

Police Association of New South Wales

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

*Police Association of NSW response to the NSW
Department of Attorney General and Justice review on
laws for child offenders*

December 2011

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Introduction

The NSW Government is reviewing the Young Offenders Act 1997 and the Children (Criminal Proceedings) Act 1987 to ensure that these pieces of youth justice legislation continue to reflect best practice and meet the needs of young people and the community including victims. This submission was completed by the Police Association of NSW after a period of research and consultation with members who have some knowledge and experience in the questions being canvassed in the review's Consultation paper. The Police Association of New South Wales has a membership of 16,300 and represents all sworn police officers and those students in training to become police. The Association is controlled by over 160 Local Branches across the state and administered by fellow members. The first point of contact for children when they enter the juvenile justice system is the NSW police. The NSW police undertake the difficult task in dealing with children and young people who commit crime and thus are well placed in providing feedback to this review. The Association's submission will refer to the questions that mostly show to impact on police and their policing environment. Long-hand comments (unedited) made by police members to the Association's submission are included for the purpose of transparency.

Question 1

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

The juvenile justice system is built around a number of key pieces of legislation. The most important of these are the Young Offenders Act, the Children (Criminal Proceedings) Act and the Bail Act. Police Association members indicated that the legislative framework was on the right track.

The legislation is effective in diverting first time offences from the criminal justice system. The stand out feature of the system is the conferencing model. Once matters get to court, again, conferencing is a valuable tool at getting lives back on track. However, the rest of the sentencing approach is too complicated for children to understand and should, in my view be simplified.

I believe that the framework is on the right track however the two Acts, YOA and CCPA, should be merged into one.

A Review commissioned by the Minister for Juvenile Justice and his agency to undertake a strategic and comprehensive review of juvenile justice in New South Wales (NSW) also indicated that in general the Young Offenders Act is effective, although some recommendations were suggested to improve its oversight and implementation. In examining the Children (Criminal Proceedings) Act and the Bail Act, the Review found that the changes to the Bail Act had a range of unintended consequences that have negatively impacted on the juvenile justice system. The Review found that these unintended consequences on children and young people can best be overcome by having the Children (Criminal Proceedings) Act take precedence over the Bail Act. This will ensure that the specific principles for dealing with children and young people are

considered for the determination of bail. To assist with the reduction in the likelihood of unintended consequences with government decisions, the Review also recommended that a children and young person's impact statement is introduced into the legislation and policy development and amendment process.¹

The mentioned Review (ie the Noetic Review) positions itself that children and young people are different to adults and need to be considered separately in the justice debate. There is no doubt though that detention is required for some offenders and offences. There is also little doubt that detention does not act as a deterrent and that it leads to poorer long term outcomes both for the individual and society in general. The Review found that the most recent research into those detained in NSW's juvenile justice system found that a quarter could have intellectual disabilities. This throws a different light upon the issue of detention. This complex issue requires careful consideration by Government. As with many complex issues, the causes of juvenile crime fall within the ambit of a range of agencies and addressing the issue is not a problem for Juvenile Justice and the Department of Human Services alone. The Review highlights the many interdependencies between agencies and the requirement for Whole of Government (and indeed Whole of Community) solutions to juvenile justice. There are also larger community issues influencing remand rates. Social factors, including alcohol and drug abuse (prescribed and illegal), the absence of positive role models and the availability of education and a stable home are all factors that influence juvenile behavior and subsequent re-offending. The Review notes the key role played by the NSW Police and makes a number of recommendations to strengthen its role, including amending some current practices particularly around bail determination and compliance.²

Question 1

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

This might be off point, but the approach to the determination of age is inconsistent with community reality. With the introduction of more and more citizens into the community via unusual routes, (eg, refugees, and asylum seekers with bridging visa's) we cannot rely on birth certificates or Federal Government issued papers. I recall serious offences committed by a "YP" who had Federal Government Papers certifying him being aged 16. I was in my early thirties and he looked my age. But there is no scientific method in NSW to determine age. We should adopt the Commonwealth model of the determination of age, where if the police suspect that the person is over the age of 18, but claims to be under 18, we should be able to take them to a radiologist and have the bones of the wrist X-Rayed so as to determine age

A report authored by the Noetic Solutions Pty Limited, identifies and describes effective practice in juvenile justice. The report reviews important international and Australian juvenile justice systems and draws from the 'what works' literature to evaluate a range of programs, as well as traditional penal and 'get tough' programs including juvenile incarceration. Specific issues of reducing Indigenous overrepresentation, and realising and coordinating whole-of community action are also discussed. The report was conducted in order to build a comprehensive evidence base from Australia and overseas to test current practice and new ideas

¹ Noetic Solutions Pty Limited, A Strategic Review of the New South Wales Juvenile Justice System, Report for the Minister for Juvenile Justice, April 2010

² Noetic Solutions Pty Limited, A Strategic Review of the New South Wales Juvenile Justice System, Report for the Minister for Juvenile Justice, April 2010

in the NSW context. There are significant differences between international juvenile justice systems. The majority of English speaking countries operate within a justice model focused on holding young people accountable for their actions and enforcing punitive measures through due process. A range of other countries, generally in Europe, tend to employ a welfare based model characterised by an informality of proceedings and interventions based on the best interests of the young person. There is however a growing trend towards hybrid juvenile justice systems incorporating elements of both justice and welfare models. There is a large variation in the rate at which young people are placed in custody across the jurisdictions examined. In Finland for example, the rate is 0.2 per 100,000 young people, while in the UK that figure is 23. These custody rates are generally characteristic of the types of juvenile justice systems in place within those jurisdictions, with high custody rates associated with justice based systems and lower rates with welfare based systems. The majority of countries reviewed believe that diverting young offenders, and utilising community based programs when they do enter the juvenile justice system, is the most effective way to reduce juvenile crime. While there will always be a need for incarcerating certain young offenders, the critical issue is finding the most effective balance between such punitive measures and preventative and diversionary approaches.³

A US study conducted by The Centre for Juvenile Justice Reform, introduces a framework for major juvenile justice system reform—the integration of a forward-looking administrative model with evidence-based programming. The administrative model is organized around risk management and risk reduction aimed at protecting the public by minimizing recidivism. Evidence-based programming is organized around services that moderate criminogenic risk factors and enhance adaptive functioning for the treated offenders. Placements are guided by a disposition matrix that supports individualized disposition plans and is organized around the risk levels and treatment needs of offenders as assessed by empirically validated instruments. An array of effective programs is supported that provides sufficient diversity to allow matching with offenders' needs. This array of programs is integrated with a continuum of graduated levels of supervision and control so that offenders can be stepped up the ladder and placed in more highly structured program environments if behavior worsens and stepped down when there is improvement. Such a system is consistently forward-looking in basing program placements and supervision levels upon objective risk and needs assessments and in constructing case management plans focused on improving future behavior rather than punishing past behavior.

Question 2

a. Are the objects of the YOA valid?

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

Members indicated that the objects of the YOA appear valid – that being;

- to establish alternatives to court proceedings, through the use of youth justice conferences, cautions and warnings, for children who commit certain offences;
- to provide an efficient and direct response to the commission of certain offences by children; and
- to use youth justice conferences to deal with alleged offenders in a way that: enables a community-based, negotiated response to offences; emphasises the acceptance of responsibility and restitution by the offender; and meets the needs of victims and offenders.

