It cannot be expected that such direct evidence of emerging illness will always be available.
- 5.19 The factor of age or maturity may also compound the effect of an identified cognitive or mental health impairment. In *R v JH* the accused (nearly 15 years old) was found unfit to be tried, and therefore the matter went to a special hearing. Evidence presented to the Court indicated that the accused was suffering psychosis and was "of a young and vulnerable age, immature and ... intellectually impaired".<sup>37</sup> Here, intellectual impairment and immaturity compounded the inability of the accused to rationally interpret his environment due to his psychosis.<sup>38</sup> Other evidence placed before the court confirmed "early onset schizophrenic illness ... [and] ... immature emotional development".<sup>39</sup> The Court found that the accused was not guilty by reason of mental illness because (despite knowing the nature and quality of his acts) he was "labouring under such a defect of reason, from a disease of the mind as not to know that what he was doing was wrong".<sup>40</sup>
- 5.20 Age is also a factor in demonstrating vulnerability and suggestibility, which is particularly relevant to people with cognitive and mental health impairments. In *R v GJF*, *R v GFF*, *R v KHF*, KHF was 15 years old when she and the co-defendants killed her mother. GFF (KHF's father) and GJF (KHF's brother, 18 years old at the time of the killing) had psychotic illnesses with delusional beliefs.<sup>41</sup> Evidence placed before the court suggested KHF had "developed an acute but transient psychotic

33. *Mental Health (Forensic Provisions) Act 1990* (NSW) s 46; CP 6, Issue 6.101-6.102, [7.89]-[7.102].

34. *R v SE* [2009] NSWSC 785 [68].

35. *R v SE* [2009] NSWSC 785 [43].

36. *R v SE* [2009] NSWSC 785 [45]-[46].

37. *R v JH* [2010] NSWSC 531 [31].

38. *R v JH* [2010] NSWSC 531 [32].

39. *R v JH* [2010] NSWSC 531 [34].

40. *R v JH* [2010] NSWSC 531 [37].

41. *R v GJF, R v GFF, R v KHF* [2002] NSWSC 737 [50].

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state in response to the intense influence of GFF and GJF” and “at fifteen years of age [was] more vulnerable than an adult to suggestion and external influence”.<sup>42</sup> Following this finding and subsequent detention of KHF, the MHRT recommended release of KHF on multiple occasions. However the executive government did not order KHF’s release, and she remained in detention.<sup>43</sup> Significant changes have occurred to legislation since this case. In particular, the amendments eliminated the decision-making role of the executive government with regard to the care, treatment, detention and release of forensic and correctional patients, in favour of orders made by a specialist division of the MHRT.<sup>44</sup>

- 5.21 In paragraphs 1.16-1.18 we discuss difficulties with the identification and assessment of cognitive and mental health impairments in young people. We seek views regarding whether these difficulties have led to any particular issues with the application of the defence of mental illness.

### 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?

- 5.22 In CP 6, we discuss the application of the defence of mental illness to the Local Court. We note that the common law defence of mental illness applies in the Local Court but that the legislative scheme in Part 4 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) does not appear to apply (except, possibly, in a limited class of proceedings). If the legislative scheme does not apply, then the common law is left to govern proceedings. The important distinction between the legislation and the common law lies in the difference in outcomes that are available to deal with defendants once they are found not guilty by reason of mental illness.<sup>45</sup>
- 5.23 The Commission has recorded its view that it is appropriate for the Local Court to have powers to deal with the full range of circumstances with which they are likely to be confronted.<sup>46</sup> As we note in relation to fitness to stand trial, the broad jurisdiction of the Children’s Court extends to all offences, except serious children’s indictable offences. This means that it may require appropriate powers to deal with the defence of mental illness and consequential disposition.

42. *R v GJF, R v GFF, R v KHF* [2002] NSWSC 737 [57]-[58].

43. NSW Bar Association, *Review of the Forensic Provisions of the Mental Health Act 1990 and the Mental Health (Criminal Procedure) Act 1990, Submission concerning decision-making for forensic patients* (2007) 5.

44. See CP 5, [1.22]-[1.23].

45. CP 6, [3.114]-[3.116], [6.105]-[6.109].

46. CP 6, [6.109].

**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?

**Doli incapax**

- 5.24 As discussed, for young defendants who are aged between 10 and 14 years of age, there is a rebuttable presumption, *doli incapax*. The presumption can be rebutted, if the prosecution establishes, beyond a reasonable doubt, that the defendant knew, at the time of the offence, that the act was "seriously wrong".<sup>47</sup> If a reasonable doubt remains, the presumption applies and the child is entitled to an outright acquittal.<sup>48</sup>
- 5.25 The presumption of *doli incapax* overlaps with the defence of mental illness. If a child has a defence of mental illness on the ground of not knowing that the act was wrong, he or she will necessarily not know that the act was "seriously wrong" and must therefore be acquitted unconditionally *doli incapax*.
- 5.26 The link, and similarity, between *doli incapax* and *M'Naghten* has been noted.<sup>49</sup> For example, it has been asserted that the "uniform idea" that underlies both is that a person should not be convicted if he did not know what he was doing was wrong.<sup>50</sup> In a case in the ACT it was held that:
- Even if it be proved that the child was insane so as to attract, if an adult, the defence of insanity, that would merely tend to support the presumption of lack of knowledge that the acts done were wrong. If the accused, though acquitted, be thought insane a civil committal under mental health legislation would be appropriate. He could be acquitted on the grounds of insanity only if *doli incapax* did not apply.<sup>51</sup>
- 5.27 The interaction between the defence of mental illness and *doli incapax* does not appear to cause significant problems. However, the evidence base for this assertion is limited and the Commission therefore asks if any problems do arise in this respect. If problems do arise, how should these problems be addressed?

47. *R v BP; R v SW* [2006] NSWCCA 172, [27]; see also *R v CRH* (unreported, New South Wales Court of Criminal Appeal, Smart, Newman and Hidden JJ, 18 December 1996).

