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**REPORT ON LEGISLATION**

**2015-16 NEW YORK STATE EXECUTIVE BUDGET A.3006 / S.2006 (PART J)  
EDUCATION, LABOR AND FAMILY ASSISTANCE ARTICLE VII LEGISLATION**

**RAISING THE AGE OF CRIMINAL RESPONSIBILITY**

The New York City Bar Association (the “City Bar”) **supports** the proposal for raising the age of criminal responsibility as contained in Part J of the 2015-2016 New York State Executive Budget (the “Proposal”).

In April 2014, Governor Cuomo appointed a Commission on Youth, Public Safety and Justice (the “Commission”) to make recommendations on how New York could raise the age of juvenile jurisdiction and make other reforms to improve youth outcomes while increasing community safety.<sup>1</sup> The Commission released an extensive Final Report in January 2015 containing 38 concrete recommendations (the “Commission Report”). The recommendations of the Commission—which was comprised of law enforcement, advocates and service providers—were unanimous. The majority of those recommendations are included in the Proposal.

The City Bar has previously expressed its support for raising the age of criminal responsibility.<sup>2</sup> Citing research supporting the view that adolescent brains do not develop full decision-making capacity until into the mid-20’s, we grounded our support in the following overarching concepts: that raising the age will reduce recidivism; that adult jails are dangerous for youth; that alternatives to incarceration are a more effective and cost-efficient way to reduce youth recidivism than detention and incarceration; that youth charged as adults face an array of collateral consequences that prevent them from moving forward with their lives; and that raising the age will help to reduce racial and ethnic disparities in our criminal justice system. This memorandum focuses on these concepts as they appear in the proposal.

The Commission Report and the Proposal represent a comprehensive approach to reforming the youth justice system. The recommendations came from a thorough study of best practices in New York and across the nation, including the lessons learned from jurisdictions that

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<sup>1</sup> Executive Order (A. Cuomo) No. 131.

<sup>2</sup> See Association of the Bar of the City of New York, Statement on Raising the Age (October 2014) *available at* <http://www2.nycbar.org/pdf/report/uploads/20072795-RaisingtheMinimumAgeTo18forCriminalResponsibility.pdf>.

have successfully raised the age in recent years. The City Bar applauds the work of the Commission and supports the Proposal. We urge its passage this session.<sup>3</sup>

## **A. SUMMARY OF MAJOR ELEMENTS OF THE PROPOSAL**

### **1. Age of Criminal Responsibility Raised**

The Proposal raises the age of juvenile jurisdiction to 18 years old, consistent with national norms. The Family Court would have original jurisdiction over most youth who were arrested—using current numbers, this would shift approximately 86% of the 16- and 17-year-olds cases to Family Court.<sup>4</sup> However, the Criminal Court would retain jurisdiction over youth charged with serious offense crimes and offense charged under the Vehicle and Traffic Law.<sup>5</sup> Specifically, the Criminal Court would retain original jurisdiction over:

- 13- to 15-year-olds charged with the current list of statutorily defined juvenile offenses.<sup>6</sup>
- 16- and 17-year-olds charged with an expanded list of juvenile offenses that includes all violent felony offenses.<sup>7</sup>
- 16- and 17-year-olds charged with Vehicle and Traffic Law offenses.<sup>8</sup>

To ensure there are sufficient planning and resources in place in the Family Court system, the change of juvenile jurisdiction would be phased in: youth under the age of 17 would move to the family court beginning January 1, 2017 and youth under the age of 18 would move January 1, 2018.<sup>9</sup> The Office of Court Administration has expressed its full support for the Governor’s proposal, and indicated that the Family Court is in a position to absorb the additional cases and that it is “the best court for these cases.”<sup>10</sup>

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<sup>3</sup> The Proposal does not go as far as what the City Bar recommended, in that we supported raising the age of criminal responsibility for *all* crimes. Nonetheless, we support the Proposal because we believe it represents a significant and achievable leap forward. We hope that the successful implementation of these reforms ultimately leads to further amendment of the law to include all crimes. In our opinion, the reasons for raising the age apply equally to all crimes and once a procedure is put in place, prosecutors and judges can weed out the cases that are exceptions.

