

**REVIEW OF THE *YOUNG OFFENDERS ACT 1997* AND THE  
*CHILDREN (CRIMINAL PROCEEDINGS) ACT 1987***

**Response to Consultation Paper, 12 December 2011**

**Submission on behalf of**

**Legal Aid NSW**

**to the Department of Attorney General and Justice**

**About Legal Aid NSW**

The Legal Aid Commission of New South Wales ("Legal Aid NSW") is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Children's Legal Service is a specialist unit within Legal Aid NSW representing children and young people involved in criminal matters in the Children's Courts. The Children's Legal Service also provides legal advice and information over the phone to young people with a criminal law problem through the "Youth Hotline".

The responses of Legal Aid NSW to the questions in the Consultation Paper are set out below, and reflect our unique experience in providing legal services to children and young people in criminal matters.

Legal Aid NSW welcomes the opportunity to provide these submissions. Should you require further information, please contact Debra Maher, Solicitor in Charge, Children's Legal Service at [debra.maher@legalaid.nsw.gov.au](mailto:debra.maher@legalaid.nsw.gov.au) or by telephone on (02) 8688 3865 or Pauline Chau, Solicitor Legal & Policy Branch at [pauline.chau@legalaid.nsw.gov.au](mailto:pauline.chau@legalaid.nsw.gov.au) or by telephone on (02) 9219 6319.

## Question 1

### (a) Does NSW's legislative framework take the right approach to offending by children and young people?

Legal Aid NSW is of the view that the *Children (Criminal Proceedings) Act 1987* (the CCPA) and the *Young Offenders Act 1997* (the YOA) in their original form reflected the right approach to offending by children and young people with a focus on diversion and a recognition that detention should be an option of last resort. However, there has been a gradual erosion of the original intent of the Acts with subsequent legislative amendments introducing a more punitive approach to dealing with children and young people.

### (b) Are there any other models or approaches taken by other jurisdictions that this review should specifically consider?

A recent study of children and young people who appeared for the first time in the NSW Children's Court in 1995 revealed that a high proportion of children and young people making their first appearance before a court continue their offending into adulthood, particularly if their first court appearance occurred when they were young.<sup>1</sup> An indigenous male who appears even once in the Children's Court is almost certain to appear in an adult court within eight years of his first appearance.<sup>2</sup> Children and young people who have received a custodial sentence from a Children's Court, or who have had multiple Children's Court appearances, are more likely to appear in an adult court and more likely to receive a prison sentence following their appearance in an adult court.<sup>3</sup> Legal Aid NSW is therefore of the view that the review should consider models that emphasise diverting children who offend from formal court proceedings.

There are a range of diversionary and alternative approaches in other Australian jurisdictions that have successfully reduced the number of juvenile offenders subject to criminal proceedings. In Victoria for example, diversion from the court system occurs primarily through the Police cautioning program.<sup>4</sup> In addition, Victoria has the lowest rate of young people under juvenile justice supervision in Australia, and when a young person does receive a supervisory order, the emphasis is on imposing the "least intrusive order" necessary within the hierarchy of sentence options.<sup>5</sup>

Legal Aid NSW also suggests that the review consider the findings of the Washington State Institute for Public Policy (the Institute) cost/benefit evidence-based analysis of a range of restorative programs for juvenile offenders. At a recent Department of Attorney General and Justice seminar entitled *Cost-benefit analysis in the real world: reducing incarceration costs*,<sup>6</sup> Dr Steve Aos presented the findings of the Institute's most recent report (July 2011) on the benefits of a range of alternative programs including Aggression Replacement Training (ART) and Functional Family Therapy (FFT).

ART is a cognitive behavioural intervention program that specifically targets chronically aggressive children and adolescents. It aims to help adolescents improve social skill competence and moral reasoning, better manage anger, and reduce aggressive behaviour.

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<sup>1</sup> Chen, S., Matruglio, T., Weatherburn, D. and Hua J., *The transition from juvenile to adult criminal careers*, Crime and Justice Bulletin, Contemporary Issues in Crime and Justice, Number 86, May 2005, 1.

<sup>2</sup> *ibid*, 4.

<sup>3</sup> *ibid*, 6.

<sup>4</sup> For more about this program see

<http://www.aic.gov.au/events/aic%20upcoming%20events/2008/~media/conferences/2008-youngpeople/holland.pdf>.

<sup>5</sup> Hansen S., "Youth Justice in Victoria"

<[http://victoria.ymca.org.au/cpa/htm/htm\\_mod\\_link.asp?id=2706](http://victoria.ymca.org.au/cpa/htm/htm_mod_link.asp?id=2706)> (Accessed 2 December 2011)

<sup>6</sup> Department of Attorney General and Justice seminar, 22 November 2011

FFT is a structured family-based intervention that uses a multi-step approach to enhance protective factors and reduce risk factors in the family.<sup>7</sup>

Any approach to offending by children and young people must comply with international standards, such as the Convention on the Rights of the Child, the Beijing Rules and the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines).

## **Young Offenders Act 1997 (NSW)**

### **Question 2 - Objects of the YOA**

#### **(a) Are the objects of the YOA valid?**

Legal Aid NSW is of the view that the objects of the YOA remain valid.

#### **(b) Are any additions or changes to the objects of the YOA needed?**

Legal Aid NSW has no recommendations for additions or changes to the objects of the YOA.

#### **(c) Should reducing re-offending be an objective of the YOA?**

Legal Aid NSW is of the view that reducing re-offending should not be an objective of the YOA. This would be inconsistent with the purposes of the YOA which is diverting children and young people from the formal court process.

