

# Children's Court of NSW Resource Handbook

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# Foreword

The Children's Court of NSW is a unique court which has specialised practice and procedure with regard to children and young people in its criminal and care and protection jurisdictions. The *Children's Court of NSW Resource Handbook* provides guidance on matters as they apply to children and young people in the legal system. While it is primarily intended to assist magistrates, other judicial officers, lawyers who appear in the Children's Court and people interested in the work of the Court may find the *Resource Handbook* informative and instructive.

The *Resource Handbook* is not intended to be encyclopedic but rather to provide relevant articles, papers, references to relevant legislation and case law, and checklists and other aids which might be helpful in the preparation, organisation, conduct or management of matters within the Court's jurisdiction. The *Resource Handbook* is also intended to provide practical assistance on issues, practices and procedures which arise in the management and conduct of proceedings which may not be addressed in court rules, legislation or case law.

The *Resource Handbook* is a dynamic document and segments will be added as they are prepared and it will be updated regularly. The Children's Court and the Judicial Commission of NSW welcome comments and suggestions on the scope and content of the *Resource Handbook* with a view to ensuring that it remains current and is of assistance to anyone dealing in the Children's Court jurisdiction.

**His Honour Judge Peter Johnstone**  
President  
Children's Court of NSW



# Acknowledgements

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The Commission does not warrant or represent that the information contained within this publication is free of errors or omissions. The *Resource Handbook* is considered to be correct as at the date of publication, however, changes in circumstances after the time of issue may impact the accuracy and reliability of the information within.

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# Introduction to new Children’s Court magistrates

Welcome to the Children’s Court of NSW.

We hope the material in the *Children’s Court of NSW Resource Handbook* will be useful for your induction into the field. Please remember that your colleagues are very happy to help and you should not feel awkward about asking.

The *Resource Handbook* has been divided into two main types of matters that you will need to address — care and protection matters (from [1-0050]ff) and criminal matters (from [5-0050]ff), which includes the important area of parole (see [6-0200]). Some common issues are highlighted here but proceed to the type of matter you are dealing with to access resource material on specific issues, applicable Acts and Regulations, relevant court practice notes, important cases, useful articles, papers and information available in other media, such as podcasts.

## Care and protection matters

Emergency care and protection orders, made under ss 43–45 *Children and Young Persons (Care and Protection) Act* 1998 are common and it is worth discussing the procedure with someone before you embark on a care day.

## Criminal matters

A sentencing chart prepared by her Honour Magistrate Jayeann Carney is attached which sets out our sentencing options.

The Children’s Court is the State Parole Authority for most parolees who are sentenced for offences committed when they were under 18 years of age (see s 29 *Children (Detention Centres) Act* 1987). This jurisdiction is exercised by any Children’s Court magistrate (but not a Local Court magistrate sitting in the Children’s Court). Parole matters are dealt with only at Parramatta.

## Judicial Commission of NSW Bench Books

The Local Court Bench Book, which has basic information about both care and protection matters and criminal matters, provides a useful introduction: links will be provided under the relevant headings in the *Resource Handbook*.

The Sentencing Bench Book has a chapter on the *Children (Criminal Proceedings) Act* 1987. The chapter refers to the leading cases involving this piece of legislation and other helpful material. You may access these Bench Books from here or from relevant points within the *Resource Handbook*.

## Legislation

For your convenience, legislation to all the relevant pieces of legislation has been hyperlinked within this *Resource Handbook*. The hyperlinks are to the JIRS collection of legislation. If you wish to access hard copies of the legislation, apart from printing out the relevant provision, you may wish to check the 4 volume looseleaf LexisNexis publication *Criminal Practice and Procedure NSW*, which is available within the court.

**Other sources of information****Children's Law News**

A further source of help in care matters especially is Children's Law News, which you will receive by email. Children's Law News contains judgments which may be of assistance, as well as articles and news regarding such areas as legislative change and practice matters. It is possible to access and search previous issues of CLN through JIRS by going to the Bench Book section and then to Children's Court Resources under "Other Organisations". You are strongly encouraged to read all the issues of CLN to date.

**Criminal Law News from LexisNexis**

This 16 page newsletter can be used to keep up-to-date with current developments in criminal law.

**Useful websites**

The following websites are helpful:

- Australian Institute of Family Studies: <[www.aifs.org.au](http://www.aifs.org.au)>
- Australian Institute of Criminology: <[www.aic.gov.au](http://www.aic.gov.au)>
- NSW Bureau of Crime Statistics and Research: <[www.lawlink.nsw.gov.au/bocsar](http://www.lawlink.nsw.gov.au/bocsar)>
- National Drug and Alcohol Research Centre: <<http://ndarc.med.unsw.edu.au>>

## How to use this Resource Handbook

The *Children’s Court of NSW Resource Handbook*, or any section of it, can be read in its entirety or sections selected as the need arises.

The *Resource Handbook* is available online only. To enable speedy access, a detailed Contents list and cross-references in the text are hyperlinked to enable immediate access to the linked section of the *Resource Handbook*. Also all statutes, regulations and rules, and their provisions, cases, and court practice notes referred to in the text have been hyperlinked.

### Your feedback

The Children’s Court of NSW and the Judicial Commission of NSW welcome your feedback on how the *Resource Handbook* could be improved.

We are particularly interested in receiving relevant practice examples (including any relevant model directions) that you would like to share with other judicial officers.

In addition, you may discover errors, or wish to add further references to legislation, case law, specific sections of other Bench Books, discussion or research material.

Please send your comments, by email, to the Editor — Children’s Court of NSW Resource Handbook at: [benchbooks@judcom.nsw.gov.au](mailto:benchbooks@judcom.nsw.gov.au)

Alternatively, you could send mail to the Judicial Commission of NSW at:

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## Care and protection matters — background material

The following background material that deals with care and protection matters has been included in this section at the following paragraph numbers:

### Articles and other resources

- Mark Allerton, “The relevance of attachment theory in care proceedings” at [1-0050]
- Piaget’s stages of cognitive development at [1-0075]
- Mark Allerton, “Apart from shortness, vegophobia and addiction to technology, how are children different?” at [1-0100]
- Professor Kenneth Nunn, “Preliminary concerns around the decision-making of out-of-home-care children who offend”, a briefing note for the Officers of the Court for the Children’s Court Section 16 Meeting, 1 November 2013
- Judge Peter Johnstone, “Child protection legislative reforms” at [1-0110]
- Judge Peter Johnstone, “Care appeals from the Children’s Court” at [1-0150]
- Judge Peter Johnstone, “Children’s participation: a look towards the future” at [1-0160]
- Judge Peter Johnstone, “Children’s Court update 2016” at [1-0170]
- Judge Peter Johnstone, “Cross-over kids: the drift of children from the child protection system into the criminal justice system” at [1-0180]
- Judge Peter Johnstone, “The Children’s Court: driving a paradigm shift” at [1-0190]
- Judge Peter Johnstone, “Expert clinical evidence in care proceedings” at [1-0200]
- Judge Peter Johnstone, “The Children’s Court of NSW: 2019” at [1-0210]
- Judge Peter Johnstone, “Children’s Court update 2019 (care and protection jurisdiction)” at [1-0220]



# The relevance of attachment theory in care proceedings

Mark Allerton, Director Children's Court Clinic, 12 December 2012

Attachment theory is now generally accepted in the field of child psychology. Following considerable empirical and research validation, it has become a pivotal consideration in the field of child protection and in care and protection proceedings in courts. Under the theory, the earliest bonds formed by children with their primary caregiver/s (particularly before 4 years of age) have a tremendous impact (affecting neurological, physical, cognitive, emotional and social development), which continues throughout life. The theory's most important tenet is that an infant needs to establish a positive relationship with at least one primary caregiver for social and emotional development to occur normally, and that further relationships build on the patterns developed in these early experiences.

## [1-0050] Definition of attachment

The research literature on child development defines attachment as a relationship pattern between a child and a caregiver. Attachment behaviour anticipates a response by the attachment figure(s), to tune in to the child's needs for attention, and to remove any perceived threat or discomfort. John Bowlby, who originated the theory, proposed that healthy attachment relationships provide a "secure base", allowing for the safe resolution of an infant's need for survival from danger, with the need to learn through exploration (Bowlby, 1988).

Attachment behaviours are the means by which infants elicit care and protection. Children are not born attached to their caregivers, but learn how to have their needs met by their experience of being parented (Stafford and Zeanah, 2006). The attachment relationship also helps an infant or young child learn how to manage unsettling emotions. Different patterns and degrees of security of attachment to caregivers result from each individual child's adaptation to the quality of parenting he or she has received. For example, when the mother has returned after an unexpected separation, a child with a secure attachment (who has learnt to expect comfort when distressed) might cry and want to be picked up, then is comforted and able to settle. A child with an avoidant attachment style (who has learnt to expect rejection or punishment when distressed) might pretend to ignore the mother. A child with an ambivalent attachment style (for whom comforting has been unpredictable) might appear to seek relief from the parent, but resist what soothing is offered, to the point of being inconsolable. The difficulties with these "normal" attachment styles will be complicated in children and infants exposed to high risk environments, where parents are the source of alarm as well as its only solution. These infants and young children, on reunion may show behaviours that appear puzzling, or "disorganised". They may, for example, withdraw and not seek comfort at all, or may seek comfort from a stranger. Such confusing behaviour might be interpreted as signs of disruptive attachment disorders.

Attachment behaviour, or what is learnt about how to elicit a response to a need for caregiving, provides a foundation for the child's later mental health, including the ability to manage emotions and impulses, socialisation, cognitive and academic abilities, and personality development.

**Relevance to care matters**

Awareness of the potential harm that can be inflicted by breaking attachments will influence a court's decisions relating to the following matters:

- Removal
- Safety
- Emergency placement orders
- Contact
- Restoration or long-term care
- Cultural identity
- Adoption
- Sibling placements
- Permanency planning.

Courts may need to weigh the relative risks of physical, emotional or sexual harm, whether associated with parental mental illness, learning problems, alcohol and other drug dependence, or exposure to domestic violence, against the potential harm that may result from breaking a child's attachments. The requirement for expedition in care proceedings (as stated in s 94(1) *Children and Young Persons (Care and Protection) Act 1998*) is a legislative acknowledgement of the critical importance of early secure attachments for young children. One of the reasons for reducing these risk factors (all of which may contribute to attachment problems) will be to provide a safe, nurturing, stable and secure environment that will allow for the safe development of more secure attachments.

Understanding an infant or young child's attachment patterns can indicate something of the quality of care he or she has received, and of his or her vulnerability to changes in caregivers. Decisions about maintenance of attachments during temporary and long-term placements will also have a significant impact on the child's present and future adjustment. These decisions may consider such factors as:

- Amount of time spent in the care of a parent or other caregiver
- Numbers of placements
- The quality of the relationships with parents compared to the quality of the relationships with foster carers.

**Attachments and changes in placement**

The breaking of a positive and secure attachment between a child and primary caregiver/s during the early years of the child's life can have a seriously detrimental effect on social and emotional development. To break an attachment is distressing, and can potentially place a child at risk. Transient effects are expected when the first change in placement occurs before 6–9 months of age. After 9–12 months of age, there will be distress, with longer-term effects of the change increasing with the child's age. From 1 to 3 years, separation is a traumatic loss and a developmental crisis. Even if the loss occurs after approximately 3–5 years of age, some persistent insecurity in new relationships is to be expected (IASA, 2012).

Children who have had secure attachments adapt to change more easily than children who have had insecure relationships with their caregivers. When the prior relationship included either abuse or neglect, affecting the quality of the child's attachments, then the change process is likely to be more difficult, ambivalent, and attenuated. Children can manage to believe that their current placement is permanent through one or two changes. With additional changes, it becomes increasingly difficult for children to form a committed relationship with the new caregiver, because their prior experience prepares them to expect disruption. This means that each successive placement is more likely to fail than previous placements. The changes are likely to be accompanied by an initial "honeymoon", followed by outbursts of uncontrolled anger, fear, or desire for comfort. The last of these is sometimes displayed as inappropriate sexualised behaviour or indiscriminate affection. Outcomes will vary, but effects of broken attachments may include mental health, behavioural, achievement and relationship problems throughout the lifespan.

### **Assessments of attachments**

The research and clinical literature suggests different ways that attachments are to be assessed. However, it indicates that assessment should involve the integration of an understanding of a child's history and physical, social and language development, behaviour, mental health, social learning and education, with careful observations of the child with prospective caregivers. Conclusions about the child's attachment relationships will then be integrated with findings about the child's needs and the caregivers' resources. This will help to understand the child, and also the persons who have, or are seeking, parental responsibility.

### **References**

Bowlby J, *A secure base: clinical applications of attachment theory*, Routledge, London, 1988.

International Association for the Study of Attachment (IASA), Family Court Protocol, <[www.iasa-dmm.org/index.php/family\\_court\\_protocol/](http://www.iasa-dmm.org/index.php/family_court_protocol/) 2012>, accessed 20 June 2013.

Stafford BS and Zeanah CH, "Attachment disorders" in Luby, JL (ed) *Handbook of preschool mental health: development, disorders, and treatment*, The Guilford Press, New York, 2006.



# Piaget's stages of cognitive development

## [1-0075] Piaget's chart

### A table of Piaget's stages of cognitive development

<b>Sensory Motor Period (0–24 months)</b>	
<b>Developmental Stage &amp; Approximate Age</b>	<b>Characteristic Behaviour</b>
<b>Reflexive Stage (0–2 months)</b>	Simple reflex activity such as grasping, sucking.
<b>Primary Circular Reactions (2–4 months)</b>	Reflexive behaviours occur in stereotyped repetition such as opening and closing fingers repetitively.
<b>Secondary Circular Reactions (4–8 months)</b>	Repetition of change actions to reproduce interesting consequences such as kicking one's feet to move a mobile suspended over the crib.
<b>Coordination of Secondary Reactions (8–12 months)</b>	Responses become coordinated into more complex sequences. Actions take on an "intentional" character such as the infant reaches behind a screen to obtain a hidden object.
<b>Tertiary Circular Reactions (12–18 months)</b>	Discovery of new ways to produce the same consequence or obtain the same goal such as the infant may pull a pillow toward him in an attempt to get a toy resting on it.
<b>Invention of New Means Through Mental Combination (18–24 months)</b>	Evidence of an internal representational system. Symbolizing the problem-solving sequence before actually responding. Deferred imitation.

### **The Preoperational Period (2–7 years)**

<b>Developmental Stage &amp; Approximate Age</b>	<b>Characteristic Behaviour</b>
<b>Preoperational Phase (2–4 years)</b>	Increased use of verbal representation but speech is egocentric. The beginnings of symbolic rather than simple motor play. Transductive reasoning. Can think about something without the object being present by use of language.
<b>Intuitive Phase (4–7 years)</b>	Speech becomes more social, less egocentric. The child has an intuitive grasp of logical concepts in some areas. However, there is still a tendency to focus attention on one aspect of an object while ignoring others. Concepts formed are crude and irreversible. Easy to believe in magical increase, decrease, disappearance. Reality not firm. Perceptions dominate judgment.  In moral-ethical realm, the child is not able to show principles underlying best behaviour. Rules of a game not develop, only uses simple do's and don'ts imposed by authority.

### **Period of Concrete Operations (7–12 years)**

<b>Characteristic Behaviour:</b>
Evidence for organized, logical thought. There is the ability to perform multiple classification tasks, order objects in a logical sequence, and comprehend the principle of conservation. Thinking becomes less transductive and less egocentric. The child is capable of concrete problem-solving.
Some reversibility now possible (quantities moved can be restored such as in arithmetic: $3+4 = 7$ and $7-4 = 3$ , etc).
Class logic-finding bases to sort unlike objects into logical groups where previously it was on superficial perceived attribute such as colour. Categorical labels such as "number" or "animal" now available.

**Period of Formal Operations (12 years–adulthood)**

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**Characteristic Behaviour:**

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Thought becomes more abstract, incorporating the principles of formal logic. The ability to generate abstract propositions, multiple hypotheses and their possible outcomes is evident. Thinking becomes less tied to concrete reality.

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Formal logical systems can be acquired. Can handle proportions, algebraic manipulation, other purely abstract processes. If  $a + b = x$  then  $a = x - b$ . If  $ma/ca = IQ = 1.00$  then  $Ma = CA$ .

