



The Chief Magistrate of the Local Court

2 December 2011

Review of the YOA and CCPA
Legislation, Policy and Criminal Law Review
Department of Attorney General and Justice
GPO Box 6
SYDNEY NSW 2001

Dear Sir/Madam

I write in relation to the review of the *Young Offenders Act 1997* and *Children (Criminal Proceedings Act 1987)*.

I do not propose to address matters raised in the Discussion Paper that solely relate to the Children's Court, but will make some brief comments in relation to the following issues that are relevant to the Local Court:

1. *The approach to dealing with two or more co-defendants who are not all children (Question 32)*

I support the amendment the *Children (Criminal Proceedings) Act 1987* (CCPA) to enable the joint hearing of:

- Committal proceedings where an adult co-defendant is more than three years older than the child co-defendant; and
- Summary proceedings involving adult and child co-defendants.

There does not appear to be a coherent rationale for prohibiting joint hearings in these matters but requiring joint hearings in matters proceeding to trial on indictment.

I agree with the observations made in the Discussion Paper concerning the significant costs of conducting separate committal proceedings (including the impact on court time and resources), as well as the imposition upon witnesses required to give evidence on multiple occasions.

In situations where a witness is the alleged victim, the requirement that he or she give evidence at several separate hearings seems likely to compound any stress or distress in relation to his or her involvement in the proceedings. Such observations are equally applicable in matters where separate summary hearings for adult and child co-defendants are required.

In my view these concerns, particularly that of the impact upon witnesses who are alleged victims, outweigh the concerns raised as to the possible adverse effect of contact between adult and child co-offenders at hearing and/or limits on the applicability of the principle of open justice in respect of an adult co-defendant.¹

If joint committal proceedings for adult and child co-defendants are adopted, in order to be workable it would be desirable for procedures in the Children's Court to be amended in conformity with those in the Local Court.

At present, matters in the Children's Court may proceed up to the conclusion of the prosecution evidence without an indication as to whether they will be finalised summarily or dealt with as committal proceedings, in view of the ability of the defendant to elect or the Court to determine that a matter should be tried according to law up to that point.

By contrast, in the Local Court an election to proceed on indictment may only be made by the prosecution and/or the defence and occurs at an earlier stage. Under s 263 of the *Criminal Procedure Act*, an election must be made by the commencement of the taking of evidence for the prosecution in the summary trial where there is a plea of not guilty. In practice, proceedings are adjourned at the first mention for 14 days for the making of an election by the next court date, well prior to the matter being listed for a hearing of any type. By the point at which a hearing occurs, there is no uncertainty as to whether a matter is proceeding summarily or as a committal.

2. *Whether the Children's Court should hear all traffic offences allegedly committed by young people (Question 33)*

Following the release of the 2010 Noetic Report, I wrote to the Acting Director General in respect of this issue. A copy of my correspondence is attached.

I remain of the view that compelling policy reasons exist for the Local Court to continue to exercise jurisdictions in respect of traffic offences committed by children. These include the following:

- Judicial statements in the higher courts have consistently maintained that the youth and immaturity of an offender is not a mitigating factor when sentencing for driving offences and deterrence, both general and specific, is paramount in the sentencing exercise;
- In terms of rehabilitative and therapeutic options for traffic offenders, those dealt with in the Local Court can be considered for referral to a traffic offender intervention program but those dealt with by the Children's Court are excluded from eligibility;
- In view of recent policy concern that the specialisation of courts may be desirable so that proceedings are determined by judicial officers with expertise in a given area of law, magistrates of the Local Court are better placed to deal with traffic offences, as the hearing of such matters comprises a significant and regular part of the Court's caseload.

¹ In regard to the issue of open justice, criminal proceedings in the Children's Court are not entirely 'closed'. The prohibition upon the public being present at a hearing does not extend to a member of the media preparing a report on the proceedings: see s 10(2). Further, the prohibition upon the naming of a person involved in criminal proceedings in the Children's Court applies only to a person who is a child (or was a child at the time of the offence): s 15A.

3. *Whether the CCPA should clarify if a child can be sentenced to a control order for a traffic offence (Question 34)*

The Local Court's power to impose a control order upon sentence when dealing with a child for a traffic offence appears sufficiently clear upon consideration of the interaction between the CCPA and the *Criminal Procedure Act 1986*.

Section 210 of the *Criminal Procedure Act* provides that the Local Court may deal with a child found guilty of a traffic offence in accordance with Division 4 of Part 3 of the CCPA, and in doing so has and may exercise the functions of the Children's Court. Section 33 of the CCPA, within Division 4 of Part 3, sets out the penalties available upon sentencing, including control orders in subsection (1)(g).

Section 210(3) expressly provides that the Local Court cannot impose a sentence of imprisonment on a child traffic offender. However, a control order is not a sentence of imprisonment (notwithstanding the practical effect of both orders is the detention of the offender).² Rather than s 210(3) in any way limiting the ability of the Court to impose a control order when sentencing under Division 4 of Part 3 of the CCPA, the subsection is understood as relating to the situation where the Local Court deals with a child traffic offender other than under the CCPA.

While it seems clear that the power to sentence a child traffic offender to a control order exists, it is rarely exercised in practice. When sentencing a child traffic offender under the CCPA, the imposition of a control order is subject to the provisions of the *Crimes (Sentencing Procedure) Act 1999*, including the requirement in s 5 that the Court not impose a sentence of imprisonment unless satisfied, after considering all other alternatives, that no penalty other than imprisonment is appropriate. The Court will also have regard to guiding principles in s 6 of the CCPA that may operate against the imposition of a control order. It is, however, appropriate that the option of a control order remain available to a court sentencing a child for a traffic offence to accommodate those comparatively uncommon situations where it is the only appropriate sentence.

