Children's Court of New South Wales

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Law Reform Commission Review of the Parole System in NSW

Thank you for the opportunity to comment on the Law Reform Commission's review of the parole system in New South Wales (Question Papers 1 – 3). I will respond to issues applicable to juveniles, whether they are being dealt with in the Children's Court or at law.

At the outset, it is important to acknowledge that a key challenge in this area is the tendency to view parole matters through the lens of adult offenders rather than considering the discrete issues relevant to juvenile offenders.

I note that a separate Question Paper will be circulated specifically relating to juveniles. The Court anticipates that this Discussion Paper will provide an opportunity for the Court to provide tailored submissions on issues specifically relevant to the Court's jurisdiction.

Question Paper 1

Question 1.1

The Children's Court supports the retention of parole and the recommendation that there should be an explicit statement of the objectives of the purposes of parole in the *Crimes (Administration of Sentences) Act 1999.*

The Court proposes that such a statement should clarify the principles relevant to juveniles. Specifically, an express statement should be included providing that parole is subject to the overarching principles outlined in s 6 of the *Children (Criminal Proceedings) Act 1987* (CCPA). Additionally, such a statement of objectives should provide that rehabilitation and the reduction of recidivism are primary considerations when making parole determinations for juveniles.

This proposition is consistent with common law principles, specifically the comments in *R v GDP* (1991) 53 A Crim R 112 at 116, where Matthews J (Gleeson CJ and

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Samuels JA agreeing) adopted comments made by Yeldham J in *R v Wilcox* (15 August 1979, unreported):

> *"...in the case of a youthful offender...considerations of punishment and of general deterrence of others may properly be largely discarded in favour of individualised treatment of the offender, directed to his rehabilitation."*

Further, an express provision should be included to provide for the principle that detention should be a measure of last resort, as contained in Article 19 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules) and Article 37 of the *United Nations Convention on the Rights of the Child.*

Question 1.2

The Children's Court sitting as the State Parole Authority (SPA) should retain discretion and should be able to override the provisions in the *Crimes (Sentencing Procedure) Act 1999*, where appropriate.

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"*. 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, programs and career development to help them address their offending behaviour and reintegrate them into the community as law-abiding citizens.

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, addressing their needs and criminogenic behaviour. This is particularly important for young people who are 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.

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"*.

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.

Question 1.4

Section 130 of the *Crimes (Administration of Sentences) Act 1999* and clauses 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 SPA regularly revokes parole prior to release. This occurs in circumstances where: the original order is less than three years, 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 where the revocation is pursuant to a request from the court.

The Children's Court sitting as the SPA, 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.

However, the Court submits that an additional safeguard should be provided for in the legislation with a presumption for release, with timely and regular review where release is revoked.

Further, the Children's Court submits that the *Crimes (Administration of Sentences) Act 1999* requires clarification on the issue of whether there is a power to initiate and then revoke a parole order that has already expired. A view exists that there is no such power at the expiration of the sentence. This becomes a real issue in those cases where the only basis for the suspected breach of parole is a new offence and where there is a plea of not guilty.

Regardless of whether the offence can be dealt with in the Children's Court or committed for trial to a higher Court, the Court queries what action can be taken regarding a parole matter when there is a finding of guilt and the sentence which has a parole component has expired.

The Children's Court submits that an amendment to the *Crimes (Administration of Sentences) Act 1999* may be necessary to make clear that such a power does exist.

Question 1.5

The Children's Court submits that the presumption in favour of supervision enunciated in s 51(1AA) of the *Crimes (Sentencing Procedure) Act 1999* should remain for young people on parole.

Question Paper 3

Question 3.1

The Children's Court submits that any public interest test should consider the rehabilitation of young offenders. Protection of the community should remain a factor in decision making. However, the Court is concerned that positing the protection of the community as an overriding consideration may pose a danger to young people.

If after a consideration of all of the relevant circumstances, the parole authority determines that protection of the community is a primary consideration then an appropriate decision may be made. However, this should not be an overriding consideration and should only be determined on a case by case basis.

