



9 December 2011

Review of the YOA and the CCPA
Legislation, Policy and Criminal Law Review
Department of Attorney General and Justice
GPO Box 6
SYDNEY NSW 2001

Via email: lpd_enquiries@agd.nsw.gov.au

Dear Sir or Madam

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

The Youth Justice Coalition (YJC) is pleased to contribute to the New South Wales Government's review of the *Young Offenders Act (1997) NSW* and the *Children (Criminal Proceedings) Act 1987 (NSW)*.

The YJC aims to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate. The YJC considers this review to be an opportunity to develop and improve upon existing child-specific legislation.

Since the late 1980s, rehabilitation and diversion have underpinned children's and young people's contact with the New South Wales criminal justice system. We are strongly of the view that a renewed commitment to the ongoing monitoring and regular evaluation of these two critical pieces of legislation allows the merits and any limitations to inform future developments in juvenile justice.

If you have any queries in relation to this submission, please contact the YJC on 9559 2899 or at yjc@clc.net.au.

Yours faithfully

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

**Review of the Young Offenders Act and
Children Criminal Proceedings Act**

December 2011





About the Youth Justice Coalition

The Youth Justice Coalition (YJC) is a network of youth workers, children's lawyers, policy workers and academics working to promote the rights of children and young people in New South Wales.

The YJC's aims are to promote appropriate and effective initiatives in areas of law affecting children and young people; and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate.

How the Youth Justice Coalition was formed

The YJC was formed in early 1987 under the auspices of NCOSS to work around the children's criminal, care and protection legislation introduced in that year. The YJC has been active since 1987 advocating for young people, particularly those involved in the criminal justice or welfare systems.

- Barnardos Belmore (incorporating the Reconnect program, Streetwork program and Post Release Options Program)
- Bondi Outreach Project
- Catholic Care Sydney
- Central Illawarra Youth Services
- Council of Social Service of New South Wales (NCOSS)
- Crime and Justice Research Network
- Dr Dorothy Bottrell, Lecturer and Convenor, University of Sydney Network for Childhood and Youth Research
- Elaine Fishwick
- Dr Evelyne Tadros, Mission Australia
- Illawarra Legal Centre
- Inner West Community Development Organisation
- Justice Action
- Liverpool Youth Accommodation Assistance Company
- Jenny Barga, Adjunct Lecturer, Sydney Law School
- Macarthur Legal Centre
- Marrickville Legal Centre
- Marrickville Youth Interagency
- Marrickville Youth Resource Centre
- National Children's and Youth Law Centre
- Professor Chris Cunneen, New South Global Chair in Criminology, Faculty of Law, University of New South Wales

- Public Interest Advocacy Centre
- Redfern Legal Centre
- Rosemount Youth and Family Services
- Shire Wide Youth Services
- Shopfront Youth Legal Centre
- The Crossing, Mission Australia
- UnitingCare Burnside
- Weave Youth Family Community (formerly South Sydney Youth Services)
- Western NSW Community Legal Centre
- YFoundations
- Youth Action and Policy Association (YAPA)

Recommendations

Young Offenders Act 1997 (NSW)

Recommendation 1: An additional principle should be inserted in s7 'Principles of scheme' of the YOA, namely 'The principle that arrest of a child should be a last resort and a child should not be arrested if there is an appropriate and alternative way of dealing with the matter'.

Recommendation 2: An additional object should be inserted in s3 of the YOA, namely 'To establish a scheme that links children and young people to appropriate rehabilitative and support services'.

Recommendation 3: Section 8(1) of the YOA should be amended to provide that all offences are covered by the Act, except serious children's indictable offences, as defined in s3 of the CCPA.

Recommendation 4: All offences for which penalty notices may be issued should be covered by the YOA.

Recommendation 5: The Youth Justice Advisory Committee should be reinstated, with representatives from agencies such as the NSW Department of Attorney General and Justice, NSW Police, Juvenile Justice and the Legal Aid Commission, to oversee the operation of the YOA.

Recommendation 6: The Government should invest in ongoing promotional and educational activities to ensure that police officers, government funded children's lawyers and magistrates understand the philosophical underpinnings and practical applications of the YOA.

Recommendation 7: Conference convenors should consistently receive both formal and informal training to ensure effective operation of the YOA.

Recommendation 8: Effective diversion requires an increase in Government funding of rehabilitative programs run by non-government organisations.

Children's (Criminal Proceedings) Act 1987 (NSW)

Recommendation 9: Section 6 of the CCPA should be amended to reflect both Article 37(b) and Article 40 of the United Nations Convention on the Rights of the Child.

Recommendation 10: The age of criminal responsibility should be raised to at least 12 years of age, preferably 14 years of age, having regard to the social realities of personal autonomy and current scientific and medical research regarding development of intellectual capacity.

Recommendation 11: A study should be conducted on (1) the number of young people appearing before Local Courts on traffic matters; and (2) sentencing outcomes, with a view to amending the CCPA so that all young people's traffic

matters are brought within the proper jurisdiction of the Children's Court.

Recommendation 12: Youth Traffic Offender programs should be widely available as a sentencing option in the Children's Court.

Recommendation 13: Section 8 of the CCPA should be amended to make clear that bail should be dispensed with for children and young people and failing this, there should be an initial presumption in favour of bail.

Recommendation 14: Current provisions regarding the recording of a conviction and evidence of prior offences should remain unchanged as they are consistent with the rehabilitative aims of juvenile justice.

Recommendation 15: Sentencing options should be consistently reviewed in order to: (1) fully implement the policy aims of the CCPA; and (2) identify areas of the state in which the full range of sentencing options are not being utilised.

Recommendation 16: Background reports should continue to be prepared by Juvenile Justice, in accordance with the current legislative requirements, but only when the court is considering a control order. The *Children (Criminal Proceedings) Regulations 2011* (NSW) should be amended to (1) include 'mental health' as one of factors that the report should have regard to; and (2) make clear that the report is to address not only the circumstances surrounding the commission of an offence, they should also consider what can be done to promote a young person's rehabilitation.

Recommendation 17: That a provision be inserted in the CCPA requiring the court, as a matter of first principle and throughout the course of a matter, to consider the application of diversionary options under the YOA.

