



## *Children's Court of New South Wales*

### **6<sup>TH</sup> ANNUAL JUVENILE JUSTICE SUMMIT SWISSOTEL SYDNEY, 5 MAY 2017**

#### **JUDGE PETER JOHNSTONE PRESIDENT OF THE CHILDREN'S COURT OF NSW**

#### **“EARLY INTERVENTION, DIVERSION AND REHABILITATION FROM THE PERSPECTIVE OF THE CHILDREN'S COURT OF NSW”**

#### **INTRODUCTION**

- 1 This paper has been prepared for the 6<sup>th</sup> Annual Juvenile Justice Summit on Friday 5<sup>th</sup> May 2017.<sup>1</sup> The topic for my address is “Early Intervention, Diversion and Rehabilitation from the Perspective of the Children’s Court of NSW”.
  
- 2 I have previously had the pleasure of addressing the 5<sup>th</sup> annual Juvenile Justice Summit in 2014, when I had been President of the Children’s Court of NSW for nearly 2 years. I have now been the President of the Children’s Court of NSW for almost 5 years, and have had the opportunity to observe and implement some remarkable developments in the youth justice system.

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<sup>1</sup> I acknowledge the considerable help and valuable assistance in the preparation of this paper provided by the Children’s Court Research Associate, Elizabeth King.

- 3 I will speak to you all today on the growing body of evidence which shows that the detention of children is less effective and more expensive than community-based programs. Following this, I will canvass some alternative options such as the Youth Koori Court, Justice Reinvestment and the *Young Offenders Act*.
- 4 I will then discuss what has been described as the 10 characteristics of a good youth justice system, and reflect on some of my hopes for the future.
- 5 Firstly, however, I will provide some background on the Children's Court of NSW.

### **SPECIALIST NATURE OF THE CHILDREN'S COURT / ROLE AND STRUCTURE OF THE CHILDREN'S COURT**

- 6 Today, the Children's Court of NSW consists of a President, 15 specialist Children's Magistrates and 10 Children's Registrars. It sits permanently in 7 locations, and conducts circuits on a regular basis at country locations across New South Wales.
- 7 The Children's Court of NSW deals with both care and protection matters and offences committed by children under 18.
- 8 Although these are two separate jurisdictions, there is a distinct correlation between a history of care and protection interventions and future criminal offending.

- 9 This nexus has been explored and articulated particularly well by former President of the Children’s Court, Judge Marien, who describes the reality of ‘Cross-over Kids’ - young people who have been before the Court in its care jurisdiction, and the frequency with which they come before the crime jurisdiction later in life.
- 10 In Judge Marien’s paper he cites the work of the eminent psychologist Dr Judith Cashmore AO, who argues that there is an established link between childhood maltreatment and subsequent offending in adolescence.<sup>2</sup>
- 11 The Children’s Court does not charge children with crimes, but it does determine their guilt. If children plead guilty, or are found guilty after a trial, the Children’s Court conducts a sentence hearing and determines the appropriate sentence to be imposed.
- 12 I believe that the ultimate aim of an enlightened system of juvenile justice should be to have no children in detention. Rather, we should be developing other social mechanisms to deal with problem children.

### *Origins of the Children’s Court of New South Wales*

- 13 The Children’s Court of NSW is one of the oldest children’s courts in the world. It has a specially created stand-alone jurisdiction which has origins traced back to 1850.

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<sup>2</sup> Judith Cashmore, “The link between child maltreatment and adolescent offending”, (2011) 89 *Family Matters*, available at: <https://aifs.gov.au/publications/family-matters/issue-89/link-between-child-maltreatment-and-adolescent-offending>.

- 14 Prior to 1850, the criminal law did not distinguish between children and adults, and children were subjected to the same laws and punishments as adults and were liable to be dealt with in adult courts.
- 15 There were a number of children under 18 transported as convicts in the First Fleet of 1788. The precise number of convicts transported is unclear, but among the 750-780 convicts, there were 34 children under 14 years of age and some 72 young persons aged 15-19.<sup>3</sup>
- 16 The first special provision recognising the need to treat children differently was the *Juvenile Offenders Act 1850*<sup>4</sup>, which was enacted to provide speedier trials and address the “evils of long imprisonment of children”.
- 17 Then, in 1866, further reforms were introduced, including the *Reformatory Schools Act 1866*.<sup>5</sup>
- 18 This Act provided for the establishment of reformatory schools as an alternative to prison, and the *Destitute Children Act 1866*,<sup>6</sup> under which public and private “industrial schools” were established, to which vagrant and destitute children could be sent.<sup>7</sup>

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<sup>3</sup> State Library of NSW Research Guides, ‘First Fleet Convicts’ at [www.sl.nsw.gov.au](http://www.sl.nsw.gov.au) accessed 29 January 2016.

<sup>4</sup> 14 Vic No II, 1850.

<sup>5</sup> 30 Vic No IV, 1866.

<sup>6</sup> 30 Vic No II, 1866 (otherwise known as the *Industrial Schools Act 1866*).

<sup>7</sup> R Blackmore, “History of Children’s Legislation in New South Wales – the Children’s Court”, at [www.childrenscourt.justice.nsw.gov.au](http://www.childrenscourt.justice.nsw.gov.au), accessed 27 January 2016, extracted from R Blackmore, *The Children’s Court and Community Welfare in NSW*, Longman Cheshire, Melbourne, 1989.

