

The Shopfront

YOUTH LEGAL CENTRE

Attn: Kathrina Lo
Criminal Law Review
Department of Attorney-General and Justice
GPO Box 6
SYDNEY NSW 2001

9 December 2011

By email

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

The Shopfront Youth Legal Centre welcomes the opportunity to make a submission to this review.

Our response to the questions in your Consultation Paper is attached to this letter.

About the Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under.

Established in 1993 and based in Darlinghurst in inner-city Sydney, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Freehills.

The Shopfront employs 4 solicitors (3.2 full-time equivalent), 2 legal assistants, a paralegal (0.4 full-time equivalent) and a social worker. We are also assisted by a number of volunteers. Our two senior solicitors have many years' experience as criminal advocates for children and adults, and are accredited specialists in criminal law; one is also an accredited specialist in children's law.

The Shopfront represents young people in criminal matters, mainly in the Local, Children's and District Courts. We prioritise those young people who are the most vulnerable, including those in need of more intensive support and continuity of representation than more mainstream services can provide.

The Shopfront also assists clients to pursue victims' compensation claims and deal with unpaid fines. We also provide advice and referrals on range of legal issues including family law, child welfare, administrative and civil matters.

The Shopfront's clients come from a range of cultural backgrounds, including a sizeable number of indigenous young people. Common to most of our clients is the experience of homelessness: most have been forced to leave home due to abuse, neglect, domestic violence or extreme family dysfunction. Moreover, most of our clients have limited formal education and therefore lack adequate literacy, numeracy and vocational skills. A substantial proportion also have a serious mental health problem or an intellectual disability, often co-existing with a substance abuse problem.

Further comments and consultation

We would welcome the opportunity to make further comments or to attend consultations if you consider this would be helpful. In this regard, please do not hesitate to contact us, preferably by email.

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The Shopfront Youth Legal Centre is a service provided by Freehills in association with Mission Australia and The Salvation Army



Mission Australia

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Freehills

Yours sincerely

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Context

Question 1

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

In our view the current legislative approach is fundamentally sound. In particular, the *Young Offenders Act*, with its focus on diversion and restorative justice, takes an appropriate approach to juvenile offending.

However, we are of the view that some legislative amendments (particularly to the *Children (Criminal Proceedings) Act*, the *Bail Act* and the *Children (Detention Centres) Act*) are required to ensure that:

- the state of New South Wales fully complies with Australia's obligations under the UN Convention on the Rights of the Child and related instruments such as the Beijing Rules;
- children who offend, or who are alleged to have offended, are dealt with in an a developmentally appropriate way at all stages of the criminal justice process;
- detention is truly a last resort;
- adequate services and support are provided to young people involved with the juvenile justice system.

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

We are concerned that the focus of NSW's juvenile justice system has shifted too far towards holding children responsible for their behaviour, without adequately recognising the realities of adolescent development and the welfare needs of disadvantaged children.

We refer to the discussion at paragraphs 2.1 and 4.3 of the Consultation Paper about adolescent development.

Common to all children and young people, regardless of their socio-economic circumstances and their apparent level of intelligence or sophistication, is that adolescent brain development is not complete until well past the age of 18 (some would say not till about 25). A child is vastly different from an adult in terms of capacity for emotional regulation, impulse control and rational judgment, particularly in circumstances of pressure or stress.

Another important factor is the disadvantaged circumstances of many young people in the juvenile justice system, particularly those who repeatedly come before the court and those who spend time in detention.

We therefore prefer the focus (such as that adopted in Sweden and Scotland) on the needs and best interests of the child in criminal proceedings, without losing sight of the fact that there is an allegation in relation to a particular offence and a child has the benefit of the presumption of innocence and proper legal advice and representation in relation to that allegation.

We agree that the overlapping of children's criminal and welfare matters has had a vexed history in NSW. The old *Child Welfare Act* 1939 that preceded the current *Children (Criminal Proceedings) Act* 1987 criminalised children who came before the Children's Court, not alleged to have committed an offence, but rather as children in need of care and protection.

Rod Blackmore, former Senior Children's Magistrate, wrote, referring to the repealed *Child Welfare Act*, "A frequent criticism of the Act was that children thought to be 'neglected' or 'uncontrollable' were dealt with by Children's Courts in almost indistinguishable ways from offenders, and that powers of the court almost coincided to the point of absurdity." (Rod Blackmore, *The Children's Court and Community Welfare in NSW*, Longman Cheshire, 1989, pg 105).

However, we consider that the Swedish model does not pose the same problems. That model recognises that children charged with criminal matters often have welfare concerns. This does not result in the criminalisation of children for their welfare problems.

The right of children to due process is fundamental. However, we believe that this should be balanced with a model that focuses on the needs and best interests of the child rather than placing too much emphasis on the criminality of their conduct. It is arguable that the large number of children and young people in custody in NSW reflects the current focus on punishing rather than supporting the child.

The special training of prosecutors in Sweden, and the broad powers to waive prosecution where a suspect is under 18 years, is commendable. We support the theory that diversion in this way best avoids drawing children and young people inappropriately into the criminal justice system.

The compulsory involvement of welfare agencies in criminal prosecution may help address the problem of the drift of children from care to crime, and go some way to making welfare agencies take more responsibility for assisting young people involved in criminal matters. Welfare issues are undoubtedly of concern to our Children's Court, but there appears to be no clear process by which to address these issues in the context of criminal proceedings, especially at pre-sentence stage.

Our current system is not prioritising the principle of detention as a last resort – this is evidenced in the number of children in custody, in particular those on remand. It is not unusual in NSW for children to be refused bail because they have nowhere to go, or to be bailed on onerous conditions that are ostensibly aimed at addressing welfare problems but which instead expose vulnerable children to being arrested and detained for breach of bail. In this sense the punishment does not necessarily fit the crime; the bail system operates in a punitive way, out of proportion to the seriousness of the alleged offence, and detention is at times being used as a residential care placement for young people in care.

The focus on welfare rather than prosecution in Sweden and Scotland better promotes the principles of the United Nations Convention on the Rights of the Child (CROC), such as detention as a last resort, and that “...*alternatives to institutional care must be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence...*”¹. It is also indicative of a community taking some responsibility for children and young people who (before the age of rational choice) are engaging in offending behaviour.

Young Offenders Act 1997 (NSW)

Question 2

(a) Are the objects of the YOA valid?

We believe the objects of the Act remain valid.

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

No, we do not believe that any additions or changes are needed.

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

No, we do not believe that reducing re-offending should be a primary objective. The YOA is primarily focused on diverting young offenders away from formal court processes. Diversion has a number of benefits, of which reducing recidivism is but one.

However, we believe that a young person's rehabilitation should perhaps be included as an objective. Rehabilitation is broader than simply reducing re-offending, and involves promoting a young person's health, development, well-being and social inclusion.

¹ United Nations Convention on the Rights of the Child, Art 40(4)

Question 3

- (a) Are the principles of the YOA valid?
- (b) Are any additions or changes to the principles of the YOA needed?
- (c) Should reducing re-offending be addressed in the principles of the YOA?

