



Children's Court of New South Wales

14 September 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 8-12) of the *Crimes (Sentencing Procedure) Act 1999* (CSPA). I will respond to questions which are of particular relevance to juveniles, whether they are being dealt with in the Children's Court or at law. The Court notes that careful consideration needs to be given to the allocation of appropriate services and resources, especially in regional areas.

Restatement of overarching principles articulated in previous submissions:

The Children's Court's fundamental proposal, articulated in its two previous submissions dated 31 May and 16 August 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).

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 Paper 8: The structure and hierarchy of sentencing options

Hierarchy of sentences

Question 8.1

Should the Crimes (Sentencing Procedure) Act 1999 (NSW) set out a hierarchy of sentences to guide the courts? What form should such a hierarchy take?

The Children's Court notes that a hierarchy in general terms exists in Part 2 of the CSPA and proposes that this level of specificity is adequate. It provides guidance in terms of severity of sentences whilst allowing for judicial discretion in arriving at the most suitable penalty in the individual case. The Court does not propose that a rigid hierarchy be imposed.

The need for flexibility

Question 8.2

Should the structure of sentences be made more flexible by:

- (a) creating a single omnibus community-based sentence with flexible components;*
- (b) creating a sentencing hierarchy but with more flexibility as to components;*
- (c) allowing the combination of sentences; or*
- (d) adopting any other approach?*

The Court is in favour of the introduction of new sentencing options as well as the flexibility to combine appropriate penalties and conditions according to the particular circumstances of the case and the offender. Greater flexibility would provide for orders which would allow for specific interventions and participation in programs intended to assist in a young person's rehabilitation, by addressing the underlying causes of their offending and thereby reducing their recidivism.

Particular sentencing combinations

Question 8.3

What sentence or sentence component combinations should be available?

¹ (unrep, Court of Criminal Appeal, NSW, NO 6582 of 1990, 15 July 1991) at pages 11 and 12.

The Children's Court supports a combination of available options including:

- o A term of detention, followed by home detention with a contemporaneous but longer good behaviour bond;
- o A term of detention with a contemporaneous but longer good behaviour bond;
- o A term of detention followed by a Community service order (CSO) with a contemporaneous but longer good behaviour bond;
- o A CSO with a contemporaneous but longer good behaviour bond;
- o Compulsory Drug Treatment Detention, with a contemporaneous but longer good behaviour bond which includes community drug treatment and support, and
- o A new Compulsory Intensive Intervention Detention, with a contemporaneous but longer good behaviour bond which includes ongoing targeted intervention and support in the community (this is discussed at 9.6.3).

Note: a good behaviour bond would typically include a period of supervision

It is the view of the Children's Court that any supervised period of a bond should involve intervention and programs, as directed by the judicial officer, which are focussed on addressing the underlying causes of the offending behaviour. Depending on the seriousness of the offending and the complexity of the offender's issues the Court is of the view that the supervision required should, if necessary, be of an intensive nature and not entail a simple weekly "check-in" with Juvenile Justice. The relevant agencies should work together and there should be ample support as well as rigorous oversight of the young person's compliance and progress.

The Court appreciates that this may create resource issues for Juvenile Justice, or other delegated agency, but is of the opinion that (currently) \$17 per day for community based services, compared to \$652 per day for detention,² provides scope for the redistribution of funds into more intensive supervision and is likely to result in cost savings to the government, particularly over the long term, if criminogenic behaviours are effectively addressed. The Court is of the view that community intervention and supervision should be appropriately resourced.

2. *Should there be limits on combinations with:*
- (a) *finer;*
 - (b) *imprisonment; or*
 - (c) *good behaviour requirements?*

The Children's Court does not support the imposition of a fine on a young person where they have no income. The purposes of sentencing are not promoted in cases where the parents pay a fine imposed on their child. In certain cases a fine could

² Department of Attorney-General and Justice, "Auditor-General's Report: Compliance Review", NSW Auditors Office, Volume seven 2011,26.

place some young people at greater risk of further offending, thus compromising their level of offending and potentially delaying their rehabilitation.

The Court however promotes a variety of combinations of penalty, which include detention and good behaviour bonds.

Question Paper 9: Alternative approaches to criminal offending

Overriding views of the Children's Court in relation to Question Paper 9:

There is a dearth of diversionary options available to young people. The Youth Drug and Alcohol Court (YDAC) is no longer operating and young people are not eligible for MERIT, CREDIT, Drug Court or Cedar Cottage (sexual offence program). Even the Traffic Offender Program cannot be ordered as a condition of bail because it is an "intervention program" for the purposes of the *Criminal Procedure Act 1986* (CPA) nor is it available where a young person is dealt with under the CCPA for traffic matters in the Local Court.

The Court supports the view that rehabilitation is the paramount principle when dealing with young people in the criminal justice system. International, domestic and common law supports the principle that diversion, appropriate intervention and rehabilitation take precedence when dealing with young people in the criminal justice system.

