New York State Association of Criminal Defense Lawyers

Position on Raise the Age

New York has the opportunity to be a nationwide leader for real, lasting, and comprehensive juvenile justice reform. But real reform takes time. The planning process that preceded the Governor’s proposal did not include all the stakeholders in the criminal and family justice systems. Although by all means an excellent beginning of a very important conversation, the 300 pages of legislation cannot be seen as a finished product. The results of passing this legislation without further conversation and vetting by dozens of agencies around New York State will be dire—for the systems that are already stretched to their limit and for the young people this legislation is intended to help and protect. This is not the kind of legislation that can be rushed.

In our opinion, the one aspect of the budget proposal that should be passed now is the allocation of resources to enable New York to move 16- and 17-year-olds from adult prisons to age appropriate facilities. This can and should be separated from the remainder of the Governor’s program bill. Even if passed, none of the substantive provisions of the Governor’s bill will be effective until 2017. It would be better to use this time to thoroughly vet the best proposal, much as Connecticut did when they Raised the Age a few years ago. Connecticut’s process and eventual result have been extremely successful because of the inclusive nature of the planning process. New York has many talented and dedicated people in hundreds of agencies affected by this comprehensive change in its criminal and juvenile justice structure. It is important that these people are able to work together to create a new structure that works and that they are able to support from the planning stages through implementation.

Reasons for more thoughtful discussion and input before passage of comprehensive juvenile justice legislation:

- The proposed reforms may exacerbate existing racial disparities in the criminal justice system – There are particular aspects of the legislation, such as the inclusion of Disorderly Conduct, a violation, as a prosecutable offense, that will have a drastic racially disparate impact. This charge, not currently prosecutable in Family Court, would become so for 16- and 17-year-olds under both the Governor’s and Assembly one-house proposals. Since these are mostly related to incidents that begin with street encounters initiated by police, it is clear that mostly young teens of color will be affected by the choice to include these provisions. The potential ramifications of a Family Court case are also much harsher for this allegation than they currently are in adult court. There is also a stark racial disparity in the choice to increase the number and types of crimes that can be prosecuted in adult court. There has to be a thorough racial impact analysis completed on every provision of this type of comprehensive criminal
justice legislation. Given the documented disproportionate representation of people of color in both the adult and juvenile justice systems and the stated goal of Raising the Age as equalizing some of this impact, it is improper to go forward without ascertaining whether this goal has been achieved. *In our assessment, there will be a greater racial disparity under the new proposal than there is currently, not less.*

- **16- and 17-year-olds will lose constitutionally protected rights** – The right to jury trials currently afforded these young people will be lost when young people’s cases are transferred to Family Court. In addition, the right to counsel currently provided in Family Court is inadequate and reduces the rights of this age cohort. Within the last week, the Department of Justice filed a “Statement of interest” in a case in Georgia on the precise issue of providing fundamental constitutional rights to young people in juvenile proceedings.¹ New York should seriously consider these fundamental rights before passing a bill, as well as the risk of scrutiny by DOJ for a new bill intended to improve things for young people. In particular, the adjustment process, which is intended to assist the young person, is fraught with landmines for kids and families regarding statements made to probation officers and the legal ramifications of various aspects of the adjustment process. At this time there is no right to counsel at adjustment but there should be—after all, people make statements that can and will be used against them during these encounters.

- **The legislation is very complex** – Combined, the Governor’s Program Bill and the Assembly one-house bill contain over 300 pages of legislation and involve over 100 different statutes from the Penal Law, Criminal Procedure Law, Family Court Act and the Executive Law.

- **Implementers of any new statutory scheme need time to consider its impact on the court system and all the agencies that work in the courts** – All of the stakeholders impacted by the legislation (county attorneys, prosecutors, defenders, judges, probation, sheriffs, foster care systems, clerks of court, etc.) will be impacted by this legislation. They have not had the chance to weigh-in on the logistics and implementation, or on their capacity to absorb the changes.

