



Juvenile Justice
Attorney General & Justice

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

**Juvenile Justice
Submission**

December 2011

Introduction

Juvenile Justice welcomes the review of the operations and content of the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*.

This legislative review coincides with a broader undertaking by the Department of Attorney General and Justice, to examine the most effective ways to prevent young people from becoming involved in crime. This project, called Youth On Track, reviewed the current juvenile justice continuum in light of best-practice evidence-based research and policies in relation to the early identification of young offenders and early and entrenched offending in children and young people. The project also considered existing legislation governing young offenders, including the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*.

Youth On Track expects to make a number of recommendations around the broad philosophy and principles governing the juvenile justice system, along with specific recommendations for improving the identification, management and treatment of young offenders at all points along the juvenile justice continuum. This may include a broadening of community justice options and models, and the development of more effective and targeted community interventions to better prevent and reduce youth offending.

Juvenile Justice therefore recommends that the findings of this legislative review be considered in conjunction with the recommendations of the Youth On Track project, when finalised.

Question 1

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

Juvenile Justice generally supports the current NSW legislative framework in terms of its commitment to divert children and young people from the formal justice system wherever appropriate, and its commitment to detention as an intervention of last resort.

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

The existing legislative framework clearly defines that children are different to adults. However, Juvenile Justice considers that there is scope to enhance the framework to better address the needs of children, both within the Children's Court and higher courts. Juvenile Justice sees merit in adopting the principles of informed participation in court dealings with children and young people. A court environment for children that was less formal and more child-friendly, would allow children to communicate more effectively and enable their more meaningful engagement in proceedings.

The recent evaluation of the Children's Koori Court in Victoria (2011) highlights the importance of a child's participation. The evaluation notes that 'all magistrates sought to directly engage with the defendant and in all cases the degree of engagement was greater than that which is normally attempted or seen in mainstream Children's Court'.

The Scottish and New Zealand juvenile justice system models are based upon welfare and inclusion principles. These systems are underpinned by the belief that meeting a child's fundamental needs will generally lead to the reduction or elimination of their criminal behaviour.

Under the Scottish model, a children's hearing system has been established that assesses the welfare and needs of the child that may be contributing to their offending behaviour, as well as addressing offending behaviour where appropriate.

The New Zealand youth justice model was developed as a system where young people, their families, victims, the community and the State are all involved in addressing and taking responsibility for offending and its consequences. The lynchpin of the New Zealand system is family group conferencing, which makes families central to the decision making process and gives young offenders and their victims the ability to participate in the decision making process. The system works to keep young offenders out of court and in the community. In 2003, 76% of youth offending in New Zealand was dealt with through diversion or alternative action schemes.¹

¹ Beecroft, *Youth Justice – the New Zealand Experience, 2003*

Question 2

(a) Are the objects of the YOA valid?

Juvenile Justice believes the objects of the YOA remain valid.

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

Juvenile Justices does not recommend any amendment to the objects of the YOA.

(c) Should reducing re-offending by children be an objective of the YOA?

Juvenile Justice does not support reducing re-offending objective in the YOA. Whilst the YOA does not specifically reference the reduction of offending or even diversion as an object, it can be inferred that the YOA is partly intended to 'divert' young people from Court, re-offending, the 'cycle of juvenile crime' and custodial orders by Courts.

The YOA sets out a graduated hierarchy of interventions for young offenders and is largely consistent with the 1989 United Nations Convention on the Rights of the Child (UNCROC)², in particular Article 40, that seeks to ensure children who are accused of breaking the law have the right to legal help and fair treatment in a justice system that respects their rights. Like the New Zealand scheme of family group conferences, the YOA emphasises family responsibility, children's rights, cultural acknowledgment and partnership between state and community. The emphasis on the provision of '*an alternative process to Court*'³ not just for young people, but for victims, families, and communities, seeks to better address the effects crime has on all who are affected following the commission of an offence by a child.

Question 3

(a) Are the principles of the YOA valid?

Juvenile Justice continues to support the stated principles of the YOA.

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

Juvenile Justice does not consider any additions or changes to the principles of the YOA are required. The YOA establishes general principles of the least restrictive sanction, the right to legal advice, and a victim's entitlement to information, family and community involvement.

(c) Should the reduction of re-offending be addressed in the principles of the YOA?

² United Nations Convention on the Rights of the Child, Article 40.

³ *Young Offenders Act 1997* (NSW), Part 1, Object 3(a)

Juvenile Justice does not support a reducing re-offending principle being introduced into the YOA, for reasons similar to those outlined in the response to question 2(c).

Question 4

Are the persons covered by the YOA appropriate?

