

‘Establishment of the Children’s Court – Then and 100 years on’

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Introduction

The purpose of this paper is to examine the factors that led to the establishment in 1905 of Children’s Courts in New South Wales (NSW) and their developments since - principally as this has affected children who have committed crimes.

When NSW as a colony inherited the criminal laws of England, there was no distinction made between adult and juvenile offenders regarding their criminal responsibility, the courts in which they were tried and available punishments. The minimum age of criminal responsibility was 7 years (with a rebuttable presumption that a child below 14 lacked the capacity to distinguish right from wrong).

The period that preceded the introduction of Children’s Courts can be characterised as one of considerable social disruption. Although transportation had long ceased, there was a high influx of immigrants (including unattached youths). New families were often without the more traditional supports such as grandparents and other extended family. Sickness and mothers dying in childbirth orphaned many children. Deserted mothers (without resort to social security) had difficulty in financially supporting their children. Although the problem of destitute children was not as great as in England (certainly in terms of numbers) it was of sufficient concern to be raised publicly from the 1850’s onwards. A Bill was presented to the Legislative Council in 1852 “for the relief of destitute children and the prevention of juvenile delinquency” but after referral to a select committee the proposal did not advance.

The problem of destitute children

In February 1852 a committee resolved to establish an asylum for destitute and abandoned children. After a generous public response the **Society for Destitute Children** opened an asylum at Ormond House, Paddington on 1 June 1852. A transfer occurred to new imposing buildings erected on a grant of 60 acres of land at Randwick on 29 March 1858 (now the site of Prince of Wales Hospital).¹ Compulsory education had been introduced in the 1880s. While fees were minimal (3d per child

¹ Doyle (1991)

per week up to one shilling per family) a reflection of the level of poverty in the community was that many families were unable to meet this modest amount.

Despite generous public supports for measures such as the Children's Asylum, there still existed a strong resistance against a notion that parents be able to "offload" the responsibility for the care and education of their children onto the State (and retrieve them when they were old enough to be "useful"). It was only at a late stage that the state become willing to play any role in providing for neglected and deserted children having left this to charitable organisation and churches.² The number of children who passed through such charitable institutions then was approximately ten times greater (on a population basis) than children now in out of home care.

A largely successful scheme was introduced in the 1880s allowing for the boarding out of many younger children. For the older boys (13 years upwards) apprenticeships were used extensively. Girls were prepared for domestic service. As well as apprenticeships there were established **Industrial Schools**. Perhaps in the "English" tradition, training ships (the "Vernon" 1867 replaced in 1891 by the "Sobraon") were used to accommodate young offenders along with the "deserted" youths for whom they were originally intended.³

The predominant community view of young minor offenders favoured rehabilitation. Vulnerable young child offenders (at least minor offenders) were viewed as not being inherently bad but rather at risk of being drawn into a life of crime as a consequence of poor parenting, idle time, bad influences and lack of "industrious" opportunity. Similar concerns were held for the "destitute/unemployed" (non-offender) group who were seen as providing a pool from which the criminal element could draw future recruits. A common "child saving" objective, largely "blurred" the way in which authorities responded to "welfare" and "criminal" children and the model adopted to deal with the former came to be used for both groups.

Child offenders/deserted children – a "blurred" response

The traditional criminal justice response (imprisonment) and its perceived harshness operated against its effectiveness. Minor crimes committed by young children were either not prosecuted at all, or when brought before the court, some magistrates tried in individual cases to divert offenders away from a sentence of imprisonment. What seems to have been a fairly extensive use of (non criminal) vagrancy type laws, further "blurred" the distinction between "criminal justice" and "welfare" groups of

² Blackmore (1995)

³ Blackmore (1995), notes that between 1867 and 1911, 5923 boys were sent to these two training ships

children and this became particularly so when the state set up its own systems of institutional care.

“The new institutional system initially required a clear distinction to be made between offenders and non-offenders, but the distinction was rapidly blurred...An appreciation of this fact is vital to an understanding of the development of methods of dealing with young offenders. Historically, it was concern about the destitute and neglected which first expressed itself. When the problem of juvenile offending was addressed, the methods employed for non-offenders provided the model.”⁴

The Bench of magistrates as early as 1863 had called for the establishment of a juvenile reformatory complaining of magistrates being forced to commit young offenders to a common jail which led, in turn, to an unwillingness to prosecute.⁵ Three private reform Bills introduced between 1863-65 failed. Important legislation was however passed in 1866.

