

12 December 2001

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Mr Laurie Glanfield
Director-General
Attorney-General's Department
GPO Box 6
SYDNEY NSW 2001

Dear Mr Glanfield

Review of Young Offenders Act

The Shopfront Youth Legal Centre is a free legal service for homeless and disadvantaged young people aged 25 and under. The Shopfront has been operating since 1993 and is a joint project of Freehills, Mission Australia's Sydney City Mission and the Salvation Army.

The Shopfront represents and advises young people on a range of legal issues, with a particular emphasis on criminal law. Many of the Shopfront's clients are under 18, and our solicitors have extensive experience appearing in the Children's Court. Two of our solicitors have received awards in the National Children's and Youth Law Centre's Children's Lawyer of the Year Awards.

We welcome this opportunity to contribute to your review of the *Young Offenders Act 1997* (NSW).

General Comments

We are of the view that the *Young Offenders Act 1997* (NSW) largely achieves its objectives. However, we have the following concerns about the Act which we believe detrimentally impact the effectiveness of the legislation:

1. The Act successfully establishes an alternative process to court proceedings however the range of offences covered by the Act, in our submission, is too limited.
2. We are concerned that the majority of young people do not access competent legal advice prior to being referred to youth justice conferencing and as such, their legal rights and due process may be being overlooked.
3. The current rate of diversion is lower than desirable and the rate of police referrals to conferences is especially low.

4. We are concerned that the principle that an outcome plan should be no harsher than a court penalty is not being adhered to, and that substantial numbers of minor offenders are undertaking the equivalent of community service hours.

Terms of Reference

We address your terms of reference specifically, and **subject to the concerns we have outlined:**

1. We agree that the Act successfully establishes an alternative process to court proceedings for dealing with children who commit certain offences;
2. We agree that the Act establishes a scheme which provides an efficient and direct response to the commission by children of certain offences; and
3. We agree that youth justice conferences are successful in allowing an offender to be dealt with in a way:
 - (a) that enables a community-based negotiated response to offences involving the affected parties;
 - (b) emphasises restitution by the offender for his or her behaviour and the acceptance of responsibility by the offender for his/her behaviour. We acknowledge this with the principles of restorative justice in mind, and the notion that through youth justice conferencing the young person attempts to repair the harm done. We do not agree with the view that an outcome plan should include monetary restitution or compensation. It is our experience that the vast majority of young people have little money, and no capacity to pay compensation. We note that the Children's Court will always take into account a child or young person's capacity to pay when considering monetary compensation; and
 - (c) We agree that youth justice conferencing, in part, meets the needs of the victim and offender. We are of the view that some legal rights of the offender need to be better protected. These concerns have been summarised above, and are elaborated on in the attachment to this letter.

Submission in response to NSW Law Reform Commission Issues Paper 19: Sentencing Young Offenders

We have recently responded to an Issues Paper by the NSW Law Reform Commission which partly dealt with the *Young Offenders Act*. Some of our concerns were detailed in our submission. We enclose an extract from our submission, which was sent to the NSW Law Reform Commission on 29 October 2001.

Conclusion

In summary, we believe that youth justice conferencing is, largely, a positive alternative to court proceedings. However, we have outlined a number of concerns that we currently hold. If these concerns are addressed, we believe the effectiveness of youth justice conferencing will be significantly enhanced.

We also refer to a pending report from the NSW Youth Justice Coalition which explores a young person's perspective of youth justice conferencing. The Report will be released in early 2002 and we encourage the Attorney-General's Department to take into account those views and experiences of children and young people.

Yours faithfully
THE SHOPFRONT YOUTH LEGAL CENTRE

Jane Irwin

Solicitor

Jane Sanders

Principal Solicitor

Attachment: Extract from submission dated 29 October 2001 by Shopfront Youth Legal Centre, in response to NSW Law Reform Commission Issues Paper 19: Sentencing Young Offenders

1 Issue 1 (page 11) - Is the range of offences covered by the *Young Offenders Act 1997 (NSW)* appropriate?

The *Young Offenders Act* provides an effective mechanism for dealing with a wide range of offences committed by juveniles. In our view, the range of offences covered by the Act should be expanded.

It must be borne in mind that "gatekeepers" (the police, DPP or Children's Court) retain a discretion, so that matters which are really inappropriate to be dealt with under the *Young Offenders Act* can be dealt with by a court.

We wish to comment on some particular categories of offences which are currently excluded from the ambit of the *Young Offenders Act*.