19 Since those early beginnings in 1850, there has been a steady progression of reform that has increasingly recognised and addressed the need for children to be treated differently and separately from adults in the criminal justice and child welfare systems.

*The need for specialist courts and the structure of the Children's Court of NSW*

20 The *Children's Court Act 1987* imposes upon the President both judicial and extra-judicial functions: s 16. My extra-judicial obligations include a requirement to confer regularly with community groups and social agencies on matters involving children and the Court. I am also required to chair an Advisory Committee that has a responsibility to provide advice to the Attorney General and the Minister for Family and Community Services on matters involving the Court and its function within the juvenile justice system in NSW: s 15A.

21 Therefore, as President of the Children's Court, I have had the opportunity to preside over a wide range of cases, to observe many children involved in the youth justice system and the care and protection system, to visit the juvenile detention centres, to read widely, to attend conferences and seminars, and to speak to a lot of experts and others involved, or interested, in matters concerning children and young people.

22 I continue to be astounded by the complexity of the issues that arise in this area.

- 23 The social disadvantage facing the children and young people and their families who have their lives characterised by decisions made by this Court, is a profound reminder of the need for continuing education and resolute and meaningful collaboration.
- 24 The evidence arising from the public hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse, and more recently the Royal Commission to examine the child protection and juvenile detention systems of the Northern Territory, exemplify the systemic failures that can arise when siloes are maintained and networks are broken.
- 25 Examining and challenging the social disadvantage and disempowerment that have defined the lives of generations of families who come before the Children's Court is critical to my role as President of the Children's Court, and the roles of my colleagues, the specialist Children's Magistrates.
- 26 It is implicit in the role of Judicial Officers that we comply with our responsibility to perform our roles consistent with the administration of justice.
- 27 However, this is a particularly special jurisdiction that is imbued with the practice of therapeutic jurisprudence and restorative justice.
- 28 Additionally, there is value in having a consistency of approach and of outcomes across the whole state, in the way evidence is presented, in the practices and procedures applied, and in the decisions made in cases that come before the Court.

- 29 I am an advocate, therefore, for the expansion of the specialist nature of the jurisdiction across as much of the state as might be achieved over time.
- 30 Children's Court Magistrates now hear something like 90% of care cases in the State.
- 31 The coverage for criminal matters remains, however, at about 60%. The balance of cases is heard by Local Court Magistrates exercising Children's Court jurisdiction, predominantly in remote parts of NSW.

*The legislative environment of the Children's Court of NSW*

- 32 The Children's Court has jurisdiction over care and protection matters and matters involving juvenile crime. The Court also has jurisdiction to hear children's parole matters, apprehended violence orders and compulsory schooling matters under s 22D of *the Education Act 1990* (NSW).
- 33 Proceedings in relation to the care and protection of children and young persons in NSW are public law proceedings, governed, both substantially and procedurally, by the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the *Care Act*).
- 34 Care proceedings involve discrete, distinct and specialised principles, practices and procedures which have regard to their fundamental purpose, namely the safety, welfare and well-being of children in need of care and protection.<sup>8</sup>

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<sup>8</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 60.

35 In the criminal jurisdiction of the Court, the applicable legislation includes the *Crimes Act 1900*, the *Bail Act 2013*, the *Children (Criminal Proceedings) Act 1987* (CCPA) and the *Young Offenders Act 1997* (YOA). Section 6 of the CCPA provides that children and young people are unique, reflecting an understanding of the cognitive and neurobiological differences between young people and adults.

36 Specifically, it states that the following principles are to be applied with regard to the administration of the Act:

*“(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,*

*(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,*

*(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,*

*(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,*

*(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,*

*(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,*



*(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparations for their actions,*

*(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.”<sup>9</sup>*

37 The YOA is a statutory embodiment of early intervention and diversion, providing the option of warnings, cautions and Youth Justice Conferences (YJC’s).

38 A YJC brings young offenders, their families and supporters face-to-face with victims, their supporters and police to discuss the crime and how people have been affected. Together, they agree on a suitable outcome that can include an apology, reasonable reparation to victims, and steps to reconnect the young person with their community to help them desist from further offending.

39 YJC’s are beneficial for the young person’s experience of the criminal justice system, as all involved in the conference are not placed in an adversarial situation.

40 Further, YJC’s facilitate co-operation between the young person and police and foster collaboration and input from the individual offender, victims, families and communities.

41 I am particularly supportive of the use of YJC’s. In my view, they produce fruitful results for both the individual offender and the community.

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<sup>9</sup> *Children and Young Persons (Criminal Proceedings) Act 1987*, s 6.

42 There are also safeguards within the *Care Act* and corresponding provisions in the CCPA and YOA that prevent the publication of any material that identifies or is likely to identify the young person.<sup>10</sup>

*Specialised principles and procedures of the Children's Court*

43 The Children's Court safeguards the needs of the vulnerable people who appear before it and has developed discrete, distinct and specialised procedures over time.

44 In criminal matters, courts are designed to be smaller, less intimidating environments and legal practitioners stay seated when addressing the Court. Participants are encouraged to tailor their language to the age and stage of the young person's development.

