



Review of the YOA and the CCPA
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To Whom It May Concern

I am pleased to provide the Commission's submission to the review of the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*.

One of the principal functions of the NSW Commission for Children and Young People is to promote the participation of children in decisions that affect their lives and to encourage government and non-government agencies to seek the participation of children in their work.

In reviewing the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*, children's perceptions of their own lives and behaviour need to be understood. Children will have important and unique perspectives to contribute in this area and with appropriate structures and support they have the capacity to contribute to this issue.

The Commission would be pleased to work with the Department of Attorney General and Justice to develop appropriate mechanisms for children to contribute to the review.

Thank you for the opportunity to contribute. If you require any further information, please contact Gregor Macfie, Director, Policy & Research, on 9286 7243 or by email at gregor.macfie@kids.nsw.gov.au

Yours sincerely

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Commissioner
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NSW Commission for Children and Young People

Submission to the Review of the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*

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The Commission welcomes the opportunity to comment on the review of the *Young Offenders Act 1997* and the *Children (Criminal Proceedings) Act 1987*.

The NSW Commission for Children and Young People has a legislated mandate to advocate for the safety and well-being of children and young people in NSW. The Commission's legislation also sets out that the Commission should give priority to vulnerable children in its work. To do this we work in partnership with other NSW Government and non-government organisations to provide policy advice, undertake research, support the development of child-safe organisations and monitor the NSW Working with Children Check.

The Commission welcomes this review as an important opportunity to consider reports and research recently published in relation to the NSW juvenile justice system, as well as research and reviews currently being undertaken in this area. Children and young people have unique needs and vulnerabilities that require special consideration. In creating laws that impact on children and young people, it is important to recognise that the approaches developed for adults may not necessarily be in the interests of children and young people.

Does the legislation continue to meet the needs of children and the community?

The Commission does not believe that the current legislative framework meets the needs of children and the community for three main reasons.

First, significant gains in understanding adolescent brain development suggest the need to rethink the meaning of criminal responsibility for children and young people. This includes the impact of negative environmental factors on the developing brain and the high incidence of these environmental factors in the lives of children who end up in the juvenile justice system.

Second, the attempt to combine the so called 'justice' and 'welfare' models of juvenile justice in the legislation has created a complex and sometimes contradictory amalgam of community based sanctions and controls alongside formal court processes and detention. It is possible that this has led to 'net widening', as police warn, caution or refer to conferencing children who might otherwise have been dealt with informally. At the same time, the evidence on re-offending indicates that the most serious and persistent offenders continue to be the most serious and persistent offenders, notwithstanding the good intentions of the legislation.

Third, the principles of restorative justice that underpin youth justice conferencing are

contentious and there is insufficient evidence for the effectiveness of youth justice conferencing in its current form in reducing recidivism.

Brain development in children and young people

Over the last few decades, significant progress has been made in understanding the brain development of children. It is now well known that the human brain does not stop growing within the first few years of life, as was once thought. Rather, there is continual development throughout adolescence and into early adulthood. For example, the frontal cortex area of the brain, which governs judgment, planning, decision-making and impulse control, doesn't fully mature until around 25 years of age (NSW Commission for Children and Young People, 2011a).

Among children this development occurs at different rates and often with stops and starts along the way. Development is influenced by gender as well as experiences during the first few years of life. Where children have suffered ongoing trauma, engaged in substance abuse or been victims of abuse or neglect, the ability of the brain to develop in a healthy way can be affected to such an extent that the neural pathways are not properly built. How the neural pathways are built impacts on learning and responses throughout adolescence and later life.

Excitement, novelty, risk and peer relations seem to signify the period of adolescence for many children. There is substantial evidence that children take more risks during this time, not because they don't understand the dangers but because they weigh risk versus reward differently from adults. This is thought to be the result of a peak in the adolescent brain's sensitivity to a neurotransmitter that helps control the brain's reward and pleasure centre. In situations where risk can get a child something they want, whether it is a material object or social status, they value the immediate reward more heavily than adults do (Dobbs, 2011).

The adolescent brain is similarly more attuned to oxytocin, another neural hormone, which makes social connections more rewarding. As a result, children prefer the company of those their own age more than ever before or after. Some brain-scan studies show that the human brain reacts to peer exclusion much as it responds to threats to physical health or food supply. For a child, this may mean they will do almost anything to maintain friendships, including engaging in anti-social or criminal behaviour (Dobbs, 2011).