48. See for example, *R v CRH* (unreported, New South Wales Court of Criminal Appeal, Smart, Newman and Hidden JJ, 18 December 1996). The Court found that "the actions taken by the appellant [CRH] are as consistent with naughty behaviour as wrong behaviour. On the criminal standard ... no prima facie case has been made out". The presumption of *doli incapax* has been strongly criticised: see *C (a minor) v Director of Public Prosecutions* [1995] 2 All ER 43. It has been abolished in England and Wales: *Crime and Disorder Act 1998* (UK) s 34 but see *Director of Public Prosecutions v P* [2007] 4 All ER 628, 639-642, 646-647.

49. *R v M* (1977) 16 SASR 589, 591; *R v Brooks* [1945] NZLR 584; *R v JA* [2007] ACTSC 37, [45]; L Steinberg and E Cauffman, "A Developmental Perspective on Serious Juvenile Crime: When Should Juveniles be Treated as Adults?" (1999) 63(2) *Federal Probation* 52, 55.

50. *R v Brooks* [1945] NZLR 584, 600.

51. *R v JA* [2007] ACTSC 51, [45].

**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?

## Forensic mental health framework

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5.28 The forensic mental health framework is outlined in detail in CP 6. The framework addresses issues such as:

- (1) procedures following a finding of unfitness;
- (2) the powers of the court following a finding of guilt at a special hearing (which can follow a finding of unfitness) or a verdict of not guilty by reason of mental illness; and
- (3) management of forensic (and correctional)<sup>52</sup> patients following court proceedings.

5.29 Sentencing, which we discuss in the following chapter, may also be relevant to the forensic mental health framework. For example, some sentencing principles are applied by the court in imposing a “limiting term” following a finding of guilt at a special hearing.

5.30 The forensic mental health framework does not have provisions that specifically apply to young people. It has also been noted “there is a general lack of information regarding the position of juveniles within the forensic mental health system”.<sup>53</sup> Previous reviews have recommended the development of “specific legislative and administrative proposals dealing with the detention, care, treatment, release and co-ordinated community support of forensic patients and transferees with intellectual disability or who are ... children”.<sup>54</sup>

5.31 Juvenile Justice have noted that:

Within the current system, there is scope for young people who are forensic patients to be detained in juvenile justice centres (rather than mental health facilities). The number of forensic patients is very limited and although these young people are not convicted offenders, they are subject to the same controls and discipline as convicted offenders.<sup>55</sup>

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52. A “correctional patient” means a person (other than a forensic patient) who has been transferred from a correctional centre to a mental health facility while serving a sentence of imprisonment, or while on remand, and who has not been classified by the Tribunal as an involuntary patient: *Mental Health (Forensic Provisions) Act 1990* (NSW) s 41.

53. G James, *Review of New South Wales Forensic Health Legislation* (2007) [3.21].

54. G James, *Review of New South Wales Forensic Health Legislation* (2007) Recommendation 4.

55. Department of Human Services (Juvenile Justice), *Submission MH28-2*, 2.

## Principles

- 5.32 In CP 6, we discussed principles and factors that a court should consider where a person has been found unfit and not acquitted, or found not guilty by reason of mental illness.<sup>56</sup> These include (a) the absence of criminal responsibility and therefore the absence of any principled basis for punishment; and (b) risk of harm, and the consequent need for restrictions on a person's liberty to ensure the safety of the community and/or the person him or herself. As we note in CP 6, the first point is a negative one, which tells us only that punitive considerations have no application in such cases, except possibly to limit the powers of the court. On the other hand, the second point involves positive considerations which can assist in decision-making.
- 5.33 In respect of young people, these considerations arguably remain relevant.<sup>57</sup> However, it may be necessary for the system also to reflect additional points of principle and practicality, such as:
- the principle that, in any decisions regarding a young person, including by a court, the best interests of the young person should be paramount;<sup>58</sup>
  - the right of a young person to participate in, and be provided with appropriate information in respect of decisions affecting him or her;<sup>59</sup>
  - the usual dependence of a young person on, and desirability of ensuring ongoing contact with, his or her family;<sup>60</sup>
  - the need to ensure continuing access to education and vocational training, and other opportunities for appropriate social development;<sup>61</sup>
  - the differences in cognitive functioning between young people and adults, the different range of cognitive and mental health impairments which are common among young people, and the difficulty in some cases of making a firm diagnosis at a young age; and
  - a shortage in NSW of services for young people may impede conditional release into the community<sup>62</sup> and may result in young forensic patients being managed

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56. CP 6, [6.53]-[6.80].

57. See CROC, art 23, 24, 37, 40; *Beijing Rules* rules 2.3, 14.1, 17.1(a), 24, 26.1-26.2.

58. CROC, art 3(1). See also *Beijing Rules* rules 1, 5, 14.2, 17(d); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2006] ATNIF 15 (entry into force 2 May 2008) art 7(2).

59. CROC, art 12; *Beijing Rules* rule 14.2. See for example *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(b), 10, 118(2)(a), 166; see also NSW Law Reform Commission, *Young Persons and Consent to Health Care*, Report 119 (2008) Recommendation 2.

60. CROC, art 8, 9, 10.1, 30; *Beijing Rules* rules 1, 15.2, 18.2, 25, 26.5. See also *Children (Criminal Proceedings) Act 1987* (NSW) s 6(d), (f); and consider *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(2)(c)-(f), 112(1).

61. See CROC, art 28, 29, 31; *Beijing Rules* rules 1, 13.5, 24, 26.1-26.2; *Children (Criminal Proceedings) Act 1987* (NSW) s 6(c); Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), Recommendation 239; and see Mental Health Council of Australia, *Home Truths: Mental Health and Homelessness In Australia*, Report (2009) 17.

