The Shopfront
YOUTH LEGAL CENTRE

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By email: [redacted]

Review of The Young Offenders Act 1997
Submission from The Shopfront Youth Legal Centre

About The Shopfront Youth Legal Centre

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. Established in 1993, the Shopfront is a joint project of Mission Australia, the Salvation Army and the law firm Herbert Smith Freehills.

We represent and advise young people on a range of legal issues, with a primary focus on criminal law. We are based in the inner city of Sydney but work with young people from all over the Sydney metropolitan area. Our four solicitors appear almost daily for vulnerable young people in the Local, Children's and District Courts.

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

The two co-authors of this submission are senior lawyers who have each worked with vulnerable young people in the NSW criminal justice system for approximately 25 years. We are both accredited specialists in criminal law; one of us is also an accredited specialist in children's law.

We have also been significantly involved in policy work. We have representatives on the NSW Law Society Criminal Law Committee and Children's Legal Issues Committee, and have also sat on various government working parties. We have provided submissions and evidence to various inquiries and legislative reviews.

General comments

We commend the aim of the Review of the *Young Offenders Act (YOA)* of ***"improving the legislative framework for youth diversion under the Act and increasing appropriate diversion of young people from the criminal justice system"[1].***

We are broadly of the view that this can be achieved by removing the exceptions in the Act and relying on the appropriate use of the discretion allowed to the gatekeepers in determining what matters should, or should not, be dealt with under the YOA. The factors that the police, DPP and Courts must consider when exercising this discretion are clearly

[1] Consultation Paper: Review of the Young Offenders Act 1997, February 2020, Executive Summary.

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expressed in the legislation, and as such, there is already built into the Act protection that objectively serious matters will not be diverted under the YOA, but dealt with in the Children's Court.

Time does not permit us to answer every question in detail. Our main concerns can be summarised as follows. We are of the view that:

- There should be no limit on the number of cautions able to be issued under the YOA.
- All matters able to be finalised in the Children's Court should be capable of being dealt with under the YOA.
- Young people should not be required to be formally interviewed by police before they are able to be dealt with under the YOA.
- Although this is not supported by the YOA, it is common practice for police to arrest a young person and take them to a police station for the purpose of seeking admissions. Arrest should be the exception rather than the rule and the YOA should be amended to help ensure this.
- In order to safeguard the rights of young people to consent to the diversion options under the YOA, it is fundamental that those protections already enshrined in the legislation are rigorously adhered to. In particular, the right to consideration of disposal under the YOA, the right to legal advice, the right to defend a matter, the right to a support person and the right to be informed of reasons for decisions made under the YOA.
- The current restrictions in the YOA adversely impact Indigenous young people who are overrepresented in our juvenile justice system, including in the very young age group. In this review we believe it is of vital importance to acknowledge the object in the YOA, *"to address the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings*" (YOA section 3(d)), and "*The principle that the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system should be addressed by the use of youth justice conferences, cautions and warnings*" (YOA section 7(h)).

Question 1: Should particular strictly indictable offences be able to be dealt with under the YOA?

We are of the view that all offences that can be dealt with to finality in the Children's Court should be able to be dealt with under the YOA.

There should be a wide discretion that allows the gatekeepers in this legislation to properly balance those factors outlined in sections 14(2), 20(3) and 37(3) of the YOA, when determining whether or not to divert a young offender under the YOA. The whole circumstances of each individual case must be taken into account in determining whether it is, or is not, appropriate for disposal under the YOA.

Our view is based on fundamental principles that highlight the importance of discretion and individualised justice in the criminal law. In *R v Whyte* (2002) 55 NSWLR 252 at [147], Spigelman CJ said: that *"The maintenance of a broad sentencing discretion is essential to ensure that all of the wide variations of circumstances of the offence and the offender are taken into account. Sentences must be individual."*

In the interests of justice, these principles should equally apply in dealing with young offenders. There will always be appropriate cases for offences that are currently excluded under the YOA and are able to be dealt with in the Children's Court jurisdiction, where there should be the option of diversion under the YOA.

We consider that the current exclusions in section 8 of the YOA are somewhat arbitrary, create artificial notions of more serious types of offending, and operate to unjustly fetter

discretion. For example, an offence of contravene apprehended violence order[2], no matter how low in objective seriousness, cannot be dealt with under the YOA, however an offence of assault occasioning actual bodily harm (AOABH)[3], no matter how high in objective seriousness, can. In our experience, it is more likely that a police officer or court, in applying their appropriate discretion under the YOA, would not divert a young person who had committed an extremely serious AOABH by way of a caution or youth justice conference. The same considerations apply to offences that are strictly indictable for adults but are within the jurisdiction of the Children's Court, eg robbery in company.

We note that the Review of the YOA has an "*aim of.. increasing the appropriate diversion of young people from the criminal justice system."*[4]. In our view, broadening the scope of offences able to be dealt with under the Act, and therefore the discretion of the gatekeepers, will go a long way to achieving this purpose.

Further, we do not consider that diversion under the YOA is a "soft option". In a youth justice conference, for example, a young offender is obliged to explore the causes and consequences of his or her actions, and the potential harm caused to the victim in the often challenging experience of a conference discussion. We believe that the principles of restorative justice that underpin the YOA are an effective community response to youth offending, with a focus on repairing the harm to the victim and the rehabilitation of the young offender. Dealing with a young person under the YOA has the benefit of diverting him or her from more formal court process, however, it also embraces the benefits of restorative justice for victims of crime. The NSW Law Reform Commission's Report on "*Young Offenders"* (2005) referred to a frequently cited description of restorative justice as, *"a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."."*[5] Further, it referred to the aim of restorative justice to *"promote accountability, healing and justice"*[6]

The carving out of offences from diversion under the YOA ignores the benefits of restorative justice for both victims of crime and young offenders, and overlooks the protection already built into the legislation, that guides the discretion of police and Courts.

