



Diversion, Early Intervention and Support: Transforming Juvenile Justice – Review of the Young Offenders Act 1997 and Children (Criminal Proceedings) Act 1987

16 December 2011

Vavaa Mawuli, Senior Solicitor

Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work with young people in the criminal justice system

PIAC has had considerable experience working with young people involved in the criminal justice system through its work on the Children in Detention Advocacy Project (CIDnAP). CIDnAP is a joint initiative of PIAC and Legal Aid NSW. The project aims to challenge the unlawful and unnecessary detention of young people. PIAC has represented some of the most vulnerable and disadvantaged young people in civil complaints arising from their interaction with the criminal justice system.

PIAC has strong concerns about the high levels of involvement of disadvantaged and vulnerable young people in the criminal justice system in NSW. Aboriginal and Torres Strait Islander young people continue to be over-represented in the system.¹ It is also alarming that there continues to be a disproportionate number of young people with mental and cognitive impairments in juvenile

¹ House of Representatives, Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system*, (2011).

detention centres in NSW.² PIAC is also concerned about the migration of children in care into the criminal justice system.

PIAC has advocated for increased diversionary options, community-based support services and early intervention strategies as a means of reducing the contact between young people and the criminal justice system.

PIAC's approach to this submission

PIAC welcomes the opportunity to provide a submission to the review by the NSW Department of Attorney General and Justice (Department) of the *Young Offenders Act 1997* (YOA) and the *Children (Criminal Proceedings) Act 1987* (CCPA).

PIAC's submission to this review draws on its experiences:

- representing people with mental and cognitive impairments or their carers and families;
- representing children in the criminal justice system; and
- representing people experiencing homelessness or at risk of homelessness through its coordination of the Homeless Persons' Legal Service.

PIAC submits that in order for this review to fulfil its stated objectives to ensure that these pieces of legislation continue to reflect best practice and meet the needs of young people and the community, including victims, the review must take into account the findings of a number of recent reviews and inquiries that address the issue of the interaction between young people and the criminal justice system. These include:

- the NSW Law Reform Commission's review of the *Bail Act 1978* (NSW);³
- the NSW Law Reform Commission's review of the criminal law and procedure applying to people with cognitive and mental health impairments in NSW;⁴
- the Commonwealth Government's inquiry into the high involvement of Aboriginal and Torres Strait Islander children in the criminal justice system;⁵ and
- the strategic review of the NSW juvenile justice system by consultancy group, Noetic Solutions.⁶

This submission draws on PIAC's earlier submissions to the above reviews and inquiries.⁷ It also draws on the findings and recommendations made by Noetic Solutions in its report to the former

² Devon Indig et al, *2009 Young People in Custody Health Survey: Full report*, Justice Health and Juvenile Justice, (2011).

³ New South Wales Law Reform Commission, *Bail: Questions for Discussion*, (2011).

⁴ New South Wales Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: an overview*, Consultation Paper No. 5, (2010).

⁵ Above n 1.

⁶ Noetic Solutions Pty Limited, *A strategic review of the New South Wales Juvenile Justice System – Report for the Minister of Juvenile Justice*, (2010).

⁷ These submissions include: Brenda Bailey et al, *Review of the Law of Bail in NSW, Submission to the New South Wales Law Reform Commission*, Public Interest Advocacy Centre, (2011); Brenda Bailey, and Peter Dodd, *Treatment and care over punishment and detention – even more critical for young people, Submission on*

Minister for Juvenile Justice, the Hon. Graham West, following its review of the NSW juvenile justice system (Noetic report).⁸

PIAC supports the justice reinvestment approach recommended in the Noetic report and believes that the NSW Government should use the justice reinvestment model as one of its key strategies to address offending behaviour by children. Numerous studies have shown that diversionary alternatives can be effective in producing lower rates of re-offending among children.⁹ Whilst justice reinvestment would require a considerable change in the way in which the NSW Government has traditionally addressed offending behaviour by children, it is clear from the findings of the Noetic report that the current system is failing many children. If the status quo remains, it will be of no benefit to the NSW Government and ‘expose the community and children and young people to poor long term outcomes.’¹⁰

Recommendation 1

That the NSW Government adopts the justice reinvestment model as one of its key strategies to address offending behaviour by children.