Research (conducted by the Law Reform Commission) on the first three years of the operation of the YOA suggests that the implementation of the Act has largely been successful. The research found that the introduction of the YOA has led to a substantial increase in the use of cautions and warning, and a corresponding decline in the use of court proceedings. At the same time, the greater utilization of diversionary options was not found to have resulted in net-widening.

³ Review of Effective Practice in Juvenile Justice, Report for the Minister for Juvenile Justice, Noetic Solutions Pty Limited, January 2010.

Looking at the YOA's impact on the over-representation of Aboriginal young people in the criminal justice system, the research found that the Act had achieved a 50% reduction on Aboriginal first offenders being taken to court. However, even among first offenders, Aboriginal young people were 1.8 times more likely to be taken to court than a non-Aboriginal young person. As well, although Aboriginal young people were equally likely as non-Aboriginal young people to be given warnings or referred to conferences, they were less likely to be cautioned than non-Aboriginal young people. The conclusion from the Commission's Report is that there was no evidence to suggest that the overall approach of the YOA is misconceived.

In terms of the policing environment, the NSW Police Force has a dedicated Youth Command that strives to reduce and prevent youth crime in NSW via a number of dedicated police in place within NSW and needs to be adequately staffed. Currently, there are over 600 juveniles being case managed by NSWPF Youth Case Managers. Analysis shows that almost 70% of juveniles who are case-managed by Youth Case Managers do not re-offend. Youth Liaison Officers, for instance, facilitate the juvenile Cautioning process at Local Area Commands; contribute toward decision-making relating to the referral of juveniles to Court or a Youth Justice Conference; ensuring police meet their legislative responsibilities in relation to the Young Offenders Act.

It is also important that all NSW Police Force officers continue to complete mandatory training in the Young Offenders Act 1997 to enable police to effectively manage their interactions with juveniles in accordance with the legislation. The Young Offenders Act 1997 is also incorporated into the training curriculum and should continue to be for all students training to become police officers at the NSW Police College.

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

Members indicated that reducing re-offending should be an objective of the YOA.

Many of the objectives refer to the rehabilitation and diversion from court for the child but very little about reducing re-offending.

In principle, it should be an objective. However implementation would be difficult. For example, would you discontinue a YJC if the child is alleged to commit a further offence whilst on the program? Perhaps the only way to address re-offending would be to explain what would happen if the person re-offends. But let's look at this in practice. It will be explained that if they commit another assault whilst a juvenile, they will likely get a s331a. The child will interpret this as a slap on the wrist or a warning. How will this provide deterrence? Accordingly, if the policy is designed to address re-offending, specific deterrence should be the method, and this is best achieved by the sentence/outcome of the first offence committed.

When asking whether reducing re-offending be an objective of the YOA, one needs to consider the findings of a study conducted by the NSW Bureau of Crime Statistics and Research in March 2011. The study talks about one of the factors police must take into account when deciding whether or not to refuse bail is the likelihood of any further offending. The aim of this study was to determine the extent to which police are refusing bail to low risk defendants and/or granting bail to high risk defendants. When it comes to judging risk of re-offending, police do not appear to adopt an overly restrictive approach. Few of those they refuse bail to are at low risk of re-offending. Indeed, some of those they grant bail to are at fairly high risk of re-offending. The fact that police grant bail in a number of cases where the defendant is at high risk of re-offending does not necessarily mean police are failing to meet their obligations under the Bail Act 1978. For one thing, police do not have the analytical tools required to conduct an actuarial risk assessment on each juvenile they detain. For another, the period over which re-offending risk is considered here extends well beyond the period that will elapse before a juvenile on bail is brought before the Children's Court. It is also important to remember that actuarial instruments may be much better than intuition or experience in judging the future risk of offending but they are nonetheless far from perfect. Some defendants deemed to be 'high risk' do not actually go on to re-offend. This puts police (and courts) in a difficult

position. In any given case they must weigh the risk of a juvenile offending on bail against the risks and costs associated with placing an unconvicted juvenile in custody who, even if subsequently convicted, may not receive a custodial sentence. It is also important to remember that bail refusal is not the only way of dealing with young people charged with criminal offences who are judged to be at risk of further offending. Other options include placing them under the care and supervision of their parents or placing them in supported accommodation under the supervision of officers from the Department of Juvenile Justice.⁴

There are examples of successful multi-agency partnerships addressing the issue of juvenile offending that could be used as a model on which to base future programs. For example, Tuggerah Lakes LAC is currently trial location for the Anti-Social Behaviour Pilot Program. The committee of this program consists of representatives from agencies including NSW Police Force, JJ, Department of Housing, Department of Education and Training, Department of Health, and Community Services. In a similar format and subject to the trial outcomes, such programs could be rolled out state-wide to review and manage the cases of recidivist juvenile offenders. This whole-of-government approach is likely to have a greater success rate in preventing and deterring re-offending and further breaches of bail than current agency strategies operating in isolation.

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?

Members indicated that the principles of the YOA were valid – that being;

- the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence;
- children accused of an offence are entitled to be informed about their right to obtain legal advice and given the opportunity to do so;
- criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter;
- criminal proceedings are not to be instituted against a child solely in order to provide any assistance or services to advance the welfare of the child or his or her family;
- children accused of an offence should be dealt with in their communities to assist their reintegration and to sustain family and community ties;
- parents are to be included in legal processes involving children and recognised as being primarily responsible for children's development;
- victims are entitled to receive information about action taken under the Act.

I would suggest an additional principle that sufficient sanction be taken against offending children to ensure they understand the consequence of their criminal behaviour.

For a YP to get a second chance via a caution is valid. For a child to face a victim in a conference, and perhaps do something to make the YP realize that the victim is a real person with real feelings, is valid. But should a child be cautioned for a break enter and steal, or a steal from person? At the moment, police have the discretion to deal with a matter under the YOA or lay informations at a court. This has worked well in the past, and generally

⁴ Snowball, Lucy, Police Bail and risk of re-offending, Crime and Justice Statistics, NSW Bureau of Crime Statistics and Research, Issue Paper no. 57, March 2011.

speaking, police have been the proper custodians of discretion to commence proceedings or work under the YOA.

The YOA is about keeping them out of the criminal justice system. If the majority of children who have cautions/conferences do not commit further offences, why amend it?

Statistics indicate that the diversionary goals of the Young Offenders Act 1997 are being achieved. Only 18.5% of juvenile offenders were dealt with by the courts during 2001-2002. In the same period, 1482 young people participated in 1353 youth justice conferences.

- Numerous evaluations of the Young Offenders Act 1997 have been conducted, with most focusing on the conferencing provisions. Studies published in 2000 and 2002 by the Bureau of Crime Statistics and Research found that the majority of offenders and victims were satisfied with the conferencing process and outcomes, and that the reoffending rates of those young people who attended conferences were significantly lower than for those who went to court.
- However, some studies have raised concerns about compliance with the legal obligations of the Act, such as informing young people of their right to obtain legal advice, and the necessity for an admission by the young person to be made in the presence of their parent or another designated adult.