Question 2: If an exception were added under section 8(1), which, if any, strictly indictable offences should be allowed to be dealt with under the YOA?

We refer to our answer to Question 1.

[2] Section 14, *Crimes Domestic and Personal Violence Act (2007) NSW*.

[3] Section 59, *Crimes Act (1900) NSW*

[4] Executive Summary, Consultation Paper, "Review of the Young Offenders Act 1997, February 2020, NSW Government.

[5] T F Marshall, Restorative Justice: An Overview (United Kingdom, Home Office, Research Development and Statistics Directorate, (1996) at 5., cited in .NSW Law Reform Commission, *Young Offenders*, Report 104, , (2005), page 32.

[6] New Zealand, Restorative Justice Network, Restorative Justice in New Zealand: Best Practice at 23, cited in .NSW Law Reform Commission, *Young Offenders*, Report 104, , (2005), page 32

Question 3: Should the YOA provide that strictly indictable offences can only be dealt with under the YOA by way of youth justice conference?

No. We reiterate our view that matters that are able to be finalised in the Children's Court jurisdiction, should be open to diversion by way of caution or conference under the YOA. The discretion of the gatekeepers will inevitably ensure that objectively serious matters are dealt with in the Children's Court.

There will be examples where it may be appropriate to caution a young offender for a strictly indictable matter. For example, the role of a child in such a matter may be so minimal, as compared to an older co-accused, that a caution is the appropriate outcome.

In order to ensure that the individual circumstances of the offence and offender are taken into account, the discretion of the gatekeepers should not be unnecessarily restricted.

Question 4: Considering the risks outlined above, would there be benefit in allowing transit officers to issue warnings and cautions under the YOA?

If not, are there any other ways that the issue identified by the 2018 Parliamentary Inquiry can be addressed?

In relation to whether or not to allow transit officers to issue warnings and cautions under the *Young Offenders Act,* there are valid arguments for and against.

In experience, it appears to be the default position for officers (whether transit officers or police officers) to issue a fine for fare evasion and other penalty notice offences. For our clients, it is unusual to be dealt with under the YOA for these types of matters, even when apprehended by a police officer who should be considering the YOA as a first resort.

A significant issue for young homeless people is fines accumulated at a time when they are young, vulnerable and without sufficient income to cover basic necessities, including public transport fares. Unfortunately, these fines can be the result of multiple infringements and become quite substantial. In our experience, these offences usually reflect compelling subjective circumstances at the time. Despite these circumstances, it is not long before informal warnings escalate to the issuing of penalty notices for our client group.

We understand the concern that allowing transit officers the power to issue warnings and cautions under the YOA may have a net-widening impact. However, in our experience, we see non-payment of fines as having an equally concerning net-widening effect.

Transport NSW has the option of issuing informal warnings or cautions to people of any age; however, many of our young clients are fined nevertheless. Although it is true that a penalty notice for fare evasion is reduced to $50 for minors, other transit offences still carry fines in the order of $200 or even $400.

Disadvantaged young people simply cannot afford to repay any fines, and are in an unfair position compared to young people with solid family support. We see net-widening occur because of later breaches of driver licence sanctions which are imposed administratively for non-payment of fines. Although licence sanctions might not be relevant until these young people are older, we often see them as older teenagers or young adults, having failed to pay for substantial fines, and offending by driving whilst unlicensed or suspended. Far too often these same young people will then drive whilst disqualified, which results in substantial periods of disqualification, further fines and further contact with the criminal justice system. This means that, in practice, those transport fines committed when they were children draw them into the criminal justice system through secondary offending.

Although we represent "vulnerable users", they nevertheless end up with substantial debts related to travelling on public transport without a ticket. One way to help resolve this problem is by allowing free public transport for young people under 18 years of age, so that young people cannot be issued with penalty notices for ticketing offences. This policy would acknowledge that young people under 18 years in most cases are financially vulnerable.

Given our comments above, we consider that allowing transit officers the power to issue warnings and cautions may result in better outcomes for young people in the longer term.

We believe that transit officers should be given the power to issue informal warnings under the YOA. Perhaps if transit officers believe a formal caution is appropriate then the matter can be referred to, and dealt with by, police. During that referral period a young person will have the opportunity to access legal advice and make an informed decision about whether they want to be dealt with under the YOA or by penalty notice.

Further, we note that a record of a warning or caution is not a criminal record, although we accept that formal cautions form part of a Court Alternatives History which is admissible in subsequent Children's Court proceedings.

The capacity of transit officers to warn, or to refer to police for a caution, under the YOA will require some specialist training and education, in the same way as police are required to undertake this.

Fundamentally, it is our view that young people should be able to make an informed decision about whether to be dealt with under the YOA or accept a penalty notice, after access to proper legal advice.

Question 5: Should the YOA be amended to apply to traffic offences committed by 16 and 17 year old drivers?

If so, how could this be balanced with community expectations around public safety?

Would allowing the YOA to apply to traffic offences committed by 16 and 17 year old drivers be inconsistent with the current sanctions and penalty regime for traffic offences, including additional restrictions around novice drivers?

We believe that the YOA should be amended so that it does not exclude any traffic matters.

Further, we support the amendment of the *Children (Criminal Proceedings) Act* to require all children's traffic matters to be dealt with in the Children's Court instead of the Local Court. The notion that "if you're old enough to have a licence, you're old enough to be treated as an adult" is no justification for differential treatment of traffic matters.

The principles relevant to children and young people must be the same, whatever the offence. Both the specialist jurisdiction of the Children's Court and the diversionary processes available under the YOA acknowledge that youth is an overriding factor that should be taken into account in offending by children, which requires a different approach to adults.

This is clear from the principles that guide the interpretation of both legislation. Including the principle "*that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance*"[7].

[7] Section 6(b) Children Criminal Proceedings Act 1987.

