Review of the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987 –NSW Police Force Response

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Discussion Item	**Questions for Consideration**	**Response**
2.4 International Practice	1. (a) Does NSW's legislative framework take the right approach to offending by children and young people? (b)Are there any other models or approaches taken by other jurisdictions that this review should specifically consider?	(a) No. The approach does not fully satisfy its aims. The police and judiciary should not be seen as the main government bodies to be relied upon to deal with offending, including recidivism, by young people. The implementation of the YOA alone cannot effectively reduce offending by the children and young people to whom it is applied. As identified in the Consultation Paper, a range of specialist tools and services that target the needs of young offenders, their families and support networks need to be in place to intervene in and reduce offending behaviour. This requires a whole of government response and any legislative framework should not be reviewed in isolation. Diversion should form part of a targeted strategy of community engagement and assistance that reduces the social conditions that are shown to increase youth offending. Any outcomes from this review need to address the identification and development of effective treatment models. It is arguably better to stem the flow of criminal behaviour early, than provide for a system where real support, control or an intervention strategy is only provided once a juvenile is entrenched in criminal behaviour. (b) A 2010 comparison of treatment models and legislation on young offenders by Australian Police jurisdictions is attached **Tab A** for information.
3.3 Objects of the YOA	2.(a) Are the objects of the YOA valid? (b) Are any additions or changes to the objects of the YOA needed? (c) Should reducing re-offending be an objective of the YOA?	*See also response to Question 1.* The objectives of the YOA remain valid, but are incomplete, in that they do not make provision for the use of the YOA to reduce re-offending. Several additions/clarifications are suggested: 1. It is recommended that the Objectives contain an explicit commitment to managing appropriately the outcomes of youth justice conferencing – at present it is questionable whether resources are adequate to monitor and ensure compliance with conferencing commitments, and 2. Reduction in re-offending rates should be an explicit objective of the YOA – and should perhaps be the first objective. 3. Section 3(b) of the YOA identifies the provision of "…an efficient and direct response…" to the commission of certain offences by children. The addition of the word 'effective' would strengthen this section, by underscoring that improvements to the YOA would provide an opportunity to implement the YOA in a way that assists in the prevention of further offending by children and young people. It is accepted that young offenders require access to a less "punitive" and more rehabilitative/supportive legal regime. But whilst this is the case, the protection of the community and reduction of crime must also be regarded as a core purpose of any criminal justice system.

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3.4 General Principles of the YOA	3.(a)Are the principles of the YOA valid? (b) Are any additions or changes to the principles of the YOA needed? (c) Should reducing re-offending be addressed in the principles of the YOA?	*See also response to Question 1.* Overall the principles of the YOA remain valid. It would be beneficial to include an additional principle, reflecting that reduction of re-offending is to be a key aim of the YOA, and that in implementing the Act, there is an obligation to support the child or young person to cease their offending behaviour. The principle that the least restrictive form of sanction is to be applied remains valid, however this needs to be balanced against the needs of the offender. Applying the least restrictive form of sanction is not an adequate principle if this simply means that we are delaying a young person's contact with the court system, rather than acting to prevent this from occurring. In some cases it may be more beneficial to the offender if additional requirements are put in place to assess and address health, welfare or other factors that may be contributing to the offending behaviour. This issue is discussed in further detail in response to *questions 13, 14 and 16.* Re-offending should be explicitly addressed in the principles of the YOA.
3.5 Scope of the YOA 3.5.1 Persons covered by the Act	4. Are the persons covered by the YOA appropriate?	Yes. Suggestions have been raised on occasion on redefining the age of "young person" to include persons up to the age of 25. This should continue to be resisted. A "young person" must continue to be defined in terms of the period between the capacity to form criminal intent and the age when a person is a legal adult.
3.5.2. Offences covered by the Act	5. Should the YOA apply to all offences for which the Children's Court has jurisdiction, unless specifically excluded?	No, the current criteria is adequate. It would be problematic to include serious offences that are currently seen by the Children's Court, because of the limited capacity to intervene effectively and attach conditions under the YOA. To automatically include all offences for which the Children's Court has jurisdiction would appear to transfer the responsibility for determining the seriousness of conduct in matters involving potentially significant criminality from a judicial officer (magistrate) to a police officer. The exercise of discretion to determine effective penalty by a police officer should be subject to explicit legislative guidance. It is not considered within community expectations for example, that an offender committing a violent robbery could receive a police caution or warning. The proposal would permit such an outcome.
	6. (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?	Broadly speaking the current excluded offences are appropriate, subject to the following comments: The NSW Police Force (NSWPF) does **not support** the relaxing of current eligibility restrictions in place (refer page 17 of consultation paper) to include some of the less serious sex offences that are presently excluded. The NSWPF position is that sexual offences are too serious and unsuitable for diversion and conferencing is inappropriate.