- **Family Court Capacity** - Family Court only recently obtained 20 new judges across the state to deal with the backlog of child welfare cases, a condition that has reached crisis proportions for families in that system. As of today, the duration of these cases continues to increase every month; meaning that it takes at least two years, and up to 7 years, for a family’s issues to be resolved. A large portion of that delay is caused solely by court backlog. With the implementation of this proposal, the same court is expected to handle up to 20,000 new juvenile delinquency cases. This will certainly set back the delays even further. Backlog contributes to enormous costs to localities, especially foster care costs. The human and social costs are also quite troubling considering the fact that the vast majority of child welfare cases involve people with mental illness, drug or alcohol abusers, and victims of domestic violence who could have the potential to safely reunify their family but are deprived of that opportunity only because of court overcrowding. Family Court simply cannot accommodate an additional 20,000 delinquency cases before the child welfare backlog is evaluated and addressed, and this proposal should not be ratified until a qualified group of stakeholders can plan for the impact of the surge of cases that can be expected.

- **Infrastructure for 16/17 year-olds** – The proposed reforms provide “sight/ sound” separation of 16- and 17-year-olds from adult defendants, at the time of arrest through placement. Creation of this infrastructure by all relevant agencies includes every police precinct in the state, every holding area in court, and every pre-trial detention and post-sentence local and state facility.

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The ability of these agencies to accomplish this has not been ascertained nor have the attendant costs been adequately accounted for.

**If passage cannot be delayed, these are our preliminary observations about current proposals being discussed as part of the budget process:**

1. **Youthful Offenders (YO)**
   a. The Governor’s bill makes YO a predicate offense for future felonies. This defeats the purpose of the YO protection that allows for the correction of mistakes made during adolescence. For instance, if a youth who was previously adjudicated a Youthful Offenders is convicted of another B violent crime (for example), that youth could be sentenced to 10-25 years. Furthermore, all youth previously granted YO protection will now have their adolescent mistakes held against them for all time.
   b. *Neither bill extends YO to include 21 year olds*, despite brain science research that recognizes that the adolescent brain continues to develop throughout a person’s early twenties.
2. **Juvenile Offenders (JO)**
   a. The Governor’s bill expands the list from 18 to over 60 criminal acts committed by juveniles that would now be prosecutable in adult court.
   b. A cursory examination of data on arrests and prosecutions of this expanded list of crimes suggest that the expansion of the list will likely have a disparate impact on 16- and 17-year-olds of color.
   c. There is no reason to exclude from the Raise the Age proposal youth, who, for example, are charged with snatching phones from other youth or who face contempt charges for incidents within the family. In fact, these are the precise charges most likely to reap the benefit of Family Court’s extensive services and alternative dispositional options. Yet under the Governor’s current proposal, such young people will be charged and prosecuted in adult court and their opportunity to be removed to Family Court has been significantly curtailed.
3. **Removal**
   a. The Governor’s proposal eliminates defense counsel’s right, pre-indictment, to file for removal; thereby, making it more difficult to remove cases of 14 and 15 year olds than it currently is. The proposal also makes it more difficult to remove cases of 16 and 17 year olds charged with robbery in the second degree and violent offenses to family court. Although it is tempting to assume that violent charges should be treated in adult court, in fact the vast majority of young people facing legally “violent” charges have not committed an act of violence. Many have gone along with an older person and did nothing themselves. Others have made threats but never had an actual weapon. Most of these cases for this age group consist of matters than can easily be seen as bullying rather than criminal behavior. These types of allegations belong in Family Court where the resources and oversight can result in the outcomes endemic to the Raise the Age campaign.
   b. We believe that Family Court should have original jurisdiction for all cases involving all young people under the age of 18 years old. If necessary, there should be an option to “bump up” certain cases to criminal court, as is the practice in many other states.
   c. In the event that the Governor’s proposal prevails and a large portion of felony matters begin in adult court, we believe that the suggestion of cross-designating the same judge to keep the matter if it is removed could result in better outcomes for youth assuming
that court is properly resourced. We believe that an individual judge who will be keeping the case may be more wiling to consider removal because he or she will be knowledgeable about the options available once the status of the case is changed. This is particularly important for young people because removal has an enormous impact on collateral consequences, such as immigration, public records of their case, employment, and education opportunities.