### **Question 3 – General principles of the YOA**

#### **(a) Are the principles of the YOA valid?**

Legal Aid NSW is of the view that the principles of the YOA remain valid.

#### **(b) Are any additions or changes to the principles of the YOA needed?**

Legal Aid NSW is of the view that the principles of the YOA could be more closely aligned with the principles of CCPA, but that this exercise would need to maintain the intent of each set of the principles.

#### **(c) Should reducing re-offending be addressed in the principles of the YOA?**

Legal Aid NSW is of the view that reducing re-offending should not be addressed in the principles of the YOA. This would be inconsistent with the purposes of the YOA which is diverting children and young people from the formal court process.

### **Question 4 – Are the persons covered by the YOA appropriate?**

The persons covered by the YOA are appropriate, subject to the view of Legal Aid NSW that the age of criminal responsibility should be increased to 12 years: the definition of 'child' should be amended to mean a person over the age of 12 and under the age of 18.

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<sup>7</sup> For further information about the Institutes programs and an overview of the Institutes approach and findings from 2009, see (<http://www.wsipp.wa.gov/rptfiles/11-07-1201A.pdf>) and <http://www.wsipp.wa.gov/rptfiles/09-12-1201.pdf>

### **Question 5 – Should the YOA apply to all offences for which the Children's Court has jurisdiction, unless specifically excluded?**

Legal Aid NSW supports the finding of the NSW Law Reform Commission that the general exclusion of all strictly indictable offences is inappropriate, and endorses the recommendation of the 2002 report that the range of offences covered by the YOA should be extended to cover all offences for which the Children's Court has jurisdiction, unless specifically excluded.

### **Question 6 – Offences specifically excluded from the YOA**

**(a) Is the current list of offences specifically excluded from the YOA appropriate?**

**(b) Is there justification for bringing any of these offences within the scope of the YOA?**

#### An offence where the principle person who investigates the offence is not a police officer

Legal Aid NSW supports the recommendation of the 2002 report that the Act be extended to cover all offences for which penalty notices may be issued to children, on the basis that monetary penalties are inappropriate for children as they have no capacity to pay the fine.

It is the experience of Legal Aid NSW that children and young people can accumulate large debts in unpaid fines for non-criminal offences such as littering or travelling without a fare on public transport. The accumulation of fines can follow a young person into adulthood and prevent them being able to register vehicles or obtain a driver's licence. In turn, this can lead to further offending, such as driving unlicensed, which can lead to further disqualification periods, fines and even imprisonment.

In 2006, the NSW Sentencing council drew attention to the 'disproportionate and oppressive effect' licence sanction have on disadvantaged and marginalised sections of the community, including Aboriginal communities and those living in remote and regional areas with limited public transport.

An investigating official who is not a police officer should be able to give a child or young person a warning or caution.

#### Traffic offences (if the child was old enough to obtain a learner licence)

Legal Aid NSW is of the view that all traffic offences allegedly committed by young people should be brought within the scope of the YOA, and believes that many of these offences would properly attract a YOA outcome.

An example of offences that would properly attract a YOA outcome is those arising from young people riding motorised foot scooters. In NSW any device with a motor must be registered for use on a road or road related area unless it is specifically exempt. Motorised foot scooters and other motorised recreational devices do not meet minimum Australian design safety standards and so cannot be registered. There are heavy penalties for using unregistered and uninsured vehicles and the police can take possession of unregistered vehicles. Some retailers who sell motorised foot scooters fail to warn customers that they cannot be used on roads or in public areas. It would be highly appropriate for a young person to be dealt with under the YOA for offences committed in these circumstances.

#### An offence which results in the death of any person

It is the view of Legal Aid NSW that this exception is appropriate.

### Most sexual offences

It is the experience of Legal Aid NSW that many sexual offences committed by children are the result of sexual experimentation, and that there are some sexual offences under the *Crimes Act 1900* (NSW) which may be appropriately dealt with under the YOA,<sup>8</sup> in appropriate matters such as:

- Section 61L (indecent assault) - where a teenager briefly touches another teenager's bottom,
- Section 61N (act of indecency) - flashing, mooning or calling out an inappropriate sexual comment,
- Section 66C (sexual intercourse) – where this is consensual sex between children who cannot legally consent because they are under 16 years,
- Section 66D (attempting s 66C offence), and
- Section 80 (attempt to commit bestiality).

### Offences under the *Crimes (Domestic and Personal Violence) Act 2007*

Legal Aid NSW is of the view that offences under the *Crimes (Domestic and Personal Violence) Act 2007* should be dealt with under the YOA but that the Children's Court should retain discretion to exclude matters where for example, serious violence has occurred.

Legal Aid NSW agrees that many breaches of Apprehended Violence Order's (AVO's) are relatively insignificant and could be appropriately dealt with by a conference or caution.

More importantly, Legal Aid NSW is of the view that legislative provisions that have been put in place to assist with the management of adult relationships do not necessarily translate well when applied to juveniles. It is the experience of Legal Aid NSW that the majority of offences under the *Crimes (Domestic and Personal Violence) Act 2007* dealt with in the Children's Court in NSW are not the typical power imbalance situations that protection order legislation is trying to address. Rather, an increasing number of protection order matters involve conflict between siblings, and between young people and their parents. In particular, parents of young people with cognitive or mental health impairments are using ADVOs to discipline children who they cannot control and for whom there are no supported housing options or health services that can offer adequate assistance.