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		A number of difficulties with implementation have emerged for Police when determining whether specific drug offences are eligible to be treated under the YOA. Currently, the YOA excludes most drug offences listed in the *Drug Misuse and Trafficking Act 1985*. Summary offences that are eligible for diversion under the YOA are identified by the quantity of substance involved, in section 8(2) (e1) and section 8(2A). In cases where a summary drug offence has been committed but no drug is present, or the drug has been administered and cannot be quantified, the offence is not eligible to be treated under the YOA. For example, a young person apprehended with a half small quantity (15g) of cannabis leaf is eligible for a warning or caution under the YOA, whereas a young person apprehended with a pipe for administration of cannabis leaf cannot be treated under the YOA and must instead be charged. This lack of consistency within the YOA with regard to the eligibility of minor drug offenders has led to lack of clarity for Police, particularly given that the Cannabis Cautioning Scheme for adults allows for the diversion of adults apprehended with cannabis leaf and/or equipment for administration. See **Tab B** for further details. There is a further anomaly regarding the eligibility of offences listed in the *Drug Misuse and Trafficking Act 1985*, in that an offence involving a 'small quantity' of a prohibited drug other than cannabis leaf is eligible for warning or cautioning under the YOA, whereas for cannabis leaf, a young offender can have no more than half of the 'small quantity' of drug to be eligible for the YOA. The YOA is thus weighted in favour of drugs other than cannabis leaf, and this implies that using cannabis leaf is a higher risk or more problematic than using other prohibited substances.
3.6 Warnings 3.6.1 Offences for which warnings may be given	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?	NSWPF does not support an expansion of warnings.
3.6.2 Entitlement to be dealt with by a warning	8. Are the current provisions governing children's entitlement to warnings appropriate?	Yes.
3.6.3 Giving warnings	9. Are the provisions governing the giving of warnings appropriate and working well in practice?	Yes.
3.6.4 Records of warnings	10. Are the provisions governing the recording of warnings appropriate? Are there any concerns with their operation in practice?	In practice, the current recording provisions are appropriate.
3.7 Cautions 3.7.1 Conditions required for	11. Are the current provisions governing the conditions for giving a caution appropriate? Are there	The present difficulty with the procedure/circumstances for giving cautions (and indeed for conferencing) revolves around the requirement for appropriate admissions by the young person and consent to the process.

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giving a caution *Refer also 3.9*	any concerns with their operation in practice?	Until the young person gives such consent and makes admissions, they are not eligible for a caution or conference and the process cannot be undertaken. This aspect of the procedure is not within the control of the apprehending police officer or of the Specialist Youth Officer and unwillingness by the young person to make admissions or consent to caution or to attend a conference will result in referral to the Court. In general at present the young person is required to make a decision regarding admissions/participation at the time of apprehension. This can lead to the young person being required to make a rapid judgement in stressful conditions – many young persons will elect not to participate in the cautioning or conferencing process as a consequence. This is not assisted by anecdotal information that suggests that some legal practitioners contacted by young people in urgent circumstances may recommend that no assistance be provided to police. Whilst not improper, this leaves police with no option but to proceed by way of court process. Subsequently, when before the Children's Court and having had additional time to seek other advice and consider options, a large number of young persons elect to participate in the cautioning process. At present the NSWPF is evaluating a Young Offenders Legal Referral scheme to extend additional opportunity to young persons to seek advice before refusing to make admissions/participate in diversion. It is also suggested that legal practitioners receive additional advice as to the operation of the YOA.
3.7.2 Process of arranging and giving a caution	12. Are the provisions that govern the process of arranging and giving cautions appropriate? Are there any concerns with their operation in practice?	The current provisions for arranging cautions after the young person has met all the necessary criteria are appropriate. The Consultation Paper contains the following comment: *Some members of the Advisory Committee to this Review have raised an issue regarding situations where NSW Police take children into custody before releasing them to get legal advice on whether to admit the offence and consent to the caution. Given that arresting the child can result in the child being taken to a police station some distance away, and remaining in custody for some time, these stakeholders have queried whether this practice is consistent with the spirit and intention of the YOA.* It must first be noted that this comment appears to relate to section 3.7.1 of the Paper, not 3.7.2. Until the young person has complied with the requirements of section 10 of the YOA they are not entitled to receive a caution. A young person is not obliged to seek legal advice at all – whilst the young person must be advised of their rights to legal advice and assisted in the exercise of their rights should they decide to seek advice, the young person is