(a) Indictable offences capable of being dealt with summarily in Children's Court

Currently the Act covers "indictable offences that may be dealt with summarily under Division 3 of Part 2 of the *Criminal Procedure Act 1986* or another prescribed law" (*Young Offenders Act* s8). Curiously, the *Children (Criminal Proceedings) Act 1987* is not a "prescribed law". This has the effect of limiting the range of offences to those that could be dealt with summarily by the Local Court if the child were an adult.

We understand that the original intention of the Act was to include offences capable of being dealt with summarily by the Children's Court, which would include some that are strictly indictable in the adult jurisdiction (such as robbery in company or aggravated break enter and steal). We understand that the current restriction is due to a drafting error caused by a failure to understand the procedural legislation governing the jurisdiction of the Children's Court. We would like to see this error corrected. This could be achieved by amending s 8, or simply by enacting a regulation to make the *Children (Criminal Proceedings) Act* a "prescribed law".

In our view, youth justice conferencing is suitable for a wide range of offences, even very serious ones. It is not a "soft option." Indeed, it could be said that conferencing works best in the case of relatively serious offences, because the young offender is obliged to really consider the consequences of his or her actions, in particular the harm caused to the victim. In most cases, conferencing is a more effective mechanism than court for achieving this.

(b) Apprehended violence offences

We do not support the exclusion of offences involving apprehended violence. We are of course aware that conferencing would be inappropriate for many domestic violence offences, as it would compound the abuse already suffered by the victim. However, children are often involved in apprehended violence order proceedings which are more to do with family conflict and personal misunderstanding than with actual violence. In fact, we have observed that AVOs are sometimes taken out by parents against their own children as a behaviour management tool, and not out of any genuine fear of violence. Similarly, AVOs are often taken out by friends who have had a falling out with the young person.

Although some breaches of AVOs by young people do involve violence, many breaches are trivial and could be appropriately dealt with by a conference or even a caution. Being able to deal with a breach of an AVO by way of youth justice conference would, in many situations, assist the parties to resolve their differences and to minimise the potential of a further breach.

(c) Drug offences

We welcome the 2000 amendment to the Act which expanded the categories of drug offences eligible to be dealt with under the Act. However, we would support a further expansion to include all drug offences capable of being dealt with summarily by the Children's Court.

We see no good reason why the options under the *Young Offenders Act* should be restricted to possession of small quantities. We believe that conferencing or even cautioning may have a valuable role to play in the case of some young people who are guilty of supply offences. For example, a child who has bought a small amount of cannabis and given some to his friends, or a drug-dependent young person who has been supporting their habit by selling aspirin and passing it off as heroin.

2 Issue 2 (page 14) - Should the Children's Court continue to have a power to caution young offenders under the *Children (Criminal Proceedings) Act 1987 (NSW)*? If so, when should this power, rather than the power to caution under the *Young Offenders Act 1997(NSW)* be used?

We strongly support the retention of the Children's Court's power to caution young offenders under the *Children (Criminal Proceedings) Act*.

In many cases, it will be appropriate to use the cautioning power under the *Young Offenders Act*, particularly if the offence is one which ought to have been dealt with by way of police caution. However, there may be some types of offences which would fall within the ambit of the *Young Offenders Act*, but which would not be appropriate for a *Young Offenders Act* caution because the young person has not admitted the offence. For example, a young person is charged with offensive language, but does not admit guilt and chooses to plead not guilty in the Children's Court. The Children's Court finds the offence proved but is of the view that it is too trivial to warrant any penalty. In this case, a caution under the *Children (Criminal Proceedings) Act* may be more appropriate than a caution under the *Young Offenders Act*.

There is also a significant range of offences to which the *Young Offenders Act* does not apply. These include sex offences, apprehended violence offences and certain drug offences. It is important that the Children's Court has the option to caution for such offences. Although it may seem difficult to envisage, even sex offences may be deserving of a caution. For example, a 16-year-old boy is criminally charged for having sex with his 15-year-old girlfriend. The relationship is loving and consensual, and the parties are of similar age and maturity. However, because the girlfriend is below the age of consent, the boyfriend has technically committed a sex offence. The level of criminality is extremely low and a caution under s33(1)(a) of the *Children (Criminal Proceedings) Act* may be an appropriate disposition.

3 Issue 3 (page 20) - Should people who attend youth justice conferences as respected members of the offender's community be paid for their services?

We believe it would be desirable if people who attend youth justice conferences as respected community members were paid for their services, particularly if these people are often called upon to attend conferences.

