

**Submission to the Review of the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987***



**December 2011**

**Council of Social Service of NSW (NCOSS)**

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## 1. ABOUT NCOSS

The Council of Social Service of NSW (NCOSS) is the peak body for the social and community services sector in New South Wales. NCOSS works with its members on behalf of disadvantaged people and communities towards achieving social justice in NSW. It was established in 1935 and is part of a national network of Councils of Social Service, which operate in each State and Territory and at the Commonwealth level. NCOSS provides an independent voice on welfare policy issues and social and economic reforms. It is the major coordinator for non-government social and community services in NSW.

## 2. Introduction

NCOSS welcomes the opportunity to comment on the *Young Offenders Act 1997* (YOA). NSW rates of detention have been consistently higher than the national average.<sup>1</sup> This has resulted in overcrowding and pressure in the juvenile justice system and brought attention to how the YOA is used to police young people and increase their contact with the juvenile justice system. NCOSS submits that this is at odds with the objective of the YOA and puts forward the argument in this submission that the YOA should meet its original intention of diverting young people from the criminal justice system.

If the YOA was administered in the spirit in which it was introduced, costs to the community would be reduced as young people would be consistently diverted from the courts. Such an approach would ensure housing and support services would be funded to maintain services to young people. In return the justice system would find immediate cost savings by reducing the flow of young people moving in and out of detention on remand.<sup>2</sup> The long term failure to apply the YOA to its full extent and fund the services needed to support the YOA results in an increase in costs to the community as young people fall through the service net and graduate to the adult prison system.

NCOSS is extremely concerned by the reference in the Consultation Paper that the objective of the YOA should focus on reducing reoffending rather than the protection of the rights of children and young people.<sup>3</sup> The alternative to the diversions provided by the YOA is to increase periods of detention. There is no evidence that detention prevents reoffending, however there is evidence that failing to assess and meet the needs of young people and ongoing contact with the court system will increase the likelihood of further periods of supervision by juvenile justice.<sup>4</sup>

NCOSS notes that the Law Reform Commission's (LRC) inquiry about people with cognitive and mental health impairments in the criminal justice system includes a

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<sup>1</sup> Kelly Richards, *Trends in juvenile detention in Australia*, AIC, No. 416 May 2011.

<sup>2</sup> The NSW Government Auditor-General Parliamentary audit report for 2011 chapter on "Law, Order and Emergency Services" report a daily cost in custody is \$642, a daily cost of community based service is \$17 at [www.audit.nsw.gov.au](http://www.audit.nsw.gov.au) at 28 November 2011.

<sup>3</sup> Attorney General and Justice, Consultation Paper (October 2011), p29.

<sup>4</sup> S Chen, T Matruggio, D Weatherburn and J Hua, *Crime and Justice Bulletin: the transition from juvenile to adult criminal careers*, BOCSAR, Number 86, May 2005.

specific reference to young people.<sup>5</sup> NCOSS submits that outcomes of this inquiry should be reflected in the YOA review along with the other current reviews mentioned in the Consultation paper.<sup>6</sup>

In this submission, NCOSS focuses on the need to support the social service sector as part of the administration costs of the YOA. NCOSS supports the Youth Justice Coalition submission where it recommends specific changes to the YOA.

### **3. Response to the Terms of Reference**

**Consider whether the policy objectives and principles of the legislation remain valid, and whether the terms of the legislation remain appropriate for giving effect to those objectives and principles.**

The YOA should not be viewed in isolation but as one gateway for young people to have their needs assessed and to access services that can help them meet those needs. Crime prevention, diversion, desistance, and reducing reoffending for juveniles is rarely separate from their welfare needs. The availability, quality, location and level of funding of support services play a major role in determining whether young people can be diverted from the criminal justice system.

The first principle that should drive any interaction between the criminal justice system and young people is 'detention as a last resort' described in Article 37(b) of the *Convention of the Rights of the Child*:

*The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.*<sup>7</sup>

Australia is a signatory to this convention and there should be an obligation on all state agencies to protect the rights of children. The principle of detention as a last resort is based on an accepted observation that holding a young person in custody is not in the interests of the young person.