45 Additionally, police do not wear their uniforms or carry their appointments in court.

46 In care proceedings, the rules of evidence do not apply, the proceedings are non-adversarial, and are required to be conducted with as little formality and legal technicality and form as the circumstances permit.

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<sup>10</sup> *Children and Young Persons (Care and Protection) Act 1998*, ss 104 and 105; *Children (Criminal Proceedings) Act 1987*, s 15A and *Young Offenders Act 1997*, s 65.

47 The need to tailor the environment and communication to the child, young person or vulnerable witness is highlighted in the English case of *R v Lubemba*:

*“It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness. If there is a right to ‘put one’s case’ (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and all the significant inconsistencies without intimidating or distressing a witness.”<sup>11</sup>*

48 In addition, the Children’s Court has the benefit of assistance from the Children’s Court Clinic. The Clinic is established under the *Children’s Court Act 1987* and is given various functions designed to provide the Court with independent, expert, objective and specialised advice and guidance.

49 As an advocate for the specialist nature of the Children’s Court, I view forums such as these as an important means by which the Children’s Court can further inform itself of research, ideas and ways in which we can work together to better understand, protect and empower our children and young people.

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<sup>11</sup> *R v Lubemba* [2014] EWCA 2064 at [38] – [45].

## **EARLY INTERVENTION, DIVERSION AND REHABILITATION**

### *The importance of understanding emerging advances in neuroscience*

50 It is my belief that effective strategies, programs and policy implementing the principles of early intervention, diversion and rehabilitation require an acute, comprehensive and insightful understanding of the reasons why children and young people commit crimes.

51 I have undertaken research over the years into this precise question, and through forums such as this which provide for collaboration and the sharing of knowledge between important stakeholders, some important insights have been discovered.

52 Some of the most informative and enlightening research stems from neurobiology, which covers the science of brain development.

53 I touched on some of this brain science at the last Juvenile Justice Summit in 2014, however even since then I have discovered, through collaboration and discussion with various stakeholders, an emerging wealth of knowledge in this area, which I believe should inform the policy of youth justice and detention moving forwards.

54 I am pleased to see that it has already begun to do so, and there have been some positive developments over the past five years.

- 55 The principle of therapeutic jurisprudence which underpins the specialised principles and procedures of the Children’s Court, has been implemented in such a way, both within the Children’s Court and by external stakeholders such as police, Juvenile Justice, out-of-home care providers, lawyers and prosecutors, as to achieve a remarkable development.
- 56 The NSW Bureau of Crime Statistics and Research reported on 30 January 2017 that the number of juveniles in custody in NSW has now fallen by 38 per cent, from a peak of 405 detainees in June 2011 to 250 in December 2016.<sup>12</sup>
- 57 Furthermore, 3 juvenile detention centres have been closed over the past 5 years in NSW, due to the falling number of young people in detention. The centres which have been closed are Emu Plains, Kariong and Juniperina. Now only 6 juvenile detention centres remain in NSW.
- 58 I believe it is no coincidence that this number has fallen so significantly, and that this development has not occurred in isolation. Rather, the insights we have gained from brain science have allowed for a better understanding of the adolescent brain, and paved the way for better policies, practices and procedures, which highlight and emphasise the fact that children are fundamentally different to adults, and must be treated as such.
- 59 It will be useful for me to canvass briefly the brain science which I outlined at the last summit, which continues to be of enormous importance in understanding the youth brain.

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<sup>12</sup> Bureau of Crime Statistics and Research, “New South Wales Custody Statistics, Quarterly Update”, December 2016, [http://www.bocsar.nsw.gov.au/Documents/custody/NSW\\_Custody\\_Statistics\\_Dec2016.pdf](http://www.bocsar.nsw.gov.au/Documents/custody/NSW_Custody_Statistics_Dec2016.pdf), accessed 21 February 2017.

60 In particular, I credit Judge Becroft, the Principal Youth Court Judge of New Zealand, for being one of the first Judicial Officers to highlight the importance of understanding brain science, and how it may assist us in meeting the need to match policy and legislation to the factual realities presented within the science.<sup>13</sup>

61 A great deal of research has been undertaken in recent years to show that the pre-frontal cortex of the brain (the frontal lobes) is the last part of the human brain to develop. The frontal lobes are those parts of the brain associated with identifying and assessing risk, managing emotion, controlling impulses and understanding consequences.<sup>14</sup>

62 We know that rational choice theory argues that young people are able to undertake a logical risk assessment in their decision-making process. Neurobiological research, on the other hand, argues that adolescent decision-making is not linear, sophisticated and predictable.

63 A further complication is that brain development differs depending upon a number of variables and that 'neuro-scientific data are continuous and highly variable from person to person. The bounds of 'normal' development have not been well delineated.'<sup>15</sup>

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<sup>13</sup> 'From Little Things, Big Things Grow - Emerging Youth Justice Themes in the South Pacific', Judge Andrew Becroft, Principal Youth Court Judge of New Zealand, 2014.

<sup>14</sup> E.C. McCuish, R. Corrado, P. Lussier, and S.D. Hart, 'Psychopathic traits and offending trajectories from early adolescence' (2014) *Journal of Criminal Justice* 42, pp 66-76.

