Children's Court of New South Wales

16 August 2012

Mr Joseph Waugh,
Senior Law Reform Officer,
NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001
AUSTRALIA

Dear Mr Waugh

RE: Law Reform Commission Review of the *Crimes (Sentencing Procedure) Act 1999*

Thank you for the opportunity to comment on the Law Reform Commission's review (Question papers 5-7) of the *Crimes (Sentencing Procedure) Act* 1999 (CSPA). I will respond to questions which are applicable to juveniles, whether they are being dealt with in the Children's Court or at law.

Question Paper 5 – Full-time imprisonment

Restatement of overarching principles articulated in previous submission:

The Children's Court's fundamental proposal, articulated in its previous submission dated 31 May 2012, was that the CSPA should provide clarification of the principles relevant to juveniles ("*the principles*"), by expressly stating that when dealt with under the CSPA, juveniles are subject to the overarching principles enunciated in s 6 of the *Children (Criminal Proceedings) Act 1987* (CCPA), and also that rehabilitation and the reduction of recidivism are primary considerations when dealing with juveniles (These two additional considerations are proposed to be included in the current review of the CCPA being undertaken by the Department of Attorney General and Justice).

The Court also noted its support for the principle that detention should be a measure of last resort but should also include "*for the minimum necessary period*", as contained in Article 19 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (Beijing Rules):

> *"The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period."*
>
> An almost identical provision exists in Article 37 of the *Convention on the Rights of the Child* (CRC).

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The Court also expressed its support for the common law principle that rehabilitation is the paramount purpose in sentencing young people and that rehabilitation advances the protection of the community. The Court referred to *R v Webster*[1]:

> *"The protection of the community does not involve simply the infliction of punishment ...The community does have a real interest in rehabilitation. The interest to no small extent relates to its own protection...The community interest in respect to its own protection clearly is the greater where the offender is young and the chances of rehabilitation for almost all of the offender's adult life, unless he is crushed by the severity in sentence, are high."*

Question 5.1

1. Should the "special circumstances" test under s 44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) be abolished or amended in any way? If so, how?

See below.

2. Should a single presumptive ratio be retained under s 44 or should a different ratio apply for different types of offences or different types of offender; and, if so, what ratio should apply to different offences or different offenders?

The Children's Court is of the view that young people should not be subject to the statutory ratio set out in s 44. The presumptive ratio contemplates the purposes of sentencing applicable to adults and appears to be focused on punishment, which is incompatible with the rehabilitative approach apposite to young people. If the ratio is retained in the revised Act young people should be subject to an exemption.

The legislative and common law principles relevant to the sentencing of young people are varied and complex and the subjective circumstances of the young person often weigh more heavily than for adults as a result of their immaturity and state of dependency. As a result, the sentencing of young people does not lend itself to a formulaic or strictly mathematical approach and every case must be considered on its individual merits. The "*instinctive synthesis*" approach, as approved by the recent High Court case of *Muldrock*[2] is particularly relevant in the sentencing of young people.

The study discussed at page 9 of question paper 5 reveals that "*special circumstances*" were most often found in cases where there was seen to be a greater need for supervision in the community, where the person had good prospects for rehabilitation and where the age of the offender was a consideration. These three findings are all highly relevant in the sentencing of young people and supports their exemption from the statutory ratio.

As well, longer parole periods with intensive supervision can assist with the young person's rehabilitation and reintegration into the community, by linking them to services and monitoring their compliance with programs which address their needs and criminogenic behaviour. This is particularly important for young people who are not only in a "*state of dependency and immaturity*" but who may have dysfunctional or unsupportive families or may be returning to an environment which is conducive to offending.

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[1] (unrep, Court of Criminal Appeal, NSW, NO 6582 of 1990, 15 July 1991) at pages 11 and 12.
[2] *Muldrock v The Queen* [2011] HCA 39.

