



## *Children's Court of New South Wales*

30 September 2020

The Hon Mr Peter McClellan AM  
Chairperson  
New South Wales Sentencing Council

By email: [sentencingcouncil@justice.nsw.gov.au](mailto:sentencingcouncil@justice.nsw.gov.au)

Dear Mr McClellan

Thank you for the opportunity to comment on the review into sentencing for offences involving assaults on police officers, correctional staff, youth justice officers, emergency services workers and health workers. The Children's Court recognises the important work these individuals undertake in the community and understands the significant concerns relating to their right to a safe workplace. Nevertheless, the Court feels that the current sentencing provisions are adequate.

Already in NSW, increased penalties exist for offences involving assaults against police and emergency services workers. For example, under s 60(2) and s 60A(2) of the *Crimes Act 1900*, the charge of assault causing actual bodily harm to a police officer or law enforcement officer in execution of their duty carries a maximum penalty of 7 years imprisonment as compared to 5 years if the same act is committed against an ordinary citizen. An offence under s 67J of the *Health Services Act 1997* of intentionally obstructing or hindering an ambulance officer when providing or attempting to provide ambulance services to another person carries a maximum of 2 years imprisonment, or a fine, or both and raises to 5 years if an act of violence is involved.

Importantly, under s 21A (2)(a) of the *Crimes (Sentencing Procedure) Act 1999*, an aggravating factor courts must consider when imposing a sentence includes that the victim was a police officer, emergency services worker, correctional officer, judicial officer, council worker, or other public official exercising public or community functions and the offence arose because of the victim's occupation or work. Lastly, the common law has long recognised that individuals in particular occupations are employed in positions involving a

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certain degree of risk, and consequently, an offender's culpability may be aggravated by the fact that the victim is a police officer.<sup>1</sup>

In making this submission, the Children's Court emphasises the fundamental principles of the *United Nations Convention on the Rights of the Child 1989*. Most notably that the arrest, detention and imprisonment of a child shall only be used as a measure of last resort and for the shortest appropriate period of time<sup>2</sup>, as well as the preference for alternative diversionary measures over formal judicial proceedings and custodial sentences.<sup>3</sup>

The factors influencing youth offending differ from that of adult offending. They are often related to lack of agency and welfare related issues. Children are also highly visible, with their use of public space drawing attention. In addition, children's brains are still developing. Neurobiological research has revealed that the pre-frontal cortex of the brain is the last part of the brain to fully mature. This is the part of the brain that is associated with identifying risk, managing emotion, controlling impulses and understanding consequences.<sup>4</sup> This is reflected in much of the Children's Court's own anecdotal experiences in relation to the type of offences subject to this review. When a child charged with an offence against a police officer, the offence has more often than not occurred during the process of arrest. A child is approached by police in a public space or residential home or facility, and during this interaction emotions quickly heighten. A reliance on consequential thinking to consider the situation and make a decision not to react is required. As children do not have the same maturity and emotional control, these interactions predictably lead to reactive behaviour, resulting in one or more criminal charges.

The Children's Court is particularly concerned that any move to impose harsher penalties may disproportionately impact vulnerable young people in care, due to their increased contact with police and other community-based services. Research conducted in Victoria found that the proportion of assaults on police and emergency workers committed by children who had experienced residential out of home care was double that of children not known to child protection.<sup>5</sup> In addition, children who had experienced residential care were almost three times more likely than children not known to child protection to be sentenced or diverted for resisting or hindering police or emergency workers.<sup>6</sup>

In the Court's experience assaults against police and other emergency service workers that involve any level of planning are very rare.

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<sup>1</sup> *R v Adam* [1999] NSWSC 144 at [44]–[46]; *R v Penisini* [2004] NSWCCA 339 at [20]; *R v Holton* [2004] NSWCCA 214 at [100], [125].

<sup>2</sup> UN General Assembly, *Convention of the Rights of the Child*, 20 November 1989, article 37(b)

<sup>3</sup> *Ibid*, article 40(3).

<sup>4</sup> Evan C McCuish et al, 'Psychopathic traits and offending trajectories from early adolescence.' (2014) 42 *Journal of Criminal Justice*, 66-76.

<sup>5</sup> Sentencing Advisory Council of Victoria, '*Crossover Kids*': *Vulnerable Children in the Youth Justice System: Report 2: Children at the Intersection of Child Protection and Youth Justice across Victoria* (2019), 20.