In 1866 provision was made (**Industrial Schools Act**, 30 Vict.No.2) for the establishment of public industrial schools.⁶ Industrial schools were not intended specifically for convicted offenders. Any child under the age of 16 if “found lodging living residing or wandering about in company with reputed thieves or with persons who had no visible lawful means of support or with common prostitutes whether such reputed thieves persons or prostitutes be the parents or guardians of such child or not or who shall have no visible lawful means of support or who shall have no fixed place of abode or who shall be found begging about any street highway court passage or other public place or who shall be found habitually wandering or loitering about the streets highways or public places in no ostensible lawful occupation or who shall be found sleeping in the open air” could be brought before a court (s.4). The court could then commit the child until 18 years of age to the custody and control of the Superintendent of a public industrial school. The superintendent had authority to discharge or apprentice the child.

The **Reformatory Schools Act** of the same year (30 Vict.No.4) provided for the establishment of reformatory schools (which could include a ship or vessel) along the lines of English legislation. Reformatory Schools were intended for convicted offenders however, no reformatory school was established for another 29 years (1895) ostensibly because there were insufficient youths to justify it.⁷

⁴ Seymour at page 65

⁵ Dickey (1968) at page 146

⁶ Although there was also provision for private industrial schools, none were ever certified.

⁷ Seymour at page 63

Such blurring of a distinction between the “criminal justice” and “welfare” groups, culminated in the 1905 legislation whereby minor offenders, delinquents, neglected (and a new category of “uncontrollable”) children could be accommodated together in institutions and for indeterminate periods.⁸

Harshness of the criminal law on children – a move towards reform

Retreating a little in time back from 1905, a major obstacle to the effective disposal of charges against juvenile offenders was that even minor dishonesty offences remained as felonies tried before a jury. Delays were often lengthy with the child in custody and in prison. A major advance (though perhaps not seen so at the time) occurred in 1850 (Act 14 Vict No.2) when it was provided that minor larceny charges committed by offenders under the age of 14 years to be heard summarily (with a lower maximum penalty). The object of the Act was to reduce the corrupting influence upon the child by older offenders while the child awaited trial. (Similar provisions soon followed enabling the summary trial of charges against older youths and adults).

“The significance of the 1850 Act lay in the fact that it paved the way for the development of children’s courts. The first step towards the creation of these courts was an acceptance of the notion that simple, speedy court procedures were appropriate for children...When in the 20th century, legislation creating children’s courts was enacted, these were not completely new courts; rather, they were modified court of summary jurisdiction exercising special powers. They were thus a logical development of the reforms introduced in 1850”⁹

Child offenders – victims to be saved or larrikins to be reformed?

The reforms culminating in the 1905 legislation are sometimes referred as being part of a “**child saving**” movement that proposed a “welfare” response to the problem of juvenile crime.

“According to the welfare approach, the young person before the law is deemed to be a needy individual, requiring “saving” not punishment. Criminality in the young person is a symptom of social or psychological pathology and so the task of the criminal justice system is to treat the particular needs of the child, not to focus on his or her criminal culpability. Thus the court is perceived as a benign and benevolent

⁸ Blackmore (1995)

⁹ Seymour at page 27

institution whose decisions are guided by considerations of how best to reform and rehabilitate and young person – whatever the degree of intervention required – rather than punish according to strict tariff principles”.¹⁰

The creation of Children’s Court could be seen as the outcome of a public desire for a more speedy and humane means of delivering justice for the young. There was also a strong concern that the existing criminal justice model through its ineffectiveness was putting at risk the broader public interest. The perceived harshness of the law led to a reluctance by victims to report offences committed by young children to police, a reluctance of police and Crown authorities to prosecute, and a reluctance of magistrates to commit for trial and juries to convict.

“**Larrikinism** was anxiously debated in the press and parliament” ... “witness after witness told the Intoxicated Drink Commission¹¹ that the colony’s future was in jeopardy because parents were failing to discipline their children....The larrikin debate can thus be seen as parental unease writ large and some commentators began to argue for a special children’s jurisdiction in which magistrates might provide the necessary discipline.”¹²

Yet, where the criminal law was applied the penalties could be harsh indeed. **Blackmore** (1995) cites the case of a boy who “directed a well-aimed rotten apple at the silk hat of a member of the passing gentry. The distinguished citizen was none other than a notable judge, and within a week the 12 year old found himself on board the *Sobraon* for a 6 year stint.”