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		not *required* to seek legal advice. It remains the decision of the young person to seek advice or not. As the young person has presumably been apprehended for the commission of an offence it is entirely appropriate that they be taken to an appropriate police station. Until the young person is entitled, through compliance with section 10 requirements, to a caution, police have no option but to proceed as though the matter could proceed by way of Court Attendance Notice and possible bail requirements. This will result in the young person being held for a period in custody.
3.7.3 After a caution is given	13. Are the provisions that govern the consequences of a caution appropriate? Are there any concerns with their operation in practice?	The provisions that govern the consequences of cautions are currently inadequate. Under current provisions, there are limited options for referring young repeat offenders into targeted programs that address underlying substance use issues that may be driving the offending behaviour, until their criminal involvement is well-established. This is in contrast to the adult diversion system, where offenders can be diverted away from the court system and into programs such as Magistrates Early Referral Into Treatment (MERIT) if they offend in the context of problematic substance use. If a warning is given, no conditions can be attached to that warning. If a caution is given, "no further proceedings may be taken against the child" (section 32). Mandatory conditions, for example requiring an assessment for substance use issues or child welfare issues cannot be attached until a child or young person has been referred to and attended a youth justice conference and an outcome plan has been established, or until the person is charged and a magistrate orders that particular conditions be met. By this stage, the child or young person may have been issued with a number of warnings and several cautions, or committed and admitted to a relatively serious offence. As identified in the Consultation Paper, repeated offending by children and young people is often associated with "histories of neglect, low levels of educational attainment, histories of substance abuse and a tendency towards acts of physical aggression".1 Until a child or young person is referred to youth justice conferencing (often seen as a 'last resort' by Police), there are limited opportunities to address these social determinants and underlying problems that accompany their criminal behaviour. Conferencing is relatively resource-intensive, requires the presence of numerous stakeholders, and may involve lengthy delays. Given that it is preferable to offer a range of interventions, to meet the level of offender need, it would be useful to introduce an interim measure that is more rigorous than the current cautioning model and less involved and resource-intensive than conferencing.

[1] Noetic Solutions Pty Ltd (2010). A strategic review of the New South Wales Juvenile Justice System.

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		In the spirit of utilising the YOA as an opportunity to intervene early to address the factors which lead to offending among children and young people, it would be beneficial to alter provisions relating to the giving of cautions (sections 29, 30, 31 and 32), to give Police additional powers to order that a child or young person be assessed by an appropriate external service provider, if they are perceived during the caution as potentially having problems with substance use. Should the child or young person not adhere to the condition to undertake assessment, the matter may be escalated as per the existing provisions of the Act (section 57(1)). A second approach could be adopted using existing youth justice conference provisions without the need to make changes to the Act. This option is outlined in response to *Question 16* below. However, this second option is not without its drawbacks. As stated earlier, conferences require considerable time and other resources. Difficulties and delays in implementing conferences lead to a perception among Police that conferences are not effective. In addition, a push to increase the use of conferencing at the expense of cautioning potentially runs counter to the guiding principle of opting for the least restrictive form of sanction that is appropriate.
3.8 Youth Justice Conferencing 3.8.1 Principles of conferencing	14(a) Are the principles that govern conferencing still valid? (b) Are any additions or changes needed?	The principles are still valid but are incomplete, in that there is a lack of emphasis on the need to investigate and address underlying problems, such as substance use issues.
3.8.2.Conditions to be met before holding a conference	No questions raised	
3.8.3 Referrals to conferences by courts	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?	The current practice in Local Area Commands is to notify the Aboriginal Legal Service, Legal Aid NSW, or other legal representative that a child has been spoken to by police in relation to an offence covered by the YOA. Anecdotal evidence from many Youth Liaison Officers across the State suggests that the Children's Legal Service of the Legal Aid Commission and Aboriginal Legal Service routinely advise young persons to exercise their right to silence. This is not a criticism of this service or the advice given. However, the consequence of such advice is that juveniles do not admit to offences and as such cannot be dealt with by police under the YOA. Court proceedings are then commenced. This may explain the difference in the rate of conference referrals. The same comments made in relation to *Question 11* are valid here. The young person needs to consent to the process and to make appropriate admissions. It is noted that the courts do not require consent to refer young persons to conferencing. Why is the rate of police referrals lower than that of courts?

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		• The YOA creates a hierarchy of diversion, warning, cautioning and conferencing. • Conferencing is presented in the YOA as the highest level of diversion and is expressly only to be utilised if the investigating official determines that the matter is not appropriate for a caution (section 36(1)). • For a Conference to be appropriate the investigating officer and/or the specialist youth officer must be of the opinion that: o A warning is not appropriate, o A caution is not appropriate, o It is not appropriate/necessary to deal with the matter by way of CAN. Because of this process, relatively few matters (proportionately) reach the criteria for a Conference. The Court has the option to use the conferencing procedure as a means of defacto sentencing following determination of guilt. This broadens the practical options to the Court. For the NSWPF Cautioning has the advantage over Conferencing by being more immediate and having processes within the direct control of the involved NSWPF Command. The immediacy of the outcome is seen as valuable – by taking action as soon as possible after the incident the NSWPF considers that a maximum impact in discouraging future offending by the young person is obtained. This also serves to meet community expectations of a prompt and effective police response to re-offending. By way of background it is noted that figures extracted from COPS for the 2010-11 Financial Year indicate that 1,309 young persons were referred to Conferences as opposed to 5,451 receiving Warnings and 11,310 receiving Cautions. Together this represents 50.8% of young persons who were dealt with under the YOA and 49.2 who were referred to court or other action not under the YOA[2].
3.8.4. Other provisions governing conferences	16. Are the above provisions governing conferencing appropriate? Are there any concerns with their operation in practice?	A number of practical issues limit the overall effectiveness of youth conferencing owing to factors beyond police control (e.g. the availability of conference participants). 1. Timeframes – the legislation envisages that conferences will be held in normal cases within 28 days of referral. This ideal timeframe is regularly exceeded – sometimes by months. Adequate resources need to be available to the conference convenor and administrator to ensure that youth conferences will reliably be held within the expected timeframes. 2. On the recent operation of the Youth Justice Conferencing scheme the NSWPF has made the following comments:[3]

