



Department of Education and Communities
NSW Commission for Children & Young People
Level 2, 407 Elizabeth Street
Surry Hills NSW 2010

22 August 2013

Dear Sir/Madam

Have Your Say: Strengthening Advocacy for Children and Young People in NSW

The Youth Justice Coalition (YJC) thanks the NSW Commission for Children & Young People (**Commission**) for the opportunity to comment on the need for an advocate for children and young people in NSW.

About the Youth Justice Coalition

The YJC is a network of youth workers, children's lawyers, policy workers and academics working to promote the rights of children and young people in NSW.

The YJC aims to promote the rights of children and young people, to promote appropriate and effective initiatives in areas of law affecting children and young people, and to ensure that children's and young people's views, interests and rights are taken into account in law reform and policy debate.

The Youth Justice Coalition's Comments

This submission endeavours to focus on the need for the Commission to protect the rights, and meet the needs, of children and young people in NSW. To achieve this, the YJC has identified key legal issues that are affecting young people in NSW today. These are issues that the YJC has committed to focusing on for 2013, and we submit that the Commission should also be committed to working on these issues:

- Graffiti
- Care and Crime
- Review of the *Young Offenders Act 1997* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW)
- Fines
- Stop and Search
- Closure of the Youth Drug and Alcohol Court; and
- Consorting legislation.

1. Graffiti

In December 2012 the *Graffiti Legislation Amendment Act 2012* (NSW) (**Amending Act**) commenced, which amends the *Graffiti Control Act 2008* (NSW) and other Acts. Of particular significance are the amendments with respect to the punishment of graffiti offences.

The Amending Act has removed the power for police to issue to a young offender who has committed a graffiti offence, a warning, caution, or to refer a child to a conference administrator for a conference.¹ Instead a young person charged with a graffiti offence will be required to appear before a court. Under the *Young Offenders Act 1997* (NSW) (**YOA**), the court may still issue a caution or refer a child to a conference administrator for a conference.²

'Pre court diversion' away from formal adjudication by a court to non-court processing mechanisms is intended to provide young offenders with specialised guidance and treatment to rehabilitate offenders and to minimize state intervention in their lives.³ Undoubtedly, the removal of diversionary schemes is inconsistent with the objective of providing 'an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings'.⁴ The requirement that a young person appear before a court for a graffiti offence unreasonably increases social and financial costs to both the offender and the wider community.

Furthermore, the Amending Act provides additional penalties for offenders who commit an offence under sections 4 or 5 of the *Graffiti Control Act 2008* (NSW). An offence against these provisions may result in the court ordering the following:⁵

- instead of imposing a fine, making a community service order under the *Crimes (Sentencing Procedure) Act 1999* (NSW) or the *Children (Community Service Orders) Act 1987* (NSW) directing the person to perform community service work,⁶ and/or
- in addition to or instead of imposing a fine, sentence of imprisonment or any other penalty, including making a driver licence order.⁷

¹ *Young Offenders Act 1997* (NSW) ss 13, 18 and 37.

² *Young Offenders Act 1997* (NSW) ss 31 and 40.

³ Joy Wundersitz, 'Pre Court Diversion: The Australian Experience' (Technical and Background Paper Series No. 25, Australian Institute of Criminology, 2007), 1-2.

⁴ *Young Offenders Act 1997* (NSW) s 3(a).

⁵ *Graffiti Control Act 2008* (NSW) s 13B.

⁶ Unless it not practicable in the circumstances, a community service order must contain graffiti clean up conditions, which may require the offender to remove graffiti from buildings, vehicles and other places, and/or restore the appearance of buildings, vehicles and other places following the removal of graffiti: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 90; *Children (Community Service Orders) Act 1987* (NSW) s 11.

⁷ A driver licence order is, if the person is a holder of a learner or provisional licence – an order extending the person's learner licence period or provisional licence period for 6 months or less; or an order requiring the person not to

Imposing restrictions on a driver's licence does not provide a young person with the necessary guidance or rehabilitation to prevent them from re-offending; rather it deliberately punishes the young person. Again, this is contrary to the principles underlying diversionary schemes, which are widely acknowledged to be more effective than punitive sentencing of a young person at preventing re-offending. Furthermore, sentences that restrict the ability to travel or more seriously, result in loss of a driver's licence are likely to have consequences on a young person's access to education or employment and may inadvertently encourage young offenders to drive in situations where they are not legally able. Finally, it is more logical and appropriate to impose driver licence orders in the context of traffic offences.

The YJC is committed to addressing the issue posed by the Amending Act and is currently engaged in assessing its value. Accordingly, the YJC would appreciate the Commission's support and assistance in any future discussions or proposals.