<sup>15</sup> S.B Johnson, R.W Blum, J.N Giedd, 'Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy' (2009) *Journal of Adolescent Health* 45(3) pp 216-221 at 220.

64 Despite this, neurobiological research to date shows that whilst adolescents may appear to function in much the same way as adults, they are not capable of the executive function that mature adults possess.

65 As Judge Becroft highlighted in one of his papers:

*“when a young person’s emotions are aroused, or peers are present, the ability to impose regulatory control over risky behaviour is diminished.”*<sup>16</sup>

66 Neurobiological development will continue beyond adolescence and into a person’s twenties (possibly even into some people’s thirties), and different people will reach neurobiological maturity at different ages.<sup>17</sup>

67 In simple terms, according to neurobiology, a young person is unable to make any rational choice, let alone a rational choice to commit a criminal act.

68 This is not to say that the findings from neurobiology research exculpate all young offenders from criminal responsibility.

69 Rather, these findings indicate that there is a grey area between right and wrong when considering the culpability of a young offender.

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<sup>16</sup> ‘From Little Things, Big Things Grow - Emerging Youth Justice Themes in the South Pacific’, Judge Andrew Becroft, Principal Youth Court Judge of New Zealand, 2014, p 5.

<sup>17</sup> B Midson, ‘Risky Business: Developmental Neuroscience and the Culpability of Young Killers’, (2012) *Psychiatry, Psychology and the Law*, 19 (5), pp.692 -710 at 700. See also: Gruber, S.A. Yurgelun Todd, D. A. ‘Neurobiology and the Law: A role in Juvenile Justice’ (2006) *Ohio State Journal of Criminal Law*, 3, pp 321-340 at 332.

- 70 Advances in neurobiology allow us to better understand the range of factors (biological, psychological and social) that make juvenile offenders different from adult offenders, and justify and improve the unique responses to juvenile crime.
- 71 The importance of understanding trauma, and the effect of trauma on brain development, is another critical issue. As a Judicial Officer, I see children and young people on a daily basis, and recognise the impact that trauma can have on a young person's ability to articulate themselves and their ability to regulate their behaviours.
- 72 Many of the Registrars at the Parramatta Children's Court often observe some sort of speech or language difficulty in the children who come before them in Dispute Resolution Conferences.
- 73 It is crucial that we examine the impacts of events such as trauma on young people when they come before the Court, but this must also be considered and acted upon at a much earlier stage in their lives than this point.
- 74 Those who encounter the legal system then enter into a space with its own language and foreign vocabulary, which further disadvantages children and young people.



75 I was struck by some examples of obvious and significant oral language problems observed by a Court-appointed Communication Assistant working in the youth justice system in New Zealand, in the national newsletter ‘Court in the Act’.<sup>18</sup>

76 For example, young people had said:<sup>19</sup>

*“I was in my family group conference. They asked me if I felt remorse for what I did? I didn’t know if I did or not – I didn’t know what ‘remorse’ meant.”*

*“He sat across the table from me in the classroom. I asked him how his court appearance went. ‘All guds... [pause] – but what does ‘guilty’ mean?”*

*“They said I was being charged with ‘possession of instruments for conversion’. The only instruments I knew were musical ones – so I thought they were trying to charge me with a ram raid on a music shop...”*

77 Much of this research which I have touched on is relevant to criminal proceedings in understanding why it is that children and young people offend, and identifying areas for early intervention, diversion and rehabilitation.

78 I have recently become aware of some important research which has enormous implications for the way in which the criminal justice system treats youths, and also on our understanding of the importance of early development, as this development can impact on care and protection matters as well as criminal matters.

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<sup>18</sup> Mark Stephenson, ‘Youth Justice in New Zealand: Not perfect...but responding’ (March 2017) 76 *Court in the Act*, p 4 and 5, available at <http://www.districtcourts.govt.nz/youth-court/newsletters/>, accessed 6 March 2017.

<sup>19</sup> *Ibid.*

- 79 I attended a wonderfully informative seminar series hosted by the Advocate for Children and Young People on 30 March 2017, and some fascinating insights in the fields of science and child development were shared by leaders in these fields.
- 80 For example, Associate Professor Elisabeth Murphy described how babies are born with 25 per cent of their brains developed, and that by age three they will have developed 80% of the brain for life.<sup>20</sup> The development of brain connections is dependent on stimulation and experiences, and these experiences in the early years are crucial as they will shape the wellbeing and cognitive development of a person as they grow through to adulthood.
- 81 This research has enormous implications for the principle of early intervention. If experiences such as trauma, abuse and neglect, even within the womb, occur within the first 1000 days of life, this may lead to difficulty later in life, especially during adolescents, but even during adulthood.
- 82 Early intervention, therefore, must be considered well and truly before a child or young person has come into contact with the criminal justice system.
- 83 Dr Michael Brydon discussed a fascinating study by Aaron Antonovsky, whereby it was discovered that 29% of women who had survived concentration camps as children were able to carry on and maintain good health after their traumatic experience.

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<sup>20</sup> G. Allen, Early Intervention: The Next Steps. An Independent Report to Her Majesty's Government. HM Government, UK, January 2011 <https://www.gov.uk/government/publications/early-intervention-the-next-steps--2>.