[2] Figures extracted from COPS by Mr J Baldwin, Chief Statistician
[3] South West Metropolitan Region Intelligence Unit, *NSW Police Force Bail Compliance Review*, February 2011 at 36

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		It is strongly evident that the current JJ (Juvenile Justice) Conferencing system is not administering conferences in a timely (and therefore meaningful) manner; and therefore the practices and management of conferences remains the most significant issue requiring examination. These lengthy delays result in both victims and offenders being less likely to attend conferences, this diminishing their effectiveness. The *Young Offenders Act 1997* stipulates that Conferences should be held within 28 days from referral; however, the Noetic Report indicates the average Conferencing wait time is 112.5 days for police and 143.4 days for the Children's Court.[4] During this review, police have also identified that Conference outcomes are taking between six to 12 months to complete.[5] This further diminishes the rehabilitative impact of Conferencing on the juvenile offender, which reduces community and police confidence in the effectiveness of the system. 3. As noted in response to *Question 13*, the lack of programs into which young offenders with drug use issues can be referred at an early stage is problematic, and fails to act to reduce re-offending by young people. The lack of power to compel a child or young person to undertake assessment or treatment until their offending is well-established is also an issue. One option for addressing this issue, and for increasing the capacity for conferences to produce outcomes that meet the needs of offenders (YOA section 3(c)(iii)), may be to make having a drug and alcohol assessment prior to the conference date a prerequisite if a specialist youth officer perceives that the child or young person may have drug problems. Changes would need to be made to sections of the Act regarding the purposes of conferencing (section 34), conditions required to be met (section 36) and the determinations that specialist youth officers need to make (section 38). An alternative approach would be to change the way that the Act is implemented, rather than altering the Act itself. Changes could be made to Police operating procedures around which offences and offenders are appropriate to warn or caution, and which should be dealt with via youth justice conferences. Operational Police could be encouraged to make increased use of conferences, rather than the less restrictive warnings or cautions, for repeat drug-related offending behaviour. Increased use of conferences in such situations would provide an opportunity to order assessment and drug treatment as an element of outcome plans. Should the young person not comply with the order and therefore

[4] Noetic Solutions Pty Ltd, *A Strategic Review of the NSW Juvenile Justice System – Report for the Minister of Juvenile Justice*, April 2010 at 58.
[5] Information obtained from the NSWPF YLO Focus Group on Youth Conferencing, *Summary of Key Issues*, 17 May 2010 at 8; as well as informal discussions with YLOs throughout 2010.

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		not fulfil their outcome plan, the matter would be dealt with according to the existing requirements as per YOA section 57(1). Currently there is a lack of clarity among operational Police regarding whether or not drug offences are eligible to be dealt with by means of youth justice conferences. Conferences are perceived by Police as performing a primarily restorative justice role, and consequently drug-related crimes with no identifiable victim are not deemed to be appropriate to be dealt with in this way. It would be necessary to undertake training with Police around any changes to operating procedures, how to record concerns about substance use in the COPS database, and how conferences could be used to address problematic drug use. 4. Conferencing is essentially a process of negotiation between young person/offender and the victim/community representatives. This has the effect of placing the "offender" in the same bargaining position as the victim. The interests of victims need to be balanced in considering any changes to the current system.
3.9 YOA interventions and legal advice	17. Should the YOA specify what constitutes an admission for the purposes of the YOA? If so, what form should an admission take?	This issue was previously raised by the Juvenile Remand Working Group. The apparent concern that police are not giving young persons an appropriate opportunity for diversion under the YOA is not supported by evidence. The preferred NSWPF position is that electronic recording of admissions is considered best practice but that it is not mandatory for diversion under the YOA. No legislative amendment is required.
	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?	Current provisions are entirely reasonable. Young persons must be notified of their right to seek legal advice and be provided with reasonable opportunity to obtain such advice. Refer also to response to *Question 12* above. It is entirely inappropriate to make the seeking of such advice compulsory. It must be noted that young persons may elect to seek advice from any person – including parents/guardians and not simply legal practitioners. Concern is held that some agencies and individuals are of the mistaken view that obtaining legal advice is compulsory and that young persons must be legally represented. The decision to seek legal advice remains that of the young person. The NSWPF can and must advise the young person of their rights but cannot require those rights to be exercised in any particular fashion.
3.10 YOA interventions and criminal history	19. Are the provisions that govern the disclosure of interventions under the YOA appropriate?	The Consultation Paper does not appear to accurately reflect the current disclosure provisions of the YOA and confuses disclosure by other persons (not the young person) with the requirement of the young person to subsequently themselves disclose the existence of YOA diversion actions. Disclosure by individuals not including the young person is covered at section 66 of the Act, specifically 2 (e) and