4. Violations
   a. Currently Family Court has no jurisdiction over violations; thus the police cannot currently arrest juveniles for disorderly conduct, harassment, and other violations. Both proposals now expand the list of offenses covered by the Family Court Act and now authorize arrest and prosecution for typical adolescent behavior that should not rise to the level of criminal conduct.
   b. This will affect thousands of teens and would make them and their families subject to the jurisdiction of the Family Court, which will last for at least a few months for cases that would likely result in an ACD in adult court and for matters that do not rise to the level of criminal behavior.
   c. Police are able to find better solutions for these types of cases when they cannot arrest the teenager. Currently for 15 year olds, they use the age old techniques of calling parents, chastising the child or bringing them to the precinct for their parents to get them.

5. Jury trial
   a. Neither bill preserves the existing right to a jury trial for 16- and 17-year-olds.
   b. Jury trials are a vital tool for protecting the rights of young people. They also provide a powerful incentive for both defense and prosecution to plea bargain.
   c. Public jury trials foster transparency and community accountability.
   d. Teens are aware of the Constitution and are cognizant that they are not getting the benefit of the promise of an impartial jury. This further marginalizes poor young people who are mostly from communities of color that are already disenfranchised in very profound ways.

6. Early intervention of counsel
   a. Neither bill provides for early assignment of counsel to protect juveniles’ rights at the precinct and during the probation adjustment process; both times at which statements are elicited that later impact punishment and can have very serious consequences to the youth and family.
   b. The Governor’s task force cited research on the adolescent brain that explains why juveniles so frequently incriminate themselves or make false statements. The presence of counsel protects against this danger.
   c. The Governor’s bill allows probation to seek an Order of Protection from the court without the need to file a petition and proceed in Family Court. It is essential that an attorney be representing the teen at that time, particularly given that Orders of Protection can have an impact on the education, housing, and family situation of the teen. There should also be an enunciated standard for granting such orders as they place the teen at significant risk if the complainant chooses to have them arrested.

7. Disposition at first appearance
   a. Neither bill creates a mechanism for disposition at first appearance in Family Court as is a common suitable resolution in adult courts. Instead, they rely on the existing Family Court system, which requires intrusive interventions and delays prior to any possibility of disposition. Brooklyn has a DAT-Y program that has reduced the rate of re-arrest by
50% by using a quick and targeted programmatic strategy for 16- and 17-year-olds. It has been documented that kids this age respond very well to programs that focus on problem-solving and consequential thinking as well as positive self-expression. In fact, overly intrusive programs have been shown to increase the likelihood of re-arrest for low level offenses. For kids that are not adjusted, there should be a method of quickly assessing the appropriateness of a one-time classroom-based program that could accomplish the goals of helping to avoid re-arrest and avoid long-drawn-out court proceedings and interventions that work against those goals. The current use of existing Family Court procedures would not allow for this type of resolution as it requires evaluations and assessments that involve delays of at least two months.

b. The overcrowding in Family Court and the enormous impact of the surge could also be ameliorated with such a provision.

8. Police diversion
   a. Neither bill incentivizes police diversion programs like the successful program in Wyoming County. These programs support what we know about adolescent brain development and effective methods to change behavior and reduce costs. They also minimize the risk that further involvement in the court system will cause more problems for the child than it will help.

9. Risk Assessment Instruments (RAIs)
   a. Both bills allow RAIs to dictate outcomes based on risk of re-offense rather than risk of committing a felony or physical injury.
      i. Currently, in NYC there are 5 opportunities for “risk assessment”: at the precinct to determine whether a youth ticket should be issued; at probation during the adjustment process; at intake for determining the appropriateness of pre-trial detention; at sentencing; and finally at placement.
      ii. RAIs appear in numerous separate locations in the proposed reforms: Agency Review of Police Decision to Detain; Adjustment of Cases; Release Before Petition-Judicial Determination; and Disposition; additionally RAIs are mentioned 16 times regarding OCFS funding.
   b. Neither bill specifically addresses the norming of RAIs specifically designated for 16- and 17-year-olds
   c. The mandated use of RAIs has been the subject of controversy. Researchers have challenged their reliability, validity, and applicability. Aside from the questionable scientific validity of risk assessment, in the case of older teens there are additional concerns because they rely on static factors and immutable characteristics-like education, socioeconomic background, or neighborhood-and thus may exacerbate unwarranted and unjust disparities. See NACDL 2014 remarks of the US Attorney General.

