

PROVISIONAL SENTENCING FOR CHILDREN

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for the

NSW SENTENCING COUNCIL

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EXECUTIVE SUMMARY

This Report deals with the exercise of sentencing an exceptional group of offenders: children aged between 10 and 14 who commit serious crime. Concern has been voiced in relation to difficulties that arise in the application of current sentencing principles when determining the appropriate length of a sentence for the small number of children who fall into this category. Concerns relate to the uncertainty in making diagnostic and prognostic assessments regarding the development of the child at the time of sentence, as is required as part of the sentencing process.

This Report considers the views of the courts, criminal justice agencies and various stakeholders in respect of a proposal to develop a special category of sentencing known as 'provisional sentencing' when responding to young offenders dealt with after conviction or plea for serious criminal offences. Provisional sentencing as a concept would allow for a notional sentence to be imposed at an initial sentencing procedure, with an ability to later vary or adjust that sentence during the course of the sentence, according to a variety of factors that might include assessments as to the offender's capacity to rehabilitate, and as to future dangerousness, and take into account a better understanding of any mental health conditions that may have emerged or become apparent as the child matures.

In addition views were sought from child and adolescent mental health professionals, agencies and stakeholders in order to ascertain the desirability of a modified sentencing regime for this group, from the mental health perspective, and to consider the scope of any proposed scheme.

In general there was tempered support for a restricted form of provisional sentencing in respect of the small group of children identified and a view that an additional sentencing tool would allow courts greater flexibility in dealing with this discrete group of offenders during the sentencing process. It was generally agreed that the scheme would assist the courts to overcome the current difficulties in accurately assessing at the time of sentence the subjective sentencing criteria as set out by statute and common law, in respect of a child during the course of that child's development. Views differed as to how the notion of provisional sentencing would work in practice, the age range it should cover, and to what offences it should apply.

This Report concludes that a scheme of provisional sentencing should be available in respect of those children aged between 10 and 14 years who have been convicted for the offence of murder, where the information available, at the time of sentencing, does not permit a proper assessment to be made in relation to the presence or likely development in the offender of a serious personality and psychiatric disorder, and as a consequence an assessment as to their potential for future dangerousness or rehabilitation.

PART ONE: INTRODUCTION

This Report addresses the issues raised by Wood CJ at CL in *R v SLD* [2002] NSWSC 758 (*'R v SLD'*) concerning the concept of alternative sentencing options applying to children who have committed serious criminal offences.

In *R v SLD* Wood CJ at CL identified a need for an alternative sentencing option where there would be provision for review and re-sentencing at a later date. 'Provisional sentencing', as it will be referred to in this Report, differs from ordinary sentencing because the person being sentenced does not receive a final sentence until he or she has been in custody for some extended period of time. The person's progress and rehabilitation in custody are taken into account in determining the final sentence that is imposed. This is different to the current system, where once a person's sentence is imposed there is no further review of the length of his or her sentence, subject to appeal to a superior court.

His Honour considered that provisional sentencing could apply to children who:

- have been convicted of offences attracting a possible maximum sentence of 25 years or more; and
- are aged less than 15 years at the time of the offence; and
- where the information available at the time of sentencing does not permit the court to make a proper assessment of the presence or likely development of a serious personality or psychiatric disorder and/or propensity for future dangerousness.

Wood CJ at CL referred his reasons for sentence in *R v SLD* to the Criminal Law Review Division of the NSW Attorney General's Department.⁴ His Honour sought consideration of a possible amendment of the law to cater for provisional sentencing.

In its annual report to the Attorney General on *Sentencing Trends and Practices 2005–2006*, the NSW Sentencing Council, chaired by the now retired Wood CJ at CL, identified the issue of provisional sentencing for serious offences committed by children as an area for potential research.⁵

This Report outlines the current situation in New South Wales including the legislative framework and case law concerning the sentencing of children; considers the proposal in *R v SLD* and the need for reform; and considers various submissions received as part of a consultation process facilitated by the Council.

Central to the idea of provisional sentencing is a process of periodic review of the child's progress and developmental changes prior to and within the period between provisional and final sentencing. The precise scope of provisional sentencing of children and the mechanisms to affect the review of provisional sentences are the key issues of this Report.

METHODOLOGY

Using LexisNexis and AustLII, a search was conducted on matters involving young offenders, particularly child offenders, who have committed serious offences in NSW. Reference was also made to cases referred to in the submissions and in media articles.

A literature review was conducted with a meta-analytic search of psychological databases (OVID, ProQuest, PsycArticles and PsycINFO) using search terms such as 'juvenile offender', 'juvenile recidivism', 'juvenile risk factors' and 'juvenile homicide'. In addition, relevant articles and books were located through library searches and were sourced from submissions.

⁴ *R v SLD* [2002] NSWSC 758, [147].

⁵ NSW Sentencing Council, *Report on Sentencing Trends and Practices 2005–2006* (2006) 11–12.

Statistical data were sourced from submissions and the Judicial Commission of New South Wales' Judicial Information Research System (JIRS). Additional data in respect of child offenders and homicide incidents were generated by the Australian Institute of Criminology. The results of the statistical analysis is presented in Part Three.

The current framework for sentencing children for murder and other serious offences is discussed in Part Four. Also discussed in this Part is the British case of Venables and Thompson, who were both aged ten when they abducted and killed a two year old boy.⁶ Some of the consultants who were involved in the assessment and treatment of the British children provided input.

Submissions were invited from key legal and government agencies in respect of introducing provisional sentencing for children. The agencies were carefully selected in order to gauge their views and form an understanding of the issues from both a legal and wider social perspective.

A second round of invitations for submissions was sent in July 2007 to experts in the field of child and adolescent forensic mental health, both locally and internationally. Invitees were selected on the basis of published research, conference participation, agency referrals, expert witness lists and professional associations. Letters of invitation outlined the rationale for the project and the description of provisional sentencing as an alternative, and included the case notes of *R v SLD* as well as an Appendix comprising a list of specific areas to be discussed (see Appendix C). The closing date was 6 August 2007 (although later submissions were accepted). Those consulted ('consultants') were given the opportunity to reply in writing, or to speak either in person or via teleconference.

Twenty-five written submissions were received whilst in-person or telephone consultations were held with 29 consultants (with an average duration of the meetings being two hours). Appendix D comprises a list of the submissions received from agencies and individuals. Appendix E comprises a list of the consultants.

⁶. *R v Secretary of State for The Home Department; Ex parte Venables* [1997] 2 WLR 67 (United Kingdom Court of Appeal); *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407 (House of Lords).

PART TWO: *R v SLD*

In *R v SLD*⁷ Wood CJ at CL sentenced a child who was aged 13 years and 10 months when he committed murder in circumstances which could not be explained. SLD murdered a three year old girl who was virtually unknown to him, entering the girl's home at night while her family slept, taking her from the house and later stabbing her in the heart, killing the child.

Due to his age and immaturity it was difficult at the time of sentencing for the various psychologists or psychiatrists to accurately diagnose the definitive presence of any personality disorder in SLD.⁸ Wood CJ at CL stated that '*the most likely diagnosis is that SLD has a severely troubled personality, the full extent and precise nature of his difficulties will become more apparent as he grows older*'.⁹

One of the professionals who assessed SLD before sentencing stated that it would be beneficial to re-determine SLD's position at a later time on the basis that by the time SLD was in his early 20s the patterns of his behaviour would be quite determined and evident¹⁰ and that at the time of sentencing any assessment of SLD's long term outcome from a developmental or dangerousness perspective was most uncertain.¹¹

His Honour was concerned about the inadequacy of the law as it applied to sentencing children convicted of committing offences of such a nature and level of seriousness. These inadequacies went to the inflexibility of sentencing options and the limited scope for thorough consideration of mental health and developmental issues surrounding children. This was particularly the case when their age and level of development prevented proper diagnosis and they were still developing intellectually and emotionally. There was a special difficulty in the assessment of the risk the child posed to the community in the future in accordance with the principles in *Veen v The Queen (No 2)*¹² (that while preventive detention

⁷. *R v SLD* [2002] NSWSC 758.

⁸. *R v SLD* [2002] NSWSC 758, [63], [73].

⁹. *R v SLD* [2002] NSWSC 758, [77].

¹⁰. *R v SLD* [2002] NSWSC 758, [83].

¹¹. *R v SLD* [2002] NSWSC 758, [74].

¹². *Veen v The Queen (No 2)* (1988) 164 CLR 465.

is impermissible, it is proper for the court to take into account the future risk the community faces from an offender when he or she is sentenced).

In his sentencing remarks, Wood CJ at CL stated that 'To sentence a person of his age [13 years] for the offence of murder, is a formidable challenge, for which there is very little, if any, precedent in this country or elsewhere.'¹³

His Honour commented on the sentencing regime in the United Kingdom, where children under the age of 18 who have been convicted of murder or any other offence which carries a penalty of life imprisonment are detained at Her Majesty's pleasure.¹⁴ In all but the most exceptional cases, the sentencing judge specifies a minimum term, on the expiry of which the prisoner becomes eligible for release to the community on licence (the equivalent of parole). The judge has the power to order that a particular child not be released. The Secretary of State determines when those provisions are to apply. Such a system allows for tariff recommendations concerning the minimum period before an offender is released. The tariff is set in open court. Release on supervision is determined by the Secretary of State.

Wood CJ at CL found that no such sentencing procedure was open to him in dealing with SLD and stated:

As the law presently stands, I must impose a sentence in the light of what is presently known, notwithstanding the circumstance that none of the psychiatrists or psychologists who have examined SLD and who have given evidence, can be certain what the future holds, or what truly motivated him. I have given consideration to the possibility of adjourning the sentencing to a date well into the future, so that SLD's performance in the Robinson Programme can be better assessed, and so that a firmer diagnosis as to his mental state can be made. However, I am of the view that to leave the matter in a state of uncertainty for the period required, would be counterproductive, and that a case such as the present does not admit of an application of the kind of principles which underlie *Griffiths* remands.

The only alternative, as I see it, is to impose a significant head sentence which would reflect my assessment that the present offence fell into the upper range of objective seriousness, and that SLD poses a significant risk of

¹³ *R v SLD* [2002] NSWSC 758, [131].

¹⁴ *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 90; *Criminal Justice Act 2003* (UK) ch 5 dealing with detention of 'dangerous offenders' for public protection.

recidivism and of being a serious risk to the community in terms of potentially killing again or committing sexual offences.¹⁵

Wood CJ at CL imposed a sentence of 20 years, with a non-parole period of 10 years.

His Honour expressed his preference that the Court could sentence the child initially to be detained at Her Majesty's pleasure, with provision for review and re-sentencing at a later date, for example at the age of 21 years, or after five years in custody.¹⁶

¹⁵ . *R v SLD* [2002] NSWSC 758, [138]–[139].

¹⁶ *R v SLD* [2002] NSWSC 758, [147].

PART THREE: THE NUMBER OF CHILDREN WHO COMMIT MURDER AND OTHER SERIOUS OFFENCES

The preparation of this Report required analysis and consideration of the relevant statistics collected by various legal and government agencies, namely the number of homicides involving young people, the precise ages of those persons, and the nature of the offences committed; with care being taken as to the methodology and terminology used in measuring the statistics and their meanings.

Statistics generated by the Australian Institute of Criminology ('the AIC') at the request of the authors (Table 1) indicate that 5223 homicides¹⁷ were committed¹⁸ by 5749 offenders for the period between 1990 and 2006. Fifty homicide incidents, involving 57 offenders, were attributed to children aged 14 years or under.¹⁹ This represents less than 1% (0.96%) of the total number of homicides committed during this period.²⁰ While this is a small number, it is not insignificant given the limited age range.

In NSW there were 17 homicides committed by children between 1990 and 2006 and 1341 homicides committed by adults during the same period. The proportion of homicide incidents attributed to children in NSW therefore is 1.27% of those incidents involving adult offenders.