<sup>4</sup> New York State Executive Budget 2015-16, Education, Labor, and Family Assistance (ELFA) Article VII Legislation, Part J (“Proposal”), §54; Commission Report at 64.

<sup>5</sup> New York State Executive Budget 2015-16, ELFA Article VII Legislation, Part J, §54.

<sup>6</sup> As defined by Criminal Procedure Law § 1.20(42) and Penal Law § 30.00.

<sup>7</sup> As defined by Penal Law 70.02(1).

<sup>8</sup> Proposal, §54.

<sup>9</sup> Proposal, §§54, 101.

<sup>10</sup> Jeff Story, *State Court System Back Cuomo Juvenile Justice Plan*, NYLJ, February 20, 2015.

Youth who are retained in adult court would have additional protections and receive age-appropriate treatment. First, when a 16- or 17-year-old is arrested, the police would be required to make reasonable efforts to contact a parent or other legally responsible adult.<sup>11</sup> Youth would also have to be questioned in a location deemed suitable for youth and a legally responsible adult must be notified of the youth's *Miranda* rights.<sup>12</sup>

The proposal also creates a new Youth Part in the superior court of every county that would hear the cases of 16- and 17-year-olds who remain in Criminal Court.<sup>13</sup> Youth Part judges would receive specialized training in adolescent development and research-based recidivism prevention. Youth Part judges would have expanded discretion to remove cases to Family Court, or to retain cases in the Youth Part but apply all of the provisions and protections of the Family Court Act, upon finding that it is in the interests of justice.<sup>14</sup> The Department of Probation will conduct a risk and needs assessment of all youth who are not detained, and provide referrals to appropriate evidence-based services.<sup>15</sup> Finally, all 13- to 17-year-olds would be sentenced under a new determinate sentencing scheme that would require a period post-release supervision.<sup>16</sup>

New provisions of law would apply to 16- and 17-year-olds whose cases originate in Family Court. As in adult court, judges would be able to set bail for these youth, which is otherwise unavailable to youth in Family Court.<sup>17</sup> Also, 16- and 17-year-olds could be charged in Family Court with disorderly conduct and harassment in the second degree, both violation-level offenses that youth can be charged with in adult court, but not Family Court, under the current system.<sup>18</sup>

The legislation also raises the lower jurisdiction of Family Court for juvenile delinquency petitions. Currently, children can be charged as juvenile delinquents at the age of 7. The legislation would raise that age to 12, except for children charged with Murder in the First and Second Degrees, for which the age would 10.<sup>19</sup>

## **2. Removal of All Youth from Adult Jails and Prisons**

The Proposal would ensure that no youth under the age of 18 are detained in adult jails, regardless of whether they are in Family or Criminal Court.<sup>20</sup> Youth adjudicated as Juvenile Offenders or Youthful Offenders in adult court will be held in Office of Children and Family

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<sup>11</sup> Proposal, §64.

<sup>12</sup> Id.

<sup>13</sup> Proposal, §80.

<sup>14</sup> Proposal, §§71, 80. Different standards for waiver would apply depending on the severity of the crime.

<sup>15</sup> Proposal, §80.

<sup>16</sup> Proposal, §§55, 57.

<sup>17</sup> Proposal, §14.

<sup>18</sup> Proposal, §4.

<sup>19</sup> Id.

<sup>20</sup> Proposal, §60.

Services’s (OCFS) custody if they are under 21-years-old at the time of sentencing and may remain in OCFS custody until the age of 23.<sup>21</sup> OCFS may transfer youth who turn 18 while in OCFS placement to Department of Corrections and Community Supervision (DOCCS) adult prisons if the commissioner certifies that there is not a substantial likelihood that the youth will benefit from OCFS programs.<sup>22</sup> In addition, the new facilities developed by OCFS in connection with raising the age will be smaller, more home-like facilities that follow a group-oriented system of change model.<sup>23</sup>

### **3. Diverting Youth from Courts and Placement**

Consistent with research showing that when low-risk youth are more deeply involved in the justice system they are more likely to reoffend, the legislation contains several provisions to increase diversion from courts and from detention and placement.