---

Propositional logic, as-if and if-then steps. Can use aids such as axioms to transcend human.

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# Apart from shortness, vegophobia and addiction to technology, how are children different?

Mark Allerton, Director Children's Court Clinic, 2012.<sup>1</sup>

*This talk focuses on what areas of child development are affected by abuse and neglect, how central the notion of attachment is to child development, and how clinicians plan assessments of what parents may offer. It integrates some of my more technical papers used to train clinicians.*

**Serious Question:** Why are child abuse and neglect bad?

## [1-0100] Attachment

An attachment relationship is the fruit of early childhood development, meaning that a child has been well cared-for, and a consistent caregiver, or a few consistent caregivers, have effectively responded to his or her needs. In well functioning families, the baby decrees what should be done and the caregiver learns to interpret and meet these needs. A “good enough” mother is sensitive and flexible in the way she studies and reacts to her baby, and intuitively learns how to supply what is required.

In this safe, predictable environment the primary caregiver can become a “secure base” for the child. The child knows the mother is there to provide security when it is required, so that he or she can then safely learn about the world through personal exploration. A baby brought up in this secure, nurturing environment learns to expect relationships to be reciprocal and direct. A signal from one person leads to a straightforward response from the other.

From this start, these children are more likely to learn that the world behaves according to intelligible principles, they will expect rewarding relationships based on assertiveness and empathy, they are comfortable with bodily contact, and will be predisposed to enjoy school and other learning activities.

For a human baby, born the most vulnerable of species, it is highly dangerous to be unattended, or not responded to appropriately. Babies are built, both biologically and psychologically, to engage with, and elicit care from others. The caregivers who make them most comfortable are those who are stronger, wiser, safer and irrationally interested in their welfare. Naturally, a primary, predictable caregiver, usually in the form of a mother, often manages to fulfil these demanding occupational criteria.

Home should be the safest of places, yet we know that for some people home is the place of greatest danger. How do people manage to survive in some homes? When the mother does not respond to the baby's cues (eg eye contact, crying, physical movements), the baby has to adapt differently. Infants need to adapt to dangerous family experiences by using the “anxious” strategies of “defended” (usually seen as a “Type A insecure” or “avoidant” strategy) or “coercive” (or “Type C insecure” or “ambivalent”) attachments. Crittenden (2008) regards these anxious attachment strategies as inherently adaptive, in that they protect the infant, and help unresponsive caregivers to be forced to meet these needs.

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<sup>1</sup> This article is adapted from a talk given to the NSW Children's Court magistrates at a Judicial Commission s 16 Conference on 3 March 2010.

Development area	A child needs ...	Impact of child abuse and neglect
<p><b>Physical development</b> (Prevention of injury, freedom from preventable illnesses and chronic conditions. Nutrition, sleep, dental care, gross and fine motor skills.)</p>	<p><b>Physical care and safety</b> Consistent safety from physical and sexual abuse and from exposure to domestic violence, in placements and contact visits; also consistent hygiene, supervision, housing, food, clothing, sleep, rest, health care, continuity, routine, advocacy, etc.</p>	<p>Problems begin in pregnancy (see below)</p> <ul style="list-style-type: none"> <li>Children born AoD addicted</li> <li>Foetal Alcohol Syndrome</li> <li>Physical injuries</li> <li>Nutrition problems</li> <li>Growth retardation</li> <li>Dental care</li> <li>Development (see below), including coordination and motor skills</li> <li>Immunisations</li> <li>Sleep</li> </ul> <p>As adults:</p> <ul style="list-style-type: none"> <li>Physical symptoms<sup>a</sup></li> <li>Vulnerability to illness<sup>b</sup></li> <li>Dental problems</li> </ul>
<p><b>Emotional development</b> (Ability to regulate emotion, to feel safe, develop self-efficacy)</p>	<p><b>Empathic attention</b> This is at the core of the attachment relationship. The child needs someone to show interest, compassionate understanding, and to respond effectively to his or her emotional needs, feelings and thoughts.</p>	<ul style="list-style-type: none"> <li>Attachment Disorders</li> <li>Failure to Thrive</li> <li>PTSD</li> <li>Anxiety</li> <li>Depression</li> <li>Behaviour problems, worse cognitive and school performance<sup>c</sup></li> </ul>
	<p><b>Attachment relationship</b> This is the focus of a young child's emotional and social development, providing the core his or her affect regulation, self-knowledge, trust and capacity to learn. Children need to feel safe, to settle, to develop a sense of self, and to know that their needs will be responded to. This requires an ongoing commitment from consistent caregiver(s), who offer responsive caregiving, empathic attention, acceptance of the child as an individual, and a model for self-concept and social learning. This is also the foundation for establishing autonomy and individual identity.</p>	<p>As adults, greater risk of:</p> <ul style="list-style-type: none"> <li>Personality disorders<sup>d</sup></li> <li>AoD dependence<sup>e</sup></li> <li>Depression<sup>f</sup></li> <li>Higher psychopathology<sup>g</sup></li> <li>Relationship problems</li> </ul>
<p><b>Behavioural development</b> (Impulse control, self-care skills, independent behaviour)</p>	<p><b>Emotional and behavioural self-regulation</b> This involves learning how to recognise and manage impulses and feelings, how to express them appropriately, how to get needs met effectively and safely, and how to respond appropriately to others. To achieve this requires effective limit-setting and discipline.</p>	<ul style="list-style-type: none"> <li>Attention problems</li> <li>Impulsivity</li> <li>AD/HD</li> <li>Emotional self-regulation problems</li> <li>Aggression problems</li> <li>Oppositional defiant disorder</li> <li>Conduct disorder</li> </ul>

Development area	A child needs ...	Impact of child abuse and neglect
<b>Social development</b> (good attachments, theory of mind, capacity to interpret and trust others, interpersonal skills, peer relations, personal identity, understanding and enhancing one's role in society)	<b>Role model(s)</b> A child learns by copying the behaviour of others, with the end result of learning how to play a constructive, independent social role and how to participate in the range of social relationships necessary for human society, from the intimate through to formal citizenship roles. This implicit, behavioural learning requires continuity of social modelling, facilitating the adoption of pro-social values, leading to a sense of meaning, belonging and cultural identity.	Speech and language development problems <sup>h</sup> Social problems based on difficulties with social cognition (eg ability to judge others and trust intelligently) Peer relationship problems Problems with authority figures Behaviour problems Oppositional defiant disorder Conduct disorder
<b>Cognitive and cultural development</b> (Play, language, problem-solving, reading, educational achievement, love of learning, creativity, cultural identity)	<b>Cultural education</b> One of the main tasks of childhood is to learn the wider explicit skills needed to adapt successfully to a complex modern community. These include language and communication, reading, transport, financial, health, occupational, recreational, cultural and spiritual education, leading to sense of personal identity in the context of human society and one's own meaningful values in life. Cultural educational needs and learning styles expand and widen over time from the family hearth to the wider society. They are acquired by different learning styles, from observation, stimulation/interaction, exploration/learning, socialisation, play opportunities, and formal instruction, through to participation in school, sport, cultural, workplace and spiritual milieus.	Attention problems Inability to play Problem-solving problems Lower cognitive abilities, particularly verbal reasoning Educational underachievement, particularly in relation to abstract reasoning Inhibited creativity Socioeconomic underachievement Loss of cultural identity

<sup>a</sup> Eg Bonomi et al, 2008.

<sup>b</sup> Ibid.

<sup>c</sup> Kerr, Black and Krishnakumar, 2000.

<sup>d</sup> Carr and Francis, 2009.

<sup>e</sup> Conroy et al, 2009.

<sup>f</sup> Bonomi et al, 2008.

<sup>g</sup> McLewin and Muller, 2005; attachment security predicted levels of psychopathology irrespective of levels of physical maltreatment.

<sup>h</sup> Lamont, 2010.

Early development from the abused child's perspective:<sup>2</sup>

- (i) You will have more difficulties and complications in pregnancy.
- (ii) The first abuse is usually in utero, from one of the mother's partners.
- (iii) You have 2–4 times greater risk of prematurity or being underweight.
- (iv) You are 10 times more likely to be delivered by Caesarean section.

<sup>2</sup> Martin, 1976, p 17.

- (v) You are likely to be a disappointment to your mother.
- (vi) The normal symbiotic relationship is missing.
- (vii) Your needs are not met with alacrity and concern.

In other words, child abuse and neglect can affect every area of a child's health, development and potential. The challenge for Children's Court Clinic clinicians is to understand what are the needs and resources, and the developmental risks and strengths, for each particular child.

### Child development<sup>3</sup>

Children who are neglected may be delayed in all areas, but it is common for them to have normal gross motor milestones, and delayed language and social development.

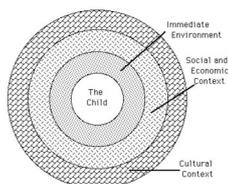
	Consensus	Down kiddies
<b>Gross Motor</b>		
Roll over	5 m	
Sit alone	7(5–9) m	11 m
Crawling (creeping)	10 m	15 m
Stand alone	11 m	20 m
Walk alone	11–15 m	26 m
Run	19–24 m	
Climb stairs (crawling)	15 m	
— up alternating feet	3 yrs	
— down alternating feet	5 yrs	
<b>Language</b>		
Turn to mother talking	6 m	
First laugh	2–6 m	
“Dada” or “Mama”	10 m	
1st words (not imitating)	12 m	23 m
2 words together	20 (19–22) m	3 yrs
<b>Personal-Social</b>		
Finger feeding	9–10 m	18 m
Drink from cup	12–13 m	23 (12–32) m
Feed self with spoon	14–18 m	29 m
Dry during the day	18 m–2 yrs	
Dry at night	~ 3 yrs	
<b>Play</b>		
Play independently on floor	4–6 m	
“Peekaboo”	9 m	

<sup>3</sup> When I was supervising the Community Services Southern Regional Developmental Disability Psychologists, we reviewed the main resources describing developmental milestones (by Griffiths, Denver, Sheridan, Cooley and a Down Syndrome book).

	Consensus	Down kiddies
Parallel play	21–27 m	
Cooperative play with peers	4–5 yrs	

## Parenting and development

Human development is not individual, but social. Bronfenbrenner’s social-ecological model of development (1979) describes these influences as intercultural, community, organisational, and interpersonal or individual. He saw the individual, organisation, community, and culture to be nested factors, like Russian dolls. Each echelon operates fully within the next larger sphere.



*FIGURE 1: A simplified version of Bronfenbrenner’s social-ecological model of development.*<sup>4</sup>

Risks to children tend to be cumulative, but attachment is the central focus. Peter Fonagy (1998) reviewed relevant developmental factors in relation to a vulnerable population of infants. He categorised risk and protective factors within early development, as linked to social inequalities:

1. **Biological factors** (attenuated by psychosocial interventions)
2. **Family and social factors** (Low SES, deprivation, family instability, single parenthood, maltreatment)
3. **The quality of parenting** (including differential sibling effects, parental psychopathology)
4. **The quality of attachment status** (attachment security correlates with SES)
5. **The influence of non-maternal care** (for children of insensitive mothers who were in low quality care).

He concluded that the relationship with the caregiver is arguably the most important mediator of the impact of social inequalities on early child development. This view is strongly supported by Schore’s (2003) review of more recent research, which concluded that social stressors related to attachment or “relational” trauma, whether abuse or neglect, can lead to severe affect dysregulation and have “more negative impact upon the infant brain than assaults from the nonhuman or inanimate, physical environment” (ibid, p 237).

The social ecological model considers behaviour from the perspective of continuous interactions within nested systems, from individual, interpersonal, organisational, community, through to intercultural factors. In our child development focus these systems might be from the maternal dyad, father and sibling relationships, extended

<sup>4</sup> From Purdue Calumet’s School of Education website.

family and kinship group, family friends, school, neighbourhood, friends, church or sporting groups, work or shops, through to public services and federal elections. Over time, development occurs through widening ripples through these areas.

The family must also interact constructively with the extended family and neighbourhood, allowing the child to learn citizenship, safe behaviour and how to live independently in a human community. In a very practical sense it is important for the family to facilitate the child's independence and learning at school, to make effective use of health and medical services, and to develop constructive peer relationships.

### **Characteristics of abusive parents and their children**

The NSW Child Deaths Committee (2000) raised specific concerns when a parent is drug-affected, particularly by methadone, and if the child is aged less than 12 months. Parental abuse of alcohol and other drugs has contributed to children's deaths from dehydration, pneumonia, bronchiolitis, toxicity, drowning and motor vehicle accidents. It is also associated with social isolation, poverty, domestic violence, parental mental illness, parental personality disorder, single parenthood with serial partners, inadequate support networks, criminal activity and involvement in drug-using networks.

The Denver Group (Steele and Pollock, 1974) identified characteristics of abusive parents:

- (a) Immature and dependent
- (b) Socially isolated
- (c) Poor self-esteem
- (d) Difficulty seeking or obtaining pleasure
- (e) Distorted perceptions of the child (including role reversal)
- (f) Fear of spoiling the child
- (g) Belief in the value of punishment
- (h) Impaired ability to empathise with the child's needs and to respond appropriately.

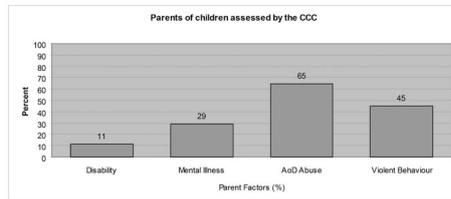
Crittenden, 1988, found:

- (a) In **abusive** families, children were described as:
  - (i) Difficult and acting out, or wary, compliant and inhibited.
- (b) In **neglecting** families they were described as:
  - (i) Very passive in infancy
  - (ii) Sometimes very active when older
  - (iii) Having a limited ability to attend to others
  - (iv) Having "significant developmental delay".
- (c) In "**abusing and neglecting families**", children were described as:
  - (i) Being out of control
  - (ii) Unable to learn to manage their parents as can abused children
  - (iii) Unable to safely ignore their parents (as neglected children can)

- (iv) Having numerous intellectual, physical and behavioural anomalies.

## A snapshot from clinic data

A recent review <sup>5</sup>of some Authorised Clinicians' reported summaries of their findings found high levels of disability (broadly defined), alcohol and other drug misuse, violent behaviour problems and mental illness for the parents of the at-risk children.



*FIGURE 2: Proportions of problems found in parents of children and young persons (0-18 years).*

## There is no such thing as a child, and no such thing as a parent

I hope this summary has shown why it is not possible to assess either a child or a parent alone. Each needs to be understood in relation to the other. My model of assessment of parenting capacity<sup>6</sup>, from which the following information is drawn, attempts to allow the interactions between the child's needs and the parents' resources to be considered. It is based on considering the parenting dimensions that relate to these needs (Steinhauer 1991, Mrazek et al, 1995, Brennan 1996, Azar et al, 1998).

Stafford and Zeanah (2006) have summarised the essentials of parenting as involving the provision of sustenance, stimulation, support, structure and surveillance. We need to operationalise what these may mean, particularly for vulnerable children.

Assessments of parenting capacity need to reflect the fact that the majority of carers are women (Wyndham 2008). When separated fathers are assessed for parenting capacity, it is often their new partners who are expected to do the work.

### (i) Responsive caregiving and protection

This includes the flexible yet continuous use of basic childcare skills, without which child development is seriously at risk:

- Adequate physical care, using appropriate routine skills (feeding, clothing, toileting, cleaning, bedtime) adapted to the situation at hand;
- Awareness of the particular child's developmental needs, and the ability to meet them, including child care and medical emergencies;
- Capacity to protect the child from physical danger in the home and neighbourhood, from physical or sexual abuse, and from exposure to domestic violence, and from potential danger from others in the household and the wider social network.

Drug use, mental illness, intellectual disabilities and personality disorders may limit these skills.

<sup>5</sup> Surveys were done in relation to assessments of 1564 children, and 2051 adults (1235 parents) assessed by the Children's Court Clinic between January 2007 and July 2008.

<sup>6</sup> Allerton, 2012.

(ii) **Reflective function**

Donald and Jueridini (2004) have clarified recent research's emphasis on the importance of **practical parental empathy**, involving the "capacity to see the experience from the child's point of view, and to realistically appraise what might need to change for the child to thrive in their care". Steinhauer (1991) has defined this more specifically as "responsive caregiving".