When broken down in a state-by-state analysis, it can be seen that the ACT has the higher number of homicide incidents committed by children proportionate to those committed by adults (3.57%), compared to the other Australian states and territories (Table 2).

¹⁷. Note homicide includes murder as well as manslaughter matters.

¹⁸. Note committed does not equate to 'convicted'. It may include those matters that were committed for trial, but resulted in 'no bill' or no further proceedings outcomes, 'not guilty' findings, or mental health or fitness outcomes.

¹⁹. Australian Institute of Criminology statistics show that, of the 57 child offenders, 46 were male and 11 were female.

²⁰. This proportion increased to 5.51% of the whole when considering the proportion of youth incidents (defined as between 15 and 18) to total homicide incidents between the same period.

Table 1: Homicide incidents and child offenders—1990–2006

	Total homicide incidents	Child incidents	Percentage (%)	Homicide offenders	Child offenders	Percentage (%)
1990	306	4	1.31	333	6	1.80
1991	323	1	0.31	346	1	0.29
1992	312	3	0.96	292	3	1.03
1993	331	3	0.91	370	3	0.81
1994	323	3	0.93	383	4	1.04
1995	326	7	2.15	385	10	2.60
1996	303	3	0.99	334	3	0.90
1997	297	4	1.35	355	4	1.13
1998	297	1	0.34	313	1	0.32
1999	327	4	1.22	365	4	1.10
2000	300	2	0.67	320	2	0.63
2001	308	3	0.97	333	3	0.90
2002	353	2	0.57	375	2	0.53
2003	297	1	0.34	312	1	0.32
2004	288	3	1.04	310	3	0.97
2005	249	1	0.40	286	1	0.35
2006	283	5	1.77	337	6	1.78
Total	5223	50	0.96	5749	57	0.99

Table 2: Proportion of homicide incidents committed by children comparative to adults

	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	NI	Total
1990	5.17	0.00	1.54	0.00	0.00	0.00	0.00	0.00	0.00	1.68
1991	0.00	0.00	2.04	0.00	0.00	0.00	0.00	0.00	0.00	0.38
1992	0.00	0.00	1.61	9.09	0.00	0.00	0.00	0.00	0.00	1.24
1993	1.08	0.00	1.54	3.57	0.00	0.00	0.00	0.00	0.00	1.07
1994	0.98	5.56	0.00	0.00	0.00	0.00	0.00	0.00	0.00	1.05
1995	2.56	1.61	3.70	4.65	0.00	0.00	0.00	0.00	0.00	2.41
1996	2.20	0.00	1.82	0.00	0.00	0.00	0.00	0.00	0.00	1.18
1997	1.41	0.00	2.82	0.00	5.88	0.00	0.00	0.00	0.00	1.63
1998	1.23	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.41
1999	2.56	0.00	3.77	0.00	0.00	0.00	0.00	0.00	0.00	1.56
2000	0.00	0.00	1.96	0.00	0.00	0.00	0.00	20.00	0.00	0.82
2001	1.14	2.44	1.79	0.00	0.00	0.00	0.00	0.00	0.00	1.19
2002	1.30	0.00	1.52	0.00	0.00	0.00	0.00	0.00	0.00	0.68
2003	0.00	0.00	0.00	4.00	0.00	0.00	0.00	0.00	0.00	0.41
2004	0.00	3.77	0.00	3.03	0.00	0.00	0.00	0.00	0.00	1.26
2005	0.00	0.00	2.08	0.00	0.00	0.00	0.00	0.00	0.00	0.44
2006	2.94	0.00	0.00	3.70	0.00	0.00	25.00	7.69	0.00	2.04
Total	1.27	0.74	1.54	1.70	0.28	0.00	3.57	0.76	0.00	1.15

Judicial Information Research System (JIRS) statistics indicate that of the convictions for murder between January 2001 and December 2007 in NSW, 16 cases of a total of 233 (0.07%) were committed by offenders aged under 18 years. Of those 16 cases, all offenders received sentences of imprisonment, with total sentences ranging between 11 years and 23 years. It is not possible to determine how many of these 16 offenders were aged between 10 and 14 years old.

The submission of the Public Defenders Office NSW examined statistics that showed that non-parole periods imposed on juveniles (under 18 years) sentenced for murder from 1990 until 2007 were in the range of between six and 27 years. Only one of the offenders was aged less than 15 years at the time of the offence (being SLD, who received a non-parole period of 10 years). These statistics showed that of the 43 juveniles sentenced for murder since 1989, 20 offenders received non-parole periods of less than 11 years, and six offenders received non-parole periods of less than eight years.²¹

Three cases were reported of children aged less than 15 years being sentenced for an offence (other than murder) that carried a maximum penalty of imprisonment for 25 years. Children aged 13 and 14 years received head sentences of imprisonment of between 31 months and six years, imposed for sexual assault,²² manslaughter²³ and robbery-related offences.²⁴ Non-parole periods were imposed in the range of seven and a half months to three years and six months.

The submission of the Office of the Director of Public Prosecutions NSW cited statistics that showed that 16 children were sentenced to imprisonment for manslaughter in the Supreme Court between October 1999 and September 2006. Of these, five children were under the age of 15 at the time of the offence.²⁵

Significantly, these statistics demonstrate that sentencing children under the age of 15 years to lengthy periods of imprisonment is reasonably uncommon.

²¹ Submission 4: Public Defenders Office New South Wales, 31 May 2007.

²² *R v JDB* (2005) 153 A Crim R 164.

²³ *LAL v The Queen; PN v The Queen* [2007] NSWSC 445.

²⁴ *R v FQ* (Unreported, NSW Court of Criminal Appeal, Hulme and Hidden JJ, Carruthers AJ, 17 June 1998).

²⁵ Submission 13: Office of the Director of Public Prosecutions New South Wales.

PART FOUR: THE CURRENT FRAMEWORK FOR SENTENCING CHILDREN FOR SERIOUS OFFENCES IN NEW SOUTH WALES

A: THE POSITION IN NEW SOUTH WALES

Section 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out the purposes of sentencing which apply to any person who is sentenced for a criminal offence. These are as follows:

- (a) to ensure that the offender is adequately punished for the offence;
- (b) to prevent crime by deterring the offender and other persons from committing similar offences;
- (c) to protect the community from the offender;
- (d) to promote the rehabilitation of the offender;
- (e) to make the offender accountable for his or her actions;
- (f) to denounce the conduct of the offender; and
- (g) to recognise the harm done to the victim of the crime and the community.

The statutory provisions that concern the sentencing of children in NSW are set out in the *Children (Criminal Proceedings) Act 1987* (NSW). Of particular significance is s 6 of that Act, which provides:

- (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them;
- (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance;
- (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption;
- (d) that it is desirable, wherever possible, to allow a child to a child to reside in his or her own home;

- (e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind;
- (f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties; and
- (g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions;
- (h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

Common law sentencing principles emphasise that when sentencing children, considerations of punishment and general deterrence should be regarded as having less weight than rehabilitation.²⁶ The significance of this factor diminishes however, in a number of circumstances, such as:

- when a child approaches adulthood;²⁷
- where children conduct themselves like adults and commit serious crimes;²⁸
- depending on the nature of the offence and the behaviour of the child;²⁹
- where the seriousness of the crime committed by a child, particularly if the crime is one of violence, is so great that the special attention normally given to rehabilitation must give way, and greater emphasis given to punishment and deterrence;³⁰
- in very serious offences, where the protection of the community is often emphasised.³¹

²⁶ . *R v GDP* (1991) 53 A Crim R 112.

²⁷ . *R v Hearne* (2001) 124 A Crim R 451.

²⁸ . *R v Bus & AS* (unreported Court of Criminal Appeal, Hunt CJ at CL, Grove J and Allen J, 3 November 1995); *R v Hawkins* (unreported Court of Criminal Appeal, Hunt CJ at CL, Grove J and McInerney J, 15 April 1993).

²⁹ . *R v AEM Snr*; *R v KEM*; *R v MM* [2002] NSWCCA 58; *R v MHH* [2001] NSWCCA 161; *R v LNT* [2005] NSWCCA 307.

³⁰ . *R v MA* (2004) 145 A Crim R 434, [28] (Dunford J).

³¹ . *R v SDM* (2001) 51 NSWLR 530.

Obligations under international law

Australia is a signatory to the United Nations *Convention on the Rights of the Child 1989*³² ('the Convention').

Article 3 of the Convention states that the best interests of the child must be a primary consideration in all actions concerning a child whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.

Article 40(2)(iii) of the Convention recognises the right of any child accused of having infringed the penal law to have the matter fairly determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law.

These articles are relevant in the consideration of any scheme of provisional sentencing, as, in the absence of any express provision to the contrary, the Executive should act consistently with the treaty's provisions.³³

Serious children's indictable offences

Pursuant to section 3 of the *Children (Criminal Proceedings) Act 1987* (NSW) 1987 and Clause 29 of the *Children (Criminal Proceedings) Regulation 2005* (NSW), a 'serious children's indictable offence' comprises:

- murder (*Crimes Act 1900* (NSW) s 19);
- manslaughter (*Crimes Act* s 24);
- aggravated armed robbery with wounding (*Crimes Act* s 98);

³². *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990). This Convention was signed by Australia on 22 August 1990 and ratified on 17 December 1990.

³³. *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

- armed robbery with a dangerous weapon (*Crimes Act* s 97(2));
- wounding or grievous bodily harm with intent (*Crimes Act* s 33);
- sexual intercourse with child under 10 years (*Crimes Act* ss 66 and 78I);
- aggravated sexual assault (*Crimes Act* s 61J); and sexual assault by forced self-manipulation (*Crimes Act* s 80A) if the victim is under 10 years; and
- specially aggravated break, enter and commit serious indictable offence (*Crimes Act* s 112(3)).

Sentencing children according to law

In accordance with s 17 of the *Children (Criminal Proceedings) Act (NSW) 1987*, children charged with these offences may only be dealt with according to law. The Children's Court of NSW has no jurisdiction in relation to these serious offences, apart from conducting committal proceedings.

When an offence is dealt with according to law, it is dealt with by using sentencing options pursuant to the *Crimes (Sentencing Procedure) Act 1999* (NSW). Mandatory life sentences cannot be imposed on children.³⁴

The specific penalty provisions of the *Children (Criminal Proceedings) Act (NSW) 1987* do not apply. This means children sentenced according to law can be sentenced to imprisonment, and for longer periods, than would otherwise apply to children under the Act. The general principles contained in s 6 of the *Children (Criminal Proceedings) Act* and the common law principles in relation to sentencing children do however, continue to apply if a child is dealt with according to law.³⁵

³⁴ . *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61(6).
³⁵ . *R v SDM* (2001) 51 NSWLR 530, 533 (Wood CJ at CL).

B: THE POSITION IN ENGLAND AND WALES

Before 1997 all children convicted of murder in England and Wales were sentenced to Her Majesty's pleasure pursuant to s 53(1) of the *Children and Young Persons Act 1933* (UK). Detention at Her Majesty's pleasure means being placed into custody without a final sentence being imposed and being held in custody for an unspecified period of time.

The child was detained in custody until the Home Secretary referred the case to the Parole Board for consideration of release to licence. As a matter of policy, the Home Secretary set a tariff at the time of initial sentence, representing the minimum period of imprisonment to be served by the child.³⁶

In *R v Secretary of State for the Home Department; Ex parte Venables*³⁷ in the Court of Appeal and the later decision of the Court of Appeal in *Re Thompson*³⁸ the operation of this system was examined.