2. Care and Crime

A parallel has been drawn between children who live in out-of-home care (OOHC) and their tendency to be involved with the criminal justice system.⁸

OOHC refers to the situation where a child is unable to live with their parents and includes foster care, residential care and independent living.⁹ The number of children in OOHC has risen every year over the last 10 years, with statistics revealing there were 39,621 Australian children living in OOHC as at 30 June 2012, with nearly half of these children in NSW.¹⁰ Research indicates that a young offender is likely to have a history of abuse or neglect, with statistics revealing that 28% of male and 39% of female juvenile detainees had a history of being placed in OOHC.¹¹

The correlation between children in OOHC and young offenders is a complex and acknowledged issue. There are a myriad of causes that result in this nexus, however, particular elements of OOHC may be accountable, including:

- a lower threshold for carers in residential care contacting the police for assistance with a young person's challenging behaviour;
- peer pressure and negative social learning amongst other young people living within the care facility;

incur 4 demerit points or more for a period of 6 months or less: *Graffiti Control Act 2008* (NSW) s 13C.

⁸ 'The Drift from Care to Crime: A Legal Aid NSW Issues Paper' (Issues Paper, Legal Aid NSW, October 2011), 1; Australian Law Reform Commission, *Family Violence – A National Legal Response*, Final Report - ALRC Report 114 and NSWLRC Report 128 (October 2010) [20.154].

⁹ Australian Institute of Family Studies, *Children in Care* (June 2013) Australian Government < <http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>>.

¹⁰ Australian Institute of Family Studies, *Children in Care* (June 2013) Australian Government < <http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114>>.

¹¹ The Hon James Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008, 556.

- absence of positive role models or positive connections with mainstream community; and
- poor support resulting in young people prematurely leaving care.¹²

The YJC is committed to finding a solution to reduce the number of young people being involved with the criminal justice system. As such, the YJC is currently working on a proposal aimed at reforming the roles of relevant stakeholders in the matter. The YJC would appreciate the Commission's support in resolving this issue.

3. Review of the *Young Offenders Act 1997 (NSW)* and the *Children (Criminal Proceedings) Act 1987 (NSW)*

In October 2011 the NSW Department of Attorney General and Justice commissioned a public review of the YOA and the *Children (Criminal Proceedings) Act 1987 (NSW)* (**CCPA**) to ensure that these two pieces of legislation continue to reflect best practice and meet the needs of young people.

The YJC was involved in the review as part of the Department's Advisory Committee and also by participating in the submissions process.¹³ In its submission, the YJC noted that while the YOA's existing objectives and principles remained valid, these could be elaborated on to emphasise the importance and benefit of diversionary schemes. The YJC also recommended widening the class of offences covered by the YOA to allow more juvenile offenders the benefit of participating in rehabilitative programs. With respect to the CCPA, the YJC noted that Australia's obligations under international law should be reflected in terms of the legislation's objectives and age of criminal responsibility. Furthermore, it was recommended that bail be dispensed with for children and young people and that sentencing options ought to be considered in light of the diversionary options under the YOA.

While results of the public review are yet to be released since the close of submissions in December 2011, the YJC maintains its commitment to the issues and recommendations raised in its submission. The YJC's dedication to this issue should be further noted in light of the aforementioned recent amendments to the punishment of young people for graffiti offences. Once results of the review have been released, YJC requests the Commission's assistance in supporting amendments to the two pieces of legislation, particularly in relation to the promotion of diversionary schemes.

4. Fines

Young people commonly receive fines for various reasons including driving and traffic offences, public transport violations or disobeying a police direction. Young people are particularly vulnerable to attracting fines with figures from the NSW Bureau of Crime Statistics and Research revealing that of 541,689 infringement notices issued in 2009, 32% of these were issued to 14 to 24-year-olds.¹⁴ It has been suggested that this vulnerability arises because young people may not earn or receive enough money to cover basic needs such as food, rent and transport,

¹² Che Stockley, 'The Role of Out-Of-Home Care in Criminal Justice Outcomes' 8 *Crime and Justice* (25 June 2013) 39, 40.

¹³ YJC, Submission to the Department of Attorney General and Justice, *Review of the Young Offenders Act and Children Criminal Proceedings Act*, December 2011.

¹⁴ Jenny Barga et al. 'Hot Topics: Young People and Crime', No. 73 (2010).

however, they still need to access and use these services despite not being able to pay.¹⁵

The effectiveness of fines as a penalty lies in their deterrent value, although, this is meaningless where the offender has no means to pay.¹⁶ For example the State Debt Recovery Office uses suspension of driver's licence as an enforcement method, as aforementioned, this may tempt young people to drive unlicensed, incurring further fines.

The YJC is concerned with the likelihood of young people accumulating considerable amounts of debt and seeks the Commission's support in being conscious of the potential cyclical consequence of issuing young people with fines.