Whether or not an offence is a traffic offence, or a different type of offence, does not change the special principles that should apply to children and young people when considering a proportionate response to their offending.

There will be more minor traffic matters that police or Courts consider can be appropriately dealt with under the YOA, in some cases with the benefit of an outcome plan that addresses traffic offending and places significant weight on rehabilitation and that arguably supports community protection.

Further, there will be matters that should be dealt with in the Children's Court jurisdiction by a Magistrate who has the same powers of disqualification as a Local Court Magistrate. We have represented numerous 16- and 17-year-olds in the Local Court jurisdiction for traffic matters. Even though the Local Court may choose to impose sentencing options under the *Children (Criminal Proceedings) Act,* the adult jurisdiction is not an appropriate Court for children.

Question 6: If the Young Offenders Act were amended to allow traffic offences by 16 and 17 year old drivers to be dealt with under the Act, are there any particular traffic offences that may be appropriate for YOA interventions?

We do not believe that any traffic offences should be excluded, including penalty notice offences. We refer to our comments about transit officers at Question 4, and rely on the same view expressed about transport offences resulting in penalty notices.

Question 7: Should any change to the application of the YOA to traffic offences be made without considering amending the Children's Court jurisdiction for traffic offences under the CCPA?

If section 8(2)(b) of the YOA were amended without concurrent amendment to the CCPA, would there be benefit in allowing police or the Children's Court to apply the YOA to traffic matters involving 16 and 17 year olds?

We refer to our answer to Question 5.

It would be anomalous for the Children's Court to be able to deal with a traffic offence under the YOA but to have to refer the matter to the Local Court for a defended hearing or sentence proceedings.

Question 8: If the YOA were amended without concurrent amendment to the CCPA, would there be benefit in giving the Local Court jurisdiction to apply the YOA to traffic matters involving children?

We refer to our answer to question 5.

The Local Court is not an appropriate jurisdiction for children. However, if the Local Court is to retain jurisdiction over children's traffic offences, we believe the full range of outcomes should be available, including YOA diversion.

Question 9:

Given the existing legislative and operational framework, and the work currently underway that enhance responses to children with harmful sexual behaviours, would allowing sexual offences to be dealt with under the YOA be beneficial in responding to this behaviour?

If so, should consideration of extending the YOA to cover sexual offending by children be considered as part the current review of the YOA, or as part of a broader, more holistic review of sexual offending by children?

We consider that the current exclusion of sexual offences should be under consideration as part of the current review of the YOA.

While we support the work outlined in the consultation paper that focuses on a more integrated multi-agency and therapeutic response to offending, we do not believe that sexual offences should be excluded under the Act. The option of diversion for appropriate offences under the YOA can only complement the current approach to children displaying harmful sexual behaviours.

We refer to our response to Question 1, and reiterate that the exercise of discretion by the gatekeepers will properly ensure that more serious sexual offences remain in the jurisdiction of the Children's Court. In matters where police are considering a criminal justice response for sexual offending, consideration of the YOA should apply. We note that for some offences the involvement of the victim in the process will not be appropriate, nor will be diversion under the YOA.

We note that the current maximum penalties for excluded sexual offences range from 18 months (for example *Crimes Act* section 61KE, sexual act) to 20 years' imprisonment. One of the guideposts for Courts considering the seriousness of an offence is the maximum penalty of an offence. The maximum penalty *"represents the legislature's assessment of the seriousness of the offence: and for this reason provides a sentencing yardstick*"[8]:

Many other offences that carry the same or higher maximum penalties as those sexual offences currently excluded under sec 8(2)(d) YOA, can be dealt with under the YOA. Given that the seriousness of the offence is reflected in the maximum penalty, it is difficult to justify the exclusion of many of those sexual offences.

Question 10: Should section 8(2)(e) of the YOA be removed, such that offences under the Crimes (Domestic and Personal Violence) Act 2007 are able to be dealt with under the YOA?

Yes. In our experience, offences under the *Crimes (Domestic and Personal Violence) Act* can involve a broad range of behaviours, from extremely minor technical breaches of AVOs to objectively very serious matters.

We acknowledge that conferencing may be sometimes inappropriate for domestic violence matters due to the power imbalances in an abusive relationship. However, where children are alleged to have committed domestic violence offences, the power dynamics between the parties are usually quite different to those that typically apply in adult matters.

Many domestic violence matters that are currently dealt with in the Children's Court relate to siblings or parents or other caregivers, and are in a different category to adult matters that often involve intimate partner violence.

Superior Courts have considered that the more serious domestic violence matters conform to a particular pattern between a vulnerable female and a, typically stronger, male partner. In *Patsan v R* [2018] NSWCCA 129*,* the Court of Criminal Appeal said:

> *"The experience of this Court and the statistics relied upon by the Crown indicate that domestic violence offences not infrequently conform to the following pattern, to which the applicant's conduct in the present case*

[8] *Elias v The Queen (2013) 248 CLR 483 at [27]*

> *conformed: a male attacks (or kills) a woman with whom he is, or has been, in an intimate relationship when she expresses a wish to leave that relationship. Typically, the male is physically stronger than the female. The male is thus generally in a position to inflict considerable harm to the female and there is no real prospect of spontaneous physical retaliation because of the disparity between their respective strengths.".*[9]

In our experience, the types of matters dealt with in the Children's Court do not conform to this pattern of domestic violence offending that adult Courts regularly encounter.

Further, it seems incongruous to us that a breach of an AVO or an intimidation offence cannot be dealt with under the YOA, but an assault arising from the same incident can.

Again, we rely on our comments in Question 1 in relation to the proper exercise of discretion by the gatekeepers of this legislation. In our view there are many matters in which both parties in these types of proceedings will consider that dealing with a matter under the YOA is an appropriate outcome.

Question 11: Should the YOA be amended to allow possession of prohibited drug, administration of prohibited drug, and possession of equipment for the administration of prohibited drugs to be dealt with under the YOA?.