We refer to our comments in Question 2. We make the same comments in relation to the principles of the YOA.

We support the addition of as principle to the effect that arrest is a last resort and a child should not be arrested if there is an appropriate and alternative means of dealing with them. The "least restrictive option" principle is important but it has not protected young people against inappropriate arrests. We refer to our answers to Questions 11, 15, and 18.

We also believe that there should be greater consistency in the principles of the YOA with the principles of the CCPA.

Question 4

Are the persons covered by the YOA appropriate?

Yes, the persons covered by the YOA are appropriate, subject to our comments about the age of criminal responsibility in our response to Question 21 under "*Children (Criminal Proceedings) Act 1987*".

Question 5

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

Yes. We believe that the general exclusion of all strictly indictable matters from the YOA is inappropriate. The YOA should apply to all offences for which the Children's Court has jurisdiction.

Question 6

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

For the reasons set out in our answer to question (b) below, we are of the view that too many offences are inappropriately excluded from the operation of the Act.

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

Offences where the investigating official is not a police officer:

We do not support the exclusion of matters where the investigating official is not a police officer.

We agree with the 2002 statutory review of the YOA that all offences for which penalty notices may be issued to children should be covered by the YOA. These offences are mostly of low objective criminality and should come under the purview of the Act. We agree that monetary penalties are inappropriate for children and young people and often cause significant hardship over an extended period of time.

We do not believe that "practical difficulties" should be the reason that the YOA is not extended to these offences. This is an example of where the interests and the needs of the child should have greater importance.

We believe there should be some process whereby, in the case of children and young people, penalty notice matters should be referred to a Police Youth Liaison Officer for consideration in relation to the YOA. We refer to our comments in our recent submission to the New South Wales Law Reform Commission (NSWLRC) reference on *Penalty Notices*.²

Traffic offences:

We believe that the YOA should apply to traffic matters. We refer to our answer to Question 33.

² http://www.theshopfront.org/documents/Penalty_notices_submission_to_NSWLRC_December_2010.pdf, p. 16 [6.5(1)]

We also refer to our comments below in relation to drug offences, where we express the view that conferencing can still be a valuable process even if there is no direct victim. Cautioning would also be an appropriate response to minor traffic offences.

An offence which results in the death of any person:

We agree that this exclusion is probably appropriate. However, we do see a role for restorative justice processes in relation to some offences causing death. For example, if a young person has killed another person (often a friend or a peer) as a result of dangerous driving, the friends and family of the deceased as well as the young offender may greatly benefit from the healing process afforded by restorative justice.

Sexual offences:

Although conferencing would probably be inappropriate for most types of sexual offences, we can see a role for the application of the YOA to some less serious sex offences, and we note that this has been at least tentatively supported by the Sentencing Council.

We are greatly concerned about the criminalisation of certain types of adolescent sexual behaviour (for example, consensual sexual activity between peers of similar age, where one or both is under the age of consent) and the lifelong stigma of a conviction, often accompanied by several years on the sex offenders register. Even if the Children's Court decides not to record a conviction, the *Criminal Records Act* deems it to be a conviction and moreover one which can never be spent.

For a discussion of these issues, we refer to the report of the NSW Legislative Council Standing Committee on Law and Justice Inquiry into *Spent convictions for juvenile offences*³.

In cases of age-appropriate consensual activity, or relatively trivial offences of indecent assault, we are of the view that such matters would be suitable for a conference or even a caution under the YOA.

Offences under the Crimes (Domestic and Personal Violence) Act:

The YOA should apply to offences under this Act. There is an anomaly in that a charge of breaching an AVO is excluded from the YOA, whereas a charge of assault (even assault occasioning actual bodily harm or recklessly inflicting grievous bodily harm) constituted by the same conduct can be dealt with under the YOA.

We agree with the comments made in submissions to the 2002 statutory review of the YOA, and in the report of the review itself, that these types of offences should not be excluded from the Act.

Please see also our recent submission to the statutory review of the *Crimes (Domestic and Personal Violence) Act 2007*, in which we provided a number of case studies and discussed the issues faced by our clients as respondents to AVO applications and defendants in proceedings for contravening AVOs.⁴

Drug offences:

In our view there is no justification for continuing to exclude all drug supply offences from the YOA. It makes no sense that cultivating of prohibited plants is included, while supply and manufacture type offences are excluded. If a young person who possesses or uses drugs, or who grows a small number of cannabis plants, could benefit from a YOA intervention, so too could a young person who supplies small quantities of prohibited drugs.

It is not uncommon for young people to share drugs with their friends, without any financial reward and without any appreciation that such conduct is legally on a par with "drug dealing". As noted in the Consultation Paper, "a forum such as a conference or caution may help the child more fully appreciate the extent and consequences of their actions and obtain assistance from rehabilitation and other services if necessary".

³

http://www.parliament.nsw.gov.au/Prod/parlment/committee.nsf/0/F899977BAA4DDC8DCA25775800057DF4?open&refnavid=LC5_5

⁴ [www.theshopfront.org/documents/Crimes_\(Domestic_and_Personal_Violence\)_Act_2007_-_submission_to_CLRD_November_2011.pdf](http://www.theshopfront.org/documents/Crimes_(Domestic_and_Personal_Violence)_Act_2007_-_submission_to_CLRD_November_2011.pdf)

In relation to the arguments advanced against including drug offences in the YOA, we respectfully disagree. We note that the Youth Drug and Alcohol Court is aimed at serious and repeat offending linked to a dependency on alcohol or prohibited drugs, and not at relatively minor drug offences. In relation to conferencing being inappropriate for offences with “unidentified victims”, we are still of the view that conferencing can be effective even if no direct victim is involved. We also note that police cautioning is not dependent on there being any victim.

Question 7

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

We agree with the recommendation of the 2002 statutory review that offences such as shoplifting be eligible for a warning. We also support the use of warnings for offences such as entering land with intent to steal, or destroy or damage property (where the damage is minor or the offence is an attempted one only).

We agree with the recommendation made by the NSWLRC which would provide forewarnings in relation to all offences covered by the YOA, unless specifically excluded by regulation.

If this is thought to be too broad, we would suggest that warnings should be available for all summary or Table 2 offences, possibly excluding those involving personal violence.

Question 8

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

We believe the current provisions are appropriate, although consideration might be given to allowing warnings to be used for very minor “violent” offences.

For example, a push or shove can technically amount to a common assault, but the violence is of such a low level that an informal warning would often be appropriate.

Question 9

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

In general we believe these provisions are appropriate and we are not aware of any concerns with their operation in practice.

Question 10

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

In general we believe these provisions are appropriate and we are not aware of any concerns with their operation in practice.

Question 11

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

Generally, the current provisions for giving a caution are appropriate. However, we are of the view that some changes are needed.

Firstly, we support the abolition of the three caution limit. As the Consultation Paper notes, this was not part of the original Act and has been criticised.