Numbers imprisoned in NSW are a little obscure. In 1859, 130 boys and 25 girls under 15 years of age were gaoled.¹³ In 1907 it was reported there were 29 children under 16 in prison.¹⁴

In the debate on the **Neglected Children and Young Offenders Bill**, the New South Wales Attorney-General Wade spoke of the “absolute farce and degradation” of a trial by jury in such cases and suggested it was in the children’s interests for the authorities to decline to prosecute rather than to expose children to jury trials and the risk of imprisonment.¹⁵

¹⁰ Naffine (1990) at pages 192-193

¹¹ 1887-1888

¹² Golder at pages 104-105

¹³ Schrivener at page 37

¹⁴ Quinn (2002) at page 132, footnote 14

¹⁵ Seymour at page 70

Reforms elsewhere

Overseas saw developments towards the creation of separate courts and new procedures to deal with juvenile offenders e.g. Juvenile Court Act 1899 in Illinois.¹⁶ The Attorney-General in the second reading of the 1905 NSW Bill in the Assembly read from an article on the success of separate courts in New York dealing with juvenile cases stating – “This children’s court, although not in detail the same, embodies exactly the same principles as the American children’s court.”¹⁷

In England provision was made in 1854 for the establishment of private reformatories (Better Care and Reformation of Youthful Offenders Act (17 & 18 Vic c.86). Under this Act children convicted of criminal offences and sentenced to imprisonment for at least 14 days could on the expiry of such sentence, be sent to for periods of 2 to 5 years to a reformatory.¹⁸ The Children Act 1908 ensured that juvenile delinquents had special attention in Juvenile Courts.

Reforms occurred in the other States (Victoria 1906; Queensland 1907; W.A 1907; Tasmania 1918).

Establishment of Industrial Schools

The ship “Vernon” was purchased in 1867 and proclaimed an industrial school in that year. A girls’ industrial school was established in Newcastle in the same year. “The Vernon seemed to flourish, but the girls’ school was dogged by a series of spectacular riots”¹⁹ That sorry picture concerning the industrial schools for girls in Newcastle came to be largely repeated at schools at Cockatoo Island and Parramatta.

As no reformatory was in fact established (by 1873 the Act being described as a ‘dead letter’) and because of falling numbers, Magistrates were increasingly willing to seek out ways of committing those “much in need of reformation” to the industrial schools rather than imprison them. However, despite the apparent success of maritime industrial schools (together with apprenticeships) for boys, the experience with industrial schools at Newcastle and Cockatoo Island was to bring into question the benefits of institutional care.

¹⁶ “Criminology” Sykes (1978) at page 445

¹⁷ Hansard, 5 July 1905 at pages 611-612

¹⁸ Dickey (1968) at page 135

¹⁹ Dickey (1968) at page 147

Industrial Schools were intended to receive 'neglected children' rather than juvenile offenders. Their obviously commendable purpose coupled with the very bad reputations of the alternative (prison), motivated police and magistrates to use them to advantage in addressing problems of child crime. In the early period after the establishment of Industrial Schools, children seemed to have been received for reasons consistent with that purpose. However, quite soon thereafter the reasons for reception to Industrial Schools altered. By use of a legal device whereby an application to commit to an Industrial School was swapped for a criminal charge or parents were coerced into bring such application themselves, such Industrial Schools came to receive juvenile offenders.

"In the absence of suitable alternatives to gaols, police and magistrates sought ways to use the Industrial School Act to deal with delinquents. They also sought ways to use the Act to assist in the control of prostitution.....

Immediately after the gazetting of the Vernon, city police began to apply the Act as it was originally intended – to clear the streets of vagrants. Many of the boys who were arrested in the first years had no parents, or their ties with families had been broken for some considerable time....At least fourteen boys had both parents dead. For another five boys the sole remaining parent had been admitted to the infirmary or an asylum.....Fewer girls were arrested for 'neglect', and the pattern of arrests was distinctly different. Omitting those girls charged with prostitution-related offences, there were eleven girls under fourteen whose 'neglect' could be classified as 'abuse'- three had been abandoned, three were 'turned out' of home, two were 'nearly naked and half starved' and three had been physically abused."²⁰

In cases of poverty, some parents would appear to have sought the help of police to have their children charged with having 'no means of support'. There were also cases where parents had sought such assistance in order to get help for a child with a mental or intellectual disability.

As the attention of the police turned to using the Act as a device ('charge altering') to control criminal activity the picture became more sinister.

"Police efforts to control juvenile delinquency are represented by a large group against whom charges under the Industrial Schools Act were often ostensibly laid by a parent but which were actually initiated by the police...because the gaols had a horrendous reputation, many magistrates were unwilling to commit minor offenders

²⁰ Shrivener at page 25

to them. The knowledge that they were unlikely to obtain a committal made the police unwilling to prosecute delinquents. After the passing of the Industrial Schools Act some police preferred charges of wandering 'in no ostensible legal occupation' against boys whom they suspect of stealing. A number of parents expressed very strong opposition and magistrates appear to have been reluctant to commit a boy if his parents objected. Police sought ways to force parents either to consent to charges or, preferably, to lay charges themselves.

