

**SUBMISSION OF THE CHILDREN AND THE LAW COMMITTEE OF THE
LAW SOCIETY OF SOUTH AUSTRALIA
June 2009**

This submission is in response to the introduction of the Statutes Amendment (Recidivist Young Offenders and Youth Parole Board) Bill 2009 (*the Bill*) introduced to parliament in May 2009 by the Attorney-General, the Hon Mr M Atkinson.

The Committee has reviewed the Bill and the second reading speech of the Hon. J. D. Hill of 13 May 2009.

The role of the Children and the Law Committee is to monitor legal issues relating to children and young people – as victim, defendant and witness; to advocate for and enhance their human and legal rights, their access to and representation in the legal system.

The Committee understands the Bill (materially Parts 3 and 4) proposes to permit a court sentencing a child for committing a serious offence, where the required criminal history exists, to declare that child a ‘recidivist young offender’. Such a declaration would override sentencing considerations of proportionality to the offence in question, and require the child to complete no less than four fifths of the resultant detention order before being eligible for consideration for conditional release by the Training Centre Review Board constituted as a Youth Parole Board.

The Committee notes the Bill is directed to “the small number of offenders who refuse to learn from experience”.

In essence, the Government intends to lock these children up for longer to be seen to be tough on crime in the attempt to make the community at large feel safe.

To this end, the Committee is opposed to the proposed legislation for the following reasons:

1. The Bill will cast the net wider than its stated intention and increase numbers of recidivist offenders due to the definition of “serious offence”.
2. The Bill will not have any material impact on rates of recidivism as:
 - a. evidence shows that longer sentences for young offenders does not correlate to a reduction in offending.
 - b. the environment in which the longer detention orders are to be served have been found to be lacking in the provision of therapeutic interventions targeted at the reasons for offending.
3. Creating a sub-class of offenders declared as recidivists and making it more difficult for them to qualify for condition release will do nothing to encourage or motivate in them a change in attitude or behaviour or ability to desist from offending upon eventual release.
4. Imposing longer detention orders on children is a breach of their human rights.

Firstly, the definition of serious offence may result in the proposed legislation impacting on greater numbers of young people than the so called “small number who refuse to learn.”

In any one year 10% of male juvenile offenders in South Australia are responsible for nearly half of all crime; a figure repeated nationally, internationally and across time and cultures. Around 5% of male juvenile offenders will be sentenced to detention each year¹.

The Committee agrees with Monsignor Cappo in his *To Break the Cycle Report*. “It is important to put the issue of youth offending into perspective. There is no youth crime wave. The rate of youth offending in South Australia is falling”.

The proposed legislation may however increase the sense of fear in the community by the increasing the number of young people who, as a result of the new s20C of the Criminal Law (Sentencing) Act 1988 (*CLS Act*) are declared as recidivist offenders. Thus Government attempts to increase perceived levels of safety may in fact be thwarted by a false increase in the number of recidivist young offenders.

In conjunction with Part 3 Subsection 6 of the Bill, enabling section 20A(1)(b)(i) of the *CLS Act* to be applied to children will have a disproportionate effect on those accommodated in the alternative care system.

Committee members regularly act for children charged with an offence of assault (a Part 3 offence of the Criminal Law Consolidation Act (*CLC Act*) whereby the child verbally or physically assaults residential care staff. While no violence in the work place is to be tolerated, the Committee is concerned those charged with the responsibility for caring for the Minister’s children are using the criminal justice system as a parenting strategy and as a means of coping with the overburdened care and protection system. The Bill unduly places children under the guardianship of the Minister at risk of accruing the requisite criminal history to be declared a recidivist young offender.

The introduction of s20C to the CLSA and it declaring a young person to be a ‘recidivist offender’, may have the (un)intended consequences of labelling that young person a serious repeat offender within the adult system. The question of whether a court declares a person to be ‘serious repeat offender’ must be considered in light of their offending as an adult, not as a youth.

Secondly, research shows that “that juveniles given more severe penalties were *more* likely to re-offend than those given less severe penalties, even after controlling for a range of other factors”.²

In March 2008 a review of programs in the youth training centres³ found 67% of residents re-offended within 6 months, and nearly 100% within four years. These

¹ Halsey, M 2006, ‘Negotiating conditional release: Juvenile narratives of repeat incarceration’, *Punishment and Society*, vol 8, no 2 p 148-9.

² Weatherburn, D., Cush, R., Saunders, P., “Screening juvenile offenders for further assessment and intervention” *Contemporary Issues in Crime and Justice*, no. 109 (Aug 2007) at 2.

rates of reoffending are not a result of young people being released from custody prematurely, but a reflection on the lack of rehabilitation they are receiving while in custody.