62. Cf *Beijing Rules*, rule 11.4 which states "[i]n order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation of victims".

within service frameworks not designed for them, for example, service frameworks for young offenders who do not have cognitive or mental health impairments<sup>63</sup> or for adult forensic patients or adult offenders.<sup>64</sup>

**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?

### Operation of framework

5.34 We seek feedback regarding relevant issues concerning the operation of the forensic mental health framework, and views regarding any ways in which its operation can be improved with respect to young people with cognitive and mental health impairments.

5.35 For example, it has been suggested that:<sup>65</sup>

- Delays that might occur following a finding of unfitness (for example, waiting for a special hearing) may have a greater impact on young people for developmental reasons. Disruption will occur to familial and social relationship at a key stage in development.
- Special consideration may need to be given to the notification and participation of guardians and/or carers of young people in relation to court or Tribunal proceedings involving young people who are unfit or not guilty by reason of mental illness.
- It can be difficult to divert a young person into a facility for treatment due to a lack of available services, especially services that address criminogenic needs. Service provision in rural and remote areas presents particular problems.

5.36 Specific provisions for young people applied in other jurisdictions include:

- Closed hearings in mental health courts for young people.<sup>66</sup>
- Statements of rights explained in an age appropriate manner.<sup>67</sup>
- A requirement that courts take into account the age of a defendant when determining whether to order unconditional release of an accused after a finding of not guilty by reason of mental illness, or where making custody orders

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63. See CROC, art 4, 23, 24 and especially art 37(c); *Beijing Rules* rules 13.4, 26.3. See for example *R v AN (No 2)* (2006) 66 NSWLR 523, 538. Cf *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 246.

64. See for example United Nations Human Rights Committee, *Brough v Australia Communication No 1184/2003 CCPR/C/86/D/1184/2003*; *R v Adams* [2001] NSWSC 1042, [1], [18].

65. See Human Services (Juvenile Justice), *Submission MH28-2*, 11-13.

66. *Mental Health Act 2000* (Qld) s 412.

67. *Mental Health Act 2000* (Qld) s 345.

following a finding of unfit and not acquitted, or not guilty by reason of mental illness.<sup>68</sup>

**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?

## Forensic samples

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5.37 In CP 8 we discuss the use of a defendant's forensic material following a finding of unfitness to be tried or not guilty by reason of mental illness, or the making of a diversionary order. We consider when legislation should require destruction or retention of forensic material collected from such defendants.

5.38 Our terms of reference require us to consider the operation of Part 10 (relating to the destruction of forensic materials) of the *Crimes (Forensic Procedures) Act 2000* (NSW). The *Crimes (Forensic Procedures) Act 2000* (NSW), governs the collection, use and retention of forensic samples generally, and has a number of provisions concerning young people. For example:

- carrying out of forensic procedures on a child under the age of 10 is prohibited except in certain circumstances;<sup>69</sup>
- use and retention of forensic material taken from a child under 10 years of age is limited;<sup>70</sup> and
- the circumstances under which a magistrate may order the carrying out of a forensic procedure on a child are limited.<sup>71</sup>

However, Part 10, which relates to the destruction of forensic materials, contains no special provision in relation to forensic samples taken from young people. Part 10 requires the destruction of a suspect's forensic material, and any record of information relating to that material in certain situations. For example, where the suspect has been acquitted of the offence or has been found to have committed the offence but no conviction is recorded, then the forensic material must be destroyed as soon as practicable unless an investigation or proceeding for another offence is pending.<sup>72</sup> In CP 8 we explore the effect of a diversionary order, a verdict of not guilty by reason of mental illness and a finding of unfitness to be tried and subsequent processes under the requirements to destroy forensic material.

68. *Criminal Law (Mentally Impaired Accused) Act 1996* (WA).

69. See *Crimes (Forensic Procedures) Act 2000* (NSW) pt 8A.

70. *Crimes (Forensic Procedures) Act 2000* (NSW) s 81M.

71. *Crimes (Forensic Procedures) Act 2000* (NSW) s 80.

72. *Crimes (Forensic Procedures) Act 2000* (NSW) s 88(4).



## CP 11 Young people with cognitive and mental health impairments in the criminal justice system

- 5.39 Section 38 of the *Children (Criminal Proceedings) Act 1987* (NSW) gives the Children's Court the power to require destruction of particular forensic materials in certain circumstances:

### 38 Destruction of photographs, finger-prints etc

- (1) If the Children's Court finds a person not guilty of an offence to which this Division applies, or finds a person guilty of such an offence but makes an order dismissing the charge under section 33(1)(a)(i), the Children's Court is to make an order that requires any photographs, finger-prints and palm-prints, and any other prescribed records (other than records of the Children's Court), relating to the offence to be destroyed.
- (2) If the Children's Court finds a person guilty of an offence to which this Division applies and makes any other order in respect of the person under section 33, it may, if it is of the opinion that the circumstances of the case justify its doing so, make an order (whether on the application of the person or otherwise) that requires any photographs, finger-prints and palm-prints, and any other prescribed records (other than records of the Children's Court), relating to the offence to be destroyed.
- (3) If the Children's Court makes an order under subsection (1) or (2) in respect of a person, it shall cause a copy of the order to be given to the person and, if the person is a child, to a person responsible for the child.

### 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?

## 6. Sentencing

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6.1 As we noted in the introduction, different principles, laws and procedures may apply to young people in the criminal context. In this chapter we consider sentencing of young offenders with a cognitive or mental health impairment, focusing on:

- identification of cognitive or mental health impairment prior to sentencing a young person;
- sentencing options available to courts exercising criminal jurisdiction with respect to young people, and how these options accommodate cognitive or mental health impairments;
- sentencing principles that apply when courts sentence young people with a cognitive or mental health impairment; and
- provisional sentencing.

### Identification

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6.2 A background report is mandatory in NSW if a court is considering sentencing a young offender to detention or imprisonment,<sup>1</sup> but is not required in respect of non-custodial penalties. Under s 33 of the *Mental Health (Forensic Provisions) Act 1990* (NSW) if it appears to the court that the defendant is a mentally ill person the court may order that the defendant be taken to, and detained in, a mental health facility for assessment.<sup>2</sup> As discussed in paragraph 2.19, s 36A of the *Bail Act 1978* (NSW) also provides a means of referring a person to assessment for participation in a treatment or rehabilitation program.