Secondly, we support an amendment to ensure that a child has access to legal advice *before* being asked to make any admission. While the Act provides that a child has a right to legal advice, it does not specify when such advice is to be provided. While we note that the current practice is for advice to be provided before any admission is made (usually via the Legal Aid Hotline for under 18s or the Aboriginal Legal Service Custody Hotline) the legislation should be amended to ensure this continues.

Finally, we note with grave concern the widespread police practice of arresting a young person before giving them the opportunity to seek legal advice and to make admissions. This is not within the spirit of the YOA and is not what was contemplated when the Act was introduced. We note the comments in Section 3.7.2 of the Consultation Paper about the use of arrest.

Although section 99(3) of LEPRA provides that arrest is a last resort, this does not seem to be enough to stop police from arresting young people in situations where diversion under the YOA is being considered. We believe there needs to be a provision in the YOA clarifying that a young person *must not* be arrested unless there is no other appropriate way of dealing with them.

In our experience there is a widely-held, but incorrect, belief among police officers that it is necessary to arrest a child in order to “give them their Part 9 rights” (i.e. the rights accorded to suspects who are detained after arrest under Part 9 of *Law Enforcement (Powers and Responsibilities) Act 2002* (LEPRA), such as legal advice and a support person).

It is of course possible to interview a child, and to facilitate access to legal advice and other support, without bringing them against their will to a police station. While arrest may often be more convenient for the police, police convenience should not take priority over the rights and interests of young people.

Please see further our response to Question 15.

Question 12

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

We refer to our comments about the use of arrest in our response to Question 11.

We support the retention of a cooling-off period. Even if a young person has received legal advice before admitting to the offence, this will often be via a brief telephone conversation and it is important that the young person have access to more comprehensive legal advice if wanted or needed.

Question 13

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

We believe these provisions are appropriate. We are not aware of any problems with their operation in practice; however, this is not to say that such problems do not exist and we would defer to people with more practical experience in this area.

Question 14

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

Yes.

(b) Are any additions or changes needed?

No.

Question 15

Are there any concerns with the comparative rate of conference referrals from police and the courts? If so, how should these concerns be addressed?

We note that it was originally intended that the majority of conference referrals would originate from the police, with the court and DPP providing something of a “safety net”. However, the reality is that police are responsible for less than half of all conference referrals.

Police officers often say that they would refer many more young people to conferencing if they would admit to the offence. Legal Aid and ALS solicitors are often blamed for advising clients to exercise their right to silence, thus depriving the young person of a conference referral.

We do accept that lawyers (including ourselves) often advise young people to exercise their right to silence. This is usually the most prudent advice in a situation where the young person is under

arrest and the advice is being provided by telephone without the young person or the solicitor being given a comprehensive outline of the allegations and the evidence against the young person.

In contrast, when a young person appears at court, there is the opportunity for a lawyer to provide face-to-face advice after reading a fact sheet (which, although it does not amount to evidence, usually contains a fairly detailed outline of the allegations).

We refer to our response to Question 11, and our concerns about the police practice of arresting young people before giving them the opportunity to obtain legal advice and decide whether to make admissions.

We believe the conference referral rate from police would increase if the police were to make arrest the exception rather than the rule, and instead release the young person and give them the opportunity to get legal advice before deciding whether to make an admission. To facilitate the proper provision of legal advice, a written outline of the allegations (in many cases a copy of the COPS event would suffice) would be sent to the young person or their nominated legal representative.

Question 16

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

We refer to our comments in relation to arrest and legal advice in our responses to Questions 11 and 15.

Question 17

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

Anecdotal evidence suggests that it is common police practice to require the child to participate in an ERISP (Electronically Recorded Interview with Suspected Person).

We are of the view that no-one should be compelled to participate in an ERISP, but should be able to choose to have their admissions recorded in a police officer's notebook (signed of course by the young person and their support person).

Compelling a young person to participate in an ERISP is undesirable for a variety of reasons; firstly, because it generally requires a young person to attend a police station; secondly, because it potentially exposes young people to further police questioning which goes beyond the scope of the offence to which they are being asked to admit.

Question 18

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

We refer to our answers to Questions 11 and 15.

It is important that legal advice be available before a child is asked to make an admission, and that this is enshrined in the Act.

We suggest that the Young Offenders Legal Referral Protocol referred to in the Consultation Paper should be the norm rather than simply a pilot in two Local Area Commands.

Question 19

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

Yes. As has already been noted, it is important that young people be able to progress to adulthood without the lasting stigma of a criminal conviction, unless the offence is particularly serious or there is a significant risk to public safety.

We note with concern that YOA interventions are still able to be disclosed in certain circumstances, such as when applying for child-related employment, and certain positions within the justice system.

Question 20

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

Yes.

There is a wealth of literature (including the sources cited in your Consultation Paper) showing that diverting young people has a number of benefits, including reducing re-offending.

Diversion is especially important in the light of recent developments around bail and custody. In recent years there has been a significant increase in the number of young people in custody in NSW, including children who are very young and who are charged with minor offences. It seems clear that much of this is due to the inappropriate imposition and enforcement of bail conditions. Research has shown that bail compliance checks and detention have no benefits, and indeed are likely to be detrimental, in terms of reducing recidivism⁵. This approach is clearly not working; it is time to return to the principles of diversion and to ensure they are applied more broadly.

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

Diversion is still a legitimate aim of the YOA. However, not all young people will be diverted under the YOA, and there is much room for improvement in terms of court processes and interventions.

In particular, there is a pressing need for support to be provided to young people at early stages of the court process, without the need for a guilty plea (or any plea) to be entered. All that the court currently has available is the blunt instrument of conditional bail, which imposes onerous obligations on young people without the support to meet them.

The Youth Conduct Order model, despite its flaws, contains some commendable elements: it takes a multi-agency approach and provides young people with support at a relatively early stage of the proceedings, while dispensing with bail and not requiring a plea to be entered.

We refer to our submission to the NSWLRC on *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System*, in which we suggested the adoption of a MERIT or CREDIT type model in the Children's Court⁶. This need not be confined to young people with substance abuse problems, or with cognitive and mental health impairments, but could be utilised for all young people with support needs that are not being met by their families or communities.

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

Yes, for the reasons outlined in section 3.11 of your Consultation Paper and in our response to Question 20(a) above.

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

Although the principles of youth justice conferencing include taking into account "the needs of any children who are disadvantaged or disconnected from their families", there is no mechanism under the Act to mandate the provision of services to a young person who needs them.

Perhaps Juvenile Justice or a similar agency should be mandated to provide support to young people who are dealt with under the YOA, as they are mandated to provide supervision to young people on court orders such as bonds and probation.

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

Yes, we are of the view that YOA interventions adequately cater for the needs of victims. In the case of a young person receiving a caution, there is a provision for a written apology to the victim.

⁵ We refer to the research cited in section 2.2 of the Consultation Paper.