In align with the above point, research has shown that early intervention aims to reduce risk factors and enhance protective factors that impact on the likelihood that a young person will engage in offending behaviour. As a crime prevention strategy, it is based on the premise that intervening early in a young person's development can produce significant long term personal, social and economic benefits. A growing body of evidence demonstrates that early intervention can be effective in achieving significant reductions in crime involvement, child maltreatment and substance abuse, and improvements in educational performance, employment, child and youth behaviour, and income (Homel 2005). Importantly, these outcomes also produce significant financial savings, for both the individual participant and the wider community. There is mounting evidence that early intervention is a more cost effective strategy than more conventional approaches to reducing crime.⁵

Bail compliance checks are an important deterrent to recidivist offender to abide by their bail, which aids in preventing their ability to engage in further criminal acts. Police place considered conditions on juvenile offenders to manage the risk of them re-offending, failing to appear at court, and/or interfering with victims and witnesses. This is an expectation of victims, the community and the Courts. Due to the numerous socio-economic and demographic difference between Local Area Commands across the State, bail compliance strategies are implemented and adapted to suit the local environment in line with other complementary policing strategies. The response from Local Area Commands indicates current bail compliance strategies are effective in deterring re-offending, detecting breaches of bail, and protecting the community (including victims and witnesses).

The NSW Police Force has developed a number of policies and strategies for addressing juvenile crime. The NSWPF Youth Policy Statement remains at the core of these policies and strategies. The two key purposes of the Youth Policy Statement is to provide a clear strategic corporate direction for police in dealing appropriately with juveniles; and to inform police and the wider community of the principles and priorities for the policing of juveniles in NSW.

⁵ AICrime Reduction Matters, Australian Institute of Criminology, Cost Effectiveness of early intervention, No. 54, 6 February 2007.

Question 4

Are the persons covered by the YOA appropriate?

Yes, the Act does well in this area.

This is a policy decision. Is it appropriate that a person committing a Table 1 offence, such as break enter and steal; break enter and malicious damage (graffiti/holes in walls - inside a person's home); steal from person; be covered under the Act, thereby allowing a caution or a conference? What would the victim say if a person who snatched their handbag got a caution (under the YOA) from a court? We have to rely on the appropriate discretion being exercised. Police have traditionally been good and trusted custodians of the discretionary feature. Courts generally exercise discretion (when it comes to sentencing via a YOA option) well.

A fundamental issue addressed in the Law Reform Commission's consultations and submissions was the scope of the Young Offenders Act 1997 (NSW) ("YOA"), including its interaction with the Children (Criminal Proceedings) Act 1987 (NSW) ("CCPA"). As these two Acts are at the core of juvenile justice law in New South Wales, this issue is of central importance in the sentencing of young offenders. The CCPA defines "child" as a person under the age of 18 years. However, in proceedings in the Children's Court, and for the purposes of sentencing in other courts, the CCPA applies to a person who was a child when the offence was committed and under the age of 21 years when charged. The Commission states, it is arguable that the YOA, which defines a "child" as a person over the age of 10 and under the age of 18, applies only to persons who are under 18 at the time they are dealt with under the Act, not merely under 18 at the time of the commission of the offence. If so, the two Acts are inconsistent. Considerations of equity and public policy require that the Acts should be made compatible in their application to "children". There is no reason why, if a person is going to be sentenced under the CCPA, the diversionary options provided by the YOA should not be available to him or her, if the offence was committed as a child. The policy considerations that dictate that children, with their undeveloped maturity and self-discipline, should be treated differently when they offend from adults should not be discarded when there is a delay in dealing with the offence. The Commission is therefore of the view that both the CCPA and the YOA should apply to all persons who have allegedly committed an offence before they turned 18, provided they are under 21 at the time they are dealt with under either Act.⁶

Question 5

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

There was a differing of opinions amongst members to the issue of the YOA's application of all offences.

The exclusion section appears to adequately cover serious matters.

No. In my view, it is not appropriate that a robbery/Ag B+E should have the possibility of being dealt with under the YOA. The courts have a large sentencing range that can take into account robberies with a low degree of criminality. I keep in mind that the Children's Court has jurisdiction to deal

⁶ Law Reform Commission, Report 104 (2005) – Young Offenders, Chapter 4, Scope of the YOA, Lawlink, 2005

with all criminal offences except those carrying 25 years or life. This includes robbery, Robbery with offensive weapon and sexual assault to name a few.

The Law Reform Commission indicated that there was a general consensus that the scope of the YOA ought to be expanded. It was argued that the YOA should cover all summary offences that may be dealt with under the CCPA (which are not "prescribed laws" for the purposes of the YOA), including drug offences, and breaches of apprehended violence orders. The consequence of expanding the offences covered by the YOA would, of course, be that the diversionary options available under the YOA, notably youth justice conferencing, would be available in relation to these offences. In support of the desirability of this, the Children's Court submitted that: ⁷

"it is the experience of the Court that many individual offences could appropriately be dealt with by conferencing in appropriate cases, especially robbery in company and robbery while armed with an offensive weapon: Crimes Act (NSW) section 97(1), especially where the amount taken is below a certain value"

Question 6

- a. Is the current list of offences specifically excluded from the YOA appropriate?**
- b. Is there justification for bringing any of these offences within the scope of the YOA?**

Again, as in the above question, a differing of opinions amongst the membership was gauged on this issue.

Yes. At the moment, only offences that are Table 1 offences (as per the Criminal Procedure Act) and below can be dealt with by the YOA. There would be argument from victims and the community that some of these offences, such as Break, Enter and Steal should not be included under the Act. The police have the ability to exercise their discretion to put them before a court, and the court would have the discretion to sentence them according to the YOA (eg a YJC) or according to the CCPA (eg bond with supervision).

No. Should a Robbery in Company be dealt with in any other way other than a Court? I think not.

As the Commission Report indicates, Parliament's decision to exclude offences under Part 15A of the Crimes Act from the YOA reflects the potential seriousness of stalking, intimidation or breach of an AVO, as well as that such offences are often serious in fact. That seriousness is grounded in actual or threatened violence, often in a domestic context. And, while Parliament envisages that the degree of violence involved in offences falling within the YOA is a factor relevant to determining whether or not such offences are appropriately subject to diversion, it has, at the same time, deliberately chosen to exclude Pt 15A offences from the operation of the YOA. This is explicable considering that the focus of Part 15A is on domestic violence offences, for which conferencing can be seen as generally inappropriate.

⁷ Law Reform Commission, Report 104 (2005) – Young Offenders, Chapter 4, Scope of the YOA, Lawlink, 2005

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?

Members indicated that the current provisions of the YOA are appropriate. Warnings were the least intrusive form of sanction available under the Act.

Appropriate at the moment. It gives enough scope to caution for offences with minor criminality and to refer more serious crimes/criminality to court. There the court has the same discretion.

Question 8

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

Members indicated the current provisions governing children's entitlement to warning were so far appropriate. When police choose a diversionary method of dealing with a charge, the likelihood of the young offender acquiring a criminal record is reduced.

It is a matter for discretion of the police or the magistrate. The only concern would be in relation to T1 offences such as break and enter/steal from person.

Question 9

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

Some members indicated the provisions governing the giving of warning were so far appropriate and working well in practice, while others believed it was a matter for discretion of the police or the magistrate. As noted above, the only concern was in relation to T1 offences such as break and enter/steal from person.

Question 10

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

Some members suggested more relevant information was required on the issuing of Warnings.

Perhaps there should be more information available on how, when, where and why to give warnings. I don't think Police know a lot about their requirements(actions, recording the warning etc) when giving warnings.

Recording a warning on the COPS database was not mandatory until 8 February 1999. Following the amendment to the YOA enabling police to record details of the young person receiving a warning, the use of warnings has grown substantially. All summary offences that do not involve violence (for example, offensive language) are potentially offences for which police can give a child a warning (and not arrest). The child does not have to admit the offence before a warning is given, but police must record the child's name, cultural background, age and sex.

