

18 June 2007

Katherine McFarlane
New South Wales Sentencing Council
GPO Box 6
Sydney NSW 2001

Dear Ms. McFarlane,

Submission regarding provisional sentencing of violent youth offenders

The New South Wales Council for Civil Liberties ('CCL') would like to thank the Sentencing Council for the opportunity to contribute a submission on provisional sentencing. CCL respectfully makes the following observations and suggestions regarding provisional juvenile sentencing for the Sentencing Council to consider. We hope that this submission proves useful for your review.

1. Executive Summary

1. Provisional sentencing, used in the proper context, would be an ideal tool for courts to use in sentencing violent juvenile offenders. After a fixed provisional period, a court can assess an offender's progress and recommend an appropriate sentence. This will be an effective method of promoting both the best interests of society as well as the offenders.

2. Is the provisional sentencing for young offenders necessary and fair?

2. Sentencing juveniles in violent crimes is a complicated process that must balance the criminal justice system's goals of punishment, rehabilitation, deterrence, and protection of the community.¹
3. Juvenile detention is subject to international law, which requires that all sentencing have the "best interests of the child" as a primary consideration.²

¹ See *Crimes (Sentencing Procedure) Act 1999* Sect 3A.

Courts must facilitate the rehabilitation of the juvenile while protecting the juvenile from physical harm and unnecessary infringement upon their individual rights. Even though this interest must be the paramount consideration, courts sentencing juveniles must also consider the general public interest as a secondary consideration.

4. In especially violent juvenile crimes, weighing the public interest with the best interest of the child can be a burdensome and difficult task at the time of initial sentencing. Immaturity, susceptibility to peer pressure, and perhaps an underdeveloped sense of responsibility might render a crime less morally reprehensible when committed by a child. In addition, the personality of a child is less likely fixed, making it difficult to determine the offender's capacity for future rehabilitation.³
5. The needs of juvenile offenders are fundamentally different from that of adults. Juveniles therefore require alternative types of sentencing. The SLD case exemplifies the need for a separate system. In that case, Chief Justice Wood regrets that he had no option, as is available in the UK, to leave room in sentencing for possible future improvements in the offender or demonstrated capacity to rehabilitate.⁴
6. The Lord Chief Justice, Lord Woolf, noted the undesirability of undoing the rehabilitative progress made by the young offenders in the Jamie Bulger case. The Chief Justice refixed the sentence at eight years while noting that, without the provisional scheme that exists in the UK, he would have likely assigned a sentence of ten years.⁵
7. Given the lack of frequency and the unique emotional and mental circumstances of these situations, the deterrent value is likely to be low. CCL believes that the NSW Sentencing Council should adopt the provisional sentencing of serious juvenile offenders in an effort to provide more individualized sentencing with added focus on rehabilitation. However, with this adoption, the Sentencing Council must provide safeguards that prevent infringement on the offender's human rights.

3. What safeguards are necessary?

- **Concerns of Indefinite Detention**

8. CCL is concerned that detention "at the Governor's pleasure" may lead to indefinite sentences for violent juvenile offenders. As the request for submissions suggests, there could be some standard interval of time set before review. CCL recommends that an appropriate mandatory time for review be set

² See *United Nations Convention on the Rights of the Child* [1991] ATS 4 (entry into force 16 January 1991).

³ See *R v Secretary of State for the Home Department; Ex Parte Smith* FC [2005] UKHL 51

⁴ See *R v SLD* [2002] NSWSC 758 at [132] *et seq.*

⁵ See *R v Secretary of State for the Home Department; Ex Parte Venables* Court of Appeal [1998] AC 407, House of Lords [1998] AC 467; and *Re Thompson* [2001] 1 All ER 737.

is between 2 and 5 years. This provision would give the courts adequate time to determine the offender's prospects for rehabilitation, while protecting their human right to a fair and proportionate sentence. It would also provide an opportunity for addressing and stabilising any mental health or addiction issues that might be present.

- **Limited Application**

9. Given the limited number of serious juvenile offenders within NSW, CCL wants to ensure that the application of this provision is appropriately limited to the gravest cases, in which offenders would be subjected to sentences much longer than the period before review.

- **Independent Review**

10. A court determining a sentence must do so without political influence. This ensures that the offender's punishment is independent and not subject to the vagaries of public sentiment (for example, Home Secretary Howard was accused of unlawfully yielding to public outcry in sentencing the two youths who were detained at Her Majesty's pleasure for the Bulger murder). A fair provisional sentencing regime requires a procedure for review set *ex ante*.
11. To ensure the fairness and independence of a reviewing court's sentence, the offender should have the usual right to appeal any sentence. This measure will limit disproportionate sentences and ensure that there is adequate due process.

4. An Alternative Approach

12. Another method for tailoring sentences to the special needs of young offenders would involve setting a head sentence while leaving the non-parole period open for review after two to five years. This scheme allows the initial sentence to reflect the gravity of the offence, ensuring the penalty is proportionate and adequately punitive. At the same time, it would provide a period to address and stabilize any mental health or developmental issues that might be present while allowing the non-parole period to reflect the offender's demonstrated progress and capacity for rehabilitation.