In addition, care workers are increasingly using ADVOs to control the behaviour of young people in out of home care in circumstances which would ordinarily be a disciplinary matter in the family home. Inappropriate AVO conditions relating to alcohol and property are regularly imposed on juveniles, not to ensure the safety of the community, but rather to control a young person's behaviour. Often conditions are not explained properly to juveniles who invariably then breach the ADVO.

In any case, young people in general, and in particular, young people with cognitive and mental impairments, often lack the capacity to understand the conditions of ADVOs and the consequences of breach. The making of protection orders in such situations is not always the most effective way to deal with conflict involving young people who have not matured and lack conflict resolution skills. Breaching AVOs can lead to conviction and the possibility of incarceration.

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<sup>8</sup> Sections 61E, 81A and 81B of the *Crimes Act 1900* have been repealed but remain in s.8 of the YOA

Criminalisation of children's problematic behaviour is of particular concern to Legal Aid NSW, given research that reveals a high proportion of children and young people making their first appearance before a court continue their offending into adulthood, particularly if their first court appearance occurred when they were young.<sup>9</sup>

It is the view of Legal Aid NSW that penalties for breach of ADVOs applicable to young people should be different to those available to adults, and should focus on the use of diversionary options including rehabilitation programs, community employment and drug treatment.

In addition, it is the experience of Legal Aid NSW that children and young people who come before the Children's Court for the first time for an offence under the *Crimes (Domestic and Personal Violence) Act 2007* are often unlikely to reoffend. Clearly it would be appropriate to deal with these types of matters under the YOA.

### Drug Offences

It is the view of Legal Aid NSW that there should be a focus on diversion and rehabilitation for young people charged with drug offences and that these offences should be dealt with under the YOA.

### **Question 7 – Should warnings be available for a broader range of offences, a more limited range of offences, or are the current provisions of the YOA appropriate?**

Legal Aid NSW is of the view that warnings should be available for a broad range of offences, and agrees that categorisation of an offence as summary may not be the most appropriate way of identifying suitability of an offence for a warning. In this context, Legal Aid NSW agrees with the recommendation of the 2002 report to extend the range of offences for which a warning may be given to include larceny involving theft from a shop.

Legal Aid NSW supports the recommendation of the NSW Law Reform Commission that warnings should be available for all offences covered by the YOA, unless an offence is excluded by regulation.

### **Question 8 – Are the current provisions governing children's entitlement to warnings appropriate?**

Legal Aid NSW is of the view that the current provisions governing children's entitlement to warnings are appropriate.

### **Question 9 – Are the provisions governing the giving of warnings appropriate and working well in practice?**

Generally, the provisions governing the giving of warnings are appropriate and working well in practice. However Legal Aid NSW is of the view that Courts should be able to give a warning where it is appropriate.

### **Question 10 – Are the provisions governing the recording of warnings appropriate? Are there any concerns with their operation in practice?**

Legal Aid NSW is of the view that the provisions governing the recording of warnings are appropriate.

Anecdotal evidence indicates the need to make clear to police officers that a warning is given without a formal admission of guilt.

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<sup>9</sup> Chen, S., Matruglio, T., Weatherburn, D. and Hua J., *The transition from juvenile to adult criminal careers*, Crime and Justice Bulletin, Contemporary Issues in Crime and Justice, Number 86, May 2005, 1.

**Question 11 – Are the current provisions governing the conditions for giving a caution appropriate? Are there any concerns with their operation in practice?**

Legal Aid NSW does not support the restriction that a child can only be cautioned on three occasions, and notes the lack of evidence for the enacting amendment in 2002. This restriction limits the ability to give a caution where it is the appropriate penalty, for example, where a young person has been charged with trespassing after being issued with a banning notice for a shopping centre which is the only one in a small town.

Legal Aid NSW is aware of an increasing trend in the number of cautions given to younger offenders, particularly Aboriginal children and children living in remote areas. The restriction that a child can only be cautioned on three occasions means that these children are losing the opportunity for further cautions at a much younger age.

Legal Aid NSW is also aware of an increasing trend in the number of cautions being given to children and young people in out of home care in circumstances which would ordinarily be a disciplinary matter in a family home.

**Question 12 – Are the provisions that govern the process of arranging and giving cautions appropriate? Are there any concerns with their operation in practice?**

Legal Aid NSW is of the view that the YOA should specifically provide that, for the purpose of a caution, it is not necessary to secure an admission of a child on an electronic recording of interview of suspected persons (ERISP).

This issue arises from the police practice of arresting the child and taking them to the police station, which may be some distance away, and where they may remain in custody for some time, although the investigating police officer may consider that a caution is appropriate. At the police station, children are often locked in a cell and can be exposed to adult offenders in custody. The reason for arresting the child and taking them to the police station appears to be a widely held belief that it is necessary to secure the admission of the child on an ERISP.

Generally, it is police practice to attempt to arrange for a child to receive legal advice via the Legal Aid NSW Youth Hotline. Some police will not interview a child unless the child has had the opportunity to obtain legal advice and, if it is after midnight on weeknights when the Hotline is not available, they will make arrangements to interview the child on a later date.

However, although a child may not have had the opportunity to obtain legal advice, it is the experience of Legal Aid NSW that many police will either proceed to interview a child or, if the child refuses to be interviewed, proceed to charge the child because they have not made an admission. In other words, cautions are not being given where they may be appropriate.

In relation to admissions and the opportunity to obtain legal advice under the YOA, Legal Aid NSW refers to the response to questions 17 and 18.