- 84 Antonovsky questioned why it is that some women were not affected in the same way most others were, and it was discovered that the reason was because they had an adult or older carer with them throughout the traumatic experience.
- 85 What is clear from this is that the benefits of a positive, enduring and nurturing relationship, even in situations of extreme adversity, cannot be underestimated.
- 86 What is also well-documented but is less clear in policy and practice, is the fact that many of the youths coming before the criminal justice system have had interventions in their life from the care jurisdiction of the Court.
- 87 This channel from care to crime is known as the 'cross-over', and kids who have their lives characterised by this phenomenon are known as 'cross-over' kids.
- 88 There needs to be appropriate and adequate funding, training and understanding of the crucial stages of development, for all stakeholders involved in the removal of children from their parents or families, and their placement in out-of-home care.
- 89 If we know that trauma impacts the ability of children to develop crucial brain functions and forge important relationships and connections, which are then critical in supporting protective factors such as education, then we already know that many children who are offending are acting out and are unable to rationalise or mitigate their actions.

- 90 Punishing children by placing them in detention centres, when they have already suffered disadvantage and trauma, makes no sense from an ethical, legal, economic or welfare perspective.
- 91 There is also a growing body of evidence that incarceration of children and young persons is both less effective and more expensive than community based programs, without any increase in risk to the community.
- 92 Most young persons in the juvenile justice system can be adequately supervised in community based programs or with individualised services without compromising public safety. Studies have shown that incarceration is no more effective than probation or community-based sanctions in reducing criminality.<sup>21</sup>
- 93 In my experience, although a bond is a higher penalty than a Youth Justice Conference, it does not require any action or reflection on the part of the young offender, and so the deterrent effect is greatly diminished. A YJC, as I have already discussed, is an example of a community-based approach, which is more effective in helping young people to understand and make reparations for their actions, and to reduce recidivism.
- 94 No experience is more predictive of future adult difficulty than confinement in a juvenile facility.<sup>22</sup>

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<sup>21</sup> K. Richards, 'What makes juvenile offenders different from adult offenders' (February 2011) 49 *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology.

<sup>22</sup> M. Wald and T. Martinez, 'Connected by 25 – Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds' (2003) Stanford University: <http://www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf> (accessed 18 April 2017).

- 95 Children who have been incarcerated are more prone to further imprisonment. Recidivism studies in the United States show consistently that 50 to 70% of youths released from juvenile correctional facilities are re-arrested within 2 to 3 years.<sup>23</sup>
- 96 Children who have been incarcerated achieve less educationally, work less and for lower wages, fail more frequently to form enduring families, experience more chronic health problems (including addiction), than those who have not been confined.<sup>24</sup>
- 97 Confinement all but precludes healthy psychological and social development.<sup>25</sup>
- 98 Detention, therefore, is not the best answer to the multiple, complex and traumatic problems experienced by, and caused by young offenders.

#### *Alternative Approaches from the Perspective of the Children's Court*

- 99 Although much of this research will be familiar to many professionals, including many of you here today, these insights are not necessarily common knowledge to all stakeholders within the criminal justice system, nor are they built comprehensively into policy, and so I believe it is important to share and discuss these insights and new developments with every stakeholder.

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<sup>23</sup> E. P. Mulvey, 'Highlights from Pathways to Desistance – A Longitudinal Study of Serious Adolescent offenders', Office of Juvenile Justice and Delinquency Prevention.

<sup>24</sup> Ibid, Road Map.

<sup>25</sup> M. Wald and T. Martinez, 'Connected by 25 – Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds' (2003) Stanford University: <http://www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf> (accessed 18 April 2017).

- 100 Early intervention, diversion and rehabilitation are the principles which will guide the way to better outcomes, practices and policy.
- 101 One method of implementing and investing in early intervention strategies, which requires a whole-of-government approach, is Justice Reinvestment.
- 102 Justice Reinvestment (JR) is an idea for rethinking the criminal justice system. The aim is to reinvest large sums of taxpayer money back into the community, rather than spending it on imprisoning people for low-level criminal activity. This requires investment in crime prevention and early intervention, as well as a shift in policy and social outlook from favouring incarceration to non-incarceration.
- 103 Importantly, Justice Reinvestment involves all levels of government in this political decision to reinvest money back into the community – Commonwealth, State, local and indigenous governance are involved, as well as the non-government sector.
- 104 I participated in the discourse on Justice Reinvestment in relation to a pilot project to be (hopefully) implemented in Cowra, and I stressed the importance of approaching the fundamental precepts of Justice Reinvestment in an educated and comprehensive way. What may work well in one area, may be problematic in another. Tailored, piloted programs are critical, and I look forward to seeing some Justice Reinvestment programs established in regional areas.

- 105 Many of you will be familiar with the Joint Protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system.<sup>26</sup>
- 106 It became apparent that police intervention was being called upon by out-of-home care providers to regulate and control the challenging behaviours of young people in residential care. This resulted in young people coming into contact with the criminal justice system and coming before the Court due to charges being laid by police.
- 107 This Protocol recognises that children and young people exhibit challenging behaviour, particularly when they have experienced some form of trauma, abuse or neglect, and that this behaviour is better managed within the out-of-home care service, rather than by police or in the Court. I suspect the implementation of the Protocol has contributed to the reduction of children in detention, as it reduces the number of children coming before the Court for low-level offences which can and should be managed by their care providers.
- 108 There are two important ways in which the Children's Court is implementing programs in line with the concept of Justice Reinvestment.
- 109 The first is through the Youth Koori Court (YKC), which was established as a pilot in 2015 at Parramatta, and the second way is through the Youth Diversion Process.