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		at Clause 15 of the Young Offenders Regulation. There is no mention in these sections of an entitlement to release information for child related employment checks, employment checks or any other purpose other than those directly connected with the operation of the YOA or in relation to a child who is under the supervision of the Department of Human Services. Section 68 of the YOA concerns the obligations of the young person to disclose the existence of matters. The current disclosure provisions are appropriate.
3.11 Appropriateness and adequacy of YOA interventions	20 (a) Is diversion still a legitimate aim of the YOA? (b) If not, how could court processes and interventions be structured so as to better address re-offending amongst children? (c) If so, is it still adequate and appropriate to divert children to warnings, cautions and conferences? (d) What changes could be made to the interventions under the YOA, to better address re-offending amongst children and young people? (e) Do the interventions under the YOA adequately cater for the needs of victims?	(a) *See also response to Question 1*. Yes, providing Diversion is seen as part of a wider process intended to reduce re-offending by young persons. The Act needs to focus on diverting children and young people into appropriate rehabilitation avenues, rather than simply diverting them out of the court system until or unless they begin to commit more serious crimes. Diversionary strategies and late court intervention of themselves do not effectively prevent recidivism. As such, the suggested options are viable additions/amendments to the current legislative framework. (b) *See also response to Question 1.* In addition to the current options of diverting young offenders through warnings, cautions and conferences, there is a need to add provisions that allow for referral of young offenders to compulsory assessment for substance use issues. Altering current provisions for cautions and/or conferences would support this. (c) *See also response to Question 1.* Effectiveness could be increased by greater availability of support services for young offenders. (d) Diversion proceedings under the YOA alone are unlikely to significantly reduce re-offending by young persons. Further intervention and support services are required to provide alternatives to re-offending. A major issue remains the lack of support services that juvenile offenders can be referred to as part of the Conference process. Examples of support services included various forms of counselling, case-management, health services, alternative education services and housing. The lack of support services is particularly evident in Aboriginal and Torres Strait Islander communities and / or rural areas of NSW. Diversion should not be seen in isolation but rather the first stage of a process that will assist young persons to recognise and avoid offending behaviour. In addition, the issue of timeframes for Conferencing needs to be addressed (see response to *Question 16*, specifically significant wait times and completion of conference outcomes).

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		(e) This issue requires deeper research. Concern has been expressed by Youth Liaison Officers in informal settings that the structure of Youth Conferences, with the emphasis of the consent of the offender, leads victims to be unlikely to contest or exercise their veto as to outcomes. An examination of the experience of victims would be of considerable utility, particularly as to whether the victim's veto is widely used.
3.12 The diversion of Aboriginal and Torres Strait Islander children under the YOA	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? (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?	There is no need to make changes to the YOA to address the needs of Aboriginal and Torres Strait Island children. However, the need remains to address the wider issues of why Aboriginal and Torres Strait Islander young people are coming into contact with the criminal justice system in the first instance. The Federal Government's report *'Overcoming Indigenous Disadvantage' 2011*, discussed factors that impact young Aboriginal and Torres Strait Islander people. The strongest predictors of Indigenous young people coming into contact with the criminal justice system include a lack of parental involvement in a child's life and a lack of adequate parental supervision. To decrease the number of Indigenous young people coming in contact with the criminal justice system a whole of government response is needed. This requires the needs of economically and socially disadvantaged people being addressed with appropriate funding and resources allocated in consultation with the Indigenous community to divert youth away from the criminal justice system before their involvement becomes entrenched. The response to *Question 15* is also relevant to police diversions, particularly when the Aboriginal Legal Service routinely advise young Aboriginal persons to exercise their right to silence.
3.13 Children with cognitive and mental health impairments	22 (a) Are the interventions under the YOA adequate and appropriate for children with cognitive impairments or mental illness? (b) If not, what changes could be made to better address offending by these children?	No quantitative data is available for the rate of application of the YOA to young people with cognitive and mental health impairments. On it's face the YOA is appropriate for dealing with young people who may have a cognitive impairment and/or a mental illness as it currently provides that an appropriately skilled person should be present at cautions or conferences involving a young person with a 'cognitive disability', to assist in communication. However, police are not mental health professionals. It is inappropriate to place the burden of deciding what, if any intervention, is most appropriate for children with cognitive impairments or mental illness on police on the basis of what is 'in the interest of justice' or 'more appropriate'. (b) The decision to caution or refer to conference should be left to the court.
3.14 Oversight of the YOA	23 Is there a need to reintroduce a body with an ongoing role to monitor and evaluate the	*See also Question 15 and concerns at Question 20.* An independent review body tasked with the evaluation and oversight of all legislation and services intended to reduce re-offending by young persons would be of assistance.

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	implementation of the YOA across the state?	Such a body should not restrict itself to monitoring the YOA alone but should be empowered to examine all aspects of youth offending, diversion and youth services.