Police indicated that it may be appropriate in very specific and isolated circumstances for police to exercise their discretionary powers under section 50 and issue a Warning, which should then be recorded. Any exercise of discretion should have regard to the following, amongst other individual considerations;

1. The seriousness of the original offence(s).
2. The criminal history of the individual.

3. Any previous breach of bail incidents by the individual.
4. Whether the breach of bail occurred whilst the individual was committing further offence(s). and,
5. Whether the breach of bail is considered a minor 'technical' breach, such as a once-off minor lateness for a curfew or for reporting.

To record when police are exercising their discretion and a juvenile has been given a Warning for a breach of bail, it is appropriate for a permanent record to be made to allow officers to determine when a juvenile offender has been given multiple Warnings. To address this issue, police indicated, it may be necessary for enhancements to be made to the existing COPS system.

Question 11

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

Members indicated a concern with the formality and time taken to gain sufficient evidence to issue a youth caution.

In recent forums, the NSWPF has been criticized for a lower referral rate to Conference in comparison to the Courts. Paramount to the ability of police to utilize the Conferencing process is the legislative requirement for the admission of guilt from juvenile offenders. In accordance with Section 36 Part B of the Young Offenders Act 1997, a juvenile offender is not eligible for a Conference, and police cannot proceed with a Caution or Conference, without admissions first being made. This legislative requirement is the predominant causal factor in the lower referral rate of police-initiated Conferences as opposed to Court-ordered Conferences.

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 suggestion from the field is that a parallel system for issuing youth cautions be introduced.

Question 13

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

Members suggested that a parallel system for issuing youth cautions be introduced. For offenders over 14 (where doli incapax is not an issue) the offender be spoken to by police, usually at the scene. A different caution be administered along the lines of 'anything you say can only be used to determine if you are eligible for a caution and cannot be used against you in criminal proceedings.' If the offence is admitted and all other caution criteria are met, the offender is handed a notice of intent to caution similar to a field CAN, nominating time, place and contact officer for caution. Parents are then mailed a copy of the notice of intent to caution. Caution is administered up to 21 days later by YLO or similar. If offender fails to participate, police can proceed by Court Attendance Notice as they do now. This solves the problem of waiting for parents to attend, with a child in quasi detention authorized by the parents until they arrive at the station. It reduces the time taken in the pre-caution interview and investigation and allows the offender to be diverted with minimum of fuss.

Question 14

- a. Are the principles that govern conferencing still valid?
- b. Are any additions or changes needed?

Yes. YJC's are very good.

In a survey of 329 conferences held across New South Wales between 24 March and 13 August 1999, BOCSAR found a high level of satisfaction with both the process and the outcomes. In summary, at least 89 per cent of the subjects in the current study believed that they had received procedural justice and had been treated fairly during the conference proceedings. Subjects understood the conference process and perceived that the conference was fair to both the offender and the victim involved. Furthermore, they believed that they had been treated with respect, could express their own views and could influence the decisions made about what should be done in their case. Victims and offenders also believed that the conference respected their rights. Other research by BOCSAR supports a connection between conferencing and reduced recidivism.

The main principles that are to guide the operation of conferences are:

- to encourage the child to accept responsibility for his or her own behaviour;
- to deal with children in a way that reflects their rights, needs and abilities;
- to provide the child with developmental and support services to enable the child to overcome their offending behaviour;
- to empower families in making decisions about a child's offending behaviour and to promote the development of the child within their family, and;
- to be culturally appropriate, wherever possible;
- to impose the least restrictive sanction appropriate in the circumstances;
- to take into account: the age and level of development of the child; their gender, race and sexuality; and the needs of children who are disadvantaged, disconnected from their families, or who have disabilities;
- enhance the rights and interests of victims, and make reparation to victims.

In terms of issues concerning members with the current Youth Justice Conferencing process, the following was expressed;

Delays in the delivery of conferences

- Police reported delays in the scheduling of some Conferences. These concerns were highlighted in the JJ Noetic report. Police suspect any benefits resulting from the Conferencing process are greatly diminished due to the time-lag in referral to Conference, which may diminish their effectiveness in reducing juvenile re-offending.
- Inadequate accountability mechanisms identified as a problem in the administration of Conferences. Often it is unclear what the status is of a juvenile's outcome plan, which is problematic for police if the juvenile is arrested on new offences.
- Some police reported they did not receive outcome plans after Conferences.
- Police are experiencing long delays before being informed of successful outcome completion in some cases.

Lack of JJ involvement

- Frustration was expressed regarding the restrictions that JJ are not involved in case-management and intervention services with juveniles diverted through Conferencing.
- Police reported that for offenders dealt with under the Young Offenders Act 1997, many welfare and case-management issues were now for the responsibility of police. For JJ to become involved, the juvenile offender needs to continue offending, and commit more serious offences requiring entry into the judicial system prior to JJ intervening.
- Police report that it is often evident before juveniles first appear at Court that some juveniles have serious issue (for example, mental health, substance abuse, familial and socio-economic issues), that will lead to future re-offending. Conferencing is an ideal forum in which juveniles can receive the

guidance and support mechanisms they need to break out of the cycle of re-offending it is effectively managed.

Structure and formality of Conference

- A common criticism of Conferences was the lack of structure and formality to facilitate juvenile offenders taking the process seriously. Problems with the structure in some areas include;
 - Lack of consistent involvement of community members in the Conference.
 - Participants cancelling at late notice, or not turning up at all.
 - Delays and lack of accountability in the organization of Conferences.
 - Limited expectations placed on juvenile's participation.

Outcome Plans

- Wide criticism was expressed that the outcome plans for offenders were often not well researched and often do not reflect or communicate to the juvenile offender the seriousness of their crimes.
- It was perceived that victims were often too lenient when making recommendations due to systemic issues with the Conference process.
- Police felt they were excluded from the outcome plan process.
- Accountability for the outcome plans (including monitoring) was often lacking.
- Police were concerned that the outcome plans often lost sight of the victim's rights and expectations.

Convenors

- It was acknowledged that the skills, background and qualifications of the Convenor has a large impact on the worth and effectiveness of Conferences. Their skills and capabilities vary widely, with some Convenors not commanding the necessary authority in the Conference.
- Convenors appear to be under-resourced in many areas, with most having little capacity to do work outside of Conferencing.
- It often appears there are not enough Convenors to cover the demand and ensure the quality and timeliness of these Conferences

Lack of support and intervention services

- Police indicated a lack of support services that juvenile offenders can be referred to as part of the Conference process eg counseling, case-management, health services, alternative education services and housing. The lack of support services is particularly evident in Aboriginal communities and/or rural areas.
- Information exchange between NSWPF and JJ officers regarding community orders and breaches
- There is at times a lack of automated information sharing between the NSWPF and JJ regarding specific conditions and restrictions contained within a juvenile offender's community orders. The way forward must involve a formalized communication network between the NSWPF, JJ, Community Services and other relevant agencies as necessary.

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?

It would appear there are more conferences arranged by the Children's Court than from a Police Station. At this stage, only Specialist Youth Officers have legislated position to refer a child offender for youth conference. Perhaps it should be legislated that this power also be delegated to a senior officer such as a Sergeant or above.

This is an area that I always had trouble understanding. s37 YOA deals with conferences. But s37(6), the place that you would normally find the limit of conferences, speaks only of the limit of cautions. But the limit on cautions are

found at s20(7). So, police don't have a restriction on the number of conferences, nor do the courts. I don't really see an issue because I support conferences, but perhaps after a person has had three police conferences, they should be referred to court.