⁶

http://www.theshopfront.org/documents/Young_People_with_Cognitive_and_Mental_Health_Impairments_in_the_Criminal_Justice_System_Submission.pdf, see responses to Q 11.1 on pp. 1-3, Q 11.21, pp. 12-14

In relation to conferencing, victims of course are essential to the process should they wish to be involved. Victims are much more likely to have their needs met through restorative justice than through more traditional criminal justice processes. As an example, research has established that victims participating in youth justice conferencing had very high rates of satisfaction with nearly all aspects of the process, including the outcome.⁷

Question 21

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

The over-representation of Aboriginal and Torres Strait Islander young people in the juvenile justice system, and their under-representation in terms of YOA diversion, is a complex problem that has persisted over the years.⁸ It is beyond the scope of this submission to fully discuss the complex issues involved. However, we would make the following suggestions:

We refer to our responses to Questions 11, 12, and 15 and 18 about the over-use of arrest and the benefits of the Young Offenders Legal Referral Protocol. Our experience shows that police are more likely to use the power of arrest in relation to indigenous young people than for their non-indigenous peers. In our view, the reduced use of arrest and the rolling out of the Young Offenders Legal Referral Protocol would help increase diversion rates for indigenous young people.

A criminal history should not be a bar to a YOA intervention but, in practice, it often is. It is well-established that Aboriginal and Torres Strait Islander young people more likely to possess a criminal record at an earlier age than non-indigenous young people.⁹

We support the affirmative action type approach proposed by His Honour Judge Norrish in his recent paper, *"Equal Justice" in Sentencing for Aboriginal People*.¹⁰ Judge Norrish argues that a legislative approach is required to directly alter the over-representation of Aboriginal people, generally, in custody. Similarly, a provision in the YOA could expressly state that a diversionary option must be considered in the case of an Aboriginal or Torres Strait Islander young person, as a first option. At least, express reference should be made to consideration of the circumstances of Aboriginal and Torres Strait Islander young people.

We also call for better funding of the Aboriginal Legal Service; current funding practices see Aboriginal and Torres Strait Islander legal services underfunded compared to Legal Aid Commissions. Their workload is comparatively greater, their resources fewer, and their court costs greater.¹¹ It has been argued that better funding would assist economic development in Indigenous communities, and reduce Indigenous over-representation.¹²

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

See our response to Question 21(a) above.

⁷ Trimboli, Lily, 'Participants' Views of Youth Justice Conferencing', from Chan, Janet B.L., *Reshaping Juvenile Justice: The NSW Young Offenders Act 1997* (2005, Institute of Criminology), 96

⁸ For a recent and comprehensive discussion of these issues, see House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, *Doing Time – Time for Doing: Indigenous youth in the criminal justice system* (2011, Parliament of the Commonwealth of Australia), p.

⁹ See, for example, Cunneen, Chris, and White, Rob, *Juvenile Justice: An Australian Perspective* (1995, Oxford University Press), 150

¹⁰ Judge Stephen Norrish, *"Equal Justice" in Sentencing For Aboriginal People*, a paper for the National Indigenous Legal Conference 13 August 2011

¹¹ Cunneen, Chris, and Schwartz, Melanie, 'Funding Aboriginal and Torres Strait Islander Legal Services: Issues of equity and access' (2008) 32 Crim LJ 38, 50-53

¹² *Ibid.*, 52-53

Question 22

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

It is our experience that young people with cognitive impairments or mental health issues are often at a significant disadvantage when being dealt with by police for an alleged offence. Developmental disabilities and mental health issues are often undetected by police, or by solicitors advising a young person by telephone. It is not unusual for a young person (particularly from a disadvantaged background) to lack insight into their condition, or the ability to communicate this to a solicitor over the phone.

We refer to our submission to the NSWLRC on *Young People with Cognitive and Mental Health Impairments in the Criminal Justice System*, in which we said:

We suspect that Young Offenders Act options are being under-utilised for young people with cognitive and mental health impairments. This could be due to a number of factors, including perceived unsuitability and instability, past behaviour which has led to involvement with the juvenile justice system and breaches of bail conditions. There is also a very understandable reluctance on the part of children's lawyers to advise a young person to admit a offence (a pre-condition for a caution or conference) where the lawyer is concerned about the young person's mental state or cognitive ability.

Conversely, there may be young people being inappropriately dealt with under the Young Offenders Act, for example, admitting to offences for which they had no mens rea and would not be found guilty by a court.¹³

In our experience, young people with emerging mental illnesses or developmental disabilities are often not diagnosed at the early stage of their entry into the juvenile justice system. We believe that these concerns could be partly addressed by a scheme that allows a young person an opportunity to seek out thorough legal advice, with the benefit of an outline of the allegations forwarded to the young person or their lawyer. It is in this context that a solicitor will have a proper opportunity to assess issues such as mental health or cognitive impairment, as well as any issues that might arise in relation to capacity to provide instructions or make admissions.

We also refer to our earlier submission to the NSWLRC on *People with Cognitive and Mental Health Impairments in the Criminal Justice System*, in which we proposed a pre-court diversionary scheme which would not require the person to admit the offence¹⁴. In that submission we said:

It must also be carefully considered whether a person would have to admit the offence to be eligible to be dealt with under the scheme. If this were the case, it is important that such an admission could not form part of the person's criminal history or be used against the person in any future proceedings. Given that a dismissal under s32 of the Mental Health (Forensic Provisions) Act does not require an admission and does amount to a finding that the offence is proved, it is difficult to see any advantage in being dealt with under a diversionary scheme in preference to s32, if diversion were to result in a finding that the offence was proved.

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

Please refer to our answer to Question 22(a).

¹³

http://www.theshopfront.org/documents/Young_People_with_Cognitive_and_Mental_Health_Impairments_in_the_Criminal_Justice_System_Submission.pdf, response to Q 11.13(1), p. 10

¹⁴

http://www.theshopfront.org/documents/People_with_Cognitive_and_Mental_Health_Impairments_in_the_Criminal_Justice_System_Submission_to_NS.pdf, Section 2, Pre-court diversion, pp 2-4

Question 23

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

Yes, we believe this would be of benefit. We also support the re-introduction of the Juvenile Justice Advisory Council.

Children (Criminal Proceedings) Act 1987

Question 21

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

Yes, we are of the view that ten years of age is too low. This is primary school aged, not even adolescence. If children in early adolescence have a lower level of emotional and intellectual maturity than in later adolescence, it is undoubtedly lower for primary school aged children.

In our view a change to the age of criminal responsibility sits best with our obligations under international instruments to prioritise the well-being of children and to ensure that the response is proportionate to the young person's circumstances and to the offence.

We believe that 13 should be the minimum age of criminal responsibility and note that in Sweden it is 15. The Swedish focus is on diversion and prevention and, according to the comments in your Consultation Paper, the rates of incarceration are extremely low. Detention and other punitive sanctions are regarded as inhumane and in conflict with CROC.