The inclusion of consideration of juvenile justice issues by Justice Wood in the Inquiry into child protection points out the inevitable overlap of welfare issues and juvenile offences. This is most clearly evident in the reference to a NSW Ombudsman investigation of Aboriginal offenders aged 10 and 11 years. Every child in the study 'had child/young person at risk reports, over half had five or more reports of this nature, all had been the subject of DOCS referrals, and over half had been subject to referrals on five or more occasions'.<sup>8</sup> Wood concluded '*until the several criminogenic factors and*

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<sup>5</sup> Law Reform Commission, [http://www.lawlink.nsw.gov.au/lawlink/lrc/ll\\_lrc.nsf/pages/LRC\\_cref120](http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_cref120) at 17 November 2011.

<sup>6</sup> Consultation Paper, above n 3, p3.

<sup>7</sup> United Nations Convention on the Rights of the Child, 1989, Article 20, and UN Standard Minimum rule for Administration of Juvenile Justice Rule 24.

<sup>8</sup> The Hon James Wood AO QC (2008), *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, Vol 2, Chapter 17

*general background of disadvantage and isolation from mainstream services ... are met, there is likely to continue to be a disproportionate representation of Aboriginal youth in the juvenile justice and care and protection domains.'*

For this reason, judging legislation alone on the basis of reducing reoffending is inappropriate. It does not provide an answer in isolation, rather legislation should support the diversionary and welfare options available in the community.<sup>9</sup>

The number of times a young person reoffends does not remove the responsibility to protect the rights of the child. Rather it is more likely to point to the failure of the welfare system to assist the young person to meet their basic needs such as accommodation, family support and education. The objectives of the YOA should include the facilitation of young people into appropriate interventions and away from the 'school to prison pipeline'.

Legislation that increases contact with the court system and relies on detention as a deterrent is likely to increase the rate of reoffending as will a failure to provide basic services that are required for these legislative mechanisms to work effectively. The NSW Auditor-General report on the needs of young offenders found the rate of reoffending depends on the action taken in response to the offence. The report considered the role of police in determining needs in the first contact, and how assessing need and referrals out of the justice system should be part of police responsibility.<sup>10</sup>

Regardless of the number of offences a young person is accused of, there is benefit in young people being diverted from the court system. A 2002 study found that the younger the age and the more frequent the contact with the court system, the more likely the young person would enter an adult prison. This would indicate that for younger age groups, the restrictions on the number of cautions should be lifted and every effort made to reduce the very young associating with older offenders.<sup>11</sup>

A report on the YMCA 'Bridge Project'<sup>12</sup> listed the following risk factors in youth offending:

- difficulties in school including suspension, truancy and low educational attainment;
- homelessness or unstable accommodation;
- substance abuse;
- unemployment;
- poverty;
- family breakdown and disruption;

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<sup>9</sup> The Hon James Wood AO QC (2008), *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, Vol 2, Chapter 17.

<sup>10</sup> NSW Auditor-General, *Performance Audit, Addressing the Needs of Young Offenders* (2007).

<sup>11</sup> S Chen, T Matruglio, D Weatherburn and J Hua, *Crime and Justice Bulletin: the transition from juvenile to adult criminal careers*, BOCSAR, Number 86, May 2005, pp10-11.

<sup>12</sup> Sherilyn Hanson, YMCA World Alliance Youth Justice Campaign, Youth Justice in Victoria, *The benefits of Victoria's Youth Justice System and the challenges ahead*, (February 2009).

- negative peer association;
- poor personal and social skills;
- limited leisure and recreation opportunities; and
- mental health issues.

None of these risk factors can be satisfied by legislation governing crime. The YOA current objectives recognises the complexity of the lives of disadvantaged young people and provides a scale of interventions prior to introducing a young person to a formal court proceeding. This allows time and scope for the risk factors listed above to be managed. Unfortunately, the resources in the community, of government services and community organisations are too few and unevenly distributed to always meet these needs. Introducing changes to legislation that would increase contact with the justice system will not remedy this shortfall in community care or provide a satisfactory alternative.