While there is no record of any of the interviews between police and parents, it is obvious in many cases from the way in which the charges were handled in court that an agreement had been reached that police would not press a charge for which a boy could have been gaoled, if parents themselves laid a charge under the Industrial Schools Act" (the case is cited of Michael aged twelve, who had been found drunk in Dixon Street, was discharged on that charge and his mother laid a charge that he was 'wandering with thieves').

In many cases the magistrates themselves simply dismissed the original charge and ordered either parent or police to prefer a charge under the Industrial Schools Act."²¹

"In cases where the original charge was stealing or similar, it is quite clear that most parents simply bowed to police pressure and agreed either to lay charges themselves or to support police charges in order to avoid a possible goal sentence for their son."²²

A similar picture emerges regarding police control of young prostitutes. Where a parent or relative had initiated the proceedings again it appeared that arrested were initiated by police and parents "coerced into laying charges" as an alternative to criminal charges that made the child liable to a gaol sentence.²³

The use of the Act also had an less fortunate outcome for one 15²⁴ year old girl "who sought police assistance against sexual overtures of her mother's ex-partner, found herself in the industrial school on a charge of having 'no means of support'.²⁵

In 1881 the **State Children Relief Board** was established. Its primary function was to cause children in institutions to be boarded out. In this regard it was extremely

²¹ Shrivener at page 26

²² Shrivener at page 27

²³ Shrivener at page 28

²⁴ The age of consent stood at 14 years and was not increased to 16 years until 1910.

²⁵ Shrivener at page 31

successful. “By 1886 the State Children Relief Board had completed the task of emptying the two orphanages and had boarded out all State-supported children from the Randwick Asylum as well as all children under eleven from the industrial schools”²⁶ The use of “altered charges” appears to have continued after the establishment of the Board.

“After 1890 the pattern of admissions to both the Vernon and the Industrial School for girls altered significantly..”²⁷ As the former had a good reputation, parents were more willing to co-operate than for the latter. As younger children now came under the control of the State Children Relief Board and could be boarded out, the institutions were now holding an older more delinquent group and magistrates became less willing to commit neglected children and so an “adjusted charge” no longer assured police of a committal.

“Police counter to the diffidence of the magistrates was to seek, and obtain, a clause in the Children’s Protection Bill (1892) which enabled a magistrate to commit children under fourteen to an industrial school ‘for any offence’. This eliminated the need for an adjusted charge and hence for parental co-operation, but magistrates still hesitated to commit boys for a first offence....”²⁸ An additional “lever” that could be used to encourage parents to initiate proceedings for committal was that under the Public Instructions Act 1880 a parent could be prosecuted if the parent failed to cause a child to go to school.

While the manipulation of the law may be deplored, the fact is that committal to an industrial school was a much preferred alternative to prison and that while prostitution was not in itself a crime, the young age of the girls involved (and many were found on examination to be suffering from untreated venereal disease) was increasingly becoming a matter of concern.

Children’s Courts Established in 1905

The aim of the **Neglected Children and Juvenile Offenders Act 1905** was described as follows –

“The Act defined the powers of the Children’s Court, and provided that children who were neglected and uncontrollable, juvenile offenders, or charged with indictable offences, could all be dealt with by it... The courts were also given general discretion

²⁶ Shrivener at page 32

²⁷ Shrivener at page 33

²⁸ Shrivener at pages 33-34

as to the institutions, including the State Children's Relief Board, to which they sent the children....The courts were to be as discreet and private as possible, and in every way possible avoid the stigma of police courts and petty sessions. The scheme was one, not of moral condemnation and punishment, but of reformation and protection.²⁹

There had been an earlier reference to "Children's Courts" in the Infants Protection Act of 1904 (as **Blackmore** points out this was confined to a heading to Part IV of the Act) but while noting that such court would be presided over by a magistrate there was no machinery for the establishment of such courts. That Act only dealt with affiliation proceedings.

The purpose of the 1905 Act is set out in its long title –

"An Act to make better provision for the protection, control, education, maintenance, and reformation of neglected and uncontrollable children and juvenile offenders; to provide for the establishment and control of institutions and for contribution by near relatives towards the support of children in institutions; to constitute children's courts and to provide for appeals from such court..."

I turn now briefly to some of the main provisions.

Children's Courts may be established by the Governor by proclamation (s.9) and to be **presided over by a "special magistrate"**. Such courts are, where practicable, not to be held in ordinary courts (s.12) and to **exclude the public** (s.13).

The Act applied to **children over 5 and under 16** (those under 5 apparently had to arrange for their own protection). It provided for the hearing both of welfare and criminal matters. There was a broad range of categories that would bring a child within the definition of a "**neglected child**" (e.g. those with no visible means of support; ill treated – provided such results or appears likely to result in permanent or serious injury; who take part in dangerous public exhibitions or performances; females who solicit men; are in places where opium is smoked or are living under conditions that indicate they are lapsing into a career of vice and crime).

