

Our Ref: rbg578180

8 December 2011

Ms Kathrina Lo
Director
Review of the YOA and the CCPA
Legislation, Policy and Criminal Law Review
Department of Attorney General and Justice
DX 1227 SYDNEY

Dear Ms Lo,

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

The Law Society's Juvenile Justice Committee (Committee) welcomes the review of the *Young Offenders Act 1997* (YOA) and the *Children (Criminal Proceedings) Act 1987* (CCPA).

The Committee has reviewed the Consultation Paper and has responded to the issues raised in the attached submission.

Should you have any questions please contact the policy lawyer with responsibility for this matter, Rachel Geare, who can be contacted on 9926-0310 or by email at rachel.geare@lawsociety.com.au.

Yours sincerely,

Stuart Westgarth
President

Question 1

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

Apart from the suggestions for change made in this submission, the Committee is of the view that the legislative framework for responding to young people in trouble with the law is largely 'fit for purpose' and generally consistent with Australia's international obligations under the relevant United Nations instruments. The Committee's concerns are principally directed towards the operation of the laws in practice, and the absence of ongoing monitoring and research about most aspects of the operation of the laws. The Committee notes in particular the paucity of research in New South Wales that specifically seeks the views of the children and young people who are drawn into the ambit of juvenile justice responses.

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

The welfare based model in countries such as Scotland and Sweden is worth considering. In Sweden only 7 to 14 children and young people receive prison sentences a year, and the prosecution undertakes specialised training and has broad powers to waive prosecution. New South Wales could learn something from these models, without going down the vexed path of the old *Child Welfare Act (1939)* which had the effect of criminalising children brought to court (not alleged to have committed offences), but for welfare issues.

The models discussed in the consultation paper appear to have a different basis. That is, for children (in Sweden for example) who are alleged to have committed offences their best interests or needs take priority, rather than a focus on the offence. A model that focuses on the needs and best interests of the child and young person without losing sight of the fundamental importance of due process, the presumption of innocence and a child's right to proper legal advice and representation would indeed be interesting. It is arguable that this does not occur in New South Wales, given the rates of children and young people in detention, in particular those from Aboriginal and Torres Strait Islander backgrounds. The number of children who come before the courts with obvious, unaddressed care issues is always confronting to Children's Court practitioners, and is well documented. The drift of children from care to crime, despite the repeal of the *Child Welfare Act 1939*, continues to be an entrenched problem. In Sweden the focus appears to be on diversion from prosecution and attention to underlying causes of offending.

Young Offenders Act 1997

Question 2

(a) Are the objects of the YOA valid?

The objects of the YOA remain valid.

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

The objects of the YOA do not require amendment.

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

The purpose of the YOA is to divert young offenders away from formal court processes through the use of warnings, cautions and youth justice conferences. Reducing re-offending should not be an objective of the YOA.

Question 3

(a) Are the principles of the YOA valid?

The principles of the YOA remain valid.

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

The principles of the YOA could perhaps be more closely correlated with those of the CCPA.

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

The purpose of the YOA is to divert young offenders away from formal court processes through the use of warnings, cautions and youth justice conferences. Reducing re-offending should not be addressed in the principles of the YOA .

Question 4

Are the persons covered by the YOA appropriate?

The persons covered by the YOA set out in section 7A are appropriate.

Question 5

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

Yes. The Committee agrees with the NSW Law Reform Commission that the general exclusion of all strictly indictable offences from the YOA is 'inappropriate'¹. The Committee continues to support the recommendation of the 2002 statutory review of the YOA that the range of offences covered by the YOA be extended to cover all offences for which the Children's Court has jurisdiction to deal with to finality².

Question 6

(a) Is the current list of offences specifically excluded from the YOA appropriate? Is there justification for bringing any of these offences within the scope of the YOA?

Traffic matters should be able to be dealt with under the YOA and the CCPA (see Question 3.3).

Offences under the *Crimes (Domestic and Personal Violence) Act 2007* should be able to be dealt with under the YOA in appropriate matters. The Committee notes that many

¹ NSW Law Reform Commission, *Report 104: Young Offenders* (2005), para 4.22

² Recommendation 1, *Report on the Review of the Young Offenders Act 1997*, NSW Attorney General's Department, October 2002, pp 5 and 41.

children in care have AVOs taken out against them by their carers. There are multiple breach proceedings against children, many of which are insignificant, and could be dealt with appropriately by a conference or a caution. In nearly all matters the young person will have an on-going relationship with the family members or carers and institution involved in the breach. For all parties who will continue to have a relationship then a youth justice conference can be an excellent opportunity in a controlled environment to address the past problems and lay down ground rules for the future. Most times the young person will not have an alternative but to go back to the family or the care givers. A conference may be the only chance for them to voice issues that affect them and have them addressed.