### **Consider the implementation of the legislation in practice.**

The NSW Ombudsman submission to Justice Wood's NSW Child Protection Inquiry provides the most succinct summary of the significant issues regarding the implementing of the YOA. Justice Wood quotes the Ombudsman submission:

*We found significant discrepancy in the use of diversionary options between (police) commands, and on occasion between different sectors of the same command. This suggests that use of the YOA depends very heavily on the views of an individual officer rather than the application of more general criteria. In our view, this issue should be closely monitored by NSW Police to identify how referral rates (to conferences) might be improved.<sup>13</sup>*

The rate of referral rates of young people from court to conferences of concern to the Ombudsman is also reflected in the Consultation Paper's data on the low referral rates by police<sup>14</sup>. NCOSS suggests that this relates to police culture as described above by the Ombudsman as well as police resources and training. Youth Liaison Officer (YLO) positions are vital to the implementation of the YOA, their ability to undertake their work varies between Local Area Commands because of management attitudes and allocation of resources. NCOSS suggest this review requests information from NSW Police about the average number of vacancies of YLO positions each month, the hours of appointment, how frequently they are taken off youth related duties and what resources are allocated to each position. NCOSS has reports that YLO appointments are often for limited hours (eg shifts ending at 4pm), frequently go unfilled for long periods of time, resources such as a car are not provided with the position and YLOs can be placed on general duties at any time. If this is widespread practice it indicates a poor commitment to young people by the NSW Police and it is therefore unsurprising that the Consultation Paper documents low referral rates by police to diversionary options such as

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<sup>13</sup> The Hon James Wood AO QC (2008), *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, Vol 2, Chapter 17, p563.

<sup>14</sup> Consultation Paper, above n 3, p 12.

conferences. The concerns raised by Wood and reports to NCOSS about the resourcing of YLOs need further investigation.

In practice, the principles of the YOA are contradicted by other legislation applied in the Children's Court such as the *NSW Bail Act, Children and Young Persons (Care and Protection) Act 1998 (NSW)* and the *Children (Criminal Proceedings) Act*. Such contradictions (for example, restrictions in applying for bail) and the lack of community resources to house young people on bail results in young people being detained even when it is known they will not receive a custodial sentence if convicted.

The combination of the administration of these Acts affecting juveniles and the lack of appropriate services results in homeless youth being 'warehoused' in detention centres. When a court does not have legislation to allow it to mandate an agency to provide accommodation, has limited authority to hear repeat bail applications, and there is no legal requirement for Community Services NSW or Juvenile Justice NSW to find community based accommodation, a young person remains in custody. It is argued that this is in keeping with the principle that welfare matters should be kept separate from criminal proceedings. However, the strict application of this principle results in young people remaining in detention, which is potentially harmful to a young person.

This was not the intention when the Acts were introduced and later amendments were made. For example, the Attorney General introducing amendments to the Bail Act in 2002 reported to Parliament at the time that diversion at the point of a bail hearing was very important, *particularly for vulnerable accused persons such as juveniles, intellectually or mentally disabled persons or persons of an Aboriginal or Torres Strait Islander background.*<sup>15</sup>

While there are pilot programs in relation to bail placement currently operating in certain areas of NSW, these are not widespread and accessible to all young people. Residential bail support programs, such as that proposed by UnitingCare Burnside, need to be seriously considered by the NSW Government.<sup>16</sup>

### **Identify how the legislation can be used more effectively in practice.**

The legislation needs to be put into practice by police at the point they are considering bail, indicators and measurements need to be in place that encourage police to use diversion and support services in the community. Referral services need to be funded to support police decisions to divert. Such programs should:

- be individually tailored to the needs of the young person;
- be available immediately;
- focus on promoting a stable lifestyle;
- involve the family when possible; and

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<sup>15</sup> NSW Parliament *Parliamentary Debates* (Hansard) Legislative Assembly 20 March 2002: 819-820

<sup>16</sup> UnitingCare Burnside, Social Justice and Communication UnitingCare Children, Young People and Families, *Releasing the pressure on remand: Bail support solutions for children and young people in NSW*

- provide practical support for a young person to meet bail conditions and attend conferences or court.