Fonagy (2000) has found social cognition to be a key mediator of the impact of attachment. Parents' ability to reflect or mirror (before their child's birth), or their **reflective function** helps predict their child's attachment security (at 18 months). It enables:

- Sensitive reflection by the caregiver, allowing the child to **internalise a representation of its mental state** ("So this feeling I'm having is what Mum calls anger", etc);
- The child to feel **safe in exploring the parent's mind** to understand feelings and thoughts that account for their behaviour;
- **Play** to be facilitated, which helps a child move from a **subjective** world where internal experience and external reality are assumed to be equivalent, to a **mentalised internal world**, where subjective experiences are recognised as but a version of external reality.

Reflective function predicts the transmission of attachment styles better than parental sensitivity, genetics or behavioural modelling.

These experiences help the child develop an **intentional stance**, the ability to understand others' mental states (thoughts, beliefs, feelings, desires), to make sense of and predict their actions. The hallmark of achievement of this stance is the child's recognition that a person's behaviour may be based on a mistaken belief (3–4 years). Our social maturity, and capacity for empathy and rapport, depend on our ability to understand the mental world of another person.

(iii) **Bonding**

This typically means the parent's attachment or emotional commitment to the child:

- Emotional acceptance of the child
- Responsibility, commitment (time, energy)
- Relationship continuity
- Warmth rather than rejection/hostility (overt, covert neglect and/or abuse)
- Management of traits attributed to the child and competition for attention from partner/spouse.

A parent needs to "be there" emotionally and physically for the child, rather than absorbed solely by his or her own, a partner's, or another child's needs. Wyndham (2008) has reminded me that this can be assessed partly by the way parents speak of their children. The words they use to describe the children, (eg "a little liar", "she's manipulative"), and the tone and manner in which they

speak of them reveal parental attributions, expectations and understanding of child development. It is also relevant to consider to what extent the parent sees the child as a narcissistic extension of him- or herself.

(iv) **Emotional availability**

A parent's capacity to regulate his or her own emotional tension leads to a capacity to understand and respond to the child's emotions, and to treat the child as a real, independent human entity. This can be limited by psychiatric or personality disturbance (depending on type, severity, and affected by ability to use clinical interventions). Emotional availability may be aided by supports for the parent and the management of stress from a possibly adverse environment (parent relationships, climate at home, extended family and social supports, employment, financial security). Bretherton (2000) reports a variety of studies closely linking maternal sensitivity in terms of emotional availability with attachment quality in infancy and maternal "states of mind" revealed by the AAI.

(v) **Strategic Behaviour Management**

This includes acceptance of supervisory responsibilities, knowledge of various child management strategies, and the ways of selecting, applying and adapting them appropriately for different situations with children. It will require developmentally appropriate expectations and a capacity to analyse a particular situation, including limit setting, redirection, discipline, flexibility and support for the child's autonomy.

Some of these skills can be taught, for example in 1-2-3-Magic, Triple P, Parent Effectiveness Training or Systematic Training for Effective Parenting. A parent also needs to be perceptive, sensitive and relatively consistent in using them. The child needs to be able to learn how to overcome unhelpful habits, control impulsiveness, develop assertiveness skills, negotiation, conflict resolution and other effective ways of behaving.

(vi) **Ability to transmit the community's cultural values**

One of the main roles of a parent is to help the child to learn how to relate to other people. The family is the place to learn safely how to cooperate, compete, communicate and participate in society. In helping children to learn how to participate effectively and independently in the wider culture, a parent will both consciously and implicitly train the child in how to behave, passing on practical knowledge about ethics and cultural identity. A family provides a microcosm of the wider society, with opportunities to learn and to practice these skills safely, and to receive guidance and feedback as they are being learned.

At any point in the child's life these dimensions will be specific and possibly different, and interact with the child's age, history, temperament, resources, history, handicaps, intelligence, attachment style.

(vii) **Supportive social environment**

The social ecological model (Bronfenbrenner 1979) considers behaviour from the perspective of continuous interactions within nested systems from individual, interpersonal, organisational, community, through to intercultural factors. In our child development focus these systems might be from the maternal dyad, father and sibling relationships, extended family and kinship group, family

friends, school, neighbourhood, friends, church or sporting groups, work or shops, through to public services, the media and government. Parents need to facilitate their children’s development in the widening ripples from family intimacy towards social complexity.

Parents need a secure and social environment supportive to their important caregiving role. Within this nurturing environment an effective parenting team may consist of two parents, or one parent and significant support person, or a wider kinship parenting group. Their role is to mobilise and coordinate resources, to share skills and to support each other in the common parenting goal. Their capacity to share the tasks and responsibilities of parenthood is reflected in the higher educational, emotional and behavioural outcomes for children in families with two parents. Single parenthood is itself a risk factor for children, compared to the consistent presence of two parents, or parenting team. Similarly, a socially isolated family may not have the back-up resources to manage emergencies, provide guidance and help, and to enrich the social ecology around the child. Such a supportive network is often referred to as scaffolding. It is important to understand the specific parental resources supported by the family’s social ecology (eg back up physical care and babysitting, emotional support allowing the parents better affect management and hence emotional availability, a network that supports behaviour management and social learning), and also to consider the sustainability of this positive social ecology.

The diagram below attempts to show how a clinician may attempt to compare a child’s assessed needs to the assessed resources a parent may be able to offer. It can indicate areas of strength and weakness in the parent-child relationship, suggesting possible remediation interventions, and also allow explicit thinking about whether any necessary changes are viable.

Child Needs	Parent Resources			Appropriate	Vulnerable	Chronic Problem
	Normal	Vulnerable	Chronic Need			
Physical Care and Safety				Responsive Caregiving and Protection		
Empathic attention				Reflective Function		
Attachment Relationship				Bonding		
Emotional and behavioural self-regulation				Emotional Availability		
Role model				Strategic Behaviour Management		
Cultural education				Ability to transmit community values		
Other: (describe)				Other: (describe)		

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# Child protection legislative reforms

Judge Peter Johnstone, President of the Children’s Court of NSW; the paper was first presented for the Local Court Magistrates on 27 October 2014.

[**Currency note:** The *Child Protection Legislation Amendment Act 2014*, the amending Act under discussion in the article below, commenced upon proclamation on 29 October 2014 (LW 6 June 2014). Some provisions quoted in this article have since been amended by later legislation. Accordingly, references in the article to the reformed sections of the *Children and Young Persons (Care and Protection) Act 1998* will link to the version of the Act as at 29 October 2014 and references to “current legislation” are linked to the Act as at 4 July 2014.]

## [1-0110] Introduction

1. This paper has been prepared for Local Court Magistrates exercising Children’s Court jurisdiction in care and protection matters. The aim of this paper is to provide guidance with regards to the child protection legislative reforms commencing on 29 October 2014.<sup>7</sup>

2. It is important to note that the legislative intent behind these reforms emphasises restoration to families and, where this is not possible, the provision of certainty and stability through permanent placements. As a result, the reforms focus on early intervention, highlighting the need to work with the Department of Family and Community Services (DFaCS), parents, carers, children and young people to resolve disputes before they reach the Court. To facilitate early intervention, provisions have been included in the amendments to ensure alternative dispute resolution mechanisms are utilised to their fullest extent.

3. In this paper, I have distilled the key elements of the reforms into eight parts. It is my intention that you will read this paper alongside the marked up copy [not reproduced here] of the *Children and Young Persons (Care and Protection) Act 1998* [the Care Act], which incorporates the changes in the *Child Protection Legislation Amendment Act 2014*.

4. Firstly, this paper will discuss the changes regarding Parent Responsibility Contracts. The paper will then provide an outline of the nature and scope of the new Parent Capacity Orders. Thirdly, the paper will look at the reforms made in relation to Contact Orders and following this, the paper will look at the new provisions in relation to Guardianship Orders. The paper will then discuss the changes to permanency planning, Supervision Orders, Prohibition Orders and the Savings and Transitional Provisions. The conclusion of this paper will provide an overview of the processes that the Court will put in place to ensure Forms and Practice Notes are consistent with the reforms.

5. The main areas of reform of the Care and Protection jurisdiction are: the power to make Parent Capacity Orders to require parents to address deficiencies in parental capacity, and to make Guardianship Orders for the permanent placement of a child

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<sup>7</sup> I acknowledge the considerable help and valuable assistance in the preparation of this paper provided by the Children’s Court Research Associate, Paloma Mackay-Sim.

or young person. Additionally, the Court will be empowered to hear contact disputes where agreement has not been reached through Alternative Dispute Resolution (ADR) and consider alleged breaches of Prohibition Orders.

## Part 1 — Parent Responsibility Contracts

6. Parent Responsibility Contracts (PRCs) exist under the current legislation: s 38A. The reforms alter the situation in relation to PRCs, removing the presumption that a child is in need of care and protection if the contract is breached and extending the applicability of PRCs to include expectant parents: s 38A(1)(b). It is anticipated that these changes will result in an increase in the use of PRCs.

7. Section 38A is amended by creating a new s 38A(1), which reads as follows:

- (1) A “*parent responsibility contract*” is either or both of the following:
  - (a) an agreement between the Director-General and one or more primary care-givers for a child or young person that contains provisions aimed at improving the parenting skills of the primary care-givers and encouraging them to accept greater responsibility for the child or young person,
  - (b) an agreement between the Director-General and either or both expectant parents whose unborn child is the subject of a pre-natal report under section 25 that contains provisions aimed at improving the parenting skills of the prospective parent and reducing the likelihood that the child will be at risk of significant harm after birth.

8. Another significant reform is that under s 38E, a breach of a PRC does not give rise to a presumption that a child is in need of care and protection. Section 61A was not amended to align with this change. This means that pursuant to s 61A, a contract breach notice of a PRC will operate as a care application. FaCS have acknowledged that this is a drafting oversight and will amend s 61A in 2015. However, the Secretary will need to file an application initiating proceedings in addition to the breach notice to ensure that the Court has sufficient information to establish proceedings.

9. [The reformed] s 38E provides:

- (1) The Director-General may file a “*contract breach notice*” with the Children’s Court in relation to a parent responsibility contract if:
  - (a) a party to the contract has breached a term of the contract, and
  - (b) the contract authorises the Director-General to file a contract breach notice with the Children’s Court for breaches of the kind committed by any party to the contract.
- (2) A contract breach notice must state the following matters:
  - (a) the name of the party to the contract who is alleged to have breached the parent responsibility contract,
  - (b) each provision of the parent responsibility contract that the party to the contract is alleged to have breached,
  - (c) the manner in which the party to the contract is alleged to have breached the provision,
  - (d) the care orders that the Director-General will seek from the Children’s Court in respect of the child or young person concerned,
  - (e) such other matters as may be prescribed by the regulations.

- (3) The Director-General is to cause a copy of a contract breach notice filed with the Children’s Court (along with a copy of the parent responsibility contract) to be served on each of the following persons as soon as is reasonably practicable after filing the notice:
  - (a) each party to the parent responsibility contract,
  - (b) the child or young person for whom the party breaching the contract is a primary care-giver.
- (4) [Repealed]
- (5) A reference in this Act to the Director-General duly filing a contract breach notice is a reference to the Director-General filing the notice in accordance with the provisions of this section.

## Part 2 — Parent Capacity Orders

10. The reforms introduce a new jurisdiction for the Children’s Court, the Parent Capacity Order (PCO). A PCO can be used as a stand-alone provision, consistent with the early intervention aims of the reforms. Additionally, a PCO can be issued during proceedings or as a result of a breach of a prohibition order.

11. Section 91A defines PCO as:

*“parent capacity order”* means an order requiring a parent or primary care-giver of a child or young person to attend or participate in a program, service or course or engage in therapy or treatment aimed at building or enhancing his or her parenting skills.

12. An application for a PCO is not an application for a care order under Ch 5, Pt 2 of the Care Act. Rather, Ch 5, Pt 3 5 set out a discrete framework for PCOs including the process for variation or revocation of a PCO and appeal provisions.

13. A PCO may be made on the application of the Secretary or on the initiative of the Children’s Court: s 91B.

14. An application for a PCO can be referred to a Dispute Resolution Conference (DRC).

15. Section 91D(3) provides that:

The purpose of a dispute resolution conference is to provide the parties with an opportunity to agree on action that should be taken to build or enhance the parenting skills of the parent or primary care-giver.

16. The threshold test as set out in s 91E is lower than the threshold test for a care application: s 72.

17. Firstly, there must be an identified deficiency in the parenting capacity of a parent/primary care-giver that has the potential to place the child or young person at risk of significant harm. Secondly, the Court must be satisfied that the parent/primary care-giver is unlikely to attend or participate in the program, service or course or engage in the therapeutic service.

18. Section 91F provides that the Court may make a PCO by consent. This function may be exercised by a Children’s Registrar in relation to an application made by the Secretary under s 91B(a).

19. Section 91H sets out the requirements regarding variation or revocation of a PCO and s 91I provides a right of appeal, limited to a question of law.

20. Practice Note 10 has been issued in relation to the listing arrangements, service requirements and the conduct of DRCs as they relate to applications for stand-alone PCOs. Legal Aid has informed the Children's Court that lawyers working in early intervention strategies will generally be assigned these applications. For this reason it is preferable that, where practicable, applications for PCOs are listed on the same day as Applications for Compulsory Schooling Orders.

### **Part 3 — Contact**

21. The reforms limit the Court's power to make contact orders for 12 months on the initial care application unless restoration is planned. However, the amendments create new processes for varying contact orders and making applications for contact orders following the conclusion of the initial proceedings.

22. Section 86(1A)–(7) provides:

(1A) A contact order may be made by the Children's Court:

- (a) on application made by any party to proceedings before the Children's Court with respect to a child or young person, or
  - (b) with leave of the Children's Court — on application made by any of the following persons who were parties to care proceedings with respect to the child or young person:
    - (i) the Director-General,
    - (ii) the child or young person,
    - (iii) a person having parental responsibility for the child or young person,
    - (iv) a person from whom parental responsibility for the child or young person has been removed,
    - (v) any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person, or
  - (c) with leave of the Children's Court — on application made by any person who considers himself or herself to have a sufficient interest in the welfare of the child or young person.
- (1B) The Children's Court may grant leave under subsection (1A)(b) or (c) if it appears to the Court that there has been a significant change in any relevant circumstances since a final order was made in the proceedings.
- (1C) The Children's Court is not required to hear or determine an application made to it with respect to a child or young person by a person referred to in subsection (1A)(c) unless it considers the person to have a sufficient interest in the welfare of the child or young person.
- (1D) Before granting leave under subsection (1A)(b) or (c), the Children's Court:
- (a) must take into consideration whether the applicant for the contact order and persons to whom the contact order applies have attempted, or been ordered by the Children's Court to try to reach an agreement about contact arrangements by participating in alternative dispute resolution, and
  - (b) may order the applicant and those persons to attend a dispute resolution conference conducted by a Children's Registrar under section 65 or alternative dispute resolution process under section 65A.

[**Note:** Legal Aid has received specific funding to provide an alternative dispute resolution service for contact disputes. Dispute resolution services for other applications under the Care Act will ordinarily be provided by the Children’s Registrars (see Practice Note 3 — paragraph 17.1).]

- (1E) Subject to any order the Children’s Court may make, an applicant for a contact order under subsection (1A)(b) who was a party to care proceedings must notify other persons who were parties to the proceedings of the making of the application.
- Note.** Section 256A sets out the circumstances in which the Children’s Court may dispense with the requirement to give notice.
- (1F) A contact order made under subsection (1A)(b) on application of a person who was a party to proceedings in which an earlier contact order was made that has expired may be made in the same or different terms to the expired order.
- (2) The Children’s Court may make an order that contact be supervised by the Director-General or a person employed in that part of the Department comprising those members of staff who are principally involved in the administration of this Act only with the Director-General’s or person’s consent and must not be made in relation to contact with a child or young person who is the subject of a guardianship order.
- (3) An order of the kind referred to in subsection (1)(a) [this refers to 86(1)(a)] does not prevent more frequent contact with a child or young person with the consent of a person having parental responsibility for the child or young person.
- (4) An order of the kind referred to in subsection (1)(b) [this refers to 86(1)(b)] may be made only with the consent of the person specified in the order and the person who is required to supervise the contact.
- (5) A contact order made under this section has effect for the period specified in the order, unless the order is varied or rescinded under section 86A or 90.
- (6) Despite subsection (5), if the Children’s Court decides (whether by acceptance of the Director-General’s assessment under section 83 or otherwise) that there is no realistic possibility of restoration of a child or young person to his or her parent, the maximum period that may be specified in a contact order made under subsection (1A) concerning the child or young person is **12 months**. [My emphasis.]
- (7) Subsection (6) does not apply to a contact order made on the application of a former party to proceedings in which an earlier contact order was made that has expired.