The Convention on the Rights of the Child

Ratified by Australia in 1990.

Where young people have breached the criminal law Article ss 40(3)(b) of the *Convention on the Rights of the Child* (CRC) encourages States to promote:

"Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected"

Subsection 40(4) further states:

"A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

Rules and Guidelines

The following rules and guidelines have been adopted by the Committee on the Rights of the Child and inform States on the implementation and content of the Convention.

The Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules)

"Rule 1.3 - Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and

*other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, **with a view to reducing the need for intervention under the law**, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law."*

*"**Commentary to Rule 5 - The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances.** The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions (for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn to wholesome and useful life)."*

*"**Commentary to Rule 11.4 - The merits of individual cases would make diversion appropriate, even when more serious offences have been committed (for example first offence, the act having been committed under peer pressure, etc.)"***

*"**Rule 13.2 - Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.**"*

*"**Rule 25 - ...rehabilitation of the juvenile in a community setting and, as far as possible, within the family unit.**"*

*"**Rule 26.1 - The objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.**"*

*"**Commentary to Rule 26.2 - Medical and psychological assistance, in particular, are extremely important for institutionalized drug addicts, violent and mentally ill young persons.**"*

*"**Rule 28.1 - Conditional release from an institution shall be used by the appropriate authority to the greatest possible extent, and shall be granted at the earliest possible time.**"*

*"**Rule 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.**"*

*"**Rule 29.1 - Efforts shall be made to provide semi-institutional arrangements, such as half-way houses, educational homes, day-time training centres and other such appropriate arrangements that may assist juveniles in their proper reintegration into society.**"*

The United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)

"Clause 1 - The prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes."

"Clause 6 - Community-based services and programmes should be developed for the prevention of juvenile delinquency, particularly where no agencies have yet been established. Formal agencies of social control should only be utilized as a means of last resort."

"Clause 25 - Special attention should be given to comprehensive policies and strategies for the prevention of alcohol, drug and other substance abuse by young persons..."

"Clause 35 - A range of services and helping measures should be provided to deal with the difficulties experienced by young persons in the transition to adulthood. Such services should include special programmes for young drug abusers which emphasize care, counselling, assistance and therapy-oriented interventions"

"Clause 45 - Government agencies should give high priority to plans and programmes for young persons and should provide sufficient funds and other resources for the effective delivery of services, facilities and staff for adequate medical and mental health care, nutrition, housing and other relevant services, including drug and alcohol abuse prevention and treatment, ensuring that such resources reach and actually benefit young persons."

Guidelines for Action on Children in the Criminal Justice System promotes:

"Clause 15 - A review of existing procedures should be undertaken and, where possible, diversion or other alternative initiatives to the classical criminal justice systems should be developed to avoid recourse to the criminal justice systems for young persons accused of an offence. Appropriate steps should be taken to make available throughout the State a broad range of alternative and educative measures at the pre-arrest, pre-trial, trial and post-trial stages, in order to prevent recidivism and promote the social rehabilitation of child offenders. Whenever appropriate, mechanisms for the informal resolution of disputes in cases involving a child offender should be utilized, including mediation and restorative justice practices, particularly processes involving victims..."

Section 6 of the Children (Criminal Proceedings) Act 1987

"A person or body that has functions under this Act is to exercise those functions having regard to the following principles:

- (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

- (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
- (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
- (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
- (e) 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,
- (f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,
- (g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,
- (h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim."

Common law principles

In **R v SDM** (2001) 51 NSWLR 530 Wood CJ said at [17]:

*"There are cases where special allowance will need to be made for the **offender's emotional immaturity**: R v Kama (2000) 110 A Crim R 47; BC200000505; [2000] NSWCCA 23, or for his or her **deprived background**, and so on".*

In **R v GDP** (1991) 53 A Crim R 112 at 116 Matthews J (Gleeson CJ and Samuels JA agreeing) adopted comments 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.**"*

In **R v TVC** [2002] NSWCCA 325 Sperling J cited Wood J in *R v Hoai Vinh Tran* [1999] NSWCCA 109 at [13]:

*"In coming to that conclusion his Honour made reference to the well known principle that when courts are required to sentence a young offender considerations of punishment and general deterrence should in general be regarded as subordinate to the **need to foster the offender's rehabilitation** ... That is a sensible principle to which full effect should be given in appropriate cases. It can have **particular relevance where an offender is assessed as being at the cross roads between a life of criminality and a law abiding existence.**"*

At Goal 17 the NSW State Plan 2021 affirms:

*"We will address the underlying causes of juvenile crime through early intervention, and appropriate non-custodial approaches. We will also reduce juvenile and adult re-offending by **diverting people with mental health problems** away from the criminal justice system and towards the health services they need. We will work to ensure that juvenile and adult offenders are given access to a range of specialist programs best placed to address the underlying causes of crime.*

It is the view of the Children's Court that programs directed at diversion, appropriate intervention and rehabilitation of young people must be a priority if a reduction in recidivism is to be achieved.

