16 December 2011

Ms Kathrina Lo
Legislation, Policy and Criminal Law Review
Department of Attorney General and Justice
GPO Box 6
SYDNEY NSW 2001
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Dear Sir/Madam,

Re: Review of the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*

Thank you for the opportunity to make a submission to the review of the *Young Offenders Act 1997* (YOA) and the *Children (Criminal Proceedings) Act 1987* (CCPA).

We address below each of the questions raised in the Consultation Paper. The Court acknowledges the previous reports and evaluations of the legislation, specifically the NSW Attorney General's Department *Report on the Review of the Young Offenders Act 1997* (AG Report) and the NSW Reform Commission *Report 104:Young Offenders* (LRC Report). This submission reflects some of the recommendations that have been made in those reports. The Children's Court has also had the benefit of reading the submission for this review by the Chief Magistrate of the Local Court and reflects some of his recommendations within our own submission.

PART 1: THE *YOUNG OFFENDERS ACT 1997*

Question 1

a) **Does the NSW's legislative framework take the right approach to offending by children and young people?**
b) **Are there any other models or approaches taken by other jurisdictions that this review should specifically consider?**

The current legislative framework takes the right approach in balancing considerations of accountability and rehabilitation. However, the Children's Court recommends placing

more weight on early intervention strategies and programs to reduce re-offending.

Question 2

a) **Are the objects of the YOA valid?**
b) **Are there any additions or changes to the objects of the YOA needed?**
c) **Should reducing re-offending be an objective of the YOA?**

The objects of the YOA remain valid.

Question 3

a) **Are the principles of the YOA valid?**
b) **Are any additions or changes to the principles of the YOA needed?**
c) **Should reducing re-offending be addressed in the principles of the YOA?**

The existing principles of the YOA continue to be relevant however there does need to be an acknowledgement in the principles that issues relating to welfare are often enlarged in criminal proceedings. Therefore a principle of the YOA should be that a young person should be dealt with in a way that helps them avoid engaging in further criminal activity. There should also be a statutory reflection in the YOA of the principle in common law that rehabilitation must be the primary aim in relation to a young offender.[1]

It is the submission of the Children's Court that the principles of the YOA and the CCPA should be the same. The principles governing how young people should be dealt with should be consistent in terms of procedure and matters of substance. It also means the concept of alternatives under the YOA become more mainstream propositions for the police and the court.

Question 4
Are the persons covered by the YOA appropriate?

The current provisions regarding persons covered under the Act are appropriate.

Question 5
Should the YOA apply to all offences for which the Children's Court has jurisdiction, unless specifically excluded?

The YOA applies to summary offences and indictable offences that are capable of being dealt with summarily.[2] It does not cover strictly indictable offences. The LRC Report found that this exclusion was inappropriate on the basis that the classification of crimes into indictable offences, summary offences (and if indictable offences, can be dealt with summarily) was to determine the seriousness of offences for more general purposes of criminal law. [3] There is no correlation between the seriousness of these offences as classified and the appropriateness of the diversionary options under the YOA.

[1] *GDP* (1991) 53 ACrimR 112 per Matthews J.
[2] *Young Offenders Act 1997* s8(1).
[3] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), para 4.22.

In the Children's Court's 2010 submission to the Law Reform Commission on Young Offenders, we argued that the YOA should cover all offences that may be dealt with under the CCPA (excluding serious children's indictable offences). In that submission we explained that:

> *It is the experience of the Court that many individual offences could appropriately be dealt with by conferencing in appropriate cases, especially robbery in company and robbery while armed with an offensive weapon: Crimes Act (NSW) section 97(1), especially where the amount taken is below a certain value.*[4]

The Court agrees with Recommendation 4.2 from the LRC Report which indicated that the YOA should be amended to cover all offences committed or alleged to be committed by children except serious children's indictable offences and except as otherwise provided under the YOA.[5]

Question 6

a) **Is the current list of offences specifically excluded from the YOA appropriate?**
b) **Is there justification for bringing any of these offences within the scope of the YOA?**

Section 8(2) of the YOA outlines offences specifically excluded from the diversionary options available under the Act. The Court questions the justification of these exclusions and believes that it may be appropriate, with regard to a number of these offences, to refer the young person to the diversionary options under the YOA.