Background to this Submission

From the late 1970s through to the end of the 1990s, there was a move to separate child welfare from juvenile justice matters in most Australian jurisdictions. Broadly speaking, a major problem with the welfare approach was the failure to protect the rights of the young person, and the entanglement of neglect and offending.

The *Children (Criminal Proceedings) Act 1987 (NSW) (CCPA)* was introduced in the late 1980s to govern the jurisdiction of the Children's Court and set out the main provisions relating to criminal proceedings against children and young people. The *Young Offenders Act (1997) NSW (YOA)*, established approximately 10-years after the CCPA, introduced alternative processes to court proceedings as part of a steady move towards diversion. For children and young people who commit certain offences, the YOA allows police to warn for minor offences, and the police and the Children's Court to deliver cautions, or to refer children and young people to youth justice conferences, as an alternative to court proceedings. The overall objective of diversion is to minimise the harmful effects of stigmatisation and unnecessary state intervention, especially among less serious offenders.¹

A number of evaluations of the CCPA and YOA have been undertaken since they were introduced, including the *Report on the Review of the Young Offenders Act 1997* completed by the Attorney General's Department in 2002, and *Report 104 Young Offenders* completed by the NSW Law Reform Commission in December 2005. Both reports concluded that the policy objectives of the CCPA and YOA remained valid. They also concluded that the use of diversion had been largely effective and there was room to expand the scope of the legislation.

The Youth Justice Coalition (**YJC**) considers that the objectives and principles enshrined in the YOA and CCPA remain valid. To any extent that the legislation has been unable to achieve its objectives to date it is suggested that systemic problems with the operation of the legislation are largely responsible. The key to successful operation of both the YOA and CCPA is enshrining an understanding of their central importance at all levels of implementation from police, through the court system and government departments, up to and including the Government itself. Commitment to ongoing monitoring and regular evaluation of these two critical pieces of legislation allows the merits and any limitations to inform future developments in juvenile justice.

¹ J. Chan (Ed.), *Reshaping juvenile justice: The NSW Young Offenders Act 1997*, Sydney: Institute of Criminology, University of Sydney (p 11)

Policy objectives and principles of the YOA

The YOA sought to use legal rules as a way of institutionalising a fresh approach to juvenile justice:

...one that regulates police discretion at the gate-keeping level, emphasises diversion as a principle, introduces restorative conferencing as an intermediate intervention, and relegates the use of the courts to the last resort.²

The policy objectives of the YOA can be partly understood with reference to s3 'Objects of Act' that can be summarised as follows:

- 1) To establish an alternative process for dealing with children through the use of youth justice conferences, cautions and warnings.
- 2) To establish a scheme which provides an efficient and direct response to the commission of offences by young people.
- 3) To use youth justice conferences in way that involves communities in negotiating solutions, offenders in taking personal responsibility and which meets the needs of victims.
- 4) To address the over representation of Aboriginal and Torres Strait Islander children in custody.

These objects arose out of concerns highlighted in the second reading speech of the then Attorney General commending the original Bill to Parliament. The Attorney General noted that studies show the majority of matters for which young people come to court are relatively minor, and that most young people come to the attention of the criminal justice system only once and do not re-offend. In this context, the Attorney General stated that:

Low-level interventions such as warnings or police cautions have been shown to be effective in preventing reoffending. Indeed a 1996 Department of Juvenile Justice report found that rates of reoffending increase proportionately with the severity of the first sanction imposed on a child. It is recognised that emphasis on prevention rather than punishment is appropriate when dealing with most offences committed by young people.³

The Bill sought to address a substantial body of research about the origins and nature of juvenile offending. It is now widely acknowledged that relatively high rates of juvenile offending can be explained by stages in the development of the adolescent brain that can predispose young people to impulsive, risk-taking behaviors.⁴ It is accepted that these factors, as well as children's vulnerability,

² Note 1, pg 11

³ NSW Legislative Council, 21 May 1997, Second Reading Speech for the Young Offenders Bill, Hansard p 8958-8959

⁴ L Leijenhorst, K Zanolie, C Van Meel, P Westenberg, S Rombouts, and E Crone, 'What Motivates the Adolescent? Brain Regions Mediating Reward Sensitivity across Adolescence', *Cereb. Cortex* (2010) 20(1): 61-69; L Steinberg, Should the science of adolescent brain development inform public policy? *American Psychologist*, (2009) 64(8), 739-750.

immaturity and lack of experience more generally, necessitate a different criminal justice response to offending by children.⁵

The YOA introduced a structured, consistent and principled approach to dealing with juvenile offending. The key principles that underline the YOA, contained in s7, reflect the philosophy of diversion, the right to legal advice and information, the importance of reintegration and ties to community and family, and the object of rehabilitation.⁶ By virtue of its foundation in these principles the YOA has been and remains a valid and effective attempt to reflect concerns about the different response required to offences committed by young people. For the YOA to remain effective and true to purpose these principles need to remain central as the YOA is considered at every level of the juvenile justice process.

The objects and principles of the YOA are also directed at addressing the concerning overrepresentation of Aboriginal and Torres Strait Islander children in the criminal justice system. Diversion rates for ATSI children have been monitored closely since the introduction of the YOA. In spite of some very positive progress⁷, BOCSAR statistics from 2010 indicate ATSI children are still more likely to go to court, and less likely to receive a caution or warning, than non-indigenous children. ATSI children are also less likely to be referred to a conference by police, but more likely to be referred to a conference by a court.⁸ In light of persistent over-representation in the juvenile justice system, equity in indigenous access to diversionary options should remain a priority object of the YOA.

Consistency with international obligations

We note that the principles of the YOA broadly align with Australia's international obligations, including the United Nations Convention on the Rights of the Child (1989) (**CROC**) and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)*.

Article 40(3) of CROC establishes a clear preference for diversion by providing that wherever appropriate and desirable, measures should be taken to help young people without resorting to judicial proceedings, provided that human rights and legal safeguards are fully respected. Similarly, Article 11 of the Beijing Rules requires that the police, the prosecution or other agencies dealing with juvenile justice cases be empowered to dispose of such cases, at their discretion, without recourse to a formal hearing. Further, commentary to the Beijing Rules states that diversion at the outset may be the 'optimal response', especially where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner.