Question 12: Should the YOA be amended to provide that possession of a prohibited drug can be dealt with under the YOA where the small quantity is involved, regardless of the drug involved?

Question 13: Should the YOA be amended to allow the supply of prohibited drugs (s25, s23(1)(b) DMTA) to be dealt with under the YOA?

Question 14: Should the supply of prohibited drugs only be able to be dealt with under the YOA where 'in the interests of rehabilitation, and appropriate in all the circumstances, to do so'?

Question 15: Should the application of the YOA to the supply of prohibited drugs be limited to where below a certain quantity of the drug is involved?

Question 16: Should the threshold quantity for supply offences to be able to be dealt with under the YOA be set so that the Act can be applied to 'deemed supply' matters?

Yes, we consider all drug offences capable of being dealt with summarily by the Children's Court should not be excluded under the YOA.

We see no good reason why the options under the YOA should be restricted to possession of small quantities or possessing or cultivating prohibited plants. Again, artificial notions that these are more serious types of offences than others that are able to be dealt with under the YOA is perplexing, as is a more punitive approach to drug matters.

In our view, we are far behind contemporary attitudes and laws related to drug use in other developed nations, which can be harmful and confusing to young people. Our punitive approach is reflected in the exclusions in the YOA, and fails to acknowledge that for many young people this offending is likely to reflect issues related to health, including

[9] *Patsan v R [2018] NSWCCA 129 [39]*

mental health. In our view, outcomes reflecting a focus on harm minimisation and rehabilitation can be achieved effectively through options under the YOA, rather than formal court process.

Further, in our experience, vulnerable young people are more likely to be exposed to, and then contribute to, this type of offending. In order to avoid future offending and focus on the needs, support and rehabilitation of young people (which will also ensure better outcomes for the community), appropriate drug matters should be able to be dealt with under the YOA. The gatekeepers retain the discretion to decide which matters should or should not be finalised under the YOA.

We note concerns that extending the YOA to include more serious drug matters may give rise to the risk that young people are exploited by adults on the basis of there being available to children more lenient outcomes. In our experience, this already routinely occurs. We often hear from our young clients that adult co-offenders coerce them into taking responsibility for drug offending because the adult argues that, as a young person, they will be dealt with more leniently by a Children's Court "and not go to gaol." This only demonstrates how vulnerable children and young people can be, and how complex are the issues that draw them into this type of offending. The fact that these children are exploited should not exclude them from diversion under the YOA, which should be an opportunity for discussion and support and addressing this cause of offending in better outcome plans.

We believe that conferencing or even cautioning may have a valuable role to play in the case of some young people who are guilty of supply offences. For example, a child who has bought a small amount of cannabis and given some to his friends, or a drug-dependent young person who has been supporting their habit by selling aspirin and passing it off as heroin.

Question 17: Which indictable offences, if any, may be appropriate for warnings under the YOA?

We agree that the offences for which police are able to give a warning should be extended under the YOA. There are a number of low-level offences, currently excluded, which may be appropriate for an on-the-spot warning. For example, shoplifting or low-level reckless damage (particularly where the stolen property is recovered or the damage to property is capable of being immediately rectified).

Reckless damage[10] can cover a broad range of conduct, including damage that is considered "trivial" but results in the interference with the physical integrity of the property. In the High Court case of *Grajewski v Director of Public Prosecutions (NSW)*[11] the Court held that a person damages property whereby there is *"…any alteration to the physical integrity of the thing. The alteration may be relatively minor and temporary as in letting the air out of a tyre, which physically alters the tyre and renders it imperfect."*[12] Many minor offences of reckless damage, or attempted damage, should be able to attract a warning under the YOA.

Question 18: Should the YOA be amended to allow police to give warnings for larceny and property offences listed in Part 2, Clause 3 of Table 2 of the Criminal Procedure Act 1986?

We agree that the YOA should be amended to allow police to give warnings for larceny and property offences listed in Part 2, Clause 3 of Table 2 of the *Criminal Procedure Act.*

[10] Section 195 *Crimes Act (1900) NSW*

[11] Grajewski v Director of Public Prosecutions (NSW) [2019] HCA 8,

[12] Ibid [53].

Question 18: Should a minimum value of the goods be specified in relation to larceny and property offences that can be dealt with via warning under the YOA?

We presume that the use of the word "minimum" in the question is an error and that you in fact mean "maximum".

We do not believe that a maximum value of the goods should be specified. This may be difficult to assess on the spot, for example, in reckless damage matters. Rather, we reiterate our view that whether or not to issue a warning in these matters should be left to the discretion of the relevant police officer.

Question 20: Should the YOA be amended to allow police to give warnings, cautions and referral to youth justice conferences under the YOA for offences under the Graffiti Control Act 2008?

Yes, we believe there is an unwarranted restriction on diversionary options for young people in relation to graffiti matters.

Police should be able to give a warning or caution for an offence under the *Graffiti Control Act.* We note that the Children's Court can caution a child for a graffiti offence. Again, the police as a gatekeeper, should have the discretion to deal with a graffiti matters by warning or caution, having regard to those factors prescribed in the legislation, which includes the seriousness of the conduct.

The Report on The Adequacy of Youth Diversionary Programs in New South Wales by the NSW Legislative Assembly Law and Safety Committee[13] discusses this issue in some detail. From paragraphs 2.32 to 2.46, the report discusses the limited range of offences that can be dealt with under the Act. Many stakeholders who made submissions or gave evidence to the Inquiry were of the view that these exclusions create anomalies and injustices, and ultimately undermine the diversionary and rehabilitative aims of the YOA.

The vast majority of the stakeholders quoted in the report believe that police should be able to warn or caution young people for graffiti offences. We agree with this view.

