



THE LAW SOCIETY  
OF NEW SOUTH WALES

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The Hon. Greg Smith SC MP  
Attorney General and Minister for Justice  
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Dear Attorney General,

**Crimes (Sentencing Procedure) Amendment (Provisional Sentencing for Children) Bill 2013**

The Law Society's Juvenile Justice Committee and Criminal Law Committee (Committees) have reviewed the *Crimes (Sentencing Procedure) Amendment (Provisional Sentencing for Children) Bill 2013*, and suggest a number of amendments below.

The Committees support the model proposed in the NSW Sentencing Council Report to enable provisional sentencing for children who are convicted of murder. The Committees appreciate the difficulties that can arise in determining an appropriate length of sentence for a child convicted of murder, due to the uncertainty in making diagnostic and prognostic assessments regarding the development of the child at the time of sentence, and as a consequence an assessment as to their potential for future dangerousness or rehabilitation.

**Enforceable undertakings**

While the Bill incorporates many of the recommendations contained in the Sentencing Council's Report, it does not adopt the proposal in relation to enforceable undertakings. The Report proposed that the court should have the power to make "enforceable undertakings" at the time 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*" (pg 52). This proposal was in the context of the health care consultants stating 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*" (pg 37). Concern was expressed that if there is no guarantee of appropriate rehabilitative programs, properly resourced, then the child may be in a worse position upon review of the provisional sentence by the court.

Proposed sections 60C and 60F allow the court to request a case plan or progress report which will include an assessment of the care and treatment of the child in custody, and an assessment of the offender's psychiatric, cognitive and psychological development since the provisional sentence was imposed. However, this stops short of enforceable undertakings. Enforceable undertakings would go further in ensuring the child is in the best position during further court dates. The lack of enforceable undertakings means that a child may be in a worse position after being incarcerated for a period of time without the guarantee of appropriate services.

The Committees are of the view that the Bill does not go far enough in ensuring that the young person has access to the supports necessary while in custody during the period of the provisional sentence, and this will inevitably impact on the final outcome and final sentence. The Bill should be amended to give the court the power to make enforceable undertakings.

#### Progress reviews

Proposed section 60E(4) provides that the court may conduct a progress review as often as it considers appropriate, but must conduct a review at least once every 2 years after the provisional sentence is imposed. The Committees are of the view that continuous review is essential to provide sufficient flexibility of response in relation to the development of the child.

The Committees submit that a review must be conducted every 6 months, as occurs in the Mental Health Review Tribunal in relation to forensic patients.

#### Setting a non-parole period

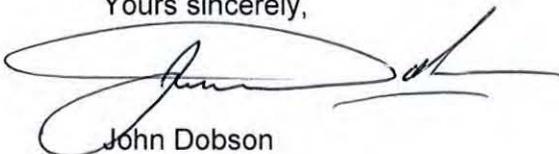
The Committees are concerned with the reference in the Bill to setting "*the non-parole period (if any)*" in the final sentence. Clauses 60G(3)(b) and 60H(2)(b) have the potential to create uncertainty as to whether or not the court must set a non-parole period for the final sentence.

The Bill should be amended to make it clear that a non-parole period must be set for the final sentence and it must not exceed the non-parole period set for the provisional sentence. The words "(if any)" should be deleted from proposed sections 60G(3)(b) and 60H(2)(b). To fail to do so will create a risk of indeterminate sentencing for young people convicted of murder, a concern expressed by the Committees in earlier consultations.

#### Monitoring and review of the provisional sentencing provisions

The Bill should include a requirement that the NSW Ombudsman monitor the scheme of provisional sentencing for children convicted of murder, and report on the use of the new provisions every three years.

Yours sincerely,



John Dobson  
**President**