However, we suggest that the YOA principles be amended to reflect the CROC principle of detention as a last resort for juveniles (Article 37(b)). Although the YOA envisages that children should be given the opportunity to be dealt with under the YOA without being arrested first, the YJC submits that police practice is very different. In our experience, police officers commonly operate under the

⁵ K Richards, What makes juvenile offenders different from adult offenders? *Trends & Issues in Crime and Criminal Justice*, no. 409.

⁶ s7 YOA

⁷ Research on the first 3 year's of the YOA's operation indicated a 50% reduction in the chance of first time Aboriginal offenders going to court: J Chan and G Luke (2005), 'Impact of the Young Offenders Act', in J Chan (ed), *Reshaping Juvenile Justice: The NSW Young Offenders Act 1997*, p182

⁸ NSW Bureau of Crime Statistics and Research, Table 3 Consultation Paper

misconception that it is necessary to arrest a child to give them an opportunity to get legal advice and to be interviewed.

Recommendation 1: An additional principle should be inserted in s7 'Principles of scheme' of the YOA, namely: 'The principle that arrest of a child should be a last resort and a child should not be arrested if there is an appropriate and alternative way of dealing with the matter'.

Reducing recidivism

Reducing recidivism is not currently a stated object or principle of the YOA. However, we are seeing increased focus on recidivism rates of young offenders as a key indicator of how effective juvenile justice intervention programs are in "reforming" young offenders.

Performance measurement is an increasingly popular strategy used by government to assess the impact of their operations, to improve "service provision" and to target resources. In 2005 the Australian Bureau of Statistics (**ABS**) identified 12 national priority areas underpinning the national information development plan for crime and criminal justice. One priority area was a commitment to develop 'an agreed measure or measures of recidivism and an evidence base that will inform policy research in the development of effective strategies'.⁹ Assisting young people to 'grow out' of crime, that is to minimise recidivism and to help young people to become 'desisters', has become a key focus.

In spite of this trend, many commentators consider measuring rates of recidivism following court or a YOA diversionary option to be problematic. This is largely due to the difficulty of ensuring an appropriate control group for comparison. For example, those receiving a warning, caution or conference as opposed to a control order may already have a different likelihood of offending behaviour.

Recidivism may be influenced by multiple factors that are unable to be controlled by criminal justice authorities. The mere commission of an offence does not provide any insight into the reasons behind that offending. Accordingly, recidivism rates cannot necessarily accurately reflect the performance of any particular criminal justice intervention. Changes in criminal offending may be due to any number of factors, and may be unrelated to any intervention program.

Further to this, whilst recidivism seems to be a popular measure, we note that focusing on recidivism renders other, perhaps equally important, outcomes of the justice system redundant. Intervention programs may be successful at improving life skills, or a reduction in the use of drugs and/or alcohol.

Regardless of these ongoing methodology challenges, a number of studies have consistently shown that those who have attended a youth justice conference have a lower risk of re-offending.¹⁰ This is often put down to the experience of a young person having to face a victim and the consequences of their actions.

⁹ Australian Bureau of Statistics (ABS) 2005a. National information development plan for crime and justice. ABS cat. no. 4520.0. Canberra: ABS. www.abs.gov.au/ausstats/abs@.nsf/mf/4520.0

¹⁰ Luke G & Lind B 2002. Reducing juvenile crime: conferencing versus court. Crime and Justice bulletin no. 69. [http://www.agd.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB69.pdf/\\$file/CJB69.pdf](http://www.agd.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/CJB69.pdf/$file/CJB69.pdf)

The YJC does not consider that reducing recidivism needs to be inserted as an additional object of the YOA. While desistance from crime may be a long-term goal of juvenile justice agencies, it is important to consider that the original primary object of the YOA is diversion. That is, reducing the number of young people appearing before the court on criminal charges due to the harmful effects of stigmatisation that may accompany the formal court and detention process, and the social effects of negative 'labelling'.

One s7 principle that we do suggest should be reinforced as a s3 object of the YOA is rehabilitation. We consider 'rehabilitation' to be a more appropriate object that 'reducing recidivism' as rehabilitation encompasses enabling a young person to have a healthy and fulfilling life as a member of the community.

Recommendation 2: An additional object should be inserted in s3 of the YOA, namely 'To establish a scheme that links children and young people to appropriate rehabilitative and support services'.

Scope of the YOA

Offences covered by the YOA

In light of the Government's stated commitment to diversion, it is important to consider whether an appropriate range of offences fall within the jurisdiction of the YOA. Currently, the YOA applies to offences committed by children that are:

- summary offences;
- indictable offences that can be dealt with summarily under the *Criminal Procedure Act 1986* (NSW); and
- other offences prescribed by the YOA.

Section 8(2) of the YOA lists a range of offences that are specifically *excluded* from coverage of the YOA that can only be dealt with by a court. The exclusions include matters such as breaches of apprehended violence orders, a range of drug offences, and traffic matters where the young person was old enough to obtain a learner licence.

The NSW LRC found in its Report 104: Young Offenders, that the general exclusion of all strictly indictable offences from the YOA to be 'inappropriate'.¹¹ Similarly, the NSW Attorney General's Department 2002 report on the review of the YOA noted that:

more serious offences, such as some violence matters and some driving matters, would benefit from conferencing, particularly where it serves the purpose of giving the offender some sort of insight into what they have done and the fact that it is a human being whom they have affected.¹²

Conferencing in particular encourages a young offender to consider the consequences of their actions, including the harm caused to the victim.

¹¹ NSW Law Reform Commission, *Young Offenders, Report 104* (2005), p27

¹² NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* (2002) pg 32

The YJC submits that section 8(1) of the YOA should be amended to provide that all offences are covered by the YOA, except serious children's indictable offences, as defined in section 3 of the CCPA. 'Serious children's indictable offences' refers to homicide, offences punishable by imprisonment for life or for 25 years, serious sexual offences, offences relating to the manufacture/sale of firearms, and any indictable offence prescribed by the regulations (currently certain sexual offences where the victim is under 10 years of age). Alignment with the jurisdiction of the Children's Court would create consistency of approach between the YOA and CCPA, and would lead to greater clarity and understanding of when the YOA options are available.