Legal Aid NSW is of the view that police should have the capacity to issue cautions at any time after the notice of caution has been given, so long as the child has had the opportunity to get legal advice.

In addition, Legal Aid NSW is of the view that police could more frequently and appropriately exercise their discretion to give cautions at a place other than the police station.

A further concern is a lack of knowledge among some police officers of offences for which a caution is available. Legal Aid NSW is also aware of instances where an investigating police officer has advised a child that they will get a caution but the decision has been overruled by a more senior officer.

Anecdotal evidence indicates inconsistency between Local Area Commands (LACs) in the process of arranging and giving cautions and in the relative number of cautions given. These matters should be monitored and effective policies implemented to improve consistency.

### **Question 13 – Are the provisions that govern the consequences of a caution appropriate? Are there any concerns with their operation in practice?**

Legal Aid NSW is of the view that the provisions that govern the consequences of a caution should be reviewed in a number of respects.

In terms of the circumstances of disclosure of cautions, Legal Aid NSW refers to the response to question 19.

The provision for the destruction of fingerprints, palm prints and photographs under section 33A of the YOA should be strengthened by establishing a time limit for destruction of no later than 14 days after the giving of a caution. Section 137A(5) of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) provides for destruction of such material as soon as reasonably practicable. The time limit for destruction under the YOA should be stronger than under LEPRA as the YOA applies to children.

Provision for the destruction of fingerprints, palm prints and photographs under the YOA should extend to matters which are dealt with by warnings or Youth Justice Conferences.

### **Question 14 – Principles of conferencing**

#### **(a) Are the principles that govern conferencing still valid?**

Legal Aid NSW is of the view that the principles that govern conferencing are still valid.

#### **(a) Are any additions or changes needed?**

The YOA should provide that bail be dispensed with upon referral of a matter to conference. Prior to the Wood Inquiry,<sup>10</sup> this was stipulated in Children's Court practice notes which were subsequently revoked.

### **Question 15 – Are there any concerns with the comparative rate of conference referrals from Police and the Courts? If so, how should these concerns be addressed?**

Legal Aid NSW is concerned that there are not more referrals to conferences from the police. It is the experience of Legal Aid NSW that the rate of referral to conferences is not uniform across all Local Area Commands, with the majority under-utilising conference referrals. This suggests that leadership of individual Local Area Commanders focussing on diversionary outcomes plays a significant role in determining outcomes for young people.

The police are notified of Court referrals to conferences via a written notice of the satisfactory completion of an outcome plan (s 56(2) YOA). However, Legal Aid NSW recommends that the YOA be amended to include a provision for notification of a Local Area Commander of a court referral to conference that is similar to the provisions for notification of a court imposed caution, including the reasons why the diversionary option was used. This would provide the Local Area Commander with the opportunity to assess why the matter was not referred to conference by the police and address any discrepancies with court referrals through training of police officers and special youth officers.

### **Question 16 – Are the above provisions governing conferencing appropriate? Are there any concerns with their operation in practice?**

Legal Aid NSW agrees that the Court should not be required to approve the outcome plan.

Legal Aid NSW notes the difficulties with the time required to organise a conference in some areas but recognises the resource issues faced by Juvenile Justice NSW.

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<sup>10</sup> Hon James Wood AO QC, *Special Commission of Inquiry into Child Protection Services in New South Wales*, November 2008 (the Wood Inquiry).



### **Question 17 – Should the YOA specify what constitutes an admission for the purposes of the YOA? If so, what form should an admission take?**

It is the view of Legal Aid NSW that the YOA should specify what constitutes an admission for the purpose of the YOA. As discussed in response to question 12, it is the experience of Legal Aid NSW that police conduct an ERISP with the child or young person notwithstanding that diversionary options under the YOA are appropriate.

Section 10 of the YOA requires that an adult be present when a child makes an admission, but does not require that a child be subject to a full LEPR compliant interview. Legal Aid NSW is of the view that the YOA should specifically provide that for the purpose of the YOA, it is not necessary to secure an admission of a child on an ERISP. In addition, the YOA should specify that a child who is 14 years or older should be able to nominate their support person. Similar to the requirement under regulation 30(1) of *Law Enforcement (Powers and Responsibilities) Regulation 2005*, the support person should also be informed about their role.

### **Question 18 - Are the provisions governing the provision of legal advice to children under the YOA appropriate? Are there any concerns with their interpretation, or operation in practice?**

Section 7(b) sets out the principle that children are entitled to be informed about their right to legal advice and to be given the opportunity to obtain that advice. Section 22 and 39 clearly state that children must be informed by the investigating officer that this entitlement exists and where advice may be obtained before a caution is given or a conference referral is made.

The Legal Aid NSW Youth Hotline was set up in 1998 to ensure that children entitled to legal advice under the YOA could obtain it. Staffed by the Children's Legal Service, the Youth Hotline provides free, confidential legal advice to young people and their families. It operates from 9am to midnight Monday to Thursday, and as a 24-hour service from 9am Friday to midnight Sunday on weekends and public holidays.

In *R v Cortez*,<sup>11</sup> the Supreme Court placed an onus on police to use the Youth Hotline, holding that police should offer children in custody the option of telephoning the Youth Hotline for legal advice. As discussed in response to question 12, Legal Aid NSW has significant concerns that many police officers do not offer young people the opportunity of obtaining legal advice from the Youth Hotline before taking part in an ERISP or making a formal statement.