Under the Young Offenders Act 1997, juveniles may be eligible for Warnings, Cautions or Conferences for a range of offences. To be entitled to be dealt with by police Caution or Youth Justice Conference under Section 10 of the Young Offenders Act 1997, one of the criteria required is that the juvenile must admit the offence. Police identified some deficiencies impeding the NSW Police Force's ability to administer diversionary measures under the Young Offenders Act 1997. During 2008-2009 COPS data holdings indicated that the NSW Police Force diverted 57% individual juveniles under the Young Offenders Act 1997 through police-initiated Warning, Cautions and Conferencing. The remaining 43% were charged and referred to Court. The primary impediment to police-initiated diversions is that many juvenile offenders simply do not make admissions. This may be influenced by legal advice to juveniles not to make admissions to police. There is potential for a proportion of these juveniles to be diverted away from the judicial system. For this to occur without changes to current legislation such as Young Offenders Act 1997, police and partner agencies are required to develop strategies that will increase the opportunity for juvenile offenders to be eligible for diversionary measures. Whilst the NSW Police Force is committed to implementing diversionary measures and practices where possible when dealing with juveniles, police are required to comply with all relevant legislation and proceed legally.

The major reason for differences in police and Court referral rates is the requirement to admit to the offence(s) to be eligible for diversionary measures. A juvenile will often not make an admission to police when arrested, but subsequently admit to the offence after speaking with a solicitor at Court. As such, the juvenile cannot be referred to diversionary measures by police, and effectively only becomes eligible to be placed before a Court. It should be noted that Court referrals occur much further along the judicial process, after the juvenile has had time to calm down and seek further legal advice, which may recommend making admissions after review of the juveniles matter. Outside of the trial Young Offenders Legal Referral program which stipulate a 14 day 'cooling off' period, police are unable to continually return to the juvenile to see if they have changed their mind about making admissions.

The information available to an arresting police officer and YLO about a juvenile is often considerably more detailed than that provided to the Court. Often not all the circumstantial facts known to the YLO and relevant to the case are admissible in Court. This may include other intelligence about the antecedents of the juvenile, previous responses to Young Offenders Act 1997 interventions and information about the victims. As such, magistrates may be more likely to refer a juvenile to a Youth Justice Conference due to the differences in the information they have available to them to regarding a juvenile offender. The defence lawyer has the opportunity at Court to present the best possible representation of the juvenile to the Court, increasing the likelihood of a Youth Justice Conference referral from the Court.

One other important fact to note here is the major reason for differences between LACs in rates of police Youth Justice Conference referrals are the characteristics of the offender population. Difference in the characteristics that are reported as affecting referral rates include:

- Socio-economic status of LAC (including familial situations)
- Demographics of the LAC population
- Number of juveniles in LAC
- Number of serious offenders in LAC
- Types of offences committed in LAC
- ATSI population

It should be noted that unlike police, a Court has the power to refer a matter of Conferencing at any stage in the proceedings, including after finding that a juvenile is guilty of an offence.

There a number of other reasons why a referral may not eventuate in a Youth Justice Conference. These reasons include:

- Withdrawal of consent by the juvenile;
- Withdrawal by the Specialist Youth Officer;
- Withdrawal by the Court or by the Office of the Director of Public Prosecutions;
- or,
- The juvenile fails to attend the Conference;

Question 16

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

Just ensuring that the offender completes the conference outcomes is the only concern I have.

In terms of time frames between referral and conference BOCSAR found that the statutory time-frames were not met in the majority of cases. 92% of the conferences held over a 17-month period did not meet the statutory time-frames. Conferences were held between 4 and 241 days after the date that the conference was referred to the conference administrator. On average, 40.3 days elapsed between the conference referral date and the date of the conference. However, BOCSAR noted that the longer time-frames were likely to be due to the time and effort required to accomplish the numerous administrative tasks associated with organising conferences, which seem to occupy more time than the legislation allows. BOCSAR surmised that convenors appear to have given higher priority to completing the pre-conference tasks fully, rather than strictly adhering to the statutory time-frames and perhaps compromising the quality of the pre-conference preparation.

The Attorney General's statutory evaluation of the YOA noted that a number of submissions argued that the time frame stipulated by the YOA is unrealistic, as a result of which "the interests of the young person may be jeopardised". The NSW Department of Aboriginal Affairs submitted that unrealistic time frames can have an adverse impact in rural areas, where participants may have to travel long distances, and hence may affect Indigenous people disproportionately, given the large numbers living in rural areas. NSW Police was of the view that the time frames under the YOA are not "unrealistic or problematic" and that the Act provides a "timely response to offences committed by children".

BOCSAR also found that 28% of conferences were held before the 10 day notice period expired. The Youth Justice Conferencing Directorate of the Department of Juvenile Justice ("YJCD") reports that for these conferences, there was usually a good reason for holding the conference earlier than 10 days after the young person has been notified of the details of the conference date, time and place. For relatively simple referrals, which require less preparation, it may often be more appropriate to hold the conference sooner rather than later. In some cases, young people and their family, or the victim, had planned to travel overseas. If the conference had been delayed until their return, this would have meant that it was held well after the 21 days had elapsed. In most of these instances, the proper preparation of conferences was not compromised.

One option may be to relax slightly the time frames to allow sufficient time for thorough preparation, but retain the qualifier as a reminder that the longer the period that elapses between the conference and the offence, the more all participants' recall of what happened and how they were affected will be diminished.⁸

⁸ Law Reform Commission, Report 104 (2005) – Young Offenders, Lawlink NSW, 2005

Question 17

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

It should be an admission which is suitable for admission in a criminal proceedings, (eg if a 14 year old committing a BE+S, it should be on tape and in the presence of a parent). This is so that if the person does not continue with a conference, the matter can be dealt with by a court and the prosecution would have a very strong case by virtue of the admissible admission.

I note that even in court, solicitors specify that the admission is only for the purpose of the YOA so as to preserve the ability to defend the matter should it ultimately be defended. On the other hand, if we want to reduce hearings, we can make a system that a person can make an admission for the purposes of the YOA only. This ties in with Question 18.

No, specifying what constitutes an admission can be difficult in the long term.

The LRC Report states that a child should have an opportunity to obtain legal advice should be enshrined in an enforceable provision in the Act. The YOA should stipulate that neither an admission of an offence made by a child, nor consent given by a child, should be valid for the purposes of the Act unless the child has received legal advice or unless the admission is made and consent given after a cooling-off period during which the child has had the opportunity to seek legal advice. The benefit of the cooling-off period is that the child has the opportunity to reflect, and consult with others, on whether or not to obtain advice.⁹

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 problem is that most legal advisors tell the child not to say anything. If they don't make an admission, they cannot be dealt with under the YOA.

You will be aware that in order for some of the diversionary provisions of the YOA to apply, the YP must first admit to the offence as a demonstration of contrition. The problem with this is that when the YP's obtain legal advice, they are commonly told not to say anything. Therein lies a conflict. They cannot be afforded the benefits of the YOA unless they admit the offence but they are advised not to admit anything lest they be charged with a crime. Perhaps there should be some provision in the legislation allowing a YP to make an admission for the purpose of activating the YOA which cannot be used against them in criminal proceedings?

⁹ Law Reform Commission, Report 104 (2005) – Young Offenders, Lawlink NSW, 2005

Police indicated that before making an admission all juveniles are given the opportunity to speak with a lawyer, be it the Legal Aid Youth Hotline, Aboriginal Legal Aid 24hr service or a private lawyer. When contacting the legal representative, the police officer will first tell them why the juvenile was arrested, and in some instances, whether they are eligible to be dealt with under the Young Offenders Act 1997. It was reported that legal representatives often recommend that the juvenile does not make admissions. This results in the juvenile being ineligible for a police-referred Youth Justice Conference.