R v Secretary of State for the Home Department; Ex parte Venables involved the conviction of two boys, who were both aged 10 when they murdered a young child. At the time, the system allowed for the discretionary detention at Her Majesty's pleasure, which was used as a sentence in lieu of a sentence of imprisonment for life without reference to its duration, to be determined by the Home Secretary on behalf of her Majesty. This is 'detention so long as there is reason to do so'.³⁹

In this case, while the trial Judge and the Lord Chief Justice had set a tariff recommendation of eight and 10 years respectively, the Secretary of State subsequently set a tariff of 15 years with a first review at 12 years. This decision was appealed to the European Court of Human Rights and legislative policy followed that allowed for the tariff in such cases to be set by the Court.⁴⁰

³⁶ Submission 4: Public Defenders Office New South Wales, 31 May 2007.

³⁷ *R v Secretary of State for The Home Department; Ex parte Venables* [1997] 2 WLR 67.

³⁸ *Re Thompson* [2001] 1 All ER 737.

³⁹ *R v Secretary of State for The Home Department; Ex parte Venables* [1997] 2 WLR 67, 83.

⁴⁰ *V v United Kingdom* (1999) 30 EHRR 121.

The scheme was successfully challenged in *Secretary of State for the Home Department; Ex parte Venables*.⁴¹ A majority of the House of Lords concluded that the adoption of a tariff that did not permit or take into account continuous review of the progress of a child in custody was an invalid exercise of the power of the Home Secretary. Lord Browne-Wilkinson explained that the unlawfulness lies in adopting a policy which totally excluded from consideration factors going to the child's progress and development during the tariff period in the determination of the interests of the welfare of the applicants.

After the case the Home Secretary adopted a new policy involving annual reports on the progress and development of the child, and a reconsideration of the appropriateness of the original tariff when half of the original tariff had expired, and at any other time where reports or requests for review suggested a review would be appropriate.

The United Kingdom legislative provisions are now found in s 90 *Powers of Criminal Court (Sentencing) Act 2000* (UK) which provides for the mandatory detention to Her Majesty's pleasure of a child convicted of murder.

⁴¹. *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407.

PART FIVE: SUMMARIES OF SELECTED LEGAL SUBMISSIONS RECEIVED BY THE NSW SENTENCING COUNCIL

Submissions were received from various legal and government agencies in respect of the proposal regarding the introduction of provisional sentencing. The following is a summary of a number of the legal submissions received.

NSW Aboriginal Justice Advisory Council⁴²

The NSW Aboriginal Justice Advisory Council ('AJAC') was concerned that provisional sentencing may lead to children being dealt with more harshly than adults for the same crime. AJAC raised whether provisional sentencing was sentencing in the nature of preventative detention for children, and a sentence that might distract the child from the focus on rehabilitation.

Further, it was noted that any negative personality traits developed over the period of detention before final sentencing because of institutionalisation might be unfairly used against the child at final sentencing, in a way that could not be used under current sentencing practices.

AJAC viewed provisional sentencing as against the interests of young Indigenous children, given their high numbers in custody, and that current legislative provisions adequately provided appropriate sentencing options.

AJAC emphasised however, that if provisional sentencing were to be adopted, it would advocate a three year, rather than five year, review period as appropriate in assessing a child's prospects for rehabilitation, with a right of appeal.

⁴². Submission 11: NSW Aboriginal Justice Advisory Council.

Aboriginal Legal Service (NSW/ACT) Limited⁴³

The Aboriginal Legal Service (NSW/ACT) Limited ('the ALS') supported amendment of the law to allow increased sentencing options to be available to a court when sentencing a child in circumstances as special and unique as those in *SLD*. It did however, identify a number of specific issues which would require careful consideration, including:

- the need for finality when sentencing children, for their own benefit and for the benefit of their families;
- the risk of receiving a more severe sentence subject to changing public sentiment;
- the adverse effect of institutionalisation; and
- tentative disagreement with the proposed five-year review window.

New South Wales Bar Association⁴⁴

The New South Wales Bar Association agreed with the development of a statutory sentencing regime permitting a court to review and revisit sentencing proceedings, after a period (in the order of five years) in certain cases involving child offenders, with the following limiting qualifications;

- it could apply only to children who are under 15 years at the time of the offence;
- it could apply only to children who are convicted of offences attracting a possible life sentence; and
- where the information available at the time of sentencing did not permit the court to make a proper assessment as to the presence or likely development of a serious

⁴³. Submission 9: Aboriginal Legal Service (NSW/ACT) Limited.

⁴⁴. Submission 5: New South Wales Bar Association,.

personality or psychotic psychiatric disorder and all potential for future dangerousness.

The submission also proposed a time-based review, after a set number of years.

Senior Children’s Magistrate of the Children’s Court of New South Wales⁴⁵

The Senior Children's Magistrate was opposed to provisional sentencing. He expressed concern about the impact of a lengthy review period on the child’s state of mind, negatively affecting behaviour while in custody, stating:

Most young people are anxious to have their proceedings finalised quickly, sometimes even if this means serving a longer sentence than might be imposed if the sentencing process be deferred even for weeks or months. The deferral of sentencing for a number of years is likely to be perceived by the young person as a cruel punishment in itself ... and may negatively affect his/her behaviour in custody. This may then adversely affect the ultimate sentencing process.

The Senior Children's Magistrate went on to say:

There seems something repugnant in the imposition of a “provisional sentence” deferring the final sentencing exercise for a lengthy period ... One might anticipate that for the offender, whose future would continue to lie under a cloud, and his/her family and for the victim and his family for whom the much longed for possibility of early “closure” would be denied, the proposal would be very onerous.

Accordingly, it was submitted, provisional sentencing may result in a young offender being treated more harshly than an adult found guilty of the same offence.

Further issues were identified including the difficulty in guaranteeing the same sentencing judge, and that the reduction of a provisional sentencing on review could undermine the integrity of the initial ‘holding’ sentence imposed.

⁴⁵. Submission 12: Senior Children's Magistrate and Deputy Chief Magistrate Scott Mitchell, Children’s Court of New South Wales.

New South Wales Council for Civil Liberties Inc⁴⁶

The New South Wales Council of Civil Liberties Inc ('the CCL') noted that provisional sentencing would be 'an ideal tool for courts to use in sentencing violent juvenile offenders' as a way to promote 'both the best interests of society as well as the offenders'.

The CCL recommended that any changes work to provide more individualised sentencing with added focus on rehabilitation.

The organisation also proposed three safeguards and an alternative approach to a fixed review period:

- to protect against indefinite sentences, an appropriate mandatory time for review would be set at between two and five years;
- to ensure that any decision made is free from political influence, the scheme would be limited to the gravest cases;
- to prevent disproportionate sentences and safeguard due process, there would be the usual appeal rights against any sentence handed down.

The alternative proposal involved setting a head sentence while leaving the non-parole period open for review of two to five years. This, it was submitted, would appropriately reflect the gravity of the offence while allowing mental health or developmental issues to be addressed.

NSW Department of Juvenile Justice⁴⁷

The NSW Department of Juvenile Justice expressed cautious support for provisional sentencing in respect of young persons charged with a serious indictable offence to assess their capacity for judgment, reasoning and psychological health.

⁴⁶. Submission 8: New South Wales Council for Civil Liberties Inc.

⁴⁷. Submission 10: NSW Department of Juvenile Justice.

The Department noted that there could be negative consequences of a sentencing review process, such as a re-agitation of the crime and its impact and this could frustrate the young person's re-integration into society.

Law Society of New South Wales⁴⁸

The Law Society of New South Wales ('the Law Society'), while acknowledging some meritorious aspects to the proposal, did not support provisional sentencing on the basis that the child is deprived of the finality in his or her sentence which effectively suspends the child's right of appeal until he or she is finally sentenced.

The Law Society submitted that the lack of certainty inherent in indeterminate sentencing would outweigh any benefits of provisional sentencing.

The Law Society stated that if a scheme were implemented:

- indefinite detention should not be adopted;
- the scheme should only apply to the offence of murder;
- the scheme should provide a set period by which the sentence must be reviewed, in the order of three years or once the child reached 18.

Legal Aid Commission of New South Wales⁴⁹

The Legal Aid Commission of New South Wales ('the Commission') expressed significant reservations about provisional sentencing, namely that such an approach does not give sufficient regard to aspects of the current sentencing regime for children.

The Commission recommended adopting a different approach, involving the trial judge setting a full sentence according to standard sentencing principles, together with a

⁴⁸ . Submission 6: Law Society of New South Wales.

⁴⁹ . Submission 7: Legal Aid Commission of New South Wales.

provisional sentence for a set period, followed by a review by the trial judge or a Supreme Court judge with the capacity to reduce or waive the full sentence. It was submitted that this would have the advantage of removing the uncertainty from the proposal.

The Commission also recommended that any scheme adopted should be limited to certain classes of offence. The agency was concerned that the proposal would extend to a significant number of other offences that carry a potential 25-year sentence.

Justice McClellan, Chief Judge at Common Law⁵⁰

Justice McClellan stated that there would be considerable benefit in giving a court the ability to sentence a child by providing for his or her initial detention with a review and a re-sentencing at a later date. Justice McClellan supported discussion of such a scheme.

Further, his Honour warned that if a flexible sentencing scheme was adopted, care would have to be exercised to ensure that the process was not oppressive in a particular case. His Honour proposed that, subject only to a maximum period within which a review must be conducted, it would be necessary to give sufficiently wide discretion in the sentencing judge to define the period before a review could take place.

Office of the Director of Public Prosecutions New South Wales⁵¹

While generally supportive of a scheme allowing for rehabilitative detention or detention until necessary for proper sentencing principles to be invoked, the ODPP viewed the system in the United Kingdom as vague and offending the important sentencing principle of finality, among other sentencing principles.

The ODPP recommended the procedure where the courts can authorise a preliminary detention period only in cases where the offender is less than 15 years old at the time of the offence and an assessment as to the future dangerousness and the presence or likely development of a psychiatric disorder cannot be made at the of sentence. The period of the

⁵⁰. Submission 1: The Hon Justice McClellan, Chief Judge at Common Law, Supreme Court of New South Wales.

⁵¹. Submission 13: Office of the Director of Public Prosecutions New South Wales.

detention would be at the discretion of the court, but before the offender attained the age of 21 years.

Public Defenders Office New South Wales⁵²

The Public Defenders Office New South Wales ('the Public Defenders') agreed that there is considerable benefit in giving a court the capacity to delay final determinations, particularly those requiring an allowance for the changes in maturity levels and the psychological development of children during their adolescent years.

The Public Defender's submitted that any scheme for provisional sentencing should relate only to those children convicted of murder where there is a need for an extended period for assessment of rehabilitation prospects or risk elements relating to future dangerousness.

In determining the timing of any review process, age-based reviews, for example, at 18 or 21 years, ran the danger of resulting in reviews later than is currently done for eligibility for release to parole, resulting in excessive non-parole periods and possibly institutionalisation.

A preferable system was the setting of a statutory tariff of no more than five years, providing for continuous review of the individual over shorter periods, with the capacity to end the process and proceed to finality when the court is satisfied that this may be done with confidence.

The Public Defenders concluded that setting a provisional tariff (as opposed to an indefinite period at Her Majesty's pleasure) would provide a degree of certainty and a barrier against manifest excess.

During the tariff period there should be continuous review periods allowing for flexibility of response where there is evidence of progress in the maturity and development of the child.

⁵². Submission 4: Public Defenders Office New South Wales Office New South Wales.

The tariff period and the reviews following should be conducted by a judge of the Supreme Court, preferably by the same judge, and allow for the usual appeal rights to the Court of Criminal Appeal (including the decision about categorising the matter as appropriate for provisional sentencing).

NSW State Parole Authority⁵³

The NSW State Parole Authority ('the Parole Authority') supported delaying the imposition of final sentence in order to allow a child to reach an appropriate level of intellectual maturity and to have an opportunity to make some progress in addressing his or her offending behaviour and towards his or her rehabilitation. This would also allow mental health and drug issues to be identified.