Rule 28 of the Beijing Rules promotes the early release and supervision of the young person:

> "*28.1 Conditional release from an institution shall be used by the appropriate authority to the greatest extent, and shall be granted at the earliest possible time.*
>
> *28.2 Juveniles released conditionally from an institution shall be assisted and supervised by an appropriate authority and shall receive full support by the community*"

A longer period of intensive supervision in the community also promotes the s 6 principles of the CCPA by providing young people with "*guidance and assistance*" by the provision and monitoring of programs and support, by assisting them "*reintegrate*" into the community, by renewing their "*family and community ties*" and by assisting them in returning to their "*own home*".

Judges and magistrates should not be unnecessarily constrained in the exercise of their discretion when sentencing young people. As such it is the view of the Children's Court that when dealing with young people s 44 is an unnecessary constraint which does not assist the implementation of sentencing principles on young persons and may in some cases hinder it.

Top-down and bottom-up approaches

Question 5.2

1. Should the order of sentencing under s 44 of the Crimes (Sentencing Procedure) Act 1999 (NSW) return to a 'top down' approach?

While the current bottom up approach only refers to the "*order of pronouncement*", it may lead to the impression that greater weight has been placed on the non-parole period at the expense of the parole period. The Children's Court supports the use of the top-down approach for similar reasons to the Chief Magistrate of the Local Court, at paragraph 5.57, as it provides a clearer statement of the total sentence and as such advances transparency and public confidence.

2. Could a 'top down' approach work in the context of standard minimum non-parole periods?

Not applicable to young people.

Short sentences of imprisonment

Preliminary comments

The Children's Court is concerned about the potential criminogenic effect of custody, particularly on first-time offenders, with some research suggesting it is the "*most significant factor in increasing the odds of recidivism*".[3]

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[3] Noetic Solutions, *A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister of Juvenile Justice* (2010), 69. See also: Barry Holman and Jason Ziedenberg, 'The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities' (2007) *A Justice Policy Institute Report.*

The NSW Bureau of Crimes Statistics and Research (BCSR) found that a custodial sentence did not reduce re-conviction rates compared to young people whose custodial sentence was suspended. They stated:

> *"These findings and the absence of strong evidence that custodial penalties act as a specific deterrent for juvenile offending suggest that custodial penalties ought to be used very sparingly with juvenile offenders"*[4]

Question 5.3

1. Should sentences of six months or less in duration be abolished? Why?

In light of the comments above and "*the principles*", the Children's Court is of the view that custodial sentences of less than 6 months should not be abolished. While their abolition *may* result in alternative community-based penalties being imposed, which address the young person's particular needs or offending behaviour, the Children's Court is concerned that some young people may be subject to *more* onerous sentences where the judicial officer is of the view that "*no penalty other than imprisonment is appropriate*" and thereby impose a sentence of *over* 6 months, because there is no alternative. The Commission refers to this as "*sentence creep*" in its question paper at paragraph 5.73.

A recent study by the BCSR indicates that while arrest and custody are deterrents to offending, an increased length of sentence has *not* been shown to be a deterrent.[5] This supports the continued availability of short-term custodial sentences where "*no penalty other than imprisonment is appropriate*".

Question paper 5 noted at paragraph 5.67 that the abolition of sentences of 6 months or less "*had not had any positive impact*" in Western Australia and at paragraph 5.68 that Victoria had decided against their abolition as it left "*too large a gap*". Until credible evidence based research exists to support their abolition short-term sentences should be retained.

If all "*sentences of imprisonment*" of less than 6 months were abolished, the use of home detention, suspended sentences and intensive supervision orders would also be unavailable for this period as they are subject to a sentence of imprisonment being imposed. This would further reduce the available penalties.

The Children's Court supports the availability of a wide variety of sentencing options which can be tailored to suit an individual's circumstances. The Children's Court proposes that there are not enough alternatives to full-time prison/detention available under the CSPA, particularly in rural NSW and especially for young people who are not currently entitled to all of the options available to adults.

