



Children's Court of New South Wales

13 December 2013

Mr Paul McKnight
Executive Director
NSW Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Mr McKnight

Encouraging appropriate early guilty pleas: Models for discussion

Thank you for providing the Children's Court with the opportunity to contribute to the consultation paper on encouraging appropriate early guilty pleas.

The Children's Court notes that the consultation paper did not make any reference to criminal proceedings in the Children's Court. Accordingly, my response will briefly traverse the obstacles to early guilty pleas in the Children's Court.

Please note that we have not made comments in relation to all of the discussion questions, however we have addressed the main issues of concern in the Children's Court jurisdiction.

1. Late service of prosecution brief:

Late service of the prosecution brief is a significant issue in the Children's Court, particularly in more complex matters. Considerable delays occur in cases where DNA, fingerprint and drug analysis, CCTV or other forensic evidence is to be relied upon.

2. Overcharging by prosecution:

The Court notes that it is common for serious charges to be substituted by less serious charges by the prosecution as proceedings progress. In the Court's view, it is worth considering whether a culture of charge bargaining discourages early guilty pleas.

3. Inconsistency of advice and negotiations:

Whilst the Children's Court understands that Legal Aid attempts to provide continuity of representation, this does not always occur and can delay the entry of a guilty plea.

4. Defendant holds back a plea:

The Children's Court has observed that where there may be some question as to whether a witness will appear in court, the defendant may hold back a plea.

5. *Doli incapax*:

The Children's Court regularly sees *doli incapax* as a reason for the late entry of guilty pleas. In these matters, the defence may be reluctant to enter a plea prior to ascertaining whether the prosecution is able to rebut the presumption.

6. Additional considerations:

Children and young people are particularly vulnerable to the stress caused by the Court environment and a number of extraneous considerations may affect their lives. As a result, these factors may impact on the ability of a young person to provide clear instructions to their lawyer to plead guilty.

The Children's Court emphasises that improvements to the efficiency of court process and procedure should be balanced against the need to ensure that a child or young person comprehends the charges and is in a position to make informed decisions about whether to plead guilty.

Question 3.1:

Pre-charge bail

The Children's Court does not support the introduction of a pre-charge bail regime in NSW. The Court submits that the disadvantages associated with a pre-charge bail scheme outweigh any possible advantages.

Firstly, a common perception of children and young people is that bail is used as either a form of punishment or as a way of monitoring and controlling their behaviour. The Court has observed that bail conditions imposed by Police may be inappropriate or onerous for children and young people to comply with. In a large number of cases where police refuse bail, bail is granted at the first court appearance.

This is concerning particularly when considered in light of the criticisms of the pre-charge bail regime in the United Kingdom. Further, children and young people are particularly vulnerable to the improper use of Police power.

The Children's Court further submits that the comparison between the United Kingdom and NSW is problematic. Such a comparison fails to consider the key administrative difference between the two jurisdictions. Specifically, the United Kingdom involves an independent prosecuting authority at a very early stage in proceedings. In the Children's Court, police prosecutors are not independent from investigating and supervising Police. As a result, the suggested scheme would not be appropriate for summary or 'either-way' offences.

Question 7.1:

Abolition of committal proceedings

The Children's Court holds concerns regarding the abolition of the committal process. However, the Court submits that the process is in need of reform to allow Magistrates to make decisions at an earlier stage in proceedings.

At the outset of proceedings, Magistrates do not make a decision about whether the matter will be dealt with summarily or committed for trial. This is because the legal framework in the Children's Court is distinct from the framework that applies in the Local Court and generally requires a consideration of the totality of the evidence. Reform of the committal process should address this issue so that a decision can be made at an earlier stage about whether the matter will be a committal and if so, whether witnesses will be called.

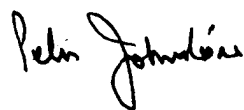
The current system can be onerous for many victims, witnesses and police as it often results in unnecessary court attendances.

Question 10.1:

Case conferencing

The Children's Court submits that a case conferencing initiative may have some success in the Court. However, the application of such a scheme would be limited.

Yours faithfully,

A handwritten signature in black ink that reads "Peter Johnstone". The signature is written in a cursive, flowing style.

Judge Peter Johnstone
President of the Children's Court of NSW