Thank you for the opportunity to make a submission to this review. Should you require any additional information or wish to discuss the above issues further, please do not hesitate to contact my office.

Yours sincerely,



Judge Graeme Henson
Chief Magistrate

² The drawing of a distinction between control orders and sentences of imprisonment is clearly contemplated in Division 4 of Part 3 of the CCPA. For example, after providing for the making of control orders in subs (1)(g), s 33 goes on to provide in subs (4) that "Notwithstanding any other Act or law to the contrary, the Children's Court shall not sentence a person to imprisonment". Section 33C further provides for the application of Parts 3 and 4 of the *Crimes (Sentencing Procedure) Act 1999* as if "a reference in those provisions to the sentencing of an offender to imprisonment were a reference to the making of a control order".



The Chief Magistrate of the Local Court

12 July 2010

Ms M Tangney
Acting Director General
Department of Justice and Attorney General
GPO Box 6
SYDNEY NSW 2001

Dear Acting Director General

Re: Noetic report recommendation 25 – determination of traffic offences allegedly committed by children

I refer to your letter dated 1 July 2010 requesting my views on the feasibility of having traffic offences allegedly committed by children heard and disposed of in the Children's Court, in respect of the Noetic report's recommendation a study be conducted.

I am of the view that it would be preferable for the Local Court to continue to determine traffic matters where the alleged offender is a child between the ages of 16 and 18 years, except where the matter can be heard by the Children's Court in conjunction with another charge. There are several reasons for my view.

Firstly, a key concern of the Court is the need for consistency in the objectives of the sentencing exercise when dealing with those found guilty of traffic offences. Such consistency is best aided by having child traffic offenders dealt with in the Local Court in the same manner as adult offenders.

In light of the responsibility to other road users that a driver takes upon him- or herself, the courts have emphasised denunciation and both general and specific deterrence as significant, even paramount, objectives when sentencing for driving and traffic offences.¹ This is based upon the recognition that there is a strong public interest in facilitating and promoting road safety. The position expressed by the courts is that the immaturity of young drivers is not a mitigating factor in relation to driving offences. The Court of Criminal Appeal recently commented, "*If a young male is old enough to be licensed to drive a motor vehicle, he is assumed to be mature enough to comply with its conditions and the traffic rules*".² In the same vein, it has

¹ For example, see *Application by the Attorney General under Section 37 of the Crimes (Sentencing Procedure) Act for a Guideline Judgment Concerning the Offence of High Range Prescribed Concentration of Alcohol Under Section 9(4) of the Road Transport (Safety and Traffic Management) Act 1999 (No 3 of 2002)* [2004] NSWCCA 303 at [122]

² *TG v R* [2010] NSWCCA 28 at [33]

said that the fact that young men in particular may perceive themselves as being 'bullet proof' is "a significant reason for general deterrence to be a prominent in cases such as these".³

The sentencing of a young offender brings with it additional considerations which, in the context of driving and traffic offences, may be difficult to unite with the public interest factors and the comments of the Court of Criminal Appeal that I have mentioned above. Generally, it has long been recognised that rehabilitation may be an important objective when sentencing a young offender.⁴ Further, under the *Children (Criminal Proceedings) Act 1987* ("C(CP)A"), various specific principles are to be applied when exercising the functions of the Children's Court, including "that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance".

It should be noted that I am not advocating that objectives such as rehabilitation should play no role in sentencing child traffic offenders. I merely point out that public interest factors such as the need for deterrence and denunciation are to be given a particular prominence in sentencing these types of offences. In my view it is appropriate that this be equally so when dealing with child and adult drivers who assume the same obligations in obtaining a licence.

Secondly, at present children whose traffic offences are dealt with in the Local Court can be considered for referral for a traffic offender intervention program, which provides community based education to educate traffic offenders about road safety and aims to improve offenders' attitudes to driving and driving behaviours.⁵ It should thus be recognised that there may be therapeutic benefits for the young offender in not being dealt with in accordance with Division 4 of Part 3 of the C(CP)A.

By contrast, section 349 of the *Criminal Procedure Act 1986* provides that a child traffic offender who is dealt with by the Children's Court or by the Local Court exercising the sentencing functions of the Children's Court pursuant to section 210 is not eligible to participate in a traffic offender intervention program.

Eligibility for referral to a program does not exclude persons under the age of 18 years.⁶ Data on the number of offenders who are referred to and complete a traffic offender program, and the number of children within those cohorts, is not yet available. However, anecdotally, magistrates have confirmed that they are referring persons under 18 to the program and view the prospective benefit of the program to young offenders in light of its objectives as considerable.

Thirdly, consistency in sentencing is assisted by the experience and education of the judicial officers who deal with such matters. The hearing of traffic matters comprises a significant portion of the daily work of magistrates of the Local Court. Magistrates sitting in the Local Court have regular experience in the application of the road transport legislation and are accordingly well placed to continue exercising this jurisdiction in respect of child traffic offenders. Education sessions on traffic matters

³ *SBF v R* [2009] NSWCCA 231 at [151].

⁴ For example, see *R v Webster*, unreported, Court of Criminal Appeal (15 July 1991)

⁵ See Part 4, Schedule 6, *Criminal Procedure Regulation 2005*

⁶ See Part 3, Schedule 6, *Criminal Procedure Regulation 2005*

are also a frequent component of ongoing judicial education within the Court. The approach taken in the Wood report was that specialist children's magistrates with experience in children's law are best suited to handling such matters; accordingly, one might likewise expect it would be practicable for traffic matters to be heard by magistrates with experience in that area of law.

Please do not hesitate to contact me should you wish to discuss these matters further.

Yours sincerely,



Graeme Henson
Chief Magistrate