Children also struggle with emotional regulation which may result in what adults consider 'over-the-top' reactions or violent outbursts that could constitute, or be perceived as, criminal behaviour. This is because adolescence is the period when hormones become a more powerful influence on the brain and children's brains show more activity in the emotional parts of the brain (Dobbs, 2011).

The gap between the increase in thrill seeking and emotional response during adolescence and the later development of self-regulation makes adolescence a time of inherently immature judgement. Some children may appear to be as capable as adults but their ability to regulate their behaviour is generally more limited than that of adults. The relative immaturity of children means that it is not appropriate to hold them accountable for their actions in the same way as adults. Children simply cannot know better as they lack

the full range of abilities and capabilities needed to exercise mature judgement (Steinberg, 2009).

During adolescence, children's brains retain much of their plasticity so that they continue to be moulded by environmental factors. Just as in the early years of life, a lack of appropriate stimulation, negative experiences, substance abuse, or trauma, can all affect the healthy development of the adolescent brain (Steinberg, 2009).

Children in the criminal justice system are some of the most vulnerable children in the community. They may be disengaged from family and education, suffering poor health, without stable accommodation and/or living in poor socio-economic circumstances.

The 2009 Young People in Custody Health Survey found that children in custody have significant health problems, including high rates of mental illness, drug and alcohol abuse and other risk taking behaviours (Indig et al, 2011). In addition, 27% had been in out-of-home care. Few children (38%) were attending school prior to custody. Parental imprisonment was common with nearly half (45%) of children ever having a parent in prison (Indig et al, 2011).

Taking all of the above into account, the Commission would agree with Farmer who, in summarising the research evidence internationally, concluded that 'many young people who come into contact with the criminal justice system are those least competent to engage with it.' (Farmer, 2011:89)

Problems with the current legislation

In 2009-10 on any given day 371 10-17 year olds were in custody in NSW, which is equivalent to 0.51 in every 1000. This is higher than the Australian average of 0.37 in every 1000 child 10-17 years old. Of the 371 children in detention on any given day in 2009-10, 55% were in custody on remand. Aboriginal children were 24.2 times more likely to be in custody on remand than non-Aboriginal children (NSW Commission for Children and Young People, 2011b).

The evidence also shows that the majority of children who appear before court re-offend. Nearly 70 per cent of the 5,476 children examined in a 2005 BOCSAR study reappeared in court within eight years (Chen et al, 2005). Aboriginal children are still more likely to go to court and less likely to receive a caution or warning than non-Aboriginal children (Chen et al, 2005).

There are a number of factors which help explain these figures which do not relate to the legislation under review. These factors include:

- the impact of the *Bail Act 1978 (NSW)* which has contributed to increasing numbers of children on remand;
- inadequate supports being available in the community (such as a safe place to live) leaving the courts with little alternative but to make control orders 'in the best interests of the child'; and
- the failure of public policy to mitigate the broad social and economic drivers that contribute to the same groups of children being persistently over-represented in the courts and juvenile detention.

However, the Commission believes that the failure to make a greater impact on the number of children in juvenile detention also arises from the confused objectives of the *Young Offenders Act 1997*.

On the one hand the legislation creates alternative sanctions to formal court processes that nevertheless reinforce the criminal law concepts of intention, guilt and punishment. On the other hand the legislation tries to make allowances, within the narrow frame of criminal law, for the social, environmental and personal characteristics of the children who come into contact with the justice system.

In our view, this model has led to the growth of confusing and sometimes unfair diversionary options (in the narrow sense of diversion from court) of limited effectiveness. The legislation may also have 'widened the net' to capture children who have committed relatively minor offences (and who in any case are likely to grow out of the offending) while detracting attention and resources from the more serious and persistent offenders who inevitably end up in the formal court process.

Youth Justice Conferencing

Even a cursory review of the literature on youth justice conferencing reveals that the principles of restorative justice that underpin it are contentious and that there is no clear evidence that youth justice conferencing reduces recidivism.

Furthermore, recent work on the oral language skills required for young offenders to participate effectively in youth justice conferencing suggests that it should never be an option for children with language or cognitive impairments (Snow, 2011). This reinforces the position that youth justice conferencing is not suitable for the vulnerable young people who are over-represented in formal court processes and in juvenile detention.

Recommendations

In light of the above discussion the Commission asks that the review consider the following recommendations.