We also think it is important for young people whose parents are unavailable or inappropriate to attend a conference, to have an adult support person present. We are of the view that these support persons should be paid for their time. Many of these people would be youth workers employed by organisations which generally operate on a shoestring budget. Such organisations would often be unable to release a staff member to attend a youth justice conference, and the youth worker would therefore be attending the conference in his or her own time. Given the low salaries that most youth workers earn, it is unreasonable to expect them to do large amounts of voluntary work.

4 Issue 4 (page 20) - Are the outcomes of youth justice conferences appropriate to achieve the objects of the *Young Offenders Act 1997 (NSW)*?

Youth justice conferences are flexible enough to allow for a wide range of outcomes, which can be tailored to meet the objectives of the *Young Offenders Act*.

We believe that there should be no limit to the range of items comprising an outcome plan, but we emphasise the need to create a plan that is appropriate, achievable and likely to promote the young person's rehabilitation from offending behaviour.

We feel some concern that, despite the principle and provision that an outcome plan should be no harsher than a court penalty, that community service is a common outcome. The Children's Court views a Community Service Order as a penalty imposed as an alternative to a control order. It is therefore a penalty high in the hierarchy of penalties capable of being imposed by a Children's Court. As such, it is arguable that this provision in principle is not being properly adhered to. Perhaps there should be clearer limitations on conference outcome plans in regard to community service hours, so as to ensure that outcomes are no more onerous than a court would have imposed.

We do acknowledge that the aims of conferencing and court-based sentencing are different, and that in many cases it is meaningless to compare outcomes. A court disposition may appear to be the best outcome in the short term, but conferencing may have more long-term benefits (such as the fact that a conference does not lead to a criminal conviction, cannot be taken into account by an adult court in sentencing, and cannot expose the young person to liability for victims compensation restitution payments).

5 Issue 5 (page 22) - Do lawyers advise young people against participation in youth justice conferencing? If so, why? Should the *Young Offenders Act 1997 (NSW)* be amended to address this issue?

5.1 What do lawyers advise their clients?

The question "do lawyers advise young people against participation in youth justice conferencing?" is extremely difficult to answer. Firstly, lawyers' advice to their clients is covered by legal professional privilege, and the contents of that advice is impossible to ascertain unless clients waive the privilege.

Secondly, the very nature of the question implies that lawyers are a homogenous group who always give their clients the same advice. This is clearly not the case.

We can say that lawyers *sometimes* advise their clients not to participate in youth justice conferencing. We have encountered very few children's or criminal lawyers who are philosophically opposed to youth justice conferencing. In fact, the Youth Justice Coalition (which has many children's lawyers among its membership) has always supported the philosophy of conferencing and was one of the organisations that lobbied for the introduction of the *Young Offenders Act*.

In many cases, lawyers will advise young people that a youth justice conference is a good idea, as it is likely to produce the most favourable outcome for the young person. However, there are some situations in which youth justice conferencing is inappropriate, and lawyers quite rightly advise their client against it.

Firstly, it would be unethical to advise a young person to admit to an offence and agree to a conference if the young person claims to be not guilty of the offence, or where there is a legitimate defence available.

Secondly, despite s52(6)(a) of the *Young Offenders Act* (which provides that a conference outcome should not be more severe than the penalty that a court might have imposed for the same offence), anecdotal evidence suggests that many conference outcome plans are in fact more onerous than Children's Court penalties. This may be a reason why some lawyers advise young people that they would be better off going to court. This is more likely to be the case with less serious offences where the young person has little or no criminal history.

It is important to remember that young people and children have a right to be appropriately and properly informed of their legal rights and different legal processes that might relate to their criminal charge, or the allegation that they have committed a criminal offence. They have a right to be informed about conference outcomes and possible court outcomes, and make an informed choice about which option they would like to choose. It should also be pointed out that lawyers have a duty to advise their clients of all options available to them, and the

likely consequences of pursuing each of these options. Failure to provide this advice would amount to professional negligence.

5.2 Possible legislative amendment

We do not see how the *Young Offenders Act* could realistically be amended to address this perceived problem. The notion that the *Young Offenders Act* be amended in some way to tailor legal advice to young people who may come under the *Young Offenders Act* is highly problematic. It goes to the issue of the independence of legal advice and the rights of young people to access such independent legal advice.

We would also oppose the deletion of the requirement that a conference outcome must not be more severe than a court outcome would be. Although it may be difficult to always comply with in practice, this is an important safeguard against conference outcomes becoming unduly punitive.