23. The implications of these new contact arrangements is articulated by Roderick Best, Director of Legal Services at DFACS:

Where there is an application for the Court to make a contact order and the plan is for restoration then there is no limitation on the duration of the contact order however once the Court determines that there is no realistic possibility of restoration the maximum duration of an initial final contact order is 12 months. By way of contrast, contact arrangements in a care and permanency plan unsupported by an order under section 86 could be for any duration notwithstanding an absence of any plan for restoration. Again, there is greater flexibility and encouragement to proceed to put in place contact arrangements if parties proceed by way of case planning than by application for court orders. If parties are proceeding by way of plans then that shifts the emphasis away from hearings and places the emphasis on the dispute resolution processes where the plans will be buffeted and refined.<sup>8</sup>

<sup>8</sup> R Best, “Planning for Contact Changes”, a talk presented to a joint training of care lawyers [at the Judicial Commission of NSW Children’s Court of NSW Section 16 Meeting on 17 October 2014].

24. Section 86A sets out the circumstances under which contact orders may be varied by agreement. The section states:

- (1) A “*contact variation agreement*” is an agreement to vary the terms of a contact order in the light of a change in any relevant circumstances since the contact order was made or last varied.
- (2) A contact variation agreement must:
  - (a) be in writing, and
  - (b) be signed and dated by those parties to the proceedings in which the contact order was made who are affected by the variation and, if the contact variation agreement is made less than 12 months after the contact order was made, the legal representative of the child or young person, and
  - (c) be registered with the Children’s Court by those parties within 28 days after the date on which the agreement was signed.
- (3) The contact variation agreement is taken to be registered with the Children’s Court when filed with the registry of the Court without the need for any order or other action by the Court.
- (4) The contact variation agreement takes effect only if (and when) it is registered.
- (5) The contact variation agreement has effect from the date of registration until the end of the period specified in the variation agreement.
- (6) Nothing in this section prevents the variation of a contact order under section 90.

#### **Part 4 — Guardianship Orders**

25. With the commencement of the legislative reforms on 29 October, the Court will have the power to make a guardianship order allocating to a suitable person all aspects of parental responsibility until the child attains the age of 18 years: s 79A.

26. Clause 35 of the savings and transitional provisions [Sch 3] provides that on 29 October [2014], current orders allocating parental responsibility to a relative or kin will automatically transfer to guardianship orders: cl 35(1). DFACS have indicated that carers have been given the opportunity to opt out of this automatic transfer. However, a s 90 application would need to be made in these circumstances.

27. The characteristics of guardianship are not entirely distinct from an order allocating PR to the Minister, in that the responsibility of the guardian ends at the age of 18. In order to make a guardianship order, s 79A(3) provides that:

- (3) The Children’s Court must not make a guardianship order unless it is satisfied that:
  - (a) there is no realistic possibility of restoration of the child or young person to his or her parents, and
  - (b) that the prospective guardian will provide a safe, nurturing, stable and secure environment for the child or young person and will continue to do so in the future, and
  - (c) if the child or young person is an Aboriginal or Torres Strait Islander child or young person — permanent placement of the child or young person under the guardianship order is in accordance — with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles that apply to placement of such a child or young person in statutory out-of-home care under section 13, and

- (d) if the child or young person is 12 or more years of age and capable of giving consent — the consent of the child or young person is given in the form and manner prescribed by the regulations.

28. A helpful way of looking at guardianship is to picture it on a continuum, with parental responsibility at one end and adoption at the other. Guardianship falls somewhere in between these two concepts, it ends at 18 and is thus distinct from adoption. However, it picks up some aspects of adoption, in that a child over 12 is required to consent to a guardianship order.

29. Section 79B provides for where applications for guardianship orders may be made (other than those orders automatically transferring over to guardianship orders on 29 October).

30. Section 79B(1)–(11) states:

- (1) Despite section 61(1), an application for a guardianship order may be made by the following:
  - (a) the Director-General,
  - (b) with the written consent of the Director-General — the designated agency responsible for supervising the placement of the child or young person,
  - (c) with the written consent of the Director-General — a person who is an authorised carer or who has been assessed, in accordance with the regulations, by the Director-General or designated agency in relation to a child or young person to be a suitable person to be allocated all aspects of parental responsibility for the child or young person.
- (2) The Children’s Court may order an applicant for a guardianship order to notify those persons specified by the Children’s Court of the making of the application.  
**Note.** Section 256A sets out the circumstances in which the Children’s Court may dispense with service.
- (3) Subject to any order the Children’s Court may make, the applicant for a guardianship order is to make reasonable efforts to notify each parent of the child or young person of the making of the application for the order.
- (4) Each parent must be given a reasonable opportunity to obtain independent legal advice about the application and is entitled to be heard at the hearing of the matter.
- (5) Without limiting section 90(1A), an applicant for variation or rescission of a guardianship order made in respect of a child or young person must notify the principal officer of the designated agency that was supervising the placement of the child or young person in out-of-home care immediately before the guardianship order was made of the making of the application.
- (6) Without limiting subsection (2), an applicant for a guardianship order other than the Director-General is to notify the Director-General of the making of the application for the order on the day the application is filed and the Director-General is entitled to be a party to the proceedings.
- (7) An application cannot be made under subsection (1)(c) by a person who is an authorised carer solely in his or her capacity as the principal of a designated agency.
- (8) Subject to any order the Children’s Court may make, an applicant for a guardianship order must present the following to the Children’s Court before the order is made:
  - (a) copies of any written consent required to be given in relation to the applicant by subsection (1),

- (b) a care plan prepared by the applicant,
  - (c) a copy of any report on the health, educational or social well-being of the child or young person that is available to the applicant and that is relevant to the care plan.
- (9) Without limiting the information that must be contained in a care plan, it must contain information about the following:
- (a) the residence of the child or young person,
  - (b) if the Children’s Court has made any contact order under section 86 in relation to contact of the child or young person with his or her parents, relatives, friends or other persons — the arrangements for contact,
  - (c) the education and training of the child or young person,
  - (d) the religious upbringing of the child or young person,
  - (e) the health care of the child or young person,
  - (f) the resources required to provide any services that need to be provided to the child or young person and the availability of those resources,
  - (g) any views the child or young person has expressed about any aspect of the care plan.
- (10) Other requirements and the form of care plan under this section may be prescribed by the regulations.
- (11) The care plan is only enforceable to the extent to which its provisions are embodied in or approved by orders of the Children’s Court.

31. Supporting or ancillary orders that require the involvement of the DFACS, such as orders for supervision pursuant to s 76(1) are not available in relation to guardianship orders. However, given that guardians will still receive a payment from DFACS pursuant to s 79C, there will be a practical connection between the guardian and DFACS.

32. Whilst an application for a guardianship order may be made in relation to the initial care application, DFACS has advised that it is more likely that an initial application will seek a time limited PR order to either the Minister or the prospective guardian and that guardianship will be identified as the permanent placement option in the care plan. Where the Court approves such an application a section 90 application would subsequently be made seeking to convert the PR order to a guardianship order.

33. Clause 5 of the amending regulation sets out special provisions in relation to the leave requirement in s 90 as it relates to guardianship orders. DFACS has advised that over time they also plan to lodge applications for guardianship in relation to a number of cases where the child is subject to a PR order to the Minister but has been in a stable placement with a relative or kin for a considerable period of time.

34. The practical implication is that the Court may see an increase in s 90 applications over time.

## **Part 5 — Changes to permanency planning**

35. The legislative reforms introduce a hierarchy of permanency planning, entitled the “Permanent placement principles”: s 10A. The intent behind these reforms are to change the focus of case planning to long term options that are more likely to offer greater stability for the child and carers.

36. Section 10A provides:

(1) In this Act:

“*permanent placement*” means a long-term placement following the removal of a child or young person from the care of a parent or parents pursuant to this Act that provides a safe, nurturing, stable and secure environment for the child or young person.

(2) Subject to the objects in section 8 and the principles in section 9, a child or young person who needs permanent placement is to be placed in accordance with the permanent placement principles.

(3) The “*permanent placement principles*” are as follows:

(a) if it is practicable and in the best interests of the child or young person, the first preference for permanent placement of the child or young person is for the child or young person to be restored to the care of his or her parent (within the meaning of section 83) or parents so as to preserve the family relationship,

(b) if it is not practicable or in the best interests of the child or young person to be placed in accordance with paragraph (a), the second preference for permanent placement of the child or young person is guardianship of a relative, kin or other suitable person,

(c) if it is not practicable or in the best interests of the child or young person to be placed in accordance with paragraph (a) or (b), the next preference is (except in the case of an Aboriginal or Torres Strait Islander child or young person) for the child or young person to be adopted,

(d) if it is not practicable or in the best interests of the child or young person to be placed in accordance with paragraph (a), (b) or (c), the last preference is for the child or young person to be placed under the parental responsibility of the Minister under this Act or any other law,

(e) if it is not practicable or in the best interests of an Aboriginal or Torres Strait Islander child or young person to be placed in accordance with paragraph (a), (b) or (d), the last preference is for the child or young person to be adopted.

37. By introducing a hierarchy of placement principles, including guardianship orders, and placing greater emphasis on adoption, it may be less likely that parents will concede that there is no realistic possibility of restoration. Therefore, we may see an increase in the number of contested applications that appear before us.

38. Additionally, it is anticipated that the identification of whether someone is Aboriginal/non-Aboriginal will play a greater part in care proceedings. This may be challenging, particularly where identification of a child’s Aboriginality is not clear as it does not meet all of the requirements in s 5.

## **Part 6 — Changes regarding supervision orders and prohibition orders**

39. The introduction of s 76(3A), changes the maximum period of supervision as follows:

(3A) Despite subsection (3), the Children’s Court may specify a maximum period of supervision that is longer than 12 months (but that does not exceed 24 months) if the Children’s Court is satisfied that there are special circumstances that warrant the making of an order of that length and that it is appropriate to do so.

40. The reforms have also impacted upon orders prohibiting action (prohibition orders) pursuant to s 90A. The changes include an extension of the class of persons subject to

a prohibition order. The persons subject to a prohibition order can now include “any person who is not a party to the care proceedings”, in addition to a parent of a child or young person.

41. Further, s 90A will now also provide a mechanism to deal with a breach of a prohibition order. The amended s 90A reads as follows:

- (1) The Children’s Court may, at any stage in care proceedings, make an order (a “*prohibition order*”) prohibiting any person, including a parent of a child or young person or any person who is not a party to the care proceedings, in accordance with such terms as are specified in the order, from doing anything that could be done by the parent in carrying out his or her parental responsibility.
- (2) A party to care proceedings during which a prohibition order is made may notify the Children’s Court of an alleged breach of the prohibition order.
- (3) The Children’s Court, on being notified of an alleged breach of a prohibition order:
  - (a) must give notice of its intention to consider the alleged breach to the person alleged to have breached the prohibition order, and
  - (b) must give that person an opportunity to be heard concerning the allegation before it determines whether or not the order has been breached, and
  - (c) is to determine whether or not the order has been breached, and
  - (d) if it determined that the order has been breached — may make such orders (including a parent capacity order) as it considers appropriate in all the circumstances.
- (4) The person who is alleged to have breached the prohibition order is entitled to be heard, and may be legally represented, at the hearing of the matter.

## **Part 7 — Savings, transitional and other provisions**

42. The amending legislation will not affect proceedings currently on foot, unless otherwise provided: s 30 of the *Interpretation Act* 1987. Notwithstanding, Sch 3 provides specific savings and transitional provisions that will apply upon the commencement of the legislation.

43. Pursuant to cl 32, the following provisions apply regarding parent responsibility contracts:

- (1) An amendment made to sections 38A–38E by the amending Act [*Child Protection Legislation Amendment Act* 2014] extends (except as provided by subclause (2)) to a parent responsibility contract that is in force immediately before the commencement of the amendment [29 October 2014].
- (2) Section 38E(4) as in force immediately before its repeal by the amending Act continues to apply to and in respect of a parent responsibility contract that is in force immediately before that repeal unless its terms are varied under sections 38A–38E as amended by the amending Act.

44. Pursuant to cl 33, the following provisions apply regarding contact orders:

- (1) An application may be made under section 86(1A), as inserted by the amending Act [*Child Protection Legislation Amendment Act* 2014], by a party to proceedings commenced (irrespective of whether or not finally determined) before the commencement of the insertion.
- (2) Section 86A, as inserted by the amending Act, extends to the variation of a contact order made before that insertion.

45. Under cl 34, an order allocating sole parental responsibility under s 149 [now repealed] of the Act, will continue to have effect.

46. Clause 35(1) provides for the automatic transition of PR orders to guardianship orders as at 29 October [2014]. Clause 35(2) provides for the continuation of financial assistance where a PR order has automatically transferred to a guardianship order and cl 35(3) provides that parties in receipt of such financial assistance are to make an annual report to the Director-General.

47. Clause 36 provides that any provision of Ch 8 applying to a child or young person in supported out-of-home care continues to apply as it did before the amendments took effect.

48. Clause 37 provides that the new s 91B(b) extends to a prohibition order breached before s 91B(b) was inserted.

49. Clause 38 provides that the inserted Ch 15A does not apply to alternative dispute resolutions conducted prior to the amendment, under ss 37, 65 or 114.

50. Clause 39 provides that the amended s 83(4) extends to a plan that has been prepared but not yet submitted to the Children's Court in accordance with s 83(3).

## **Part 8 — Changes to court forms and practice notes**

51. The Children's Court is currently in the process of creating the following forms:

- (i) Application for Parent Capacity Order [now Form 5]
- (ii) Application for Variation or Revocation of Parent Capacity Order [now Form 6]
- (iii) Parent Capacity Order
- (iv) Application for Contact Orders [now Form 4]
- (v) Contract Breach Notice [now Form 41]
- (vi) Notification of Breach of Prohibition Order [now Form 42].

52. Amendments have been made to the Application Initiating Care Proceedings and the Application to Vary or Rescind a Care Order. Once finalised, the forms will be available online on the Children's Court website [now Application and Report Initiating Care Proceedings (Form 1) and Application for Rescission/Variation of Care Order (Form 3)].

53. The Children's Court has amended Practice Note 3: Alternative dispute resolution procedures in the Children's Court. Practice Note 10: [Parent capacity orders] has been issued in relation to stand-alone parent capacity orders.

54. The Children's Court is reviewing the guidelines for Children's Registrars and guidelines for registry staff.



# Care appeals from the Children's Court<sup>†</sup>

## [1-0150] Introduction

- [1] Proceedings relating to the care and protection of children and young persons in NSW, including first instance matters before the Children's Court, and appeals from the Children's Court, are public law proceedings, governed, both substantively and procedurally, by the *Children and Young Persons (Care and Protection) Act 1998* (the *Care Act*).
- [2] Care proceedings<sup>9</sup> 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. The rules of evidence do not apply, the proceedings are non-adversarial and they are required to be conducted with as little formality and legal technicality and form as the circumstances permit.
- [3] The purpose of the paper is to provide those Judges who will be hearing appeals from decisions of Children's Court Magistrates with an overview of the key concepts in the Act, particular aspects of the care jurisdiction, and procedural considerations on appeal, including the use of Children's Registrars for Dispute Resolution Conferences and the use of expert clinical evidence from the Children's Court Clinic.