The Court proposes that all diversionary options which are available to adults under the CSPA, should be evaluated and adapted to address the relevant needs of young people. While this would require significant legislative review and reform, its legitimacy is underpinned by sound international, domestic and common law principles and its operation would assist in reducing recidivism, a priority in the NSW State Plan 2021 at Goal 17. According to Trimboli, a recent BOCSAR review of the research³ reveals that appropriately targeted intervention has been shown to reduce recidivism for a range of offences.

The Court is also of the view that diversionary programs should be available to all young people, whether dealt with at law or in the Children's Court, as evidence-based early intervention programs may assist in addressing the underlying causes of a young person's offending, irrespective of the serious nature of their offending. Trimboli cited evidence which shows that intervention is most effective for young people who have multiple risk factors and are at high risk of re-offending.⁴ The development of pro-social skills may assist a young person to embark on a law-abiding life and effectively divert them from a life of crime.

The Children's Court recognises that many of the diversionary options currently available to adults are only available in the Local Court jurisdiction and it suggests that existing or proposed facilities in the Children's Court, and Local Court where necessary, be modified to deal with young people referred from the District Court. It is essential however, that young offenders are quarantined from adult offenders, so appropriate measures should be taken to provide dedicated youth programs and list days at Court.

Another obstacle in addressing the complex needs of young people charged with serious offences is the availability of bail. The Court proposes that bail assistance programs should be explored for young people to allow them to participate in intervention programs and, where bail is not available an alternative custodial intervention program, both during remand and as a custodial sentencing option, should be developed. This will be further explored below.

Early diversion

Question 9.1

Should an early diversion program be established in NSW? If so, how should it operate?

Diversion under the *Young Offenders Act 1997* (YOA) is not available for young people who are dealt with at the Local or District Court.

³ Lily Trimboli, "NSW Court Referral of Eligible Defendants into Treatment (CREDIT) pilot program: An evaluation" (2012) Crime and Justice Bulletin, *Bureau of Crime Statistics and Research*, 3.

⁴ *Ibid.*

As discussed above the Children's Court supports the introduction of appropriate diversionary options for young people. The Court proposes that these alternatives be available if the young person is dealt with in the Children's Court, Local Court or District Court.

Program-based diversion

Question 9.2

Is the Court Referral of Eligible Defendants into Treatment program operating effectively? Should any changes be made?

In its submission to the Criminal Law Division on *People with cognitive and mental health impairment in the criminal justice system*, the Children's Court supported the expansion of the CREDIT program to all courts sitting as Children's Courts in NSW. This program would be particularly useful in addressing the often complex and multi-dimensional causes of juvenile offending.

Question 9.3

Is the Magistrates Early Referral into Treatment program operating effectively? What changes, if any, should be made?

This program should also be adapted to meet the needs of young people and be expanded to address issues with alcohol. Young people would require a higher level of support and assistance than adults to assist them in complying with the program. As well, young people typically present with a range of associated needs, and issues of addiction and rehabilitation may vary substantially from those of adults.

Question 9.4

1. Is the Drug Court operating effectively? Should any changes be made?

The YDAC was abolished on 30 June 2012 and no similarly intensive program has been proposed to address the issues surrounding substance abuse as a cause of serious criminal offending in young people. Pursuant to proper evaluation and modification, it is proposed that the Drug Court should be made available to young people, that the eligibility requirements be modified accordingly, and that the 21 days allocated for detoxification, assessment and the development of a plan should take place in a facility operated by a dedicated and accredited service provider.

Whilst this detoxification facility would be a residential facility and participation would be a condition of bail, it should not entail a period of remand, unless the young person would otherwise be detained. In its previous submission the Court supported the availability of a Compulsory drug treatment detention for serious young offenders and it is suggested that the extension of the jurisdiction of the Drug Court to include young people would link into these proposed services.

Research into the adult jurisdiction at paragraph 9.88-9.89 in question paper 9 indicates that the Drug Court is more cost effective than imprisonment and reduced

the rate of recidivism for adults who undertook the program. Due to the even higher cost of detaining young people and the potential long-term benefits that could arise (ie potentially reducing drug/alcohol offending for the balance of the life of the young person) it is feasible that the State would enjoy even greater savings by extending the jurisdiction of the Drug Court to include young people. The Children's Court also supports the expansion of the Drug Court program to other geographical areas outside the major population centres.

2. *Should the eligibility criteria be expanded, or refined in relation to the "violent conduct" exclusion?*

It is the view of the Children's Court that, by their nature, drugs and alcohol reduce inhibitions and self-control and make young people more vulnerable to impulsive, reactionary, immature and violent behaviour. The Court supports the expansion of the eligibility criteria to enable it to address drug and alcohol issues where they are shown to be causal or linked to the offending violent behaviour.