The Parole Authority viewed the review process as being motivational for the child. It considered that a body such as the Serious Offenders Review Council (SORC) would be an appropriate body to conduct such review, in addition to review by a court.

⁵³. Submission 14: NSW State Parole Authority.

PART SIX: SUBMISSIONS RECEIVED FROM HEALTH CARE AGENCIES AND PROFESSIONALS RELATING TO PROVISIONAL SENTENCING

Most of the submissions made by consultants were made on a confidential basis. Therefore, the comments by consultants referred to in this Report are generally rather than specifically attributed.

In general, the majority of submissions and consultations indicated at least tentative support for the concept of provisional sentencing. It was seen as beneficial on the basis that, providing intensive treatment could be undertaken in detention, it would allow for the conduct of objective, longitudinal assessment of progress towards rehabilitation before final sentencing. Withholding the final sentence was seen as a powerful motivation for a child to take rehabilitation more seriously, compared with the situation if the final sentencing had already taken place.

There were a number of recurring issues identified in the consultations:

The types of offences to which provisional sentencing would apply

Opinions were divided on the type of offences to which a provisional sentencing practice should apply. Some submissions revealed support for provisional sentencing in cases where the child has committed a serious offence and/or faced a term of imprisonment of 25 years or more. Others favoured the restricted use of provisional sentencing for a limited number of offences, in particular murder and/or manslaughter, serious sexual offences and assaults occasioning grievous bodily harm. Others however, simply stated that the offence should be 'serious'.

A number of submissions stated that the type of offence, or the duration of the sentence for that particular offence, should not be the primary consideration when deciding whether or not to impose a provisional sentence. Instead, the decision should ultimately depend upon the facts of each case, and the potential benefits for the child, which could flow from a provisional sentence. One submission suggested that the availability of a provisional

sentence should depend on the moral culpability of the child rather than on the offence committed.

Assessments of children

Consultants unanimously regarded the reliability and usefulness of psychological and psychiatric assessments of children, particularly those heavily focused on assessing future dangerousness, with considerable concern.

Several consultants cautioned that any risk assessment conducted at a single point in time has its limitations. As one indicated:

It is far more difficult to estimate the long-range risk of violence among 12–15 year olds than it is for adults. In fact, psychology and psychiatry have no evidence that they can do it reliably. (They can estimate short-term risks, as in the ensuing year, but not for longer-range time frames). That, in fact, is the most important reason to have different sentencing strategies for younger adolescents than for adults. Unlike with adults, we have no way to know that their offence is related to long-range future behaviour.⁵⁴

Though acknowledging this, a number of mental health practitioners have described some practical constraints of performing multi-point in-depth assessments such as securing an appointment with the offenders in custody, as well as the length of time they are allocated for conducting such interviews. Anecdotal evidence suggested that most assessments are conducted as one-off clinical interviews with the offender, with a maximum of three hours permitted for each interview.

Consultants stressed the importance of conducting a thorough and comprehensive assessment at the time of initial sentencing and the need for, and current lack of, ongoing assessment once the child comes into custody. Some consultants regarded the success of a provisional sentencing scheme as being largely dependant on the adequacy of a mental health assessment which could serve as a reference point for subsequent reviews of the child's progress.

⁵⁴. Submission 23: Dr Thomas Grisso, Director, Law and Psychiatry Program, Department of Psychiatry, University of Massachusetts Medical School, Worcester, MA, United States of America, 1.

One consultant recommended that there be an expert forensic psychiatric assessment conducted at the time of the child's entry into the system, so that potential for future problems can be flagged early. As one of the main providers of mental health assessments for offenders, Justice Health acknowledged that its priority was to 'effectively screen and assess young people when they come into custody, so that those with mental health problems are recognised and treated early'.⁵⁵

Several consultants suggested that the proposal should adopt a practice of having court-appointed mental health practitioners convening to discuss issues that have been submitted for expert opinion in a non-adversarial setting, particularly in cases of differing professional opinions. Such a proposal would permit experts meeting, combining their assessments, and providing a single, consensual report that outlines the key issues in relation to the child appearing before the court. Another aim of the experts' conference would be to propose a program of treatment for the child.

Models for such multidisciplinary assessments of young people can be found in the Tavistock Clinic in London as, for instance, used in the Bulger murder case⁵⁶. Within NSW, the Supreme Court has been commissioning "joint expert conferences" since 2001 in medical negligence cases⁵⁷. The Family Court of Australia also holds a "Conference of Experts" to assist the parties involved to achieve a just quick and cost effective disposal of the case.⁵⁸

Exchange or transfer of information from the court to custody

Consultants stated that part of the problem with accessing treatment for children came from the lack of accountability and follow-through by government agencies on recommendations that may have been made at the time of sentencing. Some consultants interviewed by the Council who had experience serving as expert witnesses in cases involving children stated that judges' recommendations made at sentence were rarely acted upon. It was generally held that once sentencing was completed the courts had no further role in the care and rehabilitation of the children sentenced.

⁵⁵. Submission 16: Justice Health, 7.

⁵⁶. Submission 20: Professors Dianna Kenny and Chris Lennings.

⁵⁷. <http://www.australiandoctor.com.au/news/48/0c017848.asp>

⁵⁸. <http://www.familycourt.gov.au/presence/resources/file/eb0026456a8cc8d/conferenceoexperts.pdf>

It was argued that the perceived failure to implement the court's sentencing recommendations could be simply resolved by communicating the judge's remarks on sentence to those responsible for keeping the child in custody. In Canadian courts, for example, when dealing with repeat sex offenders the court must order that a copy of *all* reports and testimony given by psychiatrists, psychologists, criminologists and other experts and any observations of the court with respect to the reasons for the finding that a person is a repeat sexual offender, together with a transcript of the trial of the offender, must be sent to the Correctional Service of Canada for information.⁵⁹

Additional difficulties in relation to services provided to children were identified, including:

- the lack of rehabilitation programs available in custodial setting;
- the lack of staff expertise who work with children;
- problems in intra-agency and inter-agency sharing of information;
- the lack of a link to services in the community; and
- the lack of links between the Department of Juvenile Justice and the Department of Corrective Services, particularly in relation to transfers between the two systems.

Enforceable undertakings

A number of consultants proposed that changes to the sentencing legislation should be complemented by an expansion of the court's power to issue an enforceable undertaking in relation to the rehabilitative needs of the child.

A judicially enforceable undertaking would be especially crucial if one aim of provisional sentencing is to provide an opportunity for the child to demonstrate change as well as achieve developmental potential. As there is no way of overseeing this process at present,

⁵⁹. *Criminal Code* RSC. 1985, c C-46 (Canada) s 760.

an enforceable treatment order would provide some measure of assurance and accountability to the court. One consultant explained why the need for sentencing and treatment go together as:

[t]he child could be serving a longer sentence through no fault of their own but because of the inadequacy of the service response so I would urge any possible changes (to sentencing) are accompanied by a clear mandate for appropriate service responses.

Specifically, it was suggested that the sentencing court be vested with the power to mandate and monitor the provision of treatment for a young offender.

Reviewing the provisional sentence

Most consultants considered a form of existing agencies such as the Parole Authority, the Mental Health Review Tribunal or the Serious Offenders Review Council, as the appropriate body to conduct the review.

The proposals included:

- a Parole Authority-type system, where a range of opinions from juvenile justice officials, mental health professionals, members of the community and the judiciary would be represented;
- a body such as the Serious Offenders Review Council which could provide management and review of the child's progress, subject also to monitoring by the court;
- a hybrid of the Serious Offenders Review Council and the Mental Health Review Tribunal—which would comprise both forensic mental health and representatives from victims groups;
- a body similar to the Youth Drug Court, where there is a legal authority exercising regular reviews of the child's progress which provides encouragement to continue rehabilitative efforts;

- a special review panel with forensic experts to advise on sentencing. The expert adviser drawn from the panel would sit with the judge as an adviser to clarify what issues and treatment should be focused on.

Another commonly held view was that the review should be conducted by a judicial body, with reassessment of the sentence ideally being conducted by the judge who heard the case in the first place. Variations on this suggestion included:

- a judicial panel, where experts would advise a judge on the mental health or other psychological aspects of the case in a non-adversarial setting;
- having a 'judge manager' (or two, working as a team) who would oversee the provisional sentencing process as an administrative head, using a case management approach.

Consultants were concerned that the reviewing body should be independent from the executive in a manner similar to the daily operation of the Parole Authority.

In relation to the concern raised by consultants about independence from the executive, it is notable that recent amendments to the Mental Health Review Tribunal pursuant to the *Mental Health Legislation Amendment (Forensic Provisions) Act 2008* (NSW), which commenced on 1 March 2009, take away the executive discretion to determine the release of forensic patients. This is because there were a number of problems with the reliance on Executive discretion, including the system being cumbersome, overly bureaucratic, and operating without transparency or accountability. The change to the mental health system will mean that orders for care, treatment leave and release of forensic patients will be made by a Forensic Division of the Tribunal, using a specially constituted panel which must be presided over by a sitting or former judge.

The need for a single, non-partisan report which could canvass the various options proposed by the experts and recommend a course of action to the sentencing court, was also strongly recommended.

PART SEVEN: DIFFERENT MODELS OF PROVISIONAL SENTENCES

A number of submissions made suggestions as to how provisional sentences could be imposed. This part of the Report refers to these submissions, as well as suggestions made in a report of the New South Wales Law Reform Commission on young offenders.

New South Wales Council for Civil Liberties Inc⁶⁰

The CCL suggested an alternative approach for sentencing children with special needs. This alternative approach involves setting a head sentence while leaving the non-parole period open for review after two to five years.

The CCL suggested that this proposal would allow the initial sentence to reflect the gravity of the offence, which therefore ensures that the penalty is proportionate and adequately punitive. The non-parole period would reflect the child's demonstrated progress and capacity for rehabilitation. At the same time, this proposal would provide a period to address and stabilise any mental health or developmental issues that might become present.

Legal Aid Commission of New South Wales⁶¹

The Commission suggested that a provisional sentence could be achieved by a court setting a full sentence according to standard sentencing principles, together with a provisional sentence for a set period to be served in a juvenile justice centre, to be followed by a review by the trial judge or a Supreme Court judge with the capacity to reduce or waive the full sentence.

The Commission suggested that this proposal would have the advantage of removing some of the uncertainty resulting from the original proposal of a provisional sentence with no clear indication as to the outcome once it was served. It would require the trial judge to apply

⁶⁰. Submission 8: New South Wales Council for Civil Liberties Inc.

⁶¹. Submission 7: Legal Aid Commission of New South Wales.

sentencing criteria which reflected current views on the seriousness of the offence at or near the time the child was convicted, focusing on rehabilitation as a primary consideration, as well as the other matters to be considered under s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW).

Public Defenders Office New South Wales⁶²

The Public Defenders proposed a system of provisional sentencing involving the imposition of a provisional tariff with continuous review.

The agency argued that such a proposal would provide sufficient safeguards for the child as well as providing flexibility of response where there is evidence of progress in the maturity and development of the child. A child could not be detained beyond the provisional tariff. The setting of a provisional tariff therefore prevents a sentence becoming one of continuous detention beyond the longest period that would otherwise be appropriate. The proposal for a regular and continuous review of the progress and development of the child would better advance the principles underlying the sentencing of children.

Office of the Director of Public Prosecutions New South Wales⁶³

The ODPP suggested that in exceptional cases there should be a compromise position where a 'preliminary detention period' is imposed in matters where significant issues remain unresolved at the time of sentencing. The preliminary detention period would extend to a relevant date at the court's discretion, being a date before which the child turns 21 years old. This power to sentence a child to a period of preliminary detention should be invoked only in exceptional cases.