For young people, the common law provides that rehabilitation is the paramount purpose in sentencing. A corollary of this principle is that rehabilitation of a young person necessarily advances the protection of the community.

This principle is cogently articulated in *R v Webster* (unrep, Court of Criminal Appeal, NSW, NO 6582 of 1990, 15 July 1991) at pages 11 and 12:

> *'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.'*

If protection of the community is considered along the lines articulated in *R v Webster* for young people, then this danger could be averted.

However, protection of the community as a paramount consideration without a connection to rehabilitation is inconsistent with foundational principles governing the sentencing of young people.

The Court underscores this point by submitting that an express provision be included in the *Crimes (Administration of Sentences) Act 1999* confirming the legislative principle in s 33 (2) of the *Children (Criminal Proceedings) Act 1987*. This principle has been internationally affirmed 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 should always be a disposition of last resort and for the minimum necessary period."*

Questions 3.3, 3.5 and 3.6

At the outset, the Children's Court supports the objectives articulated in Goal 17 of the NSW State Plan 2021. Specifically, that:

> *"We will work to ensure that juvenile and adult offenders are given access to a range of specialised programs best placed to address the underlying causes of crime."*

Problems with the availability of in custody programs has significant implications given the emphasis the SPA places on reports from Community Corrections. The fact that SPA will refuse parole if the offender has not satisfactorily completed programs is problematic given the limited options available in certain areas and to vulnerable groups of offenders.

Many young people experience dual diagnosis for drugs, alcohol and mental illness in addition to a history of dysfunction in the areas of education, family, health and housing. Accordingly, program providers for all services should collaborate and share resources, where appropriate.

The Children's Court highlights this issue by reference to the case of a juvenile who is convicted of a serious sex offence. In such a case, programs available both in custody and post release are limited. Further, youth services will not accommodate the offender due to the fact that he/she is a sex offender. In such circumstances a young person may stay in custody for months without receiving assistance.

The announcement that Community Offender Support Program (COSP) Centres will be shut down is concerning as these centres play a vital role in providing suitable post release accommodation.

Consequently, the Court submits that there is a need for increased resources, programs and accommodation options for young people on parole.

Another issue requiring collaboration with service providers relates to the transfer of rehabilitation services offered when a young person is released on parole. Whilst they may receive support in detention, release on parole often results in a lack of support or supervision.

This is concerning as young people are especially vulnerable to the risks associated with returning to their old associations without support or supervision to increase their chances of rehabilitation and reintegration.

Even in situations where support services are organised post release, there is no seamless transfer between services provided in custody and services available post release. The reality is that a lack of appropriate supports after leaving detention is likely to catalyse problematic behaviours. There is a distinct need for programs that are locked in so that children and young people in detention can be seamlessly transferred from rehabilitation and support in custody to rehabilitation and support post release.

There should be greater opportunity to facilitate specific interventions and participation in programs to assist in a young person's rehabilitation. This would allow young people to address the underlying causes of their offending and reduce the chance of recidivism whilst in custody.

Question 3.7

The Children's Court submits that victims' involvement should be considered in circumstances where a sentence of more than three years has been imposed. Therefore, the Court believes that SPA should only require victims' involvement for matters involving serious offences.

The Court proposes that victims' involvement in parole matters could be facilitated through a restorative justice approach. As a consequence, a holistic approach could be taken to ventilate concerns, such as victims' fears for their safety. As a result, this would promote the overall aims of the parole decision making process, specifically to manage risk and reduce reoffending.

Question 3.18

The Children's Court submits that parole should be left to the discretion of the Children's Court. All parole matters, breaches and release to parole are assigned to a specific Magistrate sitting at Parramatta Children's Court. In some cases, Children's Magistrates at Parramatta will deal with parole at the time of sentence.

A challenge has arisen with the transfer of Kariong operations from Juvenile Justice to Corrective Services. The Court takes issue with young offenders' parole being determined by Corrective Services rather than Juvenile Justice.

The Court submits that where a young person under eighteen is paroled from Kariong, they should come under the supervision of Juvenile Justice rather than the SPA.

Yours sincerely,

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