6.3 Several jurisdictions provide for court-ordered psychological or psychiatric assessment of young offenders with cognitive and mental health impairments. For example, in Victoria, “[i]f it appears to the Court that a child found guilty of an offence is intellectually disabled, the Court must, before passing sentence, order a

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1. See para 1.55. *Children (Criminal Proceedings) Act 1987* (NSW) s 25.

2. See para 4.24.

## CP 11 Young people with cognitive and mental health impairments in the criminal justice system

pre-sentence report in respect of the child”.<sup>3</sup> In New Zealand, a court may order the preparation of an assessment report by a health assessor. The report may be prepared for various reasons, including for the purposes of determining fitness and for sentencing.<sup>4</sup> Where the subject is a child or young person, the assessor should also consult the subject’s parent or guardian where practicable.<sup>5</sup>

6.4 The ALRC and Human Rights and Equal Opportunity Commission have recommended that national standards for juvenile justice should require that:

- Magistrates and judges considering sentences for young people with a mental illness or severe emotional or behavioural disturbance should obtain and give appropriate consideration to specialist psychiatric reports prior to making any decisions about sentencing.
- Sentences should, where appropriate, provide for systematic and continuing assessment and treatment for young offenders affected by mental illness or severe emotional or behavioural disturbance. This should apply to both custodial and non-custodial sentencing programs.<sup>6</sup>

6.5 In Canada, a youth justice court may, at any stage order, medical, psychiatric or psychological assessment where necessary for particular purposes (including purposes relating to sentencing) where:

- (1) a young person is charged with a serious violent offence;
- (2) his or her history indicates a pattern of repeated findings of guilt; or
- (3) there are reasonable grounds to believe that he or she may have “a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability”.<sup>7</sup>

For the purpose of the assessment, the young person may be remanded to custody for up to 30 days. However, there is a presumption against custodial remand.<sup>8</sup>

### 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:

3. *Children, Youth and Families Act 2005* (Vic) s 571(3). Additionally, if the Secretary to the Department of Human Services has issued a formal statement in respect of the young person that he or she has an intellectual disability within the meaning of the *Disability Act 2006* (Vic), the pre-sentence report must include a copy of that statement and must specify disability services that are available and appropriate to the young person and which are designed to reduce the likelihood of the child committing further offences: s 571(4).
4. *Criminal Procedure (Mentally Impaired Persons) Act 2003* (NZ) s 38. It may also be relevant for determining fitness to stand trial, or application of defence of mental illness.
5. *Criminal Procedure (Mentally Impaired Persons) Act 2003* (NZ) s 39(2)(c).
6. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) Recommendation 249.
7. *Youth Criminal Justice Act 2002* (Can) s 34(1)-(2).
8. *Youth Criminal Justice Act 2002* (Can) s 34(3)-(4).

- (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?

## Courts

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- 6.6 While the existing legislation outlines a number of sentencing options which are targeted at young offenders, “it does not provide for sentencing options, or alternatives to sentencing, that are specifically designed for young offenders with a mental illness or intellectual disability”.<sup>9</sup> Here, we examine sentencing options available to courts exercising jurisdiction with respect to young people.

### Children’s Court

- 6.7 As discussed in paragraph 1.48, offences dealt with by the Children’s Court are serious enough to warrant prosecution but not so serious that the young person is required to be tried in the District or Supreme Courts.<sup>10</sup> The District and Supreme Court deal with “serious children’s indictable offence[s]”, which include, for example, homicide and offences punishable by imprisonment for life or for 25 years.<sup>11</sup>
- 6.8 The Children’s Court can employ a flexible approach to sentencing with a strong emphasis on the needs of the offender and the causes of offending, even where the offending is relatively serious.<sup>12</sup> Part 3, Division 4 of the *Children (Criminal Proceedings) Act 1987* (NSW) deals with penalties available to the Children’s Court. Upon a finding of guilt, the following options are available:<sup>13</sup>
- dismiss the charge – with or without administering a caution;

9. Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (1996) [28.145].

10. *Children (Criminal Proceedings) Act 1987* (NSW) s 3, 17; see also S Vignaendra and G Hazlitt, *The Nexus Between Sentencing and Rehabilitation in the Children’s Court of NSW*, Judicial Commission of NSW Research Monograph No 26 (2005) 3.

11. See *Children (Criminal Proceedings) Act 1987* (NSW) s 3.

12. S Vignaendra and G Hazlitt, *The Nexus Between Sentencing and Rehabilitation in the Children’s Court of NSW*, Judicial Commission of NSW Research Monograph No 26 (2005) 62-63, 67-68, 73-75, 82-83.

13. *Children (Criminal Proceedings) Act 1987* (NSW) s 33.

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- a caution under the *Young Offenders Act 1997* (NSW);<sup>14</sup>
  - release on good behaviour bond, not exceeding 2 years;
  - impose a fine not exceeding the maximum fine prescribed by law, or 10 penalty units, whichever is lesser (prior to imposing a fine the court must consider the young person's ability to pay and impact on rehabilitation);
  - release on condition of compliance with an outcome plan determined in a youth justice conference;<sup>15</sup>
  - adjourn proceedings for up to 12 months, to assess the person's capacity and prospects for rehabilitation, allow the person to demonstrate that rehabilitation has taken place or for another purpose the court considers appropriate in the circumstances;<sup>16</sup>
  - release on probation, on conditions (for up to 2 years);
  - a community service order;<sup>17</sup>
  - non-association and place restriction orders (for offences punishable by imprisonment for 6 months or more); or<sup>18</sup>
  - where other alternatives are "wholly inappropriate", impose a "control order" requiring a person to be detained in a detention centre (this may be suspended in particular circumstances).<sup>19</sup>
- 6.9 Particular combinations of the orders outlined above are also permitted, for example, probation and a fine.<sup>20</sup> Some of the conditions that can be imposed with a good behaviour bond include schooling, employment, medical treatment and requirements with regard to residence.<sup>21</sup>

### District and Supreme Courts

- 6.10 A young person may be tried in the District or Supreme Court where they are:
- charged with a serious children's indictable offence;<sup>22</sup>

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14. *Young Offenders Act 1997* (NSW) s 31.