We are very concerned about the data referred to from the Young People in Custody Health Survey (2015) which showed that, for the participants, the first offence type committed was on average a graffiti offence at the age of 11.8 years. The participants in this survey were involved in Children's Court proceedings as young children and ultimately ended up in custody. We note that Aboriginal and Torres Strait Islander children are overrepresented in relation to the very young children who are appearing in the Children's court, and also those children and young people who end up in custody. In NSW, the proportion of Aboriginal young people between the ages of 10 and 12 making their first contact with the criminal justice system is 30-56 times higher than non-Aboriginal children.[14]

We agree that a punitive approach and early exposure to formal court process may have contributed to the escalation of offending. We support a focus on diversion and rehabilitation which can be achieved through options under the YOA. Further, such an approach better supports the objects and principles of the YOA, "*to address the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings."*[15]

[13] Report 2/56, September 2018

[14] Weatherburn, Don and Ramsay, Stephanie, "Offending over the life course: Contact with the NSW Criminal justice system between the age 10 and 33", Crime and Justice Statistics Bureau Brief, NSW Bureau of Crime Statistics and Research, Issues Paper 132, April 2018, 7 [https://www.bocsar.nsw.gov.au/Documents/BB/2018-Report-Offending-over-the-life-course-BB132.pdf].

[15] Section 3(d) *Young Offenders Act 1997*; section 7(h) *Young Offenders Act 1997*

Question 21: Should the limit on cautions that a child may receive under the YOA be removed (through removing sections 20(7) and 31(5) of the Act)?

We believe that the limit on cautions should be removed. The limit serves to fetter discretion of the police and the Courts, and to interfere with principles of individualised justice, that is, that the circumstances of the offence and the offender are considered in each individual case.

One of the aims of this Review is to increase the number of appropriate diversions under the *Young Offenders Act*. The limits to cautions interferes with this aim.

We are of the view that vulnerable young people are disproportionately disadvantaged by this rule. In particular, Aboriginal and Torres Strait Islander young people who are over-represented in their early entry into the juvenile justice system.

Police are already guided in their discretion to issue a caution under section 20(3), including at (d) by, *"the number and nature of any offences committed by the child and the number of times the child has been dealt with under this Act*". The Court would undoubtedly consider this also in the exercise of discretion.

Question 22: Should the admission requirement under the YOA be removed altogether?

Should the admission requirement be removed for cautions only (and retained for youth justice conferences)?

Could removing this requirement create risks of net-widening in terms of young people receiving a YOA outcome even where they disagree with the allegations put to them?

Could removing the admission requirement for cautions cause uncertainty around the difference between warnings and cautions?

We believe that the requirement for an admission under the YOA should only apply after a young person has had access to legal advice, and that there needs to be more clarity about what constitutes an admission.

It should be made clear in the Act that there is no requirement for a formal police interview, and in particular an ERISP, for an admission to comply with the YOA.

We agree that a simple, standard form should be available which the young person can sign after legal advice, to confirm acceptance of responsibility for the offending. Alternatively, the signing of a police notebook entry, or an admission made via a communication from the young person's legal representative, should suffice.

In our view, a consent by the young person to a caution (after legal advice) should be adequate to allow a police officer to caution a young person. We believe of critical importance is the timing of access to legal advice prior to a child consenting to a caution or signing a document that confirms s/he admits the offence.

We are very concerned about the practice whereby some police officers take children or young people back to the police station, for the purpose of an interview (and an admission) and to access telephone legal advice.

Although there is nothing in the YOA to specify that a formal police interview is necessary, the practical impact of the admission requirement has been that the police generally require the young person to undergo an ERISP or other formal interview.

In many cases, police are arresting young people and transporting them to the police station to interview them for the purpose of establishing whether an admission will be

made or not. This practice conflicts with the common law principles that arrest is a last resort[16] and that there is no power to arrest for the purpose of questioning or an interview[17]. Any deprivation of an individual's liberty is an arrest at common law[18].

Arrest as a last resort is a fundamental principle that is reflected in section 8 of the *Children (Criminal Proceedings) Act* 1987 and in section 99 of the *Law Enforcement (Powers and Responsibilities) Act* 2002. Further, the NSW Supreme Court has stressed that the use of the power of arrest for minor offences where the defendant's particulars are known, is not a proper use of arrest power.[19]

Arrest for the purpose of an interview or obtaining an admission is in breach of section 99 of the *Law Enforcement (Powers and Responsibilities) Act* 2002 and the common law of arrest, including the recent High Court decision in *State of NSW v Robinson*[20]. The majority (Bell, Gageler, Gordon And Edelman JJ) said, at [63]:

> *"In Bales v Parmeter, Jordan CJ provided a clear statement of the law in New South Wales: an arrest can only be for the purpose of taking the arrested person before a magistrate (or other authorised officer) to be dealt with according to law to answer a charge for an offence. An arrest merely for the purpose of asking questions or making investigations in order to see whether it would be proper or prudent to charge the arrested person with a crime is an arrest for an improper purpose and is unlawful. That straightforward, single criterion has been repeatedly cited with approval in New South Wales and elsewhere. In making that statement, Jordan CJ was expressing the effect of s 352 of the Crimes Act 1900 (NSW). Nothing done in LEPRA (in its original or amended form), or for that matter in any of the intervening legislative amendments which will be examined, has displaced that single criterion."*

The High Court has said that, *"The right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes"*[21]

The deprivation of liberty of some young people in order to conduct an interview, with one of the considerations being whether options under the YOA apply, is of grave concern to us.

Even where the young person is not arrested but is asked to attend the police station voluntarily, many young people may believe that they have no choice but to attend a police station. Further, the insistence on a formal interview often provides police with an irresistible opportunity to ask further questions. The questioning may go beyond the scope of the alleged offence that the child is being asked to admit to for the purpose of a caution or conference. Even with a support person present, young people are typically disempowered in this situation; they may feel pressured into answering further questions and lack the practical ability to have the interview terminated at an appropriate point.