Breaches of orders between siblings, or between children and their parents or carers raise different policy considerations than breaches of orders between domestic adult partners. Children and young people often lack the capacity to understand conditions of an AVO and the consequences of a breach, which can result in a criminal conviction. Penalties for breaches by children and young people should be different than penalties for adults and should focus on diversionary options.

Consistent with the response to Question 5, the Committee submits that the YOA should cover all drug offences capable of being dealt with by the Children's Court.

Question 7

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

Warnings should be available for a broader range of offences. The Committee agrees with Law Reform Commission recommendation 4.4³ that warnings should be given for all offences covered by the YOA unless an offence is specifically excluded by regulation.

The Committee strongly supports the recommendation of the 2002 statutory review of the YOA that warnings should be able to be given for larceny involving theft from a shop – a recommendation that was proposed and strongly supported by NSW Police in their submission to the review.⁴

Question 8

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

The provisions governing a child's entitlement to a warning need to be extended.

The limitation on a child's entitlement to be dealt with by way of a warning when the circumstances of the offence involve violence precludes the use of warnings for trivial actions (for instance a push or shove) that are categorised by law as assaults, and that are not uncommon in police interactions with some children and young people.

The legislation is silent on the meaning of the phrase 'in the interests of justice' in section 14(2)(b) and 14(4). The Committee considers that more guidance should be provided for police officers on the practical application of this limitation on the entitlement of children and young people to be dealt with by way of a YOA warning.

³ Report 104: Young Offenders (2005) para 4.48-4.50.

⁴ Recommendation 2, *Report on the Review of the Young Offenders Act 1997*, NSW Attorney General's Department, Sydney, October 2002, pp 5 and 41.

Question 9

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

To the knowledge of the Committee, no research has ever been undertaken on the operation in practice of warnings under Part 3 of the YOA. For this reason, the Committee is not in a position to comment on this question. The Committee strongly suggests that properly formulated research should be undertaken on the operation in practice of this important part of the YOA, and that this research should include the views of children, young people and their carers.

The Committee suspects that Aboriginal young persons do not receive warnings on appropriate occasions when a non-Aboriginal young person may receive a warning in similar circumstances. The research suggested above would shed light on the situation.

Question 10

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

Yes, the provisions governing the recording of warnings are appropriate. The Committee cannot comment about 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?

The limit of three on the number of occasions on which a caution can be given inappropriately limits the flexibility of the YOA, and is inconsistent with the original intent of the YOA, and with the principle of the YOA that a child is entitled to the least restrictive form of sanction⁵. All provisions⁶ relating to the limit should be repealed.

The Committee has concerns that the provisions governing the conditions for giving a caution are not always complied with.

Question 12

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

The legislative provisions that govern the process for arranging and giving a caution are appropriate.

The issue is not with the legislative provisions; the concern lies with their operation in practice. While there is no research on the matter, anecdotal evidence from practitioners suggests that the requirements relating to timeframes and notification of the child are often not complied with. Police should not arrest young people for the purpose of dealing with them under the YOA. A young person should have a right to legal advice *before* being asked to make any admissions. Although current practice is that legal

⁵ Section 7(a), *Young Offenders Act 1997*.

⁶ Sections 20(7), 31(5), *Young Offenders Act 1997*.

advice is provided before an admission, the legislation currently provides for legal advice before a caution or conference.

The Committee considers that research on the practical operation of the provisions on cautions should be undertaken as a matter of urgency.

Question 13

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

The provisions that govern the consequences of a caution are appropriate. The Committee has not been informed of any concerns with their operation in practice.

Question 14

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

The principles that govern conferencing remain valid.

A referral to a youth justice conference under the YOA or as a sentencing option under the CCPA (sections 40 YOA, section 33(1)(c1) CCPA) is overtly intended to keep young people out of custody. Youth justice conferences are designed to include the child's family and support people in the process, to reinforce respect for human rights and ensure that the child can assume a constructive role in society (sections 3 and 34 YOA). A properly convened youth justice conference also provides victims of offences committed by children and young people with the opportunity to appropriately participate in the decision making process.