Legal Aid NSW is of the view that the YOA should specify that a child is entitled to obtain legal advice via the Youth Hotline before an admission is made, and that this entitlement should be extended to children who are not in custody but who may be interviewed at home or on the street.

Legal Aid NSW is also concerned that despite Youth Hotline solicitors advising the police (on the client's instructions) that a child or young person is not going to make an admission or participate in an ERISP, there are occasions where police proceed to interview the child. Legal Aid NSW is currently re-negotiating the Youth Hotline protocol with the NSW Police.

### **Question 19 – Are the provisions that govern the disclosure of interventions under the YOA appropriate?**

It is the view of Legal Aid NSW that the provisions that govern the disclosure of interventions under the YOA are generally inconsistent with the objects and principles of the YOA and too broad. Adults applying for employment should not be required to disclose diversionary options imposed on them when they were children.

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<sup>11</sup> *R v Cortez* [2002] NSWSC (Unreported, Dowd J, 3 October 2002).

## Question 20 – Appropriateness and adequacy of YOA interventions

### (a) Is diversion still a legitimate aim of the YOA?

Legal Aid NSW is of the view that diversion should remain the key aim of the YOA.

### (b) If not, how could court processes and interventions be structured so as to better address re-offending amongst children?

Not applicable.

### (c) If so, is it still adequate and appropriate to divert children to warnings, cautions and conferences?

It is the view of Legal Aid NSW that it is both adequate and appropriate to divert children to warnings, cautions and conferences, and the use of these diversionary options should be more widespread.

### (d) What changes could be made to the interventions under the YOA, to better address re-offending amongst children and young people?

Legal Aid NSW makes no recommendations to change the interventions under the YOA.

### (e) Do the interventions under the YOA adequately cater for the needs of victims?

Legal Aid NSW is of the view that the interventions under the YOA adequately cater for the needs of victims. For cautions, victims can provide a written statement (section 24A) and children who receive cautions can be requested to provide apology letters to the victim (s 29(4)).

Victims frequently participate in conferencing, and an apology letter from the child routinely forms part of outcome plan derived at conferences.

## Question 21 – The diversion of Aboriginal and Torres Strait Islander children under the YOA

### (a) What changes to the YOA, or its implementation, could be made to ensure that Aboriginal and Torres Strait Islander children have equal access to diversionary interventions under the YOA?

It is a matter of significant concern to Legal Aid NSW that Aboriginal and Torres Strait Islander children do not have equal access to diversionary interventions under the YOA.

Legal Aid NSW is of the view that the reason for unequal access to diversionary interventions is not the YOA itself but rather its implementation. There is a need for police training on the objects and principles of the YOA that are directed at addressing the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of diversionary interventions, as well as leadership focusing on diversionary outcomes.

### (b) What changes to the YOA, or its implementation, could be made to better address the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system?

It is the view of Legal Aid NSW that over-representation of Aboriginal and Torres Strait Islander children cannot be addressed by changes to the YOA but can be assisted through monitoring its implementation to ensure proper compliance with its provisions.

That said, over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system stems from systemic social and economic disadvantage, a problem that cannot be addressed by a criminal justice response.

#### **Question 22 – Children with cognitive and mental health impairments**

##### **(a) Are the interventions under the YOA adequate and appropriate for children with cognitive impairments or mental illness?**

Legal Aid NSW is of the view that the diversionary interventions under the YOA are adequate and appropriate for children with cognitive impairments or mental illness.

Young people with cognitive and mental impairments often lack the capacity to understand the nature and effect of their behaviour and diversionary options, where necessary, are the most suitable response to offending.

##### **(b) If not, what changes could be made to better address offending by these children?**

Given that young people with cognitive and mental impairments often lack the capacity to understand the nature and effect of their behaviour, police should exercise their discretion to consider a non-legislative response and take no action, where appropriate.

#### **Question 23 – Is there a need to reintroduce a body with an ongoing role to monitor and evaluate the implementation of the YOA across the state?**

Legal Aid NSW strongly believes that a body with an ongoing role to monitor and evaluate the implementation of the YOA across the state is necessary and appropriate.

This body should be responsible for ensuring compliance with the provisions of the YOA and more generally, that implementation of the YOA is consistent with its objects and principles. It should identify emerging trends and issues and recommend improvements.

Legal Aid NSW is of the view that the body should have a legislative basis, and should be responsible for advising the Attorney General. Its membership should include representatives of various government agencies, such as Legal Aid NSW, the Department of Juvenile Justice, the Bureau of Crime Statistics, the Children's Court, the NSW Police and the Department of Attorney General and Justice, as well as other key players in the juvenile justice system including the Aboriginal Legal Service, the Law Society NSW, and bodies representing the interests of victims and children.

## **Children (Criminal Proceedings) Act 1987**

### **Question 21 – Should the age of criminal responsibility be changed? If so why, and to what age?**

Legal Aid NSW is of the view that the age of criminal responsibility (10 years) is too low and should be raised to at least 12 years. It is the experience of Legal Aid NSW that children aged 10 and 11 fall far short of knowledge that an act charged is seriously wrong in the criminal sense.

This reflects most research into child development and intellectual capability. For example, Swiss psychologist Jean Piaget believes that it is only around the age of 12 years when most children gain the necessary moral and cognitive development to know right from wrong. He also states that children below 12 years may lack the intellect to properly instruct legal representatives, and may not understand legal concepts such as 'not guilty'.<sup>12</sup>

As noted by former Senior Children's Magistrate Steven Scarlett, an increase in the minimum age of criminal responsibility will more closely fit with the age most children are transitioning into high school<sup>13</sup> and further developing their intellect. Most children turn 13 in their first year of high school.