This discrepancy potentially breaches s 6(e) of the CCPA which states "*that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind*". Therefore, short-term sentences and all of the options available to adults that are appropriate for short-term sentences should be available to young people.

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[4] Don Weatherburn, Sumitra Vignaendra and Andrew McGrath, "The specific deterrent effect of custodial penalties on juvenile re-offending" (2009) *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice*, 6.

[5] Wai-Yin Wan, Steve Moffatt, Craig Jones and Don Weatherburn, "The effect of arrest and imprisonment on crime" (2012) 158 *Crime and Justice Bulletin, Contemporary Issues in Crime and Justice,* 16.

As a positive safeguard the revised Act should include a presumption that when considering a sentence of 6 months or less, a young person, especially a first-time offender, is best served by a community-based order which addresses his/her offending behaviour or circumstances. This further reinforces the focus on rehabilitation and the principle that detention is a measure of last resort.

2. Should sentences of three months or less in duration be abolished? Why?

No, for the reasons articulated above.

3. How should any such abolition be implemented and should any exceptions be permitted?

Not applicable.

4. Should sentences of imprisonment of six months or less continue to be available as fixed terms only or are there reasons for allowing non-parole periods to be set in allowing non-parole periods to be set in relation to these sentences?

The Children's Court is of the view that shorter-term sentences, with a parole period imposed by the judicial officer, should be available for young people in circumstances where "*no penalty other than imprisonment is appropriate*". Again, the parole component of the sentence could be used productively in the case of a young person, with intensive supervision to engage the young person in pro-social activities and programs to help them address their offending behaviour and reintegrate them into the community as law-abiding citizens.

This option is helpful when sentencing a young person who has committed multiple offences, where a mix of custodial and non-custodial options may be appropriate. A short sentence of custody reinforces the seriousness of the offending while allowing the young person to be released in anticipation of rehabilitation.

It was proposed by the Sentencing Council in 2004 that a "*custody plus*"[6] be introduced and it is the view of the Children's Court that this is something that could be explored as an option for young people. Please refer back to the Court's comments at question 5.1.2.

Aggregate head sentences and non-parole periods

Question 5.4

1. How is the aggregate sentencing model under s 53A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working in practice and should it be amended in any way?

Whilst it is too early to make any detailed analysis, aggregate sentencing is a welcome reform, and anecdotally, is producing simpler, more understandable sentences.

2. Should a court be required to state the individual sentences that would have been imposed if an aggregate sentence had not been imposed by the court?

The Children's Court is of the view that there is no utilitarian value in having to state the individual sentences that would have been imposed. If the requirement is retained,

[6] NSW Sentencing Council "Abolishing prison sentences of 6 months or less; A Report of the NSW Sentencing Council" (2004) *NSW Sentencing Council.*

notwithstanding that standard non-parole periods (SNPP) do not apply to young people, it is my opinion that currently there is confusion as to whether the non-parole period needs to be stated when a SNPP applies. I am of the view that the non-parole period does not need to be stated in relation to individual sentences that would otherwise have been imposed.

Accumulation of head sentences and special circumstances

Question 5.5

1. Should a court be required to state reasons if the effective sentence does not reflect the special circumstances finding on the individual sentences?

Not applicable.

2. Are there any other options to deal with these cases?

Not applicable.

Directing release on parole

Question 5.6

What limit should be applied to the automatic release of offenders to parole on expiry of a non-parole period?

Section 130 of the *Crimes (Administration of Sentences) Act 1999* and clause 232 of the *Crimes (Administration of Sentences) Regulation 2008* provide that release is not automatic in certain circumstances. The Children's Court understands that the Parole Authority regularly revokes parole before release where the original order is less than three years, in circumstances where; the offender has made a request, accommodation is not available, there is a view that the offender "*is unable to adapt to normal lawful community life*" and pursuant to a request from the court.