Juvenile Justice proposes the YOA be amended to include the following persons:

(i) Parents/guardians of child victims of personal violence

Juvenile Justice proposes the extension of the definition of victim (section 5) for the purpose of recognising parents, or guardians, as a victim within the meaning of the YOA when their child is the victim of a personal violence offence. Parents of child victims are often affected emotionally and financially by personal violence crimes against their children and should be specifically recognised within the definition of victim. This provides parents of child victims the opportunity to be afforded the right of veto of any outcome plan and extends the meaning of principle 7(f):

‘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.’

(ii) Health and alcohol or other drug counselling professionals

Juvenile Justice proposes the amendment of sections 28 and 47(2) of the YOA to include reference to a health and alcohol or other drug counselling professionals where a child has been charged with an offence under the *Drugs Misuse and Trafficking Act 1985* (NSW).

Provision is made for a health professional to accompany a child to a caution under sections 28 and 47(2) but only in the context of the child being ‘under care’.

(iii) Juvenile Justice Officer

Juvenile Justice proposes the amendment of section 47(1) to allow for attendance at a conference by a person nominated by Juvenile Justice for the purpose of training and education.

NSW Police trainees are able to attend a conference under section 47(1)(k) of the YOA for training purposes.

Juvenile Justice staff may only attend, or observe, a youth justice conference in the following circumstances:

- Assistant Managers (YJC), when performing the functions of a conference administrator under the YOA, have Attorney General approval under section 47(3) to attend and observe, but not participate in, a youth justice conference to conduct an assessment of a convenor’s performance.

- If a child is subject to supervision pursuant to an order made under section 33 of the *Children (Criminal Proceedings) Act 1987*, the child's supervising officer is also able to attend.

There is no opportunity, outside of section 47(3), for Juvenile Justice Officers or Conference Convenors, to observe a youth justice conference for training purposes.

Question 5

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

Juvenile Justice supports the YOA applying to all offences for which the Children's Court has jurisdiction, unless specifically excluded. The fact that this is not currently the case causes a level of confusion among both police and magistrates and has led to courts instructing Juvenile Justice to facilitate conferences for excluded offences.

Question 6

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

Juvenile Justice supports a review of the current list of excluded offences and contends that certain excluded offences should be eligible for a youth justice conference in certain circumstances.

Youth justice conferencing has proven efficacy⁴ in dealing with relatively serious offences, such as *robbery*, because such conferences force the offender to consider the consequences of their actions and the impact on the victim. Such offences are often committed by children, some of whom may have had no previous involvement in the juvenile justice system. Related offences such as *steal from person* and *demanding property (using menace)*, are matters that are currently dealt with successfully under the YOA through conferences and cautions. In fact, *robbery* and *steal from person*, derive from the same section of the *Crimes Act 1900* (section 94).

Young people frequently commit offences with their peers. Offending in groups may be considered a '*circumstance of aggravation*'⁵, a more serious offence by measure of penalty, which is generally excluded from the YOA.

Juvenile Justice considers the following offences would be suitable for inclusion in the list of matters that could be dealt with under the YOA:

- (i) Certain breaches of Apprehended Violence Orders (AVOs) (*Crimes (Domestic Violence and Personal Violence) Act 2007*).

⁴ Trimboli, BOCSAR, *An Evaluation of the NSW Youth Justice Conferencing Scheme*, 2000

⁵ NSW *Crimes Act 1900*, section 105A

While not advocating it would be appropriate for the YOA to cover breaches where actual violence has occurred, Juvenile Justice would support amendment of section 8(2)(e) to enable certain breaches of AVOs (*Crimes (Domestic Violence and Personal Violence) Act 2007*) to be dealt with under the YOA. Many AVOs taken out against young people do not necessarily relate to actual or potential violence by the young person (such as the breach of a condition not to come within a certain distance of an applicant's home/ workplace or disobeying a condition aimed at curbing a particular aspect of behaviour).

(ii) Indecent Assault (Sec 61L, *Crimes Act 1900*) and Commit Act of Indecency (Sec 61N, *Crimes Act 1900*)

Juvenile Justice recommends that the less serious offences, by measure of penalty, of Indecent Assault (Sec 61L, *Crimes Act 1900*) and Commit Act of Indecency (Sec 61N, *Crimes Act 1900*) be eligible to be considered for a youth justice conference having regard to sections 36 and 37 of the *Young Offenders Act 1997*.

These offences are presently excluded from being dealt with under the YOA. Indecent Assault carries a maximum penalty of five years imprisonment and Act of Indecency carries a maximum penalty of two years where the victim is under the age of 16 years and, 18 months where the victim is 16 years or above.

The exclusion of these offences overlooks the needs of victims, which include the need to receive acknowledgement for the wrong they have suffered by the perpetrator, and to have other significant people know about this wrong. Due to the way in which adversarial procedures are constructed, victims have no avenue to tell their story under the current system.⁶

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

New Zealand and South Australian jurisdictions currently include sex offences in the range of offences that can be dealt with by way of a caution or conference. Canada and the United Kingdom also have the option of dealing with sex offences via a cautioning process.