Question 19

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

Members indicated that the provisions that govern the disclosure of interventions under the YOA were appropriate.

Question 20

a. Is diversion still a legitimate aim of the YOA?

Yes, although it seems that leniency reigns supreme in this legislature.

LRC Report maintained that the key to widening the practical application of the YOA - and thereby increasing the rate of diversion - is an expanded program of education and training to familiarise all those involved in juvenile justice with the YOA's provisions, together with improved resourcing of Youth Liaison Officers and Specialist Youth Officers.¹⁰

As mentioned already, police identified deficiencies impeding the NSWPF's ability to administer diversionary measures under the Young Offenders Act 1997. The primary impediment to police-initiated diversions is that many juvenile offenders do not make admissions.

It is also important to note that the Computerised Operational Police System (COPS) makes it easy for police to process and record CANS. If police have to go through a complicated, multi-step process, as they did with issuing a summons, in order to issue a CAN, compared with the immediacy of charging; the structure must support the desired approach.

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

It should be structured such that the child offender is dealt with by harsher penalty each time they re-offend after their second intervention through this Act.

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

The trend in New South Wales and the role of the Act has been to encourage the diversion of juvenile offenders (who commit less serious offences) from formal court proceedings and detention, into alternative options in order to address their anti-social behavior which is achieved via the methods of warnings, cautions and conferences.

¹⁰ Law Reform Commission, Report 104 (2005) – Young Offenders, Lawlink NSW, 2005

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

There is substantial evidence that intervening early in the lives of children at risk will divert them from entering the juvenile justice system.

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

Members indicated that the interventions under the YOA did adequately cater in most cases for the needs of victims. The Conference outcome plan represents a course of action agreed to by the victim and the juvenile. This must not be any more onerous than that which a Court might impose and must be completed within six months.

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?

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?

Police indicate that ATSI juveniles are over-represented in not making admissions and / or refusing interviews, which prevents police from issuing a Caution or Conference under the Young Offenders Act 1997, if the juvenile was eligible to be dealt with under the Act. This was also raised by JJ through the Australian Institute of Criminology's Best Practice Interventions in Corrections for Indigenous People Conference as early as 2001.¹¹ There is potential for NSWPF, Legal Aid and ALS to meet and discuss means of broadening the scope of what constitutes an admission, as well as formalizing a process to better facilitate an admission, which will result in the least onerous outcome of juvenile offenders with minor matters. Additionally, research conducted by the Australian Institute of Criminology has identified numerous issues influencing ATSI access to diversion, including;

- Less likely to make an admission of guilt to police;
- More likely to have multiple charges;
- More likely to have previous criminal convictions;
- More likely to have drug misuse problems that are not covered by the drug diversion programs and;
- More likely to have a co-existing mental illness.

The NSWPF continues to develop and promote programs to assist ATSI juvenile offenders in the community, and the reduction of offending by ATSI people is a key objective of the NSWPF. However, in administering diversionary measure under the Young Offenders Act 1997, police are unable to offer Cautions and Conferences to ATSI juvenile offenders if these juveniles have been advised to refuse to admit guilt. In short, the NSWPF has a myriad of general and specialist programs as well as consultative instruments to address ATSI over-representation in the criminal justice environment. However any effective reduction in ATSI participation in the criminal justice system requires a whole-of-government approach.

¹¹ Barga, J., NSW Juvenile Justice, Diverting ATSI Young Offenders from Court and Custody in NSW – Practice, Perspectives and Possibilities Under the Young Offender Act 1997, Presented at the Australian Institute of Criminology's Best Practice Interventions in Corrections for Indigenous People Conference, Sydney 8-9 October 2001.

The Young Offenders Legal Referral System is a program initiated by the NSWPF in 2001, and was originally trialled for Aboriginal and Torres Strait Islander (ATSI) juveniles only but has since been trialled for all juvenile offenders. This referral program allows for a 14-day period in which admission may be sought from juvenile offenders, which would allow for diversion rather than the charging of juveniles where appropriate. By utilising this system of 'tag and release', Police are able to release the juvenile to seek legal advice and support from their family/community prior to being interviewed. This allows for every opportunity for the juvenile to be dealt with by way of Caution or Conference under the Young Offenders Act 1997. If the juvenile fails to return by the specified date, the officer in charge will commence proceeding against the juvenile and record that the juvenile was given every opportunity to seek advice and support and has failed to do so. This referral program is referred to within the National Policing Policy, and is supported by the NSWPF, the NSW Ombudsman's Office, the NSW Department of Aboriginal Affairs, the Aboriginal and Torres Strait Islander Commission, and the Aboriginal Justice Advisory Council.

The NSW Police Force has a myriad of general and specialist programs as well as consultative instruments to address ATSI over-representation in the criminal justice environment. However any effective reduction in ATSI participation in the criminal justice system, as mentioned already, requires a whole-of-government approach.

Question 22

- a. **Are the interventions under the YOA adequate and appropriate for children with cognitive impairments or mental illness?**
- b. **If not, what changes could be made to better address offending by these children?**

No. They require the assistance of mental health services, but I don't think that these are available under the YOA, but only available under a s32 order from a court.

I look at the typical case. A YP in the care of the minister/or carer who assaults his carer. This is a DV offence. In my experience, you can't prevent the re-offending of a person with a mental illness in the absence of intensive community based treatment. This is normally by virtue of a s32 order under the mental health legislation.

It is important to ensure that a treatment-oriented approach is encouraged at every point of their contact with the criminal justice system and that this process is adequately resourced. The role of legislation in relation to young people with cognitive and mental impairments must be focused on treatment as a first priority, and service provision resourced so that it may follow where the law leads. Screening effectively for cognitive and mental health impairments is a difficult area. Police require further training to be adequately furnished with the knowledge and skill to identify a young person with a cognitive or mental impairment. Appropriate checklists should be available for police.

In terms of programs - One way of balancing the different needs of young offenders is to implement programs, such as multi-systemic family therapy, that address multiple needs within a broad offence-focused framework. In this way it may be possible to work on issues that are related to both offending and well-being. Striking the balance between specialist offending programs and more holistic and strengths focused programs presents particular challenges. Another aspect to factor in concerns the responsiveness of service to young people. The responsiveness principle is a particularly important, yet relatively neglected principle of the 'what works' approach.

The programs that are devised for reducing juvenile delinquency must involve youth in their development, and this involvement will be most effective when there is mutual trust and a strong line of communication. It is important that the youth involved in this process come from a broad spectrum of backgrounds and abilities, including representatives of those young people who need these programs the most. Whatever strategy is pursued in dealing with offenders, if it is to succeed, the entire community, families, schools, public agencies, social service organizations, and businesses must be involved.¹²

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?

Members indicated that there was a need to reintroduce a body with an ongoing role to monitor and evaluate the implementation of the YOA across the state.

Yes, this would be a important step in the right direction to ensure the legislation is used appropriately and to change aspects of the legislation that is not working.