5. Stop and Search

In NSW the police are empowered to stop, search and detain a person if the police officer suspects on reasonable grounds that the person has in their possession and/or control:

- anything stolen or otherwise unlawfully obtained;
- anything used or intended to be used in connection with the commission of a relevant offence;
- in a public place, a dangerous article that is being or was used in connection with the commission of a relevant offence; or
- a prohibited plant or prohibited drug.¹⁷

The police need not demonstrate reasonable suspicion if a person freely consents to a search.¹⁸ Where a young person is searched under these circumstances, a difficulty arises as to whether the young person freely consented due to the power imbalance between the police and the young person.¹⁹

Furthermore, as significant users of public spaces, young people are more likely to be subject to police intervention. Statistics indicate that 42% of people searched for knives or weapons were juveniles, and that the majority of these searches were 'unproductive' compared to searches of adults, which were more likely to result in a weapon being found.²⁰ In light of this, YJC is concerned with the unreasonable frequency with which young people are subject to police searches. Consistent negative contact with the police can provoke young people to resist arrest, assault police and/or use offensive language, which can result in further offences.

6. Closure of the Youth Drug and Alcohol Court

The YJC is supportive of diversionary schemes for children and young people targeted at rehabilitation and improving young offenders' wellbeing by assisting them to develop life skills. Prior to its recent closure, the Youth Drug and Alcohol Court (YDAC) was exemplary of such a diversionary program aimed at 'reducing drug and/or alcohol related criminal activity by children through judicial and therapeutic

¹⁵ Law and Justice Foundation, 'Fine But Not Fair: Fines and Disadvantage' 3 *Justice Issues* (November 2008) 3.

¹⁶ Jenny Barga et al. 'Hot Topics: Young People and Crime', No. 73 (2010).

¹⁷ *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 21.

¹⁸ *DPP v Leonard* (2001) 53 NSWLR 227, 7.

¹⁹ Jane Sanders, 'Police Powers Update January 2013', 11.

²⁰ Jenny Barga et al. 'Hot Topics: Young People and Crime', No. 73 (2010).

interventions'.²¹ As aforementioned, punitive sentences are ineffective at preventing recidivism, and therefore the YDAC enabled the YDAC magistrate to focus on and address the possible underlying causes of the offender's behaviour, an effective means of reducing re-offending.²² The YJC supports re-establishing programs with similar objectives to the YDAC.

7. Consorting legislation

In April 2012 the *Crimes Amendment (Consorting and Organised Crime) Act 2012* commenced, which amends the *Crimes Act 1900* (NSW). To be convicted of the offence, a person must have consorted (by any means of communication, including electronic) with at least two convicted offenders and to have consorted with each of those offenders on at least two occasions after being given an official warning in relation to each of those convicted offenders.²³ Under the *Crimes Act 1900* (NSW), certain forms of consorting are to be disregarded (e.g. consorting with family members, in the course of lawful employment, etc) if the defendant satisfies the court that the consorting was reasonable in the circumstances.²⁴

Although NSW previously had a consorting offence,²⁵ it was a summary offence with a significantly lower maximum penalty and was rarely prosecuted.²⁶

Apart from offending basic rights such as freedom of association, YJC is concerned about the impact of these new consorting laws on young people. Consorting can be an offence even if there is no criminal purpose.²⁷ For example, in light of the large proportion of young people involved with the criminal justice system, and the likelihood of a young person associating with a juvenile offender, many young people are at risk of committing a criminal offence. The YJC supports evaluation of the new consorting laws (including the upcoming NSW Ombudsman review), particularly in respect of its potentially detrimental impact on young people.

Role of the Commission

The YJC observes that in "The role and functions of NSW Commission for Children and Young People", the Commission does not undertake research itself, but instead collaborates with other government departments, NGOs and academics to develop an agreed research project. As an advocate seeking to promote the rights and welfare of children and young people, the YJC submits that the Commission ought to conduct research and policy work as it is best placed to understand the needs and issues pertaining to young people. In light of this recommendation, the Commission must be adequately resourced to carry out this research and policy work and may achieve this through collaboration with other agencies.

²¹ The Children's Court of New South Wales Practice Note No. 1: Practice Note for the Youth Drug and Alcohol Court.

²² Shelley Turner, 'The New South Wales Youth Drug & Alcohol Court Program: A Decade of Development' 37(1) *Monash University Law Review* 280.

²³ *Crimes Act 1900* (NSW) ss 93W and 93X.

²⁴ *Crimes Act 1900* (NSW) s 93Y.

²⁵ *Crimes Act 1900* (NSW) s 546A (repealed).

²⁶ Jane Sanders, 'Consorting Laws in NSW' 38(2) *Alternative Law Journal* (2013) 130.

²⁷ Jane Sanders, 'Consorting Laws in NSW' 38(2) *Alternative Law Journal* (2013) 130.

In addition, the YJC notes that the Commission has been established as an independent statutory corporation. The YJC reiterates the importance of remaining independent to ensure the effective promotion of the rights and welfare of children and young people.

Thank you for considering this submission. If you require further information please contact the Youth Justice Coalition on (02) 9559 2899, or at yjc@clc.net.au.

Yours faithfully

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