The Canadian model is predicated on observations that higher risk cases respond better to more intensive services than to less intensive services, while lower risk offenders fare as well or better with minimal intervention.

Research conducted on the South Australian model compared the outcomes of almost 400 sexual assault matters (committed by young people) that were finalised in court or by conference or formal caution in the South Australian jurisdiction.⁷

The findings of the study included,

⁶ Professor Marcia Neave, La Trobe University Law School, 6 October 2004

⁷ Daly, K, 2006 *Restorative Justice and Sexual Assault*. British Journal of Criminology, 46, 334-356

'A major difference between court and conference cases is that conference youth have admitted committing the offence to the police at an earlier point in time. It is here that we can identify the potential advantages of diversionary forms of RJ [Restorative Justice], from the point of view of victims and YPs [Young People]. For victims, there is an admission to the offence and the likelihood of some outcome, which provides some degree of vindication. For YP there are incentives to admitting earlier than later: admission early on (or even later in court) and a referral to conference means there is no potential for a conviction or for a detention sentence...'⁸

Also, the study found that conferences were more likely to include therapeutic rehabilitative interventions in their outcomes while the courts were more focused on imposing penalties rather than rehabilitation options.⁹

Daly's research of the South Australian Youth Conferencing scheme suggested that 'conferences have the potential to offer victims a greater degree of justice than court. The young person's admission to the offence services as an important public validation of the harm suffered by the victims, and the conference offers a forum for apology and reparation.'¹⁰

In its submission to the Law Reform Commission's report¹¹(2005:138) on *Young Offenders*, the Shopfront Youth Legal Centre provided an example of a sexual offence that would be ineligible to be dealt with under the current YOA:

...a 16-year-old boy is criminally charged for having sex with his 15-year-old girlfriend. The relationship is loving and consensual, and the parties are of similar age and maturity. However, because the girlfriend is below the age of consent, the boyfriend has technically committed a sex offence...

In this example the young person may have benefited from being diverted from court.

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?

Juvenile Justice recognises that warnings should only be a diversionary option in less serious offences. However, the agency would support a review of the range of offences for which a warning may be given to include a broader range of lower level, non-summary offences such as larceny involving theft from a shop, particularly where the value of the stolen property is low.

⁸ *ibid*

⁹ *ibid.*

¹⁰ *ibid*

¹¹ NSW Law Reform Commission, 2005, Report 104 (2005) - *Young Offenders*

It is evident that children persistently committing low level offences are accelerated through the justice system because the nature of their offence excludes them from being eligible for a warning, they exhaust their caution allocation quickly and then are often considered ineligible by police for a youth justice conference due to the number of previous offences and frequency of offending.

Question 8

Are the current provisions governing children's entitlement to warnings appropriate?

Juvenile Justice supports the current provisions governing children's entitlement to warnings.

Question 9

Are the provisions governing the giving of warnings appropriate and working well in practice?

Juvenile Justice considers the current provisions governing the giving of warnings appropriate.

Question 10

Are the provisions governing the recording of warnings appropriate? Are there any concerns with their operation in practice?

Juvenile Justice considers that any warning given should not form part of the person's criminal history or be used against the person in any future proceedings, especially as an admission is not required for the giving of a warning, nor is legal advice offered to the child.

Due to the increased vulnerability of children with an intellectual disability or cognitive impairment and in those cases where this has yet to be fully identified, the availability and provision of legal advice is critical to adequately protect children with reduced capacity in relation to admissions and consent.

Question 11

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

Juvenile Justice would support a review of the conditions governing whether a child is entitled to be dealt with by way of caution, especially in light of the low rate of diversion of Aboriginal & Torres Strait Islander (ATSI) children. Removing the mandatory requirement to consider the number of offences committed by the child when applying the YOA and removing the current limit of three caution occasions may have positive outcomes for the diversion rate of ATSI young people.

Section 20 (7) of the YOA restricts children from being entitled to be dealt with by caution in relation to an offence if the child has been dealt with by caution on three or more occasions. Prior to the 2002 amendments, there was no provision in the YOA limiting the number of cautions that may be given to a young person. These amendments have effectively increased the severity of the response to an offence that might otherwise be the subject of a further caution, by diverting the matter to conferencing or referring it to court proceedings. This limitation on the number of cautions conflicts with the principle of application of the least restrictive form of sanction, especially in circumstances where subsequent offending may be at a frequency and low level of seriousness to appropriately consider the giving of a further caution.

Sherman and Strang¹²(2007) concluded that restorative justice programs appear to work better among more serious offenders, such as those convicted for violent crimes. The escalation of less serious offences, by measure of penalty, to youth justice conferences can erode the efficacy of those conferences as they often fail to attract victim participation. Victims of less serious crimes often report the level of harm caused is not of a level deemed sufficient to warrant their attention. A formal caution under the current provisions would be equally effective.