Scope of this submission

PIAC’s submission does not seek to address all of the questions posed in the Department’s consultation paper. This submission mainly focuses on the issues that deal with the operation of the YOA with respect to Aboriginal and Torres Strait Islander young people and young people with mental and cognitive impairments.

General comments about the Young Offenders Act

In PIAC’s view, the YOA establishes a suitable process for diverting young people who commit offences from formal court proceedings. PIAC is concerned, however, that there remain difficulties with its implementation, and this impacts on the overall effectiveness of the legislation. This is particularly problematic where Aboriginal and Torres Strait Islander young people are concerned. As noted in the Department’s consultation paper and as is evident in a number research studies on the YOA, Aboriginal and Torres Strait Islander young people are less likely to be diverted under the YOA as compared to non-Indigenous young people.¹¹ This issue is addressed in further detail below. However, this very fact alone demonstrates that further reform and changes in practices are needed in order to guarantee the effectiveness of this important legislation.

the NSW Law Reform Commission’s Consultation Paper on Young people with cognitive mental health impairments in the criminal justice system, Public Interest Advocacy Centre, (2011); Laura Brown and Ken Zulumovski, *A better future for Australia’s Indigenous young*, Submission to the House of Representatives Standing committee on Aboriginal and Torres Strait Islander Affairs’ Inquiry into the high involvement of Indigenous juveniles and young adults in the criminal justice system, Public Interest Advocacy Centre, (2009).

⁸ Above n 6.

⁹ See: Kelly Richards, Australian Institute of Criminology, ‘Trends in juvenile detention in Australia’ (2011), *Trends & issues in crime and criminal justice*, no. 416.

¹⁰ Above n 6, ix.

¹¹ Lucy Snowball, Australian Institute of Criminology, ‘Diversion of Indigenous juvenile offenders’, (2008) *Trends & issues in crime and criminal justice*, no. 355.

It is also concerning that the remand population in NSW juvenile detention centres is on the rise.¹² While recent changes to bail legislation have been identified as one of the main causes of this increase, the role of the YOA also needs to be examined in this regard to determine whether the YOA framework can be more effectively used to reduce the number of young people that end up facing formal court proceedings and, consequently, on remand.

PIAC is aware of situations where young people have been diverted by the court under the YOA after being charged by police and placed on strict bail conditions. In such cases, breaching a bail condition would usually result in the young person being arrested and remanded in custody to be taken before the court. In the case of one of PIAC's clients, the young person was placed on stringent bail conditions by the police for relatively low-level offences. These conditions included a reporting condition requiring the young person to report to a specified police station several times per week. When the young person failed to report on an occasion, the young person was arrested by police and remanded in custody overnight. The next day, the young person appeared at the Children's Court in custody and the Magistrate dismissed the charges with a caution.

Obviously there are reasons why this may happen in particular cases. Indeed, it is acknowledged that this situation may arise because the police are only able to issue three cautions under the YOA, whereas there is no such restriction on a Magistrate's ability to issue a caution. However, the fact that a young person is arrested and taken to court only to be released on a caution by the Children's Court suggests that changes are needed to the legislation to try as far as possible, to keep young people away from judicial processes altogether. Limiting a young person's contact with formal court processes, reduces their chances of re-offending in the long term.

While some legislative reform may be needed to improve the efficacy of the YOA, PIAC submits that the main challenges lie in its implementation. As has been identified in previous reviews of the YOA, insufficient resources for youth liaison officers, insufficient training for those involved in the implementation of the YOA and lack of adequate and appropriate support services for young people continue to be major stumbling blocks to the effectiveness of this legislation.

Should reducing re-offending be an objective and/or principle of the YOA?