We consider below three types of offences, and consider whether it would be appropriate for them to be brought within the ambit of the YOA as per the above proposal. We note existing protections under the YOA:

- The diversionary options under the YOA already have threshold criteria (in relation to seriousness, level of violence etc.); and
- The 'gatekeepers' - police, the Children's Court and the Director of Public Prosecutions - ultimately retain discretion as to whether a matter is appropriate to be dealt with under the YOA.

1. Offences under the Crimes (Domestic and Personal Violence) Act

Currently, s8(2)(e) of the YOA excludes all offences under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). This includes breaches of an apprehended violence order (**AVO**) as well as stalking and intimidation.

It has been argued that many AVOs taken out against a young person do not necessarily relate to actual or potential violence by the young person. Rather, they are often taken out by a family member as a 'behavioural tool', or by a young person's acquaintance or friend.¹³ Accordingly, many AVO breaches are trivial and would be appropriate for diversion. Conferencing in particular may assist the parties to resolve their issues, minimising the potential for further conflict.

Concerns have been raised about the possibility, in some circumstances, for a youth justice conference to compound the abuse already experienced by a victim. However, we note that breaches of AVOs involving serious violence would already be excluded by the criteria in the YOA that gatekeepers must consider when determining if and how a matter should be dealt with by that legislation.

2. Drug Offences

The bulk of drug offences under the *Drug Misuse and Trafficking Act 1985* (NSW) are excluded from the YOA pursuant to s8(2)(e1) and (f), with some exceptions contained in s8(3).

In summary, for the small number of drug related charges that do fall within the ambit of the YOA, eligibility for a YOA diversionary option will depend on the amount of the substance in question. Specifically, the offence must have involved less than half the 'small quantity' of that drug, as defined by the Schedule to the *Drug Misuse and Trafficking Act 1985* (NSW).

We submit that the YOA should instead cover all drug related charges capable of being dealt with summarily by the Children's Court. We concede that a conference would often not be appropriate where there was no identifiable victim, however a

¹³ Note 11 at 4.31

warning or caution may be appropriate depending on the circumstances. Cautions for drug offences could be particularly effective if the range of persons able to attend a caution were expanded to include health drug and counselling professionals. We support this recommendation (initially raised in the NSW LRC's Report 104¹⁴).

3. Traffic Matters

We submit below that the Children's Court should have jurisdiction to hear all traffic matters of young people, regardless of whether they are of licensable age. If the CCPA was amended to reflect this, and the YOA was amended to mirror the jurisdiction of the CCPA, traffic matters would be eligible for a possible warning, caution or conference, depending of course on whether the circumstances of the offence made it appropriate to be dealt with by the YOA, including the seriousness of the offence, harm caused and the degree (if any) of violence involved.

The YJC submits that traffic matters should not automatically fall outside the jurisdiction of the YOA. Whilst a diversionary measure may not always be appropriate, there may be situations where a warning, caution or conference could be an appropriate and effective way to address the offending and repair harm.

Recommendation 3: Section 8(1) of the YOA should be amended to provide that all offences are covered by the Act, except serious children's indictable offences, as defined in s3 of the CCPA.

Offences where the investigating official is not a police officer

The YJC agrees with the recommendation contained in the 2002 review of the YOA (by the Attorney General's Department) that all offences, for which penalty notices may be issued should be covered by the YOA. These offences are mostly of low objective criminality and it is well recognised that monetary penalties are inappropriate for children and young people.

Administrative challenges in instituting such a change should not be a barrier. We recommend that options for inclusion of offences where the investigating official is not a police officer be explored. For example, perhaps penalty notices could be referred to a police Youth Liaison Officer for possible action under the YOA.

Recommendation 4: All offences for which penalty notices may be issued should be covered by the YOA.

¹⁴ Note 11 at 4.47

Operation of the YOA

Youth Justice Advisory Committee

Success of the YOA has depended on the collaboration and effective interaction between various key agencies. Initially, the YOA prescribed the establishment of a Youth Justice Advisory Committee (YJAC)¹⁵ consisting of representatives from agencies such as the NSW Attorney General's Department, NSW Police, Department of Juvenile Justice and the Legal Aid Commission, many of whom had worked together in the working party that developed the YOA.

The YJAC was responsible for advising the Attorney General, relevant Ministers and Director Generals on the operation of the YOA. The YJAC played an important role in providing advice on regulations, guidelines for conferences, selection, training and appointment of convenors, and monitoring and review of the YOA.

For example, after the YOA had been in force for approximately 15 months, the YJAC was concerned that the diversion rate of Aboriginal and Torres Strait Islander young people was disproportionately low. They conducted a review and made 17 recommendations regarding policies and strategies that should be adopted by police and courts to improve the situation ("Strategies to Improve Diversion Rates under the YOA", internal document 10/05/2001). Many of these recommendations were adopted by the NSW Police ("NSW Police Service Response to Review of Gatekeeping Role in the YOA", internal document 11/5/2000).

Early formal evaluations of the YOA considered the role of the YJAC in monitoring and facilitating enormous improvement of the Act's operations, to be one of the YOA's key success factors.¹⁶

In September 2004, the Young Offenders Regulation 1997 was repealed and the YJAC ceased to exist. We submit that the YOA would benefit from a reinvigoration of the YJAC in order to continue the collaborative approach that was taken during the developmental phase. A commitment to ongoing monitoring and regular evaluation allows the merits and limitations of the YOA to inform future developments.

Recommendation 5: That the Youth Justice Advisory Committee be reinstated, with representatives from agencies such as the NSW Department of Attorney General and Justice, NSW Police, Juvenile Justice and the Legal Aid Commission, to oversee the operation of the YOA.