15. In determining whether to refer a matter for the holding of a conference the court must take into account the seriousness of the offence, the degree of violence involved, harm caused to the victim, number and nature of offences committed by the child and the number of times the child has been dealt with under the *Young Offenders Act*, and any other matter the court thinks appropriate in the circumstances: *Young Offenders Act 1997* (NSW) s 40.

16. For example, adjournment of proceedings might occur upon acceptance into the YDAC program.

17. See also, *Children (Community Service Orders) Act 1987* (NSW); *Children (Community Service Orders) Regulation 2005* (NSW).

18. *Children (Criminal Proceedings) Act 1987* (NSW) s 33D.

19. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(2), s 33(1B).

20. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(e1).

21. *Children (Criminal Proceedings) Regulation 2005* (NSW) cl 32.

22. *Children (Criminal Proceedings) Act 1987* (NSW) s 17. "Serious children's indictable offences" include, for example, homicide and offences punishable by imprisonment for life or for 25 years: s 3.

- before the Children’s Court for an indictable offence and elect to be tried according to law; or<sup>23</sup>
  - before the Children’s Court for an indictable offence and the Court determines that it would not be appropriate to proceed summarily.<sup>24</sup>
- 6.11 The court may sentence the young person “according to law”; impose a penalty under the *Children (Criminal Proceedings) Act 1987* (NSW); or remit the young person to the Children’s Court for a penalty to be imposed (if the young person is less than 21 years old).
- 6.12 In general, where a superior court is deciding whether to deal with a young person under Part 3, Division 4 of the *Children (Criminal Proceedings) Act 1987* (NSW) or “according to law”, the court must have regard to: the seriousness and nature of the indictable offence; the age and maturity of the person at the time of the offence and at the time of sentencing; the seriousness, nature and number of any prior offences committed by the person; and such other matters as the court considers relevant.<sup>25</sup> Penalties under the *Children (Criminal Proceedings) Act 1987* (NSW) and remittance to the Children’s Court are not available for serious children’s indictable offences, and therefore a young person who commits such an offence must be sentenced according to law.<sup>26</sup>
- 6.13 If a young person is dealt with according to law the penalties that are available to adults are also available with respect to young people. However, there are some differences.<sup>27</sup> If a court sentences a person under the age of 21 to imprisonment, the court may (if certain criteria are satisfied) direct that the sentence be served as a juvenile offender:<sup>28</sup>
- A person who is serving or has served a term of imprisonment in a correctional centre, or a person who has been sentenced in relation to a serious children’s indictable offence is not eligible to serve a term of imprisonment as a juvenile offender after he or she has turned 18 years old unless special circumstances apply.

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23. *Children (Criminal Proceedings) Act 1987* (NSW) s 31(2).

24. *Children (Criminal Proceedings) Act 1987* (NSW) s 31(3), s 31(5). See also s 16, s 18.

25. *Children (Criminal Proceedings) Act 1987* (NSW) s 18; see for example *R v MSS* [2005] NSWCCA 227, [16]-[20]. “Other matters” include the penalty that the court considers would be appropriate, and its availability under the respective regimes: *R v WKR* (1993) 32 NSWLR 447, 451; *R v DAR* (Unreported, NSW Court of Criminal Appeal, Hunt CJ at CL, Ireland and Dunford JJ, 1 October 1997).

26. *Children (Criminal Proceedings) Act 1987* (NSW) s 18, s 17, s 20.

27. See CP 6, Chapter 8. Minor differences include a maximum number of community service hours that can be ordered, and exemption from mandatory life sentences: *Children (Community Service Orders) Act 1987* (NSW) s 13; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61.

28. *Children (Criminal Proceedings) Act 1987* (NSW) s 19. After attaining the age of 21 years a person is not eligible to serve a sentence of imprisonment as a juvenile offender unless the non-parole period (where set) or sentence of imprisonment will end within 6 months of that person turning 21 years old: s 19(2).

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- Special circumstances include vulnerability due to illness or disability; the availability of education, training and therapeutic programs; or unacceptable risk of physical or psychological harm.<sup>29</sup>

### 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?

## Sentencing principles

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- 6.14 The *Children (Criminal Proceedings) Act 1987* (NSW) provides a number of general principles that apply to all courts exercising jurisdiction with respect to children, including the Children's, District and Supreme Courts.<sup>30</sup> These principles partly reflect international human rights law relating to children and young offenders.<sup>31</sup> However, none of the principles relate specifically to young people with cognitive and mental health impairments.<sup>32</sup>
- 6.15 The *Crimes (Sentencing Procedure) Act 1999* (NSW) articulates the purposes for which a court may impose a sentence on an offender. These include punishment, deterrence, protection of the community, rehabilitation, accountability, denouncement of conduct and recognition of harm to the victim and community.<sup>33</sup> As we note in CP 6, these legislative statements work alongside common law sentencing principles.<sup>34</sup> For example, judges will consider issues of proportionality, meaning that the punishment must fit the crime.<sup>35</sup>
- 6.16 In CP 6 we discuss how courts have developed principles specific to sentencing offenders with mental impairments. For example, the fact that mental illness will

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29. *Children (Criminal Proceedings) Act 1987* (NSW) s 19(1A), s 19(3), s 19(4). See, for example *R v SLD* [2002] NSWSC 758, [141].