The application of the YOA should ensure that detention is only used as a measure of last resort and for the shortest appropriate period of time. Police should apply diversion as a first response and diversionary programs need to be funded and properly coordinated. The consequences of failing to implement the YOA without this principle are described appropriately by Justice Wood:

*The long term consequences of acquiring a record as a juvenile or of being detained in a detention centre, in terms of future employability and rehabilitation, are such that every possible alternative should be made available. This has a particular significance for those young people who, no fault of their own, have suffered that degree of abuse, neglect and poor parenting that might call for care and protection intervention or that might otherwise heighten their risk of drifting into criminal behavior.<sup>17</sup>*

**What changes to the YOA implementation could be made to better address the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system?**

The over representation of Aboriginal and Torres Strait Islander children in the criminal justice system is well known and has been the subject of several inquiries. The most recent national inquiry by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs reported in June 2011, finding representation ‘worse now than it was 20 years ago when the Royal Commission into Aboriginal Deaths in Custody report was published.’<sup>18</sup> The Committee made 40 recommendations most concerning health, education, social programs and improvements in service coordination for young people. The report did not refer to increasing police powers or reducing diversion programs that would increase contact with the justice system. NCOSS submits that this review should consider the recommendations in the Committee’s report - *Doing Time - Time For Doing: Indigenous youth in the criminal justice system*.

**Is there a need to reintroduce a body with an ongoing role to monitor and evaluate the implementation of the YOA across the state?**

NCOSS supports the reintroduction of a body with an ongoing role to monitor and evaluate the implementation of the YOA across the state. This submission has described how, for young people, justice issues cannot be separated from welfare needs. Consequently, to be effective, the Department of Justice should establish a body that includes in its membership representatives from consumer groups and the providers of community health, social and education services to take an active part in monitoring and evaluation. The range of services affected by the implementation of the

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<sup>17</sup> The Hon James Wood, above at n 9, p 575.

<sup>18</sup> Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (June 2011), *Doing Time - Time For Doing: Indigenous youth in the criminal justice system*, summary.

YOA means that the monitoring must take into account those elements that determine how full implementation is undertaken – from policing to program delivery.

Members of the body should be selected from a public nomination process.

#### **4. Recommendations**

1. NCOSS recommends that the YOA be maintained and the objective of the Act should be to divert young people and children from the criminal justice system.
2. NCOSS recommends the YOA should be governed by human rights principles that apply in relation to children and young people, in particular, the principle of detention as a last resort should be included as an operating principle.
3. NCOSS recommends that indicators and measures that encourage compliance with the *Young Offenders Act 1997 (NSW)* and the monitoring of such compliance should be incorporated in state-wide plans for all relevant government agencies.
4. NCOSS recommends the NSW government increase resourcing of early intervention and support programs for young people at risk of entering the juvenile justice system. Organisations working with young Aboriginal people should be a target for these programs.
5. NCOSS recommends an Indigenous Working Group should be established in consultation with communities and stakeholders, to propose policy and legislative changes that will assist Indigenous people with their interactions with the criminal justice system. Recommendations in the *Doing Time- Time for Doing* report from the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs should be considered by such a body.
6. NCOSS recommends an audit of resources allocated to Youth Liaison Officer positions be undertaken and a program implemented to ensure all positions are full time, positions are filled without delay, resources such as cars are available when needed and that their youth liaison duties remains a priority for that position.
7. NCOSS recommends that general duty police officers undertake specific training on a regular basis on how to engage and work with young people. This should include training on police obligations with respect to arrest being used as a last resort as stated in the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* and the *Children (Criminal Proceedings) Act 1987 (NSW)*.
8. NCOSS recommends the Youth Policy Statement currently under review should be consistent with the exercise of discretionary powers and referrals to



diversionary options. The draft policy should be completed and distributed prior to completion of the legislative review of YOA.

9. NCOSS recommends that formal arrangements are in place to ensure consistent and coordinated practices and service delivery from all relevant agencies, including the NSW Police Force, NSW Health, Departments of Education and Training, Corrective Services, and Disability and Housing.
10. NCOSS recommends that the Department of Justice establishes an advisory body to monitor and review the YOA and matters affecting the juvenile justice system. Membership should include consumers and service organisations. Appointment should follow a call for public nominations.