## The Care Act

### The guiding principles

- [4] Decisions in care proceedings, at first instance and on appeal, are to be made consistently with the objects, provisions and principles provided for in the *Care Act*, and where appropriate, the United Nations Convention on the Rights of the Child 1989 (CROC),<sup>10</sup>
- [5] The Act contains an inextricable mixture and combination of both judicial and administrative powers, duties and responsibilities. It is often difficult to precisely discern where the Department's powers and responsibilities begin and end as opposed to those of the court. In summary, however, the Act establishes a regime under which the primary, and ultimate, decision-making as to children rests with the court.<sup>11</sup> I will be concentrating, in this paper, on the judicial aspects of the legislation.
- [6] The objects of the *Care Act*, are to provide:<sup>12</sup>
- (a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and

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<sup>†</sup> Judge Peter Johnstone, President of the Children's Court of NSW, District Court Annual Conference 2016, Wollongong, Wednesday 29 March 2016.

<sup>9</sup> *Children and Young Persons (Care and Protection) Act 1998*: s 60.

<sup>10</sup> *Re Tracey* (2011) 80 NSWLR 261; *Re Henry*; *JL v Secretary, DFACS* [2015] NSWCA 89 at [208]ff.

<sup>11</sup> Report of the Special Commission of Inquiry into Child Protection Services in NSW, November 2008 (the "Wood Report"), Volume 2 at 11.2.

<sup>12</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 8.

- (a) recognition that the primary means of providing for the safety, welfare and well-being of children and young persons is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement in accordance with the permanent placement principles, and
- (b) that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and
- (c) that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

[7] The *Care Act* sets out a series of principles governing its administration. These principles are largely contained in s 9, but also appear in other parts of the Act.

[8] First and foremost is what is sometimes referred to as the paramountcy principle: s 9(1). This principle requires that in any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount.

[9] This principle, therefore, is the underpinning philosophy by which all relevant decisions are to be made. It operates, expressly, to the exclusion of the parents, the safety, welfare and well-being of a child or young person removed from the parents being paramount over the rights of those parents.

[10] It is now well settled law that the proper test to be applied is that of “unacceptable risk” to the child: *M v M* (1988) 166 CLR 69 at [25]. That case dealt with past sexual abuse of a child but the principles there set out apply to other forms of harm,<sup>13</sup> such as physical and emotional harm. A positive finding of an allegation of harm having been caused to a child should only be made where the court is so satisfied according to the relevant standard of proof, with due regard to the matters set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336. Nevertheless, an unexcluded possibility of past harm to a child is capable of supporting a conclusion that the child will be exposed to unacceptable risk in the future from the person concerned.<sup>14</sup>

[11] The Secretary will not fail to satisfy the burden of proof on the balance of probabilities simply because hypotheses cannot be excluded which, although consistent with innocence, are highly improbable: *Director General of Department of Community Services; Re “Sophie”* [2008] NSWCA 250 at [67]–[68], per Sackville AJA.

[12] His Honour said in that decision:

[67] The reasoning process I have outlined involves an error of law. The primary Judge, although stating the principles governing the burden of proof correctly did not apply them correctly. It was appropriate to take into account the gravity of the allegation of sexual misconduct made against the father, as required by s 140(2) of the *Evidence Act* 1995. It was not appropriate to find that the Director-General had failed to satisfy the burden of proof on the balance of probabilities simply because his Honour could not exclude a hypothesis that, although consistent with innocence, was “highly improbable”.

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<sup>13</sup> *A v A* (1998) FLC 92-800.

<sup>14</sup> *M v M* (1988) 166 CLR 69 at [26].

To approach the fact-finding task in that way was to apply a standard of proof higher than the balance of probabilities, even taking into account the gravity of the allegation made against the father.

[68] As the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* at 171, statements to the effect that clear and cogent proof is necessary where a serious allegation is made are not directed to the standard of proof to be applied, but merely reflect the conventional perception that members of society do not ordinarily engage in serious misconduct and that, accordingly, a finding of such misconduct should not be made lightly. In the end, however, as Ipp JA observed in *Dolman v Palmer* at [47], the enquiry is simply whether the allegation has been proved on the balance of probabilities.

[13] Whether there is an “unacceptable risk” of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] FamCA 1235. This is an exercise in foresight. The court must examine what the future might hold for the child, and if a risk exists, assess the seriousness of the risk and consider whether that risk might be satisfactorily managed or otherwise ameliorated, for example, the nature and extent of parental contact, including any need for supervision.<sup>15</sup> Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. The risk of detriment must be balanced against the possibility of benefit to the child.

[14] Secondary to the paramount concern, the *Care Act* sets out other, particular principles to be applied in the administration of the Act. These are set out in ss 9(2), 10, 11, 12 and 13. There are also special principles of self-determination and participation to be applied in connection with the care and protection of Aboriginal and Torres Strait Islander children: ss 11, 12 and 13.

- Wherever a child is able to form his or her own view, he or she are to be given an opportunity to express that view freely. Those views are to be given due weight in accordance with the child's developmental capacity and the circumstances: s 9(2)(a). See also s 10.
- Account must be taken of the culture, disability, language, religion and sexuality of the child and, if relevant, those with parental responsibility for the child or young person: s 9(2)(b).
- Any action to be taken to protect the children from harm must be the least intrusive intervention in the life of the children and their family that is consistent with the paramount concern to protect them from harm and promote their development: s 9(2)(c).
- If children are temporarily or permanently deprived of their family environment, or cannot be allowed to remain in that environment in their own best interests, they are entitled to special protection and assistance from the State, and their name, identity, language, cultural and religious ties should, as far as possible, be preserved: s 9(2)(d).
- Any out-of-home care arrangements are to be made in a timely manner, to ensure the provision of a safe, nurturing, stable, and secure environment, recognising the children's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made: s 9(2)(e).

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<sup>15</sup> Justice S Austin, “The enigma of unacceptable risk”, paper presented at the 2015 Hunter Valley Family Law Conference, 31 July 2015.

- Unless contrary to the child's best interests, and taking into account the wishes of the child, this will include the retention of relationships with people significant to the children: s 9(2)(f).
- If a child or young person is placed in out-of-home care, the permanent placement principles are to guide all actions and decisions made under this Act (whether by legal or administrative process) regarding permanent placement of the child or young person: s 9(2)(g).
- Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible: s 11(1).
- Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12.
- Where possible, any out-of-home placement of an Aboriginal or Torres Strait Islander child is to be with a member of the extended family or kinship group.
- If that is not possible, the Act provides for a descending process of placement with an appropriate Aboriginal and Torres Straits Islander carer before, as a last resort, placement with a non-Aboriginal and Torres Straits Islander carer, after consultation: s 13(1).
- In determining where a child is to be placed, account is to be taken of whether the child identifies as an Aboriginal or Torres Strait Islander and the expressed wishes of the child: s 13(2).
- A permanency plan must address how the plan has complied with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in s 13: s 78A(3).

[15] The *Care Act* is not the most precise or orderly piece of legislation one could hope for. There are, however, a number of key concepts that principally occupy the exercise of the care jurisdiction, about which I will say something. They include:

- Removal of children
- The need for care and protection
- Permanent placement
- Realistic possibility of restoration
- Parental responsibility
- Out-of-home care
- Contact.

**Removal of children from their parent(s) or carer(s)**

[16] If the Secretary forms the opinion that a child is in need of care and protection, he or she may take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child: s 34(1).

- [17] Removal of a child into state care may be sought by seeking orders from the court: s 34(2)(d), by the obtaining of a warrant: s 233, or, where appropriate, by effecting an emergency removal: s 34(2)(c); see also ss 43 and 44.
- [18] Where a child is removed, or the care responsibility of a child is assumed, by the Secretary, he or she is then required to make a care application to the Children's Court within 3 working days and explain why the child was removed: s 45. The court may then make interim care orders: s 69. The order may be for allocation of parental responsibility pending final orders, or such other order as the court considers is required. An "interim order" is an order of a temporary or provisional nature pending the final resolution of the proceedings in which an applicant "generally speaking, does not have to satisfy the court of the merits of its claim": [77]; see also [78]–[80].<sup>16</sup>
- [19] The usual interim order is for the allocation of parental responsibility to the Minister until further order.<sup>17</sup> Such an order enables appropriate investigation and planning to be undertaken by Departmental caseworkers while the child is in a protected environment. The making of an interim order in effect puts the position of the parties in a holding pattern, without prejudice, and without any admissions.

### **The need for care and protection**

- [20] After removal or assumption of a child into care, the first phase of care proceedings is generally referred to as the establishment phase.<sup>18</sup>
- [21] For care proceedings to be "established" a finding is required that the child is in need of care and protection for any reason or was in need of care and protection at the time the Application commencing the proceedings was made.<sup>19</sup>
- [22] The significance of a finding is that it forms the basis for the making of final care orders under the *Care Act*. The proceedings then enter a second phase, sometimes referred to as the "welfare phase"<sup>20</sup> during which planning for the child is undertaken.
- [23] The need for "care and protection" is not conclusively defined, and the concept is at large; a finding may be made for "any reason". But the *Care Act* does specify a range of circumstances that, without limitation, are included in the definition, or to which the definition extends: s 71.
- (a) death or incapacity of parents
  - (b) acknowledgement by parents of serious difficulties in caring for a child
  - (c) actual or likely physical or sexual abuse or ill-treatment
  - (d) a child's basic physical, psychological or educational needs are not being met or are likely not to be met (other than as a result of poverty or disability)
  - (e) a child is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of their domestic environment
  - (f) a child under 14 has exhibited sexually abusive behaviours, and needs therapeutic assistance

<sup>16</sup> *Re Jayden* [2007] NSWCA 35 per Ipp J at [71]–[74].

<sup>17</sup> *Re Mary* [2014] NSWChC 7.

<sup>18</sup> *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 at [36].

<sup>19</sup> *Children and Young Persons (Care and Protection) Act 1998*, ss 71(1) and 72(1).

<sup>20</sup> *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 at [37].

(g) the child is subject to a care order of another state (or territory)

(h) the child is in unauthorised out-of-home care: s 171(1).

### **Permanent placement**

[24] Once a child has been found to be in need of care and protection the Secretary is required to undertake planning for the child's future. In most cases the Secretary will prepare a formal Care Plan that addresses the needs of the child.<sup>21</sup>

[25] The Secretary is required to consider what permanent placement is required to provide a safe, nurturing, stable and secure environment for the child.<sup>22</sup> Permanent placement is to be made in accordance with the permanent placement principles prescribed.<sup>23</sup> The "hierarchy" established might be summarised as follows:

- If it is practicable and in the best interests of the child, the first preference for permanent placement is for the child to be restored to the parent(s).
- The second preference for permanent placement is guardianship of a relative, kin or other suitable person.
- The next preference (except in the case of an Aboriginal or Torres Strait Islander child) is for the child to be adopted.
- The last preference is for the child to be placed under the parental responsibility of the Minister.
- In the case of an Aboriginal or Torres Strait Islander child, if restoration, guardianship or the allocation of parental responsibility to the Minister is not practicable or in the child's best interests, the child is to be adopted.

### **Realistic possibility of restoration**

[26] Thus the Secretary must assess whether there is a realistic possibility of restoration of the child to the parent(s), having regard firstly to the circumstances of the child; and secondly, to the evidence, if any, that the parents are likely to be able to satisfactorily address the issues that have led to the removal of the child.<sup>24</sup>

[27] The court must then decide whether to accept the assessment of the Secretary. If the court does not accept the assessment of the Secretary, it may direct the Secretary to prepare a different permanency plan: s 83(6).

[28] The phrase "realistic possibility of restoration", therefore, involves an important threshold construct, which informs the planning that is to be undertaken in respect of any child that has been removed from parents or assumed into care and found to be in need of care and protection.

[29] There is no definition of the phrase in the *Care Act*. However, the principles concerning the interpretation and application of the phrase were comprehensively considered in the Supreme Court by Justice Slattery in 2011: *In the matter of Campbell*

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<sup>21</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 3(1).

<sup>22</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 10A(1).

<sup>23</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 10A(3).

<sup>24</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 83(1).

[2011] NSWSC 761. This decision has recently been cited with approval by the Court of Appeal: *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89 at [44].

[30] I have discussed the principles in a number of judgments including *Department of Family and Human Services (NSW) re Amanda & Tony* [2012] NSWChC 13 at [29]–[32] and *DFaCS (NSW) re Oscar* [2013] NSWChC 1 at [29]–[34], *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5 at [78], and in *DFaCS and the Youngest M Children* [2014] NSWChC 4 at [51].

[31] The principles relating to the phrase “a realistic possibility of restoration” may be summarised as follows:

- A possibility is something less than a probability; that is, something that it is likely to happen. A possibility is something that may or may not happen. That said, it must be something that is not impossible.
- The concept of realistic possibility of restoration is not to be confused with the mere hope that a parent’s situation may improve.
- The possibility must be “realistic”, that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon “unlikely hopes for the future”. It needs to be “sensible” and “commonsensical”.
- It is at the time of the determination that the court must make the assessment. It must be a realistic possibility at that time, not merely a future possibility.
- It is going too far to read into the expression a requirement that a parent must always at the time of hearing have demonstrated participation in a program with some significant “runs on the board”: *In the matter of Campbell* [2011] NSWSC 761 at [56].
- There are two limbs to the requirements for assessing whether there is a realistic possibility of restoration. The first requires a consideration of the circumstances of the child or young person. The second requires a consideration of the evidence, if any, that the parent(s) are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.
- The determination must be undertaken in the context of the totality of the *Care Act*, in particular the objects set out in s 8 and other principles to be applied in its administration, including the notion of unacceptable risk of harm.

### **Permanency planning**

[32] Where the Secretary assesses that there is a realistic possibility of restoration to a parent, and the court accepts that assessment, the Secretary is to prepare a permanency plan<sup>25</sup> that includes a description of the minimum outcomes that need to be achieved before the child is returned to the parent, services to be provided to facilitate restoration, and a statement of the length of time during which restoration should be actively pursued.<sup>26</sup>

<sup>25</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 83(2).

<sup>26</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 84.

- [33] If the Secretary assesses that there is no realistic possibility of restoration to a parent, the Secretary is to prepare a permanency plan for another suitable long term placement in accordance with the permanent placement principles discussed above, as set out in s 10A of the *Care Act*.
- [34] Permanency planning means the making of a plan that aims to provide a child with a stable, preferably permanent, placement that offers long-term security and meets their needs.<sup>27</sup> The court must not make a final care order unless it expressly finds that permanency planning has been appropriately and adequately addressed.<sup>28</sup>
- [35] The permanency plan must have regard to the principle of the need for timely arrangements, the younger the child, the greater the need for early decisions, and must avoid the instability and uncertainty that can occur through a succession of different placements or temporary care arrangements.<sup>29</sup>
- [36] The planning must also make provision for the allocation of parental responsibility, the kind of placement proposed, the arrangements for contact, and the services that need to be provided.<sup>30</sup>
- [37] A permanency plan does not need to provide details as to the exact placement in the long-term, but must be sufficiently clear and particularised so as to provide the court with a reasonably clear picture as to the way in which the child's needs, welfare and well-being will be met in the foreseeable future.<sup>31</sup>
- [38] If the child is an Aboriginal or Torres Straits Islander there are particular additional requirements to be addressed. The permanency planning must address how the plan has complied with the principles of participation and self-determination set out in s 13 of the *Care Act*.<sup>32</sup> It should also address the principle set out in s 9(2)(d) which requires that the child's identity, language and cultural ties be, as far as possible, preserved. Proper implementation requires an acknowledgement that the cultural identity of an Aboriginal child or young person is 'intrinsic' to any assessment of what is in the child's best interests.<sup>33</sup> It follows that the need to consider Aboriginality and ensure the participation of families and communities must be applied across all aspects of child protection decision making.

### **Parental responsibility**

- [39] Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children.<sup>34</sup> The primary care-giver is the person primarily responsible for the care and control of a child, including day-to-day care and responsibility.
- [40] If the Children's Court finds that a child is in need of care and protection, it may make a variety of orders allocating parental responsibility, or specific aspects of parental responsibility.<sup>35</sup>

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<sup>27</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 78A(1).

<sup>28</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 83(7).

<sup>29</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 78A(1).

<sup>30</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 78.

<sup>31</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 78A(2A).

<sup>32</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 78A(3).

<sup>33</sup> *Department of Human Services and K Siblings* [2013] VChC 1, per Magistrate B. Wallington at p 4.

<sup>34</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 3.

<sup>35</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 79(1).