Question 12

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

Juvenile Justice is satisfied the provisions are appropriate.

Question 13

Are the provisions that govern the consequences of a caution appropriate? Are there any concerns with their operation in practice?

Juvenile Justice is satisfied the provisions are appropriate and holds no concerns with their operation in practice.

Question 14

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

Juvenile Justice believes the principles remain valid.

(b) Are any additions or changes needed?

¹² L.Sherman & H. Strang, 2007 *Restorative Justice: The Evidence*, The Smith Institute, United Kingdom

Juvenile Justice recommends an additional principle relating to the presumption of bail for young people referred to a youth justice conference is required.

Juvenile Justice strongly advocates that children referred to a youth justice conference not be subject to bail, and recommends that when the court is dealing with a matter to which section 57(2) of the YOA applies the child should be excused from attending court and bail dispensed with.

Further, when the court is considering dealing with a matter under section 33(1)(c1) of the CCP, the child should be excused from attending court and bail dispensed with, unless the court requires the child to appear for sentencing.

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?

A major consequence of the current low rate of police referrals, is the negative impact on victims of crime who would be entitled to participate in a youth justice conference. Court referrals to youth justice conferencing are made at a later stage in proceedings than a police referral. Juvenile Justice would support any efforts to minimise court referrals to youth justice conferencing (and increase police referrals) as court referrals:

- Lengthen the period between the time the offence was committed to the time a victim is given the opportunity to participate in the decision making process of a conference;
- Complicate the engagement of victims in the process when the offence is not recent and the impact of the offence has either softened over time or the victim has become unwilling to revisit the trauma they experienced;
- Delay the timely holding of conferences due to the extensive engagement work that must occur with other participants where matters are often considered to be 'in the past' or are no longer relevant to the people involved;
- Impede the recall of the offence by the child. Holding a conference as close to the commissioning of the offence as possible optimises a child's recount of the events leading up to the offence, aids them in recalling their motives for committing the offence and generally provides a more meaningful context to all participants; and
- Delay the provision of key interventions required in order to repair the harm caused to a victim and identify support services aimed at helping the child overcome their offending behaviour.

The application of Part 8 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA) in relation to children may be confusing

and is often raised in Specialist Youth Officer training co-facilitated by Juvenile Justice personnel in conjunction with police. Inconsistent application of LEPRA may result in a greater number of children being referred to the court rather than being diverted under the YOA.

Part 8 of the LEPRA does not require a police officer to arrest a person under 18 years of age, if it is more appropriate to deal with the matter under the YOA. For a child to be diverted to a caution or conference under the YOA, he or she must admit the offence in the presence of a responsible adult. To facilitate this, police commonly arrest the young person (despite Part 8, section 108 of LEPRA), based on the rationale that this is necessary to ensure that the young person is accorded their legal rights and has access to legal advice and support people.

Juvenile Justice contends that a young person can be accorded these rights without being arrested. When combined with an opportunity to seek legal advice (and consider whether they will in fact make an admission) this suggested practice may result in improved outcomes for the child and increase the opportunity for appropriate diversion.

Juvenile Justice also supports the trial of the Young Offender Legal Referral scheme currently being conducted by NSW Police at Campbelltown and Macquarie Fields LACs. One of the limiting factors of the Police referral system under the YOA, is the requirement for young offenders to have admitted their offence to be eligible for a caution or youth justice conference. The Young Offender Legal Referral scheme allows young people suspected of committing an offence to be granted a 'cooling-off' period to obtain appropriate legal advice. Where a young person subsequently admits guilt, they retain their initial eligibility for cautioning or conferencing. Juvenile Justice recommends the broadening of this diversionary scheme.

Question 16

Are the above provisions governing conferencing appropriate? Are there any concerns with their operation in practice?

The provisions governing conferencing are administratively prescriptive. Juvenile Justice recommends a number of amendments to Part 5 of the YOA. These include:

- (i) The use of youth justice conferencing be broadened to include the opportunity for children to be referred to a conference by the court post-sentence.

A number of young offenders appearing before the Children's Court are unable to participate in youth justice conferences. For some, this is because the offence committed is outside the scope of section 8 of the YOA, while others may be ineligible for referral for other reasons. In view of the acknowledged benefits of conferencing for both offenders and victims, it may be appropriate to consider a conferencing model for

those children appearing before the Children's Court for serious crimes, who are not entitled to be diverted to a conference under current YOA provisions. The use of a conference for such matters would provide for the involvement of the victim/s in the court process.

A post-sentencing conferencing option for serious young offenders would provide the courts with a process that:

- (a) recognises and includes those who exercise parental responsibility;
- (b) recognises and includes victims of crime.