It is widely acknowledged that children and young people who have had contact with the criminal justice system are at the greatest risk of re-offending. As such, the effective implementation of diversionary options is an important strategy in reducing offending behaviour among children.

However, it is not useful to simply look at the role and/or impact of the YOA in reducing re-offending. Any approach that aims to address levels of offending among young people, particularly those that are vulnerable and disadvantaged, must also incorporate a broader agenda; that is, to support measures which address the social and economic factors that contribute to offending behaviour. These factors include, among others, lack of educational participation and employment opportunities, poor housing conditions and overcrowding, substance abuse, child abuse and neglect and poor access to services due to geographical

¹² Above n 9.

barriers. Without addressing these issues, there will be no significant headway made in reducing re-offending in the long term.

PIAC is also concerned that including reducing re-offending as an object or principle of the YOA could make it more difficult for some young people to be diverted from formal court processes. The objects and principles that guide the operation of the YOA are relevant to the way in which discretion is exercised. Including reducing re-offending as a principle may impact on the exercise of discretion in individual cases where there is a view that a diversionary option may not prevent further offending by the individual in the short term.

Further, there are benefits of diversion other than reducing re-offending. Some diversionary options offer young people the opportunity to access rehabilitation, counselling and other support services, which improve the young person's well-being and health. PIAC submits that if amendments are made to include reducing re-offending as an object and/or principle of the YOA, then it should also include the other benefits of diversion, such as access to rehabilitation and promoting effective reintegration into the community.

Recommendation 2

That reducing re-offending should not be included as an objective or principle of the YOA.

Alternatively, if reducing re-offending were included as an objective or principle of the YOA, then other benefits of diversion should also be included, such as access to rehabilitation and promoting reintegration into the community.

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

PIAC submits that the range of offences covered by the YOA should be expanded to include all of the offences for which the Children's Court has jurisdiction and traffic offences. PIAC supports the arguments outlined in the submission made by the Shopfront Youth Legal Centre on this issue.

PIAC acknowledges that such an amendment to the YOA would mean broadening the reach of the legislation to enable it to be used for more serious offences, such as sexual offences, domestic violence offences and drug offences.

PIAC has observed that at times, the law and order debate has fuelled a perception that diversionary measures are not punitive enough, and a tougher approach is needed to address youth offending. This has been the case recently, in the debate surrounding the introduction of tougher penalties for graffiti in NSW by removing the power of police to deal with a young person who has committed a graffiti offence under the YOA. It has been argued that diversionary options are not an appropriate response to graffiti offences as they are not sufficiently punitive.

Such views are inconsistent with the human rights principles that underpin the juvenile justice system, which include the principle that formal court proceedings should not be instituted against a child if there is an alternative option for addressing with the matter.¹³ Further, the NSW juvenile

¹³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, resolution 44/25, (entered into force 2 September 1990), Article 40.3.

justice system recognises that where possible, punishment and general deterrence should not be given precedence over interventions aimed at rehabilitation and treatment.¹⁴

Diversion can be an appropriate option for addressing some categories of ‘serious’ offending behaviour. Serious offences can cover a very broad spectrum of offending conduct. For example, a sexual offence could involve consensual sex between two teenagers aged 15 and 16. The objective criminality involved in such an offence is so low, that a blanket exclusion of diversionary options for such an offence is not useful or appropriate. In such cases, diversion may be the most appropriate way of dealing with the offending behaviour.

Through its coordination of the Homeless Persons’ Legal Service (HPLS), PIAC has observed the impact of penalty notices on people experiencing homelessness and other vulnerable groups of people. PIAC has strongly advocated for reform of penalty notices system.¹⁵ The penalty notices system can reinforce and exacerbate disadvantage. Young people, in particular, are at a disadvantage when it comes to penalty notices, as they are often not in a financial position to pay a monetary penalty. This then has flow-on effects on the young person as they incur debts with no means of paying them off. This can lead to loss of licence or inability to obtain a licence until the debts are repaid. PIAC believes that the penalty notice system is inappropriate for young people and supports an amendment to the YOA to allow it to cover all offences for which penalty notices may be issued to children.