(b) Are any additions or changes needed?

No additions or changes to the principles are required.

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?

The Committee is pleased with the number of Court referrals to conferences. The Committee is concerned that there are not more police referrals to conferences. This requires renewed police commitment to the effective operation of the YOA, under the leadership of the Youth Issues Sponsor, and in collaboration with youth justice conferencing staff and convenors in Juvenile Justice and with children's lawyers, particularly those in the Children's Legal Service of Legal Aid and the Aboriginal Legal Service Custody Notification Scheme who provide telephone advice to children in police custody.

One reason often advanced for the low rate of police referrals is that young people do not make admissions. In the Committee's view, there would be more police referrals to conferences (and cautions) if police did not arrest young people up-front, but gave them the opportunity to get legal advice (with the benefit of a written outline of allegations) first.

These concerns need to be addressed administratively, rather than by legislation.

Question 16

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

The Committee submits that the requirement for court approval of the outcome plan for court referred youth justice conferences should be removed. There is not a similar requirement for youth justice conferences that are referred by police. Alternatively, more guidance should be provided, perhaps in the *Young Offenders Regulation 2010*, for Magistrates and conference administrators on the intent and purpose of section 54(2) of the YOA.

The time limits⁷ for the holding of a conference after receipt of a referral remain problematic. The first review of youth justice conferences by the NSW Bureau of Crime Statistics and Research⁸ found that, on average, the time between acceptance of referral by a conference administrator and the holding of a conference was 40.3 days. The Committee understands that conferences are still not complying with the 28 days (if practicable) time line. There are often very good reasons for not meeting this suggested time limit, particularly where victims need to be given time to consider whether to accept the invitation to participate, and where a large number of potential participants need to be prepared for the conference by the convenor. The Committee awaits the findings of the evaluation of youth justice conferencing currently being undertaken by the Bureau of Crime Statistics and Research before making further comment on this point.

Question 17

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

Yes, more guidance should be provided to police, lawyers, and courts on what constitutes an admission for the purposes of the eligibility requirements for cautions and youth justice conferences⁹ under the YOA.

In New Zealand, children are not formally arrested unless the offence is serious and it is in the interests of justice to do so¹⁰, and are not required to make formal admissions to be eligible to be dealt with by way of a family group conference. Rather, the child is required to state at the conference that they do not deny the offence¹¹ – a less stringent requirement than a formal admission.

The Committee is very concerned about the widespread police practice of arresting young people before giving them the opportunity to seek legal advice and to make admissions.

A formal admission should not involve a record of interview. After a young person has been apprehended and has obtained legal advice they should be able to make admissions by acknowledging in writing that they admit each element of the offence. This can be done by signing a police notebook in the field or at a police station. Young

⁷ Section 43, *Young Offenders Act 1997*.

⁸ Trimboli, L, *An evaluation of the NSW Youth Justice Conferencing Scheme*, NSW Bureau of Crime Statistics and Research, Sydney, 2000, pp 62-63

⁹ Sections 10, 19(b), 31(1)(b) 36(b) and 40(1)(b), *Young Offenders Act 1997*.

¹⁰ See Part 4, *Children, Young Persons and Their Families Act 1989* (NZ) for the legal requirements for youth justice in New Zealand.

¹¹ See sections 245 and 246, *Children, Young Persons and Their Families Act 1989* (NZ).

people should only be required to admit their involvement and not be questioned on the actions of any other person.

At present, police are subjecting children who are eligible to be dealt with under the YOA to a full interview, on the assumption that the matter may ultimately proceed to court. Section 10 of the YOA requires only that an adult be present when a child makes an admission for the purposes of the YOA, not that the child be subject to a full interrogation. It is unfair to subject young people to a full interview - young people are immature, usually with low levels of comprehension, are often daunted by the whole process in an unfamiliar environment, where a real power imbalance exists.

The Committee considers that consideration should be given to the provision of training for police on the less stringent requirements that were intended for YOA eligibility by the framers of the legislation.

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?