Diversion rates

One way to measure use of YOA interventions is annual state-wide statistics on the number of matters that proceed to court and that proceed by warning, caution or conference. In 2005, the Law Reform Commission reported a substantial increase in the use of cautions and warnings and a corresponding decline in the use of court proceedings. The table below contains NSW recorded crime statistics from the NSW Bureau of Crime Statistics and Research. It outlines the methods of proceedings against alleged offenders between 10 and 17 across a 5-year period from 2006 to 2011.¹⁷

¹⁵ s70, YOA (now repealed)

¹⁶ Note 1, p197

¹⁷ NSW Bureau of Crime Statistics, Dg11/9956

Period (financial year)	Court	Conference	Caution	Infringement Notice	Warning	Total
06-07	14,091 (19.1%)	1,425 (1.9%)	10,659 (14.5%)	26,365 (35.9%)	21,023 (28.6%)	73,501
07-08	15,283 (19.5%)	1,973 (2.5%)	10,974 (14.0%)	27,266 (34.9%)	22,686 (29.0%)	78,191
08-09	14,703 (23.9%)	1,819 (3.0%)	11,334 (18.4%)	25,128 (40.8%)	8,552 (13.9%)	61,546
09-10	14,583 (25.6%)	1,895 (3.3%)	11,413 (20.1%)	24,160 (42.5%)	4,809 (8.5%) ¹⁸	56,871
10-11	13,708 (23.3%)	1,675 (2.8%)	10,117 (17.2%)	28,084 (47.6%)	5,351 (9.1%)	58,944
Total:	72,300	8,787	54,497	131,003	62,421	329,053

Key observations from this data include:

- A peak in the number of youth conferences in financial year 2009-2010 at 3.3%, with a 0.5% decline to 2.8% in 2010-2011.
- A peak in the number of cautions in financial year 2009-2010 at 20.1%, with a decline to 17.2% in 2010-2011.
- A large increase between financial years 2006-2007 and 2010-2011 in Infringement Notices, from 35.9% to 47.6%.

This current data indicates year-to-year fluctuations in the use of diversionary processes. BOCSAR statistics from 2010 extracted in the consultation paper indicate ATSI children are still more likely to go to court, and less likely to receive a caution or warning, than non-indigenous children. ATSI children are also less likely to be referred to a conference by police, but more likely to be referred to a conference by a court.

The 2005 Law Reform Commission report concluded that a target diversion rate would not be a reliable means of measuring the success of the YOA.¹⁹ However, promotion and education may help to reduce some of the disparities in the application of the YOA.

Ongoing promotion and education

The continued success of the YOA requires ongoing promotional and educational activities to ensure that police officers, government funded lawyers and magistrates understand the philosophical underpinnings and practical applications of the legislation. Education and training is the key to widening the practical application of the YOA, and thereby increasing the diversion rate.

The NSW Police had to implement a number of initiatives following the enactment of the YOA. The new diversionary measures required a significant shift in the philosophy and practice of policing. The YOA guides police discretion to an extent not usually seen in legislation by setting out criteria which distinguishes between matters that should be dealt with by way of a warning and a caution, and those that should be dealt with by way of conference. Commencement of criminal proceedings should only occur if a young person is not entitled or eligible to be dealt with by diversionary options. Police willingness to actually exercise these diversionary

¹⁸ This 'drop' was not in practice a drop in the number of YOA compliant warnings. BOCSAR simply 'cleaned' the police data on warnings from 2009 on so that the data now includes only those warnings that are for summary offences that do not involve violence (s 14, YOA). Prior to 2009, this data included warnings for minor assaults, shop lifting etc, which police still have discretion to give, but which are not consistent with the limitations on a child's entitlement to be dealt with by way of a warning under the YOA.

¹⁹ Note 11 at 3.66

options is largely dependent on their knowledge, attitude and experience in relation to the YOA.

Soon after the YOA came into effect, the Youth Issues Working Party, headed by a Regional Commander, successfully obtained approval from the police executive for the appointment of a YLO for each of the 80 local area commands. YLOs are critical to the operation of the YOA through training other police, establishing relationships with conference administrators, monitoring the performance of the command, reviewing determinations of SYOs and generally promoting the use of the YOA.

Better police compliance with the YOA would remove the question of bail entirely for a significant majority of children and young people in trouble with the law. Money saved from the reduction of in the numbers of young people in custody should be invested in original and ongoing training for all police, especially youth liaison officers (YLO) and specialist youth officers (SYO), as well as conference convenors.

Recommendation 6: That the Government fund ongoing promotional and educational activities to ensure that police officers, government funded lawyers and magistrates understand the philosophical underpinnings and practical applications of the YOA.

Conference convenors

The role of conference convenor is critical to successful operation of the YOA. Convenors prepare all relevant parties, act as a facilitator for the conference, identify all the appropriate community resources to include in the outcome plan and ensure that the outcome plan is appropriate. The convenor is also essentially responsible for establishing and maintaining a safe, respectful environment, which is sensitive to vulnerabilities.

Their ability to do this depends largely on their core competencies and ongoing training. Key competencies include:

- Working knowledge of the criminal justice system;
- Conflict resolution skills;
- Understanding victims and dynamics of victimisation;
- An ability to work effectively with offenders;
- Cultural awareness; and
- Administrative and management skills.

Recommendation 7: Conference convenors should consistently receive both formal and informal training to ensure effective operation of the YOA.

Rehabilitative programs

Both Government and non-government organisations have a role to play in realising diversion and restorative justice. Government develops legislation, policies and guidelines and plays a critical role in funding and administrative support for rehabilitative and restorative justice related programs, which are largely run by non-government organisations.

Conference outcome plans often require a young person to complete a course or engage in case management offered by a non-government organisation. These programs need to be adequately funded to allow diversion to operate at community level.

One such example is the Youth Crime Prevention program run by South West Youth Services (Mission Australia) - a program that strives to address a variety of needs: educational, employment, vocational, accommodation, health, social and family support. Referrals are often made by police or following a youth justice conference.

Recommendation 8: Effective diversion requires an increase in Government funding of rehabilitative programs run by non-government organisations.

Coordinated 'all of Government' approach

While the YOA provides a framework for diversion and restorative justice, much more needs to be done to explore conceptually and practically the links between diversion/restorative justice and social justice. This is critical given what we know about the criminogenic factors of young offenders from the 2009 Young People in Custody Health Survey by Juvenile Justice and Justice Health.

Being held accountable or being encouraged to participate are not sufficient in themselves to rectify unpleasant situations and environments that generate much of the pressure or impetus to offend in the first place.²⁰

Responses to juvenile offending need to address wider issues of (among others) homelessness, unemployment and poverty. This requires an 'all of government' approach.