30. See para 1.42. *Children (Criminal Proceedings) Act 1987* (NSW) s 6. Legislation in other Australian jurisdictions also contains statements of principles for exercising criminal jurisdiction with respect to young people: *Children, Youth and Families Act 2005* (Vic) s 362; *Young Offenders Act 1993* (SA) s 3; *Juvenile Justice Act 1992* (Qld) s 3, sch 1; *Young Offenders Act 1994* (WA) s 7; *Youth Justice Act 1997* (Tas) s 5; *Youth Justice Act 2007* (NT) s 81; *Children and Young People Act 1999* (ACT) s 68.

31. As to international instruments regarding the human rights of young people and their relevance to sentencing, see New South Wales Legislative Council Select Committee on Juvenile Offenders, *Report on the Inquiry into Juvenile Offenders* (2005) ch 8; NSW Law Reform Commission, *Sentencing: Young Offenders*, Issues Paper 19 (2001) [3.28]-[3.29]; and J McDougall and H Lam, "Sentencing young offenders in Australia" (2005) 86 *Reform* 39, 39-40.

32. The principles have been criticised for being "so general as to be of little assistance in the sentencing of young offenders": *GDP v The Queen* (1991) 53 A Crim R 112, 116.

33. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A. See CP 6, [8.8]-[8.9].

34. CP 6, [8.7].

35. *Veen v The Queen (No 2)* (1988) 164 CLR 465; *Bugmy v The Queen* (1990) 169 CLR 525; *R v Whyte* (2002) 55 NSWLR 252, [152]; *Lowe v The Queen* (1984) 154 CLR 606; *Postiglione v The Queen* (1997) 189 CLR 295; *R v Morgan* (1993) 70 A Crim R 368, 371; CP 6, [8.10]-[8.11].

“render the offender an inappropriate vehicle for general deterrence”, that a custodial sentence may weigh more heavily on a mentally impaired person, or reduced moral culpability.<sup>36</sup> Common law sentencing principles that apply to offenders generally have also been modified to apply to young offenders. This is discussed below.

- 6.17 In 1997 the ALRC recommended that legislative support be given to a number of additional principles for sentencing of young offenders. Those principles do not expressly refer to young people with cognitive or mental health impairments. However, the principles do refer to the “special circumstances of particular groups” and “the impact of deficiencies in the provision of support services in contributing to offending behaviour”:<sup>37</sup>

The national standards for juvenile justice should include principles for sentencing of juvenile offenders. These principles should also be reflected in relevant Commonwealth, State and Territory legislation. They should include the following:

- the need for proportionality, such that the sentence reflects the seriousness of the offence
- the importance of rehabilitating juvenile offenders
- the need to maintain and strengthen family relationships wherever possible
- the importance of the welfare, development and family relationships of the child
- the desirability of imposing the least restrictive sanctions consistent with the legitimate aim of protecting victims and the community
- the importance of young offenders accepting responsibility for their actions and being able to develop in responsible, beneficial and socially acceptable ways
- the impact of deficiencies in the provision of support services in contributing to offending behaviour
- the need to take into account the special circumstances of particular groups of juvenile offenders, especially Indigenous children.

- 6.18 In a separate review of sentencing federal offenders, the ALRC recommended that federal sentencing legislation should be amended to include the following sentencing factors:

- (a) ‘mental illness’ and ‘intellectual disability’ in addition to ‘mental condition’; and
- (b) that the offender is receiving treatment or is undertaking a behaviour intervention program to address any physical condition, mental illness,

36. *R v Hemsley* [2004] NSWCCA 228, [34]; CP 6, [8.8]-[8.43].

37. Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report No 84 (1997) Recommendation 239, [19.16]-[19.27].



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intellectual disability or mental condition that may have contributed to the commission of the offence.<sup>38</sup>

### 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?

### Sentencing according to law

- 6.19 As noted above, the principles in s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) apply alongside common law and statutory sentencing principles, regardless of whether the young person is sentenced “according to law”, or otherwise.<sup>39</sup> The Act recognises that young offenders “bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance”.<sup>40</sup> When sentencing young people, general deterrence and denunciation is usually accorded less emphasis, in favour of increased emphasis on rehabilitation.<sup>41</sup>
- 6.20 However, the relevance of the statutory and common law principles that apply to young people may be reduced in particular circumstances.<sup>42</sup> Where a young person conducts him or herself “violently in the way an adult might conduct himself, and commits a crime of considerable gravity”, principles of community protection, retribution and deterrence may outweigh considerations such as the offender’s youth and theoretical rehabilitative prospects.<sup>43</sup> This approach is more likely to be adopted where:
- the offender is close to adulthood.<sup>44</sup>
  - the nature of the offence is serious; and/or<sup>45</sup>
  - the offender has conducted themselves “as an adult”.<sup>46</sup>

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38. Australian Law Reform Commission, *Same Crime, Same Time*, Report 103 (2006) Recommendation 28-5.

39. See para 1.42.

40. *Children (Criminal Proceedings) Act 1987* (NSW) s 6(b).

41. *R v GDP* (1991) 53 A Crim R 112, 116; *R v AEM* [2002] NSWCCA 58, [97].

42. *R v Bus* (Unreported, NSW Court of Criminal Appeal, Hunt CJ at CL, Grove and Allen JJ, 3 November 1995).

43. *R v Hawkins* (1993) 67 A Crim R 64, 66; *R v Pham and Ly* (1991) 55 A Crim R 128, 135; *R v Gordon* (1994) 71 A Crim R 459, 469; *R v Tran* [1999] NSWCCA 109, [9]-[10]; *R v WKR* (1993) 32 NSWLR 447, 460; *R v SDK* [2002] NSWSC 758, [20]. The concept of a young person “acting as an adult” has been criticised: see *R v AN* [2005] NSWCCA 239, [52], [57].

44. *R v AN* [2005] NSWCCA 239, [52]; *R v Hearne* (2001) 124 A Crim R 451.