<u>An offence where the person who investigates the offence is not a police officer</u>

The LRC's Report concluded that penalty notices should not be brought within the YOA. The main concerns were that extending the diversionary options of the YOA to cover penalty notice offences would be to net-widen and bring a young person further into the criminal justice system then was warranted.[6] Furthermore, the report had concerns that if penalty notices were to be included, the gatekeepers under the YOA would also need to be expanded to cover investigators of an offence that are not police officers (ticket inspectors etc). The Commission recommended that the Children's Court be given the power to review the amount specified in any penalty notice.[7]

The Court acknowledges these concerns however we think the practical problems may not be as great as predicted by the Law Reform Commission. The Court would support legislative amendments that would allow police to determine whether the offence was appropriate for the diversionary options under the Act rather than the investigator.

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[4] The Children's Court of NSW, *Submission* quoted in NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), para 4.10.
[5] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), para 4.27.
[6] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), para 4.16.
[7] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), para 4.19.

The fact is that the diversionary options may be the best option for many young people. There are some young people who receive penalty notices and accumulate substantial debts and are not able to pay them. These debts, if left unpaid, have serious long-term consequences for the individual. The ability for a young person to have the penalty amount reviewed by the Court may not deter the young person from re-offending. In these circumstances, options of cautions and conferencing may be appropriate.

Offences under the *Crimes (Domestic and Personal Violence) Act 2007*

Many of the AVO matters that come before the Children's Court involve young people being violent or threatening to be violent to a parent or parents with siblings being onlookers but not direct victims. In these cases, the power dynamic is quite different from adult partner-partner domestic violence. Parents have direct control of the finances and other resources, including accommodation. Parents are also in a position of internal conflict because they usually feel a sense of responsibility as the parent or support person to the child and can sometimes use Apprehended Domestic Violence Orders (ADVOs) as a behaviour management tool. The adversarial court process and the inflexible consequences of some ADVOs can exacerbate the situation rather than improve it.

The Court agrees with submissions made to the Law Reform Commission Report, including those of the New South Wales Legal Aid Commission and The Law Society of New South Wales, that diversionary options should be available for offences under the *Crimes (Domestic and Personal Violence) Act 2007* where it is considered appropriate.[8] This involves the inclusion of Apprehended Violence Orders (AVOs) generally, not just breaches of those orders. Offences under the *Crimes (Domestic and Personal Violence) Act 2007* where there is violence or where the victim is a child may be excluded from diversionary options.

Drug Offences

The LRC Report had concerns that drug offences often have 'unidentified victims' and therefore the restorative justice objectives of conferencing may be incapable of full achievement.[9] It also indicated that the Youth Drug and Alcohol Court program demonstrates the government policy to deal with drug offences in a holistic fashion and the court program is tailor-made to address the wide range of young offenders needs and problems through intensive case management.[10] As such there is an argument that diversionary options under the YOA will not be able to give the young person the resources and assistance that the Youth Drug and Alcohol Court program can.

Whilst the Court acknowledges this opinion, it agrees with previous submissions of Shopfront Legal Centre and the Law Society of NSW that the Act should cover all drug offences being capable of being dealt with summarily by the Children's Court.[11]

[8] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), para 4.31
[9] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), para 4.45.
[10] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), para 4.44.
[11] New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997*, 40.

Conferencing and cautions could provide an effective response for drug offences, particularly if the range of persons who can attend a conference was extended to health and drug counselling professionals.[12]

Question 7
Should warnings be available for the broader range of offences, a more limited range of offences, or are the current provisions of the YOA appropriate?

Warnings may be given for summary offences covered under the YOA except as otherwise provided by the regulations.[13] The LRC Report had reservations about this categorisation of offences eligible for warnings[14] and recommended that warnings may be given in respect of all offences covered under the YOA unless specifically excluded by regulation.[15] The Children's Court supports this recommendation. This does not guarantee that warnings will be used over other diversionary options under the Act but ensures that where appropriate, a warning may be given.