²⁰ C. Cunneen & R. White, *Juvenile Justice: Youth and Crime in Australia* (4th ed), 2011 p376

Policy objectives and principles of the CCPA

It is well recognised both internationally and in Australia that young people, because of their age and lack of emotional or developmental maturity, are entitled to special protections when dealing with the criminal justice system. In NSW, this vulnerability is largely recognised through the enactment of the CCPA, which establishes the legal framework for dealing with young people suspected or convicted of committing a criminal offence. The CCPA sets out the definition of a young person or child, the jurisdiction of the Children's Court, and the procedures for the commencement and the conduct of criminal proceedings against young people.

The YJC submits that the guiding principles in s6 of the CCPA should be reviewed given that the CCPA was proclaimed in 1987 and some 4 years later, Australia became a signatory to the UN CROC. In our view, the CCPA could better reflect CROC.

We note that the CCPA already addresses pertinent principles such as the right of young people to participate in proceedings that affect them; the need for guidance due to dependency and immaturity; the importance of minimal disruptions to education and home life; and the necessity for children to accept responsibility for their actions and to make reparation, including consideration of the effect of their actions on a victim.

However, we submit that the CCPA should be amended to expressly reflect Article 37(b) of CROC, that arrest, detention and imprisonment of young people is a measure of last resort and should be for the shortest possible period of time. Further to this, we submit that the CCPA should echo Article 40 of CROC, which provides that children in the criminal process shall be treated:

in a manner consistent with the promotion if the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting a child's reintegration and the child's assuming a constructive role in society.

<p>Recommendation 9: Section 6 of the CCPA should be amended to reflect both Article 37(b) and Article 40 of the United Nations Convention on the Rights of the Child.</p>

Scope of the CCPA

Age of criminal responsibility

Currently, there is a conclusive presumption that no child under the age of 10 can be guilty of an offence (s5, CCPA), and a rebuttable presumption known as *doli incapax* that a child between the ages of 10 and 13 cannot possess the requisite knowledge to form or possess criminal intent.

The rate at which children mature varies considerably. The doctrine of *doli incapax* attempts to recognise this by requiring assessment on a case-by-case basis. The principle of *doli incapax* is supported by the United Nations CROC. The United Nations however, does not give any specific guideline as to the appropriate age of criminal responsibility:

States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law... (Article 40(3))

The YJC is of the view that 10 years of age is too low and should be raised to at least 12 years of age, preferably 14 years of age. Whilst it is lower than 10 in some jurisdictions, we note that it is 12 in Canada, 13 in France and 15 in Sweden, Norway and Denmark. On several occasions the United Nations Committee on the Rights of the Child has expressed its concern to Australia about our relatively low age threshold of criminal responsibility. In 1997 the Committee urged Australia to raise the threshold from the current age of 10.²¹ In 1995 the Committee said it was 'deeply concerned that the minimum age of criminal responsibility is generally set at the very low level of 7 to 10 years', particularly in light of the United Nations CROC and other international legal instruments.²²

The imposition of criminal responsibility is said to be 'the gateway to punishment'.²³ Only those people for whom individual punishment can be justified should be subject to this level of responsibility.

In setting an age for criminal responsibility the law should consider personal responsibility. Personal responsibility requires autonomy, capacity and choice. There is a large body of scientific research to show that children have under-developed intellectual capacity when compared with adults. For example, biological factors such as functioning of the frontal lobes of the brain play an important role in the development of self-control and reasoning. The frontal lobes are thought to mature at approximately age 14.²⁴ On this basis, science can provide proof that a child at age 10 could not be considered an autonomous individual:

It is only during the onset of early adolescence that young people become competent to think in abstract terms. With this comes the capacity to feel guilt and shame, linked with an awareness of the implications for others of the offender's wrongful actions.²⁵

In addition to the scientific aspect of personal autonomy, the age of criminal responsibility should take the social reality of a child's individual circumstances into account:

²¹ Concluding Observations of the United Nations Committee on the Rights of the Child: Australia (CRC/C/15/Add.79-21 October 1997) paragraphs 11, 21, 22 and 29)

²² Concluding Observations of the United Nations Committee on the Rights of the Child: Australia (CROC/C/15/Add.34-15 February 1995, paragraphs 15,17, 35 and 36)

²³ C Elliott, 'Criminal Responsibility and Children: A New Defence Required to Acknowledge the Absence of Capacity and Choice' (2011) *Journal of Criminal Law* 75 JCL p308

²⁴ Note 23, p294

²⁵ J. Fortin, 'Children's Rights and the Developing Law' (Cambridge University Press: Cambridge, 1998) 72-3, cited by H. Keating 'Reckless Children?' [2007] *Crim LR* 546 at n61

...the impact of the care (or absence of care) from their parents and the social conditions in which they live are strongly determinative of their behaviour, including potentially criminal behaviour.²⁶

There is a strong correlation between poverty, abuse and youth offending. Young people cannot be viewed as autonomous individuals with the freedom to make a choice about the commission of a criminal offence. Children's moral competency develops over time through their relationships with the people around them. If those relationships are damaging, this will impact on the young person's personal development.

Further to the above, we submit that not enough is known about the current use of the principle of *doli incapax* and its interaction with the current age of criminal responsibility. The Criminal Law Review Division of the NSW Attorney General's Department last reviewed the age of criminal responsibility in 2000. We need research on how the doctrine is raised, how it is administered across different courts, and research on complex evidentiary issues concerning the interpretation of a child's capacity, or lack thereof to form the relevant *mens rea*.

Recommendation 10: The age of criminal responsibility should be raised to at least 12 years of age, preferably 14 years of age, having regard to the social realities of personal autonomy and current scientific and medical research regarding development of intellectual capacity.

Traffic offences

Currently, the Children's Court will not have jurisdiction to hear and determine traffic matters alleged to have been committed by a young person, unless:

- At the time of the alleged offence the young person was not old enough to obtain a licence or permit to drive the relevant vehicle (under the *Road Transport (Driver Licensing) Act 1998* and *Road Transport (Drivers Licensing) Regulations 1999*); or
- The traffic offence arose out of the same circumstances as a criminal charge, which is to be dealt with by the Children's Court. (s28(2) CCPA)

If a young person does not fall within one of the above two exceptions, their traffic matter will be heard in the Local Court. This raises a number of issues for young people. Firstly, there is no automatic entitlement to representation by Legal Aid in the Local Court as there is in the Children's Court. Local Court duty lawyers are only available in respect of traffic offences where there is a real risk of imprisonment. This will often not be the case given the large range of summary traffic matters. This exposes many young people to appearing before the court without legal advice or representation, especially given the vast majority of young people are not in a position to engage a private practitioner.