²⁹ Dickey (1977) at pages 171-172

Where a child was before a court (either in a care or criminal matter) if the parent was not before the court the attendance of the parent could be secured (if necessary by warrant). Both child and parent had an opportunity to call evidence.

Whether the child was found to be neglected, uncontrollable or an offender the core outcomes were the same. The child could be (a) released on probation (with conditions); (b) committed to an asylum or to the care of a person willing to undertake such case; (c) committed to an institution. Additionally a child convicted of a summary offence could be dealt with according to law (reasons were to be furnished to the Minister). In respect of an indictable offence (except homicide or rape) the child could also be committed for trial. If committed for trial a novel provision enabled a trial to be avoided. If the Attorney-General had entered a nolle prosequi, the Minister could (with the consent of the child or parent or if evidence on behalf of the child had been given at the committal) commit the child to an institution.³⁰

In the case of a crime, if the court was satisfied that the parent had contributed to the commission of the offence by wilful default or by habitually neglecting to exercise due care of the child, the court may order the parent to pay any penalty, damages or costs and also give security for the future good behaviour of the child.³¹

An order of committal to an institution was made in general terms (ie under 18 but subject to early discharge by the Governor or being apprenticed). The court could recommend in which institution the period was to be served.

The position of Special Magistrate

The court was to be presided over by a “Special Magistrate” who was envisaged as a person having a special understanding of and sympathy for children and should not be constrained by tariff principles when the time came to pass sentence – one who combined the willingness to display leniency with an ability to recognise cases in which corrective measures were needed.³² A Special Magistrate should devote himself to the jurisdiction both for the sake of consistency in the disposal of cases and also that the magistrate “may gain those valuable qualities which experience alone can give.”³³

³⁰ Section 26(2)

³¹ Section 25

³² Seymour at page 72

³³ See Seymour at page 73 citing the NSW Attorney-General during the Parliamentary Debate in 1902.

“The new Children’s Courts were to have “somewhat of a parental, informal character rather than the severity, formality and possible terrorism of the ordinary courts of the land”³⁴

The Bill received bipartisan support and was carried on the second reading in the Legislative Assembly by 52 votes to 3.

³⁴ Golder at page 127

Children's Courts Proclaimed

The 1905 Act was assented to on 26 September 1905 and came into operation on 1 October 1905. Children's courts were proclaimed on 29 September 1905 at Sydney, Newcastle, Parramatta, Burwood and Broken Hill.³⁵

The Children's court commenced sitting at Ormond House, Paddington in October 1905. Two "Special Magistrates" were appointed from the ranks of existing magistrates.

The make up and numbers of cases is interesting. "In the first two months of operation, fifty-five cases of neglected or uncontrollable children, 213 juvenile offenders and sixty-four indictable offences were dealt with, as well as seventy-five affiliation cases, twelve cases of assault against children and four of neglect"³⁶

Probation proved to be the cornerstone of non-custodial option. The Court had the assistance of honorary probation officers. The existence of the special court for juvenile offenders ironically led to an increase in the number of prosecutions but the new sentences available, especially probation is given as a reason for a decline in the number of those being committed to an institution.

Early tensions

The administrative arrangements gave rise to tensions. Child welfare had been the responsibility of a semi-autonomous part-time State Children's Relief Board. In 1905 it was sought to bring the Board within the parameters of the relevant department and Minister - the Department of Public Instruction. Magistrates were required to give reasons when dealing with a child according to law and such decisions could be overturned by the Minister. Magistrates complained that their informed decisions were being reviewed by clerks in the Department who could persuade the Minister to overturn them. In 1909 the President of the Board and Under-Secretary of the Department fixed 'guidelines' for the classification and destination of children coming before the court. A magistrate complained that he was losing his freedom to choose between the sentencing/treatment options outlined in the Act.³⁷

The **Ormond House**³⁸ premises were overcrowded and unsatisfactory. The court in 1911 moved to new premises in **Albion Street Sydney** (that came to be known as the "Metropolitan Children's Court"). This also housed the "Metropolitan Shelter for Boys". Female detainees continued at Ormond House until 1923 when the "Metropolitan Girl's Shelter" was opened at Glebe.³⁹ As at 1920 there were still only two Special Magistrates.⁴⁰

³⁵ 1 Petty Sessions Review at page 177.