Question 8
Are the current provisions governing children's entitlement to warnings appropriate?

The current provisions are adequate.

Question 9
Are the provisions governing the recording of warnings appropriate? Are there any concerns with their operation in practice?

The Court does not have any particular knowledge in this regard but we believe the provisions are appropriate.

Question 10
Are the provisions governing the recording of warnings appropriate? Are there any concerns with their operation in practice?

The Court does not have any particular knowledge in this regard but we believe the provisions are appropriate.

Question 11
Are the current provisions governing the conditions for giving a caution appropriate? Are there any concerns with their operation in practice?

The Court does not have any particular knowledge with regard to police cautions. However, for the wide judicial discretion available to the Children's Court the current provisions are appropriate.

[12] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), rec 4.3.
[13] *Young Offenders Act 1997* s13.
[14] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), para 4.50.
[15] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), rec 4.4.

Question 12
Are the provisions that govern the process of arranging and giving cautions appropriate? Are there any concerns with their operation in practice?

The Court believes the current provisions governing the process for arranging and giving of cautions is appropriate.

The Children's Court does have concern though with the issue raised in the Consultation Paper for this review that the standard practice of NSW Police is to take the young person into custody before releasing them to get legal advice on the offence. If the police are not satisfied regarding the identification of the individual then the police should take the young person into custody. If identification can be ascertained however, then issuing a notice is a more appropriate option. This allows the young person and their parent or appropriate support person to organise to attend the police station and give them time to obtain advice.

There are valid reasons for taking the young person in to custody. Generally it requires young people to get legal advice and makes sure they understand the offence and their options. However, being in custody is a serious occurrence; not only is it a deprivation of liberty but it can increase the chance of contamination. It is a last resort for young people and the procedures of the Act should reflect this principle.

Question 13
Are the provisions that govern the consequences of a caution appropriate? Are there any concerns with their operation in practice?

The Court takes no issue with the provisions governing the consequences of a caution.

Question 14
a) Are the principles that govern conferencing still valid?
b) Are any additions or changes needed?

In general, the Court believes the principles that govern conferences are still valid.

Question 15
Are there any concerns with the comparative rate of conference referrals from Police and the Courts? If so, how should those concerns be addressed?

The Director of Public Prosecutions or a court may refer a matter involving a child who is alleged to have committed an offence to a conference administrator for a conference. This is subject to a number of conditions including: 1) the offence being one for which a conference may be held; 2) the child admits to committing the offence; 3) the child consents to the holding of the conference (when referred by DPP); and 4) the court is of the opinion that a conference should be held. [16]

The statistics as outlined in the Consultation Paper indicate that the referral by courts to conferences have been significantly and consistently higher than those undertaken by NSW Police. This reflects a trend that we have observed in the Children's Court

[16] *Young Offenders Act 1997* s40.

that matters are brought before the court, which can be and should be appropriately diverted to a conference.

In theory, police referral should be higher considering they are the first point of contact with the legal system. However, these statistics do not necessarily indicate that police are refusing diversionary options for young people. We believe that a significant number of court referrals occur because the young person does not admit to the offence when the matters are being considered by the Specialist Youth Officer (SYO), such admission being a precondition of a holding a conference under section 36 of the YOA.[17]

The Court also believes that a lower rate of referrals by police correlates with particular local area commands. We would encourage more training for police as to the diversionary options under the YOA and when best to be applied.

The Children's Court recommends that more comprehensive statistics regarding warnings, cautions and conferences be obtained to enable understanding of reasons that the police referral rate for cautions and conferences is lower than that of the court. This would involve looking at each local area command and assessing what competing factors are being used to determine diversionary options or lack thereof.

Question 16
Are the above provisions governing conferencing appropriate? Are there any concerns with their operation in practice?