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4.3 Age of criminal responsibility	21 Should the age of criminal responsibility be changed? If so, why, and to what age?	The current age of criminal responsibility is appropriate and should not be changed. From BOCSAR's 2007 report, 'Screening juvenile offenders for further assessment and intervention' the risk of re-offending by juveniles less than 14 years of age who were placed on supervised orders was identified at 82.7%[6]. The age of a juvenile offender is a predictor of re-offending. If the age of criminal responsibility is increased children who do not receive early intervention via non-criminal justice system pathways will be missed and be allowed continue to commit acts of crime with no concept of accepting responsibility for their behaviour or how to behave appropriately in society. By the time they reach any increased age of criminal responsibility, they will be entrenched in their now criminal behaviour, with little prospect of successful intervention.
4.4 Structure of the Act	22 Could the structure of the CCPA be improved? If so, what other structure is recommended?	No comment.
4.5 Guiding principles	23 (a) Are the guiding principles set out in the CCPA still valid and are any changes needed? (b) Should the principles of the CCPA be the same as the principles of the YOA? (c) Should the CCPA include an objects clause? If so, what should those objects be?	(a) Noting the current prevalence of juvenile recidivism, the guiding principles should refer to promoting the reduction of juvenile recidivism rates. The ratification of the United Nations Convention on the Rights of the Child (CRC) is properly a matter for the Commonwealth. Notwithstanding this, most, if not all, portions of the CRC mentioned at clause 2.3 of the consultation paper, whilst not repeated, have application by the operation of at least the *CCPA*, *YOA*, *Law Enforcement (Powers and Responsibilities) Act 2002* and *Children (Detention Centres) Act 1987*. As such, there is no need to include or specifically recognise the CRC in legislation. Notably, s.33 (2) of the CCPA provides that the Children's Court shall not deal with a person under subsection (1) (g) (control order) unless it is satisfied that it would be wholly inappropriate to deal with the person under subsection (1) (a)–(f1). Also, section 33(1)(g) is subject to s.5 of the *Crimes (Sentencing Procedure) Act* which reads: A court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate. (b) No, one Act deals with processes of diversion from criminal proceedings, the other Act deals with criminal proceedings. (c) No, the current principles suffice.
4.6 Commencement of proceedings against children	24 (a) Are the processes for commencing	(a) Yes. Especially considering the CCPA continues to state that certain offences and circumstances are more

[6] Note 13 at 6

	proceedings against children appropriate? (b) Is the different process for serious children's indictable offences and other serious offences appropriate?	serious and may have to be dealt with in a different way. (b) The process and options for commencing proceedings against children for serious children's indictable offence and other serious offences is the same as for other offences.
4.7 Hearing of children's criminal proceedings	25 (a) Are the provisions for the conduct of hearings appropriate? (b) Are the limitations on use of evidence of prior offences, committed as a child, appropriate? (c) Should the wording of section 15 be amended to make it easier to understand?	(a) Yes. (b) The limitations should not apply to tendency and co-incidence evidence. The *Evidence Act 1995* is the appropriate legislative instrument for these issues. (c) Yes. It is common practice not to record a conviction against a child over the age of 16 due to the concerns that a conviction attaches to employment prospects. Whilst this may be appropriate, in order to make the most appropriate decision on sentence, Judicial officers in the adult jurisdiction should be apprised of all information relevant to the accused person. For example, it would be highly inappropriate to deal with an 18 year old charged with a domestic violence offence with numerous non-conviction priors for matters of domestic violence in the Children's Court (committed after he turned 16) under s.10 of the *Crimes (Sentencing Procedure) Act 1999*. The legislation makes the juvenile's record in this circumstance admissible in the adult jurisdiction even where no convictions are recorded, however, it is open to misinterpretation. Perhaps the sub-section could read: *(1) Any evidence of an offence or offences proved to be committed when an accused person was a child is not admissible in any subsequent sentencing hearing unless:* *(a) a conviction was recorded against the child, or* *(b) proceedings for the subsequent offence were commenced within 2 years of the final sentence date for the offence or offences proved to be committed when the accused person was a child.*
4.8 Penalties	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?	Sentencing options available to judicial officers pertaining to children should provide for circumstances where, in committing an indictable offence, the child conducts themselves either the way a child might conduct themselves or the way an adult might conduct themselves. For example, committing an indictable offence of violence or considerable gravity in circumstances where there is considerable forethought may align a juveniles action to adult behaviour, whereas such offences committed on the spur of the moment may align the juveniles actions to juvenile behaviour. See below for relevant judicial comments on the issue.