³⁶ Dickey (1977) at page 172

³⁷ Golder at page 129

³⁸ Ormond House has since reverted to its original name of 'Juniper House'

³⁹ Blackmore

⁴⁰ Golder at page 136

Institutions “come ashore”

The “Sobroan” (and a boys reformatory at Eastwood) were replaced in 1912 by the State Farm near Gosford.⁴¹

At least one other industrial school had been established at Brush Farm in 1894 to “accommodate the more ‘vicious’ young offenders, some of whom would previously have been sent to gaol.”⁴²

However, from 1914 boys aged between 16 and 18 (who were not eligible to be in an institutional centre) who had been sent to prison, were transferred to Gosford by a legal device of early release from prison on licence with a condition the balance of such sentence was to be served at Gosford.⁴³ This “experiment” had apparently ceased by 1920.

In 1899 part of Darlinghurst Gaol was converted into a separate prison for young offenders. At an earlier stage it appears that young offenders were housed in the female section of Darlinghurst Gaol. In 1915 Emu Plains prison farm received those aged 16 to 25.

The Child Welfare Act 1923

The Child Welfare Act 1923 repealed the Children’s Protection Act 1902 No.47 and the 1905 Act. It sought to address the longstanding difficulties between the State Children’s Relief Board, the Department and the Minister by dissolving the Board and vesting its powers in the Minister and establishing a new agency – the Child Welfare Department.

The criminal jurisdiction of the Children’s Court was extended from 16 to 18 years of age (perhaps a measure of public confidence in the performance of the courts). All children who had been received in an asylum or institution, apprenticed or boarded-out under the Act were to be thereafter referred to by the generic title of “ward”. The definition of a neglected child was widened to incorporate a new category of a child “being in the opinion of the court under incompetent or improper guardianship”. Otherwise the powers and procedures of the court remained largely unaltered.

The depression brought with it its own financial and social pressures. “(T)he depression also reduced the state’s capacity to supervise the families of children at risk or to find ‘ some person willing to undertake’ their care.”⁴⁴ A 1934 review of the administration of the Child Welfare Department raised concerns that probation (the success of which was attributed as a reason for a fall in the number of those in detention) was becoming a farce, due to the number of paid officers being cut while a system of honorary probation officers had broken down.⁴⁵

⁴¹ Dickey (1977) at page 180

⁴² Quinn at page 120

⁴³ Quinn at page 121

⁴⁴ Golder at page 150

⁴⁵ Golder at page 150

The Child Welfare Act 1939

This substantially re-enacted the earlier legislation with some modifications. The minimum age of criminal responsibility was raised from 7 to 8 years of age. The Sydney Children's Court was constituted as a court of review. The purpose was to enable a review of committal orders where children sentenced in country courts had been transferred to Sydney and were subjected to a physical and psychological examination. Such examination may well disclose some important new information concerning the child. The review was also a response to a concern that committal orders were being overused by country magistrates. Such criticism may not have fully appreciated the limited options and resources available in country locations. A review enabled an order to be rectified much quicker than an appeal to the District Court (and a child who would invariably have no legal representation may well not pursue such an appeal).

Movement towards reform

The law remained relatively static for the next 30 years but the forces for change were building up. In the field of child protection, watershed research (1962) and the coining of the emotive term the "**battered baby**" was to change the whole focus from the rebellious or neglected young adolescent to babies and toddlers. In 1977 an amendment provided additional protection to child offenders while being interviewed in police stations. 1979 being the International Year of the Child heightened public awareness of children's issues generally. The Australian Law Reform Commission issued a report in 1981 on "Child Welfare".

In 1975 the Law Society of New South Wales created a scheme for legal representation for children of rostered private practitioners. In 1979 it was taken over by the Legal Aid Commission. Since that time most children before the Children's Court have been legally represented with the cost being met by the State.

One reform intervening during this period raised the minimum age of criminal responsibility from 8 to 10 years in 1977.

A **Green Paper** issued in 1978 (the "**Jackson**" report) opens with this comment – "It has been recognised for a number of years by all political parties that State laws relating to child and community welfare are in need of thorough revision." A review of the proposals in the green paper and further submissions led to a failed **Community Welfare Bill 1981**. The **Community Welfare Act 1982** (substantially in the same terms) was passed but only minimal provisions were proclaimed to commence. Already substantial amendments were proposed to that largely unproclaimed Act and by mid 1986 the project had stalled. The experience of these earlier cumbersome proposals led to reforms being introduced in a package of Bills in 1987. The enactments included the Children's Court Act 1987, the Children (Criminal Proceedings) Act 1987, the Children (Community Service Orders) Act 1987 and the Children (Detention Centres) Act 1987.

In 1980 the position of Senior Special Magistrate was created.

In 1982 the Local Court Act had the consequence of removing the former system of gradings whereby Special Magistrates were on a lower grade to magistrates presiding on the general bench in the Metropolitan area.

On the 29th April 1983 the Metropolitan Children's Court at Albion Street (long criticised for its overcrowding, poor location and facilities) closed with the construction of Bidura Children's Court. The Bidura Remand and Assessment Centre (that was intended to hold in custody on remand male offenders formerly at Albion Street) proved to be totally unsuitable, providing little barrier to the many escapees. It now only holds in custody those appearing in court that day.