Such conferences would not be diversionary. They would occur following a sentence being imposed and provide the opportunity for victims of crime to have a place within the Children's Court sentencing regime, an entitlement currently only offered to victims of certain offences committed by adults.

Such conferences would only occur where the child accepts responsibility for the offence, and where both the victim of crime and the child agree to participate. Any outcomes resulting from such conferences would need to recognise the punishment that has already been imposed by the court.

- (ii) Provision to conference administrators of a period of 14 days to make a determination.

Juvenile Justice recommends conference administrators be granted a period of 14 days to make a determination, in line with the period extended to Investigating officials, Specialist Youth Officers and the Director of Public Prosecutions.

Under section 41, a conference administrator must (unless impracticable), on referral of a matter by a specialist youth officer for a conference, consult with both the specialist youth officer and the investigating official as to whether the matter should be dealt with by holding a conference. In doing so the conference administrator must consider the following criteria:

- the seriousness of the offence,
- the degree of violence involved in the offence,
- the harm caused to any victim,
- the number and nature of any offences committed by the child and the number of times the child has been dealt with under the YOA.
- Investigating officials (sec 9(2)(2B)) when determining whether a child should be warned, cautioned or referred to a specialist youth officer for consideration of the suitability of a youth justice conference are afforded a period of 14 days to make a determination. Similarly, a SYO (sec37(4)) is afforded a period of 14 days to determine whether or not a child is entitled to have their matter referred to a conference. The DPP (sec 41(4)) must also

make a determination no later than 14 days after receiving a referral. circumstances.

(iii) Removal of the requirement for a court to approve an outcome plan

Juvenile Justice recommends the amendment of section 54 in order to remove the requirement that a court approves an outcome plan if the court referred the matter for a conference. This provision requires the court to make a judgement on the suitability of an outcome plan against a set of very broad criteria outlined in section 52 of the YOA.

Sections 52(3) & (4) outline which parties should be involved in the agreement of an outcome plan. Ultimately, a young person and any victim who personally attends a conference each have a right of veto. The majority of outcome plans are approved by the court; in 2010-11 there were only seven occasions where the referring court failed to approve an outcome plan.

Juvenile Justice is supportive of continuing to provide the courts with a copy of the outcome plan and to report completion and non-completion as required in sections 56, 57 and 58 of the YOA, but believes the current approval requirements to be a waste of court resources.

(iv) Notice to victims of satisfactory completion of outcome plans

Juvenile Justice recommends amendment of section 56 (2) of the YOA in order to appropriately notify only those victims of crime who have been party to conference proceedings. The current provisions provide for a written notice to be given to the child, any victim, the person or body that referred the matter for a conference, the Commissioner of Police (if the matter was referred by the Director of Public Prosecutions or a court) and any other person on whom the outcome plan imposed obligations.

Juvenile Justice suggests the amendment require a written notice be given to only those victims of crime *party to the conference, whether as a result of personal attendance or indirect participation.*

Sec 7 (g) affirms the principle of a victim's entitlement to information and involvement. However, the experience of this agency has been that many victims who elect to exercise their entitlement to not to personally attend, or participate indirectly in a youth justice conference, are critical of ongoing correspondence about a process they have elected not to take part in. Such correspondence, as a result, has no reference or context for these victims of crime and has the potential to cause further harm.

Question 17

Should the YOA specify what constitutes an admission for the purposes of the YOA? If so, what form should an admission take?

Juvenile Justice agrees with the Law Reform Commission's (2005) concerns that neither an admission nor consent to a diversionary process should be valid unless the admission is made and consent given after the child has received legal advice or has had a reasonable opportunity to receive advice.

Research indicates that most young offenders cannot process the information and questioning that occurs in a police station or court. Juvenile Justice staff regularly report young people asking for an interpretation of proceedings and acknowledging that they did not understand what was being asked of them.

The revised Act could stipulate that children detained by the Police should not be required to make any statement or sign any document relating to the offence for which they are suspected, without a lawyer or specialist support person being present to assist them. This is particularly important in the case of children 15 years and under, who are most likely to be overwhelmed and intimidated by the legal process.

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?

Juvenile Justice holds a number of concerns relating to the provision of legal advice to children.

There is no existing legislative requirement that a child must receive legal advice before an admission is made. Principle 7(b) provides for a child to be informed of their right to advice and to have the opportunity to obtain advice. Sections 22 and 39 provide for a child to be informed where legal advice may be obtained. In practice, a child does not have to be provided with advice prior to making an admission.

There are also practice issues regarding the provision of legal advice to children at the point of apprehension by police, particularly in relation to children communicating with a legal adviser via telephone and adequately comprehending the often complex legal issues at play.