At page 28 of 'To Break the Cycle Report' Monsignor Cappo comments that longer sentences are unlikely to stop young people's engagement in crime. Rather, he recommends both community safety *and* the rehabilitation of young offenders needs to be assertively pursued (at page 43); and that amendments to the *Young Offenders Act (SA) 1993* should only occur in the context of a stronger focus on rehabilitation (recommendation 2).

The Committee endorses this approach. In order to address the issue of repeat offending, intensive, therapeutic interventions targeted at the reasons why young people re-offend (criminogenic needs) must be provided during detention and following their release. Only then will patterns of repeated offending and learned anti-social behaviours be broken and the community regarded as a safer place.

Thirdly, the fact that a child has committed a number of declared serious offences at such a young age demonstrates s/he does not possess insight into their offending behaviours, nor the maturity or personal capacity to choose a lifestyle that does not involve such behaviours. If any child deserves specialist treatment, then it is those children who are so deeply embroiled in the youth justice system that they have not been able to comply with previous judicial orders or resisted committing further offences. If rehabilitation is to be assertively pursued as recommended by the *To Break the Cycle Report*, then children who have repeatedly offended should not be labelled as a recidivist and remain for a longer period in an environment that does not facilitate their rehabilitation.

Categorising young people as "recidivist young offenders" and imposing a different set of procedural rules with regards to applying for conditional release, will only further marginalise them from our community and place additional systems barriers to them successful reintegrating into the community.

Fourthly, locking up young people for longer is in breach of their human rights. As per the Convention on the Rights of the Child to which Australia is a signatory, article 40 states that:

'State Parties recognise the right of every child alleged as, accused of, or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.' (Our emphasis)

Article 3 of UNCROC provides the best interests of the child should be a primary consideration in all actions, courts and law.

³ UniSA 2008, *Review of Programmes in Youth Training Centres*, Commissioned by the Office of the Guardian for Children and Young People.

Rule 19.1 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) echoes the UNCROC: ‘the placement of a juvenile in an institution shall always be the disposition of last resort and for the minimum necessary period.

Declaring a child to be a recidivist and a danger to the public does not promote children’s sense of dignity and worth, nor make the community a safer place.

Requiring them to complete four fifths of their detention order is not a placement of the minimum period. Moreover remaining in an institution found to be lacking in appropriate therapeutic supports is not in the best interests of the child.

A Government that prides itself on being “tough on law and order” is not one which breaches children’s human rights in order to find favour with voters. Being tough involves reforming government policy, following through on well-researched recommendations for change, and allocating resources to Families SA so as to enable it to employ well-qualified staff to deliver therapeutic interventions that address the reasons that young people offend.

Imposing longer detention orders will not rehabilitate the effects on families riddled with neglect, abuse, domestic violence, mental health, repeated breakdown of foster care placements, and the breakdown of families.

We refer to Part 4 section 13 of the Bill and its amendments to the Young Offenders Act to establish a Victim’s register.

Given the strong links between victimisation and offending, the Committee is pleased that a Victim Register will give young offenders who are so often themselves young victims of crime perpetrated by their peers and adults, a voice in the Youth Parole Board’s deliberations.

Taking the perspective of a child victim, the Committee recommends that specialist counselling be made readily available to registered victims appropriate to their developmental stage. Children must be assisted to make sense of their experiences, so that they do not continue to view themselves in a negative way of being a victim.

Literature on the development stages of children suggest that they do not as yet have the cognitive ability to reflect on how their actions may impact on others. Thus in establishing a Victims Register and recommending the placement of two persons with expertise in the needs of victims of crime (s18 of the Bill) on the Training Centre Review Board, we ask the Government does not overlook the cognitive ability of offenders nor give too great a weighting to the views of any registered adult victims and his/her close relatives.

We refer to s14 of the Bill which permits a record of an informal caution to be made. The lack of specificity as to the use to which this record may or may not be put is of concern to the Committee. The recording of an informal caution defeats the purpose

of the caution being informal. It may be used to gate-keep young people from being dealt with by way of an informal caution in future.

In conclusion, the changes proposed, particularly in relation to recidivist young offenders are contrary to the principles of the *Young Offenders Act (SA) 1993*. Labelling a young person as a recidivist young offender does not allow them to “develop into responsible and useful members of the community.”

Young offenders need “care, correction and guidance” if they are to develop into responsible and useful members of the community and realise their potential.

The *Young Offenders Act* currently and more than adequately has the ability to address young offenders offending as “part of a pattern of repeated offending” and to take the safety of the community into consideration when sentencing. With the Court’s ability to address these issues, there is no need for the proposed changes.