New South Wales Law Reform Commission

In its Report 104 entitled *Young Offenders*, the NSW Law Reform Commission ('the Commission') examined children and the criminal law at several different points in the

⁶². Submission 4: Public Defenders Office New South Wales Office New South Wales.

⁶³. Submission 13: Office of the Director of Public Prosecutions New South Wales.

criminal justice system.⁶⁴ Chapter 11 of the Report dealt with children who commit serious offences, described the operation of the law in relation to serious offences pursuant to the *Children (Criminal Proceedings) Act*, current sentencing practice, and the approach in the United Kingdom.

The Commission found that:

[i]n the case of young offenders ... the information before the sentencing court to enable a proper assessment of culpability and prospects for rehabilitation may be lacking. The presence or likely development of a serious personality or psychiatric disorder, or a propensity for future dangerousness is difficult to know. A better sentencing mechanism is needed, that allows the objectives of sentencing to be fully realized.⁶⁵

The Commission recommended that:

'...this is best achieved by requiring the judge, in the case of a serious children's indictable offence, to sentence the young offender according to the normal method prescribed by section 44 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)* and to invest the judge with a discretion to make an order, in appropriate cases, that the offender be re-sentenced at a specified period before the end of the non-parole period or minimum term.⁶⁶

⁶⁴ New South Wales Law Reform Commission, *Young Offenders*, Report 104 (2005).

⁶⁵ New South Wales Law Reform Commission, *Young Offenders*, Report 104 (2005) [11.12].

⁶⁶ New South Wales Law Reform Commission, *Young Offenders*, Report 104 (2005) [11.13] (see also Recommendation 11.1).

PART EIGHT: DISCUSSION

In Parts Five to Seven of this Report the views of a number of different agencies and health professionals were summarised and models discussed. This Part of the Report further examines the issues identified in relation to provisional sentencing.

A: PROVISIONAL SENTENCING

Support and suitability

Having regard to the submissions, there is an overall consensus that provisional sentencing is most suited to cases such as *SLD*, where the information available at the time of sentencing does not permit the court to make a proper assessment as to the presence or likely development of a serious personality or psychiatric disorder, and/or propensity for future dangerousness.⁶⁷

The New South Wales Council for Civil Liberties Inc commented that:

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.

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 ...⁶⁸

The Senior Children's Magistrate agreed that the sentencing of children in this class should be given special attention due to the medical research on the unique brain growth and

⁶⁷. *R v SLD* [2002] NSWSC 758, [147].

⁶⁸. Submission 8: NSW Council for Civil Liberties Inc.

development that takes place during the adolescent years. He noted that the definition of personality disorder indicated that a person must be over that age of 18 years before a safe diagnosis could be made. Often diagnosis of mental health disorders in children is difficult.⁶⁹

Practical experience of this issue was also commented upon by the Public Defenders Office:

An important indicator of the value in extending the armoury of sentencing options when dealing with young offenders is that, as experience indicates, reliable assessments of psychiatric factors in juvenile offenders conduct can be inherently problematic. Forensic psychiatrists are often properly guarded when assessing prospects and risks related to young offenders and will occasionally concede the limitations of their capacities in this regard. This is particularly so in the instances where the parties or the Court seeks assessment of a crucial factor, such as the existence or degree of risk in future dangerousness. In some cases the problematic nature of assessment results in multiple diagnoses or differential diagnoses so hedged about with qualifications as to render them no secure basis for final sentencing conclusions. ... In some instances, a degree of caution, even indecision, may be the only rational response to the challenge of assessing a young person, in whom immaturity or possibly transient responses to environmental factors, such as parental abuse, makes assessment difficult.⁷⁰

Delaying sentencing would take into account changes in maturity and psychological development because more meaningful mental health and behavioural assessments can be made. Specific factors include when the child has reached an appropriate level of intellectual maturity and has had the opportunity to make rehabilitative progress and demonstrate remorse.

The Office of the Director of Public Prosecutions (ODPP) referred to one of the purposes of provisional sentencing being an assessment of future dangerousness. However another purpose would be to assess actual rehabilitation. The ODPP gave tentative support to a

⁶⁹. Submission 12: Senior Children's Magistrate and Deputy Chief Magistrate Scott Mitchell, Children's Court of New South Wales. . See too Submission 20: Prof. Dianna Kenny and Prof. Chris Lennings, University of Sydney; Submission 22: Dr Eileen Vizard, National Child Assessment and Treatment Service, United Kingdom.

⁷⁰. Submission 4: Public Defenders Office New South Wales.

scheme based on the principle of rehabilitative detention or detention until such time as necessary for proper sentencing principles to be invoked.⁷¹

Concerns

Reservations to the concept of provisional sentencing were raised by the ODPP with reference to the principle of finality:

The principle of finality should not be readily discarded. The consequences for all parties in not knowing the length of a sentence imposed for a specific offence is not a favoured outcome, in particular for the very young for whom a year is regarded as a lengthy period. Further, we do not support any concept of re-sentencing which could occur years after the offence and conviction and perhaps jeopardise any positive change that may have occurred in the intervening years. It could also be seen as a further punitive measure imposed on the offender who would have to be brought back before the courts on a continuing basis ...⁷²

It is also important that a scheme of provisional sentencing does not offend the important sentencing principles of proportionality and parsimony, and that children not be sentenced to any harsher a penalty than an adult for the same offence.

Some of the other arguments against provisional sentencing relate to the special hardship on a child of an indeterminate sentence being imposed.

The Legal Aid Commission of New South Wales referred to the difficulties in applying criteria in relation to the seriousness of an offence at a date which was significantly removed from the period and social climate that prevailed at the time the offence was committed and the child was found guilty.⁷³

This concern was shared by the Senior Children's Magistrate, who was concerned that the ultimate sentencing court may have difficulty distinguishing between factors that were present and operative at the time of the offence, and factors that have subsequently

⁷¹. Submission 13: Office of the Director of Public Prosecutions New South Wales.

⁷². Submission 13: Office of the Director of Public Prosecutions New South Wales.

⁷³. Submission 7: Legal Aid Commission of New South Wales.

developed and which have no bearing on the criminality of the offence or the circumstance of the child at the time of the offence.⁷⁴

The Senior Children's Magistrate was hesitant about assessments of a child who has spent a lengthy period of time in custody and who may have developed mental health disorders or behavioural problems at least in part because of that detention.⁷⁵

Consultations with experts in child and adolescent mental health identified a number of concerns about the interaction of the provisional sentencing framework with issues unique to children , including:

- The potential increase in a child's risk level by virtue of the very fact that he or she is placed within the juvenile justice system, which in many circumstances is not conducive to rehabilitation and may even be detrimental to the progress of the child.
- The adverse impact of institutionalisation may lead to higher risk of recidivism, particularly as children have problems with envisioning matters in the longer term.
- If the child is deprived of the finality of sentence it is possible that having to wait for final sentence would be very stressful for the child.
- Re-sentencing years after the offence may jeopardise any positive changes that may have occurred in the intervening years and may be seen as a further punitive measure imposed on the child, who has to be brought back before the courts on a continuing basis.
- Provisional sentencing delays closure for victims as well as offenders.

⁷⁴. Submission 12: Senior Children's Magistrate and Deputy Chief Magistrate Scott Mitchell, Children's Court of New South Wales.

⁷⁵. Submission 12: Senior Children's Magistrate and Deputy Chief Magistrate Scott Mitchell, Children's Court of New South Wales.

B: DETENTION AT HER MAJESTY'S PLEASURE

Wood CJ at CL in *SLD* specifically considered the issue of permitting detention at Her Majesty's pleasure until a later time when the child could be sentenced. The submissions and consultations highlighted a number of objections to this form of sentencing:

- it may lead to indefinite sentences for children who have committed violent offences which disadvantages children because this leads to longer periods in custody.⁷⁶ There is a stated opposition to the concept of imposing sentences tantamount to indefinite sentences for children;
- the lack of satisfactory facilities for children currently in detention;
- it is potentially inconsistent with the United Nations *Convention on the Rights of the Child*. Article 40(2)(iii) of the Convention recognises the right of any child to have his or her matter fairly determined without delay. Leaving the final sentence to be determined at a future date is less consistent with the requirements of determination of the matter without delay;⁷⁷
- the rights of appeal of a person detained at Her Majesty's pleasure are potentially suspended until he or she is finally sentenced;⁷⁸
- sentencing years after an offence has occurred jeopardises positive changes in the child that may have occurred in intervening years;
- it could be seen as a further punitive measure imposed on a child who would have to be brought back before the courts on a continuing basis;

⁷⁶ . Submission 6: Law Society of New South Wales; Submission 8: New South Wales Council for Civil Liberties Inc.

⁷⁷ . Submission 7: Legal Aid Commission of New South Wales.

⁷⁸ . Submission 6: Law Society of New South Wales.

- a child is entitled to comprehend fully the sentence that has been imposed on him or her and then place his or her focus on rehabilitation.⁷⁹ This does not occur when detained at Her Majesty's pleasure;
- deferral of sentencing for a number of years is likely to be perceived by the child as a cruel punishment in itself. It is likely to cause a sense of hopelessness and anxiety which is a penalty in itself and may negatively affect his or her behaviour in custody;⁸⁰
- it could arguably be a form of preventive detention.⁸¹ Preventive detention means being detained beyond the period of the sentence for the protection of the community. While preventative detention does occur in some limited circumstances (such as in relation to sexual offenders being detained in custody after their sentences have expired), this should not be permitted in relation to children;
- a court dealing with an adult who was a child when the offence was committed is less likely to apply the principles relating to the sentencing of children;⁸² and
- there is no system of detention at Her Majesty's pleasure for adult offenders. Children should be in no worse position in sentencing than an adult.

As set out earlier there is broad support for a general concept of a more flexible sentencing regime applying to children convicted of very serious crimes. This is qualified by concern that appropriate discretion should be vested in the sentencing judge, whereby children are only subjected to the operation of the scheme after suitable assessments and safeguards are in place.

If a scheme of provisional sentencing for children is to be implemented, it should address the concerns referred to above.

⁷⁹. Submission 11: NSW Aboriginal Justice Advisory Council.

⁸⁰. Submission 12: Senior Children's Magistrate and Deputy Chief Magistrate Scott Mitchell, Children's Court of New South Wales.

⁸¹. Submission 12: Senior Children's Magistrate and Deputy Chief Magistrate Scott Mitchell, Children's Court of New South Wales.

⁸². Submission 12: Senior Children's Magistrate and Deputy Chief Magistrate Scott Mitchell, Children's Court of New South Wales.

PART NINE: RECOMMENDATION FOR A SCHEME OF PROVISIONAL SENTENCING IN NEW SOUTH WALES

After carefully considering the present legal framework, the submissions received and the consultations conducted, as well as the expressed need for change, the authors of this Report recommend legislative change to implement a form of provisional sentencing in NSW in certain prescribed cases.

This Report concludes that a scheme of provisional sentencing should be available in respect of those children aged between 10 and 14 years who have been convicted for the offence of murder, where the information available, at the time of sentencing, does not permit a proper assessment to be made in relation to the presence or likely development in the offender of a serious personality and psychiatric disorder, and as a consequence an assessment as to their potential for future dangerousness or rehabilitation.

The authors of this Report recommend the following model of provisional sentencing for children.

A: THE PROPOSAL

Circumstances in which provisional sentencing will be available

It is proposed that:

1. provisional sentencing be available in respect of those children aged between 10 and 14 at the time of the commission of the offence who have been convicted for the offence of murder;
2. either the court, prosecution or defence would have the ability to raise the potential application of provisional sentencing; and

3. provisional sentencing would be considered on a case-by-case basis, with the court exercising its discretion to deal with the child pursuant to the provisions or to sentence according to ordinary sentencing principles.