Juvenile Justice supports the Young Offender Legal Referral scheme. Such a scheme may also aid in identifying those children where *doli incapax* may apply or where an intellectual disability or cognitive impairment may suggest the need for alternative and more appropriate means of dealing with the child.

Question 19

Are the provisions that govern the disclosure of interventions under the YOA appropriate?

Juvenile Justice supports the existing provisions.

Question 20

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

Juvenile Justice strongly supports the Act's aim of diverting children away from the formal justice system wherever appropriate, and advocates that a child should only be referred to a Children's Court when all other alternatives have been exhausted.

Research indicates that the youngest juveniles who come into contact with the law are likely to be the most vulnerable. Early onset of offending in childhood (as opposed to adolescence) is associated with significantly greater childhood adversity and neuropsychological impairment (Moffitt and Caspi, 2001; Raine et al., 2005). Younger children are also likely to be significantly more vulnerable within the formal justice system due to their lower levels of comprehension, and at increased risk within detention settings due to their lack of maturity. Therefore all appropriate opportunities to divert children away from the formal justice system should be supported and enhanced.

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

N/A

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

Juvenile Justice strongly supports the existing pre-court diversion system of warnings, cautions and Youth Justice Conferences. Research suggests that these types of intervention have a positive impact on future offending. Vignaendra and Fitzgerald (2006) examined the likelihood and frequency of reoffending, time to reoffend and the likelihood of imprisonment within five years, among young people cautioned by police or who participated in a youth justice conference. The results showed that 42 per cent of the caution cohort and 58 per cent of the conference cohort reoffended within five years. These percentages were lower than the reoffending rate for young people who proceeded straight to court without diversionary options (Chen et al. 2005).

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

The Youth Justice Conference process is an early intervention that allows Juvenile Justice to start to identify the needs of young offenders. Juvenile Justice is currently trialling an enhanced youth justice conference process in the Newcastle area. The trial is working to assess a participant's needs and to provide appropriate interventions (incorporated into their Outcome Plan) that address the causes of their criminal behaviour. While this scheme is currently a trial, Juvenile Justice sees merit in the assessment and appropriate referral

of conference participants as an early intervention that will work to reduce future reoffending. The trial is currently under evaluation.

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

Juvenile Justice is confident the interventions under Part 5 of the YOA adequately cater for the needs of victims, but acknowledges that the necessity to engage victims in the process of the YOA is balanced with the imperative to meet the prescribed time frames in the YOA. Cautions also have a lower degree of victim participation than youth justice conferences.

Youth justice conferencing is the only juvenile justice initiative that gives victims of crime the opportunity to be directly involved in decisions relating to the offence committed against them, the opportunity to address the young person directly and the right to veto the conference outcome. The youth justice conference enables young people to take steps towards directly repairing the harm they have caused to victims. The involvement and empowerment of victims of crime is an integral part of youth justice conferencing.

Juvenile Justice recommends that the definition of personal attendance at a conference be expanded to include those victims who elect to participate in a conference via audio visual link. Section 52(4) of the YOA states:

The child, and any victim of the offence who personally attends the conference, each have a right of veto with respect to the whole of an outcome plan, or with respect to any decision proposed to be contained in an outcome plan, regardless of the views of any other participant in the conference.

As 'personal attendance' is undefined in the YOA it is recommended that participation via audio visual link be considered personal attendance in order to provide victims the opportunity for participation and the right of veto.

Question 21

(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?

Aboriginal and Torres Strait Islander (ATSI) young people represent almost half of the Juvenile Justice client base. In comparison, Indigenous young people aged 10-18 make up only 3% of the NSW population. ATSI young people are more than twice as likely as non-ATSI young people to appear before court rather than accessing alternative options under the YOA, and are much less likely to receive an infringement notice or warning than non-ATSI young people.

Some of the barriers to participation of ATSI young offenders in judicial diversionary programs include having a prior criminal history, the degree of violence associated with an offence, the number of previous cautions and the necessity for an admission of responsibility for the crime. Juvenile Justice

would support any consideration given to changing current restrictions to allow more ATSI young people to access diversionary interventions. This includes a re-evaluation of the existing requirement to consider the number of offences committed by a child when applying the YOA, with consideration given to removing the current limit of three caution occasions.

Juvenile Justice supports the trial and expansion of the Young Offender Legal Referral scheme.

Juvenile Justice also sees a role for increasing the cultural competency of all justice system workers to build a better understanding of the unique factors impacting upon ATSI peoples and create improved relationships with local Aboriginal communities.

(b) As a related matter, 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?

In 2010, the Bureau of Crime Statistics and Research released a report on *Reducing Indigenous contact with the court system*. The report stated that reducing Indigenous recidivism was an effective way of reducing the over-representation of Indigenous defendants in court, theorising that a 20% reduction in the rate of Indigenous re-appearance in the court system would significantly reduce the ratio of Indigenous to non-Indigenous court appearances. The report concluded that efforts should therefore be focussed on offender rehabilitation and increased assistance in promoting compliance with court orders.