Doli incapax should be maintained to continue to provide an important transitional instrument that protects children from being penalised when their mental development does not fit the arbitrarily legislated minimum age of criminal responsibility.<sup>14</sup>

### **Question 22 – Could the structure of the CCPA be improved? If so, what other structure is recommended?**

Legal Aid NSW makes no recommendations on the structure of the CCPA.

### **Question 23 – Guiding principles**

#### **(a) Are the guiding principles set out in the CCPA still valid and are any changes needed?**

Legal Aid NSW considers that the guiding principles (a) to (f) are still valid. These were the original principles in the CCPA and reflect the Convention on the Rights of the Child.

Principles (g) and (h) were subsequently added and should be deleted. They are inconsistent with, and dilute the intent of principles (a) to (f).

Legal Aid NSW also proposes that the principle in section 7(c) of the YOA, "that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter," should be included as a guiding principle in the CCPA.

In addition, Legal Aid NSW supports the recommendation of the ALRC Report on children in the legal process,<sup>15</sup> that sentencing principles for children should include the need to maintain and strengthen family relationships wherever possible. This recommendation recognises that strengthening the child or young person's position in the family, as well as strengthening the parent's ability to deal with offending behaviour, can help reduce the incidence of offending behaviours.

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<sup>12</sup> In Dalby J T, 'Criminal Liability in Children' (1985) 27 *Can J Crim* 137 as cited in Bala N and Mahoney D, *Responding To Criminal Behaviour Of Children Under 12: An Analysis of Canadian Law & Practice*: <http://gsilver.queensu.ca/law/bala/papers/crimbeh.htm> at 3 (21 March 2000)

<sup>13</sup> Above n4

<sup>14</sup> *Lawlink NSW: A Review of the Law on the Age of Criminal Responsibility of Children* 10 Jan 2000: [http://www.lawlink.nsw.gov.au/clrd1.nsf/pages/clrd\\_child](http://www.lawlink.nsw.gov.au/clrd1.nsf/pages/clrd_child) at 2 (21 March 2000).

<sup>15</sup> Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, 1997, Report 84, Sydney.

The ALRC report also considered that the sentencing of young offenders should take into account the special circumstances of particular groups of young offenders, especially indigenous children.

**(b) Should the principles of the CCPA be the same as the principles of the YOA?**

Legal Aid NSW is of the view that the principles of the YOA and could be more closely aligned with the principles of CCPA, but that this exercise would need to maintain the intent of each set of the principles.

**(c) Should the CCPA include an objects clause? If so, what should those objects be?**

Legal Aid NSW does not believe that there would be benefit in the CCPA including an objects clause.

**Question 24 – Commencement of proceedings against children**

**(a) Are the processes for commencing proceedings against children appropriate?**

Legal Aid NSW proposes that the CCPA re-establish the presumption that children should not be detained or bailed to appear at court. Further, section 8(1) should be amended to require that criminal proceedings must not be commenced against a child otherwise than by way of a 'future' CAN', subject to specified exceptions.

This is consistent with Article 37 (b) of the Convention on the Rights of the Child which states that "no child shall be deprived of his or her liberty unlawfully or arbitrarily. 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."

**(b) Is the different process for serious children's indictable offences and other serious offences appropriate?**

Legal Aid NSW agrees that the offences set out in section 8(2)(a)(i) that attract an exception from the presumption in section 8(1) are appropriate. However, Legal Aid NSW is of the view that the section 8(2)(a)(ii) should be restricted to an indictable offence under Division 2 of Part 2 of the *Drug Misuse and Trafficking Act 1985* that involves a commercial quantity of drugs.

Legal Aid NSW proposes that s 8(2)(b) should be deleted. The section is subjective and cannot be fairly and consistently applied.

Legal Aid NSW also believes that the wording in s 8(2)(c) should be more prescriptive to provide guidance in its application.

**Question 25 – Hearing of children's criminal proceedings**

**(a) Are the provisions for the conduct of hearings appropriate?**

Legal Aid NSW is of the view that some provisions for the conduct of hearings should be clarified and others more strictly enforced.

**Section 10 – Exclusion of general public from criminal proceedings**

The provisions excluding the general public should be strictly enforced. In particular, the media should be excluded from the proceedings. It is the experience of Legal Aid NSW that the media breach the prohibitions on the publishing and broadcasting of names even after warnings by the Magistrate.

Legal Aid NSW is of the view that the CCPA should specify that the media cannot have access to records or court documents relating to a child or young person in proceedings under the CCPA to ensure that the identity of children is protected.

#### Section 12 – Proceedings to be explained to children

Legal Aid NSW notes that increased use of AVL technology has created difficulties for the Court in ensuring that the child understands, is heard and participates in proceedings consistent with article 12 of the Convention on the Rights of the Child.

Interaction via a screen can mean that it is difficult for the court to establish a rapport and gauge compliance with the section. This can be exacerbated by technical difficulties. For example, when the AVL technology is not working properly, matter outcomes may be reached by the court in the absence of the young person.

#### Section 13 – Admissibility of certain statements etc

While section 13(1)(a) provides that any statement, confession, admission or information given to the police by a child is admissible only if the person responsible for the child etc. was present, Legal Aid NSW is of the view that that the wording in section 13(1)(b) is too broad and compromises the intent and purpose of section 13(1)(a).