If the Children's Court refers a matter for a conference, the Act requires a conference convenor to refer any outcome plan agreed to at a conference to the Court.[18] The Court may approve the plan or continue the proceedings. Members of the Advisory Committee to this review outlined that because the Children's Court is not a party to the agreement it can make the approval of an outcome plan difficult. It was suggested in the Consultation Paper that it might be appropriate to remove the requirement for court approval of the outcome plan.

The Children's Court agrees that approving an outcome plan is made more difficult where the court is not a party to the conference. However, we disagree with the solution of removing the requirement to approve the outcome plan. Once a matter comes before a court it should only be finalised by a judicial determination rather than an administrative decision.

The Court suggests that it be necessary for the conference convener to provide a report on the conference. This should include the following:

- who attended and their role in the conference;
- if any victims did not attend, the reasons for non-attendance; and
- a brief account of the conference.

This would allow the Court to understand the reasons for the agreement of the outcome plan and to make a determination as to whether the plan is too lenient, too harsh or otherwise appropriate.

[17] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), para 5.46.
[18] *Young Offenders Act 1997* s54(1).

Question 17
Should the YOA specify what constitutes an admission for the purposes of the YOA? If so, what form should an admission take?

Question 18
Are the provisions governing the provision of legal advice to children under the YOA appropriate? Are their any concerns with their interpretation, or operation in practice?
In order for a young person to be diverted to a caution or conference under the YOA, they must admit to the offence and then consent to a caution being given or conference being held (except if the matter is already in court).[19]

The LRC Report recommended that neither an admission nor consent to a diversionary process should be valid unless the admission is made, and consent given, after the child has received legal advice or has had reasonable opportunity of receiving legal advice.[20] 'Reasonable opportunity' is defined to mean not less than four days between the times an allegation is made that a child has committed an offence and the commencement of diversionary proceedings.[21] The Commission was reluctant to recommend a child be forced into obtaining legal advice. However, the Children's Court feels that legal advice should be mandatory before an admission is accepted and a diversionary process consented to. There are too many opportunities for police, parents or co-offenders to influence a young person in a vulnerable situation.

With regard to the Young Offenders Legal Referral Protocol, the Children's Court believes this has been successful in ensuring young people receive adequate legal advice. The Court supports the continuation of this mechanism and believes that provisions should be made to allow the protocol to be part of the *Young Offenders Regulation 2010.*

Question 19
Are the provisions that govern the disclosure of interventions under the YOA appropriate?

The court believes the current provisions are appropriate.

Question 20
a) **Is diversion still a legitimate aim of the YOA?**
b) **If not, how could court processes and interventions be structured so as to better address re-offending amongst children?**
c) **If so, is it still adequate and appropriate to divert children to warning, cautions and conferences?**
d) **What changes could be made to the interventions under the YOA to better address re-offending amongst children and young people?**
e) **Do the interventions under the YOA adequately cater for the needs of victims?**

[19] *Young Offenders Act 1997* ss 19(1)(b) and 19(1)(c); 36(1)(b) and 36(1)(c).
[20] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), rec 5.2.
[21] NSW Reform Commission (LRC), *Report 104:Young Offenders* (2005), rec 5.2.

The Children's Court believes that diversion is still a valid aim of the YOA. There is argument though that diversion may not always adequately address the needs of a young person who is at high risk of further offending and that CCPA options may be more appropriate. There may be circumstances where it would be legitimate for a court to intervene in order to ensure the young person receives assistance from Juvenile Justice or any other agency where there is a real likelihood of further offending.

Question 21

a) **What changes to the YOA, or its implementation, could be made to ensure that Aboriginal and Torres Strait Islander children have equal access to diversionary interventions under the YOA?**
b) **What changes to the YOA, or its implementation, could be made to better address the over-representation of Aboriginal and Torres Strait Islander children in the criminal justice system.**

In the Court's view, comprehensive statistics need to be obtained to analyse the relevant factors that can be used to determine what diversionary options are available to Aboriginal and Torres Strait Islander children. It would also be helpful in these instances to have statistics on matters that are not dealt with under the YOA where a lack of parents or other support person was a relevant consideration. This would assist in designing programs or training of police to ensure that Aboriginal and Torres Strait Islander children with comparable circumstances, particularly nature of offence and prior criminal history, are being dealt with under the YOA the same way as others.