As discussed above, great impact could be achieved through the relaxation of barriers to diversion and better engagement of ATSI children and young people, and through increased education, family and community engagement.

Question 22

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

People with mental health and cognitive impairments are significantly over-represented within the juvenile justice system. These children are particularly vulnerable and benefit from interventions which divert them away from custodial settings.

Early identification of a child's possible cognitive impairment or mental illness is imperative to ensure the child is treated appropriately. Juvenile Justice employs a checklist for youth justice conference convenors to report on key issues associated with a conference referral. This includes an 'additional needs checklist' for completion where a convenor suspects a child may have a communication or cognitive disability. Based upon the findings of these assessments convenors can estimate a child's capacity to understanding

proceedings, seek additional assistance if required and tailor proceedings accordingly.

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

Due to the increased vulnerability of children with an intellectual disability and those children whose intellectual disability may not yet be fully identified, the availability and provision of legal advice is critical to adequately protect these children in relation to admissions and consent. Juvenile Justice would support a broadened remit of the Young Offender Legal Referral scheme to include children with a suspected or known mental illness or cognitive impairment, thereby providing them with an opportunity to obtain legal advice and to undergo appropriate assessment to determine their cognitive capabilities.

Juvenile Justice also supports expanded utilisation of the Criminal Justice Support Network (CJSN) by police and the courts. The CJSN provides volunteer support workers for people with an intellectual disability who are in contact with the criminal justice system. CJSN volunteers help people understand their situation and rights and exercise their options. They alert police to any medical needs, confusion, or inappropriate language used during interviews. They also arrange legal advice, help organise referrals or follow-up support and act as a support person at a conference. The CJSN has coverage in a wide range of areas across NSW and has an outreach service which can provide referrals to regional areas.

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?

Juvenile Justice supports the reintroduction of a legislated body to oversee the effective working of the *Young Offenders Act*. The abolition of the Youth Justice Advisory Council removed the only formal mechanism for the three administering agencies (Police, Attorney General's and Juvenile Justice), to oversight the legislation, and monitor and regulate inter-agency collaboration. Reintroducing such a body would enhance the operation of the YOA by allowing issues to be identified and addressed at the appropriate level.

Question 24 (referenced as Q21 in paper)

Should the age of criminal responsibility be changed? If so, why?

Most western nations now focus their interventions on addressing the underlying issues behind a child's criminal behaviour, rather than using the formal court system and incarceration. There is extensive evidence to support this approach to children's offending, and to increasing the age of criminal responsibility, which is currently set at age 10 in NSW, among the lowest in the world.

International research has found that the brain is not fully formed at puberty, but continues to mature until at least 21 years and possibly as late as 25 years. Scientific research demonstrates that children's brains are still developing in ways that affect their impulse control and their ability to choose between anti-social behaviour and socially acceptable courses of action, resulting in children having a lesser capacity for forward planning. This research raises questions as to the appropriate culpability of children for their criminal behaviour.

Internationally, there is vigorous debate around the appropriate age of criminal responsibility. This issue is currently being discussed in Scotland, where the age of criminal responsibility is eight years, but a child below the age of twelve years cannot be prosecuted. In 2006 Ireland introduced legislation to raise the age of criminal responsibility from 7 to 12 years of age. In Canada the age of criminal responsibility is from 12 years of age. In most European Union countries the age of criminal responsibility is set between 12 and 15 years, with a focus on diversion to welfare based services until age 16. In these jurisdictions, incarceration is typically used only in extreme circumstances. This is also the case in countries such as China and Malaysia, where children 10-14 years are not subject to incarceration.

Question 25 (referenced as Q22 in paper)

Could the structure of the CCPA be improved? If so, what other structure is recommended?

Juvenile Justice supports the current structure.

Question 26 (referenced as Q23 in paper)

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

The guiding principles remain valid.

(b) Should the principles of this Act be the same as the principles of the YOA?

The principles should not be the same. As the purposes of the two Acts are distinctly different yet complementary, so should be the principles.

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

Juvenile Justice would support an objects clause which states areas pertaining to children not covered in the principles.

Specifically, Juvenile Justice would support a reference to the need for consideration to be given to the child's level of maturity and understanding, and to the circumstances of the case.

Question 27 (referenced as Q24 in paper)

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

N/A

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

N/A

Question 28 (referenced as Q25 in paper)

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

Juvenile Justice maintains that Section 12 *Proceedings to be explained to children*, should be enhanced to ensure greater compliance with the wording "reasonably practicable to ensure that the child understands the proceedings". The revised Act needs to require courts to use language that children can understand and to ensure that communication is pitched at an appropriate developmental level that will assist the child to engage in the court process.