		Kirby J in *JIW v Dpp*[7] stated, "*The more serious the offence and the more important general deterrence, the more likely it is that it may be appropriate that the person charged should be dealt with according to law".* Sully J (Hunt CJ at CL and Campbell J generally agreeing) in *R v WRK*[8] stated, *"The graver the crime the greater the warrant for the exercise of the relevant discretion in favour of dealing with the offender according to law."* In *R v Bendt*[9], a crown appeal against the sentence imposed on a child for robbery in company where the offender was the same age as JIW, Meagher JA (with Dowd and Barr JJ agreeing) said at para 16, *"the most disturbing thing about it is that while Mr Bendt was technically a child within the meaning of the Act, he was only just so. A child within the meaning of the Act is a person under the age of 18. Mr Bendt was a child but not by much. He was 17 years and 9 months, I think. His Honour should have treated him as an adult, unless there was some reason why he should be treated as a child. There was, in my view, no real reason why that should take place. It would be a most extraordinary thing if he would be treated differently had he been four months older."* From *KT v R*:[10] '*The emphasis given to rehabilitation rather than general deterrence and retribution when sentencing young offenders, may be moderated when the young person has conducted him or herself in the way an adult might conduct him or herself and has committed a crime of violence or considerable gravity'*.
	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?	In circumstances where the court can take into account such other matters as the court considers relevant, no.
	28 Does the list of special circumstances that can justify certain offenders aged 18 to 21 being placed in juvenile detention remain valid?	Yes.
4.9 Background reports	29 (a) What should the content of the background reports be? (b)Should the contents be prescribed in legislation? (c) Should other reports be available to assist in sentencing?	(a) The Consultation Paper appears to be inaccurate as to the required content of background reports when it suggests that the listed issues on page 38 are mandatory. An examination of the *Children (Criminal Proceedings) Regulation 2011* reveals a somewhat different picture. Clause 34 of the Regulation sets out the format requirements of background reports. The Consultation Paper is not entirely correct in suggesting that the requirement is "prescriptive and confusing" as the Regulation clearly lists issues that must be addressed where relevant. They are <u>not</u> mandatory. It may be the case that the Department of Juvenile Justice (DJJ) processes for the preparation of background reports should be examined to determine whether reports prepared address irrelevant criteria.

[7] [2005] NSWSC 760
[8] (1993) 32 NSWLR 447
[9] [2003] NSWCCA 78 (at par 16)
[10] (2008) 182 a Crim R 571 at [22]

		This may prove to be a training issue rather than a legislative matter. Perhaps, for the purpose of shortening the length and time taken to prepare background reports, the question should also focus on what should not be included in background reports, refer detailed advice from Police Prosecutions **Tab A**. In circumstances where a facts sheet has been tendered or the circumstances of the offence proven at hearing, there is no need to rehash these details in the background report, particularly from the point of view of the young person. At times, legal practitioners are left in the unenviable position, particularly on the issue of contrition, of making submissions inconsistent with the information provided to the DJJ officer. The Young Person's criminal antecedents are tendered by the prosecution. It is also practice for DJJ to recommend particular sentences. This is inappropriate. The court should be provided with information, not opinion. It is inappropriate for DJJ officers, who are neither judicial officers nor do they have standing in the proceedings, to make submissions on the most appropriate sentence. Background reports should include: • family background, • employment status, • level of education; whether or not they are attending school; whether or not they have previously been expelled or suspended from school (noting the latter two are indicators of future recidivism), • friends and associates and whether these persons have had contact with DJJ (noting that high-risk young people assigned to high-risk-only groups increase their rate of antisocial behaviour), • nature and extent of the person's participation in their community, • any disabilities the person has, • nature and extent of the person's involvement with DJJ and whether or not they have successfully completed programs put in place by DJJ; complied with previous court orders/sentences, • alternatives to control that are available to the young person, and • whether the young person is suitable for the available alternatives to control. (b) Yes (c) Yes, but these should not be prescribed in or limited by legislation not already in place.
4.10 Other reports	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?	In principle, yes. However, further detail is sought regarding this proposal and the circumstances surrounding the requirement for such a report being sought and from which agency. Clarification and identification of the current powers that exist to seek such information is also sought.

4.11 Jurisdiction of the Children's Court 4.11.1 Serious Children's Indictable Offences	31 Is the list of serious children's indictable offences appropriate? If not, what changes need to be made?	The following offences should be included in the list: 1. all sexual assault matters (sexual intercourse without consent) where the alleged victim is 16 years of age or above; 2. all sexual assault matters where the alleged victim is under 16 and did not in fact consent to the act (as opposed to statutorily not being able to consent). Adding the above offences to the list means that the Children's jurisdiction will only deal with allegations of sexual assault where the alleged victim, even if they are under 16 years of age (but years or over), in fact consented to the sexual intercourse. Forcing intercourse on a person who does not consent to the act is so serious, so grave a crime and conduct that is akin to the way an adult might conduct him or herself, as to warrant being dealt with according to law.[11] Noting that that sexual assault[12] does carry a standard non-parole period of 7 years, sentencing statistics from the Joint Investigation Response Squad show that for the six sentences handed down in the Higher Courts from June 2003 to June 2010 to persons less than 18 years of age, all received a sentence higher than the jurisdictional limit of the Children's Court.[13] However, the appearance in this jurisdiction was subject to the discretion of the children's court magistrate or application of the young person.[14]
4.11.2 Age of Defendants	32 Is the current approach to dealing with two or more co-defendants who are not all children appropriate?	When matters proceed to higher court trial, joint hearings are held regardless of age differences. There is a legitimate public interest in reducing the amount of and number of times victims and witnesses attend upon a court house. Further, it is not cost effective to hold two separate trials in summary matters. On the concern expressed in the consultation paper about the possible adverse influence on the young person from the older co-accused, it is currently the case that if separate summary hearings are held, the prosecution may call the young person as witness. As such, the young person may still have to appear, albeit in a different capacity, in the adult jurisdiction. NSWPF would prefer an approach whereby all committals and summary hearings with two or more co-defendants who are not all children be heard once. Weighing the concern expressed in the consultation paper about the possible adverse influence on the young person from the older co-accused against the cost benefit in holding one joint trial and the principle of open justice, NSWPF would prefer they be heard in the Local Court.
4.11.3 Traffic Offences	33 Should the Children's Court hear all traffic	No. The immaturity and inexperience of traffic offenders aged 16-18 is already recognised in the fact that provision is made for the Local Court to exercise the sentencing options under the CCPA.[15]