Question 22

a) **Are the interventions under the YOA adequate and appropriate for children with cognitive impairments or mental illness?**
b) **If not, what changes could be made to better address offending by these children?**

Children with cognitive and mental health impairments are going to find any process that requires them to express themselves and to comprehend what others are saying difficult. As such, the use of diversionary options for these children means that particular assistance is required.

The current procedural protections contained in the Act are appropriate however we acknowledge that the NSW Law Reform Commission will soon release their report on *People with Cognitive and Mental Health Impairments in the Criminal Justice System*. Further consultation on this issue should occur following this report.

Question 23
Is there a need to reintroduce a body with an ongoing role to monitor and evaluate the implementation of the YOA across the state?

The Young Offenders Advisory Council (YOAC) should become a statutory body. Its responsibilities should be expanded to cover the monitoring and evaluation of the YOA and its implementation.

PART 2: THE *CHILDREN (CRIMINAL PROCEEDINGS) ACT 1987*

Question 24
Should the age of criminal responsibility be changed? If so, why, and to what age?

The current age of responsibility is 10 years.[22] The Court has no issue with the age of criminal responsibility however we acknowledge that whilst it is the same as it is in England and Wales, it is young in comparison to most other developed countries. Most European countries, for example, define a child as being over the age of 14-16 years old.[23]

Question 25
Could the structure of the CCPA be improved? If so, what other structure is recommended?

The structure of the legislation is a secondary consideration once the issues in this review, and the responses to them, are considered. This is especially the case if there is a recommendation to amalgamate the YOA and CCPA.

Question 26

a) **Are the guiding principles set out in the CCPA still valid and are there any changes needed?**
b) **Should the principles of the CCPA be the same as the principles of the YOA**
c) **Should the CCPA include an objects clause? If so, what should the objects be?**

See Question 3.

Question 27

a) **Are processes for commencing proceedings against children appropriate?**
b) **Is the different process for serious children's indictable offences and other serious offences appropriate?**

The intent behind the current section 8 of the CCPA was that proceedings should ordinarily commence with no bail and without arrest. With the *Children (Criminal Proceedings) Amendment Act 1987*, section 8 was amended to reflect that criminal proceedings should be commenced by a Court Attendance Notice (CAN) rather than by summons. There was no clarification with this amendment that bail should be dispensed with at the commencement of proceedings against young people. It is recommend that legislative amendments reflect the spirit of section 8.

In the experience of the Children's Court, it is rare that an on-the-spot CAN is given to a child in circumstances where an adult would have received a Field CAN. It should be the usual practice that a police officer not take the child into custody but issue a CAN when they can be satisfied as to the child's identity (and where there are

[22] *Children (Criminal Proceedings) Act 1987* s 5.
[23] Neal Hazel (2008) *Cross National Approaches to Youth Justice*, Youth Justice Board. Available online at: < http://www.yjb.gov.uk/publications/Resources/Downloads/Cross_national_final.pdf>.

no other good reasons for the child to go into custody), thereby minimising the need for the child to be in police custody (see Question 12). It is important that procedures exist which minimise the taking of children into custody.

Question 28

a) **Are the provisions for the conduct of hearings appropriate?**
b) **Are the limitations on use of evidence of prior offences, committed as a child appropriate?**
c) **Should the wording of section 15 be amended to make it easier to understand?**

a) Yes

b) and **c)** With respect to section 15, the wording and intention of the section is clear although the Court does have some reservations as to the policy itself. Evidence of prior offending should be available to a court determining bail and sentence in all circumstances. It is questionable why prior offences of guilt, including serious offences are not admissible purely because two years have passed. This is particularly questionable when the offence is the same offence in similar circumstances that has been committed previously.

Question 29

Is it appropriate for courts other than the Children's Court, when dealing with indictable offences, to impose adult penalties or Children's Court penalties?