The imposition of a provisional sentence

Once a determination had been made to utilise the provisions, a provisional sentence would be imposed as follows:

- the court would first fix a provisional sentence, which would correspond to the non-parole period that would otherwise have been imposed;
- after fixing the provisional sentence, the court would then fix the balance of the term of the sentence, which represents the period during which the child could be released on parole;
- the provisional sentence and the balance of term together would comprise the head sentence;
- a finding of special circumstances would permit the judge to vary the ratio between the provisional sentence and the balance of term, in the same way as s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) applies to any other sentence; and
- the court would be restricted from imposing any condition that the child be held in custody after the expiry of the head sentence.

Review of the provisional sentence and the head sentence

- There should be an ongoing process of judicial review of the child whilst in custody. This review would entail at least an initial review of the child which must be done within two years of the child coming into custody; ongoing review of the child during the 'mid-point' of his or her period in custody; and final determination of the provisional sentence by the sentencing court.

- The timing of these reviews should be based on reports provided to the court in relation to the progress of the child. The period of time between these reviews should be a matter of discretion for the court, but should not be greater than two years.
- If the child remains in custody after the provisional sentence has expired, a judge will continue to have responsibility for reviewing the child and determining the date of release from custody.
- The child can apply for final determination of the provisional sentence.
- At the time the provisional sentence is imposed the court can make directions in relation to the treatment of the child in custody and enforceable undertakings from those treating the child in custody can be sought. These directions can be assessed at the time of each review.

The final determination of the sentence

- The final determination of the provisional sentence may be held at any time on the application of either the child or the prosecution. The final determination must be held at least one year before the expiry of the provisional non-parole period and no later than five years from the date of the initial sentencing.
- A final determination of the provisional sentence can take place, permitting the child to be released before the end of the provisional sentence and permitting the sentencing judge to re-determine both the provisional sentence and the head sentence.
- The final determination of the provisional sentence and head sentence should be by a judge of the Supreme Court, and preferably the judge who originally sentenced the child.
- Following release from custody the child will be subject to supervision from the Serious Offenders Review Council. Any breach of parole provisions would be dealt with by the Serious Offenders Review Council.

Rights of appeal

- The child has a right to appeal to the Court of Criminal Appeal on all aspects of the provisional sentence, including the decision to impose a provisional sentence.
- The prosecution would have a limited right of appeal to the Court of Criminal Appeal, in relation to errors of law in making a decision as to whether to impose a provisional sentence or as to the inadequacy of the term of the provisional sentence imposed.

B: ESSENTIAL ELEMENTS OF THE PROPOSAL

The following is an explanation of some of the important aspects of the proposal.

The nature of the provisional sentence

The provisional sentence, imposed at the time of initial sentencing, is the *earliest possible date of release* of the child from custody. The provisional sentence, as well as the head sentence, is finally determined at a later time to the initial sentence. Whatever the final determination of the sentence, the child is not automatically released from custody when the provisional sentence ends, unless that is the determination that the Judge makes. The provisional sentence is the shortest period of time that the child can be held in custody (and may be itself shortened on review by the sentencing judge).

The period after the end of the provisional sentence is termed the 'balance of term'. Although this equates to the balance of term which would be imposed as part of an ordinary sentence, the term 'balance of term' is used to make it clear that the child is not necessarily automatically released at the end of the provisional sentence.

Whether a child is released at the end of the provisional sentence, or at some point during the balance of term, depends on the child's progress, which is regularly reviewed by the judge. As the child's progress is reviewed in custody, and there is a better assessment of the child's psychiatric or developmental condition, one possibility is that the judge may consider when the sentence is finally determined that the provisional sentence should be

shortened. Another possibility may be that the judge determines that the child is not to be released at the end of the provisional sentence. If this happens, the child remains in custody and is subject to further regular review by the judge.

Although the length of the provisional sentence and the head sentence can be reduced, they cannot be increased. It is not possible to *increase* the non parole period or head sentence for any other sentenced person. A child who is provisionally sentenced should be in no worse position to any other child or adult (see especially s 6(e) *Children (Criminal Proceedings) Act*, discussed in Part Four).

Application to the offence of murder alone

There were differing views arising from the submission and consultation process regarding the type of offences to which provisional sentencing should apply. The authors were particularly mindful of suggestions that the scheme be expanded to include offences of serious inter-personal violence, such as serious assaults and reckless wounding, where it could be argued that the degree of violence involved avoided the infliction of death only through happy accident.

However, there are three reasons why provisional sentencing should be limited to the offence of murder alone.

Firstly, as the Public Defenders raise in their submission, there is concern that matters to which a maximum penalty of 25 years or more is applied is too wide for provisional sentencing. Not every offence with that maximum penalty would necessarily constitute facts that meet the description of grave objective criminality. Provisional sentencing requires a specific level of moral culpability and gravity of the crime. An extended period of assessment of rehabilitation prospects or risk elements amounting to future dangerousness would be required before provisional sentencing provisions would be triggered.

Secondly, sentencing children for very serious offences is difficult, but the difficulties in sentencing a child for murder are exceptional. *SLD* was largely a unique case.⁸³ Courts have

⁸³. *R v SLD* [2002] NSWSC 758, [21].

sentenced children under the age of 14 for very serious sexual offences and have not expressed concerns similar to those by Wood CJ at CL in *SLD, AEL v The Queen*,⁸⁴ *R v KLH*,⁸⁵ *R v JDB*⁸⁶ and *R v KBM*.⁸⁷

Finally, there is concern that provisional sentencing for the wider class of offences may result in a significant increase in the sentences imposed for all non-murder offences, regardless of facts or circumstances.

It is notable that in England and Wales, detention at Her Majesty's pleasure applies only to children convicted of murder.

Provisional sentencing applies only to children aged between 10 and 14 years at the time of the commission of the offence

Consultants and submissions agreed that most major developmental changes occur between the ages of 13-17 years.

This proposal adopts the class of child that Wood CJ at CL envisioned in *SLD*, who is aged between 10 and 14 at the time of the offence.

The discretion to impose a provisional sentence

If a scheme of provisional sentencing is to be implemented, a court should have discretion whether to undertake provisional sentencing. Provisional sentencing would be appropriate where the information available at the time of sentencing does not permit the court to make a proper assessment in relation to the presence or likely development in the offender of a serious personality or psychiatric disorder, and as a consequence an assessment as to their potential for future dangerousness or rehabilitation;

⁸⁴ *AEL v The Queen* (2007) 170 A Crim R 355.

⁸⁵ *R v KLH* (2004) 148 A Crim R 515.

⁸⁶ *R v JDB* (2005) 153 A Crim R 164.

⁸⁷ *R v KBM* [2004] NSWCCA 123.

The application of provisional sentencing would be justified where a child has committed a murder and the current developmental and psychiatric or personality state are such as to raise serious questions and concerns as to the protection of the community.⁸⁸

Setting a provisional sentence

This would accord with the current practice in s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), where a non-parole period is set first, followed by a period to be served on parole.

An adult who is sentenced to murder, where the sentence is not one of life imprisonment, will have a head sentence and a non-parole period set. The adult is then eligible to release to parole during the period after the non-parole period has expired. It is important that children be in no worse a position than an adult (as recognised by s 6(e) of the *Children (Criminal Proceedings) Act 1987* (NSW)).

Setting the head sentence

There must be a period beyond which a child cannot be detained. This prevents the sentence becoming one of continuous detention beyond the longest point that would otherwise be appropriate.

Such a point should be seen as a limit, rather than as a necessary and expected destination. The total sentence cannot be extended.

The provisional sentence and head sentence would bring some degree of certainty to the child. Continuous review would provide sufficient safeguards for the child as well as providing flexibility of response where there is evidence of progress in the maturity and development of the child.

⁸⁸. Submission 4: Public Defenders Office New South Wales, 31 May 2007.

A process of continuous review

During the provisional sentence (and into the parole period if the child remains in custody after this point) there should be continuous review allowing for flexibility of response where there is evidence of progress in the maturity and development of the child.

The process of periodic review is central to provisional sentencing of children. Although there was some uncertainty as to the exact interval of review, most mental health experts consulted proposed conducting a mental health assessment on at least a yearly or even six-monthly basis, the findings of which can be fed into a more comprehensive review to be undertaken at the end of the provisional sentence. This would assist in the early detection and treatment of any emerging mental illness.

As the Public Defenders noted, there must be sufficient flexibility, so that if an earlier diagnosis can be confidently made, a court can move forward the final determination of the provisional sentence and the head sentence.⁸⁹

The scheme of continuous review proposed here has a precedent in the scheme of continuous review used in relation to people found unfit to be tried or those sentenced to a limiting term after being found not guilty by reason of mental illness under the *Mental Health Act 1990* (NSW).

One of the benefits of the ongoing review of the child is that there could be a gradual process of leave allocation and reduced security classification to facilitate transfer of the young offender into community rehabilitation schemes.

Final determination of the provisional sentence and the head sentence

The final determination of the provisional sentence may be held at any time on the application of either the child or the prosecution. The final determination must be held at least one year before the expiry of the provisional non-parole period and no later than five years from the date of the initial sentencing, permitting the child to be released before the end of the provisional sentence and permitting the sentencing judge to re-determine both the provisional non-parole period and the head sentence.

⁸⁹. Submission 4: Public Defenders Office New South Wales.

The rationale for fixing a five-year period by which the final determination must be made is that this provides an aspect of finality regarding the time of final sentence and accords with the known developmental stages that should allow for diagnosis and assessment. The five-year prescription also takes into account the anticipated delay between charge and sentencing in matters of this kind (generally 18 months to two years), so that children who fall within the proposed provision sentencing scheme would be aged between 16½ and 19½ at the time of final sentence.

In sentencing adults, an established model of prolonged pre-sentence assessment before final determination is already in existence in respect of the re-determination of life sentences imposed on people before the *Sentencing Act 1989* (NSW) under Schedule 1 to the *Crimes (Sentencing Procedure) Act*. The Public Defenders noted that the re-determination process requires the court to consider the offender's progress throughout the years of custody, monitored by the Serious Offenders Review Council's reports and custodial records.⁹⁰ Similar advantages would be obtained in the case of children convicted of murder.

While a sentence length-based review appears more favourable, submissions and consultations were equally varied on the length of sentence that should be served before a final review was conducted. Most placed this within the range of two to five years,⁹¹ which would give the courts adequate time to determine a child's prospects for rehabilitation as well as stabilise any mental health or addition issues that might be present, while protecting against the possibility of indefinite sentences.⁹² In particular, some consultants saw the upper limit of five years to be excessive and suggested that it be three or less years.⁹³

An alternative to either a strictly age-based or sentence length-based review was suggested by the Law Society, which proposed that a provision for final review be set at the age of 18 or after three years in custody, whichever came first.⁹⁴

⁹⁰. Submission 4: Public Defenders Office New South Wales.

⁹¹. Submission 5: New South Wales Bar Association; Submission 8: New South Wales Council for Civil Liberties Inc; Submission 9: Aboriginal Legal Service (NSW/ACT) Limited.

⁹². Submission 8: New South Wales Council for Civil Liberties Inc.

⁹³. Submission 11: NSW Aboriginal Justice Advisory Council.

⁹⁴. Submission 6: Law Society of New South Wales, 2.

The re-determination process requires the court's consideration of carefully documented and close observation of an offender through many years in custody, albeit a much longer period than would be appropriate for the proposed provisional scheme for children.

As the Public Defenders stated:

In the context of life-sentence re-determination there is a measure of assurance obtained by the sentencing judge through extended assessments, in particular contained within the Serious Offenders Review Council's reports and in detailed custodial records of the prisoner's progress (or lack thereof). There would be similar advantages obtained in the cases of some younger offenders convicted of very serious crimes. This is particularly so in instances where, because of the offender's immature age, reliable assessments of prospects and risks are problematic at the initial point of sentencing.⁹⁵

As Justice McClellan proposed,⁹⁶ a child should be able to request a review of the provisional sentence at any time.