45. *R v Bus* (Unreported, NSW Court of Criminal Appeal, Hunt CJ at CL, Grove and Allen JJ, 3 November 1995); *R v AEM* [2002] NSWCCA 58; *R v MHH* [2001] NSWCCA 161; *R v LNT* [2005] NSWCCA 307.

46. *R v Bus* (Unreported, NSW Court of Criminal Appeal, Hunt CJ at CL, Grove and Allen JJ, 3 November 1995); *R v AEM* [2002] NSWCCA 58, [97]; *R v Hawkins* (1993) 67 A Crim R 64, 66.

- 6.21 In this context, what bearing should cognitive and mental health impairments have on sentencing principles as they apply to young people? The difficulty of distinguishing between the impact of developmental immaturity and mental abnormality on mental function has been identified.<sup>47</sup>
- 6.22 Case law demonstrates that a mental illness or cognitive impairment may impact on the sentencing of young offenders by:
- affecting the maturity and development of the young person, and therefore influencing whether he or she was acting as an adult;
  - influencing the objective seriousness of the offence due to impaired judgment;
  - requiring that the weight given to general deterrence is not only reduced due to the age of the young person, but also that a person with cognitive or mental health impairment may not be a suitable subject for general deterrence; and/or
  - reducing moral culpability.
- 6.23 For example, in *R v AN* the Court noted that the applicant’s criminal responsibility was diminished by both his “vulnerability and immaturity” due to his age, and the “mental deficiencies from which he suffered” which “resulted in a reduced understanding of the criminality of his conduct and its consequences to the victim and himself”.<sup>48</sup> In this particular case, AN could not properly be regarded as conducting himself “as an adult”.<sup>49</sup>
- 6.24 In *R v H*, H’s intellectual disability was considered in conjunction with the H’s youth, and the Court noted that he had “less ability than an ordinary youth of his age might have to reason that he should not associate himself with the callous and degrading conduct that was displayed”.<sup>50</sup> The Court also considered that, due to his mental illness (paranoid schizophrenia), the sentence would weigh more heavily on H than “for an ordinary young man of his age”.<sup>51</sup>
- 6.25 In the recent case of *R v MJR*, MJR was being sentenced for aggravated break enter and steal, and murder. MJR was 17 years old at the time the offences were committed, and due to his age and the gravity of the offences committed, the common law principles underlying s 6 of *Children (Criminal Proceedings) Act 1987* (NSW) were “of less assistance” to MJR.<sup>52</sup> However, MJR was suffering from an “undiagnosed and untreated mental disorder, in the form of juvenile bipolar disorder and ... depression” and, the Court noted that this affected his judgment and contributed to the commission of this crime.<sup>53</sup> Since MJR’s mental disorder had a

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47. See Law Commission (UK), *Murder, Manslaughter and Infanticide: Project 6 of the Ninth Project of Law Reform: Homicide* (2006) [5.125]-[5.137]; *Roper v Simmons* (2005) 543 US 551.

48. *R v AN* [2005] NSWCCA 239, [22]. Contrast *R v WTB* (2006) 94 SASR 231.

49. *R v AN* [2005] NSWCCA 239, [61].

50. *R v H* [2005] NSWCCA 282, [100].

51. *R v H* [2005] NSWCCA 282, [103].

52. *R v MJR* [2010] NSWSC 653, [81].

53. *R v MJR* [2010] NSWSC 653, [62].

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bearing on his judgment, it also influenced the objective seriousness of the offence.<sup>54</sup>

- 6.26 Where “an offender suffers from a significant mental disability, less weight may be given to general deterrence”.<sup>55</sup> However, where there are considerations of both age and mental or cognitive impairment the cumulative effect is greater than it would be for each alone:

The considerations that apply in determining the significance to be given to general deterrence when sentencing a child are not the same as those which apply when sentencing a person who suffers from a mental abnormality. In the former case the issue is one of weighing the need for general deterrence as against the need to promote the rehabilitation of the child. In the latter case the issue is whether the offender is a suitable subject for general deterrence and, if so, to what degree having regard to the severity of the mental abnormality and its connection with the offence committed. I do not believe that the weight to be given to general deterrence in dealing with a child suffering from a mental disability can be determined simply on the basis of applying only the relevant considerations applicable to a child or only the relevant considerations applicable to a person suffering from a mental disability.<sup>56</sup>

- 6.27 The mental condition of a young offender has been found relevant to the assessment of culpability.<sup>57</sup> Indeed, youth and intellectual impairment have been used to justify lesser sentences than those imposed on older co-offenders without such impairments.<sup>58</sup>

### 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?

## Provisional sentencing

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- 6.28 A 2009 report produced for the Sentencing Council addressed the issue of provisional sentencing for children (“the Report”).<sup>59</sup> Provisional sentencing would allow a notional sentence to be imposed at first instance, “with an ability to later vary or adjust that sentence during the course of the sentence, according to a variety of factors that might include assessments as to the offender’s capacity to rehabilitate, and as to future dangerousness, and take into account a better understanding of any mental health conditions that may have emerged or become apparent as the

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54. *R v MJR* [2010] NSWSC 653, [62].

55. *R v AN* [2005] NSWCCA 239, [37]-[38]; *R v MJR* [2010] NSWSC 653, [85]; *TC v R* [2009] NSWCCA 296, [98].

56. *R v AN* [2005] NSWCCA 239, [46].

57. *R v AN* [2005] NSWCCA 239, [38].

58. *R v H* [2005] NSWCCA 282, [98].

59. S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009).

child matures”.<sup>60</sup> The Report found that, while there were varying views regarding the appropriate application of provisional sentencing, there was tempered support for a provisional sentencing scheme.