Section 11 adjournment

Question 9.5

Is deferral of sentencing under s 11 of the Crimes (Sentencing Procedure) Act 1999 (NSW) working effectively? Should any changes be made?

In 2002 the *Crimes Legislation Amendment (Criminal Justice Interventions) Act* (CLACJIA) amended the *Criminal Procedure Act 1986* (CPA), the *Bail Act 1978* and the *Crimes (Sentencing Procedure) Act 1999* (CSPA):

- o *Part 9 Intervention Programs* (now Part 4) was inserted into the CPA:
 - ▶ *Section 177* (now s 349) states that a person is not eligible to participate in an intervention program if they are dealt with in the Children's Court for the offence or dealt with under Division 4 of Part 3 of the CCPA.
 - ▶ *Section 175(1)* (now 347(1)) states that *"The regulations may declare that a program of measures for dealing with offenders or accused persons that is described in the regulations is an **intervention program** for the purposes of this Part."*
- o *Section 36A* of the *Bail Act 1978* was amended to introduce bail for the purpose of allowing a person to be referred for assessment for, or participation in, an intervention program. The section expressly precludes young people from being bailed for this purpose under s 36A(6).
- o *Section 11* of the CSPA was expanded to provide for deferral of sentencing for the purpose of assessment or participation in an intervention program under s 36A. Previously deferral was only available for participation in rehabilitation programs.

The *Criminal Procedure Regulation 2010* deals with Part 6 Circle Sentencing Intervention Program, Part 7 Forum Sentencing Intervention Program and Part 8 Traffic Offender Intervention Program.

As a result, a young person cannot be granted bail to allow them to participate in an intervention program nor can they participate in an intervention program if they are being sentenced under the CCPA or dealt with in the Children's Court. An intervention program may be ordered as a condition of a good behaviour bond under s 9 or 10 of the CSPA or as an order under s 10(1)(c).

The Second Reading Speech for the CLACJIA⁵ did not provide an explanation as to why young people had been almost entirely excluded from participation in "intervention programs".

The Court recommends that the sections of the legislation referred to be amended to ensure that young people in the criminal justice system are positively assisted in accessing intervention programs which address their complex needs and the underlying causes of their criminal offending, at the pre-sentence, sentence and post-sentence stage.

Intervention programs under the *Criminal Procedure Act 1986* (NSW)

Question 9.6

1. *Is the current scheme of prescribing specific intervention programs operating effectively? Should any changes be made?*

No comment.

2. *Is there scope for extending or improving any of the programs specified under the scheme?*

Yes, by adapting them and making them available to young people.

3. *Are there any other programs that should be prescribed as intervention programs?*

The Children's Court proposes that a system of intensive bail support be developed to allow more young people to be granted bail to participate in targeted intervention programs.

The Court is concerned that young people who are not eligible for bail or who are sentenced to a period in custody do not have access to appropriate, intensive and targeted intervention programs. In its previous submission to question papers 5-7, the Court lent its support to the introduction of a youth orientated version of the adult Compulsory Drug Treatment Detention at s 5A CSPA.

The Court proposes that a similar sentencing option, called "*Compulsory Intensive Intervention Detention*" be introduced. This would allow a young person, ordered to serve a custodial sentence whose criminogenic needs were causal or connected to their offending, to have any parole period revoked and their sentence served by way of a 3 staged intervention program, intended to address the underlying causes

⁵ NSW, *Second Reading Speech*, Legislative Assembly, 12 November 2002, 655 (Mr Stewart, Parliamentary Secretary on behalf of Mr Debus).

of their offending behaviour. As with the Compulsory drug treatment detention it would provide for:

1. a period of intensive intervention in detention;
2. upon successful completion of stage 1, the young person would enter a stage of semi-open detention where they would participate in programs within the community, and
3. upon successful completion of stage 2, the young person would enter a stage of less intensive intervention in the community. The young person would be released on parole for this stage of the program.

If a young offender did not comply they would not proceed to the next stage, which may result in them remaining in detention for a longer period than if they had complied with the program. The program would effectively reward compliance and promote rehabilitation by allowing committed young people to reduce their term of detention.

In the case of young people who are refused bail, the Court recognises that there may be difficulty in engaging them in meaningful programs as the likely time in detention may be uncertain. In spite of this the Court maintains that young people who present at Court with particular needs, identified in expert reports or by assessment of the Adolescent Court and Community Team, should be expedited into "standard" programs while in custody awaiting the outcome of their matter. Where young people do show progress towards rehabilitation during this period it is proposed that it should be a relevant consideration at sentence or in any bail application.