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<sup>26</sup> NSW Ombudsman, Joint Protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system:  
<http://www.acwa.asn.au/Pages/Conf2016/Mon/HeritageRoom3/1330/MonHeritageRoom31350Demetrius/CareandCrimeJuliannaDemetriusNSWOmbudsman15August2016.pdf>.

### **The Youth Koori Court**

- 110 The Children's Court began trialling the YKC on 6 January 2015 at Parramatta Children's Court.
- 111 We created this pilot in response to the devastating over-representation of Aboriginal young people in the justice system.
- 112 The YKC was established within existing resources and without the need for legislative change.
- 113 The YKC uses a deferred sentencing model: s 33(1)(c2) *Children (Criminal Proceedings) Act 1987*. The process that has been developed for the YKC involves an application of the deferred sentencing model as well as an understanding of and respect for Aboriginal culture.
- 114 Mediation principles and practices are employed in a conference process to identify issues of concern for the young person, identify ways in which those concerns can be addressed, and develop an Action and Support Plan for the young person to focus on for three to six months prior to sentence.
- 115 The legislative scheme applicable to the YKC is consistent with the general principles informing the work of the Children's Court.



116 Specifically, the provisions in s 6 of the *Children (Criminal Proceedings) Act 1987* state:

- (a) That children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, *a right to be heard, and a right to participate*, in the processes that lead to decisions that affect them.
- (b) That children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, *require guidance and assistance*.
- (f) That it is desirable that children who commit offences be *assisted with their reintegration into the community so as to sustain family and community ties.*" (My emphasis added).

117 The direct participation of the child is required as referrals to the YKC can only be made on the application of the young person. It is a voluntary process and relies upon genuine commitment and ownership by the young person.

118 The culturally competent component of the YKC is demonstrated through the set-up of the court room itself. The YKC sits in a court room with artworks prepared by young people in custody at each of the juvenile justice centres in NSW.

119 Notably, the full suite of sentencing options are available to the Judicial Officer.

- 120 The YKC has been sitting for just over two years now, and we celebrated the two year milestone in February this year, with all of the stakeholders involved, including some young people who had successfully completed the YKC process. We were delighted to receive a visit from Senator Pat Dodson on the day, who sat as a respected person in the Youth Koori Court, and shared some words of encouragement and wisdom with one of our young participants.
- 121 From February 2015 to December 2016 the YKC had 52 referrals and 48 of those young people were sentenced. In 2017 we have 11 young people continuing or referred, and 2 have been sentenced so far this year. There are currently 9 young people working within the YKC program.
- 122 A formal process evaluation is being conducted by Western Sydney University, and we hope to receive this as soon as possible.
- 123 Anecdotally, many young people have become genuinely engaged in the process, and, given the participatory nature of the process, many young people have developed a strong sense of accountability for their actions.
- 124 With the assistance of the Children's Court Assistance Scheme, five of the Youth Koori Court participants have been able to obtain permanent housing, which is a significant achievement.
- 125 Although the YKC was successfully established within existing resources, funding is needed in order to achieve excellence in the program, and also to expand the program.

126 Communities such as those in Redfern, Glebe, La Perouse and Dubbo have been consulted on the possibility of expanding the YKC, and are eager to see the expansion of the YKC to their communities. The lack of funding to do so is the main impediment. The release of the evaluation report will, we hope, provide a platform from which to apply for, and agitate for funding.

127 I am advocating strongly for the reinvestment of the savings of this remarkable reduction of 38% of children in detention into the youth justice system, to enable the expansion of programs such as the YKC to service more communities, and to support and divert as many youths as possible.

128 On this note, I have recently engaged in some promising and exciting discussions with stakeholders in the Pacific Communities Forum, discussing the possibility and practicality of establishing a court similar to the YKC model and the Pasifika Court of New Zealand.

129 Pacific Islander youths are the largest group (after Aboriginal youths) from multicultural communities represented in the justice system.

130 I look forward to working with community leaders and organisations to continue discussions and work towards the possibility of another culturally appropriate and much-needed court to divert youths from detention centres.

### **Youth Diversion Process**

131 The Youth Diversion Process is another way in which the Children's Court has been implementing diversionary options to reduce contact of children with the criminal justice system since 2014.

- 132 Under this process, legal practitioners engaged by Legal Aid NSW will identify young people who are likely to become regular users of Legal Aid services against specific criteria developed and informed by research conducted on High Service Users.<sup>27</sup>
- 133 The legal practitioner will also assess the young person against the criteria used by the Integrated Case Management Panel (a panel coordinated by the Department of Family and Community Services in the Western Sydney District) and in appropriate cases make a referral to that panel in conjunction with Juvenile Justice.
- 134 Unless a young person has entered a plea of not guilty, the Children's Court agrees that an adjournment of 3 or 6 weeks, where the Court has ordered a Juvenile Justice Background Report is appropriate to allow for referral to and assessment by the Integrated Case Management Panel.
- 135 The Children's Court thereafter manages and deals with these matters having regard to any additional information or action taken by the Integrated Case Management Panel or related agency.
- 136 The principles of diversion, rehabilitation and a multi-agency approach underlie the Youth Diversion Process, which is very much in line with the principles underlying Justice Reinvestment.