We agree fundamentally that criminal charges and court proceedings for children under 13 years are not the appropriate sanction for this age group. The recent literature about adolescent development and the age of criminal responsibility provides cogent arguments in support of this position¹⁵.

As noted in section 2.1 of the Consultation Paper, we note that offending rates peak at the age of 16 or 17¹⁶, and it could be said that most children "grow out of crime".

However, there is a significant number of children and young people who will not "grow out of" offending, at least not unless they are provided with a great deal of support to overcome difficulties such as homelessness, disability, mental illness and unresolved trauma¹⁷. Such support is best provided in a holistic way that does not involve a punitive approach.

Question 22

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

The structure of the Act could undoubtedly be improved and we would be happy to be involved in further consultations about this. However, in the context of this submission, this is not a pressing issue.

Question 23

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

We believe that the guiding principles set out in CCPA should be reviewed.

¹⁵ See, for example, 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 289-308, cited in section 4.3 of the Consultation Paper.

¹⁶ Australian Bureau of Statistics, *Recorded Crime – Offenders*, 2009-10, ch. 2, p. 13

¹⁷ This is also acknowledged in section 2.1 of the Consultation Paper.

Consistency with Convention on the Rights of the Child

The CCPA was proclaimed in 1987. Australia became a signatory to the United Nations Convention on the Rights of the Child in 1991.

The principles of the Act should clearly reflect the sentiment in Article 40 of CROC, which provides that a child, in the criminal process, shall be treated “*in a manner consistent with the promotion of 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.*”

Detention as last resort

The principles in the CCPA could better reflect the principle that arrest, detention and imprisonment of children and young people is a measure of last resort and for the shortest appropriate period of time (as in CROC Article 37 (b)).

Children not to be treated more harshly than adults

Further, it is important to include a principle that a child should not be treated more harshly than an adult at *any* stage of the criminal justice process, including in any decision as to arrest or bail.

The current principle that “*The penalty imposed on a child for an offence should be no grater than the imposed on an adult who commits an offence of the same kind*” is largely adhered to when it comes to sentencing.

However, children are often subject to far more onerous bail conditions than those imposed on adults. We have heard some Children’s Court magistrates justifying this approach as being consistent with the “guidance and assistance” principle in s6(b). In our view this is unacceptable. Although bail is ostensibly *not* about punishment, there is no doubt that bail conditions and breach action do have a punitive effect on young people.

Children entitled to the assistance of the State

We are of the view that the principles should include a comment that children are entitled to the assistance of the State. We refer to our previous comments about the disadvantaged situation of many children who are involved in the juvenile justice system.

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

We believe that there should be consistency in principles between the CCPA and the YOA. However, unless the two Acts are to be merged, there will need to be some differences in recognition of the different purpose of each Act.

We believe that the principles in the YOA are relevant in criminal proceedings in the Children’s Court. In particular, if the Children’s Court is of the view that criminal proceedings were unnecessarily commenced, the court may take this into account (for example, in deciding whether to impose a YOA caution, to refer the child to a youth justice conference, or in terms of appropriate penalty).

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

We do not see the need for an objects clause, but if one is to be adopted, we suggest it would include responding to children who are alleged to have offended in a developmentally-appropriate way that accords children due process while promoting their rehabilitation.

Question 24

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

We believe there is a need for legislative amendment to ensure that arrest is truly a last resort and that bail is dispensed with in most cases involving children.

The original section 8 of the CCPA was drafted to ensure that the majority of children and young people were diverted from the process of arrest, charge and bail determination. The presumption was that young people would receive a summons or court attendance notice (CAN), rather than be arrested and charged. The provision sought to directly limit a child or young person’s experience of arrest and detention at the commencement of criminal proceedings.

As noted in the Consultation Paper, the current wording of the legislation does not directly create a presumption of proceeding by way of court attendance notice without arrest and detention. This is a change that occurred inadvertently when other legislation introduced changes in terminology.

To address this inadvertent change in process and in order to satisfy our obligations under CROC (specifically Article 37(b)) the section should be amended to accord with the principle that arrest and detention is the last resort. We need to return to a presumption that criminal proceedings against children should be commenced by way of Field, Future or No Bail CAN, and that conditional bail or bail refusal should be reserved for the most serious of circumstances.

Although section 99(3) of LEPRA provides that arrest must be a last resort, this still does not provide adequate protection against children being arrested, given Bail CANs and “loaded up” with bail conditions.

Section 8 also reflects the desirability of dispensing with bail, rather than expecting children to comply with bail conditions. In recent years, much has been said and written about young people and bail in NSW, and particularly about the disturbing increase in the numbers of young people on remand. See, for example, the Youth Justice Coalition’s *Bail Me Out* Report,¹⁸ the Noetic Report, and our recent submission to the NSWLRC reference on *Bail*.¹⁹ The high number of young people on remand in NSW (about 80% of who do not go on to receive a control order) illustrates the problem and injustices created by the inappropriate imposition and enforcement of bail conditions.

We note that the NSWLRC is soon due to report on its bail reference, and it is possible that it will recommend some legislative changes in relation to young people and bail. As we said in our submission to the NSWLRC reference on *Bail*, we believe the CCPA should take precedence over the *Bail Act*, and not the other way around as is currently the situation.

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

In general, the more serious the alleged offence, the greater the justification for imposing conditional bail or for refusing bail altogether. However, there should be no invariable or inflexible rule about this.

In the course of the NSWLRC’s current reference on bail, many comments have been made about the inappropriateness of the current offence-based presumptions in the *Bail Act*. The weight of opinion suggests that a range of considerations should be taken into account, not just the nature of the alleged offence.

Question 25

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

Members of the public should continue to be excluded in order to protect a child’s privacy.

We believe that media should also be excluded, given the vulnerability of children and the potential impact on young lives of any media coverage, whether the young person is identified or not. At the very least we support a presumption that media are excluded except with the leave of the court. The decision should rest with the judicial officer, taking into account any views expressed by the young person.

We note that the YOA does not permit media to attend youth justice conferences, unless they somehow come within section 47(3), which provides: “*The conference convenor may permit a person to attend a conference for the purposes of carrying out research or evaluation that has been specifically approved by the Minister, but only with the consent of the child the subject of the conference and any victim. Any such person may not participate in the conference.*”

¹⁸ Katrina Wong, Brenda Bailey and Dianna T. Kenny, *Bail Me Out: NSW Young People and Bail*, Youth Justice Coalition, pp. 4-5 [s. 1.3]

¹⁹ [www.theshopfront.org/documents/Bail - submission to NSWLRC July 2011.PDF](http://www.theshopfront.org/documents/Bail_-_submission_to_NSWLRC_July_2011.PDF)

We also support a tightening of the restrictions on media reporting of criminal proceedings involving children. Please see our submission on *Publication of Names of Children Involved in Criminal Proceedings*²⁰.