Youth in Family Court have long benefited from the adjustment process; after being summoned to court, youth meet with a juvenile probation officer who determines whether probation monitoring or referral to services is an appropriate alternative to being referred to the court for prosecution. The Proposal expands upon the success of the current system by mandating that probation “diligently attempt” to adjust violation and misdemeanor allegations.<sup>24</sup> It also mandates the use of validated risk assessments to inform adjustment, while mandating that probation consider the extent of physical injury to the complainant, where applicable.<sup>25</sup>

The Proposal gives probation departments more time and tools to facilitate adjustment. Instead of two months, with an additional two months upon court approval, the legislation would give probation departments an initial four month to make adjustment attempts.<sup>26</sup> It would allow probation officers to apply to the court for an order of protection as part of the terms of adjustment. It would also specifically allow for the use of juvenile review boards with community members for adjustment. The Proposal would expand the authority of probation departments to adjust designated felony charges unless there was physical injury to the complainant, and cases that have been removed from adult court, with the permission of the court.<sup>27</sup>

The Proposal addresses a major concern associated with moving more youth under juvenile jurisdiction: in New York City, 59% of detention admissions are for youth charged with misdemeanors,<sup>28</sup> 53% of youth placed in OCFS facilities were charged with misdemeanors,<sup>29</sup>

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<sup>21</sup> Proposal, §95.

<sup>22</sup> Proposal, §96.

<sup>23</sup> Proposal, §508.

<sup>24</sup> Proposal, §15.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> Commission Report at 96.

and it is believed that a significant number of youth are placed for technical violations of probation—violating the terms of conditions of probation other than committing a new offense.<sup>30</sup> To address this, the Proposal would prohibit detention and placement of low-risk youth charged with violations and most misdemeanor charges, unless the court finds that there is an imminent risk to public safety.<sup>31</sup> Similarly, courts could not detain or place youth for technical violations of probation where no new crime is alleged unless the youth poses a specific, imminent threat to public safety, or the youth is on probation for a violent felony and graduated sanctions have been exhausted.<sup>32</sup> Without seeking approval of the court, probation departments can use graduated sanctions, such as a more intense level of supervision, reprimands by department administrative officials, changes in service providers, and greater restrictions on movement.<sup>33</sup>

Finally, to reduce the overall number of youth in detention and placement and ease the burden on the juvenile system, thereby creating capacity to raise the age, the legislation reforms key parts of Persons In Need of Supervision (PINS) cases. A PINS is defined as a youth under the age of 18 who does not attend school as required, is incorrigible, is ungovernable, is habitually disobedient and is beyond the lawful control of a parent or other person legally responsible, violates the penal code regarding marijuana or prostitution, or appears to be a sexually exploited child.<sup>34</sup> Currently, these youth can be detained or placed in out-of-home facilities outside of their communities—a costly response that disrupts education, health and mental health care, but does little to strengthen family response. While some jurisdictions, including New York City, undertook reform of their PINS systems in the past ten years, across New York State there were 627 youth who were placed after adjudication as a PINS in 2013, with a median length of stay of 18 months.<sup>35</sup>

To address this, the Proposal would create Family Support Centers in the highest need areas of the state to ensure that youth and families who are struggling or in crisis are connected with the services they need.<sup>36</sup> The Family Support Centers, based on a promising model piloted

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<sup>29</sup> *Id.*

<sup>30</sup> Data collection about technical violations probation is inconsistent throughout New York State. However, the Office of Juvenile Justice and Delinquency Prevention estimates that, nationally, 16% of youth in out-of-home placements had a technical violation of probation listed as the most serious offense leading to placement. Commission Report at 97.