Because so many young people present with dual diagnosis for drugs/alcohol/mental illness and also have problematic histories with education, family dysfunction, health, housing etc it is proposed that program providers for all the services outlined, would work closely together and share resources where appropriate.

Approaches to criminal offending

Question 9.7

1. *Should restorative justice programs be more widely used?*

Yes. Court can be a process which quarantines young offenders from the human element of their offending. Restorative justice programs assist young people by requiring them to face their victim and consider the harm they have caused. Consequences then flow as they are held accountable, are a party to discussions, and must agree on punishment, reparation or programs.

A recent study by BOCSAR⁶, looked at public perceptions of what is effective in preventing crime and disorder. For offences of theft/vandalism and assault, the study found that 86% of the public surveyed agreed that offenders should do

⁶ Elizabeth Moore, "Restorative Justice Initiatives: Public opinion and support in NSW" (2012) Crime and Justice Statistics, *NSW Bureau of Crime Statistics and Research*, 10.

unpaid work in the community and 87% agreed that victims should have the opportunity to inform offenders of the harm they had caused. Those surveyed believed that these two outcomes were more effective in preventing crime and disorder than receiving a prison sentence.

Forum Sentencing

BOCSAR is currently reviewing the effect of Forum sentencing in Local Courts on recidivism. Participants in previous research expressed a high level of satisfaction with the program⁷ but to date it has not been shown to reduce re-offending.⁸ As well, Youth justice conferencing⁹ has not been shown to reduce re-offending.

Youth Justice Group Conferencing in Victoria is only available to young people who are facing serious charges. The model is based on Group Family Conferencing in New Zealand where the Ministry of Justice refers to them as the "*lynch-pin of the New Zealand youth justice system*".¹⁰ The Victorian conferences are only conducted where a probation order or custody is likely, and the offender returns to the Court at the completion of their outcome plan. Successful completion of the plan results in a more lenient sentence, typically a community based order as opposed to a sentence of detention.

The Children's Court is concerned that if matters dealt with by way of a Forum are finalised on the completion of the intervention plan, as in the current Local Court scheme, judicial officers may be reticent to impose a Forum on young offenders for more serious offences, as they do not have control over the final disposition of the matter and the intervention plan may not adequately satisfy the purposes of sentencing.

Research from the UK indicates that conferencing may be more effective in reducing recidivism for more serious offending.¹¹ A recent evaluation of the Victorian model has shown that young people who participated in a Youth Justice Group Conference were "*much less likely to have reoffended within 12 or 24 months than young people who received initial sentences of Probation or Youth Supervision Orders*".¹²

In principle, the Court supports the introduction of a modified version of Forum Sentencing, framed on the Victorian model, for young people who are facing more serious charges in the Children's Court, Local Court or District Court. In this proposed model, upon completion of the timetable set for the intervention plan, the

⁷ Trimboli, above n 3, 12.

⁸ Craig Jones, "Does Forum sentencing reduce re-offending" (2009) 129 *Crime and Justice Bulletin, NSW Bureau of Crime Statistics and Research*, 12.

⁹ Nadine Smith and Don Weatherburn, "Youth Justice Conferences versus Children's Court: A comparison of re-offending" (2012) 160, *Crime and Justice Bulletin, NSW Bureau of Crime Statistics and Research*, 17.

¹⁰ The Youth Court of New Zealand, "Family Group Conference" <<http://www.justice.govt.nz/courts/youth/about-the-youth-court/family-group-conference>> at 13 September 2012.

¹¹ Law Reform Commission, "Sentencing Question Paper 9: Alternative approaches to criminal offending" (2012) *New South Wales Law Reform Commission*, paragraph 9.138.

¹² KPMG, "Review of the Youth Justice Group Conferencing Program" (2010) *Department of Human Services*, 39.

young person would return to Court for sentencing where satisfactory compliance with the plan would result in a lesser penalty. Conversely failure to complete the plan is a relevant factor in any further sentencing exercise.

It is the Court's view that a return to Court promotes greater transparency and community confidence in the justice system, particularly when dealing with serious offences. The Court also supports the expansion of the current program so that it is available for first time offenders.

Circle Sentencing

The Children's Court supports the expansion of the current Circle Sentencing model, or the introduction of a dedicated youth Circle Sentencing scheme, to address the complex needs of young Indigenous people. The Court understands that Indigenous sentencing options are available in all states in Australia except Tasmania and that some states, including Queensland, South Australia and Victoria have courts dedicated to young Indigenous people.

On a daily basis the Children's Court deals with the overrepresentation of Indigenous young people at all stages of the criminal justice system. The Court supports the introduction of more culturally appropriate ways to deal with young Indigenous people, in particular by engaging and empowering their families and communities.