#### Section 14 – Recording of conviction

While the Court has discretion to refuse to record a conviction for a child who is 16 years or older, it is current practice that the conviction is automatically recorded in the absence of any specific direction that it not be recorded.

Legal Aid NSW is of the view that this practice is inconsistent with the intent of the legislation and that section 14(1)(b) should be amended to establish a presumption that a conviction of a child who is 16 to 18 years should not be recorded unless specifically ordered by the Court.

In addition, noting that it was intended that section 33(1) mirror section 10 of the *Crimes (Sentencing Procedure) Act 1999*, section 33(1) should be amended to include the phrase "without proceeding to conviction" to clarify that a penalty can be imposed without conviction.

#### **(b) Are the limitations on use of evidence of prior offences, committed as a child, appropriate?**

Legal Aid NSW is of the view that the limitations on the use of evidence of prior offences committed as a child are appropriate.

#### **(c) Should the wording of section 15 be amended to make it easier to understand?**

Legal Aid NSW agrees that that the wording of section 15 should be amended to make it easier to understand.

#### **Question 26 - Is it appropriate for courts other than the Children's Court, when dealing with indictable offences, to impose adult penalties or Children's Court penalties?**

Legal Aid NSW is of the view that Courts other than the Children's Court, when dealing with indictable offences, should impose Children's Court penalties. This should also apply to serious indictable offences.

#### **Question 27 - Is there any need to amend the list of factors to be taken into account when deciding whether to impose adult penalties or Children's Court penalties where they have committed a non-serious indictable offence?**

The factors to be taken into account when deciding whether to impose adult penalties focus on the offence. Legal Aid NSW is of the view that the Court should also have regard to the subjective circumstances of the young person, including background, mental health and prospects of rehabilitation.

### **Question 28 – Does the list of special circumstances that can justify certain offenders aged 18 to 21 being placed in juvenile detention remain valid?**

Legal Aid NSW is of the view that the special circumstances are too limited and do not reflect the rehabilitative purposes of the CCPA. In some cases, a young person may have served the majority of their sentence in juvenile detention while on remand, but then be transferred to an adult correctional facility when sentenced because there is no finding of special circumstances.

The criteria for special circumstances should be inclusive rather than exclusive and include such other matters as the court considers relevant.

### **Question 29 – Background reports**

#### **(a) What should the content of the background reports be?**

Background reports should not deal with the commission of the offence itself or uncharged allegations of criminal conduct. It is the experience of Legal Aid NSW that report writers detail the actual circumstances of an offence and uncharged allegations.

The background reports should include information about the young person's background and subjective circumstances as well as eligibility and suitability for non-custodial options.

Legal Aid NSW agrees that background reports are often ordered when a control order is not being considered and notes the resource implications for Juvenile Justice NSW and the negative consequence of the delay in the proceedings.

It is the view of Legal Aid NSW that regulation 34 (i) of the Children (Criminal Proceedings) Regulations 2011, which allows such other matters as the prosecutor considers appropriate to be included in the report, should be deleted.

#### **(b) Should the contents be prescribed in legislation?**

Legal Aid NSW agrees that the contents of background reports should be prescribed in legislation to ensure that unnecessary or objectionable material is not included.

#### **(c) Should other reports be available to assist in sentencing?**

Legal Aid NSW is of the view that psychological and psychiatric reports should be available to assist the Court in sentencing, where appropriate. However, the Court should only order these reports with the consent of the young person.

These reports should not detail the actual circumstances of an offence and uncharged allegations.

### **Question 30 – Should a court have the power to request a report from relevant government agencies in order to determine whether a young person is at risk of serious harm (and in need of care and protection) and/or whether they are homeless?**

Legal Aid NSW is of the view that a court should have the power to request a report from relevant government agencies in order to determine whether a young person is at risk of serious harm and/or whether they are homeless.

It is the experience of Legal Aid NSW that many young people appear in court with no accommodation options. A by-product of not being able to request a report from the Department of Family and Community Services is that juvenile detention may become a placement for a young person who is homeless.

**Question 31 – Is the list of serious children's indictable offences appropriate? If not, what changes need to be made?**

Legal Aid NSW is of the view that the list of serious children's indictable offences is appropriate.

**Question 32 – Is the current approach to dealing with two or more co-defendants who are not all children appropriate?**

Legal Aid NSW is of the view that the current approach to dealing with two or more co-defendants who are not all children is appropriate, and works to protect the child.

**Question 33 – Should the Children's Court hear all traffic offences allegedly committed by young people?**

Legal Aid NSW is of the view that the Children's Court should hear all traffic offences allegedly committed by young people.

The justification for the current law - that children old enough to drive should be dealt with in the same forum as adults – is inconsistent with the principles in the CCPA.

In addition, the dual jurisdiction of the Children's Court and the Local Court to hear children's traffic matters can give rise to anomalies in sentencing. Two young offenders of the same age who have committed the same traffic offence can be dealt with in two different jurisdictions with different sentencing powers simply because one of the offenders committed another offence in conjunction with the traffic offence. The process and outcome can be more serious if dealt with in the Local Court. While the Local Court has the power to use Children's Court penalties, it is the experience of Legal Aid NSW that these are rarely used.

The inability of the Children's Court to hear certain traffic offences also causes a degree of confusion amongst police officers. Traffic matters are often referred inappropriately to the Children's Court, only to be sent on to the Local Court.

**Question 34 – Should the CCPA clarify whether a child can be sentenced to a control order for a traffic offence?**

It is the view of Legal Aid NSW that the CCPA should clarify that a young person can be sentenced to a control order for a traffic offence.