Secondly, unlike the Children's Court where the general public are excluded from criminal proceedings to which children are a party (s10, CCPA), the Local Court is not a "closed court". Further to this, Division 3A of the CCPA containing restrictions on the publication and broadcasting of names of young people before the Children's Court does not apply to proceedings in respect of a traffic offence where those

²⁶ Note 23 at p297

proceedings are held before a court other than the Children's Court (s15F, CCPA). This exposes young people in a way that is inconsistent with the protective provisions of the CCPA, which seek to avoid stigmatisation and negative labelling.

There is also a stark inconsistency in the legislation in that a young person who has committed another offence that falls within the jurisdiction of the CCPA at the same time as the traffic offence, will have the opportunity of having their traffic matter dealt with by the Children's Court. However, a young person who has committed *only* a traffic offence will appear before a Local Court. There is no basis for this discrepancy in entitlement.

In dealing with a young person convicted of a traffic offence, the Local Court is able to sentence a young person at law, using the sentencing options available for adults. A Local Court Magistrate *may* instead exercise the sentencing options outlined in s33 of the CCPA (s210, *Criminal Procedure Act 1986 (NSW)*), but there is no requirement to use the child-specific legislation. A solicitor acting for the young person would ordinarily address the court on this issue, however it is our understanding that there is a tendency in the adult jurisdiction for Magistrates to apply the sentencing options relevant to adults. Children's Court sentencing principles (s6, CCPA) are of course vastly different to the sentencing principles applicable in the adult jurisdiction (s3A, *Crimes Sentencing Procedure Act 1999 (NSW)*). Notably, if sentenced as an adult the law would fail to recognise the potential for cognitive, emotional and/or psychological immaturity of the young person to contribute to their breach of the law.

It is our submission that all traffic offences of young people should be heard in the Children's Court. The current anomaly is based on the presumption that a young person old enough to drive is old enough to be dealt with by adult law. This however does not recognise the fundamental principle that children and young people are to be treated differently at law, and does not align with the principles of the CCPA, the YOA, or Australia's international obligations under CROC. A specialised approach should apply to traffic offences as with any other type of offences. We note that the Children's Court is still able to impose deterrent measures such as disqualification where appropriate.

The Noetic Report on Juvenile Justice noted that there is no data available regarding the number of children appearing before Local Courts for traffic offences, and whether they are consistently sentenced according to the provisions of the CCPA or the *Crimes (Sentencing Procedure) Act 1999 (NSW)*. The Noetic Report therefore recommended a study to understand the consequences of bringing the jurisdiction of all traffic matters under the CCPA, notably the additional time and resources required by the Children's Court.²⁷ The YJC supports this recommendation, with a view to bringing all children and young people's traffic matters within the proper jurisdiction of the Children's Court.

We further recommend, as recommended by the NSW LRC in its 2005 Report 104, that a wider, more offence-focused range of sentencing options be available for traffic matters.²⁸ Traffic Offender Programs are currently not available in the Children's Court. Widespread access to driver education programs for young people would be an effective in helping to ensure that young people drive lawfully and safely.

²⁷ Peter Murphy & Anthony McGinness, *Strategic Review of the New South Wales Government into the Juvenile Justice System: Report for the Minister of Juvenile Justice*, Noetic Solutions Ltd, April 2010, p75

²⁸ Note 11, p178

Recommendation 11: A study should be conducted on (1) the number of young people appearing before Local Courts on traffic matters; and (2) the sentencing outcomes, with a view to amending the CCPA so that all young people's traffic matters are brought within the proper jurisdiction of the Children's Court.

Recommendation 12: Youth Traffic Offender programs should be widely available as a sentencing option in the Children's Court.

Operation of the CCPA

Commencement of proceedings against children

On face value, s8 of the CCPA suggests that in the vast majority of cases a young person should *not* ordinarily be subjected to arrest and charge at a police station. Section 8 provides that criminal proceedings should be commenced against a young person by way of a court attendance notice except in the case of serious indictable offences or some drug offences, or except in circumstances where it is believed the young person is unlikely to comply with the court attendance notice or is likely to commit further offences.

In spite of this, the alarming number of children and young people on remand and the large number of children and young people with bail conditions indicates that s8 of the CCPA operates very differently in practice.²⁹ When the CCPA was first enacted, the intention was to ensure that the majority of proceedings against children were commenced by way of summons as opposed to arrest or bail. The subsequent introduction of court attendance notices (**CAN**)³⁰ to which bail can be attached overrode the position that children should not be remanded or bailed to appear at court.

We need to embed the presumption that criminal proceedings against children should be commenced by way of a Field, Future or No Bail CAN. Conditional bail or bail refusal should be reserved for the most serious of offences. Section 8 should be amended to accord with the principle that arrest and detention is the last resort.

The YJC recently submitted to the NSW Government's bail inquiry (by way of written submission to the NSW Law Reform Commission) that where possible, bail should be dispensed with for children and failing that, there should be an entitlement or presumption in favour of bail. This reflects the intention of s8 of the CCPA, which provides that bail should be dispensed with unless *exceptional* circumstances clearly indicate otherwise, and s7(a) of the YOA, which provides that the least restrictive form of sanction should be applied to a child.

Recommendation 13: Section 8 of the CCPA should be amended to make clear that bail should be dispensed with for children and young people and failing this, there should be an initial presumption in favour of bail.

²⁹ NSW Law Reform Commission, *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System*, Consultations Paper 11 (2010) 30

³⁰ *Justices Act* was repealed and replaced with provisions in the *Criminal Procedure Act*

Limitations on the use of prior offences/convictions

Current limitations on the use of evidence of prior offences and convictions (ss14 and 15, CCPA) are appropriate in that they reflect the rehabilitative aims of juvenile justice and ensure that a young person's involvement with the criminal justice system will not prejudice them.