Recommendation 3

The YOA should be expanded to include all of the offences for which the Children’s Court has jurisdiction and traffic offences.

Recommendation 4

The YOA should be extended to cover all offences for which penalty notices may be issued to children.

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

PIAC submits that the power of police to issue cautions under the YOA should not have any quantitative limits. Research shows that cautions are effective in lowering rates of re-offending.¹⁶ The Noetic report notes that the amendments made in 2002 to limit the amount of cautions that

¹⁴ See *Children (Criminal Proceedings) Act 1987* (NSW), s 6; and Judge Mark Marien SC, President of the Children’s Court of New South Wales, ‘Juvenile Justice and community-based sentencing for juveniles in New South Wales’ (Paper presented at a Seminar on Sentencing and Related Issues in Judicial Practice, Shenzhen, China, May 2011), 2.

¹⁵ Ellena Galtos and Emma Golledge, *Not such a Fine Thing! Options for Reform of the Management of Fines Matters in NSW*, Public Interest Advocacy Centre, (2006); and Julie Hourigan-Ruse and Katherine Boyle, *Penalty Notices: Still not such a fine thins for vulnerable people, Submission to the NSW Law Reform Commission inquiry into penalty notices*, Public Interest Advocacy Centre, (2010).

¹⁶ Above n 6, 53 – 54.

can be issued by the police were made without any evidence base.¹⁷ There is no current evidence to show that this amendment is leading to better outcomes for young people.

PIAC acknowledges that the NSW Law Reform Commission's 2005 review of young offenders did not find any evidence to show that the amendments have caused any injustices.¹⁸ However, PIAC is concerned that such a significant amendment was made to the legislation without any evidence showing how limiting the powers of police in this regard would support the objects and principles of the legislation. To the contrary, limiting the number of cautions contradicts the objects and principles of the YOA. In particular, it is noteworthy that the YOA seeks to establish a scheme to provide an efficient and direct response to the commission of certain offences by children,¹⁹ and that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.²⁰

Recommendation 5

Section 20(7) of the YOA, which provides that a child can be cautioned on no more than three occasions, should be repealed.

Diversion of Aboriginal and Torres Strait Islander children

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?

What changes to the YOA, or its implementation, could be made to better address the overrepresentation of Aboriginal and Torres Strait Islander Children in the criminal justice system?

One of the objects and principles of the YOA is to address the overrepresentation of Aboriginal and Torres Strait Islander children in the criminal justice system. However, recent statistics show that Aboriginal and Torres Strait Islander young people continue to be overrepresented in the NSW juvenile justice system and the YOA has not been as successful in diverting them from formal court processes as it has with their non-Indigenous counterparts.²¹

The fact that more than a decade has passed since the introduction of the YOA and Aboriginal and Torres Strait Islander young people who commit crimes are still less likely to be given a diversionary option than non-Indigenous children suggests that there are problems with the implementation of the legislation in respect of this group of young people and that further reform of the legislation may be necessary to address this discrepancy. PIAC warns, however, that making changes to the YOA or the way in which it is implemented, to ensure that Aboriginal and Torres Strait Islander children have equal access to diversionary options is only one of a range of

¹⁷ Ibid.

¹⁸ New South Wales Law Reform Commission, *Young Offenders*, Report no. 104 (2005).

¹⁹ *Young Offenders Act 1997 (NSW)*, s 3

²⁰ *Young Offenders Act 1997 (NSW)*, s 7

²¹ Above n 11.

strategies that would be required to address the overrepresentation of Aboriginal and Torres Strait Islander children in the NSW juvenile justice system.