5.3 Lawyers' attendance at conferences

We agree with Hennessy's observations that lawyers rarely attend conferences, and that it would be beneficial for more lawyers to have experience of attending conferences. However, Legal Aid does not provide funding for lawyers to attend conferences, which means it is unrealistic to expect most solicitors to attend.

We would also point out that most lawyers who advise young people are from specialist children's or youth legal services, and already have a good understanding of the conferencing process. Having lawyers attend conferences is unlikely to bring about a significant change in the type of legal advice given to young people.

There are also many people (including conference administrators and convenors) who actively discourage the involvement of lawyers in the conference process, believing it is antithetical to the philosophy of conferencing, in that it may allow a young person to "hide behind" their legal representative rather than directly "face the music". We agree that young people should be encouraged to speak for themselves at conferences rather than be legally represented, but we support the presence of lawyers as support persons and advisers.

5.4 The importance of legal advice

We are concerned generally about the issue of legal advice and its role during the cautioning or conferencing procedure. It is our view that in seeking to reduce the level of exposure of children and young people to formal criminal proceedings, the legal rights of young people must never be overlooked. It is our view that young people are entitled to competent legal advice at every stage of the proceedings, whatever form the process takes.

We note that at 2.36 of the Issues Paper on page 21 the comment "the availability of independent legal advice at the police station is critical to ensure that such admissions under the *Young Offenders Act* are made voluntarily." As stated the statistics show that only 21% of young offenders attending youth justice conferences are obtaining legal advice. It therefore seems that in a substantial majority of cases that young people are not accessing competent legal advice before police seek admissions or otherwise. We note that there appears to be no data which shows how many young people are accessing legal advice prior to police cautions.

Research in the past has shown that young people frequently plead guilty simply in order to get a matter over and done with, or because they think they are guilty when legally they may not be. Admissions made in the absence of prior legal advice in our view are often unreliable; however a large number of young people and children are being cautioned or conferenced under the *Young Offenders Act* without legal advice.

We applaud the establishment of the Legal Aid hotline for under 18s. However, we are still concerned about the significant numbers of young people who are not accessing legal advice through that service. We note that prior to the *Young Offenders Act* any young person charged with a criminal offence had a right to, and was provided with, free legal advice and representation from the legally-aided duty solicitor scheme. It is our view that children and young people are a vulnerable group in our community. They have legal problems which are often complex and require an analysis of unique principles of law. We believe that the right of access to legal advice is a fundamental right which must be protected. Rather than limit the role of children's lawyers in the *Young Offenders Act* processes, we believe that their role should be accentuated to ensure that children's rights are protected in the process.

6 Issue 6 (page 23) - Do the Police Service and the Department of Juvenile Justice comply with the record keeping requirements under the *Young Offenders Act 1997 (NSW)*? Are the statutory record keeping requirements under the *Young Offenders Act 1997 (NSW)* appropriate and adequate?

We are unable to comment on whether the statutory record keeping requirements are appropriate. However, we express concern that in the first year of operation of the *Young Offenders Act*, the police service did not fulfil its record-keeping duties under the Act.

7 Issue 7 (page 29) - What is an appropriate rate for diversion of young offenders under the *Young Offenders Act 1997 (NSW)*? How can this be achieved?

We are unable to specify a figure that would be an appropriate rate for diversion under the *Young Offenders Act*. However, we agree with Hennessy that the current diversion rate is lower than desirable and the rate of police referrals to conferences is especially low.

Part of the solution to this problem is in training and resourcing more specialist youth officers, and has been flagged in the issues paper. We would also support the expansion of the range of offences covered by the *Young Offenders Act* (see our response to issue 1).

In our experience, many young people are not diverted to a caution or conference by the police because they do not admit to the offence. This is often because they have not had legal advice or there has not been an independent adult available to attend a police interview. In many cases, instead of releasing the young person and allowing them time to obtain legal advice and find an appropriate adult, police make the decision to initiate court proceedings straight away. Better funding for legal advice services (including funding the Legal Aid hotline to operate 24 hours) and the funding of a network of trained youth workers to attend

police interviews as independent adults may also help increase the rate of diversion.

Once court proceedings have been initiated, matters are often referred to a conference if the young person admits the offence. However, once they are at court, many of our clients choose for the proceedings to remain in court. They see it as preferable to plead guilty and get it over and done with (often on the first court date) rather than go to a conference.