1. That the criminal justice system be reserved for serious children's indictable offences only.

2. That the *Young Offenders Act 1997* be replaced with legislation to give effect to a system of children's hearings based on the Scottish model that should apply to all children under the age of 18 years.

A brief description of the Scottish model is outlined below. The Commission supports this approach because it:

- is clearly focused on the best interests of the child
- deals with the practical and contextual issues relating to the child's needs and behaviours without employing legal and social work rhetoric
- directly engages with the child and their family
- knits together the required community supports and holds local authorities to account for implementation
- formalises support and monitoring in the community
- allows for restorative justice where this is considered to be in the best interests of

- the child
- is generally supported by children, families and the wider community. (Pratt, 1993).

The Commission recognises that giving effect to this model in NSW would involve wider system reform, including to the child protection system. There would be a need to consult the community about how this would work and for a commitment to divert current resources to generate change.

The Scottish model

How it Works

The grounds (legal reasons) for bringing a child or young person before a hearing are set down in section 52(2) of the Children (Scotland) Act 1995 and include that the child:

- is beyond the control of parents or carers
- is at risk of moral danger
- is or has been the victim of an offence, including physical injury or sexual abuse
- is likely to suffer serious harm to health or development through lack of care
- is misusing drugs, alcohol or solvents
- has committed an offence
- is not attending school regularly without a reasonable excuse
- is subject to an antisocial behaviour order and the Sheriff requires the case to be referred to a children's hearing.

Children under 16 are only considered for prosecution in court for serious offences such as murder, assault which puts a life in danger or certain road traffic offences which can lead to disqualification from driving. In cases of this kind the Procurator Fiscal has to decide if prosecution is in the public interest. Even if so, it is still by no means automatic that the child will be prosecuted. The Procurator Fiscal may refer the child or young person to the Reporter (see below) for a decision on whether referral to a hearing is more appropriate. Where the child or young person is prosecuted in court, the court may, and in some cases must, refer the case to a hearing for advice on the best way of dealing with the child. The court, when it considers that advice, may also refer the case back to a hearing for a decision.

The Reporter

The Reporter is an official employed by the Scottish Children's Reporter Administration. All children and young people who may need compulsory measures of supervision must be referred to the Reporter. The main source of referrals is the police and social work, but other agencies such as health or education can make a referral, as well as any member of the public or even the child him/herself.

When the Reporter gets a referral, s/he must make an initial investigation before deciding what action, if any, is necessary in the child's interests. The Reporter must consider whether there is enough evidence to support the grounds for referral and then decide whether compulsory measures of supervision are needed.

The Reporter has statutory discretion in deciding the next step and s/he may:

- decide that no further action is required. The Reporter will write to the child/young person and usually the parent or other relevant person (see below for definition of 'relevant person') to tell them of this decision.
- refer the child or young person to the local authority so that advice, guidance and assistance can be given on an informal and voluntary basis. This usually involves support from a social worker.
- arrange a children's hearing because s/he considers that compulsory measures of supervision are necessary for the child.

The Children's Panel

The children's panel is a group of people from the community who come from a wide range of backgrounds. Panel members are unpaid and give their services voluntarily, but are carefully selected and highly trained. They must be at least 18 years old but there is no upper age limit.

Every local authority has a children's panel, and panel members sit on hearings on a rota basis. A children's hearing has three panel members, of which there must be a mix of men and women. The hearing must decide whether compulsory measures of supervision are needed for the child and, if so, what they should be.

Across Scotland there are around 2,500 children's panel members. They are carefully prepared for their task through initial training programmes and they will develop their knowledge and skills during their period of service through experience and attending in-service training.

The Hearing

A children's hearing is a lay tribunal of three members. It must not be wholly male or female and aims to have a balance of age and experience. One of the three panel members will chair the hearing. The hearing considers and makes decisions on the welfare of the child or young person before them, taking into account all the circumstances, including any offending behaviour.

The hearings can consider cases only where the child/young person, the relevant persons (see below) accept the grounds for referral as stated by the Reporter, or where they accept them in part and the hearing decides it is proper to proceed.

Where the grounds for referral are not accepted, or the child does not understand due to age or ability, (unless the hearing decides to discharge the referral) the case is referred to the Sheriff to decide whether the grounds are established. If the Sheriff is satisfied that the grounds are correct, the Reporter will arrange another hearing.