The overrepresentation of Aboriginal and Torres Strait Islander young people in the criminal justice system has been the subject of a number of recent inquiries and reviews. The issue was the focus of a federal inquiry conducted in 2009. The report of the inquiry made forty recommendations designed to address Aboriginal and Torres Strait Islander disadvantage and disproportionate incarceration rates.²² In the same year, the then NSW Attorney General, the Hon. Graham West, commissioned a strategic review of the NSW juvenile justice system, which culminated in a number of recommendations calling for a fundamental shift in the Government's approach to addressing offending behaviour by children and young people.²³ The review also considered strategies to reduce the overrepresentation of Aboriginal children in the juvenile justice system. As noted in the Noetic Report:

[T]he overrepresentation of Indigenous children and young people in the juvenile justice system is intrinsically linked to disadvantage in the Indigenous population. It is important to understand that any measures to reduce Indigenous overrepresentation in the juvenile justice system in isolation of broader disadvantage is highly unlikely to realise long-term benefits.²⁴

In PIAC's submission, the recommendations made in these two inquiries should form the basis for the development of a strategy to tackle Aboriginal overrepresentation in the NSW juvenile justice system. Both inquiries recognised that a holistic and whole of government approach is needed to address the disproportionate rates of contact of Aboriginal young people with the NSW juvenile justice system. The recommendations from these inquiries were broad reaching in recognition of the wide range of social and economic factors which impact on offending behaviour. The recommendations range from implementing strategies to increase participation in sports and recreational activities, to improved cross-cultural training for police officers, to a fundamental re-design of the current system for dealing with offending by young people by adopting the justice reinvestment model.

One of the reasons the YOA has not been as successful for Aboriginal and Torres Strait Islander children as it has for non-Indigenous children, is that there is an inconsistent approach taken by police and local areas commands to diversion. The *Doing Time – Time for Doing* report highlights some factors that may account for this inconsistency. The report refers to the over-policing of Indigenous communities and strained relations between police and Indigenous people as some of the factors that lead to the disproportionate contact of young Indigenous people with the criminal justice system.²⁵ Some studies have also suggested that racial bias on the part of police may be an influence in certain areas.²⁶ Whatever the case may be, it is clear that a more consistent approach is needed to ensure that Aboriginal and Torres Strait Islander children have equitable access to diversionary options under the YOA.

²² Above n 1.

²³ Above n 6.

²⁴ Ibid, 138 - 139

²⁵ Above n 1.

²⁶ Chris Cunneen, 'Racism, Discrimination and the Over-representation of Indigenous People in the Criminal Justice System: Some Conceptual and Explanatory Issues' (2006) 17(3) *Current issues in Criminal Justice* 329.

The current scheme gives police fairly broad diversionary discretion.²⁷ PIAC recommends that the YOA should be amended to specify with greater particularity, the factors that the police should take into account when exercising their discretion to divert a young person from court proceedings. This is not to limit the police's discretion to divert a young person from the criminal justice system, but rather to provide more guidance to aid police in the exercise of their discretion.

Specifically, PIAC recommends that the YOA should be amended in order to require consideration to be given to whether the young person is Aboriginal or Torres Strait Islander in making a determination as to whether the person is entitled to a diversionary option. Although the YOA aims to achieve this by including addressing Aboriginal and Torres Strait Islander overrepresentation as one of its stated objects and principles, experience has shown that the YOA has not been successful in this regard. This approach may give this object and principle the practical force and utility that is needed to ensure that there is a consistent approach taken to decisions about diversion for Aboriginal and Torres Strait Islander young people.