The Children's Court Act 1987

The Act constitutes the **Children's Court of New South Wales** and is composed by such Children's Magistrates as the Chief Magistrate may from time to time appoint. The appointee must be a Magistrate and have "in the opinion of the Chief Magistrate, such knowledge, qualifications, skills and experience in the law and the social or behavioural sciences, and in dealing with children and young people and their families, as the Chief Magistrate considers necessary to enable the person to exercise the functions of a Children's Magistrate."⁴⁶ The court has such jurisdiction as is conferred upon it by this or other legislation.

The Act set out the functions of the Senior Children's Magistrate⁴⁷ which included a requirement to convene a meeting of Children's Magistrates at least once every 6 months, confer regularly with community groups and social agencies and report to the Attorney-General on the activities of the court. The Governor may make Rules for the administration of the Act and the Rule in turn provided for the giving of practice directions.

Children (Criminal Proceedings) Act 1987

Under these reforms while the basic structure of criminal responsibility, procedures relating to admissions, committal for trial and sentencing options remained substantially unaltered, the "welfare" model had lost favour. What was proposed was very much, what may be called a "back to justice" model.⁴⁸ Under such a model the powers of the State were to be constrained (without regard to the welfare of the child). "Accordingly, children should be afforded full due process of law and if found guilty of a crime, should be punished neither more nor less than was warranted...What was needed...was a greater focus on the crime, not the child, and more effective constraints on the powers of the court."⁴⁹

This approach had been foreshadowed in the Bail Act 1978.

⁴⁶ Section 7(2)

⁴⁷ Section 16

⁴⁸ Gale at page 7

⁴⁹ Gale at page 7

The Bail Act 1978

Under the Child Welfare Act 1939, a Children's Court⁵⁰ during a remand had options of dealing with the child by (a) detaining the child in a shelter (b) releasing the child on bail (c) permitting the child to go home with a parent or other person willing to undertake the care of the child. The latter alternative was liberally adopted. Conversely after a finding or admission of guilt, often children were remanded in custody for 14 days before sentence in order to obtain a P & M (physical and mental) survey.

The Bail Act 1978 effectively instituted a uniform code for all accused persons with minimal concession to the youth of the offender. An exception is s.32(4) that provides that, the fact that an accused under the age of 18 years does not reside with a parent or guardian is not to be taken into account in considering the strength of the community ties of the accused. The Bail Act put a high premium on a risk of absconding but this was rarely a major consideration for juveniles. On the other hand the risk of further offending if released on bail required the court to be satisfied that the accused was likely to commit further offences and such risk was serious by reasons of its likely consequences. This was often a difficult test for the prosecution to meet. Not infrequently juveniles continued to commit offences repeatedly while on bail (to the detriment of the community and their own interests by reducing any prospect of a non custody sentence).

The Bail Act did provide both the court and police with a new capability to attach conditions to bail. Curfews and non-association with co-offenders and protection of victims and witnesses are now common features of bail conditions.

Changes made by 1987 Act

The Children's Court lost the power to impose a sentence "according to law" even for those over 18 when sentenced. This had not been utilised so much to impose a sentence of imprisonment on an offender who had attained the age of 18 by the time of sentence, but rather to take advantage of "adult" sentencing options such as periodic detention or community service. The court remains generally closed to the general public but the media has a right to be present and to publish non-identifying reports. The court does not deal with traffic matters for offenders old enough to hold a licence unless the "traffic" matter is linked with a "non-traffic" offence.

Jurisdiction is retained to hear and determine summarily except for "serious children indictable offences" and these must be dealt with in a higher court. The court retained its power to commit for trial for an indictable offence. A parent can be excluded from the proceedings but not the child (the converse of earlier legislation). A conviction cannot be recorded for an offender under the age of 16 years.

Sentencing options have been broadened and there is no distinction made between summary and indictable offences (being heard summarily) –

- a. dismissal (with or without caution);
- b. bond (for up to 2 years);

⁵⁰ Section 81(7)

- c. fine;
- d. bond plus fine;
- e. probation (for up to 2 years);
- f. community service order;
- g. committal (that may be suspended).

In late 1989 the Children's Court via the Sentencing Act acquired a parole jurisdiction that has become increasingly significant both in terms of numbers and in the complexity of such decisions. Parole determinations may involve sentences imposed by the Children's Court, District Court or Supreme Court.

The 1990's

In 1993 a **Green Paper** prepared by the Juvenile Justice Advisory Council of NSW ("Future Directions for Juvenile Justice in NSW") was released. Of the many proposals, was included one for the establishment a scheme of Community Youth Conferencing that was further developed in a **White Paper**.