Research shows that to date, Circle Sentencing has not been shown to reduce recidivism,¹³ but researchers suggest that criminal justice and community building aims are very much related and were being met. The studies proposed that recidivism should not be the only criterion of assessment and that success of the program should be considered in light of the broader community building objectives.¹⁴

Whilst the Court promotes ongoing evaluation and improvement of the (youth) Circle Sentencing process it is of the view that narrowing the focus to recidivism alone may minimise actual successes, by failing to recognise its potential to strengthen more informal social controls within Aboriginal communities over the longer term. The Court supports a longer term view of the success of Circle Sentencing (and youth Circles) where its crime prevention capacity may evolve over time.

2. *Are there any particular restorative justice programs in other jurisdictions that we should be considering?*

Youth Justice Conferencing is available in the Children's Court but is not suitable for matters dealt with at law. The version of Forum sentencing discussed above is supported by the Court as an additional program, and would be useful for the more serious matters at the Children's Court, Local Court and District Court.

¹³ Jacqueline Fitzgerald, "Does circle sentencing reduce Aboriginal offending?" (2008) 115 Crime and Justice Bulletin, *NSW Bureau of Crime Statistics and Research*, 7.

¹⁴ Elena Marchetti, "Indigenous Sentencing Courts" (2009) Brief 5, *Indigenous Justice Clearing House*, 3.

The Court is not aware of other restorative justice programs, other than those listed above, which would add to the regime of sentencing options for young people.

Question 9.8

1. Should problem-solving approaches to justice be expanded?

The Court supports problem-solving approaches to justice which address the complex needs and underlying causes of criminal offending in young people. The recommendations articulated above support the diversion of young people at all stages of the criminal justice system into appropriate programs. It is proposed that these programs should consider the young person holistically and agencies should work together to address the overlapping and often complex needs of the young person. A summary of the proposed programs include:

- o the expansion of the Adolescent Court and Community Team (ACCT);
 - ▶ This team should be required to identify and screen young people at court who are likely to suffer with cognitive and mental health impairment or mental illness, and should not rely on referral alone;
- o the introduction of a youth CREDIT program;
 - ▶ It is proposed that the ACCT and youth CREDIT would work closely together to identify, assess, make recommendations to the Court, refer young people into appropriate services and oversee the young person's progress holistically;
 - ▶ A multi-agency approach to criminal offending should be facilitated where information is shared, families are engaged where appropriate and the level of supervision is measured according to a risk/needs assessment;
- o The expansion of the Drug Court to accommodate young people to replace the previous Youth Drug and Alcohol Court;
- o An intensive bail support program to assist more young people access intervention programs;
- o Targeted "*standard*" intensive intervention programs for young people on remand which may assist in bail applications and at sentence;
- o Targeted intensive interventions at the sentencing stage, where a condition of an order is framed to provide for compliance with a program to address the identified needs of the individual as part of a community based order;
- o Compulsory drug treatment detention for young people;
- o Compulsory intensive intervention detention for young people, and
- o The transition from detention into services in the community should be seamless and accompanied by the optimal level of supervision.

The Court welcomes further investigation into the possibility of introducing a "*Community Court*" in NSW, described at paragraph 9.170-190. This may assist in diverting young people away from the criminal justice system by engaging and empowering communities in addressing local issues, offering culturally appropriate solutions, linking young people to services to address the dynamic risk factors of their offending, provide mediation in domestic disputes prior to court involvement,

provide assistance with housing and offer restorative justice processes at a grass roots level.

2. *Should any of the models in other jurisdictions, or any other model, be adopted?*

As above.

Any other approaches?

Question 9.9

Are there any other diversion, intervention or deferral options that should be considered in this review?

The Court welcomes proposals for further evidence-based options for young people.

Question Paper 10 – Ancillary orders

Compensation orders

Questions 10.1

Are compensation orders working effectively and should any changes be made to the current arrangements?

The Children's Court reiterates its comments in relation to fines for young people at paragraph 8.3.2. The Court is of the view that financial obligations should not be placed on young people who do not have an income. The purposes of sentencing are not advanced in cases where the parents pay the compensation and a financial burden on a young person may compromise their rehabilitation and place them at risk of further offending. The Court prefers that young people make reparation by performing work in the community or for the victim, through formal or informal processes. Youth Justice Conferences, CSOs, and the proposed Youth Forum Sentencing would be ideal vehicles for this, but there is also scope for such work to be a condition of a bond.

Driver licence disqualification

Question 10.2

1. *What changes, if any, should be made to the provisions governing driver licence disqualification or to its operational arrangements?*

The Children's Court is of the view that young people are highly susceptible to committing driving offences and it supports restrictions and conditions being imposed on young people for their own protection, the protection of the community and for general deterrence.

The Court is concerned that young Indigenous people living in rural and remote areas, where there is little or no public transport, are more likely to be tempted to

drive a vehicle when they are not licenced to do so. The Committee responsible for the *Doing Time – Time for Doing* report expressed its concern that "*driving licence offences appear to constitute a significant part of the normative sentencing culture for Indigenous youth.*"¹⁵ The Court supports the Committee's view at paragraphs 7.155 - 7.156, that steps should be taken by governments to provide support and assistance regarding licencing and traffic matters for Indigenous people in rural and remote areas.

