



THE LAW SOCIETY
OF NEW SOUTH WALES

Our Ref: RBGMM1303377

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6 April 2010

His Honour Judge Mark Marien SC
President NSW Children's Court
Parramatta Children's Court
Locked Bag 5113
Parramatta 2124

Dear Judge,

Practice Note No.1 Youth Drug and Alcohol Court

Thank you for your correspondence advising that you would consider any proposal from the Law Society's Juvenile Justice Committee (Committee) concerning amendments to Practice Note No.1 Youth Drug and Alcohol Court (YDAC).

The Committee sought input into the Practice Note following an announcement by Magistrate Hannam that the Practice Note was being revised.

The Committee makes the following preliminary comments for your consideration:

- The Committee is concerned that a child can be referred for assessment for referral to the YDAC without their consent (paragraph 4, 'Referral to the YDAC', b) 'Court referral without consent of child'). This is related to another concern, that the role of the child's solicitor is not clearly stated in the Practice Note. The Practice Note should clearly state that the child is entitled to take legal advice during all stages of the YDAC procedures, that a specialist children's solicitor will be appointed for this purpose, and that this solicitor will represent the child or ensure that the child understands the proceedings throughout the period of time that the child is on the YDAC program (including when the Joint Assessment and Review Team decides that the child is not complying with the YDAC Program Plan).
- The reference to the likelihood of a custodial penalty currently sits at paragraph 7.4 of the Practice Note as a reason the YDAC can exercise a discretion to exclude a young person. This should be moved to paragraph 5, 'Directions applying to referrals to the YDAC', so that this must be considered before a referral is made. This would make it clear that the YDAC program is for young people who are facing custody. The YDAC is not a supervised bond or

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supervised probation program, and it should be clear that it does not take the place of existing supervised order options.

- A further matter for concern is the inference that can be drawn from paragraph 7.7 that some children are being held in custody while being assessed for suitability for the YDAC. This was not the intention when YDAC was established. The Practice Note could be stronger on this point and state clearly that the child should not be assessed in custody unless all community based options have been exhausted. This would then infer that the Children's Court is seeking to comply with the UN Convention on the Rights of the Child and the Beijing Rules, which state that remand and custody should be used as options of last resort and for the shortest possible period of time.
- For consistency with section 33 of the *Children (Criminal Proceedings) Act 1987*, the word 'order' should be used in paragraph 18.2, rather than the word 'sentence'.
- The Committee notes that the Adult Drug Court gives adult participants a lot more certainty about what the program holds for them and also the possible outcomes. The Adult Drug Court is governed by the *Drug Court Act 1998 (DCA)*, and the Committee acknowledges that a Practice Note does not have the force of legislation, however it is useful to examine the protections that are in place for adults that do not exist for children.

➤ Imposition of an initial sentence

The DCA states in s 12 that when the final sentence is imposed on an offender, the Court must re-consider the initial sentence and take into account the progress made on the program. If this practice was mirrored in the YDAC program (and a possible procedure for doing this would be to provide the young person with a 'sentence indication'), then this would allow for transparency of penalty and remove any perceived bias when the young person comes to be sentenced at the end of his/her program. Knowing what sentence they were facing would allow young people to make an informed choice about their participation on the program and would also allow them to understand the final sentence when it is given, e.g. they would be able to see where a reduction was made because of a level of participation, even where they did not complete the program.

It is a common complaint of young people that they have been prejudiced against on a personal basis upon sentence to the point where they feel disadvantaged for having participated on the program. Many young people have expressed the view that they have received an additional punishment for their failure on the program, and that their final sentence was greater than what they would have received if they had just been sentenced in the Children's Court instead of being referred to YDAC.

➤ Immunity from prosecution for certain offences

Section 17 of the DCA provides immunity to offenders who make admissions to certain offences in order to be admitted onto the program or admissions made throughout the program.

Immunity from prosecution is very important for any Court that operates on a therapeutic jurisprudence model in an adversarial system. Young people who are expected to be honest about illegal substance misuse need to know they are protected from prosecution. The Practice Note should clearly state that admissions about drug use will never be used as a basis to charge them.

➤ Jurisdiction of the Drug Court

Section 24 of the DCA sets out the jurisdiction of the Adult Drug Court. To mirror this very simplistic section would allow clarification of whether or not young people may be referred from the District Court and which Court would then sentence the young person on finalisation. The Practice Note should provide that referrals from the District Court can be made and accepted.

➤ Policies

The Adult Drug Court has also developed policies that are available to the public that explain procedures in relation to the everyday running of the court. The Practice Note could allow for the YDAC team to formalise their processes in a number of 'policy documents'. An example of a policy which would be very helpful within YDAC is the 'completion or termination of the program'. This policy addresses the situation of 'substantial compliance'. It is often the case that young people have managed to complete the majority of their program goals but are having difficulty finding steady employment or relapse just towards the end. The policy outlines what should be done in this situation.

The idea of 'phases' should also be explored. Ordinarily young people initially enter a residential rehabilitation facility and upon completion are re-integrated into the community to find employment or re-commence education. As such, there are two stages of the program. Often young people can complete the first phase without complication but encounter significant difficulties with the second. Separating the program into phases could provide the opportunity for recognition of the young person's achievements and also provide positive reinforcement.

The Drug Court policy acknowledges that Aboriginal and Torres Strait Islanders should be given priority for selection, so to should YDAC. Similarly, young women should also be given priority.

I trust that these proposals are of assistance. The Committee would also appreciate the opportunity to review and comment on the final draft of the Practice Note.

Yours sincerely,


Mary Macken
President