It might be said that the presence of the media and their ability to report on Children's Court proceedings promotes "open justice" and a greater public understanding of the Children's Court. However, the presence of media in adult courts, and their ability to report on proceedings, does not seem to have improved public understanding of the criminal justice system. We refer to the comments of Dr Don Weatherburn on the often sensationalist and irresponsible media reporting of criminal proceedings, referred to in our preliminary submission to the NSWLRC on *Sentencing*.²¹

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

We are of the view that any non-conviction of a child in the Children's Court should be inadmissible in the adult jurisdiction.

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

If it is to be retained, section 15 should be amended so that it is easier to understand and to clarify what it is trying to achieve.

As the decision in *Tapueluelu v R* [2006] NSWCCA 113 makes clear, a literal reading of the section can lead to results which are somewhat odd and which may not have been what Parliament originally intended.

For example, a young person is dealt with by the Children's Court for an offence of armed robbery at age 15. She pleads guilty and receives a 12-month probation order without conviction. At the age of 19 she appears in the Local Court for an offence of possess prohibited drug. Section 15 precludes the court from taking the juvenile matter into account. She is fined \$50 for the drug offence. Twelve months later, she is charged with a further offence and this time, her juvenile criminal history is admissible, because less than two years has elapsed since her last offence.

We believe that inadmissible evidence of a non-conviction in the Children's Court should not be "revived" by a subsequent adult offence.

Question 26

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

Any court dealing with children should be required to comply with the principles of the CCPA.

We would prefer that all courts, including superior courts dealing with serious children's indictable offences, be required to apply the sentencing options in the CCPA rather than adult sentencing options. This would mean, for example, that a custodial sentence imposed upon a child would always be a control order and never a sentence of imprisonment. Of course, the Act would need to provide for an increased jurisdictional limit so that superior courts imposing control orders are not constrained to a maximum of two years.

If the application of adult sentencing options to juvenile offenders is to be retained, we submit that such options should only be available if the young person has already turned 18 by the time of sentence. No child under 18 should be sentenced to imprisonment, even if it is to be served in a juvenile detention centre or juvenile correctional centre.

Although there is justification for very serious offences to be dealt with in superior courts, with more severe penalties than those available to the Children's Court, we see no justification for treating children as adults. No matter how serious the offence, children are developmentally different from adults and must be treated accordingly.

²⁰ http://www.theshopfront.org/documents/Publication_of_names_of_children_involved_in_criminal_proceedings.pdf

²¹ http://www.theshopfront.org/documents/Sentencing_Shopfront_Preliminary_Submission.PDF, p. 3 [1.2]

Question 27

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

The current section 18(1A) places too much focus on the offence, rather than the circumstances of the child or young person.

The young person’s subjective circumstances (for example, mental health or disability), and any progress in terms of personal rehabilitation or need for rehabilitation, should also be listed as factors to be taken into account.

Question 28

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

No. It is our experience that this age group is extremely vulnerable in adult custody. We would like to see a broadening of the section to ensure that young people who are under 21 years and offended as a child serve their sentence in a juvenile detention centre.

Question 29

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

We believe it is helpful for the contents of background reports to be prescribed in legislation or regulation.

We agree with the comments in the Consultation Paper that section 25 of the CCPA and clause 34 of the Regulations are too narrow in their requirement that background reports focus on the circumstances surrounding the offence. There should also be comments about current circumstances, progress toward rehabilitation and appropriate sentencing options. These matters are highly relevant to sentencing of children and young people and should be included in the reports. While in practice they often are included, this needs to be enshrined in legislation. We would add that perhaps “background report” is not the most appropriate term for such a report.

We are concerned that there seems to be a move within Juvenile Justice to make background reports shorter and more along the lines of pre-sentence reports prepared by the adult Probation and Parole Service. We would resist any such trend. Currently we find Juvenile Justice background reports extremely helpful for us as children’s advocates. These issues relevant to the sentencing that can be difficult for a solicitor to draw out from a young person before sentence. We believe that the court also finds them helpful in sentencing decisions. Background reports ensure that children coming before the Children’s Court have the benefit of these highly relevant factors being taken into account in sentence.

(b) Should the contents be prescribed in legislation?

The contents should be prescribed in legislation to ensure consistency. There should be some mention of health issues, in particular, mental health.

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

In some circumstances other reports should be available to the court, for example, reports that assess cognitive functioning or mental illness.

If a child or young person consents to participating in such an assessment process, the court should be able to request such a report, to be prepared and funded by an appropriate government agency.

Currently, limited reports are available from Justice Health Mental Health Court Liaison workers at some courts. In most cases, psychiatric and psychological reports are organised by the child’s legal representative, with the assistance of very scarce Legal Aid funding²².

²² In some cases there is no Legal Aid funding available for these reports. We have heard anecdotal evidence that the Aboriginal Legal Service has no funds available to obtain psychiatric or psychological reports.

We also refer you to our preliminary submission to the NSWLRC on *Young People with Cognitive and Mental Health Impairments*, particularly our response to Q 11.32.²³

Question 30

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

Yes. There is a documented drift of children from care to crime. Often children appearing before the Children's Court in criminal proceedings have pressing care issues.

Our experience is that traditionally (in many cases) the Department of Family and Community Services (formerly DoCS) have formed a view that once the child or young person is before the criminal court, then it is the responsibility of Juvenile Justice to provide services. This is confusing the underlying issues as to why so many young people in care find themselves also involved in criminal proceedings.

A provision that a magistrate may order a report from relevant government departments (including Family and Community Services) highlights the importance of actively addressing the care needs of these young people, and confronting the real issue of the drift from care to crime for many young people. It will also allow more emphasis on the relevant departments working together with a young person.

Question 31

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

We support the majority of criminal matters being dealt with in the Children's Court. This is the appropriate jurisdiction for the vast majority children and young people.

However, we acknowledge that matters of the utmost seriousness should continue to be dealt with by superior courts. We do not have any comments on the list of serious children's indictable offences.

Question 32

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

Yes.

In particular, we are of the view that there should be separate hearings for co-accused where one is a child and the other an adult who is more than 3 years older than the child. We understand that this involves two hearings, one in the Children's Court and one in the adult jurisdiction. However, we believe that there is a valid concern about the potential adverse influence of this older adult co-accused on a child or young person.

We are firmly of the view that the child's matter should continue to be dealt with by Children's Court.

Question 33

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

Absolutely, yes.

The history of a separate jurisdiction for children and young people alleged to have committed offences has traditionally reflected the acceptance that different principles and practices should apply. It is simplistic to draw the line at traffic offences and argue that they are more "adult like" than other offences. This argument appears artificial when considering that the Children's Court

²³

http://www.theshopfront.org/documents/Young_People_with_Cognitive_and_Mental_Health_Impairments_in_the_Criminal_Justice_System_Submission.pdf, response to Q 11.32, pp 16-17.

can deal with serious matters such as break, enter and steal, robbery matters or obtain benefit by deception type matters, and the list goes on.