[41] For example, the court can allocate complete responsibility to the Minister, or allocate only some aspects to the Minister and other aspects to the parents, or some other person. Or it might make orders for shared responsibility between the Minister and others.<sup>36</sup>

[42] The specific aspects of parental responsibility that might be separately or jointly allocated are unlimited, but include residence, contact, education, religious upbringing, and medical treatment.<sup>37</sup>

[43] When allocating parental responsibility, the court is required to give particular consideration to the principle of the least intrusive intervention, and be satisfied that any other order would be insufficient to meet the needs of the child.<sup>38</sup>

[44] Where a person is allocated all aspects of parental responsibility, the court may make a guardianship order: see ss 79A–79C.

### **Out-of-home care**

[45] Where the Secretary assesses that there is no realistic possibility of restoration, a permanency plan for another suitable long-term placement is submitted to the court: s 83(3). The Secretary may consider whether adoption is the preferred option: s 83(4).

[46] A long-term placement following the removal of a child which provides a safe, nurturing and secure environment may be achieved by placement with a member or members of the same kinship group as the child or young person, or placement with an authorised carer: s 3.

[47] Out-of-home care means residential care and control provided by a person other than a parent, at a place other than the usual home: s 135.

[48] Decisions concerning out-of-home placement of children in need of care and protection are not decisions that the court undertakes lightly or easily. But at the end of the day, a risk assessment is required, in accordance with the principle that the safety, welfare, and well-being of the children are paramount.

[49] The permanency plan need not provide details as to the exact placement, but must provide sufficient detail to enable the court to have a reasonably clear understanding of the plan: s 83(7A).

[50] The permanency plan will generally consist of a care plan: s 80, together with details of other matters about which the court is required to be satisfied. The care plan must make provision for certain specified matters: s 78. These are:

- (a) the allocation of parental responsibility between the Minister and the parents of the child for the duration of any period of removal;
- (b) the kind of placement proposed, including:
  - (i) how it relates in general terms to permanency planning,
  - (ii) any interim arrangements that are proposed pending permanent placement and the timetable proposed for achieving a permanent placement,

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<sup>36</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 81 (rep).

<sup>37</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 79(2).

<sup>38</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 79(3).

- (c) the arrangements for contact between the child and his or her parents, relatives, friends and other persons connected with the child,
- (d) the agency designated to supervise the placement in out-of-home care,
- (e) the services that need to be provided to the child or young person.

### Contact

[51] Importantly, where there is not to be a restoration, the permanency planning must also include provision for appropriate and adequate arrangements for contact.<sup>39</sup>

[52] In addition, the court may, on application, make orders in relation to contact, including orders for contact between children and their parents, relatives or other persons of significance but only for a maximum period of up to 12 months. The court may make a range of contact orders, both as to frequency and duration, and whether or not the contact should be supervised.<sup>40</sup>

[53] The introduction of s 86 into the *Care Act* in 2000 permitted the Children's Court, for the first time, to make contact orders beyond the life of the particular proceedings. The section does not, however, create any right or other entitlement to contact in care cases. Nor, in my view, does it create any presumption that contact should exist. Contact, although recognised in s 9(2)(f), remains subject always to the safety welfare and well-being of the child. An order under s 86 mandating contact arrangements should, therefore, only be used sparingly, in cases of demonstrated need, such as intransigence, inflexibility, or a failure to have proper regard to the needs and best interests of the child.

[54] The issue of appropriate contact for children who have been permanently removed from the care of their parents, particularly young children, remains vexed, and there continues to be a wide range of opinion as to the value of contact.

[55] Perceived benefits to be derived by children from contact include developing and continuing meaningful relationships. On the other hand, contact can have an unsettling effect on a child, act as a distraction, impede attachment to new carers, and disrupt the placement.

[56] It is generally accepted that a child benefits from some contact with the family of origin (except in extreme cases). Much depends on the level of trust and co-operation that exists between the carers and the birth family. In some cases the birth family can play a positive and supportive role. In other cases, members of the birth family can put the stability of the placement at risk. There is a strong body of opinion that contact should not interfere with a child's growing attachment to the new family. The younger the child, and the less time the child has been with the birth parents, the less the need for other than minimal contact, for identification purposes.

[57] There are some relevant judicial pronouncements that guide the resolution of contact issues, including the decisions in *Re Liam* [2005] NSWSC 75, *George v Children's Court of NSW* [2003] NSWCA 389, and *Re Felicity; FM v Secretary, Department of Family and Community Services (No 3)* [2014] NSWCA 226 at [42].

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<sup>39</sup> *Children and Young Persons (Care and Protection) Act* 1998, ss 9(2)(f), 78(2).

<sup>40</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 86.

[58] In 2011 the Children's Court issued Contact Guidelines designed to provide assistance to Judicial Officers, practitioners and parties, which were based upon available research and the court's "accumulated expertise and experience as a specialist court" in care proceedings.

[59] The issue of contact in care cases requires the consideration of a range of factors, having regard to the exigencies and circumstances of the particular case, both advantageous and disadvantageous, and balancing the benefits against the risks, the primary focus being on the needs and best interests of the child, and any risk of unacceptable harm: *In the matter of Helen* [2004] CLN 2.

[60] The decision should be based on relevant, reliable and current information.

[61] Factors include the level of attachment to the relevant member of the birth family, the degree of animosity displayed by the birth family against the carers, the level of demonstrated co-operation and engagement with the carers, and the commitment to supporting the placement, the degree of any abusive experience while in the care of the birth family and any ongoing emotional sequelae, the competing demands of the children's educational, cultural, social and sporting activities, the proposed location of the contact, the travel and other disruption involved, the quality of the contact, the safety of the children during contact, and any other risk factors associated with contact, including the potential for denigration of the carers or other undermining of the placement, and the potential for other negative persons or influences to be present at the visit.

[62] Preferably, contact should be left to the discretion of the person having parental responsibility, taking into account the advice of any professionals retained to assist with the children and the views of all those affected, including the children themselves (having regard to their age, their level of emotional and psychosocial development, and other factors).

[63] The regime for contact should be flexible, recognizing that circumstances change as children grow older and their emotional, social and other needs develop.

[64] Some relevant statements in the Children's Court Guidelines are:

For some children the benefit of contact will be primarily that they understand who they are in the context of their birth family and cultural background. Contact might also help ensure that the child has a realistic understanding of who their parent is and that the child does not idealise an unsuitable parent and develop unrealistic hopes of being reunited with the parent.

The focus must always be on the needs of the child and what is in the best interests of the child. How will the child benefit from contact with parents and siblings? Some benefit may be achieved over a long term, i.e. by providing the foundation for a relationship between the child and the parent which will develop later.

Younger children will usually need more frequent contact for a shorter duration than older children to maintain a relationship. Younger children especially should not be subjected to long travel to attend contact.

Children and carer families will have their own commitments and patterns involving such things as sport, cultural activities, spending time with friends and church attendance.

It is important to ensure that a child is not made to feel greatly different from others in the household because they are at contact rather than participating in carer family events. It is also important that the child does not resent attendance at contact because it takes them away from something that they enjoy doing.

It is very important to see children in the context of their extended family and not just their parents. Particular attention should be paid to supporting sibling relationships. Even if extended family members are unable to care for a child it is still likely that contact will be beneficial - providing information and family and cultural identity. Existing healthy relationships should be supported even if a child is to remain in out-of-home care.

Balancing extended family contact and placement stability and normality requires careful consideration. For example, what would be usual contact with grandparents if the child were not in care?

Contact can occur in other ways than face-to-face. In some situations it will be necessary to limit or prohibit indirect contact or to ensure that it is supervised. It may also be necessary to prohibit a parent from making any reference to the child on a social networking website. Alternatively, especially if the parent is at some distance from the child, the use of electronic communication should be encouraged.

A long-term contact order may create problems as a child's circumstances change, particularly if the contact is to be relatively frequent. School, sport, cultural activities and friendship dynamics are just some of the factors which change over time. As a child gets older less frequent but longer contact may be appropriate.

The need for contact to be supervised may also change as the child and the parents' circumstances change.

## Particular aspects of the care jurisdiction

### Practice and procedure

[65] Care proceedings, including appeals, are to be conducted in closed court: s 104B, and the name of any child or young person involved, or reasonably likely to be involved, whether as a party or as a witness, must not be published: s 105(1).

[66] This prohibition extends to the periods before, during and after the proceedings. The prohibition includes any information, picture or other material that is likely to lead to identification: s 105(4).

[67] There are exceptions, such as where a young person (i.e. a person aged 16 or 17) consents, where the Children's Court consents, or where the Minister with parental responsibility consents: s 105(3).

[68] The media is entitled to be in court for the purpose of reporting on proceedings, subject to not disclosing the child's identity. But, the court has a discretion to exclude the media. In my view, the discretion would only be exercised in exceptional circumstances, because the provisions of s 105 of the *Care Act* are usually sufficient protection: *R v LMW* [1999] NSWSC 1111.

[69] Under the common law principles of open justice, the balance would lie in favour of the newspaper: *John Fairfax & Sons Ltd v Police Tribunal of New South Wales* [1986] 5 NSWLR 465 at p 476 at G. In *AM v DoCS; Ex parte Nationwide News* [2008] NSWDC 16, I held that the common law principle of open justice is secondary to the principles in s 9(a) of the *Care Act*, in particular the paramountcy principle. In that

case, I held that the newspaper, which had previously published material tending to identify the children, had not satisfied me that this sort of publication was not likely to re-occur.

[70] I excluded the reporter from remaining in court. I went on to say:

However, in the interests of a balancing exercise and applying the principle of open justice to the extent that it applies subject to s 9(a), I would be prepared to allow this newspaper to come back with some evidence which might convince me that it would be appropriate for me to be satisfied that, with acceptable undertakings, there could be a basis upon which I might allow its reporters to remain in court during the hearing.

Interestingly, the newspaper concerned did not take up that invitation.

[71] Care and protection proceedings, including appeals, are not to be conducted in an adversarial manner: s 93(1).

[72] The proceedings are to be conducted with as little formality and legal technicality and form as the circumstances permit: s 93(2).

[73] In *Re Emily v Children's Court of NSW* [2006] NSWSC 1009 the Supreme Court set out the manner in which care proceedings are to be dealt with by the court.

The learned Magistrate was required by the explicit terms of the Care Act to deal with the matter before him in the manner for which express provision is made in, relevantly, sections 93, 94 and 97 of the Care Act. It is no doubt the case that those sections, broadly expressed though they are, do not empower a Children's Court Magistrate to take some sort of free-wheeling approach to an application, proceeding in virtually complete disregard of what ordinary common-sense fairness might be thought to require in the particular case. **The (Court) is, however, both empowered and required to proceed with an informality and a wide-ranging flexibility that might be thought not entirely appropriate in a more formally structured Court setting and statutory context.** [Emphasis added.]

[74] The court is not bound by the rules of evidence, unless it so determines: s 93(3). Nevertheless, the court must draw its conclusions from material that is satisfactory, in the probative sense, so as to avoid decision-making that might appear capricious, arbitrary or without foundational material: *JL v Secretary, Department of Family and Community Services* [2015] NSWCA 88 at [148].

[75] In *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 Meagher JA said at [79] in relation to a similar provision governing a tribunal:

Although the Tribunal may inform itself in any way it thinks fit and is not bound by the rules of evidence, it must base its decision upon material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined. Thus, material which, as a matter of reason, has some probative value in that sense may be taken into account: *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 491-493; *The King v The War Pensions Entitlement Appeal Tribunal; Ex parte Bott* [1933] 50 CLR 228 at 249-250, 256.

[76] It is difficult to imagine circumstances in which a court might make such a determination that the rules of evidence should apply. The only situation that has so far occurred to me, apart from the rule as to relevance, relates to the provisions of the *Evidence Act* 1995 concerning self-incrimination: s 128.

[77] The standard of proof in care proceedings is on the balance of probabilities: s 93(4) of the *Care Act*. The High Court decision in *Briginshaw v Briginshaw* (1938) 60

CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved: *Director General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250.

[78] The provisions of the *United Nations Convention on the Rights of the Child* 1989 (UNCROC) are capable of being relevant to the exercise of discretions under the *Care Act; Re Tracey* (2011) 80 NSWLR 261.

[79] The circumstances in *Re Tracey* were unusual and unique. Nevertheless, it may be important to draw the parties out on the question of whether any aspect of CROC is specifically relied upon. If so, it will need to be addressed, to the extent that it raises some question for additional consideration. Otherwise, it is prudent to advert to UNCROC, in any Reasons, as not having any additional relevance. I usually add a paragraph along the following lines:

Most, if not all, of the provisions in UNCROC have been incorporated into or are reflected in the Care Act. The parties in the present matter made no submissions based on the Convention.

Nor did anything occur to me as to any provision in UNCROC such that there was some different requirement, some additional principle, or some gloss that required the Court to have particular regard to, in determining this case or in considering the permanency planning proposed, such that I was required to go beyond the Care Act and the case law interpreting it.

[80] The Court of Appeal approved a similar statement in *Re Kerry (No 2)* [2012] NSWCA 127.

[81] More recently, in *Re Henry; JL v Secretary, DFaCS* [2015] NSWCA 89 at [208]–[220], Justice McColl discussed the application of the Convention, confirming that its provisions are capable of being relevant in care proceedings but the circumstances in which that might occur were limited. Not all failures to refer to CROC in the context of the *Care Act* will attract relief on appeal: at [217].

### **Expeditious administration of proceedings**

[82] Time is of the essence for the disposal of care cases. The *Care Act* provides that all care matters are to proceed as expeditiously as possible: s 94(1). The court is required to avoid adjournments, which should only be granted where it is in the best interests of the child or there is some other cogent or substantial reason: s 94(4). The Children's Court aims to complete 90% of care cases within 9 months of commencement and 100% of cases within 12 months.

[83] The timetable for each matter is to take account of the age and developmental needs of the child: s 94(2). Directions should be made with a view to ensuring that the timetable is kept: s 94(3). Practice Note 5 deals with case management in care proceedings. It deals with each of the stages of a care application and provides for a series of standard directions at [15.6] with prescribed times for the completion of various interlocutory processes, leading to the earliest resolution or allocation of a hearing date in contested matters.

### **Child legal representatives**

[84] The *Care Act* provides for the participation of a child or young person in the proceedings through their representation by either an independent legal representative

(ILR) or a direct legal representative (DLR): s 99A. An ILR will be appointed to act as the representative for a child under 12: s 99B. An ILR must consult with the child, but their duty is to act in accordance with the paramountcy principle. Whereas, a DLR may be appointed for any child at the age of 12 or over who is capable of giving proper instructions: s 99C. The DLR must then advocate as instructed by the child.

[85] In addition to these provisions, the Law Society of New South Wales has prepared "Representation Principles for Children's Lawyers".<sup>41</sup> These guidelines set out a number of important duties and obligations for practitioners representing children.

[86] I will not traverse the document in full, however I will canvass some of the principles these guidelines detail. The guidelines set out the following: a definition of who is the client; the role of the practitioner; determining whether a child has the capacity to give instructions; taking instructions and appropriate communication; duties of representation; confidentiality; conflicts of interest; access to documents and reports; interaction with third parties and ending the relationship with the child.

[87] Importantly, Principle D6 (dealing with communication) emphasises the importance of tailored communication to practitioners. The commentary to the principles state:

It is important that practitioners are prepared and informed before any meeting with the child. The child must always be treated with respect – this involves listening and giving the child the opportunity to express him or herself without interrupting, addressing the child by his or her name, accepting that the child is entitled to his or her own view etc.<sup>42</sup>

### **Support persons**

[88] Under s 102, a participant in proceedings before the Children's Court may, with leave of the Children's Court, be accompanied by a support person. Leave must be granted unless the support person is a witness or the court, having regard to the wishes of the child or young person, is of the view that leave should not be granted or if there is some other reason to deny the application.

[89] However, the Children's Court can withdraw leave at any time if a support person does not comply with any directions given by the court. In addition, a support person cannot give instructions on behalf of the participant.

### **Examination and cross-examination**

[90] The *Care Act* provides that a Children's Magistrate may examine and cross-examine a witness in any proceedings to the extent that the Children's Magistrate considers appropriate in order to elicit information relevant to the exercise of the Children's Court's powers.<sup>43</sup>

[91] The *Care Act* also provides guidance as to the nature of examination and cross-examination of witnesses.<sup>44</sup>

[92] This guidance accords with the inquisitorial nature of care proceedings insofar as proceedings are required to be conducted in a non-adversarial manner, with as little formality and legal technicality and form as the circumstances permit.