The right to obtain legal advice should be strengthened prior to a valid admission, in order to ensure procedural fairness and to avoid net-widening. A young person must be informed of this right. Consent to participate in a caution, or the signing of a simple form confirming that the young person admits the offence (after legal advice) should be regarded as equivalent to the acceptance of responsibility for the offence. In most

[16] *DPP (NSW) v Mathews-Hunter [2014] NSWSC* 843 [49]- [52]

[17] *Robinson v State of New South Wales [2019] HCA 46; R v Dungay [2001] NSWCCA 443; Zaravinos v State of New South Wales [2004] NSWCA 320*

[18] *R v Donohue (1988) 34 A Crim R 397*, Hunt J at p 401,

[19] *DPP v Carr (2002) 127 A Crim R 151 at [35] (Smart AJ)*

[20] Op cit, *Robinson v NSW*

[21] *Cleland v The Queen, cited in [21] DPP (NSW) v Mathews-Hunter [2014] NSWSC 843 at [51*]

circumstances, the key will be providing time for the young person to obtain legal advice and to reflect on that advice.

We note that for a Children's Court to caution a young person or refer them to a youth justice conference, an interview with police is not required. It is enough for the young person or their legal representative to state to the Court that the young person admits the offence.

Providing clarity that an ERISP or other formal police interview is not required for an admission would go some way to addressing the problem of young people being unlawfully or improperly arrested, or pressured into a police interview.

We note the concern referred to at page 37 of the Consultation Paper that, due to their immaturity, vulnerability and the obvious power imbalance when being dealt with by police, removing the requirement for an admission may create a risk that children accept a YOA caution to avoid police or court action in circumstances where they have not committed the offence. However, in our experience, the same issue applies whether there is a requirement for an admission to police or not. Children are very often vulnerable in police stations, and the integrity of any admission is something legal representatives routinely explore with their clients.

In our experience, children often want to plead guilty when they attend the Children's Court as well, "to get it over and done with" or to end onerous bail conditions. Unfortunately, although undesirable, this is often an issue that confronts practitioners representing children. One way to minimise this is access to competent and thorough legal advice and advocacy.

In our view, the way to address the concern that some children will potentially admit offences to avoid further sanction in circumstances where they are innocent is to strengthen the right to legal advice and advocacy pre-caution and pre-court.

We are firmly of the view that the right to legal advice, before a consent to be cautioned or to be dealt with by youth justice conference, must be strengthened.

In its 2005 Report, "*Young Offenders",* the NSW Law Reform Commission found that *"a young person's right under the YOA to obtain legal advice is impaired unless the young person has been advised of the right at the outset of any proceedings, and given the opportunity to exercise the right*".[22] The Commission goes on to state, *"…while the Legal Aid Hotline is a very valuable resource, it does have its limitations. First, advice over the phone is not the same as face-to-face advice…Secondly, complex advice must be delivered simply, in plain English, sometimes through an interpreter, which is not always easy to achieve over the phone. Thirdly, due to a lack of adequate facilities at some police Stations, the child is not always given proper privacy while receiving advice*."[23]

We support the Commission's view that, in order to give the right to legal advice some substance, there will be many matters in which a young person should be released in order to allow time for him or her to obtain legal advice, before consenting to a caution, or a youth justice conference. *" While the Hotline would remain an important crisis contact, a cooling-off period would then enable a young person to follow-up initial telephone advice with "face-to-face" legal advice, overcoming the shortcomings of telephone interaction."*[24]

We support the view of the NSW Law Reform Commission, and believe this position continues to be relevant. In particular:

[22] .NSW Law Reform Commission, *Young Offenders*, Report 104, , (2005), page 111.

[23] Ibid, page 111- 112.

[24] Ibid, page 112.

> *"….the Commission has concluded that…the s 7(b) principle 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 the cooling-off period during which the child has had the opportunity to seek legal advice."*[25]

The Commission recommended the following:

> *Recommendation 5.2: " Neither an admission by a child of an offence, nor consent to diversionary processes, should be valid for the purposes of s 19, 23, 31, 36, 40 of the Young Offenders Act 1997 (NSW) unless the admission is made, and consent given, after the child has received legal advice or has had a reasonable opportunity to receive legal advice. A "reasonable opportunity" should be defined to mean not less than four days between the time an allegation is made to the child that he or she has committed an offence and the commencement of the diversionary processes."*[26]

There should be a process available in appropriate cases where a child is issued with a notice of an alleged offence (as they may be with a Field or Future Court Attendance Notice for matters proceeding to Court) that allows the young person to obtain legal advice in relation to whether a child consents to a caution or referral to a youth justice conference by police or otherwise.

However, we acknowledge that there will be less serious matters in which a child is dealt with by police at the scene of an offence (for example a minor shoplifting), the child will be provided with means to access legal advice then and there, and police will caution on the spot[27]. It is in the interests of the principles of diversion to not interrupt this process for more minor matters. An alternative way of dealing with these sorts of matters, is of course, to expand those offences for which a police officer can issue a warning.

A young person (unless lawfully under arrest, and noting that arrest should be a last resort) should not be taken to a police station. Unless lawfully arrested, the majority of young people should be allowed to remain at liberty until they have had the opportunity to obtain legal advice and decide whether to accept a caution or conference referral. The practice of taking children back to the Police Station conflicts with diversionary principles, including those outlined in the principles of the YOA, in particular, *"The principle that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence"*[28] We refer to the words of his Honour, Justice Smart, in *DPP v Carr*, *"Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear."*[29] It is crucial that we do not lose sight of fundamental rights protected in law when considering this diversionary mechanism.

Further, we agree that a child or young person should not be required to participate in an ERISP or any other type of formal police interview for the purpose of a caution or referral to a youth justice conference.

Question 23: Should the admission requirement be lowered, such that a child can "not deny" an offence in order to be eligible for diversion under the YOA?