The Children's Court, sitting as the Parole Authority, may therefore refuse to release a young person where an application under the section has been made. These limits adequately address the concerns that arise but as a safeguard a presumption for release, with timely and regular review where release is revoked, should be provided for in the legislation.

Question 5.7

1. Should back end home detention be introduced in NSW?

Home detention is available to young people who are sentenced at law and ordered to serve a term of imprisonment. The Children's Court is of the view that this type of detention is well suited to *some* young people and supports its inclusion as a sentencing option as the strict supervision assists in promoting rehabilitation by allowing the young person to return to school or work, to access services and intervention programs and ultimately promotes their reintegration into the community. Please refer to the Court's comments at question 5.1.2.

The Children's Court supports the use of back end home detention for young people because, in addition to the benefits above, it reduces the time that the young person spends in detention.

It should be made clear in the legislation that home detention is available to young people and the eligibility and suitability requirements need to be redrafted to provide for them.

2. If so, how should a person's eligibility and suitability for back end home detention be determined and by whom?

Eligibility would be on the basis of the offence type and the nature of any prior offences. Sections 76 and 77 would require modification to be more applicable to young people.

Suitability should be assessed by a judicial officer and should rest on the young person's level of remorse, their subjective characteristics, the availability of a stable, supportive and functional home environment and the willingness of the family/supervisors to commit to assisting with compliance on the program.

Release to home detention should be conditional upon a satisfactory report by Juvenile Justice, which among other things must show that the young person has been compliant and of good behaviour during the detention period.

Question 5.8

1. Should the sentencing jurisdictional limits in the Local Court be increased and, if so, by how much?

The Children's Court is of the view that all traffic offences committed by young people should be dealt with in the Children's Court. Currently traffic matters are dealt with by the Children's Court where the young person is not old enough to hold a licence or where there is a related criminal offence.

The magistrates in the Children's Court are specialist Children's Magistrates who already deal with traffic matters committed by young people and they are acutely aware of the principles and special considerations which are relevant to young people.

The penalties under the CCPA were developed specifically for young people and the magistrates are able to deal more holistically with the young person if they are appearing before the court for other matters.

This view reflects the submission made by the Children's Court on 13 December 2011, to the Legislation, Policy and Criminal Law Review Division of the Department in its review of the CCPA.

2. Should a magistrate be able to refer a sentencing matter to the District Court if satisfied that any sentence imposed in the Local Court would not be commensurate with the seriousness of the offence?

No comment, except to note that the Children's Court has this power under section 31 of the CCPA.

Question Paper 6 – Intermediate custodial sentencing options

Compulsory drug treatment detention

Question 6.1

1. Is the compulsory drug treatment order sentence well targeted?

Currently this option is not available to young people and it is the view of the Children's Court that a modified version of the program would be well suited to young people whose offending is connected to their drug or alcohol use.

It is proposed that the current program should be modified to suit the specific needs of young people. Preliminary suggestions include:

- That it be administered in a facility where young offenders are separated from adults;
- That a separate part be included in the *Drug Court Act 1998* and the *Drug Court Regulation 2010* to address the criteria relevant to young people;
- That a provision entitled "Eligible convicted **young** offender", be included in the *Drug Court Act 1998* to address the eligibility criteria for young people (*similar to "Eligible convicted offender" under s 5A*). Some preliminary recommendations are:
    - Young people should be precluded from participation if they have committed one of the following offences:
        - Murder, attempted murder or manslaughter,
        - Sexual offence involving a child unless the court decides that, in all of the circumstances, it is not appropriate to preclude the young person,
        - Any offence involving the use of a firearm.