A concern both for the welfare of children found in public places and without supervision and their potential for involvement in child and involvement in crime, resulted in the enactment of the **Children (Parental Responsibility) Act 1994** that came into effect on 13th March 1995. It was perhaps unfortunate that an innovative sentencing measure was combined with a more controversial proposal for police to remove children under the age of 15 years from such public places. This Act was replaced by the **Children (Protection and Parental Responsibility) Act 1997** (and for court purposes) substantially in the same terms. Section 11 created an offence for a parent who by wilful default has contributed directly or in a material respect to an offence committed by his/her child.

In that same year a trial of police referred conferencing commenced in six police districts.

The proposals for police cautioning and community youth conferencing arose from dissatisfaction with both the "welfare" and "back to justice" models. The "cautioning" proposal sought to regularise (and expand by creating a right to a caution) and existing police practice. "Conferencing" on the other hand took up the 1993 proposal of the Juvenile Justice Advisory Council as influenced by New Zealand legislation and writings on "restorative justice". The latter described as follows - "Here the purpose is to bring together victims, offenders and their families in order to arrive at a mutual solution and so restore the balance of peace and harmony between the parties."⁵¹ In fact the giving of cautions was so eagerly embraced by police that the Government in 2002 capped the number of 3 cautions per offender before further charges would be referred to the court.

In 2003-4, 1,256 young people participated in youth justice conferences.

The effect of the Act has been to reduce the overall number of minor charges coming before the court with no worse rate of re-offending. Those however appearing for

⁵¹ Gale at page 17

the first time in court (by reasons of a history of prior police cautions and conferences) are usually more entrenched in criminal activity than in the past. The make up of those appearing before the Children's Court has markedly altered with a distinct trend towards an older, more sophisticated and violent offender. This has also required Juvenile Justice to re-examine the appropriateness of its services delivered for those under supervision (whether under parole orders or otherwise).

The Children's Court 100 years on

The court has been constituted as the Children's Court of New South Wales. The court administratively falls within the Local Court structure but the Senior Children's Magistrate (who has certain statutory responsibilities) has the same status of a Deputy Chief Magistrate. The Court is presided over by Children's Magistrates who while drawn from the ranks of the magistracy, devote themselves largely full time to the jurisdiction.

Geographically the court operates from Nowra in the south, north to Toronto and west to the lower Blue Mountains. This might be considered a modest expansion in 100 years. The bulk of matters in the country continue to be heard by the Local Court magistrate but all now have at least a minimum of experience in the Children's Court.

Police prosecutors appear in police matters supplemented by appearances by lawyers of the office of the Director of Public Prosecutions (but largely confined to committal hearings and the summary hearing of some sexual offences). Almost all children are legally represented. The Department of Juvenile Justice provides a professional service by experienced staff to supervise offenders in the community. Unlike the former "district officer" they do not have to spread their expertise across juvenile offenders, child neglect and abuse, truancy, substitute care, adoption and disaster relief.

There are specialised programs for sexual offenders, violent offenders and those with drug and alcohol issues. The make up of those entering detention has also changed and now comprise a greater percentage of offenders within a high-risk group for re-offending. They also comprise a greater percentage of those over the age of 18. A recent response to a trend for higher courts to order that terms of imprisonment be served in a detention centre, has seen the maximum security facility at Kariong proclaimed as a "Juvenile Correctional Centre". As in the case of those in detention a greater percentage of offenders now fall within a high-risk group for re-offending.

The retreat of the Department of Community Services from intervention for older children (and from directly providing residential care) to young offenders who have committed less serious crimes but who have high welfare needs (in terms of accommodation, serious emotional, mental health and drug and alcohol issues) continues to pose significant challenges to the court and the Department of Juvenile Justice in managing such offenders in the community.

On a nation wide comparison basis the Children's Court presents as being very efficient. It is however disadvantaged by its jurisdiction in the Sydney area being spread between eight separate court locations (Hornsby and Sutherland being

shared with Local Courts). There is a proposal for a six court special purpose Children's Court to be built at Parramatta. This should promote an even higher level of efficiency.

The Children's Court continues to uphold the objectives of its proposers of providing a speedy, professional and otherwise efficient disposal of criminal proceedings against juvenile offenders. It has maintained its strong links with its origins being summary courts while maintaining its distinct identity. It has adapted (perhaps not always quickly enough for some) to the changes in society and complexity in criminal procedures (especially as to the reception into evidence of admissions) that was unimagined even 30 years ago. It has continued to respond to the special needs of children in the criminal justice system whether as accused, victim or witnesses. It has done all these things while largely retaining public confidence in the institution of the Children's Court and has done so despite the often overcrowded and inadequate physical surroundings of its court buildings.

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