According to the findings in the Noetic Report, it is evident that individual departments and agencies are doing a lot of good work for children and young people, but this effort is not always coordinated, and does not fit into a broader strategic framework. The majority of existing Government strategic documents are focused on identifying actions and projects (e.g. the State Plan, Youth Action Plan and Keep Them Safe). There is no strategy or framework that sets out a philosophical approach, long term goals, and brings together the range of services, projects, programs etc. available for children and young people (i.e. from building youth friendly infrastructure to juvenile justice centres). The Report recommends the development of such a strategy in order to assist policy makers and implementers with decision making and action by providing a coherent long term approach to children and young people – this could somehow be factored into the monitoring/evaluative role suggested.

Question 24

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

Some members indicated that the age of 10 of criminal responsibility remain the same and not be changed; while others suggested the doli presumption be reduced to age 12.

Yes. 14 year olds seem to be getting older these days. I have seen so many 12 and 13 year olds committing break and enters, committing robberies, and they all rely on doli incapax. I would like the doli presumption to be reduced to 12 years of age.

No, I believe the age of 10 is still appropriate.

The terms 'child', 'juvenile' and 'young person' are used at different times, depending on the legislation or program in question. The meaning of those terms in the criminal law generally

¹² Ford, Kathryn., Paper presented at the conference: Children, Young People and Their Communities: The future is in our hands, held 27-28 March at Launceston Tramsheds Complex, Launceston, Tasmania.

accords with the definition of 'child' in the Young Offenders Act 1997: a person who is of or over the age of 10 years and under the age of 18 years.¹³

Question 25

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

As mentioned already, some members indicated that merging the YOA and the CCPA was a better idea.

Question 26

- a. Are the guiding principles set out in the CCPA still valid and are any changes needed?**
- b. Should the principles of the CCPA be the same as the principles of the YOA?**
- c. Should the CCPA include an objects clause? If so, what should those objects be?**

The Children's Court is required to sentence young offenders pursuant to the provisions of the CCPA. The range of penalties under the CCPA consists of cautions, good behaviour bonds, fines, probation, community service orders, control orders and detention. IP 19 asked whether this range was adequate and whether it was being fully utilised by sentencing courts. IP 19 also specifically asked whether licence disqualification should be available as a sentence for all offences, a suggestion raised during the Commission's preliminary consultations. Although some submissions that addressed the issue of the range of options were of the view that both the range, and the utilisation of that range, were adequate, a number of other submissions suggested that available options were not being fully utilised. A possible disparity between the practice of country Children's Court magistrates and those of the Sydney metropolitan region in the utilisation of the current range of sentencing options under the CCPA was raised as a matter of concern in the Commission's consultations.

There was acknowledgement that in some parts of New South Wales some sentencing options are unavailable in practice. Magistrates outside the Sydney metropolitan region may be willing to use the full range of sentencing options, but resource constraints mean that they are unable to do so. The Children's Court would welcome more sentencing options, or possibly solutions for individual cases. It submitted that "magistrates in the Children's Court are always looking for non-custodial solutions to the cases before the Court".

The Commission agrees that the current range of options should constantly be reviewed to explore alternatives to detention, in order to implement the policy aims of the CCPA as fully as possible. Two submissions suggested that consideration should be given to a form of home detention for young offenders as an option of last resort in appropriate circumstances before a control order is made. However, Shopfront, although it thought that it may be worth considering adapting the adult sentencing options of home detention and periodic detention for young offenders, did not "at this stage" support their introduction. It pointed out that periodic detention can be very difficult to comply with in practice, especially for those without an independent means of transport, and that home detention is a very intrusive option involving electronic surveillance, which it sees as "generally inappropriate for children".

¹³ Johns Rowena., Young Offenders and Diversionary Options, NSW Parliamentary Library Research Service, Briefing Paper No 7/03, March 2003.

The Commission considers that court-based sentencing of young offenders should be monitored in order to establish in which particular areas of the State the full range of sentencing options is not being utilised. This may be a task best undertaken by the Bureau of Crime Statistics and Research ("BOCSAR") or the Judicial Commission. Any information obtained should be used as the basis for further investigation to establish whether an increased allocation of resources in those areas would facilitate a more comprehensive application of the sentencing options under the CCPA. It is essential that community-based options receive adequate funding, both within and outside the Sydney metropolitan region. It is unacceptable that a young offender should be denied the benefit of an appropriate sentencing option merely by reason of its unavailability.¹⁴

Question 27

a. Are the processes for commencing proceedings against children appropriate?

Members indicated the processes for commencing proceedings against children were still appropriate.

The LRC states in its findings that in recent years, there has been a decrease in commencing proceedings by charge and arrest and an increase in commencing proceedings by CAN. In 1995, 52% of proceedings (against all offenders) in the Local Court were initiated by charge and arrest, whereas by 2000 this had decreased to 36%. In 2001, of all matters (excluding driving offences) where police proceeded against "juvenile persons of interest" (including proceeded against other than to court), 29% were by way of charge and arrest. This percentage decreased gradually over the next three years until, in 2004, it was 22%. The submission of the Children's Court recommended commencing proceedings by way of summons (now CAN) because it has the advantage of providing a "cooling-off" period in the wake of the alleged offence, and increases the available investigation time. It was also submitted that police might be more inclined to commence proceedings by way of a CAN if the process were simplified, and made compatible with the use of the Computerised Operational Policing System. Without making a specific recommendation in relation to this suggestion, the LRC Report supports its adoption.¹⁵

(As mentioned already) it is important that the Computerised Operational Police System (COPS) makes it easy for police to process and record CANS. If police have to go through a complicated, multi-step process, as they did with issuing a summons, in order to issue a CAN, compared with the immediacy of charging; the structure must support the desired approach.

b. Is the different process for serious children's indictable offences and other serious offences appropriate?

Yes, there still needs to be that differentiation between these sets of offences in my opinion.

As noted in the LRC Report, a general exclusion of 'serious children's indictable offences' as defined in the CCPA from the operation of the YOA is justified in terms of the objects and principles of the YOA. In addition, it creates a consistency of approach

¹⁴ Law Reform Commission, Report 104 (2005) – Young Offenders, Lawlink NSW, 2005

¹⁵ Court-based sentencing, Report 104 (2005) – Young Offenders, Law Reform Commission, Lawlink, 2005.

between YOA and CCPA, generally aligning that approach with the jurisdiction of the Children's Court.¹⁶

Question 28

a. Are the provisions for the conduct of hearings appropriate?

Of concern is the number of briefs of evidence prepared for Children's Court that ultimately end up as a plea of guilty. Nearly every children's matter is dealt with summarily, but the local court practice notes don't seem to have been replicated or followed in Children's Court. There is certainly no discernible difference in sentencing for early pleas or matters where a brief is prepared and a plea entered or where a full hearing takes place.

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

I feel strongly in this area that there should be a review on the use of evidence of prior offences....I think the court should be fully aware of everything in the offender's past when considering what penalty to impose and it would be appropriate to lift the limitations.

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

The difficult wording in Section 15 of the Young Offenders Act regarding the disclosure of records relating to cautions and conferences requires some amendment to make it easier to understand.

Question 29

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?

No, I don't believe so because the Children's Court is a specialist court understanding the structure, effect and consequence of penalty imposed.

If you are talking about local courts in the country, then yes – it is appropriate.

Question 30

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?

No, I don't believe so because the factors are adequate.

¹⁶ Law Reform Commission, Report 104 (2005) – Young Offenders, Lawlink NSW, 2005

Question 31

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

Members indicated that the list of special circumstances justifying certain offenders aged 18 to 21 being placed in juvenile detention still remain valid.

Question 32

a. What should the content of the background reports be?

Members indicated that the content of the background reports contain all relevant information.

Should contain ALL relevant information!!