Participation in a Traffic Offender Program and evidence of rehabilitation should have the potential to reduce the disqualification period beyond the automatic period.

2. *Should driver licence disqualification be made available in relation to offences that do not arise under road transport legislation?*

The Children's Court is not aware of any evidence-based research which supports the disqualification of driving licences for unrelated matters or provides evidence that it promotes any of the purposes of sentencing. Until such evidence exists, the Court does not endorse such a measure.

Question Paper 11 – Special categories of offenders

Indigenous offenders

Question 11.1

1. *How can the current sentencing regime be improved in order to reduce:*
 - a. *the incarceration rate of Indigenous people; and*
 - b. *the recidivism rate of Indigenous offenders?*

In 2010 –2011 47% of young people in detention were Indigenous.¹⁶ The submission to the Committee on the Rights of the Child expressed its concern that "*There are a variety of reasons for the overrepresentation of Aboriginal and Torres Strait Islander young people, including a lack of diversion and crime prevention program...*"¹⁷ The Court supports appropriate intervention during the course of the criminal justice process to address the underlying causes of offending behaviour, curtail custodial sentences and reduce recidivism.

The Intensive bail support scheme referred to earlier should have a special focus on young Indigenous people, particularly where they lack accommodation. The committee for the *Doing Time - Time for Doing* report expressed the importance of intervention occurring at the earliest stage of the criminal justice process, preferably at the point of charging, by way of restorative justice and intervention

¹⁵ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, "*Doing Time – Time for Doing: Indigenous youth in the criminal justice system*" (2011) *Parliament of the Commonwealth of Australia*, paragraph 7.154

¹⁶ Juvenile Justice NSW, "Annual Report Summary: 2010-2011" (2011) *Juvenile Justice*, 2.

¹⁷ Australian Human Rights Commission, "Information concerning Australia and the Convention on the Rights of the Child: Submission to the Committee on the Rights of the Child, (2011) 4th *Australian Government's 4th Periodic Report*, paragraph 178.

based rehabilitation.¹⁸ If bail were granted they should be ordered to participate in an intervention program where successful completion would mitigate their sentence.

Appropriate services, intervention programs and sentencing options should be available for young Indigenous people in rural areas. The Court supports further enquiry into culturally appropriate and evidence-based programs, such as those outlined in a 2011 report by the Indigenous Justice Clearinghouse.¹⁹

Upon a plea of guilty or finding of guilt, the Court proposes that young Indigenous people whose offending appears to be related to disadvantage experienced as a direct result of their Indigenous status "must" automatically be considered for participation in an intervention program under s 11 of the CSPA. If eligible for bail, the *Fernando* principles could be used as a guide to establish their eligibility to participate in the designated intervention. The ACCT could assist the Court in making this assessment. The young Indigenous person would then be referred to the youth CREDIT program for supervision and referral to culturally appropriate programs.

Upon successful completion/compliance with the program/s and accompanying evidence that the young person's prospects for rehabilitation were improved as a result of the programs, the resulting sentence could be reduced. This could result in a community based order rather than detention, thus contributing in a small way to a reduction in the number of young Indigenous people being detained. By addressing the causes of the offending behaviour it is conceivable that such intervention would also reduce the likelihood of further offending.

Where a young person is not granted bail it is proposed that a culturally appropriate intensive "standard" intervention program be ordered in appropriate cases, as outlined in question 9.6.3. Programs should, where possible, provide supervision in the detention centre by a member of the Indigenous community or by a person with sufficient training in Indigenous issues.

The Court also supports referral to (youth) Circle Sentencing, in the form previously discussed. The Court supports the involvement of family, as well as appropriate community members or extended family where possible.

The Court supports culturally appropriate versions of the proposed Compulsory Drug Treatment Detention and Compulsory Intensive Intervention Detention, which would reduce the time in detention if the young person complied with the program. The Court also supports the introduction of dedicated Indigenous youth-specific diversionary programs in detention, such as the Balund-a program, a residential diversionary program which aims to:

"reduce re-offending and enhance skills within a cultural and supportive community environment...Programs address specific areas of risk to assist

¹⁸ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 15, paragraph 7.210-7.211.

¹⁹ Kelly Richards, Lisa Rosevear and Robyn Gilbert, "Promising interventions for reducing Indigenous juvenile offending" (2011) Brief 10, *Indigenous Justice Clearinghouse*.