We refer to the comments in the "Context" section of the Consultation Paper that refer to "adolescent brain development" which differentiates adults from young people. The Consultation Paper comments, *"it is now widely accepted that these factors, as well as children's vulnerability, immaturity, and lack of experience more generally, necessitate a different criminal justice response to offending by children."*

We are of the firm view that this applies equally to traffic matters as it does to any other matter. The current process by which children are taken before adult courts (often unrepresented) is inappropriate, disproportionately punitive and arguably in breach of our obligations under CROC.

Although there is provision for the Local Court to exercise the sentencing options under the CCPA, it is our experience that many Local Court magistrates are unaware of, or fail to consider, the provisions of the CCPA. The tendency in the adult jurisdiction is to apply the sentencing principles and options relevant to adults. Children can suffer harsh penalties and lengthy disqualifications which are often inappropriate to their age and circumstances.

Further, children are not always legally represented in the Local Court, even though they should be entitled to Legal Aid. When they are represented, duty solicitors are not always well-versed in the special legislative provisions applying to children.

The comment that the focus of traffic offences is deterrence and public safety as providing some rationale as to why matters are dealt with in the Local Court, ignores the fact that the Children's Court is still able to impose deterrent measures such as disqualification where appropriate. It also ignores the fact that punitive and deterrent sanctions are unlikely to be effective when applied to children and young people.

The comment that *"...since the ability to obtain a licence is a privilege extended to adults, all traffic offenders should be dealt with as adults"* is misconceived. It is adults who extend this "privilege" to young people with full knowledge of developmental difference between adults and children. This is despite what is described in the Consultation Paper as a "higher risk" when children and young people are driving. If the concern is so great, than perhaps there should be reflection on the licensable age. However, we note that there are already a number of restrictions placed on learner and provisional drivers, recognising that young drivers generally pose a higher risk to road safety than more mature drivers.

In fact, the acknowledged over-representation of young drivers in traffic offences and accidents suggests that young people who commit traffic offences should be treated differently to adults. Rather than the punitive and deterrent measures which are applied to adult traffic offenders, young people require a rehabilitative approach to assist them to become safer drivers.

We recommend that all traffic offences allegedly committed by juveniles should be dealt with in the Children's Court. Children are less mature and more vulnerable than adults; they also respond less effectively to punitive and deterrent sanctions. They deserve the special protection, and the rehabilitative approach, afforded by the Children's Court.

We also submit that, while the Children's Court should have power to impose licence disqualification, automatic and mandatory disqualifications should *not* apply in the Children's Court.

The case study below is based on a client of the Shopfront Youth Legal Centre. Regrettably this is not an isolated example, but is indicative of the problems faced by young people whose traffic offences are dealt with in the adult jurisdiction.

Case study: Marco

Marco, now in his mid-20s, grew up in a household where he witnessed and was subject to serious domestic violence from his stepfather. As a result, he missed significant periods of his schooling, and at age 17 he moved out of the family home to live with his foster grandmother.

Marco was initially unable to obtain a licence because he had insufficient documentary identification to satisfy the Roads and Traffic Authority. His birth certificate bears one surname but his other documentary identification, including school records from 1992

onwards, bore another. By the time he had managed to gather the necessary identification documents, he was already disqualified from driving.

Marco's first two offences of driving while unlicensed were committed while he was under 18, and dealt with by the Local Court. Most of Marco's traffic offences were committed near the family home or near his foster grandmother's place. Driving was an escape for him during a turbulent period in his life.

By the time he turned 18, Marco was already disqualified from driving until the age of 23. He committed further offences of driving while disqualified at age 18. As a result, Marco ended up being disqualified from driving for a total of 9 years from 2002 to 2011.

Court records show that Marco was unrepresented on every court sentence date, except his last one in 2003. Being unrepresented, Marco did not have anyone to assist him to place before the court any submissions about mitigating circumstances or (when he was still a juvenile) about the use of sentencing options under the *Children (Criminal Proceedings) Act*. Nor did Marco have access to any legal advice about his appeal rights (unfortunately he did not become aware of the service provided by the Shopfront Youth Legal Centre until some years later).

Marco's most recent traffic offence was committed in December of 2002, and he has demonstrated good behaviour and maturity since that time. In 2008 we sent a petition to the Governor of New South Wales seeking that Marco's licence disqualifications be remitted. This application highlighted the obstacles faced by Marco in his apprenticeship as a mechanic, and getting to and from work without a licence, as well as the mitigating circumstances surrounding Marco's offences, but was ultimately unsuccessful.

Question 34

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

No. In our view the legislation already makes it clear that a child can be sentenced to a control order for a traffic offence (although of course this will rarely be appropriate).

Question 35

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

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

Yes, it is appropriate for Children's Court magistrates to retain this discretion. The Children's Court is a unique jurisdiction and it should not be open to the prosecution to make an election.

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

Yes. We acknowledge that the current section 31 is problematic because, until the close of the prosecution case, no-one is certain whether a hearing for an indictable offence is a summary hearing or a committal hearing.

We refer to the discussion in the report of the previous working party. No recommendation was ultimately made, as the members of the working party were not in unanimous agreement. However, a model was proposed which we support in principle.

In matters where the child has entered a plea of not guilty, we suggest that the prosecution should be able to make an application under section 31 once the brief of evidence has been served. The prosecution should be able to tender the brief and the child's criminal history, and the defence should be able to tender any material on the child's subjective circumstances.

If the magistrate decides the matter may not properly be disposed of in a summary manner, the matter would proceed as committal proceedings, and the child would retain the right to make an application under section 91 or 93 of the *Criminal Procedure Act* to have prosecution witnesses called for cross-examination at committal.

If the magistrate decides that the matter should be dealt with summarily, he or she should (on the application of the defendant) be required to disqualify himself or herself from presiding over the hearing.

If the child wishes to elect to “take his or her trial according to law”, this election should be done before the matter is set down for hearing.

Where a plea of guilty is entered, the prosecution should be required to make any application at the time the plea of guilty is entered. However, it would be open to the magistrate to defer making a decision until a background report has been obtained. A background report may contain compelling information about the child’s subjective circumstances that would support the matter being dealt with summarily.

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

We would support a provision along the lines of Section 18 (1A).

Question 36

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

In the main, they are appropriate, with the exception of the suspended control order provision.

Suspended sentences

The implications of a suspended sentence are not always well understood by young people, which often sets them up for failure. Often magistrates treat a suspended sentence as a non-custodial option - however, on a breach, full-time custody is often the end result.

We refer to our submission to the Sentencing Council on *Suspended sentences*,²⁴ and in particular to the following extracts:

The replication of the adult provisions into the Children (Criminal Proceedings) Act without any modification has caused serious problems for juvenile offenders.

And

There are good reasons why suspended sentences are inappropriate for children. Their relative lack of maturity means that children cannot always comprehend the potential consequences of breaching a suspended sentence. A young person may understand when told by the magistrate “If you breach this order, I will have to send you to detention for 6 months”, but it is another thing for a child to be able to apply this in practice. Immaturity, impulsivity and a lack of agency over their lives make children more vulnerable than adults to breaching a suspended sentence, either by re-offending or by failing to comply with conditions.