10. Rap Sheet errors
    a. Neither bill holds the state responsible for fixing rap sheet errors, especially the failure to seal cases for which YO was granted.
    b. Neither bill holds reporting agencies responsible for disclosing information that was intended to be sealed from public view.

11. Videotaped interrogations
    a. Neither bill mandates videotaped interrogations for juveniles charged with felonies as the Governor’s Task Force recommended.
12. Detention
   a. Both bills provide too many exceptions (and exceptions to exceptions) to preventing pre-court detention.
   b. We recommend de novo review of bail and pre-trial detention decisions based on factors that were unknown at the time bail was set, things that occur in jail, and simply for kids whose family cannot afford to post bail. With a few days to prepare and contact family and friends, attorneys will be able to present a bail package, as is often done in Federal Court, and more young people will be released.

Important Principles in Current Proposals That Must Remain Included in Any Reform Legislation

1. Prohibit the detention of young people up to the age of 18 in adult jails and prisons
2. Fund the creation of new close to home facilities to house 16- and 17-year-olds
3. Provide for weekend arraignment for juveniles in adult courts when Family Court is not in session
4. Create and fund Family Support Centers for Persons In Need of Supervision (PINS), most specifically including respite centers that are very much needed for kids and families in crisis.
5. Eliminate all-or-nothing pre-trial detention.

Positive attributes about the Assembly one-house bill that should be preserved

1. Does not make Youthful Offender (YO) cases a predicate for future offenses.
2. Increases the number of Juvenile Offender (JO) eligible charges by 5 new crimes involving terrorism, as compared to the Governor’s proposed inclusion of 40+ new crimes.
3. Has shorter timelines for subsequent sealing of past crimes committed before the age of 20
   a. 1 year for a misdemeanor; 3 years for a non-JO felony; 5 years for a JO felony.
   b. Also allows for sealing of more than one offense if all offenses took place as part of the same criminal transaction.
4. Mandates adjustment for all misdemeanors and non-violent felonies, not limited to just “low-risk” youth, as measured by invalid Risk Assessment Instruments, as in the Governor’s bill.
5. Originates Juvenile Offender cases involving 13, 14, and 15-year-olds in Family Court, with the possibility of removal to adult courts. Puts the burden on prosecutors to prove that it is in the interest of justice not remove the case. (However, does not go far enough in that it does not provide the same opportunity for 16- and 17-year-olds).
6. Grants judges greater discretion in transferring cases from adult court to Family Court.
7. Does not increase prison sentences for JOs.
8. Vehicle and traffic laws (VTLs) are heard in Family Court as opposed to the Governor’s bill which retains those crimes in adult court.
9. Leaves intact indeterminate sentencing for juvenile offenders, which allows for juvenile facilities to determine release rather than reliance on parole.
10. Has better standard for preventing detention than Governor’s bill (e.g. exception for violent felonies, Governor’s bill makes exception for all felonies.).
11. Does not make exception for JO’s convicted of VTL-related offenses to stay in adult prison (the Governor’s bill seems to have such young people stay in adult facilities).
Positive attributes about the Governor's bill that should be preserved

1. Creates youth parts with cross-jurisdiction for judges which allows judges to remove a case to Family Court while retaining jurisdiction thus providing greater and flexible access to tools contained in both the adult and juvenile justice systems.
2. Mandates specialized training for youth part judges.
4. Prohibits the detention of PINS.
5. Doesn’t add a third violation – using a fake ID to buy alcohol – as prosecutable in Family Court as the Assembly bill does.