The provisions governing the provision of legal advice to children under the YOA are appropriate. Section 7(b) sets out the principle that children are entitled to be informed about their right to legal advice, and to be given an opportunity to obtain that advice, and sections 22 and 39 clearly state that children must be informed by the investigating officer, *before* a caution is arranged or a conference referral is made, that this entitlement exists, and where the advice may be obtained. The Legal Aid Youth Hotline was specifically established in 1998 to ensure that legal advice could be obtained in practice by all children who are entitled under the YOA to be dealt with by way of caution or referral to a youth justice conference. The Aboriginal Legal Service Custody Notification Scheme has been operating since 2000 and ensures that all Aboriginal young persons who are apprehended by a police officer are given legal advice to obtain their entitlements under the YOA.

However, the Committee has some serious concerns about the operation of these provisions in practice. Members of the Committee have reported that police may not always clearly advise children about the availability of the Youth Hotline, and that some police do not ensure that the child can access the Hotline in private and at the earliest possible time. Anecdotal evidence available to the Committee indicates that some police do not provide solicitors with sufficient information about the nature of the offence or the facts of the matter to be able to properly advise the child. This can and does result in the claims made by some police that solicitors always advise the child not to make an admission, and contributes to the reluctance of some police to comply with the requirements of the YOA. The Committee is pleased that Legal Aid, the Aboriginal Legal Service and the NSW Police Force are working together to address the challenges from their respective positions in the provision of legal advice.

Question 19

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

The general rule that a warning, caution or conference does not have to be disclosed, including as criminal history is appropriate.

The exceptions to this rule relating to disclosure of a caution or conference contained in section 68(2) should be reconsidered. One of the benefits of diverting children from formal court proceedings is avoiding or reducing the stigmatisation of the child. Adults applying for certain employment opportunities should not have to disclose cautions or conferences from their childhood.

The interventions under the YOA should not be disclosed or taken into account in proceedings before the Children's Court (including sentencing proceedings).

Question 20

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

Diversion from the formal court process is the key aim of the YOA.

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

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

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

Questions 20(b)-(d) are premised on the wrong assumption. The legislation is not designed to address re-offending.

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

Only youth justice conferences were *designed* to cater for victims and they do so for those victims who agree to voluntarily participate in a conference. One of the strengths of a properly prepared and conducted conference is victim involvement. Where substantial harm has been suffered by a victim, this can be considered by a specialist youth officer when deciding whether the child should be dealt with by way of caution or referral to a youth justice conference (section 20(4) YOA). Following a recommendation made in the review of the YOA¹², the views of victims can now be relayed to a child by the person who delivers a YOA caution (section 24A).

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 Committee is very concerned that the diversion rates for Indigenous children and young people continue to be lower than those for non-Indigenous children and young people.

‘ The evidence .. shows that Indigenous young people are treated differently from non-Indigenous young people in the juvenile justice system, tending to receive more punitive outcomes when discretionary decisions are being made.’¹³

The evaluation of the Aboriginal Over-Representation Strategy found that:

¹² Recommendation 19, *Report on the Review of the Young Offenders Act 1997*, NSW Attorney General's Department, October 2002, pp 7, 53, and 54.

¹³ Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia* (4th edition) Oxford University Press, Melbourne, 2011, p157.

‘...there are still significant differences in the type of police intervention depending on whether the young person is Aboriginal or not. The most common outcome for a non-Aboriginal young person is a formal warning, while for an Aboriginal young person it is arrest and charge.’¹⁴

Changes to the legislation are not required; the issue relates to the operation of the YOA. There is a need for increased police awareness and training in relation to diversionary options such as cautions, warnings and conferences and a better understanding of the principles contained in the YOA.

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

The provisions of the legislation do not require amendment. The issue lies with ensuring proper compliance with the provisions. Compliance with the YOA by police, in particular when dealing with Indigenous children and young people, should be subject to ongoing monitoring, review and report to Parliament.

The Committee is of the view that continued reliance on criminal justice responses will never be sufficient to reduce the overwhelming number of Indigenous children and young people in the juvenile justice system. The issues surrounding the high level of involvement of Indigenous children and young people in the juvenile justice system are complex. The Committee refers the review to the extensive research undertaken by the NSW Bureau of Crime Statistics and Research on Indigenous over-representation in the criminal justice system, and to the large volume of work published by Harry Blagg, Chris Cunneen and Larissa Behrendt. This research has identified and analysed the social and political conditions under which the level of involvement of Indigenous children and young people in the criminal justice system has continued to increase, and the suggestions and recommendations made by these writers about appropriate avenues, often outside criminal justice, to address this complex set of issues and to reduce Indigenous contact with and engagement with police and other justice agencies.