Recommendation 14: Current provisions regarding the recording of a conviction and evidence of prior offences should remain unchanged as they are consistent with the rehabilitative aims of juvenile justice.

Penalties

Both CROC and the Beijing Rules require a range of sentencing options for young people. Specifically, Article 40(4) of CROC requires that a variety of dispositions such as counselling, probation, education and vocational training programs and other alternatives shall be used to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence.

The penalties in Part 3 Division 4 of the CCPA provide a wide range of sentencing options. These apply to any proceedings that are being dealt with summarily or in respect of which a person has been remitted to the Children's Court under s20.³¹

There are however, concerns regarding disparity between metropolitan Sydney and regional areas in terms of access to the full range of sentencing options. For example, the Youth Drug and Alcohol Court (**YDAC**) is an innovative program offering the opportunity to participate in an intensive program of rehabilitation before being sentenced. Throughout the six-month program participants undergo detoxification and rehabilitation, attend educational and vocational courses, and appear regularly throughout that period before the YDAC. Whilst the program has expanded, it still has limited geographical spread, and is currently operating at Campbelltown, Parramatta and Bidura. Not only do young people in regional and remote areas not get access to this program, the level of community based drug and alcohol treatment services outside of metropolitan Sydney is largely inadequate.

Similarly, the Intensive Supervision Program (**ISP**) based on multi-systemic therapy is only available in western Sydney and Newcastle. The ISP targets serious and/or repeat young offenders aged between 10 and 16 years who are assessed as being at medium to high risk of re-offending or incarceration. The intended results of the ISP include a reduction in re-offending and incarceration, a reduction in substance misuse, improved family functioning, decreased behavioural problems at home, increased school attendance or uptake of training and employment opportunities, improved caregiver discipline practices and increase association with pro-social peers. In ISP the worker contracts with the young person's carer to agree to a number of strategies to deal with their current situation. The focus is on the family and the community rather than solely upon the young person. Young people in regional and remote areas would benefit from this program being more widely available.

³¹ In addition, a higher court, when dealing with a child committed for a serious indictable offence (other than a serious children's indictable offence) has a discretion to apply a more lenient sentencing regime rather than to deal with the child according to law (s18(1A)).

Recommendation 15: Sentencing options should be consistently reviewed in order to: (1) fully implement the policy aims of the CCPA; and (2) identify areas of the state in which the full range of sentencing options are not being utilised.

Background reports

Before imposing a control order, the Court must have a background report which is an assessment of the background of the child or young person completed by Juvenile Justice to assist the Court (s25, CCPA). Whilst this may be time consuming and lead to some delay in the finalisation of matters before the Children's Court, we submit that background reports are an effective way to address the s6 considerations of the CCPA and to uphold the principle of detention as a last resort. Background reports are particularly helpful where the defence solicitor has not been able to have access to the young person's family, teachers etc.

The matters listed in clause 34 of the *Children (Criminal Proceedings) Regulations 2011* (NSW) are appropriate for background reports, however the list should also include specific reference to possible mental health issues. The Regulations should also make clear that the report is to address not only the circumstances surrounding the commission of an offence, they should also consider what can be done to promote a young person's rehabilitation to assist the court to develop targeted sentencing outcomes.

Recommendation 16: Background reports should continue to be prepared by Juvenile Justice, in accordance with the current legislative requirements, when the court is considering a control order. The *Children (Criminal Proceedings) Regulations 2011* (NSW) should be amended to (1) include 'mental health' as one of factors that the report should have regard to; and (2) make clear that the report is to address not only the circumstances surrounding the commission of an offence, they should also consider what can be done to promote a young person's rehabilitation.

In some circumstances, we submit that other reports such as reports assessing mental illness or cognitive functioning should be made available to the court. Magistrates should be able to request such a report if a child or young person agrees to be assessed.

In relation to whether the court should have power to request a report from other government agencies to assess needs in respect of care and protection, we can identify benefits and possible disadvantages. Often children appearing before the Children's Court in criminal proceedings have pressing care issues. Empowering Magistrates to order reports from the Department of Family and Community Services would perhaps help to highlight these issues and may improve collaboration between government agencies.

However, the separation of the care and criminal jurisdictions should be upheld. It would not be appropriate for care considerations to be incorporated into criminal sentence proceedings as this would be likely to lead to confusion on the part of the young person as to what the court is trying to achieve.³²

The court faces significant difficulties in dealing with young people who are homeless, yet who are not known to the Department of Family and Community

³² Note 11, p209

Services. It is not always clear who has responsibility for young people that fall within this category. We support the NSW LRC's recommendation from 2005:

Recommendation 8.7 A Protocol should establish which department or departments has responsibility for a young person appearing before the Children's Court in a criminal matter who is in need of care and protection and/or bail or crisis accommodation. The Protocol should promote cooperation in such matters between the Children's Court, the Department of Juvenile Justice and the Department of [Family and] Community Services, in the child's best interests.³³

Amalgamation of the YOA and CCPA

Together, the CCPA and YOA are the core pieces of juvenile justice legislation in NSW. It has been argued that an amalgamation of these two pieces of legislation would allow for clearer interaction between them, and would further entrench diversionary options into the juvenile justice system. However, we submit that this goal may be achieved more simply without having to merge the two Acts.

In order to capture the critical way in which the two pieces of legislation interact, a clause could be inserted in the CCPA, expressly requiring consideration of the YOA diversionary options. This would perhaps be best placed in Part 2 'Criminal proceedings generally' of the CCPA, in either Division 1: 'Preliminary' or Division 4: 'Penalties'. Such a provision could state:

Where an offence falls within the jurisdiction of the Young Offender's Act 1997 (NSW) having regard to section 8 of that Act, a court must as a matter of first principle and throughout the course of that matter, consider the application of diversionary options under that Act, namely cautions (Part 4) and youth justice conferences (Part 5).

This would create a clearer progression from diversionary options under the YOA to more serious sanctions under the CCPA, and ensure that the YOA is not overlooked.

<p>Recommendation 17: That a provision be inserted in the CCPA requiring the court, as a matter of first principle and throughout the course of a matter, to consider the application of diversionary options under the YOA.</p>

³³ Note 11, p211