PIAC also recommends that the YOA should be amended to prescribe that children between the ages of 10 and 14 must be given a diversionary option, unless there are exceptional reasons not to do so. This follows the approach in Sweden where diversion is mandatory for children under the age of 15 years old. In PIAC's submission, this approach is also supported by the findings of a recently released UK study carried out by the Royal Society's Science Policy Centre. The study raises questions over the age of criminal responsibility, which in England is 10 years old, as it is in Australia. The study makes the following observation:

[I]t is clear that at the age of ten the brain is developmentally immature, and continues to undergo important changes linked to regulating one's own behaviour. There is concern among some professionals in this field that the age of criminal responsibility in the UK is unreasonably low, and the evidence of individual differences suggests that an arbitrary cut-off age may not be justifiable.²⁸

The ages between 10 and 14 are critical in terms of how a young person might progress, or not, through the criminal justice system. Research shows that Aboriginal children between those ages who have had contact with the juvenile justice system are almost certain to be imprisoned as adults.²⁹ Legal Aid NSW conducted a study of the fifty most frequent users of its services between 2005 and 2010 and found that 90% of its highest service users were under the age of 21. Further, the average age of first contact with Legal Aid was 13 years old. The high service users were mostly accessing Legal Aid's criminal law services; however, many had had contact with its care practice and almost 50% had been in out of home care.

Such research demonstrates that the critical time for intervention in the lives of young people who commit crime, is from 10 – 14 years of age. Such intervention should bring together a range of agencies whose role is to support the young person to ensure that they have the best possible chance of escaping the criminal justice system and integrating positively into the community.

²⁷ *Young Offenders Act 1997 (NSW)*, ss 14, 20 and 37.

²⁸ The Royal Society, *Brain Waves Module 4: Neuroscience and the Law*, Science Policy Centre (2011), 14.

²⁹ Above n 6, 144.

Such intervention should be modelled on the approach taken in New Zealand, which is to empower the young person and his or her family and community to decide what is the best way to deal with the young person's offending behaviour, rather than leaving the decision in the hands of professionals.³⁰ The Government needs to fund culturally appropriate services, particularly in regional and remote areas, to ensure that there are services available to assist and support the young person both as part of a diversionary intervention and in the aftermath. Further, the value of funding for early intervention programs, particularly in disadvantaged areas where youth offending is high cannot be overstated.

For children and young people aged 14 and over, PIAC also favours the Swedish model, where it is policy to refer offenders to social agencies rather than prosecute. The Swedish juvenile justice system places more emphasis on rehabilitation and the provision of support services to assist young people. The number of young people imprisoned per year in Sweden is considerably low, as the response to youth offending behaviour is formally shared between the judicial system and social services.³¹ PIAC considers this approach to be a good model on which to base a strategy in NSW to reduce re-offending generally, but also specifically in the case of Aboriginal and Torres Strait Islander young people.

Recommendation 6

The recommendations made in the federal inquiry into the high involvement of Aboriginal and Torres Strait Islander juveniles and young adults in the criminal justice system and the Noetic report should be taken into account in forming a strategy to tackle Aboriginal overrepresentation in the NSW juvenile justice system.

Recommendation 7

The YOA should be amended to include as one of the criteria for diversion, whether the young person is Aboriginal or Torres Strait Islander.

Recommendation 8

The YOA should be amended to prescribe that children between the ages of 10 and 14 must be given a diversionary option, unless there are exceptional reasons not to do so.

Diversion of young people with mental and cognitive health impairment

PIAC endorses the recommendations made by the Shopfront Youth Legal Centre to this review in relation to the appropriateness of diversionary interventions under the YOA for young people with cognitive impairments or mental illness.

There is a disproportionate number of people in NSW with cognitive disability or mental health impairment that come into contact with the criminal justice system. There are many good reasons why a diversionary intervention is appropriate for young people with cognitive or mental health impairment, not the least of which is that treatment and rehabilitation (where possible) is proven to be effective in addressing the issues that underlie the offending behaviour. It is widely

³⁰ Above n 6, 6 – 7.

³¹ Neal Hazel, *Cross-National Approaches to Youth Justice*, (2008), 39, viewed December 2011
http://www.yjb.gov.uk/publications/Resources/Downloads/Cross_national_final.pdf

acknowledged that people with mental and cognitive impairments are not appropriate vehicles for general deterrence, and the system should support their rehabilitation.