**Question 35 – Hearing charges in the Children's Court**

**(a) Are there any concerns with these provisions? In particular:**

- i) Is it appropriate that Children's Court magistrates have such discretion, rather than having the election decision rest solely with the prosecution and/or defence as is the case with the adult regime?**

Legal Aid NSW is not of the view that the current provisions are working well in relation to the Magistrate determining that a charge may not properly be disposed of in a summary manner. An application to commit to a higher court should be made by the defence or prosecution.

- ii) Should there be a more restricted timeframe for the defendant (or the Court) to make an election?**

Legal Aid NSW is of the view that the timeframe for an election to have an indictable offence tried according to law should be at least 14 days after a plea is entered.



**(b) Should the CCPA include any guidance about the circumstances in which the Children's Court may form the opinion that the charge may not be disposed of in a summary matter (as it does for indictable offences set out in s18 (1A))?**

Legal Aid NSW is of the view that the CCPA should provide clear and detailed guidance about the circumstances in which the Children's Court may form the opinion that a charge may not properly be disposed of in a summary manner.

The threshold should be high and the circumstances should include not only the offence but the subjective circumstances of the young person, including background, mental health and prospects of rehabilitation.

**Question 36 – Penalties in the Children's Court**

**(a) Are the penalty provisions of the CCPA appropriate?**

As discussed in response to question 25, noting that it was intended that section 33(1) mirror section 10 of the *Crimes (Sentencing Procedure) Act 1999*, section 33(1) should be amended to include the phrase "without proceeding to conviction" to clarify that a penalty can be imposed without conviction.

**(b) Are there any concerns with their operation in practice?**

As detailed in response to question 6, Legal Aid NSW has concerns about the imposition of fines that young persons do not have the capacity to pay. The use of fines as a penalty should be discouraged.

Legal aid NSW is also concerned about the lack of availability of community service orders in regional and remote areas, which can mean that a young person receives a suspended sentence or a control order instead.

**(c) Should the penalty options be clarified or simplified in the Act?**

Legal Aid NSW is of the view that the penalty options in the Act should be clarified. Inconsistent amendments have meant that penalties under the CCPA have become confusing over time.

**Question 37 - Records**

**(a) Are the provisions for the destruction of records appropriate?**

Legal Aid NSW is of the view that there should be a presumption in favour of destruction of records in the circumstances set out in question 37(c), unless the court otherwise orders.

**(b) Are there any concerns with their operation in practice?**

There should be more efficient processes for the routine destruction of records.

**(c) Should the presumption for destruction of records be reversed in relation to proceedings where a child or young person pleads guilty, or the offence is proved by the Court dismisses the charge with or without a caution?**

Legal Aid NSW strongly supports reversing the presumption for the destruction of records in relation to proceedings where a child or young person pleads guilty, or the offence is proved by the Court and dismisses the charge with or without a caution.

## Question 38 – Terminating or varying orders

### (a) Are the provisions for terminating and varying good behaviour bonds and probation orders and for dealing with breaches of such orders, appropriate?

Legal Aid NSW is of the view that section 9A of the *Children (Detention Centres) Act 1987*, which allows for the detention of young people in adult gaols for alleged breaches of Children's Court good behaviour bonds or probation orders, should be repealed. This provision is contrary to the principles of the CCPA.

### (b) Are there any concerns with their operation in practice?

Legal Aid NSW has concerns with the operation of the provisions for breaches of good behaviour bonds and probation orders, and refers to the response to question 38(c).

### (c) Should there be a wider discretion to excuse a breach of suspended control order?

It is the firm view of Legal Aid NSW that there should be a wider discretion to excuse a breach of a suspended control order by young people or, where a breach is found, to impose a penalty which is less than the suspended control order.

Legal Aid NSW suggests excuses to avoid breach action should include where the breach is "minor" as opposed to "trivial".

In addition, excuses to avoid breach action should include where "there are good reasons for not revoking the bond" as opposed to the current test of where "there are good reasons for excusing the person's failure to comply with the conditions of the bond". This would allow a breach to be excused where the young person breaches a bond by committing another offence but subsequently undergoes rehabilitation.

There are significant policy and practical reasons why the discretion to excuse a breach of a suspended control order by young people should be more expansive than it is for adults, and to impose a penalty which is less than the sentence. Child offenders lack capacity for consequential thinking: they do not realise as readily as adults that breach of a suspended sentence means they will be placed in custody. In addition, children do not have the same range of sentencing options as adults when a breach is found. For example, home detention and intensive corrections orders are not available to children.

## Should the two Acts be merged?

### Question 39 - Should the YOA and CCPA be merged? If so, what should be the objects of any new Act?

Legal Aid NSW does not support merging the YOA and the CCPA. Legal Aid NSW accepts that advantages of merging of the two Acts would be a single piece of legislation, simplification of the legislative approach to dealing with young offenders, and a clearer progression from diversionary options to more serious sanctions. However, Legal Aid NSW believes the advantages of a merger of the two Acts are outweighed by the disadvantage of eroding the status of diversionary processes as separate to criminal proceedings.

The YOA establishes a hierarchy of diversionary options for young offenders and regulates how these sanctions should be used as an alternative to criminal proceedings. There has been an increasing acceptance of the role played by warnings, cautions and conferences. However, while the YOA is generally functioning well but there are inconsistencies in the use of diversionary options across the State. Legal Aid NSW believes that the status of the YOA as a separate piece of legislation makes diversionary options a clear alternative for the police and the Court in dealing with young people.