*on improving life skills and reintegration into the community, for example cognitive based programs, drug and alcohol, anger management, education and employability, domestic violence, parenting skills and living skills. Cultural activities include excursions to sacred sites, music, dance and art. Elders employed by the program provide support and assist residents to recognise, restore and value cultural links with their land and history"*²⁰

Where a young Indigenous person is sentenced before a traditional court, the Court supports the use of the *Fernando* principles in mitigating the severity of sentence in appropriate cases.

Appropriate post release programs should be implemented to reintegrate the young Indigenous person back into their community by connecting them to appropriate services and supervision. Don Weatherburn proposes that:

*"...if you are looking for a short to medium- term strategy for reducing Aboriginal imprisonment, there could be no better place to start than rehabilitation strategies for reducing the proportion of Aboriginal people who, after release from prison, come back to prison."*²¹

2. *Are there any forms of sentence other than those currently available that might more appropriately address the circumstances of Indigenous people?*

The Court welcomes suggestions for further evidence-based alternatives.

3. *Should the Fernando principles be incorporated in legislation and if so, how should this be achieved and what form should they take?*

Yes. The Court supports these principles being codified for eligible Indigenous offenders and propose they be used when a young Indigenous person *must* be considered for referral for intervention under s 11 of the CSPA. They should also be available in mitigation at sentence.

Offenders with cognitive and mental health impairments

Question 11.2

1. *Should the Crimes (Sentencing Procedure) Act 1999 (NSW) contain a more general statement directing the court's attention to the special circumstances that arise when sentencing an offender with cognitive or mental health impairments? If yes, what form should these principles take?*

Yes. Where an issue is identified the Court should be provided with expert evidence to assist it in the sentencing process. A definition of "*cognitive or mental health impairment*" should be inserted into the legislation to assist in identifying these individuals. The Court supports the definition provided by the Law Reform

²⁰ Corrective Services, NSW Government, "Balund-a (Tabulam)", <www.correctiveservices.nsw.gov.au/offender-management/correctional-centres/balund-a_tabulam> 14 September 2012.

²¹ House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, above n 15, paragraph 7.215.

Commission in its 2012 report on *"People with cognitive and mental health impairment in the criminal justice system: Diversion."*

2. *In what circumstances, if any, should the courts be required to order a pre-sentence report when considering sentencing offenders with cognitive and mental health impairments to prison?*

It can be difficult for the Court to identify a person who might be suffering from a cognitive or mental health impairment. It is incumbent on the legal practitioner representing the young person to be sensitive to the issues and raise it with the Court.

Section 25 of the CCPA applies in all Courts exercising criminal jurisdiction over young people, and requires that a Court shall not sentence a young person to detention unless a background report is prepared and tendered, and the court has taken into account matters contained in it. In the case of young people with a cognitive or mental health impairment, a background report should be considered in conjunction with any accompanying evidence including psychological or school reports.

3. *Should courts have the power to order that offenders with cognitive and mental health impairments be detained in facilities other than prison? If so, how should such a power be framed?*

In principle the Court supports the detention of young people with cognitive and mental health impairments in a separate facility but careful consideration would need to be given to its process and implementation.

4. *Do existing sentencing options present problems for people with cognitive and mental health impairments? If so, how should this be addressed?*

Where a sentence is being considered which would require compliance with conditions or programs is being ordered, a background report should be ordered and considered with any accompanying psychological, school or other reports.

5. *Should any new sentencing options be introduced for people with cognitive and mental health impairments? If yes, what types of sentencing options should be introduced?*

Special care should be taken during the course of the criminal justice process to divert young people with cognitive or mental health impairment into appropriate programs to assist them in addressing their complex needs. More targeted intervention may be required to assist these young people in complying with any conditions attached to their sentence.

The Court would welcome suggestions for additional sentences which adequately addressed the purposes of sentencing while addressing any individual vulnerabilities of a young person suffering from a cognitive or mental health impairment.

Question Paper 12 – Procedural and jurisdictional aspects

Jurisdictional reforms

Question 12.9

- 3. Should the Chief Magistrate have the power to issue guideline judgments for the Local Court? If so, what procedures should apply?*

This would not be appropriate for matters involving young people.

Question 12.10

- 1. Should a sentence indication scheme be reintroduced in NSW?*

The Court is not aware of any research indicating that such a scheme satisfies the interests of justice in a particular case.

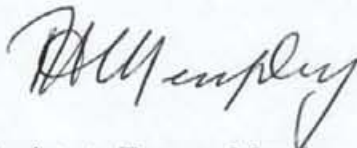
The role of victims in sentencing proceedings

Question 12.11

- 1. Should a court be permitted to give weight to the contents of a family victim impact statement when fixing the sentence for an offence in which the victim was killed?*

No. The Children's Court is of the view that the current scheme is appropriate and that while it is important for the victim to be able to publicly express the impact of their loss, there is a risk that the value of one life may inappropriately be viewed as greater than the life of another because of a particularly compelling victim impact statement.

Yours sincerely



Magistrate Terence Murphy
Acting President