[25] Ibid, page 113.

[26] Op cit, page 114.

[27] Section 26(3) Young Offenders Act 1997 (NSW)

[28] Section 7(a) *Young Offenders Act 1997 (NSW)*

[29] *DPP v Carr* [2002] NSWSC 194, (2002) 127 A Crim R 151 per Smart J

Would children be more willing to "not deny" an offence rather than make an admission? Are they likely to interpret "not deny" as a lower threshold?

Would a "not deny" threshold be easy to explain to children, or would this threshold add to complexity in the application of the YOA for Practitioners?

We are concerned that a "not deny" requirement to police may still be interpreted by police dealing with young people as a requirement not dissimilar to an admission and therefore dependent on a formal police interview. We are also concerned that the difference between "not deny" and an admission will be lost on children and young people being questioned at a police station.

Access to appropriate legal advice before a child or young person attends a police station for a caution or is referred for a conference would potentially resolve this problem. As would clarification that consent to a caution or conference, or the signing of a short standard form confirming the young person admits the offence, constitutes an admission for the purposes of the YOA.

However, for the purpose of a youth justice conference and after a young person has accessed legal advice, we do not object to a requirement that a child must accept responsibility for an offence by a "not deny" requirement or by a requirement to sign a short form admitting the offence. We agree that a meaningful youth justice conference can only occur in the context of a young person accepting responsibility for his or her actions.

It is our view that a legal representative should liaise with police, rather than young people being compelled to attend the police station for questioning in order to ascertain whether or not a child denies an offence.

Question 24: Should the meaning of admissions made for the purposes of the YOA be defined in the legislation?

If so, what are the minimum requirements for an admission that should be specified?

We do not believe that the meaning of admissions should be defined in legislation, except to clarify that an ERISP or other formal police interview is *not* required.

We reiterate our view that any acceptance of responsibility, or admission, should be required only after access to legal advice, and should not be dependent on a police interview. It should be specified in legislation that the young person should not be required to participate in a formal police interview.

We note concerns that a young person may agree with the elements of an offence, but not the police version as a whole. This is already not unusual, for example in the Children's Court on a plea of guilty to an offence, there is often a discussion of a young person's account that may differ in some respects to the Prosecution's version as set out in the police facts. The fact that versions differ in some ways is not fatal to the plea in mitigation. However, if the version of the young person and Prosecution is substantially different, it may be that the Court will not accept the plea or that the legal advice would be to contest the matter in court.

In our view, this will always be an option for a young person after proper legal advice when deciding whether to consent to a caution or a youth justice conference.

Question 25: What elements of an admission are necessary in order to ensure that youth justice conferences are not negatively impacted?

The acceptance of responsibility for the offending is important to ensure a meaningful youth justice conference.

Question 26: Should the Protected Admissions Scheme be provided for in the legislation?

Yes. This is an important measure to encourage young people to make admissions for the purpose of YOA diversion, without fear that the admissions may later be used against them in a criminal prosecution should the matter not proceed under the YOA.

Yes. This is an important measure to encourage young people to make admissions for the purpose of YOA diversion, without fear that the admissions may later be used against them in a criminal prosecution should the matter not proceed under the YOA.

We reiterate that by "admission" we do not mean participation in a formal police interview. As we have already made clear, we believe that an admission for the purpose of the YOA should be made in a simple signed document or via a legal representative. We agree with the 2018 Parliamentary Inquiry's Recommendation that it should not be necessary for a young person to participate in an ERISP before police issue him or her with a caution (Recommendation 3). We believe this should not be necessary also in relation to referral by police to youth justice conferences.

Any admissions made by a child, in whatever form they are made, should be protected at law, where police are considering diversion under the YOA.

Giving legislative basis to the Protected Admissions Scheme is only one of several protective measures that we believe should be adopted in relation to admissions. The others, which include improved access to legal advice and further protection against unwarranted arrest, are discussed elsewhere in this submission.

Question 27: Would a standard form for admissions in the legislation assist with encouraging admissions under the YOA and help provide consistency in how admissions are obtained?

We refer to our answers above.

Question 28: Should the use of arrest as a last resort for young people be legislated? Should this be considered as beyond the context of the YOA?

The common law principle that arrest is a last resort is well established for all, including young people[30]. In *Robinson v State of New South Wales* [2018] NSWCA 231, the Court of Appeal reiterated that section 99 of LEPRA must be construed in the context of common law principles relating to the power of arrest and that neither the text nor context of the statute suggests an intention to depart from these general law constraints[31] Rather, these common law principles are embedded in the language of Section 99, and expressly preserved by LEPRA section 4[32]. This decision was recently upheld by the High Court in *State of New South Wales v Robinson* [2019] HCA 46[33].

In our view, the intention of section 8 of the CCPA has also been to reiterate this principle. At the inception of the CCPA the original words of section 8 stated that proceedings should be commenced by way of "summons or citation", and was later changed to "attendance notice", so as to ensure that, except in certain circumstances, children were not to be arrested and charged with criminal offences. Rather, proceedings

[30] *Director of Public Prosecutions (NSW) v Mathews-Hunter [2014] NSWSC 843* [59]

[31] *Robinson v State of New South Wales [2018] NSWCA 231*; [120]; [124-127]; [165]; [173]).

[32] Ibid, [35]; [44]; [132- 134]

[33] *State of New South Wales v Robinson [2019] HCA 46*

were to be commenced in a way which did not involve the arrest of the child. That is, that arrest must be a last resort.