Other courts have discretion when dealing with young people who have committed indictable offences, to apply penalties available for adults or apply penalties available for children.[24] However, if we accept that all children and young people are to be dealt with differently because of the principles of section 6 of the CCPA, it is therefore acceptable for the penalties to reflect that they are children. Thus, it is appropriate for all other courts to impose Children's Court penalties. This means greater consistency when dealing with young people.

Question 30

Is there any need to amend the list of factors to be taken into account when deciding whether to impose adult penalties or Children's Court penalties when they have committed a non-serious indictable offence?

The Court believes the current list of factors under section 18(1A) of the CCPA is appropriate and gives a broad discretion to the Court to determine penalties. The only inclusion suggested would be to specify considerations relating to the vulnerability of the offender. In particular, consideration should be given to the following:

- whether a young person has an intellectual disability or mental illness;
- whether the young person is an Aboriginal or Torres Strait Islander;
- their family circumstances; and/or
- cultural background.

It is helpful for these factors to be explicit given the other factors that are specified in section 19 of the Act. It also reflects the common law with respect to sentencing.

[24] *Children (Criminal Proceedings) Act 1987* (NSW) s 18.

Question 31
Does the list of special circumstances that can justify certain offender's aged 18 to 21 being placed in juvenile detention remain valid?

The special circumstances outlined are appropriate and maintain a broad discretion for the Court.

Question 32

a) **What should the content of the background reports be?**
b) **Should the contents be prescribed in legislation?**
c) **Should other reports be available to assist in sentencing?**

Background reports are generally comprehensive, reliable and contain information that cannot be reasonably obtained without requesting a report. Thus, the Court recommends that the prescribed contents of background reports should remain as they are.

However, it has been the experience of the Court that matters can be delayed when a custodial penalty is an option and a background report, which discusses the circumstances surrounding an offence, is not available. There have been many circumstances where a young person has committed the same crime on two different occasions and the court has received a background report on the first offence. This report contains all the relevant information applicable to the current offence but the court is unable to proceed with sentencing until background report to second offence is received.

The Children's Court recommends that the court should be able to dispense with the requirement for a background report or particular contents of a background report when the information is otherwise available.

Question 33
Should a court have the power to request to a report from relevant government agencies in order to determine whether a young person is at risk of serious harm (and in need of care and protection) and/or whether they are homeless?

The Children's Court is regularly confronted with young people who are homeless, who are without family support and who appear to be in need of care and protection. An option to request a report is therefore important in order to reduce re-offending and to reduce young people in custody.

Section 349 of the *Children, Youth and Families Act 2005* (Vic) allows the court to refer an application to the Secretary for investigation where there is significant concern for the child's wellbeing. The Secretary is to provide a report within 21 days advising that a protection application has been made, an application for a therapeutic treatment has been made or no application is required. It is recommended that a similar provision be adopted in the NSW jurisdiction. This would be in accordance with the principles of the Act and would provide a more holistic approach to sentencing.

Question 34
Is the list of serious children's indictable offences appropriate? If not, what changes need to be made?

The current list of serious children's indictable offences is appropriate.

Question 35
Is the current approach to dealing with two or more co-defendants who are not all children appropriate?

Section 29(2) of the CCPA provides that the Children's Court may hear and determine committal proceedings in respect of co-defendants who are not all children. Sub-section (3) provides an exception to this discretion if the elder of the co-defendants is over 18 and is more than three years older than the younger of the co-defendants. In these situations, separate committals for the offenders are required. This is often a serious imposition on witnesses and a significant cost to the justice system. The Children's Court submits that subsection 29(3) of the legislation should be amended to allow the Court to maintain discretion regarding joint committals for co-defendants where one is over 18. There are some situations where, despite there being over a three-year age difference between the younger co-defendant and the adult co-defendant, it is relevant and appropriate to hear and determine the matters together. One instance is when the co-defendants are siblings. The benefits of allowing this discretion will assist in preventing the adverse consequences of joint committals.

Question 36
Should the Children's Court hear all traffic offences allegedly committed by young people?