This is consistent with human rights principles which provide that people with mental illness should have the right to be treated in the least restrictive environment and with the least intrusive treatment appropriate for the persons need and the need to protect the physical safety of others.³² Indeed, the Attorney General, the Hon. Greg Smith, has advocated publicly for the diversion of people with mental illness from the criminal justice system. Consistent with that sentiment, PIAC recommends that the YOA should include as one of its objects and principles addressing the overrepresentation of young people with mental and cognitive impairments in the criminal justice system through diversionary alternatives under the YOA.

Further, one of the criteria to be taken into consideration in determining whether to divert a young person should be whether the person has a cognitive or mental health impairment. That said, PIAC acknowledges the practical difficulties in making this assessment, particularly given many young people are not diagnosed at the early stage of their entry into the criminal justice system. Shopfront Youth Legal Centre's submission makes some useful recommendations about how to address this issue to ensure that young people with mental and cognitive impairment are able to have equal access to diversionary options. In particular, they submit, and PIAC endorses their recommendation, that by giving the young person a proper opportunity to seek legal advice from a lawyer, an assessment of issues such as mental health or cognitive impairment might arise and therefore inform the process of dealing with the young person under the juvenile justice system.

Recommendation 9

The YOA should include, as one of its objects and principles, addressing the overrepresentation of young people with mental and cognitive impairments in the criminal justice system through the use of youth justice conferences, cautions and warnings.

Recommendation 10

The YOA should be amended to include, as one of the criteria for diversion, whether the young person has a mental illness or cognitive impairment.

Children (Criminal Proceedings) Act

PIAC endorses the recommendations made by the Shopfront Youth Legal Centre to this review in relation to the CCPA. PIAC limits its comments in relation to the CCPA to issues regarding its interaction with the *Bail Act 1978*, the age of criminal responsibility and the question posed in the Consultation paper about merging the YOA and the CCPA.

Interaction between the CCPA and the Bail Act

In its submission to the recent review of the *Bail Act 1978*, PIAC raised concerns about the fact that the *Bail Act* does not adequately consider the different needs and rights of children. As such, it effectively has the same impact on young people as it does on adults – a situation that is

³² The protection of persons with mental illness and the improvement of mental health care, GA Res. 46/119, 75th Sess, UN DOC A/RES/46/119, 1991, Principle 9, viewed July 2011
< <http://www.un.org/documents/ga/res/46/a46r119.htm> >.

inconsistent with Australia's international law obligations. Indeed, the fact that the *Bail Act* applies equally to young people as it does to adults is one of the main reasons for the sharp increase in the numbers of young people on remand in NSW juvenile detention centres. To address this wholly undesirable situation, PIAC submits that the CCPA should take precedence over the Bail Act or at the very least, the principles which guide the operation of the CCPA should also apply in respect of bail decisions made in relation to young people.

Recommendation 11

The CCPA should take precedence over the Bail Act 1978.

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

As referred to above, a recently released UK study suggests that the age of ten may be an unreasonably low age to hold a child criminally responsible for offending behaviour.³³ The report finds that the brain is still developing at that age and the parts of the brain which are connected with judgment and decision-making are still in the process of forming and continue to do so throughout adolescence. As such and consistent with recommendation 8 above, PIAC submits that the current approach to dealing with children between the age of 10 and 14 who commit criminal offences, needs to be changed.

Should the YOA and the CCPA be merged?

PIAC supports the merger of the YOA and CCPA for the reasons outlined in the Shopfront Youth Legal Centre's submission to this review. In addition, PIAC submits that merging the two Acts would be consistent with an amendment to the YOA to expand the range of offences that can be dealt with under it to include all offences for which the Children's Court has jurisdiction. This is in line with the jurisdiction of the CCPA. Further, although the YOA currently requires police to consider diversionary alternatives before instituting court proceedings in relation to certain offences, PIAC believes that a merger of the two Acts would encourage this approach even further and, as noted in the Consultation Paper, create a clearer progression from diversionary options to more serious sanctions.

³³ Above n 28, 14