<sup>31</sup> Proposal, §§13, 18. The City Bar has previously expressed opposition to legislation that would have introduced a “public safety” component in connection with bail determinations in Criminal Court, where none now exists. In Family Court, the current standard is that a youth can be detained if there is a “serious risk that before the return the respondent will commit which if committed by an adult would constitute a crime.” N.Y. Family Court Act §320.5(3). Since the Proposal (i) makes no changes to how bail determinations are made in Criminal Court; (ii) limits the Family Court’s ability to detain low-risk youth charged with misdemeanor and violation offenses unless the court finds and makes a record that there is “an imminent risk to public safety”; (iii) permits bail to be set for 16- and 17-year-olds in Family Court; and (iv) allows greater opportunities for alternatives to detention for youth, on balance, we are supportive of this section of the Proposal.

<sup>32</sup> Proposal, §31.

<sup>33</sup> Commission Report at 98.

<sup>34</sup> Family Court Act §712(a). PINS are also widely known as “status offenders.”

<sup>35</sup> Commission Report at 100. Eighty-nine percent of PINS placements were youth outside of New York City. *Id.*

<sup>36</sup> Proposal, §50.

in Connecticut, would provide referrals for a broad range of family services and crises responses, including counseling, mediation, mental health, and respite care.<sup>37</sup> The Proposal would simultaneously prohibit detention and placement of youth who are the subject of a PINS petition.<sup>38</sup> Importantly, the lead PINS agency (either the local social services district or the probation department) would be required to assess all youth for sexual exploitation, and the Proposal would leave open the option of placement in a long-term safe house for youth who are exploited.<sup>39</sup>

#### **4. Facilitating Reentry**

Two important pieces of the Proposal will create more opportunities for older youth and those with youthful convictions to move forward to positive lives. Consistent with current understanding of adolescent neurobiology, important parts of the human brain continue to develop until the mid-20's. Specifically, the frontal lobe, often called the “executive decision-making center” is the last part of the brain to develop. Yet, it is this part of the brain that governs self-regulation, weighing of long-term consequences, and sensitivity to peer influence and immediate reward.<sup>40</sup> As a first step toward incorporating this understanding into the justice system, the Proposal expands the eligibility for a youthful offender adjudication—which replaces convictions and makes the court records confidential—to youth under age 21.<sup>41</sup>

The Proposal also provides that the court records for all youth who are eligible for a youthful offender adjudication (except those charged with sex offenses) will be confidential while the case is pending and that the proceedings can be held confidentially upon request.<sup>42</sup> This ensures that if a young person is eventually granted a youthful offender adjudication, the full effect and intention are not thwarted because the information has been obtained previously by online “mugshots” websites, background check companies, or other publicly available sources.

The Proposal also creates two new sealing mechanisms. Any youth under the age of 21 who is convicted as an adult will have the ability to have their cases conditionally sealed after remaining conviction-free for a specified number of years.<sup>43</sup> The sealing will be automatic

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<sup>37</sup> Commission Report at 103.

<sup>38</sup> Proposal, §34.

<sup>39</sup> Proposal, §38

<sup>40</sup> Commission Report at 17.

<sup>41</sup> Proposal, §77. The City Bar has long supported allowing youthful offender adjudication for youth under the age of 21. See Association of the Bar of the City of New York, Report on A.1794/S.6524 which would amend the criminal procedure law to increase the age of eligibility for youthful offender status to age 21 (reissued February 2014), available at <http://www2.nycbar.org/pdf/report/uploads/20072410-IncreasingtheAgeofYouthOffenderStatus.pdf>.

<sup>42</sup> Proposal, §78; See Penal Law Article 720.