The Children's Court has jurisdiction to deal with some traffic offences in the following circumstances: 1) when the traffic offence arose out of the same circumstances as another offence that is alleged to have been committed by the person and in respect of which the person is charged before the Children's Court or 2) when the person was not, when the offence was allegedly committed, old enough to obtain a licence or permit under the *Road Transport (Driver Licensing) Act 1998* (being 16 years).[25] The Local Court has the power to deal with a guilty traffic offence under the CCPA, exercising the sentencing functions of the Children's Court where necessary.[26]

In 2010, the Noetic Report suggested that all traffic offences involving young people should be brought within the jurisdiction of the Children's Court.[27] It did not go so far as to recommend legislative change due to a lack of data about how the legislation was working in practice however it recommended a study to assess the impacts of amending the legislation.[28]

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[25] *Children (Criminal Proceedings) Act 1987* (NSW), s28(2).
[26] *Criminal Procedure Act 1986* (NSW) s 210.
[27] Noetic Solutions Pty Ltd, 'A Strategic Review of the New South Wales Juvenile Justice System' (April 2010) para 247.
[28] Noetic Solutions Pty Ltd, 'A Strategic Review of the New South Wales Juvenile Justice System' (April 2010) rec 25.

The Chief Magistrate of the Local Court, in his submission to this review, highlighted that:

> *"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…deterrence…is the paramount consideration in the sentencing exercise."*

With the greatest respect to those statements, this view is not consistent with the principles of the CCPA or modern understanding of the developmental stages of young people. In relation to traffic offences, whilst considerations of youth are usually given less weight by way of mitigation than with other offences, those considerations should still be given some weight. Even when performing actions normally performed by adults young people are more likely to act impulsively and immaturely. It is also the case that for many young people a driver's licence is an important asset in seeking employment. A rehabilitative approach should also be available for these people.

The Court agrees with the Noetic Report that the Children's Court should hear all traffic offences allegedly committed by a young person. It seems unreasonable for the Children's Court to deal with some traffic offences when in conjunction with other offences but cannot deal with them otherwise. Dealing with traffic offences in the Children's Court means that the young people are dealt with in closed courts and are at less risk of contamination. The rehabilitative and therapeutic options for traffic offenders that are available in the Local Court, including the traffic offender intervention program, should also be made available for young offenders who are dealt with in the Children's Court.

Question 37
Should the CCPA clarify whether a child can be sentenced to a control order for a traffic offence?

The Children's Court agrees with the submission of the Chief Magistrate of the Local Court that the current provisions are clear in their expression and intent. The option of imposing a control order should be available for a traffic offence in those rare circumstances where it is deemed to be necessary.

Question 38

a) **Are there any concerns with these provisions? In particular:**
    a. **Is it appropriate that the Children's Court magistrates have such discretion rather than having the election decision rest solely with the prosecution and/or defence as is the case with the adult regime?**
    b. **Should there be a more restricted timeframe for the defendant (or the court) to make an election?**
b) **Should the CCPA include any guidance about the circumstances in which the Children's Court may form the opinion that the charge may be disposed of in a summary matter (as it does for indictable offences set out in s18(1A))?**

There are several exceptions to the general rule that offences in the Children's Court, other than serious children's indictable offences, are to be dealt with summarily.[29] One of which is where the court, after all the evidence for the prosecution has been taken, decides that the matter should be dealt with according to the law. The determination is made, having regard to all the evidence before the Children's Court, that the evidence is capable of satisfying a jury beyond reasonable doubt that the person has committed an indictable offence, and that the charge may not properly be disposed of in a summary manner.[30] There are only a small number of matters that are dealt with in higher courts whose committal court was the Children's Court and whose offences do not include serious children's indictable offences.

The exception under section 31(3) can result in multiple hearings of the same offence where the prosecution case is made in the Children's Court and then to the Local or District Court. This means witness's may be giving evidence on several occasions, which is particularly concerning if the witnesses who are victims of sexual or violent offences.

The Children's Court agrees the submission of the Chief Magistrate of the Local Court that it would be desirable for procedures in the Children's Court to be amended to conform to those in the Local Court. This means an election to proceed on indictment can only occur at an early stage, before a hearing date is set and can only be made by prosecution and/or defence.