There will be circumstances in which temporary/emergency measures will be necessary. A Sheriff has the power to grant a Child Protection Order where it is considered that the child is in immediate danger. This is usually reviewed by a children's hearing on the second working day after the order has been granted. A children's hearing is able, in certain circumstances, to issue warrants. For example, if a child fails to attend a hearing a warrant may be issued to make sure s/he attends another hearing. If it is necessary to find a child

and keep him/her in a "place of safety", a Place of Safety warrant may be issued. This may last a maximum of 22 days; it can be extended on review by another children's hearing for a further 22 day period each time, but only up to a total of 66 days. After that, the Reporter must apply to the Sheriff for any further periods of 22 days, if that is necessary.

The hearing, or the Sheriff in certain court proceedings, may appoint an independent person known as a Safeguarder. The role of the Safeguarder is to prepare a report to assist the hearing in reaching a decision in the child's best interests.

Relevant Persons

The definition of a 'relevant person' is set out in Section 93(2)(b) of the Children (Scotland) Act 1995, and is a person who has (or has been legally granted) parental rights or responsibilities for the child, or any person who normally has charge of, or control over, the child (but this does not include someone who only works with the child as part of his/her employment).

What Happens at the Hearing?

A hearing is usually held in the child's or young person's home area. The layout of the room is relatively informal with the participants usually sitting round a table. Normally, the child/young person must attend and always has the right to attend all stages of his/her own hearing. The hearing may decide that the child does not have to attend certain parts of the hearing – or even the whole hearing – if, for example, matters might come up that would cause the child significant distress.

It is important that the relevant persons (e.g. the parents) should be present at the hearing so that they can take part in the discussion and help the hearing to reach a decision. Their attendance is compulsory by law, and failure to appear may result in prosecution and a fine. The child/young person and the relevant persons may take a representative to help them at the hearing, and each may choose a separate representative. However, this does not mean that they don't have to attend themselves. In certain cases the hearing may appoint a publicly funded Legal Representative.

The parents or other relevant persons and their representatives can be excluded from any part of the hearing so that the panel members can get the views of the child/young person, or if the child may be distressed by their presence. However, the chairman must afterwards explain the substance of what has taken place in their absence. Although the proceedings are private, a person from the press is allowed to attend the hearing, but may be asked to leave the room if the hearing decides it is necessary in order to get the views of the child, or if the child may be distressed by their presence. The press is not allowed to disclose the identity of the child. Also allowed to attend a hearing are a Children's Panel Advisory Committee member for the purpose of monitoring panel members' performance, and members of the Scottish Committee of the Council on Tribunals. Other observers may attend a hearing, but nobody is admitted unless they have a legitimate concern with the case or with the hearings system and have the agreement of the chair of the hearing, the child and the child's family. The hearing is therefore a small gathering able to proceed in a relatively informal way and to give the child and parents the confidence and privacy to take a full part in the discussion about what needs to be done for the child.

The hearing has to decide on the measures of supervision which are in the best interests of the child or young person. It receives a report on the child and his/her social background from a social worker in the local authority, and where appropriate from the child's school. Medical, psychological and psychiatric reports may also be requested. Parents, and in general the child if s/he is over 12, are provided with copies of the reports at the same time as the panel members. The hearing discusses the circumstances of the child fully with the parents, the child or young person and any representatives, the social worker and the teacher, if present. As the hearing is concerned with the wider picture and the long term well-being of the child, the measures which it decides on will be based on the welfare of the child. They may not appear to relate directly to the reason that was the immediate cause of the child's appearance at the hearing. For example, the hearing may decide that a child or young person who is not receiving adequate parental care should not be removed from the home, because suitable support is available within their home area. Alternatively, a child who has committed a relatively minor offence may be placed away from home for a time if it appears that the home background is a major cause of the child's difficulties and the hearing considers that removal from home would be in his/her best interests.

Supervision Requirements

If the hearing thinks that compulsory measures of supervision are necessary, it will make a Supervision Requirement, which may be reviewed annually until the child becomes 18. The hearing has wide scope to insert conditions in the Supervision Requirement, and the local authority is responsible for ensuring it is carried out. In most cases the child will continue to live at home but will be under the supervision of a social worker. In some cases the hearing will decide that the child should live away from home with relatives or other carers such as foster parents, or in one of several establishments managed by the local authority or voluntary organisations, such as children's homes, residential schools or secure accommodation. It may also decide who the child may have contact with, and when.