There have been amendments to this section over time which continued to refer to methods of commencing criminal proceedings other than by arrest and charge. The most recent amendment was made by the *Justices Legislation Repeal and Amendment Act* 2001 which made comprehensive statutory reforms of criminal procedure. Section 8 of the CCPA replaced the phrase "summons or attendance notice" with "court attendance notice". However, the *Criminal Procedure Act* 1986 was also amended at that time to provide that all criminal proceedings in the Local Court would be commenced by "court attendance notices", including after arrest.[34]

This had an unintended consequence on the meaning of section 8 of the CCPA. That is, the meaning of section 8 was mistakenly altered in a way in which it can be interpreted that the term "court attendance notice" no longer refers to an alternative to arrest. We note that the High Court considered the construction of section 8 in *PM v The Queen* [2007] HCA 49*,* and stated that it should be interpreted in such a way that arrest should be a last resort when proceedings are being commenced against children.

However, it is our view that this interpretation needs to be adequately expressed in the CCPA, and amended to use terminology that makes the original intention of section 8 clear. That is, that when police are commencing proceedings against children it is by way of a "Field CAN", "Future CAN" or "No Bail CAN" unless the circumstances justify proceeding by way of a lawful arrest and charge.

We do not believe that the principle that arrest is a last resort needs to be legislated in the YOA. However, we believe that section 8 of the CCPA needs to be amended to reflect its original intention, and that proceedings against children should generally be commenced other than by way of arrest.

We do, however, believe that there needs to be a provision in the YOA that states a young person is not required to participate in an interview with police for the purpose of an admission. This may help to stamp out the common police practice of arresting young people and taking them to the police station for an interview. We refer to our answer to question 22.

Question 29: Should the YOA be amended to specify that 'personal attendance' at a youth justice conference includes attendance via other means (e.g. attendance via audio-visual link)?

Time does not permit us to provide a comprehensive answer to this and the following questions about youth justice conferences.

However, we have read the draft submission from the NSW Law Society and we broadly endorse their position.

Attendance via AVL may be appropriate in some circumstances and we believe that the legislation should provide for some flexibility.

Question 30: Currently under the legislation only a police officer is able to attend a youth justice conference for training purposes. Should this be extended to also include YJNSW staff or conference convenors?

We agree with the Law Society that the ability to attend a youth justice conference for training purposes should be extended to YJNSW staff or conference convenors, provided the same criteria at s47(1)(k) of the YOA apply.

[34] s47 and s172 Criminal Procedure Act 1986

Question 31: Should the YOA be amended to clarify that a conference administrator can return a matter to the referring authority (i.e. SYO, ODPP or Court) for consideration not to proceed under s44, when the administrator has identified issues that mean progressing with a youth justice conference would not be appropriate?

In what circumstances may it be appropriate for this to occur? Should this be clarified in the legislation?

We believe that a conference administrator should be able to return a matter to the referring authority in certain circumstances, if it becomes clear that a conference is no longer possible or practicable, e.g. if the young person withdraws their admission or their consent to a conference.

However, we are opposed to the conference administrator becoming another gatekeeper and imposing their own view on whether a conference is in the interests of justice. These issues have already been considered by the police, DPP or court in referring the young person for a conference.

Question 32: Should the legislated timeframe to convene a youth justice conference be amended to align with, and account for, the administrative and coordination tasks required to be undertaken?

If yes, what is an appropriate timeframe and why?

In our experience, conferences rarely take place within the legislated timeframe and it may be preferable to prescribe a more realistic timeframe.

However, we do not wish to see conferences being delayed due to a lack of administrative resources or a lack of priority being given to conferencing.

We believe that the reinstatement of the Youth Justice Conferencing Directorate within Youth Justice NSW, with an appropriate allocation of resources, may assist in ensuring that conferences take place in a timely manner.

Question 33: In developing outcome plans for children from Aboriginal and Torres Strait Islander and multicultural backgrounds, should consideration be given to the child's cultural needs?

We agree with the Law Society that, when outcome plans are being developed for Indigenous children, consideration should always be given to their cultural needs.

Question 34: Should the maximum period of community service work that can be included in a youth justice conference outcome plan be less than the maximum number of hours that may be imposed under the Children (Community Service Orders) Act 1987?

We agree with the Law Society's view that the maximum period of community service work that can be included in a YJC outcome plan should be less than the maximum number of hours that may be imposed under the *Children (Community Service Orders) Act.*

Question 35: At present, the Young Offenders Regulation 2016 distinguishes outcome plans for graffiti and bush fire or arson offences, by including additional requirements.

Are these requirements appropriate?

Should any other requirements apply in relation to these offences?

We agree with the Law Society's view that there should be no mandatory inclusions in outcome plans with respect to any offence, including graffiti and bush fire or arson offences.

Question 36: Should the YOA be amended so that the requirement to inform victims of conference outcomes is limited to those victims who have participated in conferences or those who do not participate but request to be informed?

We agree with the Law Society and would support an amendment to the YOA of this nature.

Question 37: Should the title of the YOA be amended to remove reference to 'young offenders'?

If so, what is an appropriate title for the Act?

We do not have a view on the title of the Act. However, we agree with the Law Society that a person should not be referred to as an "offender" unless they have admitted to or been found guilty of an offence.

Question 38: Should the principles of the YOA under section 7 be amended to align with the principles under the CCPA?

We agree with the Law Society's view that the YOA should be amended to incorporate relevant principles in the CCPA that are not present in the YOA.

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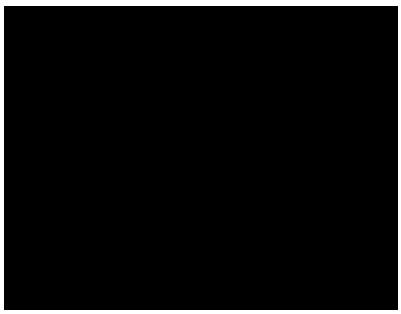
Thank you for the opportunity to make this submission.

We are happy to be contacted for further comment.

We believe there would be value in convening some roundtable discussions to deal with some of the issues raised in this review. We would be keen to participate in any such discussions.

Our preferred means of contact is via email at [redacted].

Yours sincerely



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