Question 39

a) **Are the penalty provisions of the CCPA appropriate?**
b) **Are there any concerns with their operation in practice?**
c) **Should the penalty options be clarified or simplified in the Act?**

The Court does have some concern with the ambiguity of section 33(1)(c2). It is clear that the Court may make an order for a single adjournment of proceedings against the person for a maximum period of 12 months. However there should be clarification as to whether the provision allows a subsequent adjournment. There is sometimes a significant time lapse between the time a plea is entered and the time of admission into a rehabilitation program. The Court should have the flexibility to further adjourn proceedings where necessary. A redrafting of this sub-section is recommended to avoid confusion.

It is arguable that the provision for both a good behaviour bond and probation under section 33 is unnecessary. The advantage of each of these options is that it enables the court to signify the greater seriousness of an offence by having each option available.

The Court also believes that there should be an option to include referral to a YJC as part of a penalty in the same way that both probation and a CSO is available for a single offence. The clear advantages of YJC's should not be restricted to less serious offences.

[29] *Children (Criminal Proceedings) Act 1987* (NSW) s31(1).
[30] *Children (Criminal Proceedings) Act 1987* (NSW) s31(3)(b).

The Court is concerned with the lack of a statutory basis for the Youth Drug and Alcohol Court program despite its successful operation for a decade. There should be legislation which covers matters such as eligibility, entry into the program, conditions of participation, the role of the Joint Assessment and Referral Team, special provisions for arrest warrants and the administration of the YDAC program in the same way that the *Drug Court Act 1998* provides for adult participants.

One further issue worthy of consideration is whether a finding of guilt should result in a conviction for young people aged 16 years or older. Serious consideration should be given to providing that there is a presumption that no conviction be recorded unless the court decides to impose a conviction rather than the current situation where a conviction is recorded unless the court otherwise orders. Most young people will only appear once in the Children's Court and in these cases a conviction is unnecessary and may hinder rehabilitation.

Question 40

a) **Are the provisions for the destruction of documents of records appropriate?**
b) **Are there any concerns with their operation in practice?**
c) **Should the presumption for destruction of records be reversed in relation to proceedings where a child or young person pleads guilty, or the offence is proved but the Court dismisses the charge with or without a caution?**

The current provisions are appropriate.

Question 41

a) **Are the provisions for terminating and varying good behaviour bonds and probation orders, and for dealing with breaches of such orders, appropriate?**
b) **Are there any concerns with their operation in practice?**
c) **Should there be a wider discretion to excuse a breach of suspended control order?**

The current provisions for terminating and varying good behaviour bonds and probation orders and for dealing with breaches are appropriate. However, the provisions regarding breach of suspended sentences operate unfairly and harshly on young people. The circumstances in which a breach of a suspended sentence can be excused are very limited; see *DPP v Cooke* [2007] NSWCCA 184. Although suspended sentences are rare in the Children's Court there are occasions where a relatively minor offence, e.g. shoplifting, breaches a suspended sentence for a more serious offence such as robbery, and the court is faced with imposing a custodial sentence when that sentencing option may be inappropriate. The first consideration is that courts should not impose such sentences if there is a risk that breach proceedings may result in a custodial penalty when that would be inappropriate. However, it is also worth noting that for adults the options of home detention and intensive correction orders are available as further alternatives when a suspended sentence is breached. No alternative short of full time custody is available for young people. Consideration should be given to a broader discretion to deal with breaches short of a full time custodial penalty.

Question 42
Should the YOA and CCPA be merged? If so, what should be the objects of any new Act?

The YOA and CCPA should be merged, although the amalgamation would be for symbolic reasons rather than substantive ones. It is important to affirm that YOA options are part of the mainstream of dealing with criminal offences committed by young people. We have outlined in this submission the need for the principles and objects to be the same in the YOA and CCPA and therefore amalgamation of the Acts would be useful in ensuring consistency.

Yours sincerely

Judge Mark Marien SC
PRESIDENT