Question 22

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

Yes. If a young person has a mental illness, a mental condition or developmental disability it is still generally the case that intervention under the YOA is preferable to Children’s Court proceedings and a section 32 order under the *Mental Health (Forensic Provisions) Act 1990*.

There can be difficulties for a solicitor to provide thorough legal advice (particularly by telephone) to a young person who might be suffering from one of these conditions, unknown at that point, to the solicitor. Mental Health issues and intellectual disability are not always obvious to police and advising solicitors, but still impact on capacity to instruct, capacity to understand advice and interaction by the child and young person with the police or the solicitor. Children and young people who experience these conditions have great difficulty articulating what condition they have, or in many cases have not been properly diagnosed. Often the diagnosis comes when they are more entrenched in the juvenile justice or criminal system. The problem is often the lack of

¹⁴ Chris Cunneen, Garth Luke and Nina Ralph, *Evaluation of the Aboriginal Over-Representation Strategy, Report to the NSW Department of Juvenile Justice*, Sydney Institute of Criminology, Sydney, 2006, p11.

diagnosis or understanding of the issues the young person is dealing with at the early stages of their contact with the legal system.

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

As outlined in our response to questions 17 and 18, the Committee is of the view that police do not need to conduct a formal interview with a child who is eligible and entitled to be dealt with by way of caution or referral to a youth justice conference under the YOA, or to undertake an investigative process. The YOA should be amended to provide more guidance on what is required to constitute an "admission" under the legislation (see Questions 17 and 18). This would assist in increasing access to cautions and conference referrals under the YOA for children with cognitive impairment and mental health impairment.

The Committee notes that, while the YOA provides an unusual degree of guidance on the exercise of police discretion, the Act is not intended to completely fetter its exercise¹⁵. Police use the legislation when it would be more appropriate to use a non-legislative solution, for instance when warnings are used prematurely. It is a principle¹⁶ of the scheme under the YOA that the legislation is not intended to usurp the use of police discretion, where appropriate, to deal with matters other than by reference to the legislation.

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, there is a need to reintroduce a body with an ongoing role to monitor and evaluate the operation of the YOA across the state. The body should have a legislative basis, membership that draws from agencies with responsibility for the effective operation of the YOA, victim and youth advocacy organisations, and be chaired by a well informed independent chair, and report regularly to Parliament.

General comment: Given that the YOA has now been law in NSW since April 1998, the Committee considers that the implementation phase is long over, so that references to implementation in the questions posed in the review seem curious and inappropriate, when the concern is, or now should be, with the *operation* of and compliance with the provisions of the YOA.

Children (Criminal Proceedings) Act 1987

Question 21

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

In NSW there is a conclusive presumption that a child under the age of ten cannot commit an offence.¹⁷

¹⁵ See, for example, Chan, J et al, 'Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997' (2004) 28 (2) *Criminal Law Journal* 72-92

¹⁶ See sections 7(c) and 7(d), *Young Offenders Act* 1997.

¹⁷ Section 5 *Children (Criminal Proceedings) Act* 1987.

Under the common law, children aged between 10 and 14 who commit criminal offences are presumed to be incapable of committing a crime because they lack the necessary knowledge to have a criminal intention. To rebut this presumption, the prosecution must prove that the child did the act charged and that when doing the act, the child knew that the act was seriously wrong in the criminal sense.¹⁸

The United Nations Committee on the Rights of the Child has repeatedly criticised England, Wales and Northern Ireland for having an age of criminal responsibility of ten years old,¹⁹ and has recommended that it should be raised.²⁰ The United Nations Committee on the Rights of the Child concluded:

‘... that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.’²¹

The Consultation Paper refers to research into adolescent brain development that links psychological development and offending; and has found that 10-14 year olds are prone to risk-taking behaviours, are impulsive, short-sighted and are particularly vulnerable to peer pressure.

In ‘*The age of criminal responsibility: developmental science and human rights perspectives*’ Farmer concludes that research suggests that:

‘...children aged ten and 11 are most definitely not competent to participate effectively in the legal system and have reduced culpability. Additionally, those particular ten and 11 year olds who come into contact with the YJS are likely to be especially vulnerable’.²²

The Committee does not support the current age of criminal responsibility. Research into brain development and a child’s rights perspective is inconsistent with an age of criminal responsibility of ten years old. The Committee fails to see how a primary school aged child has the capacity to form the necessary intent. The Committee submits that the age of responsibility should be a minimum of 13 (when the child is in high school rather than primary school).