      Note: It is the view of the Children's Court that drug offences and offences of violence should not preclude young people from participation in the program.
    - The young person should be eligible to participate if sentenced to a term of imprisonment or detention for a period of at least 9 months (*currently 18 mths for adults*);
    - First offenders should not be precluded from entry into the program (*as often a juvenile's first offence can be serious, for example a robbery which is the product of an already established drug problem. Early intervention should be a priority in assisting the young person address their criminogenic needs, in this case drug and alcohol abuse, with the intention of preventing further offending*);
    - The offence must be related to the person's drug dependency and associated lifestyle, and
    - Entry into the program should be available to young people with a dual diagnosis for mental health and drug or alcohol issues.
- A new "suitability" provision (*currently under s 18E Drug Court Act 1998*) should include:
    - Level of motivation;
    - Offender's drug treatment history, if any.

      Note: It is the view of the Children's Court that offences of violence, or the likelihood of committing a domestic violence offence should not preclude young people from participation in the program.
- A new "criteria" clause (*currently in clause 5 of the Drug Court Regulations 2010)* should include that the person is male and that they:

- Reside within the boundaries of the Compulsory Drug Detention Program boundaries;
- Has committed his offence within the boundaries and where the young person does not reside within the boundaries can demonstrate that he identifies with the area within the boundaries, or
- Although not residing in or having committed his offence(s) within the current boundaries, can demonstrate that he/she otherwise identifies with the area in the boundaries.

2. Are there any improvements that could be made to the operation of compulsory drug treatment orders?

Not applicable.

Home detention

Please refer back to the Court's comments at 5.7.

Question 6.2

1. Is home detention operating as an effective alternative to imprisonment?

The Children's Court is only aware of one young person who has served a term of home detention. As stated above the Court considers this to be an appropriate sentencing option for some young people and should be widely available. The Court is of the view that home detention should also be available under the CCPA.

2. Are there cases where it could be used, but is not? If so what are the barriers?

As above.

3. Are there any improvements that could be made to the operation of home detention?

The eligibility and suitability requirements should be revised to encompass young people.

Intensive correction orders

Question 6.3

1. Are intensive correction orders operating as an effective alternative to imprisonment?

Intensive correction orders (ICOs) are not available to young people. It is the view of the Children's Court that the current procedures for ICOs are not suitable to young people because the extensive obligations would be difficult for them to fulfil so there is a risk of setting them up for failure. The Court is also concerned that the consequence of a breach of an ICO is usually severe, resulting in the person serving the balance of the sentence without parole.

In principle however, a modified version of the program, administered by Juvenile Justice and more along the lines of the Youth Conduct Orders, would be an ideal *intermediate custodial sentencing option* for young people because it would allow intensive intervention and rigorous supervision to assist the young person to access services and programs to address their needs and criminogenic behaviour. The Court suggests that a modified version, in which the Children's Court is granted a broad discretion to deal with breaches or appeals, should be developed and should also be available under the CCPA.

2. Are there cases where they could be used, but are not? If so what are the barriers?

Not applicable.

3. Are there any improvements that could be made to the operation of intensive correction orders?

Not applicable.

Suspended sentences

Question 6.4

1. Are suspended sentences operating as an effective alternative to imprisonment?

Yes, but the Court should have a greater discretion not to revoke an order and the power to set a non-parole period.

2. Are there cases where suspended sentences could be used, but are not? If so what are the barriers?

Suspended sentences of less than 6 months should be available.

3. Are there any improvements that could be made to the operation of suspended sentences?

Children's Court Magistrates should have greater discretion regarding revocation as there are circumstances where a breach does not warrant a custodial penalty.

4. Should greater flexibility be introduced in relation to:
a. the length of the bond associated with the suspended sentence?

Yes. The Court is of the view that there should be greater flexibility in the length of the bond imposed especially in the case of a young person, where the suspension of a short determinate sentence may serve as an incentive to comply in the longer term with supervision and programs which are intended to address his or her special needs or criminogenic behaviour.

b. partial suspension of the sentence?

The Court sees no value in this option given the power to impose a sentence which includes non-parole and parole periods.

c. options available to a court if the bond is breached?