The ability to reduce the provisional sentence and the head sentence at the time of final determination

The provisional non-parole and head sentence can both be reduced if there is positive progress by the child whilst in custody.

This reflects *R v Secretary of State for the Home Department; Ex parte Venables*⁹⁷ where Lord Hope of Craighead stated:

The child's progress and development while in custody, as well as the requirements of punishment, must be kept under review throughout the sentence. A policy which ignores at any stage the child's development and progress while in custody as a factor relevant to his eventual release date is an unlawful policy. The practice of fixing the penal element as applied to adult mandatory life prisoners, which has no regard to the development and progress of the prisoner during this period, cannot be reconciled with the

⁹⁵ Submission 4: Public Defenders Office New South Wales, 2.

⁹⁶ Submission 1: The Hon Justice McClellan, Chief Judge at Common Law, Supreme Court of New South Wales.

⁹⁷ *R v Secretary of State for the Home Department; Ex parte Venables* [1998] AC 407.

requirement to keep the protection and welfare of the child under review throughout the period while he is in custody.⁹⁸

What is noteworthy about *R v Secretary of State for the Home Department; Ex parte Venables* in relation to the proposals contained in this Report is that on sentence following appeal, Woolf LCJ took into consideration the ‘striking progress’ and ‘genuine remorse’ that the offenders had displayed over the preceding seven-year period, noting he did not wish to ‘undo much of the good work’ that had been achieved over the period.⁹⁹ His Lordship re-set the tariff period at eight years, and conceded that if he had been setting the tariff at the time of original sentence he would have selected 10 years.¹⁰⁰

Conduct of the review and determining the date of release

In NSW, a judge of the Supreme Court conducts the process of re-determining a life sentence. It is submitted that a judge should conduct any review of a sentence imposed upon a child who is provisionally sentenced.

It is also proposed that it is the judge who originally sentenced the child or, if unavailable, another judge of the Supreme Court who determines the child’s release date.

For any other comparable offender, the ultimate date of release from custody is determined by the State Parole Authority. The reasons why it is proposed that that a judge is the one who determines the date of release of the child from custody, are as follows:

- Given the exceptional situations in which provisional sentencing would apply, it is appropriate that judicial scrutiny, in the form of the judge who originally sentenced the child or, if unavailable, another judge of the Supreme Court, who should have the responsibility for making this determination.
- It is the judge who at the outset determined that a provisional sentence is appropriate, and it is the judge who reviews the child’s progress in custody and who

⁹⁸ *R v Secretary of State for the Home Department: Ex Parte Venables* [1998] AC 407, 532.

⁹⁹ *Re Thompson* [2001] 1 All ER 737, [8], [10], [13].

¹⁰⁰ *Re Thompson* [2001] 1 All ER 737, [18].

finally determines the sentence. This final determination comes at the end of a process of regular review of the child.

- At the time the provisional sentence is imposed the judge may seek enforceable undertakings from those who will have care of the child while in custody. (Enforceable undertakings are discussed in Part Six of this Report). The purpose of these enforceable undertakings is to ensure that the child is adequately treated, monitored, and protected whilst in custody. It is appropriate that the judge who is involved in this process is the one who determines whether the child has progressed to the stage where the child can be released.

The process of the initial sentencing and regular review will give the judge intimate knowledge and insight into the development and progress of the child over time, placing the judge in a stronger position than the State Parole Authority to understand, assess and evaluate both the offender and their progress during their custodial term.

It is envisaged that in a similar way to the State Parole Authority, the judge may inform himself or herself by calling for expert reports and hearing evidence in open court from experts and others responsible for the child's detention and treatment at the time of determining the final sentence and the date of release from custody.

Rights of appeal

At each stage of the provisional sentencing process a child should have a right of appeal to the Court of Criminal Appeal.

The child's rights of appeal should cover the initial determination of the application of a provisional sentence, the setting of a provisional sentence, the setting of a sentence at the conclusion of the review period.

This proposal also preserves the Director of Public Prosecutions' right of appeal, as referred to earlier. As noted previously, none of the rights of the Director of Public Prosecutions to appeal are reduced by provisional sentencing.

The role of victims in provisional sentencing

In relation to offences of murder, the families of victims can be heard at the time of sentencing through Victim Impact Statements, and when an offender comes before the State Parole Authority for determination of release to parole. When a child is provisionally sentenced, the purposes of sentencing (discussed in Part Four) continue to apply. A number of the purposes of sentencing set out in s 3A *Crimes (Sentencing Procedure) Act* relate to victims and their families. Section 3A(g) *Crimes (Sentencing Procedure) Act* in particular, requires that the harm done to the victim of the crime and the community is to be recognized on sentence. A provisional sentence will have to reflect this and the other purposes of sentencing.

However, there is no doubt that provisional sentencing will affect the families of victims. The review of a child's release date from custody once the child is provisionally sentenced will be by a Judge of the Supreme Court. It is this Judge, and not the State Parole Authority, who will determine the final length of the sentence and the date that the child will be released from custody. Whilst allowing for a role in the setting of the initial sentence, the proposal does not permit an ongoing role for the families of victims in the *review* process, or in relation to the final determination of the sentence. Because the provisional sentence is continuously reviewed, it is conceded this may heighten the anxiety of a victim's family.

Acknowledging these difficulties to the families of victims, it is hoped that the families of victims would recognise that the sentencing and subsequent review of a child who is provisionally sentenced is quite exceptional, and that the decision to provisionally sentence a child is an exceptional step. The families of victims may understand why there are differences to ordinary sentencing.

PART TEN: CONCLUSION

This Report deals with an exceptional group: children aged between 10 and 14 who commit murder. In trying to sentence children in this category, who are a very small number, there can be cases of real uncertainty in making either diagnostic or prognostic determinations of development when it is in a state of flux. Imposing a sentence of imprisonment in such a case is likely to represent a qualified finding on the available evidence at that point in time.

The ability to put in place a procedure that would adequately deal with these difficult matters would be beneficial in the exceptional cases to which they would apply. This Report suggests that a scheme of provisional sentencing, which would be a flexible sentencing regime to accommodate the development of children who have committed murder and to provide them with an incentive to work on their treatment and rehabilitation whilst serving their sentence (by way of the prospect of an earlier release date).

The submissions and consultations leading to this Report found no support for any sentencing which could occur years after an offence and conviction and which would jeopardise any positive changes that may have occurred in the intervening years. Such a system could also be seen as a further punitive measure imposed on the child who would have to be brought back before the courts on a continuing basis.

The proposal contained in this Report aims to provide the court with flexibility and discretion, whilst balancing issues of fairness to the offender with public policy consideration, in its attempt to determine the appropriate sentences for this unique category of offenders.

APPENDIX A: DEFINITIONS

In this Report the following words have these meanings:

Child—a young person between the ages of 10 and 14 years.

Detention at Her Majesty's pleasure—where a person is held in custody for an unspecified period of time.

Finality—a principle that the process of sentencing should be completed to permit the sentenced person to move forward.

Head sentence—the total of the non-parole period as well as the balance of term after the end of the non-parole period.

Release on licence—the equivalent of parole in the United Kingdom that applies to offenders who are sentenced to a term of imprisonment of at least 12 months.

Non-parole period—the minimum amount of time to be served in custody.

Parole—the release of an offender from custody on conditional liberty after he or she has served a minimum term of imprisonment set by the court.

Parole period—the period of time in which an offender is on conditional liberty, having served a minimum term of imprisonment set by the court.

Parsimony—the principle that a sentence imposed in a matter is to be the least restrictive that can be imposed.

Preventive detention—detaining a person after his or her sentence has finished, to protect the community from further offending by that person.

Proportionality—a principle which states that a sentence imposed on a person must be proportionate to the objective seriousness of the offence.

Provisional sentence—the equivalent of a non-parole period, set in the case of a child to whom provisional sentencing applies.

Provisional sentencing—a proposal where a sentence is imposed but the final sentence is not set until some future time during a child's period in custody.

Sentencing according to law—sentencing using options applying to ordinary offenders, rather than to the specific sentencing options relating to children.

Standard non-parole period—represents the non-parole period for certain specific offences in the middle range of objective seriousness for that particular type of offence. Generally the standard non parole period only applies after trial.

APPENDIX B: OVERVIEW OF RELEVANT CASES

Citation	Summary	Sentence
<i>R v SLD</i> [2002] NSWSC 758	Aged 13 years and 10 months; murdered three-year-old girl by stabbing.	20 years imprisonment, with 10 years non-parole.
<i>R v AO</i> (2003) 138 A Crim R 189	14-year-old Somali refugee pleaded guilty to nine counts of armed robbery. Previous offences of possessing car breaking implements, stealing, robbery and robbery in company, resisting an officer, demanding property with menaces with intent to steal and affray.	Seven years imprisonment. Four years non-parole. For previous offences: he had been the subject of recognisances, probation orders, control orders, community service orders and fines. Most recently, he had received a control order for six months commencing on 10 April 2002.
<i>R v Robinson</i> [2002] NSWCCA 359	17-year-old—murder; mutilation of victim.	45 years imprisonment; 35 years non-parole period.
<i>R v O'Grady</i> [2001] NSWSC 1255	16 years nine months old. Murder with rifle.	15 years imprisonment; 10 years non-parole.
<i>R v LMW</i> [1999] NSWSC 1109	10-year-old charged with manslaughter of six-year-old by dropping him into the river knowing he could not swim.	Acquitted.
<i>R v HAS</i> (Unreported, NSW Court of Criminal Appeal, Smart, Ireland and Dunford JJ, 13 August 1998)	17-year-old from a deprived background and an unstable childhood environment in which alcohol was freely abused. He had a history of alcohol and drug abuse and some brain impairment possibly induced thereby. Pleaded guilty to attack with a knife—stabbing victim to chest and neck with intent to kill after derogatory comments made about the mother.	Minimum and additional terms of 12 and five years respectively. After appeal—minimum term was reduced and the additional term increased by 18 months.
<i>R v Verney</i> (Unreported, NSW Court of Criminal Appeal, Hunt CJ at CL, Carruthers and Ireland JJ, 23 March 1993)	17-year-old convicted of two counts of murder. The victims were his mother and young step-sister both of whom were shot as they slept. He had no significant record. There was psychiatric evidence but the judge did not find any significant diminution in criminal culpability.	The sentence imposed included minimum and additional terms of 13 and seven years respectively.