Question 22

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

The Committee does not have an opinion on this issue; it is a matter for the legislators.

Question 23

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

¹⁸ For further discussion in relation to *doli incapax* in NSW see ‘Doli Incapax – the criminal responsibility of Children’, Matthew Johnston, paper prepared for the Children’s Magistrates’ Conference, 1 February 2006.

¹⁹ United Nations Committee on the Rights of the Child, ‘Concluding Observations: United Kingdom and Northern Ireland’, September 2008, para 77(a).

²⁰ Ibid, para 78(a).

²¹ United Nations Committee on the Rights of the Child, General Comment No.10, Children’s Rights in Juvenile Justice (2007), Para 32.

²² Elly Farmer, ‘The age of criminal responsibility: developmental science and human rights perspectives’, *Journal of Children’s Services*, Vol 6 No 2 2011, p91.

The original guiding principles and paragraphs (a) to (f) are valid and are broadly reflective of what came later in the Convention on the Rights of the Child.

The principles are watered down by the addition of (g) and (h). These principles should be deleted.

The principles should give less weight to general and specific deterrence and greater weight should be given to rehabilitation.

Article 37(b) of the Convention on the Rights of the Child states that arrest, detention or imprisonment of a child shall be used only as a measure of last resort. A statement to this effect should be included in the principles listed in section 6.

Section 6 should also include a principle that children should be assisted by the State.

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

Assuming that there are two separate Acts, there should be commonality between the principles of the two pieces of legislation, but they should also reflect the different purposes of the Acts.

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

The Committee does not consider that the CCPA needs an objects clause.

Question 24

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

Article 37(a) of the Convention on the Rights of the Child provides that arrest and detention should be a last resort. The legislation should clarify the presumption that children should not be detained or bailed to appear at court.

Section 8 of the CCPA needs to be updated to reflect the original intention of the section. The section states that criminal proceedings should not be commenced against a child other than by way of a CAN. Section 8 is referring to a “no bail”, “field” or “future” CAN rather than a bail CAN and the section should be amended accordingly.

Section 8(1) should also be amended to replace ‘should not’ with ‘must’ so that the section reads: ‘Criminal proceedings must not be commenced against a child otherwise than by way of court attendance notice’.

The experience of Committee Members suggests that police continue to arrest and question young suspects, and to refuse bail or impose unreasonable or impracticable conditions at unnecessarily high rates. On some occasions, police may charge a young person with an offence/s so that they can then be placed on strict bail conditions. Bail should be not be used as a social control mechanism by police on some young persons.

The Committee also notes with concern that Indigenous young people are more than twice as likely to be proceeded against by way of arrest and charge than non-Indigenous young people (46.8% compared to 21% in 2004).²³

²³ Chris Cunneen, Garth Luke and Nina Ralph, *Evaluation of the Aboriginal Over-Representation Strategy, Report to the NSW Department of Juvenile Justice*, Sydney Institute of Criminology, Sydney, 2006, p21.

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

The offences contained in section 8(2)(a) are appropriate, however section 8(2)(a)(ii) should be amended so as to only relate to offences involving a “commercial quantity” of a prohibited drug.

Section 8(2)(b) should be deleted.

Section 8(2)(c)(i) relating to the child’s violent behaviour should be deleted. It is appropriate for the violent nature of the offence to be considered under section 8(2)(c)(ii).

Question 25

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

Section 10(1)(a) provides that any person not ‘directly interested in the proceedings’ should be excluded from the court. This provision needs to be strictly enforced and upheld to exclude the media and the police who have no interest in the matter.

The protection relating to the admissibility of evidence in section 13 needs to be strengthened so that the protection is effective. The discretion in section 13(1)(b) is too broad, and Magistrates too readily admit statements, confessions and information when the person responsible for the child or the child’s solicitor was not present at the time the statement was made. The limits on the exercise of this discretion need to be tightened.

The Committee notes that the increased use of AVL is problematic. Time-pressed courts often deal with the matter before the AVL commences. This is in conflict with section 12 of the CCPA that states that the court must take such measures as are reasonably practicable to ensure that the child involved understands the proceedings and is given ‘the fullest opportunity practicable to be heard, and to participate, in the proceedings’.