## Background

- 6.29 The Report emerged following the case of *R v SLD*, where a 13-year-old boy was sentenced for the murder of a three-year-old girl.<sup>61</sup> The girl was not known to SLD. Due to his age and immaturity, psychologists and psychiatrists had difficulty explaining SLD’s motivations, and arriving at a definitive psychological or psychiatric diagnosis – and therefore could not form a reliable view regarding, for example, risk to the community and prospects of rehabilitation.<sup>62</sup> As a result, the Court had to use the information that was available as best it could. It therefore imposed a “significant head sentence” (20 years, with a non-parole period of 10 years),<sup>63</sup> noting the offence was at the upper range of seriousness, that SLD posed a significant risk of recidivism, and a serious risk to the community.<sup>64</sup> This finding allowed the Parole Authority to decide, over a span of 10 years following the non-parole period, whether the defendant should be released, having regard to what became known concerning the defendant’s mental state. The Court made the following recommendation:

In such a case it would be desirable, in my view, if the Court could sentence the offender initially to be detained at her Majesty’s pleasure, with provision for review and resentencing at a later date, for example at the age of 21 years, or after say 5 years in custody.<sup>65</sup>

## Advantages and disadvantages

- 6.30 Concerns have been raised regarding the application of provisional sentencing, including:
- whether provisional sentencing amounts to preventative detention;
  - possible institutionalisation of the offender, and adverse effects as a result;
  - that detention may not be conducive to rehabilitation;
  - the approach is vague, and there is a need for finality when sentencing;
  - the danger that young offenders may be treated more harshly than adults found guilty of the same offence;

60. S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009) 9.

61. *R v SLD* [2002] NSWSC 758.

62. *R v SLD* [2002] NSWSC 758, [63]. See S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009) 14-16.

63. Note that due to age, childhood trauma, intellectual impairment and immaturity, the Court found that this case constituted “special circumstances” which warranted variation of the ratio between the head sentence and non parole period: *R v SLD* [2002] NSWSC 758, [141].

64. *R v SLD* [2002] NSWSC 758, [139].

65. *R v SLD* [2002] NSWSC 758, [147].

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- possible suspension of a right to appeal a sentence, because a final sentence is not available;
  - that the approach gives insufficient regard to aspects of the current sentencing regime for young people;
  - the prospect of indefinite detention;
  - compliance with international instruments; and
  - the approach delays closure for victims and offenders.<sup>66</sup>
- 6.31 On the other hand, provisional sentencing allows for: psychological development during adolescence and changes in maturity levels; assessment of capacity for judgement, reasoning and psychological health; identification of mental health and drug issues; longitudinal assessment of progress toward rehabilitation; opportunity for intensive treatment; and provides powerful motivation to take rehabilitation seriously.<sup>67</sup> It also addresses concerns about the reliability and utility of psychological and psychiatric assessment of children, the unique development that takes place in adolescent years, as well as problems associated with “the lack of accountability and follow-through by government agencies” on recommendations made at sentencing.<sup>68</sup>
- 6.32 Other proposed models include setting a head sentence, but leaving the non-parole period open for review, or giving the court the power to reduce the sentence, after a number of years.<sup>69</sup>

### Findings in the Report for the Sentencing Council

- 6.33 The Report commissioned by the Sentencing Council concluded that:
- (1) provisional sentencing should apply to children aged between 10 and 14 at the time of the commission of an offence, and who have been convicted of murder;<sup>70</sup>
  - (2) the court, or either party, would have the ability to raise the potential application of provisional sentencing;

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66. S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009) 27-34, 47-48.

67. See S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009) 30, 33-35.

68. S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009) 36-37, 44.

69. See S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009) 41-43.

70. The report noted that there were differing views regarding the type of offences to which provisional sentencing should apply. However, it noted three particular reasons to limit provisional sentencing to murder, particularly (1) “matters to which a maximum penalty of 25 years or more is applied is too wide for provisional sentencing” (2) difficulties sentencing a young person for murder are exceptional (3) expanding provisional sentencing beyond murder may result in significant increase in sentences for non-murder offences: S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009) 54-55.

- (3) “provisional sentencing would be considered on a case-by-case basis, with the court exercising its discretion to deal with the child pursuant to the provisions or to sentence according to ordinary sentencing principles”;<sup>71</sup> and
- (4) provisional sentencing should be made available “where the information available, at the time of sentencing, does not permit a proper assessment to be made in relation to the presence or likely development in the offender of a serious personality and psychiatric disorder, and as a consequence an assessment as to their potential for future dangerousness or rehabilitation”.<sup>72</sup>

6.34 More specifically, under the Report’s proposal:<sup>73</sup>

- The court would impose a provisional sentence (corresponding to the non-parole period that would otherwise have been imposed) and also indicate the balance of the term. Together, the provisional sentence and the balance of the term constitute the head sentence, however the child could be released during the balance of the term.
- Review by the court would occur regularly, and at least following two years in custody, and again at the mid point of the young person’s period in custody, followed by final determination of the provisional sentence by the sentencing court.
- The court could make directions in relation to the treatment of the child in custody, and enforceable undertakings can be sought from those treating the child during these reviews.
- Final determination should occur one year prior to the expiration of the provisional non-parole period, and no later than five years from the date of sentencing.
- Final determination could permit release prior to the end of the provisional sentence and the sentencing judge would be permitted to “re-determine both the provisional sentence and the head sentence” (this can only be reduced, not increased).
- Following release, the young person would be subject to supervision from the Serious Offenders Review Council.
- The young person would have a right to appeal all aspects of the provisional sentence.

6.35 The Report proposes that provisional sentencing “would be justified where a child has committed a murder and the current development and psychiatric or personality

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71. S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009) 51.

72. S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009) 9-10.

73. S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009) 51-54.

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state are such as to raise serious questions and concerns as to the protection of the community”.<sup>74</sup>

**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?

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74. S Beckett, L Fernandez and K McFarlane, *Provisional Sentencing for Children* (NSW Sentencing Council, 2009) 56.

## Appendix A. Preliminary consultations

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NSW Juvenile Justice, 7 June 2010

The Shopfront Youth Legal Centre, 7 June 2010

Ms Jenny Bargaen, 24 June 2010

Children's Legal Service, Legal Aid NSW, 1 July 2010