See 6.4(1) and (3). When considering the revocation of a suspended sentence the test in s 98(3)(a) should be broader and state:

> *s 98(3) In the case of a good behaviour bond referred to in section 12, a court must revoke the bond unless it is satisfied:*

(a) that the offender's failure to comply with the conditions of the bond was trivial in nature, ***or further offences committed were minor or unrelated****, or*

(b) that there are good reasons for excusing the offender's failure to comply with the conditions of the bond. ***In the case of a young person, good reasons includes whether or not they have substantially complied with, or demonstrated significant progress in, rehabilitation.***

Upon revocation of a bond young people should have the same options available as adults under s 99(2), in particular intensive correction orders and home detention. Please see the Court's responses to questions 6.2 and 6.3.

Rising of the court

Question 6.5

1. Should the "rising of the court" continue to be available as a sentencing option?

No, because it implies a sentence of imprisonment for which there is justification.

2. If so, should the penalty be given a statutory base?

Not applicable.

3. Should the "rising of the court" retain its link to imprisonment?

Not applicable.

Maximum terms of imprisonment that may be served by way of custodial alternatives

No comment.

Other options

Question 6.7

What other intermediate custodial sentences should be considered?

The Children's Court is of the view that a combination of custodial and non-custodial penalties should be available. For example, a short sharp custodial sentence, which may or may not be suspended, followed by an extended period on a s 9 bond provides an incentive to be of good behaviour and allows for appropriate supervision and intervention to be imposed.

Question 6.8

No comment.

Question Paper 7 – Non-custodial sentencing options

Community service orders

No comment.

Section 9 bonds

No comment.

Good behaviour bonds

No comment.

Fines

Question 7.4

1. Are the provisions relating to fines in the Crimes (Sentencing Procedure) Act 1999 (NSW) working well, and should they be retained?

The Children's Court is of the view that it should be expressly stated in the Act that the magistrate or judge must consider the means and ability of the young person to pay a fine. In spite of a relevant qualification existing in s 6 of the *Fines Act 1996* the Court is aware of many instances, particularly in traffic matters, where young people have received fines which are no different from those imposed on adults, when they are without means to pay. It is not appropriate for their parents to pay the fine as this does not serve any of the purposes of sentencing.

2. Should the provisions relating to fines in the Crimes (Sentencing Procedure) Act 1999 (NSW) be added to or altered in any way?

No comment.

3. Where a particular offence specifies a term of imprisonment but does not specify a maximum fine, how should the maximum fine be calculated?

No comment.

Conviction with no other penalty

Question 7.5

1. Is the recording of no other penalty under s 10A of the Crimes (Sentencing Procedure) Act 1999 (NSW) working well as a sentencing option and should it be retained?

Not normally relevant to young people as a result of s 14 of the CCPA.

2. What changes, if any, should be made to the provisions governing the recording of no other penalty or to its operational arrangements?

No comment.

Non-conviction orders

No comment.

Other options

Question 7.8

Should any other non-custodial sentencing options be adopted?

The Children's Court supports the availability of a variety of sentencing options. This is in keeping with international principles. Article 40.4 of CRC and Rule 18.1 of the Beijing Rules both call for a large variety of alternative penalties to be available to young people.

The Court is of the view that the penalties under the CCPA have been designed specifically for young people and as such address their special needs more effectively than other legislation. The Court proposes that where an appropriate penalty exists, a young person should be sentenced under the CCPA. This view reflects the submission made by the Children's Court on 13 December 2011, to the Legislation, Policy and Criminal Law Review Division of the Department in its review of the CCPA.

Where no suitable penalty exists under the CCPA, resulting in the young person being dealt with under the CSPA, the Children's Court submits that young people should be entitled to all the sentencing options available to adults (modified where necessary), that greater flexibility is available in the existing options and that more sentencing options should be introduced.

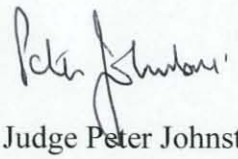
Question 7.9

No comment.

Question 7.10

No comment.

Yours sincerely,



Judge Peter Johnstone

PRESIDENT