The Antisocial Behaviour etc. (Scotland) Act 2004 also gave hearings the power to restrict a child or young person's movement. This involves intensive support and monitoring services (monitoring is facilitated by an electronic "tag") where the young person is restricted to, or away from, a particular place. The electronic tag must be supported by a full package of intensive measures to help the young person change their behaviour. There is however no element of punishment in a hearing decision, so it does not for example have the power to fine the child/young person or the parents. All decisions made by hearings are binding on that child/young person. A Supervision Requirement can be terminated when a hearing decides that compulsory measures of supervision are no longer necessary.

Review Hearing

A Supervision Requirement must be reviewed at another hearing within a year otherwise it lapses. A hearing may specify an earlier review date. The child or relevant person may request a review after three months, and the local authority can call for a review at any time. The Reporter has a duty to arrange review hearings. At a review hearing, which is again attended by the child and relevant persons, the Supervision Requirement can be continued, changed or discharged.

Appeals

The child or young person, or the parents, may appeal to the Sheriff against the decision of a hearing, but must do so within 21 days. Once an appeal is lodged, it must usually be heard within 28 days. After that, the Sheriff's decision may be appealed to the Sheriff Principal or the Court of Session on a point of law only.

Legal Advice and Legal Aid

Prior to the hearing, legal advice is free or available at reduced cost under the legal advice and assistance scheme, to inform a child or the relevant persons about their rights at a hearing and to advise about acceptance of the ground for referral. Similarly, legal aid may be available for preparation for appearance in the Sheriff Court either when the case has been referred for establishment of the facts or in appeal cases.

Legal Representation at a Hearing

Legal representation is provided free of charge for a child or young person where the panel members sitting on the hearing consider it likely that there may be a recommendation of secure accommodation, or where legal representation is needed to allow the child to participate effectively at the hearing. Children's Legal Representatives are members of special panels maintained by local authorities and are qualified solicitors who work in public or private practice. Legal Representatives are expected to be sensitive to the atmosphere and ethos of the children's hearing. All costs of legal representation are met by the Scottish Government. [<http://www.childrens-hearings.co.uk/background.asp>.]

3. That the minimum age of criminal responsibility (MACR) be increased to 12 years

An understanding of children's cognitive and social development should help inform where governments set the MACR.

The age of criminal responsibility in NSW is 10 years. This age is based on a conclusive presumption under section 5 of the *Children (Criminal Proceedings) Act 1987* that no child who is younger than 10 years old can commit an offence. In NSW, the common law presumes that a child between the ages of 10 and 14 does not possess the necessary knowledge to have a criminal intention, known as *doli incapax*. This is a rebuttable presumption which requires that the prosecution, in addition to proving the elements of the offence, must also prove that the child knew that what they did was seriously wrong in the criminal sense.

NSW has one of the lowest ages of criminal responsibility internationally. For example, the age of criminal responsibility is 12 years in Canada, 13 years in New Zealand (except for murder/manslaughter where the age limit of 10 applies), 14 years in Italy, Germany and Spain and 15 years in many Scandinavian countries (Urbas, 2000).

There is evidence that between the approximate ages of 11 and 16 children show considerable improvements in reasoning and processing information. As a result of these developments, children become more capable of abstract, deliberative and hypothetical thinking during this growth from late childhood to adolescence (Steinberg, 2009).

The *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules) specify that in setting the age of criminal responsibility emotional, mental and intellectual maturity of children should be considered. The rules also state that countries should "consider whether a child can live up to the moral and psychological components of criminal responsibility" and notes that if the age of criminal responsibility is set too low "the notion of responsibility would become meaningless".

The principle of *doli incapax* is limited to considerations of whether a child knows that their behaviour was wrong in a criminal sense. It does not permit consideration of other biological and social factors that are also important, in our view, in determining the criminal responsibility of children. These factors have been mentioned above and include children's less well-developed emotional regulation, their greater propensity to take risks, and being strongly influenced by the need for peer approval. These factors also include the effects of negative environmental factors on some children during their development.

In light of this the Commission recommends that the review consider raising the minimum age of criminal responsibility in NSW initially to the age of 12 and with a later decision to raise it further to a point between 14 and 16 years following a review of the effectiveness of raising the age to 12 years and of any other reforms to the juvenile justice system. (Farmer, 2011).

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