<sup>43</sup> Proposal, §67. Two years for a misdemeanor, 5 years for a non-violent felony, and 10 years for a juvenile offense or violent felony. The applicant can have no pending cases.

unless the District Attorney requests at the time of sentencing that any future sealing application be made on notice and to the sentencing court.<sup>44</sup>

Any person with a past conviction that occurred before the age of 21 and prior to the effective date of the legislation will be able to apply to the sentencing court to have the conviction sealed after remaining conviction-free for the same time periods as above. Upon applying, the court will provide notice to the District Attorney's office and determine whether the sealing criteria have been met and whether a preponderance of the evidence shows that sealing is in the interests of justice.<sup>45</sup>

In both cases, the sealing is conditional; it will be revoked upon a new arrest. However, if the new arrest does not result in a criminal conviction, the sealing will be restored. In addition, courts and criminal justice and law enforcement agencies, will still have access to sealed information for law enforcement purposes, as will gun licensing agencies.<sup>46</sup>

## **5. Raise the Age Costs Borne by State**

The State has committed to bearing the costs associated with raising the age of juvenile jurisdiction. The Proposal provides for reimbursement to localities for 100 percent of the costs associated with probation services, preventative services, aftercare services, independent living services, foster care services, and close-to-home initiatives provided to 16- and 17-year-olds pursuant to raising the age.<sup>47</sup> The budget also allocates \$25 million to plan, create, and expand services for raising the age and \$110 million for capital expenditures to create new facilities.<sup>48</sup>

## **B. FUTURE CONSIDERATIONS**

The City Bar believes the reasons for raising the age for the crimes identified in the Proposal are equally applicable to all crimes. We hope that after the Proposal is fully implemented and demonstrating success, the Legislature will see fit to amend the law so that it includes all crimes. Systems can be put in place to make sure that all youth crimes are dealt with appropriately, both in terms of jurisdiction and sentencing.

In addition, the Commission on Youth, Public Safety and Justice recommended videotaping interrogations of 16- and 17-year-olds charged with felonies; this recommendation

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<sup>44</sup> Id.

<sup>45</sup> Id.

<sup>46</sup> Id. Although the City Bar supports the Proposal's sealing provisions as applied to youth under the age of 21 or where convictions occurred before the age of 21, we take no position on whether such sealing provisions should be extended to adults or to circumstances beyond those contemplated by the Proposal. Moreover, some committee members expressed serious concerns about the provision allowing a violent felony youthful offender adjudication for anyone 16 or over to be used as a predicate in sentencing for subsequent violent felony charging and sentencing, especially given the City Bar's long history of supporting the purposes behind youthful offender adjudication and sealing of records.

<sup>47</sup> Proposal, §§48, 52, 97.

<sup>48</sup> New York State Executive Budget 2015-16, Capital Projects Budget, at 245.

was not included in the Proposal. The City Bar supports videotaping interrogations in all felony cases because “Electronic recording of custodial interrogations not only protects the innocent by guarding against false confessions, but increases the likelihood of conviction of guilty persons by developing the strongest and most reliable evidence possible.”<sup>49</sup> Youth are more vulnerable to false confessions; thus the need for protection is greater.<sup>50</sup> The failure to incorporate this important recommendation is a missed opportunity.

Finally, after raising the age of juvenile jurisdiction is implemented, the impact of using bail in Family Court should be studied, including a comparison of detention rates of younger youth and the impact of a bail option on release decisions. The City Bar also believes that for youth remaining in the Criminal Court, release decisions should be based on a risk assessment instrument that is validated for a youth population, and 16- and 17-year-olds should be exempted from court fees and surcharges that are currently imposed upon sentence in Criminal Court.

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<sup>49</sup> See Association of the Bar of the City of New York, Report on Legislation A.4721/S.1267 (reissued February 2013), available at <http://www.nycbar.org/pdf/report/uploads/20071964-CommentonElectronicRecordingofInterrogations.pdf>.

<sup>50</sup> See, e.g., Jan Hoffman, *In Interrogations, Teenagers are Too Young to Know Better*, NY Times, October 13, 2014, available at <http://well.blogs.nytimes.com/2014/10/13/in-interrogations-teenagers-are-too-young-to-know-better/>.