Citation	Summary	Sentence
<i>R v JDB</i> (2005) 153 A Crim R 164	Aged between 13 years and five months and 14 years and two months at the time of the offences. Six offences—having intercourse with his eight-year-old half-sister.	Non-parole period of 12 months imprisonment to be served in a detention centre. The applicant was directed to be released to parole subject to the supervision of the Department of Juvenile Justice (DJJ) at the conclusion of the non-parole period and other appropriate conditions.
<i>AEL v The Queen</i> (2007) 170 A Crim R 355	Aged 13 (possibly 12). AEL, pleaded guilty to one count of sexual intercourse with a child beneath the age of 10. Three further matters of indecent assault upon another child under the age of 10 were included on a Form 1. The victims in each case were his siblings, his brother then aged about 8 and his sister aged about five.	A 3 year good behaviour bond was imposed, requiring the applicant to reside at Mirvac House, a rehabilitative unit for young people. After breaching the bond the applicant was sentenced to a non-parole period of 18 months with a further term of 3 years and 6 months.
<i>R v AN</i> [2005] NSWCCA 239	13 years 9 months old, detained with intent to hold for advantage and aggravated sexual assault. Found unfit to be tried due to mild to moderate intellectual disability.	Special hearing; judge specified limiting terms—five years and eight years for each charge.
<i>R v CK</i> [2002] NSWSC 942	16-year-old convicted of manslaughter—threw a metal bar at the deceased's car as it passed by the place where he was standing and the bar penetrated the victim's skull.	Seven years six months; non-parole period four years. Detention and then at age 21 years to be transferred to low-security adult prison.
<i>R v KBM</i> [2004] NSWCCA 123	13-year-old; pled guilty to sexual intercourse with a person under the age of 10 years (victim was 9 years old).	Three years in juvenile detention centre; 12 months non-parole.
<i>R v JNN</i> [2004] NSWCCA 426	17 years and two months old; scissors; detained girl and beat her; cut her hair.	Three years and four months imprisonment; non-parole period of 20 months.
<i>R v P</i> [2004] NSWCCA 218	17-year-old. Aggravated armed robbery.	11 years, with six years non-parole for first offence; and six years, with three years non-parole for second offence.
<i>R v NMTP</i> [2000] NSWSC 1170	16-year-old; acquitted of murder but convicted of (a) malicious wounding with intent to do grievous bodily harm; (b) firing a firearm in public; and (c) maliciously discharging a loaded arm with intent to do grievous bodily harm.	(a) three years imprisonment, non-parole period of 18 months; (b) three months imprisonment (concurrent with first sentence); (c) two years imprisonment, non-parole period of 12 months.
<i>R v SDM</i> (2001) 51 NSWLR 530	17 years and 11 months old. Armed robbery.	Four and a half years of imprisonment to be served out in a detention centre.

Citation	Summary	Sentence
<i>R v AEM Snr; R v KEM; R v MM</i> [2002] NSWCCA 58	AEM: 19 years and five months old. KEM: 16 years and 10 months old. MM: 16 years and three months old. Aggravated sexual assault (in a group).	AEM: overall sentence of 13 years, non-parole period of nine years to be served in custody. KEM: overall sentence of 14 years, non-parole period of 10 years to be served in custody. MM: overall sentence of 13 years, non-parole period of 10 years to be served in custody.
<i>LAL v The Queen; PN v The Queen</i> [2007] NSWSC 445	Both 14 years old (taxi driver).	Six years, with three years and six months non-parole period.
<i>R v AD</i> [2005] NSWCCA 208	15 years old; aggravated sexual assault.	Non-parole period of two years and six months, and parole period of one year and nine months.

APPENDIX C: INVITATION LETTER

Specifically, the Council seeks your advice on the following areas:

- What types of child offences would you consider suitable for provisional sentencing? (e.g. murder, manslaughter, aggravated robbery, etc)?
- What special role should mental health and developmental issues play in the sentencing of young offenders? How best can judges make use of existing mental health assessments which reflect uncertainty about the prognosis and risk levels of the young offender?
- Are there any developmental or other considerations in the assessment or treatment of young offenders that would help in formulating a sentence?
- What kinds of treatment or rehabilitation programs would you recommend, or are currently available, for addressing the needs of serious young offenders?
- Are there any specific indicators of change to look out for in a child offender's behaviours while in custody that would assist in the fixing of the final sentence or in determining suitability of release during a review (i.e. how would you know if the child has progressed to a point where he/she is deemed suitable for release)?
- How should the principles of rehabilitation, deterrence and community safety be balanced in the sentencing of young offenders?
- Any other relevant issues you wish to raise.

APPENDIX D: SUBMISSIONS RECEIVED

Number	Agency / Individual
1	The Hon Justice McClellan, Chief Judge Common Law, Supreme Court of New South Wales
2	The Hon Justice Kirby, Supreme Court of New South Wales
3	His Honour G. Henson, Chief Magistrate of the Local Courts of New South Wales
4	Public Defenders Office New South Wales
5	New South Wales Bar Association
6	Law Society of New South Wales
7	Legal Aid Commission of New South Wales
8	New South Wales Council for Civil Liberties Inc
9	Aboriginal Legal Service (NSW/ACT) Limited
10	NSW Department of Juvenile Justice
11	NSW Aboriginal Justice Advisory Council
12	Senior Children's Magistrate and Deputy Chief Magistrate Scott Mitchell, Children's Court of New South Wales
13	Office of the Director of Public Prosecutions New South Wales
14	NSW State Parole Authority
15	Dr Nick J Wilson, National Research Advisor, Department of Corrections Psychological Services, New Zealand Department of Corrections
16	Justice Health
17	Dr Randall Salekin, Center for the Prevention of Youth Behaviour Problems, University of Alabama, United States of America
18	Dr Olav Nielssen, Psychiatrist
19	Professor Sue Bailey, Bolton Salford and Trafford Mental Health Trust (BSTMHT) United Kingdom
20	Professor Dianna Kenny and Dr Christopher Lennings, University of Sydney

21	John Taylor, Clinical Forensic Psychologist
22	Dr Eileen Vizard, National Child Assessment and Treatment Service, United Kingdom
23	Dr Thomas Grisso, Director, Law and Psychiatry Program, Department of Psychiatry, University of Massachusetts Medical School, Worcester, MA, United States of America
24	Ms Catriona McComish, former Assistant Commissioner, NSW Department of Corrective Services
25	Mr Tim Keogh, Psychologist

APPENDIX E: LIST OF CONSULTANTS

Dr Mark Allerton

Director, Children's Court Clinic, Parramatta and co-researcher of the *NSW Young People on Community Orders Health Survey 2003–2006*.

Dr Peter Ashkar

Forensic psychologist, Duffy Robilliard Psychologists, New South Wales. Recently completed a PhD thesis on the impact of incarceration on serious young offenders in Kariang Detention Centre.

Ms Julie Babineau

Acting CEO Justice Health.

Dr Susan Bailey

Consultant Child and Adolescent Forensic Psychiatrist, Bolton Salford & Trafford Mental Health Trust (BSTMHT), Manchester; and Professor, Faculty of Health, University of Central Lancashire, United Kingdom.

Professor John Basson

Statewide Director of Mental Health, Justice Health and Chief Psychiatrist of New South Wales.

Dr Howard Bath

Clinical Psychologist, Professional Instructor, Cornell University Therapeutic Crisis Intervention Project; former Agency Director and inaugural Chair of the Child and Family Welfare Association of Australia.

Associate Professor John Brennan

Director, Child and Adolescent Mental Health Service, Sydney Children's Hospital; former Director, Child and Adolescent Mental Health Unit, Westmead Hospital; and currently involved with Redbank House, a tertiary psychiatric service for infants, children, adolescents and their families.

Mr Peter Champion

Clinical Psychologist, Professional Member, NSW Psychologist's Tribunal; former Member NSW Guardianship Tribunal and former Clinical Psychologist in Charge, Regional Assessment Centre Met East (1982–88) and former Resident/Clinical Psychologist, Minali Assessment Centre (1975–82), NSW Department of Community Services.

Dr Emma Collins

Clinical and forensic psychologist, accredited with the NSW Children's Commission Child Sex Offender Counsellor Accreditation Scheme (to work with both adults and young people).

Dr Clarice Graham

Justice Health.

Professor David Greenberg

Clinical Professor of Forensic Psychiatry, University of Western Australia and Professor of Psychiatry, Conjoint appointment at University of New South Wales.

Dr Thomas Grisso

Professor of Psychiatry; Director of Mental Health and Law Core (Centre for Mental Health Services Research); Coordinator, Law-Psychiatry Program, University of Massachusetts Medical School; and author, *Double Jeopardy: Adolescent Offenders with Mental Disorders* (2004).

Dr John Howard

Director of Clinical Services, Training and Research, Ted Noffs Foundation, Consultant Clinical Psychologist, Department of Adolescent Psychiatry, Prince of Wales Hospital, Honorary Visiting Fellow, National Drug and Alcohol Research Centre, University of New South Wales; and former member of the Technical Steering Committee of the World Health Organization's Department of Child and Adolescent Health and Development (CAH).

The Hon Greg James QC

President, Mental Health Review Tribunal and former NSW Supreme Court Justice.

Professor Dianna Kenny

Professor of Psychology, School of Behavioural and Community Health Sciences and co-researcher of the *NSW Young People on Community Orders Health Survey 2003–2006*.

Dr Timothy Keogh

Clinical and forensic psychologist and family psychotherapist. Formerly the Director of Inmate Services and Programs, NSW Department of Corrective Services and Director of the Collaborative Research Unit, NSW Department of Juvenile Justice. Past President of the Child Psychoanalytic Foundation, foundation member of the NSW Institute for Family Psychotherapy, and part time member of the Mental Health Review Tribunal.

Dr Chris Lennings

Senior Lecturer in Psychology, School of Behavioural and Community Health Sciences, University of Sydney, co-researcher of the *NSW Young People on Community Orders Health Survey 2003-2006* and author of *Young Offenders Who Kill: A Review of Five Australian Case Studies* (2004).

Catherine Lynch

Director Adolescent Health, Justice Health.

Ms Catriona McComish

Former Assistant Commissioner Probation and Parole; Community Offender Services and Inmate Management, NSW Department of Corrective Services. Currently undertaking a PhD at the University of New South Wales.

Dr Olav Nielssen

Chairman, Forensic Section of the Royal Australian and New Zealand College of Psychiatrists (RANZCP).

Professor James Ogloff

Foundation Professor of Clinical Forensic Psychology, School of Psychology, Psychiatry & Psychological Medicine, Monash University; and Director of Psychological Services, Victorian Institute of Forensic Mental Health (Forensicare).

Dr Julian Parmegiani

Chairperson, NSW Motor Accidents Authority's Psychiatric Impairment Reference Group; Chief Medical Officer (Psychiatry, Towerlife; Referee, Australian Medical Journal and the Australia-New Zealand Journal of Psychiatry) and former Chairperson, NSW Section of Forensic Psychiatry.

Ms Anna Robilliard

Forensic psychologist, Duffy Robilliard Psychologists.

Associate Professor Randy Salekin

Associate Professor of Psychology and the Associate Director of the Centre for the Prevention of Youth Behaviour Problems, University of Alabama and former Board Member of the Directors of the American Psychology-Law Society.

Mr Michael Sterry

Justice Health.

Mr John Taylor

Clinical forensic psychologist and former Member of the Handicapped Persons Review Tribunal.

Dr Eileen Vizard

Clinical Director, National Clinical Assessment and Treatment Service (NCATS) and Consultant Child and Adolescent Psychiatrist and Clinical Director, NSPCC's National Child Assessment and Treatment Service, United Kingdom.

Dr Brent Waters

Foundation Professor of Child and Adolescent Psychiatry, University of New South Wales (Retired); former Director of Psychiatric Services, St Vincent Hospital, former Head of the Psychiatry Department, Sydney Children's Hospital and former Deputy Convenor, Classification Review Board.

Bruce Westmore

Former acting Deputy Director of Psychiatric Services, Queensland Department of Health, and Director of Forensic Psychiatry for the State of Queensland, Dr Westmore has extensive experience in the areas of administrative psychiatry, clinical work (in both the hospital and prison settings) and in teaching and research.

Appendix F: NSW Sentencing Council

- The Hon James Wood AO QC, Chairperson
- The Hon John Dunford QC, Deputy Chairperson
- Mr Howard Brown OAM, Victims of Crimes Assistance League
- Mr Nick Cowdery AM QC, Director of Public Prosecutions
- Assistant Commissioner Paul Carey, NSW Police
- Mrs Jennifer Fullford, Community Representative
- Ms Martha Jabour, Homicide Victims Support Group
- Mr Norman Laing, NSW Aboriginal Land Council
- Mr Ken Marslew AM, Enough is Enough Anti-Violence Movement
- Mr Mark Ierace SC, Senior Public Defender
- Ms Jennifer Mason, Director General, Department of Community Services
- Ms Penny Musgrave, Director, Criminal Law Review Division, NSW Attorney General's Department
- Mr Ronald Woodham PSM, Commissioner, NSW Department of Corrective Services

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