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

The current legislation provides that the Court may refuse to record a conviction for children aged 16 and over against whom an offence is proved. This provision is often not brought to the attention of the Court and the conviction is automatically recorded, which is not the intention of the legislation.

Section 14(b) should be amended so that there is a presumption that a conviction of 16-18 year old is not recorded unless ordered by the Court.

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

Section 15 needs to be clarified; it is often misinterpreted. A literal reading of the section means that if an offence is committed more than two years after a non conviction in the Children’s Court, the offence the subject of the non conviction is not admissible in proceedings. However, if a further offence is committed within 2 years of that other offence the protection of the section is interrupted, and the admissibility of the non conviction in the Children’s Court is revived. The Committee is of the view that Section

15 should be amended to ensure that if there is a two year crime free period since the offence the subject of the non conviction in the Children's Court, then that Children's Court offence should not be admissible in *any* subsequent criminal proceedings.

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?

The Courts should be compelled to use Children's Courts penalties. The Court should have the choice to remit the matter back to the Children's Court or deal with the matter using the Children's Court penalties.

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 focus of section 18(1)(A) is primarily on the offence. There should be more focus and comment on the person's subjective factors, e.g. progress with rehabilitation, or the need for further rehabilitation.

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, the list of special circumstances does not remain valid.

As a consequence of the amendment larger number of juveniles aged between 18 and 21 are being held in inappropriate placements. It is now harder to convince Magistrates to make section 19 orders since the special circumstances factors were inserted. The list is far too restrictive and should be deleted. The factors in place have worked against section 19 orders being granted.

Question 29

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

The legislation requires better guidance against the inclusion of objectionable material and reports, e.g. allegations of uncharged offences.

The courts are not using background reports as intended by the legislation. Magistrates are ordering background reports for young people who have committed offences that would never realistically attract a control order. Juvenile Justice prepared 5150 background reports in 2010-11, even though less than 600 control orders were made in that period.²⁴

The legislation should clarify that a full background report should only be ordered where the court is seriously considering a control order, or on application by the solicitor for the child for a report to address a specific area to assist in the sentencing process.

(b) Should the contents be prescribed in legislation?

The contents should be prescribed in legislation to ensure consistency. Some mention should also be made of a child's general health history; in particular, reference should be made to any mental health issues suffered by the child.

²⁴ Consultation Paper, p38.

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

The capacity for psychological assessments of a child should be increased. The Magistrate should have the ability to make the order on application, with the consent of the child a prerequisite to a psychological assessment.

The Committee notes the importance of maintaining medical confidentiality to protect the integrity of medical treatment of a child in custody.

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. The Committee supports the Court having 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.

A report that determines that a young person is homeless would trigger the process under section 120 of the *Children and Young Persons (Care and Protection) Act 1998*. Section 120 would be more effective if it compelled the Director General to arrange for the provision of services including residential accommodation, rather than giving the Director General the discretion to do so.

Question 31

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

Yes.

Question 32

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

Yes. The legislative provisions work to protect the child.

Question 33

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

Yes. The Children's Court should be able to hear all traffic matters. The different considerations and treatment that apply to children in the criminal justice system apply equally to traffic offences. The argument that a child who is old enough to drive should be dealt with as an adult is inconsistent with the principles of the CCPA.

Question 34

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

No. The Committee does not want the Local Court to have jurisdiction to hear traffic matters allegedly committed by young people. The Committee's position is that the matter should be dealt with in the Children's Court, where there are factors relevant to the age and circumstances of the young person and the aims of the CCPA that should be considered when deciding penalties.

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?

The decision should be up to the Magistrate, but only on the application of the prosecution, not of the Magistrate's own volition.

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

The timeframes should be a maximum of 14 days after the first appearance, but preferably shorter.

(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 manner (as it does for indictable offences set out in s18(1A))?

Yes. The provisions are not detailed enough. There needs to be clear guidance for Magistrates and a very high threshold to establish that a charge may not be disposed of in a summary manner.

Question 36

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

Section 33 should be amended to state:

'before imposing any of the penalties in this section, the Court must consider the options under section 31 or section 40 of the Young Offenders Act'.

The court should have the ability to backdate a bond or probation order. This would enable the Court to take into account any period of supervision that the child has been subject to e.g. where the child has already been subject to the Youth, Drug and Alcohol Court or Griffiths remand supervision.