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<sup>27</sup> Van de Zandt, P. and Webb, T. (2013), *High Service Users at Legal Aid NSW: Profiling the 50 highest users of legal aid services*.

**Section 32 of the *Children (Criminal Proceedings) Act 1987 (NSW)***

- 137 Section 32 of the *Children (Criminal Proceedings) Act* (CCPA) outlines the various sentencing options available to those exercising the Children's Court jurisdiction.
- 138 Penalties available include discharge with a good behaviour bond, fines, a Youth Justice Conference, deferred sentencing and community service work.
- 139 Section 32 represents an important diversionary process, one which I believe is underutilised.
- 140 In my experience, it is very effective to utilise s 32 as a deferred sentencing model. It is not ideal to simply discharge young offenders who have committed offences, where there is no reparation, reflection or forward-thinking required to help that person address the reasons why they committed a crime in the first place.
- 141 A deferred sentencing model, such as that used in the Youth Koori Court, allows an offender time to reach out within their community (if appropriate), and seek help in the form of drug and alcohol rehabilitation, mental health and trauma counselling, community service etc.
- 142 I have noted recently, and with great concern, the lack of residential drug and alcohol services in Western Sydney. This is a service which is greatly needed, and I will continue to advocate strongly for the provision of such a service in this crucial area.

**Section 28 of the *Bail Act 2013* (NSW)**

143 This provision of the *Bail Act* states that the Court can require that suitable arrangements be made for the accommodation of the accused young person before he or she is released on bail.

144 This is an important tool for Judicial Officers in ensuring that children and young people who are accused of criminal offences are not simply released back into the community into a situation of danger such as homelessness, abuse or neglect.

*Arising issues*

145 One particular issue which has come to the attention of the Children's Court only recently is the significant number of children and young people who are not attending school.

146 Anecdotally, we know that roughly 40% of children entering into the criminal jurisdiction of the Court are not attending school, whether it be due to truancy, suspension or expulsion.

147 Furthermore, roughly 40% of children in residential care are also not attending school.

148 We also know that roughly 40% of children in the care system will cross over into the criminal justice system, and so this is a staggering number of children and young people not attending school.

149 Education is one of the most powerful protective factors for young people.

- 150 The absence of these children from school indicates a broader therapeutic problem, and I am advocating strongly for the need for a systematic, whole-of-government approach to this problem. It is astounding to see so many children and young people not attending school, and no safety net in place to catch those who come into contact with the criminal justice system.
- 151 Victoria has implemented an Education Justice Initiative, which I would like to see replicated in NSW. The Education Justice Initiative was established in 2014 and is funded for three years by the Department of Education.
- 152 An Education Justice Initiative Officer attends the Children's Court and receives referrals from Judicial Officers for children who are not attending school. They will sit down and talk with the children and young people and their families and discuss why they are not attending, and explore options for returning to education.
- 153 The Officer will advocate with schools and the Department of Education to resolve any identified issues, and will also link children and young people to help in their schools, for example, a welfare worker.
- 154 They act as a resource for lawyers and youth justice workers around education options, processes and policies.
- 155 I was very pleased to hear of a proposed multi-agency forum to bring to light some of these issues and collaborate as to how all relevant stakeholders can address this problem.

*Thoughts for the future*

156 I would like to conclude with some thoughts on what Judge Becroft and Judge Harding of the NZ Youth Court system have articulated as the '10 Characteristics of a Good Youth Justice System'.<sup>28</sup>

157 The first characteristic is a limitation upon charging children and young people, which in NSW is articulated in s 7(c) of the *Young Offenders Act*.

*“the principle that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.”*

158 In New Zealand, roughly 80% of young offenders never come before the Court, and are dealt with by the specialist youth division of the police force (Police Youth Aid).<sup>29</sup> Furthermore, it is estimated that around 83% of those young people who are dealt with by alternative action by Police Youth Aid never reoffend.<sup>30</sup>

159 This is an effective and efficient system which recognises the risks and negative outcomes associated with detention, and champions firm, community-based alternative action as a solution. I believe this is a system worth aspiring to.

160 The second characteristic is a minimum and maximum age for the youth court jurisdiction.

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<sup>28</sup> Judge C J Harding and Judge A J Becroft, '10 Characteristics of a Good Youth Justice System', a paper for the Pacific Judicial Development Programme, Family Violence and Youth Justice Workshop, 2013 Port Vila, Vanuatu.

<sup>29</sup> *Ibid* p 2.

<sup>30</sup> *Ibid* p 3.