I see time and time again, views by the JJ officer as to the imposition of a sentence. Why is a JJ officer allowed to say that a person convicted of 10 x Ag BE+S should be dealt with in the community. They should simply provide the background, and a list of the options.

It seems to be a conflict of interest that JJ officers be allowed to suggest that people be dealt with in the community, when this result may benefit their budgetary constraints.

b. Should the contents be prescribed in legislation?

Members agreed that the contents be prescribed in legislation.

c. Should other reports be available to assist in sentencing?

I believe so. The court should have available to it all relevant reports to enable a balanced sentencing view.

Question 33

Should a court have the power to request to 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?

These types of reports are very important and I definitely recommend it!

Question 34

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

Members agreed that the list of serious children's indictable offences were appropriate.

Please consider sexual assaults and dangerous drive cause death.

Question 35

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

If joint committal hearings for young people and older co-accused were to be allowed there may be problems, including the possibility of adverse influence on the young person from the older co-accused, and the need for proceedings to be in a closed court resulting in a lack open justice regarding the older co-accused. When matters proceed to trial, joint hearings are held regardless of age differences. This is quite a valid argument and appropriate changes are required to rectify the dilemma.

No – Firstly, there are parity issues at sentencing. Secondly, if the group of offenders have been around the criminal justice system before, the juvenile can be forced to take the blame for leading the group so that the others get a lighter sentence, and they as a juvenile, get minimal sentence as usual. Why can't there be a policy position that if a YP, being 16 or 17 year old commits a strictly indictable offence (as per the criminal procedure Act) in the company of adults, that the YP is dealt with according to law (ie on indictment).

Question 36

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

No, I believe the traffic offences should be dealt with by the Local Court; as mentioned before, the Local Court is the specialist body in these types of offences.

No – leave it as it is.

Question 37

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

The LRC in its findings suggests a wider and more offence-focused range of sentencing options relating to traffic offences ought to be available. Widespread access to driver education programs for young people would be much more effective in helping to ensure that young people drive lawfully and safely.

Question 38

- a. **Are there any concerns with these provisions? In particular:**
 - i. **Is it appropriate that Children's Court magistrates have such a discretion, rather than having the election decision rest solely with the prosecution and/or defence as is the case with the adult regime?**
 - ii. **Should there be a more restricted timeframe for the defendant (or the Court) to make an election?**
- b. **Should the CCPA include any guidance about the circumstances in which the Children's Court may form the opinion that the charge may not be disposed of in a summary matter (as it does for indictable offences set out in s18(1A))?**

At the moment, we have the decision in R v JIW to guide us for dangerous driving causing death. The only other cases that I have seen go upstairs are sexual assaults. It might be a good thing if parliament were to set guides, however, why not expand the matters that are considered "Children's serious indictable".

No – because sometimes, this is done at hearing, which is appropriate as the police prosecutions do not have the resources (and Brief handlers do not have the experience) to ensure that the brief is of the standard required for committal.

In practice, the DPP will only deal with matters according to law if it is a children's Serious Indictable offence. What we have been doing, is we refer a matter to the DPP, the DPP decline, and then we make application that the magistrate consider its powers pursuant to s18(1A) to commit the matter to the District court. This works better for Dangerous Driving cause death and sexual assaults, as the court is not concerned with the DPP budget, however, it seems to me, that the DPP will consider their budget in preference to the seriousness of offences.

Question 39

- a. Are the penalty provisions of the CCPA appropriate?**
- b. Are there any concerns with their operation in practice?**
- c. Should the penalty options be clarified or simplified in the Act?**

No. They are too complicated, and if the child cannot understand the distinction between a s331b and a s331e or a s331B, then how is it a real sentence with real meaning. This is the common argument with s12 bonds in the adult jurisdiction. For example, Kirby J acknowledged that courts often say that a sentence of suspended sentence is the penultimate penalty known to law, "However, in practice, it is not always viewed that way by the public, victims of wrong-doing and even by offenders themselves."¹⁷ This is because they don't understand it.

Also, the criminal justice system does not work on the basis that all people who commit a crime will be detected and convicted. There are simply not enough police to do this. It works on the basis that people will be deterred from committing crimes as they don't want to go to gaol. In the children's court, children know that they are not going to gaol for a robbery, so they are not scared. They tell their friends and the friend commit the crime without fear of gaol. I recall the main offender who rioted in the Merrylands High School incident said in his JJ report that he thought that he would just get a slap on the wrist (or words to that effect). How can this be consistent with the method of enforcement in the state.

I have grave concerns about the sentencing for robbery in company and multiple break and enter offences. The need to demonstrate that it was an adult type offence in order to evoke the guideline sentences of Henry and Harris respectively. Multiple robberies/break and enters should have an expectation of a control order.

¹⁷ R v Dinsdale (2000) 115 A Crim R 558

The LRC in its findings makes an interesting point that sentencing under the CCPA may in appropriate cases, serve objectives similar to those underpinning the diversionary scheme of the YOA. The Commission therefore favors the expansion of s6 of the CCPA to provide that, in imposing a penalty on a child the court should, where appropriate, have regard to:

- the desirability that children should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties;
- the necessity for children who accept responsibility for their actions making reparation; and
- the effect of the crime on the victim¹⁸

Question 40

a. Are the provisions for the destruction of records appropriate?

Members indicated the provisions for the destruction of records were appropriate.

b. Are there any concerns with their operation in practice?

Members indicated no concerns with their operation in practice.

The LRC report states that under s38(1) of the CCPA, the Children's Court must order the destruction of photographs, finger-prints and palm-prints, and other prescribed records (other than records of the Children's Court) relating to the offences following the dismissal of the charge and the giving of a caution under 233(1)(a). By contrast, the YOA is silent on the retention of material relating to the offence following caution. The Commission believes that the consequences of the caution under the YOA should, in this respect, be brought into line with the CCPA. It is consistent with the focus of the law on rehabilitation of young offenders that such records be destroyed following a caution, whether administered by a court or other authorized person.¹⁹

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?

Members indicated that the presumption should be reversed.

Question 41

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

I don't believe the provisions are appropriate, the imposition of bonds should be a serious warning to offenders that they could be in big trouble if they breach the conditions of the bond/probation order but on many occasions this is not acted upon.

b. Are there any concerns with their operation in practice?

As mentioned above, members indicated the provisions inappropriate.

¹⁸ Court-based sentencing, Report 104 (2005) – Young Offenders, Law Reform Commission, Lawlink, 2005

¹⁹ Law Reform Commission, Report 104 (2005) – Young Offenders, Lawlink NSW, 2005

During the Law Reform Commission's consultations following its release of Issues Paper 19, Sentencing: Young Offenders¹⁰⁶ ("IP 19"), it was suggested that in some cases courts do not dispense with, but in fact order, conditional bail or add good behaviour bonds when referring young offenders to youth justice conferences.

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

No, there is too much discretion already!!

Question 42

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

There were mixed opinions from members regarding whether the YOA and the CCPA be merged.

I believe the two Acts should be merged as there are similarities in legislation between them. The objects of the new Act would be mix of the objects and principles of the current Acts.

No – they operate well as separate acts.

There are examples of duplication within the Acts - an example of a similarity or more so duplication is in; Section 31 of the Young Offenders Act 1997 authorises courts to caution a young offender, which seems to duplicate the power to caution under s 33(1)(a) of the Children (Criminal Proceedings) Act 1987. There needs to be more of an analytical debate on the question of merging the Acts from relevant parties.