The lack of flexibility following a breach of a suspended sentence is an even greater problem for children than it is for adults. During the developmental phase of adolescence, a young person’s circumstances can change quite significantly in a short period of time. When dealing with juvenile offenders, a court at all times needs to have flexibility in its choice of sentencing options.

We are of the view that for children and young people, given their youth, immaturity and capacity, suspended sentences are inappropriate. If suspended sentences are to be retained for children, there should be a wider discretion to excuse a breach. Please see further our answer to Question 38(c).

²⁴ http://www.theshopfront.org/documents/Suspended_sentences_-_submission_to_NSW_Sentencing_Council_August_2011.PDF,

Case study – Troy

Troy is a young man who has been involved with the juvenile justice system since the age of 13. He has grown up in a dysfunctional household with inconsistent parenting, family conflict and, at times, physical violence.

Over the years Troy has been charged with numerous offences such as shoplifting, breaking into cars, common assault and minor property damage. These offences were relatively minor and, for a juvenile, would rarely attract a custodial sentence. After a while, police stopped considering diverting Troy under the *Young Offenders Act*, as he has “used up all his cautions” and was thought to have too long a criminal history for youth justice conferencing to be appropriate.

At age 16, Troy was charged with “use telecommunications service to menace/harass/offend”, a Commonwealth offence with a maximum penalty of 3 years’ imprisonment. He had sent an offensive Facebook message to a police officer who had arrested him (and according to Troy, seriously mistreated him) a few weeks previously.

Troy pleaded guilty and was sentenced to a 6-month suspended sentence under section 33(1B) of the *Children (Criminal Proceedings) Act*. Troy did not wish to appeal against the suspended sentence (and, given his criminal history, it was questionable whether an appeal would have been successful).

Troy responded well to Juvenile Justice supervision and did not re-offend for almost 6 months – by far the longest break in his offending history since he first came to the notice of the juvenile justice system.

Two days before the expiry of the suspended sentence, Troy was charged with shoplifting after he tried to steal some soft drink. This was an impulsive act motivated by thirst and the fact that he had no income at the time.

Troy pleaded guilty to shoplifting. His solicitor argued that the suspended sentence should not be revoked as there were good reasons to excuse the breach or, alternatively, the breach was trivial (as it involved and impulsive and unsuccessful attempt to steal a very small amount of property).

Troy’s solicitor submitted that “good reasons to excuse the breach” included the fact that the breach was committed only two days before the expiry of the suspended sentence, and that the consequences of revocation (a 6-month full-time custodial sentence) greatly outweighed the severity of the breach.

Troy’s solicitor noted that, for children, there is no intermediate option of periodic or home detention; a revocation of a suspended sentence automatically results in a full time custodial sentence. On this basis she submitted that the *Cooke’s* case should be distinguished, as *Howie J’s* decision partly turned on the fact that periodic detention and home detention were available as alternatives to full-time custody following the revocation of a suspended sentence.

Although this sort of submission has been accepted by some Children’s Court magistrates, the magistrate on this occasion was not persuaded, and Troy served a full 6 months in juvenile detention.

Non-association and place restriction orders

Non-association and place restriction orders are overly punitive and unfair to a young person. Young people’s choices over their movements and associations are limited, particularly in country areas. Moreover, young people’s lives can change quickly, and these orders can be setting up a young person for breach.

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

See our comments above and below in relation to the operation of suspended sentences.

We also have concerns about control orders. Although a control order is said to be a last resort, the number of children and young people (particularly Aboriginal and Torres Strait Islander young people) who are given control orders is of real concern. This is particularly so when comparing the

numbers with other jurisdictions such as Sweden (or, closer to home, Victoria), and considering the principles of CROC.

We support there being clear guidance in legislation, including a stronger statement that a control order is an absolute last resort, and that the court should place greater emphasis on the rehabilitation of a young offender than the principles of punishment and deterrence.

There should also be a direct comment in the legislation in relation to Aboriginal and Torres Strait Islander young people. In this regard we refer to our response to Question 21 (a) and to the paper by His Honour Judge Norrish *Equal Justice" in Sentencing for Aboriginal People*.²⁵

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

We submit that section 33(1) should be renumbered. Since the most recent amendments, it has become unwieldy and confusing.

Question 37

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

Yes.

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

Yes; we have heard that records are not being automatically destroyed as they should be.

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

Yes.

Question 38

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

In general, we are of the view that the provisions are appropriate. We particularly support the ability to apply to vary the terms of a bond or probation order, which is not available in the adult jurisdiction.

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

No, except for the provisions relating to suspended sentences.

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

As stated above, our primary position is that suspended sentences are inappropriate for children. If they are to be retained, there should be a wider discretion for children's magistrates to excuse a breach of a suspended control order.

We again refer to our submission to the Sentencing Council on *Suspended sentences*,²⁶ and our response to Question 36(a) above.

²⁵ Judge Stephen Norrish, *"Equal Justice" in Sentencing For Aboriginal People*, a paper for the National Indigenous Legal Conference 13 August 2011

²⁶ http://www.theshopfront.org/documents/Suspended_sentences_-_submission_to_NSW_Sentencing_Council_August_2011.PDF,

Should the two Acts be merged?

Question 39

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

We note the advantages and disadvantages of merging the two Acts, as outlined in the Consultation Paper. We accept that there are legitimate arguments both for and against the merger. On balance, we support the Acts being merged.

One Act would provide more consistency. It would give equal value to both diversionary and court processes, and would increase the legitimacy of diversionary options. It would also provide consistency in developing a set of principles that apply to children at all stages of the criminal justice system.

In relation to the concerns that the YOA could be “watered down” by such a merger, we believe that the legitimacy of YOA interventions could in fact be strengthened by including them in the same act as the current CCPA provisions. They would be seen as being integral to the juvenile justice system, rather than being marginalised as they sometimes unfortunately are.

We do not see that a merger of the two Acts would require significant retraining or changes in practice for police or other agencies. In our view, there is already a significant need for retraining police in relation to appropriate practice for dealing with children (in particular, arrest as a last resort) and in all likelihood there will be a need for further training if amendments are made to the *Bail Act* following recommendations by the NSWLRC.

If the Acts are merged, we believe that the objects and principles of both the current YOA and the current CCPA should be incorporated. This is subject to our comments in Question 23 about the need for review of the principles of the CCPA.

If the two Acts are to be merged, careful consideration should be given to its title. The current title of the *Young Offenders Act* is appropriate because the Act deals largely with young people who have admitted to committing offences (the exception being those who are given informal warnings). However, it would be inappropriate to use the term “offenders” in the title of any merged Act, as the CCPA applies not only to offenders but to children alleged to have committed offences, who may be subsequently found not guilty.

We suggest that a title along the lines of *Children and Young Persons (Criminal Proceedings) Act* or even *Children and Young Persons (Criminal Justice Interventions) Act* may be appropriate.

**The Shopfront Youth Legal Centre
December 2011**