- 161 Australia has set the minimum age at 10 for criminal liability, and maximum age of 18 for the criminal jurisdiction, and adopts the doctrine of *doli incapax*.
- 162 The third characteristic is having trained specialists working with young people, which the Court has achieved through the numerous specialised agencies, services and stakeholders who are available at the Parramatta Children's Court as well as across the State.
- 163 The fourth characteristic is timely decision making and resolution of charges, which is reflected in s 9 of the *Children (Criminal Proceedings) Act 1987*.
- 164 The fifth characteristic is the delegation of decision making to families, victims and communities. Youth Justice Conferencing is an example of this process, and which has proven to be effective in diverting young offenders and improving the outcomes for young people, whilst acknowledging the harm caused and the reasons why this occurred. The Youth Koori Court is another process reflective of the desirability and effectiveness of community-based therapeutic justice.
- 165 The sixth characteristic is the duty to encourage participation by young people in the criminal justice process. This is necessary to allow for the opportunity to take responsibility for their offending, as well as to empower the young person and achieve positive outcomes in reducing recidivism. Again, the Youth Justice Conference and Youth Koori Court processes embody these characteristics in NSW.

- 166 The seventh characteristic is evidence-based, therapeutic approaches to offending. I am strongly advocating for a residential drug and alcohol service in Western Sydney, as well as a model similar to the Family Drug Treatment Court in Victoria. These services are needed in order to provide truly therapeutic interventions and solutions to the issues and challenges faced by young people.
- 167 My interest in desistance theory has been sparked recently, which explores the process by which offenders come to desist in offending. This theory acknowledges social circumstances and relationships with others *“are both the object of the intervention and the medium through which ... change can be achieved.”*<sup>31</sup>
- 168 Social capital, which includes the network and relationships which enable people to function effectively in society, is necessary to encourage desistance.
- 169 Policy in rehabilitating and supporting young offenders should, perhaps, reflect this proposition. This would require a greater, holistic focus on building family relationships, connection to community, culture and a broader social identity.

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<sup>31</sup> S. Farrall, *Rethinking What Works with Offenders: Probation, Social Context and Desistance from Crime* (2002); F. McNeill, A Desistance Paradigm for Offender Management, 2006 *Criminology and Criminal Justice*, p 50, available at: [http://www.sccjr.ac.uk/wp-content/uploads/2009/01/A\\_Desistance\\_Paradigm\\_for\\_Offender\\_Management.pdf](http://www.sccjr.ac.uk/wp-content/uploads/2009/01/A_Desistance_Paradigm_for_Offender_Management.pdf)

- 170 One of the most important characteristics of an effective youth justice system is articulated in number eight: an ability to refer children and young people to care and protection where there is an overwhelming need to do so.
- 171 A causal link between childhood maltreatment and criminal offending has been confirmed and evidenced by the reality of ‘cross-over kids’.
- 172 In many cases that come before the Court it is clear that young offenders are often and urgently in need of care and protection intervention. In NSW however, the two jurisdictions of care and crime are separated, and there is no ability of the Court to divert a young offender to care and protective measures of its own accord.
- 173 In New Zealand, the legislation allows for referral out of the Court and to welfare services if a young offender or a child is considered to be in sufficient need of care and protection.<sup>32</sup>
- 174 The reality demonstrates a significant link between the two jurisdictions, and so New Zealand is leading the way in incorporating this into their legislation and practice.
- 175 The ninth characteristic is minimal use of incarceration and/or custodial sentences.

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<sup>32</sup> *Children, Young Persons and Their Families Act 1989* (NZ), s280 and 280A.

- 176 Underlying this characteristic is the knowledge of the dangers and problems associated with incarcerating children and young people, including the ‘contamination’ effect of forming friendships and connections with more experienced offenders, and the ‘innoculation’ effect in discovering that detention was not such a bad experience, especially in comparison to their circumstances in the community.
- 177 It has been asserted that confinement in a secure facility all but precludes healthy psychological and social development.<sup>33</sup> This view is further bolstered by the research findings that incarceration actually interrupts and delays the normal pattern of “aging out”.<sup>34</sup>
- 178 As mentioned, I am pleased at the significant reduction in the number of youths in detention, and hope to see this number continue to fall, so that no children and young people are held unnecessarily in detention, but are dealt with in effective and appropriate programs within the community.
- 179 The final characteristic is keeping the young person with their family and community.
- 180 This requires alternative programs which involve the family and community groups in an addressing a young offender’s behaviour, such as the Youth Justice Conference and Youth Koori Court.

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<sup>33</sup> J Baldwin, *Juvenile justice reform: a blueprint*, Youth Transition Funders Group, 2012, Washington DC, p 4 at [www.ytfg.org/wp-content/uploads/2015/02/Blueprint\\_JJReform.pdf](http://www.ytfg.org/wp-content/uploads/2015/02/Blueprint_JJReform.pdf) accessed 27 January 2016.

<sup>34</sup> Holman and Ziedenisberg, above n 34, p 6.

- 181 I believe it is necessary to expand these services, particularly the Youth Koori Court, to all areas of the state, so as to ensure that young people are given the opportunity for diversion into a holistic, family-oriented community program. Again, this may require additional services such as drug and alcohol programs, family counselling etc.
- 182 As can be seen, NSW champions many of these 10 characteristics, but there is still work to be done in certain areas.
- 183 I feel confident surrounded by strong and empowering advocates such as yourselves, that the way forward will be towards continuing to divert, rehabilitate and protect young people, with particular focus on their developmental, cultural and social needs.

Judge Peter Johnstone

**President of the Children's Court of NSW**