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

The limitations are appropriate.

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

Juvenile Justice supports the redrafting of Section 15 into plain English and increased clarity around the parameters of matters that are inadmissible.

Question 29 (referenced as Q26 in paper)

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?

Juvenile Justice considers it appropriate for young people appearing in all jurisdictions to be able to be dealt with under children's law if deemed appropriate.

Question 30 (referenced as Q27 in paper)

Is there any need to amend the list of factors to be taken into account when deciding whether to deal with a child according to law or according to Division 4, Part 3 of the CCPA, where they have committed a non-serious indictable offence?

Juvenile Justice considers the list of matters requiring consideration (Part 2 Division 4 Section 18 (1A) (a) – (e)) to be suitable and to encompass relevant factors. However, there may be some benefit for courts in further clarifying (e), to clearly state certain common vulnerabilities such as disability and mental health issues and cultural disadvantage.

Question 31 (referenced as Q28 in paper)

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

Juvenile Justice supports the list of special circumstances that allow certain young adult offenders to be placed in juvenile justice centres. However, some inconsistent practices have developed which legislative changes could resolve. In some cases, the court may impose a Section 19 on a young person who may be in a juvenile correctional centre. The deletion of the note under 19(1) would be supported by Juvenile Justice.

Question 32 (referenced as Q29 in paper)

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

Background reports should only be requested from Juvenile Justice where a control order is being considered. The background report can identify any diversionary options which may be available. It can also provide useful and relevant material to assist in the sentencing process.

(b) Should the contents be prescribed in legislation?

No. The contents of the report should be delegated to the Director-General. The current legislation is too prescriptive and inflexible. Contents should be agreed between the courts and Juvenile Justice.

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

Yes. Other reports should be available to the court to assist the magistrate determine the most suitable sentence. Shorter, more tailored reports would provide a more effective use of agency resources.

Question 33 (referenced as Q30 in paper)

(a) Should the court be able to request a report from relevant government agencies in order to determine whether the young person is at risk of serious harm (and in need of care and protection) and/or whether they are homeless?

Juvenile Justice would support the Children's Court being able to request reports from other government agencies to clarify specific issues. Having the appropriate information available would ensure that magistrates have a comprehensive understanding of a child's situation, and can take into account relevant health and welfare issues in determining the appropriate sentence.

(b) Should this be set out in legislation?

Yes.

Question 34 (referenced as Q31 in paper)

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

Juvenile Justice supports the current list.

Question 35 (referenced as Q32 in paper)

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

Juvenile Justice supports the approach that all children's matters be held in an environment that they are able to engage with and comprehend. In those cases where a child has adult co-offenders, the location of the proceedings should ensure that all participants are fully cognisant of the proceedings.

Question 36 (referenced as Q33 in paper)

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

Yes. Specialist Children's Courts and Children's Magistrates have the knowledge and expertise to deal most effectively with children.

Question 37 (referenced as Q34 in paper)

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

Yes.

Question 38 (referenced as Q35 in paper)

- (a) **Are there any concerns with these provisions? In particular:**
- (i) is it appropriate that Children's Court magistrates have such a discretion, rather than having the election decision rest solely with the prosecution and/or defence as is the case with the adult regime?**
 - (ii) should there be a more restricted timeframe for the defendant (or the Court) to make an election?**

Children's Court magistrates must have the discretion, rather than having the election decision rest solely with the prosecution and/or defence, as is the case within the adult regime. It is always preferable for matters to be summarily held in a Children's Court as this jurisdiction is specifically set up for children.

- (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))?**

The most relevant aspect of s18(1A) is (c) *the age and maturity of the person at the time of the offence and at sentencing.*

Question 39 (referenced as Q36 in paper)

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

Yes.

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

N/A

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

N/A

Question 40 (referenced as Q37 in paper)

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

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

- (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?**

N/A

Question 41 (referenced as Q38 in paper)

- (a) Are the provisions for termination and varying good behaviour bonds and probation orders and for dealing with breaches of such orders appropriate?**

Yes.

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

The operation in practice varies across NSW which can cause operational difficulties. Some courts require the Juvenile Justice Officer to attend court to

swear in the breach while other courts require a faxed copy to be sent to the court. Standard practices would be preferable.

(c) Should there be a wider discretion to excuse a breach of a suspended Control

Yes.

Question 42 (referenced as Q39 in paper)

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

Juvenile Justice sees merit in retaining two separate Acts, as their purposes are distinctly different. To merge the two Acts may promote ease of use among practitioners within the juvenile justice system, but would run the risk of diminishing the purpose and impact of the diversionary principles of the Young Offenders Act.

Juvenile Justice instead proposes that greater consistency is achieved across the two Acts in terms of the hierarchy of interventions available, the protections and special assistance afforded children, and the overarching principle of detention as an option of last resort.