[11] *JIW v Dpp* [2005] NSWSC 760; *R v WRK*(1993) 32 NSWLR 447; *KT v R* (2008) 182 a Crim R 571 at [22]
[12] *Crimes Act 1900* s.61(I)
[13] S.33(1)(g) CCPA; Judicial Commission of NSW.
[14] *Children (Criminal Proceedings) Act 1987* (NSW) s 31
[15] *Criminal Procedure Act 1986 (NSW)* s 210.

	offences allegedly committed by young people?	Such a proposal would require at least 30,000 extra matters to be heard by Children's Courts whilst undermining the NSW licensing regime. The Roads & Marine Services is considered the responsible and appropriate authority for licensing functions. The government through the RMS has introduced significant sanctions to address young driver behaviour by restrictions upon alcohol levels, vehicle usage and passenger sanctions. Provisional data indicates that about 60,000 penalty notices have been issued in 2009/2010 to young drivers. If these matters were to be placed before the Children's Court they would be seriously overwhelmed, notwithstanding the unnecessary financial costs that may be incurred by the courts and police. When taking into account the impediments and the possible creation of a dual licensing regime the proposal has the potential for young driver's behaviour to deteriorate and significantly increase their involvement in motor vehicle crashes, refer detailed advice attached **Tab E**.
	34 Should the CCPA clarify whether a child can be sentenced to a control order for a traffic offence?	The current legislation covers this. However, if there is ambiguity over whether the Local Court can sentence a child to a control order for a traffic offence, this should be expressly stated.
4.12 Hearing charges in the Children's Court	35 (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? (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))?	(a) (i) It is appropriate for Magistrates to retain discretion. Noting that the Children's Court jurisdiction automatically deals with all offences apart from Serious Children's Indictable Offences, if a magistrate is of the view that the jurisdictional limit of the Children's Court is not sufficient to deal with the criminality of the conduct of the young person, they should continue to have the discretion to refer the matter. (ii) No comment. (b) NSWPF has no objection to the operation of s.18(1A) applying to s.31 of the CCPA.
4.13 Penalties in the Children's Court	36 (a) Are the penalty provisions of the CCPA appropriate? (b) Are there any concerns with their operation in practice? (c) Should the penalty options be clarified or	(a) Yes, in that multiple options are provided for. (b) Operational police hold some concerns regarding the granting of bail for recidivist young offenders and the avoidance of control orders at the time of sentencing. (c) There is unnecessary duplication concerning the courts ability to combine sentences at ss.33 (1) (d) and

	simplified in the Act?	(e1).
	37 (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 but the Court dismisses the charge with or without a caution?	(a) Yes. (b) No. (c) No. Our whole judicial system relies upon being able to identify persons to the court. Particularly with regard to sentencing purposes, the court must be satisfied that an accused person's or young person's criminal history is accurate; that it is in fact the accused person's/young person's criminal history. Any doubt over the contents of an accused person's criminal history should be resolved in favour of the accused person/young person. By reversing the onus, an accused person/young person will more readily be able to claim that entries on their criminal record that cannot be confirmed by fingerprints are not theirs. The flow on effect will either be more time spent on the particular proceedings seeking to call evidence to prove that the accused person/young person was indeed previously sentenced for a particular matter or the prosecution not contesting the issue.
4.14 Terminating or varying orders	38(a) Are the provisions for terminating and varying good behaviour bonds and probation orders, and for dealing with breaches of such orders, appropriate? (b) Are there any concerns with their operation in practice? (c) Should there be a wider discretion to excuse a breach of suspended control order?	(a) Yes. (b) No comment. (c) No. Widening the discretion will reduce their deterrent effect. Further, the discretion is already sufficiently wide, especially when the breach may be excused for 'good reasons'.[16].
5. Should the two Acts be merged?	39. Should the YOA and the CCPA be merged? If so, what should be the objects of any new Act?	No. It is illogical to include in an Act that regulates court procedure within the Children's jurisdiction a procedure that seeks to divert from such court procedure. The NSWPF broadly agrees with the dot points under the heading of 'Disadvantages' in the consultation paper. Additionally, the YOA is explicitly intended to provide a clear alternative to criminal proceedings for young people. To merge the legislation will blur that distinction. Diversion from criminal proceedings should be presented as a real and distinct alternative to criminal proceedings, rather than simply an option.

[16] CCPA s.41A(2)(b)