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<sup>41</sup> The Law Society of New South Wales, "Representation Principles for Children's Lawyers", 4th edition, 2014.

<sup>42</sup> *ibid* at p 22.

<sup>43</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 107(1).

<sup>44</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 107.

[93] The Act prohibits the use of offensive or scandalous questions by excusing a witness from answering a question that the court regards to be offensive, scandalous, insulting, abusive or humiliating unless the court is satisfied that it is essential to the interests of justice that the question be asked or answered.<sup>45</sup>

[94] Further, oppressive or repetitive examination of a witness is prohibited unless the court is satisfied that it is essential in the interests of justice for the examination to continue or for the question to be answered.<sup>46</sup>

### **Joinder**

[95] In proceedings under the *Care Act*, the parties will generally comprise the Secretary of the Department, the child or children, the parent(s), the step-parent(s), and the legal representative, being the Independent Legal Representative for children under 12, or the Direct Legal Representative for children 12 and over, up to the age of 18.

[96] Other persons having a genuine concern for the safety, welfare and well-being of the child(ren) may be given leave to appear in the proceedings, or be legally represented, and examine and cross-examine witnesses.<sup>47</sup>

[97] Others who might be significantly impacted by a decision of the Children's Court, not being parties to the proceedings, are to be given "an opportunity to be heard on the matter of significant impact".<sup>48</sup> Historically, such persons were generally not made parties, but could present an affidavit. They could not, however, cross-examine or call witnesses of their own.

[98] There has been something of a change in approach in relation to the joinder of parties to Care proceedings in recent times, partly driven by the transfer of casework to the NGO sector, but also as a result of some recent pronouncements by superior courts. The court is now increasingly receptive to joinder applications and more likely to make orders than in the past. In *Re June (No 2)* [2013] NSWSC 1111 ("Re June"), McDougall J clarified the distinction between ss 87 and 98(3) of the *Care Act*:

The second point to note is that the opportunity to be heard is not the opportunity to participate in the proceedings either as a party as of right (s 98(1)) or as someone given leave (s 98(3)). Thus, it does not follow that the opportunity to be heard includes the right to examine or cross-examine witnesses at least generally.

However, if the question of significant impact is one that is the subject of evidence, and if there are direct conflicts in that evidence, then in a particular case, the opportunity to be heard may extend to permitting cross-examination in that particular point.<sup>49</sup>

[99] The more recent decision in *Bell-Collins Children v Secretary, Department of Family and Community Services* [2015] NSWSC 701, provides further clarification.

[100] During case management, the Children's Magistrate had refused the application of the grandparents to be joined as parties. At the hearing, which came before me at the Children's Court at Woy Woy,<sup>50</sup> I gave the grandparents an extensive opportunity to be heard, under s 87(1).

<sup>45</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 107(2).

<sup>46</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 107(3).

<sup>47</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 98(3).

<sup>48</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 87(3).

<sup>49</sup> *Re June (No 2)* [2013] NSWSC 1111 at [186]–[187].

<sup>50</sup> *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5.

[101] In the de novo appeal to the Supreme Court, the grandparents renewed their application for joinder and the matter was considered by Justice Slattery. The significant aspect of Slattery J's decision was his distillation of the distinction between the opportunity to be heard under s 87(1) and the granting of leave to appear under s 98(3):

In section 87(1) the threshold is one to ensure that non-parties who may suffer adverse impacts from Care Act orders will receive procedural fairness before such orders are made. The focus is on "impact on a person".<sup>51</sup>

But the threshold for s 98(3) is more child-centred.

The s 98(3) right is only available to a person who in the Court's opinion "has a genuine concern for the safety, welfare and well-being of the child". It is perhaps because the s 98(3) threshold is more altruistic than that under s 87 that the Care Act can afford a wider scope to participate to those who receive a grant of s 98(3) leave. Persons meeting s 98(3) leave will sometimes be, as the great grandparents are in this case, people who can by their participation fill an evidentiary gap in the proceedings that it may be in the best interests of that child to see filled in the proceedings. In my view that is the case here.<sup>52</sup>

[102] Accordingly, Slattery J granted the grandparents leave on terms under s 98(3). The grandparents were only granted leave to cross-examine and adduce evidence about their own suitability as alternative carers for the children.

[103] Finally, I wish to draw attention to a decision by Magistrate Schurr in 2003 in which an NGO, Anglicare, was joined as a party to care proceedings: *In the matter of "Pamela"* [2003] CLN 3.

[104] In that matter, the Department of Community Services (as it was then designated) sought an order from the court revoking the leave of Anglicare to appear as a party. The Secretary argued that the NGO had insufficient interest in the proceedings and that it was probable that the positions taken by the parties would be duplicated.

[105] Magistrate Schurr outlined Anglicare's involvement in proceedings as follows:

In late 1998 the Department of Community Services delegated to Anglicare the role of foster care agency, a role it continues to date. Anglicare does not exercise any powers of parental responsibility for this child, and these powers remain with the Minister. Anglicare workers do, however, supervise the foster carers, coordinate access by the birth family and liaise with the Department of Community Services through case conferences.<sup>53</sup>

[106] Anglicare had originally sought leave to be joined as a party to argue for an "independent assessment of the child and family members". Anglicare argued that once leave was granted there was no limit on their role in the proceedings.

[107] The Department argued that leave should only be granted to those persons with rights, powers and duties relating to children, by reference to the objects in s 8(a) of the *Care Act*. It was argued that Anglicare had neither parental responsibility nor the day-to-day care of the child and could not be granted leave.

<sup>51</sup> *Bell-Collins Children v Secretary, Department of Family and Community Services* [2015] NSWSC 701 at [33].

<sup>52</sup> *ibid* at [34].

<sup>53</sup> *In the matter of "Pamela"* [2003] CLN 3 at p 4.

[108] Magistrate Schurr concluded that Anglicare's involvement with the child was sufficient to bring it within the scope of s 98(3).

### **Rescission and variation of care orders: s 90**

[109] Peculiar to the care jurisdiction is the power to rescind or vary final care orders, at a later date.<sup>54</sup> This statutory power enables a review of orders without the need for an appeal, where there has been a "significant change in any relevant circumstances" since the original order.

[110] Applications for rescission or variation of care orders require the Applicant to obtain leave.

[111] A refusal of leave is an "order" for the purposes of s 91(1) of the *Care Act: S v Department of Community Services* [2002] NSWCA 151 at [53]. Refusal to grant leave may, therefore, be the subject of an appeal de novo from the Children's Court.

[112] The former President of the Children's Court expressed the view that if, on appeal, leave is granted, the hearing of the substantive application should then be remitted to the Children's Court for hearing:<sup>55</sup>

With respect to appeals against a refusal by the Children's Court to grant leave under section 90(1), in my view if the District Court upholds the appeal and grants leave it should remit the proceedings to the Children's Court to determine the substantive section 90 application. Having granted leave the District Court would not have jurisdiction to hear the substantive application as the only "order" before the court (being the subject of an appeal under section 91(1)) is the order refusing leave. Further, if the District Court proceeded to hear the substantive section 90 application following it granting leave, the unsuccessful party on the substantive application in the District Court would be deprived of a statutory right of appeal.

[113] The *Care Act* sets out a number of additional matters that the court *must* take into account before granting leave: s 90(2A):

- (a) the nature of the application, and
- (b) the age of the child or young person, and
- (c) the length of time for which the child or young person has been in the care of the present carer, and
- (d) the plans for the child, and
- (e) whether the applicant has an arguable case, and
- (f) matters concerning the care and protection of the child or young person that are identified in:
  - (i) a report under section 82, or
  - (ii) a report that has been prepared in relation to a review directed by the Children's Guardian under section 85A or in accordance with section 150.

<sup>54</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 90.

<sup>55</sup> Marien M, "Care proceedings and appeals to the District Court", Judicial Commission of NSW, Annual Conference of the District Court of NSW, 28 April 2011.

[114] Once leave is granted, the *Care Act* goes on to prescribe another set of requirements that must be taken into account when the rescission or variation sought relates to an order that placed the child under the parental responsibility of the Minister, or that allocated specific aspects of parental responsibility from the Minister to another person: s 90(6).

[115] The matters specified in s 90(6) are:

- (a) the age of the child or young person,
- (b) the wishes of the child or young person and the weight to be given to those wishes,
- (c) the length of time the child or young person has been in the care of the present caregivers,
- (d) the strength of the child's or young person's attachments to the birth parents and the present caregivers,
- (e) the capacity of the birth parents to provide an adequate standard of care for the child or young person,
- (f) the risk to the child or young person of psychological harm if present care arrangements are varied or rescinded.

[116] In the decision by Justice Slattery *In the matter of Campbell* [2011] NSWSC 761, his Honour discussed the concepts of "a relevant circumstance" and "significant" change in a relevant circumstance in the context of an application for leave.

[117] As to what constitutes a "relevant circumstance" Slattery J said:

The range of relevant circumstances will depend upon the issues presented for the Court's decision. They may not necessarily be limited to a "snapshot" of events occurring between the time of the original order and the date the leave application is heard. This broader approach reflects the existing practice of the Children's Court on s 90 applications: see for example *In the matter of OM, ZM, BM and PM* [2002] CLN 4.

[118] As to what constitutes a "significant" change in a relevant circumstance, he referred to *S v Department of Community Services (DoCS)* [2002] NSWCA 151 where the Court of Appeal held that the change must be "of sufficient significance to justify the consideration [by the court] of an application for rescission or variation of the order".

Slattery J said that there are dangers in paraphrasing the s 90(2) statutory formula for the exercise of the discretion beyond this statement of the Court of Appeal: [43]. He also made it clear that the court's discretion to grant leave is not only limited by s 90(2), but also by the requirement to take into account the list of considerations in s 90(2A). Therefore, establishing a significant change in a relevant circumstance under s 90(2) is a necessary, but not a sufficient, condition for the granting of leave.

[119] As to the requirement of an "arguable case", Slattery J held that this does not relate to the application for leave, but relates to the case for the rescission or variation sought, taking into account the matters in s 90(6). Therefore, the matters in s 90(6) must be taken into account in determining whether the applicant for leave has an arguable case. Slattery J agreed with Judge Marien that the interpretation of "arguable case", as expressed in *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215, should be adopted; namely, that an arguable case is a case that is "reasonably capable of being argued" and has "some prospect of success" or "some chance of success".

[120] These principles were considered and applied in *Kestle v The Director of the Department of Family and Community Services* [2012] NSWChC 2, in which a helpful summary of the principles to be applied in a s 90 application is set out [22]:

- (i) In determining whether to grant leave the Court must first be satisfied under s 90(2) that there has been a significant change in a relevant circumstance since the Care order was made or last varied.
- (ii) The range of relevant circumstances will depend upon the issues presented for the Court's decision. They may not necessarily be limited to just a "snapshot" of events occurring between the time of the original order and the date the leave application is heard.
- (iii) The change that must appear should be of sufficient significance to justify the Court's consideration of an application for rescission or variation of the existing Care order: *S v Department of Community Services* [2002] NSWCA 151.
- (iv) The establishment of a significant change in a relevant circumstance is a necessary but not a sufficient condition for leave to be granted. The Court retains a general discretion whether or not to grant leave.
- (v) Having been satisfied that a significant change in a relevant circumstance has been established by the applicant, the Court must take into account the mandatory considerations set out in s 90(2A) in determining whether to grant leave.
- (vi) The s 90(2A) mandatory considerations include that the applicant has an "arguable case" for the making of an order to rescind or vary the current orders.
- (vii) An arguable case means a case "which has some prospect of success" or "has some chance of success".
- (viii) In determining whether an applicant has an arguable case and whether to grant leave, the Court may need to have regard to the mandatory considerations in s 90(6).

[121] The judgment went on to specifically consider whether leave could be granted on a specific basis.

[122] The mother had submitted that it was not open to the court to grant leave on a discrete issue such as contact.

[123] She submitted that once leave is granted, all issues (including restoration and contact) may be re-visited by the court at the substantive hearing.

[124] The court did not accept this argument and held that the court has a wide discretion under s 90(1) to grant leave, referring to the decision of Mitchell CM in *Re Tina* [2002] CLN 6, and said at [53]:

In my view, the wide discretion available to the court in granting leave under s 90(1) allows the court to also exercise a wide discretion as to the terms and conditions upon which leave is granted.

Accordingly, the Court may restrict the grant of leave to a particular issue or issues. This would be appropriate, for example, where the Court determines that an applicant parent does not have an arguable case for restoration of the child to their care, but does have an arguable case on the issue of increased parental contact.

[125] In a careful judgment in *Re Bethany* [2012] NSWChC 4 Children's Magistrate Blewitt AM applied these principles at [49]–[50].

***Costs in care proceedings***

[126] Costs in care proceedings are not at large. The *Care Act* limits the power to make an order for an award of costs. Section 88 provides:

The Children's Court cannot make an order for costs in care proceedings unless there are exceptional circumstances that justify it in doing so.

[127] Under the common law a successful party has a "reasonable expectation" of being awarded costs against the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 120; [1998] HCA 11 at [134]. Fairness dictates that the unsuccessful party typically bears the liability for costs: *Oshlack* at [67]. This means that the successful party in litigation is generally awarded costs, unless it appears to the court that some other order is appropriate, either as to the whole or some part of the costs: *Currabubula Holdings Pty Ltd and Paola Holdings Pty Ltd v State Bank of NSW* [2000] NSWSC 232.

[128] The common law position is, however, displaced by the *Care Act*, which provides for a comprehensive statutory scheme for care proceedings in which the power of the court to award costs is circumscribed by s 88, so that costs may only be awarded where exceptional circumstances exist.

[129] The policy basis behind the restriction on the power to award costs is self-evidently based in the notion that parties involved in care proceedings should have as full an opportunity to be heard as is reasonably possible, and should not be deterred from participating in such proceedings by adverse pecuniary consequences, the safety, welfare and well-being of the child being the paramount concern.<sup>56</sup>

[130] The meaning of "exceptional circumstances" in the context of s 88 of the *Care Act*, and when they might exist, has been considered and discussed in various decisions, most notably in the judgments in *Department of Community Services v SP* [2006] NSWDC 168, *Department of Community Services v SM and MM* [2008] NSWDC 68, *XX v Nationwide News Pty Ltd* [2010] NSWDC 147 and *Director General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3.

[131] I will not review those decisions here, but it may be said that the situations in which "exceptional circumstances" might be found are not exhaustively defined or limited by them.

[132] Some general propositions are nevertheless apt: The discretion to award costs must be exercised judicially and "according to rules of reason and justice, not according to private opinion ... or even benevolence ... or sympathy": *Williams v Lewer* [1974] 2 NSWLR 91 at 95, and is not to be exercised arbitrarily or capriciously, or on no grounds at all: *Oshlack*, above, at [22].

[133] The underlying idea is of fairness, having regard to what the court considers to be the responsibility of each party for the costs incurred: *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121].

[134] The court may have regard to the particular circumstances of the case, including the evidence adduced, the conduct of the parties and the ultimate result: *Knight v Clifton* [1971] Ch 700.

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<sup>56</sup> *The Secretary, DFACS (NSW) and the Knoll Children (Costs)* [2015] NSWChC 2.