[https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-03/Crossover\\_Kids\\_Report\\_2.pdf](https://www.sentencingcouncil.vic.gov.au/sites/default/files/2020-03/Crossover_Kids_Report_2.pdf)

<sup>6</sup> *Ibid*.

Consequently, it is unlikely that harsher penalties will act as a deterrent for children and young people charged with these offences. In addition, given deterrent options like mandatory sentencing rely on an individual's ability to appropriately rationalise and weigh up consequences, the Court submits that the intended purpose is unlikely to be achieved in relation to children involved in these offences. In addition, the Children's Court submits that the unique nature of children and young people's individual circumstances and cognitive development should be central in issues of youth justice, and the current legislative provisions allow Children's Magistrates to appropriately consider these factors upon sentencing.

Children's Magistrates are guided by the principles enshrined in s 6 of the *Children (Criminal Proceedings) Act 1987* (CCPA). These principles balance the need for children who commit offences to bear responsibility for their actions and make reparations, with the recognition that children require guidance and assistance as a result of their state of dependency and immaturity. The principles also recognise that children achieve more positive rehabilitative outcomes when they remain connected to their communities and in continuous education. These principles are also reflected in other legislative provisions which apply to children, including the omission of children from show-cause provisions for bail determinations<sup>7</sup> and standard non-parole periods.<sup>8</sup>

Significantly, the United Nations Committee on the Rights of the Child recently noted that it remains 'seriously concerned' about the continuing existence of mandatory sentencing applying to children in both the Northern Territory and Western Australia<sup>9</sup>, and has previously observed that in relation to mandatory sentencing of children in Australia it is not in the best interests of children and should be abolished in so far as it applies to children.<sup>10</sup> Furthermore, research indicates that to date; there is no robust evidence that mandatory sentencing deters individuals from further offending.<sup>11</sup>

The Children's Court acknowledges the need to protect individuals who undertake fundamental roles maintaining community safety, and the need to appropriately sentence those who cause them harm, including children. However, in order for sentencing of children and young people to have its desired outcome, Magistrate's must retain the flexibility to consider the most appropriate avenue for each young person having regard to the circumstances of the offending and the young person's individual circumstances, including their level of development and emotional maturity.

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<sup>7</sup> *Bail Act 2013*, s 16A(3).

<sup>8</sup> *Crimes (Sentencing Procedure) Act 1999*, s 54D(3).

<sup>9</sup> United Nations Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Australia, CRC/C/AUS/CO/5-6, paragraph 47(f).  
[https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/AUS/CRC\\_C\\_AUS\\_CO\\_5-6\\_37291\\_E.pdf](https://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/AUS/CRC_C_AUS_CO_5-6_37291_E.pdf)

<sup>10</sup> United Nations Committee on the Rights of the Child, Concluding Observations of the Committee on the Rights of the Child: Australia, CRC/C/AUS/CO/4, 28 August 2012, paragraph 84.  
[http://www2.ohchr.org/english/bodies/crc/docs/co/CRC\\_C\\_AUS\\_CO\\_4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf)

<sup>11</sup> Michael Tonry, 'The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings' (2009) 38 (65) *Crime and Justice*.

The specialist Children's Magistrates who operate within the jurisdiction undertake judicial education specifically tailored to children and young people. Consequently, Children's Magistrates are in a good position to appreciate the issues impacting upon a young person's ability to foresee and mitigate risks and ensure that the principles at s 6 of the CCPA are adhered to appropriately when imposing a penalty.

Finally, consideration should be given to the potential impact of any changes to sentencing including any mandatory sentencing provisions, on other vulnerable members of the community. Individuals experiencing domestic violence, or in caring roles for young people who experience mental illness or disabilities such as Autism Spectrum Disorder often reach out to NSW Police, emergency services and community service workers for help and support to manage challenging behaviour. The Children's Court submits that if changes in sentencing laws limited the discretion available to courts to impose appropriate penalties aimed at rehabilitation these individuals may be hesitant to reach out for support for fear of the potential consequence should a situation escalate.

Please feel free to contact my Executive Officer, Rosemary Davidson at [REDACTED] should you have any questions regarding this submission.

Yours sincerely

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Judge Peter Johnstone

**President of the Children's Court, NSW**