The Committee has concerns about the inappropriateness of place restriction and non-association orders. They are overly punitive and often unfair to a child or young person. Young person's lives can change quickly, particularly in country areas. These orders often set up a young person for breach. The Review would benefit from detailed research on the use of the conditions and the results of any breaches. The Committee suspects that Aboriginal young persons, who rely so strongly on family connections, are disadvantaged by the sections.

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

The Committee is concerned about the lack of availability of Community Service Orders in regional and remote areas. The Standing Committee on Law and Justice's 2006 report '*Community based sentencing options for rural and remote areas and disadvantaged*

populations' raised concerns about the lack of community based sentencing options in many regional and remote areas.²⁵

The experience of Committee Members is that the lack of availability of Community Service Orders in regional and remote areas pushes sentences up, so that a rural or remote young person receives a suspended sentence or a control order when a metropolitan young person would receive a less severe order.

The Committee has concerns about the length of bonds imposed on children and young people. Often the length reflects the perceived welfare needs of the child rather than the criminality of the offence. The time of the bond should be linked to the age of the child and the nature of the offence. In determining the length 2 steps are required; 1) determine the bond that is appropriate and 2) consider the length with reference to the sentencing principles.

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

Section 33(1) should be renumbered. The section has become unwieldy and difficult to read.

Question 37

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

The provisions are appropriate.

The Committee suggests a legislative amendment to require the destruction of photographs, fingerprints and palm prints following the successful completion of an outcome plan from a police referred youth justice conference, similar to those for YOA cautions²⁶.

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

The Committee recently made inquiries to the NSW Police Force in relation to the destruction of finger-prints, palm-prints and photographs of young people.

The NSW Police Force advised that it had identified compliance issues with some of the legislative requirements to destroy forensic material, and work is underway to rectify the problem.

(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, there should be a presumption that the material is destroyed automatically.

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?

²⁵ Standing Committee's 2006 report: *Community based sentencing options for rural and remote areas and disadvantaged populations*, NSW Parliament Sydney.

²⁶ See section 33A, *Young Offenders Act 1997*.

No. The provisions require amendment as detailed in (c) below.

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

Yes, see (c) below.

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

Yes. The Committee supports a more flexible approach to breaches of suspended control orders.

Young persons are treated differently by the criminal justice system and are subject to their own legislation. However, at the point of time when young offenders are before a court for a breach of a suspended control order they are in a worse position than adults who are before a court for breaching a suspended prison sentence.

An adult who breaches a suspended sentence and the bond is revoked, is able to be assessed for an Intensive Corrections Order (previously periodic detention) that is they may not have to undertake a full time jail sentence.

A young person who breaches a suspended control order and the bond is terminated has no options other than being sentenced to a full time control order.

The legislation that relates to a failure to comply with the suspended prison or control order is very similar (section 41A CCPA and section 98(3) of the *Crimes (Sentencing Procedure) Act 1999*).

The Court of Appeal in *DPP v Cooke & Anor* [2007] NSWCA 2 outlines the approach on breaching section 12 bonds for non-trivial breaches. Normally a further offence would result in the bond being revoked and any consideration of the subjective circumstances of the offender at the time of the proceedings for the breach will not be relevant nor will the consequences of revoking the bond.

Justice Howie differentiates a more favourable South Australian decision against revocation in *R v Marston* (1993) 60 SASR 320 on the basis that 'secondly, and perhaps more significantly, the impact of the revocation of the bond can be ameliorated in this State by ordering that the sentence that is enlivened by the breach be served by periodic detention or home detention.'

As stated above, these options are not available for revocation of suspended control orders.

When one looks at the guiding principles of the CCPA and the vast research material on young persons the legislation should allow the court to take into account a wider range of considerations when looking at breaches of suspended control orders.

The court should be able to take no action on a wider set of reasons than only that the breach is considered trivial. The court, when deciding whether or not to revoke a suspended control order, should look at the actions of the young person whilst on the suspended control order; how far into the ordered before there were problems; the effect on the young person's present and future development if a control order is imposed; whether the breaches are the result of activities or issues that are out of the control of the young person.

Question 39

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

The Committee is concerned that a merger of the legislation may affect the integrity of the YOA. The Committee considers that, rather than a merger, more overt connections between the two pieces of legislation should be included in the CCPA, as suggested in our response to question 36.