- [135] The purpose of an order for costs is to compensate the person in whose favour it is made and not to punish the person against whom the order is made: *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33 at [34]; *Dr Douglass v Lawton Pty Ltd (No 2)* [2007] NSWCA 90 at [22].
- [136] Where an order for costs is made, I suggest that the order specify whether the costs are awarded on an indemnity basis, or that the costs should be quantified on the ordinary basis, as defined in s 3 of the *Civil Procedure Act 2005*.
- [137] I am also of the view that the Children's Court has the power to award a fixed sum of costs. The various provisions of the *Care Act*, including s 93(2), are sufficient to give the Children's Court the power to do so.<sup>57</sup>
- [138] Judicial officers have traditionally been reluctant to order the payment of specified sums of costs. Nevertheless the cases suggest a number of circumstances in which it might be appropriate to make such an order, such as the avoidance of the expense, delay and aggravation involved in protracted litigation which might arise out of taxation (or assessment): *Sherborne Estate (No 2): Vanvalen v Neaves; Gilroy v Neaves* (2005) 65 NSWLR 268 at [38]; *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665; *Keen v Telstra Corp (No 2)* [2006] FCA 930 at [4].
- [139] In my view, it will generally be appropriate to make orders for specified sums of costs in care proceedings.
- [140] But, the power is to be exercised judicially: *Idoport Pty Ltd v National Australia Bank Ltd* [2007] NSWSC 23 at [8]–[10]; and there must be proper factual foundation for the order: *Roberts v Rodier* [2006] NSWSC 1084 at [40]–[44], *Ventouris Enterprises Pty Ltd v DIB Group Pty Ltd (No 4)* [2011] NSWSC 720.
- [141] The court arrives at an estimate of the proper costs by examining, on the basis of particulars provided, whether the quantification is logical, fair and reasonable: *Lo Surdo v Public Trustee* [2005] NSWSC 1290 at [7]; *Roberts v Rodier* [2006] NSWSC 1084 at [40]–[44].
- [142] The courts have, however, tended to apply a discount, having regard to the “broad-brush” approach involved: *Idoport* at [13]; *Ginos Engineers Pty Ltd v Autodesk Australia Pty Ltd* (2008) 249 ALR 371; [2008] FCA 1051 at [23].
- [143] The power to award costs in the Children's Court, however, does not extend to awards of costs against non-parties, or legal practitioners.<sup>58</sup>
- [144] There are, however, some exceptions to this principle, which arise under the general law.
- [145] The exceptions include persons who are not parties in the strict sense, but are closely connected with the proceedings, such as nominal parties: *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203 at 217; or “relators”: *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518; or “next friends”: *Palmer v Walesby* (1868) LR 3 Ch App 732; and tutors: *Yakmor v Hamdoush (No 2)* (2009) 76 NSWLR 148.

<sup>57</sup> *The Secretary, DFACS (NSW) and the Knoll Children (Costs)* [2015] NSWChC 2.

<sup>58</sup> *Director General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3; *In the matter of Mr Donaghy (Costs)* [2012] NSWChC 11.

[146] Then there are persons who appear in the proceedings for some specific limited purpose, who are in effect a party, for that limited purpose, such as someone appearing to maintain a claim for privilege: *ACP Magazines Pty Ltd v Motion* [2000] NSWSC 1169, or to obtain a costs order: *Wentworth v Wentworth* (2000) 52 NSWLR 602.

[147] It might also be arguable that such orders may also be made against persons who are bound by an order or judgment of the court and fail to comply, or who breach an undertaking given to the court, or persons in contempt or who commit an abuse of process.

[148] These are issues for determination in the future.

### **Cultural planning**

[149] The *Care Act* is to be administered under the “paramountcy principle”, that is, that the safety, welfare and well-being of the child is paramount.<sup>59</sup> In addition to this paramountcy principle, the *Care Act* sets out other particular principles to be applied in the administration of the *Care Act*.<sup>60</sup>

[150] One of these principles is that account must be taken of concepts such as culture, language, identity and community.<sup>61</sup> Additionally, it is a principle to be applied in the administration of the *Care Act* that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as is possible.<sup>62</sup>

[151] Further, Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Secretary, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under the *Care Act* that concern their children and young persons.<sup>63</sup>

[152] Finally, a general order for placement of an Aboriginal or Torres Strait Islander child who needs to be placed in statutory out-of-home-care is prescribed.<sup>64</sup> In summary, the order for placement is, with:

- (a) a member of the child's or young person's extended family or kinship group, as recognised by the community to which the child or young person belongs,
- (b) a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs,
- (c) a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child or young person's usual place of residence,
- (d) a suitable person approved by the Secretary after consultation with:
  - (i) members of the child's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and

<sup>59</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 9(1).

<sup>60</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 9(2).

<sup>61</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 9(2)(d).

<sup>62</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 11.

<sup>63</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 12.

<sup>64</sup> *Children and Young Persons (Care and Protection) Act* 1998, s 13(1).

- (ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

[153] Before it can make a final care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed.<sup>65</sup>

[154] Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security.<sup>66</sup> The plan must:

- (a) have regard, in particular, to the principle that if a child is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement,<sup>67</sup> and
- (b) meet the needs of the child,<sup>68</sup> and
- (c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements.<sup>69</sup>

[155] Culture is a critical element in the assessment of what is in a child's best interests and a critical consideration in assuring the safety, welfare and well-being of a child. It is vital that decision makers in child protection matters are provided with sufficient information to be able to appreciate the distinct role culture plays in the identity formation and socialisation of each child.

[156] The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles and to adequately and appropriately address cultural planning are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

[157] There are various cases over recent years that address the Aboriginal and Torres Strait Islander Principles set out in the *Care Act*. These include: *Re Kerry (No 2)* [2012] NSWCA 127; *Department of Family and Community Services (NSW) re Ingrid* [2012] NSWChC 19; *RL and DJ v DoCS* [2009] CLN 3, *In the matter of Victoria & Marcus* [2010] CLN 2 at [49]; *Re Simon* [2006] NSWSC 1410; *Re Earl and Tahmeisha* [2008] CLN 7 and *Shaw v Wolf* [1989] FCR 113.

[158] I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children. As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4 at [94]:

The Aboriginal and Torres Strait Islander Principles are in the Care Act 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons. They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters before the Children's Court.

[159] I am happy to report that in the past year a template for a cultural action planning section in the Care Plan has been developed. The idea behind this template is to

<sup>65</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 83(7).

<sup>66</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 78A.

<sup>67</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 9(2)(e).

<sup>68</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 78A(1)(b).

<sup>69</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 78A(1)(c).

ensure that adequate casework is undertaken to appropriately identify a child's cultural origins, and to put in place fully developed plans for the child to be educated, and to fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.

## Care appeals

### Procedure

[160] A party dissatisfied with a decision of the Children's Court may appeal to the District Court: s 91(1). The decision of the District Court in respect of an appeal is taken to be a decision of the Children's Court and has effect accordingly: s 91(6).

[161] The appeal is by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence on which the order was made by the Children's Court may be given on the appeal: s 91(2). The District Court may decide to admit the transcript or any exhibit from the Children's Court hearing: s 91(3).<sup>70</sup>

[162] Judges of the District Court hearing such appeals have, in addition to any functions and discretions that the District Court has, all the functions and discretions that the Children's Court has under Chapters 5 and 6 of the *Care Act* ie ss 43–109X: s 91(4).

[163] The provisions of the *Care Act* (Chapter 6) relating to procedure apply to the hearing of an appeal in the same way as they apply in the Children's Court: s 91(8).

[164] It is important, therefore, for District Court judges hearing such appeals to understand the Act, its guiding principles, and its procedural idiosyncrasies.

### The Children's Court Clinic

[165] The Children's Court Clinic (which I will refer to in short form as 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 specialist advice and guidance.

[166] The court may make an assessment order, which may include a physical, psychological, psychiatric, or other medical examination, or an assessment, of a child: s 53. The court may also make an order for the assessment of a person's capacity to carry out parental responsibility (parenting capacity): s 54.<sup>71</sup>

[167] In addition, the court may make an order for the provision of other information involving specialist expertise as may be considered appropriate: s 58(3).

[168] The court is required to appoint the Clinic for the purpose of preparing assessment reports and information reports, unless it is more appropriate for some other person to be appointed. The reports are made to the court, and are not evidence tendered by a party.

[169] It is absolutely critical, therefore, that the Clinician be, and be seen to be, completely impartial and independent of the parties.

[170] The Clinic has limited resources. Great care should be exercised in the making of assessment orders and, if made, the purpose should be clearly identified and spelled out for the Clinician. It is important to remember that the court has a discretion as to

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<sup>70</sup> Marien J discusses the nature of the appeal in his 2011 paper at [4.1].

<sup>71</sup> For a more detailed discussion of assessment orders see Judge Marien's 2011 paper at [5].

whether it will make an assessment order. An assessment order should not be made as a matter of course. In particular, the court must ensure that a child is not subjected to unnecessary assessment: s 56(2). In considering whether to make an assessment order, the court should have regard to whether the proposed assessment is likely to provide relevant information that is unlikely to be obtained elsewhere.

[171] Having said that, the court can derive considerable assistance from an Assessment Report. In addition to providing independent expert opinion, the Clinician can provide a hybrid factual form of evidence not otherwise available. Because they observe the protagonists over a period of time, interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes, clinicians can provide the court with insights and nuances that might not otherwise come to its attention.

[172] Thus, a Clinician can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the court, trammelled by the adversarial process and the 'snapshot' nature of a court hearing, would not otherwise have the benefit of.

[173] The Children's Court expects Clinicians to be aware of, apply and adhere to the provisions of the Expert Witness Code of Conduct set out at Schedule 7 of the Uniform Civil Procedure Rules 2005 (UCPR).

#### **Alternative dispute resolution in care matters**

[174] Where intervention by Community Services is necessary, it is preferable that the intervention occurs early and at a time that allows for genuine engagement with the whole family, with a view to avoiding, wherever possible, escalation of problems into the court system. Once cases do need to come to court it remains important that the court also has processes available that will facilitate bringing the parties together with a view to them coming to a mutually acceptable resolution, that is in the best interest of the child, thereby avoiding lengthy, emotionally draining and often irrevocably divisive formal hearings.

[175] Over the past few years, the Children's Court has initiated and entrenched alternative dispute resolution (ADR) processes, which has involved an expansion and development of the involvement of Children's Registrars in care matters. Prior to the introduction of these new initiatives the use of ADR in the Children's Court was restricted not only by the resources available, but also by an adversarial culture within the jurisdiction that favoured traditional court processes.

[176] The ADR processes in the Children's Court are available in an appeal to the District Court.

[177] The Dispute Resolution Conference (DRC) model has now become an integral aspect of Children's Court proceedings.

[178] The conferences involve the use of a conciliation model. This means Children's Registrars have an advisory, as well as a facilitation role.

[179] Conferences are now regularly conducted at the court by Children's Registrars who have legal qualifications and are also trained mediators: see s 65 of the *Care Act* and are based at Parramatta, Broadmeadow, Campbelltown and Port Kembla Children's Courts, and Lismore and Albury Local Courts.

- [180] Importantly, however, Children's Registrars will travel to any court throughout the State and conduct DRCs.
- [181] The DRC process has brought about a significant shift in culture that has impacted on cases in the Children's Court more generally. The Australian Institute of Criminology (AIC) has evaluated the use of ADR in the area of care and protection, and found high levels of participation and satisfaction. Family members involved found the process to be useful, and felt they were listened to and were treated fairly. The AIC evaluation found that approximately 80% of mediations conducted have resulted in the child protection issues in dispute being narrowed or resolved.
- [182] The timing of a referral of disputed proceedings to a DRC can sometimes be important.
- [183] Like all referrals for mediation, it is a matter of judgment when to do so. Sometimes it is necessary for the issues to be sufficiently defined to make the mediation viable.
- [184] On other occasions, it is better to refer as soon as possible, even if all the relevant documentation and information is not necessarily available.
- [185] The importance of confidentiality in the DRC model was reaffirmed in *Re Anna* [2012] NSWChC 1.
- [186] In that case the father said something during the DRC that was described by the Secretary as an admission that may have been relevant to the father's capacity to be responsible for the safety, welfare and well-being of his daughter. The Secretary sought leave to file an affidavit by a caseworker who was present at the DRC in which he refers to the alleged admission made by the father.
- [187] In rejecting the application to file the affidavit, the court said:
- A pivotal feature of alternative dispute resolution (ADR) is that, except in defined circumstances, what is said and done in the course of ADR is confidential in the sense that it cannot be admitted into evidence in court proceedings.
- This important protection of confidentiality encourages frank and open discussions between the parties outside the formal court process ...
- The encouragement of frank and open discussion between the parties is particularly important in ADR in child protection cases. ADR provides parents with the opportunity to freely discuss with the Department, in a safe and confidential setting, the parenting issues of concern to the Department and, most importantly, it provides the Department with the opportunity to discuss with the parents in that setting what needs to be done by the parents to address the Department's concerns.
- [188] The court went on to say, however, that the protection is not absolute. He referred to a clause in the *Children and Young Persons (Care and Protection) Regulation 2000*. That Regulation has been superseded and the relevant clause is now Clause 19 of the *Children and Young Persons (Care and Protection) Regulation 2012*.
- [189] Clause 19 of the new Care Regulation defines "alternative dispute resolution", which includes a DRC. It goes on to provide that evidence of anything said or of any admission made, during alternative dispute resolution is not admissible in any proceedings.
- [190] Similarly, a document prepared for the purposes of, or in the course of, or as a result of, alternative dispute resolution is not admissible in evidence in any proceedings before any court, tribunal or body.

[191] Clause 19(5) enables the disclosure of information obtained in connection with the alternative dispute resolution, but only in very limited circumstances, and only by the Children's Registrar conducting the DRC. The permissible circumstances include where the relevant persons consent, or in accordance with a requirement imposed by or under a law (other than a requirement imposed by a subpoena or other compulsory process).

[192] In discussion of the Clause, the court made various important observations, including:

However, the clause does not impose a general prohibition against disclosure of information obtained in connection with ADR. The clause does not, therefore, prohibit a person attending a DRC disclosing information obtained in connection with the DRC to a third party. For example, the clause does not prohibit a parent disclosing to their treating professional what was said at a DRC nor does it prohibit a lawyer who appears at a DRC as an agent disclosing to their principal what transpired at a DRC. [17]

Nor does the clause prohibit a party attending a DRC using information disclosed by another party at the DRC to make independent inquiries and tender in evidence in the proceedings the result of those independent inquiries: see *Field v Commissioner for Railways for New South Wales* [1957] 99 CLR 285. [18]

[193] The more contentious exception enabling disclosure by the Children's Registrar now appears in Clause 19(5)(c). Clause 19(5)(c) refers to:

reasonable grounds to suspect that a child or young person is at risk of significant harm within the meaning of section 23 of the Act.

[194] I do not propose here to consider in detail today the circumstances under which a disclosure made at a DRC might be admissible pursuant to Clause 19(5)(c). That is a discussion for another day. For the moment, be aware that the power exists, but it is limited to disclosure by the person conducting the alternative dispute resolution, that is the Children's Registrar, and not the parties or others in attendance, or the caseworkers or legal practitioners involved.

## Conclusion

[195] I hope the contents of this paper have been helpful in guiding judges hearing care appeals.

[196] Additional resources may be found at the following sites:

- (a) The website of the Children's Court contains numerous resources including the Practice Notes, the Contact Guidelines and various protocols. Most important, however, is the Children's Law News site (CLN), which contains various cases and articles collected over the last decade relating to Children's Law. It contains a helpful index.
- (b) There is a chapter in the *Civil Trials Bench Book* on "Child care appeals from the Children's Court" at [5-8000].
- (c) The Judicial Commission website contains the *Children's Court of NSW Resource Handbook*.

[197] Finally, please feel free to ring me at any time to discuss issues of law or procedure in care matters.

# Children's participation: a look towards the future

Judge Peter Johnstone, President of the Children's Court of NSW; the paper was first presented for the Child Representation Conference on 5 March 2016.

## [1-0160] Introduction

- [1] This paper has been prepared for the Child Representation Conference on Saturday 5 March 2015 at the Novotel Wollongong Northbeach.<sup>72</sup>

I am conscious not to be unduly repetitive of the issues that have been presented by my colleagues. Accordingly, I have approached this paper by viewing the issue of children's participation through the lens of an Independent Legal Representative (ILR).

- [2] This paper will explore the important role played by Independent Legal Representatives (ILRs) in the Children's Court, including the challenges implicit in their work and ways to strengthen the performance of their role by undertaking *participatory advocacy*. I will conclude by canvassing promising initiatives for enhancing child participation in the future.

- [3] Firstly I wish to acknowledge the traditional owners of the land on which we meet, the Wadi Wadi people of the Dharawal nation and pay my respects to their Elders past and present.

- [4] 4. Harnessing the participation of children and young people is fraught with challenges, particularly where children and young people have experienced disempowerment, maltreatment and historical disadvantage.

- [5] Part of the complexity of the ILR's role lies in balancing the safety, welfare and well-being of the child against the need to provide the child with the opportunity to freely participate in the decisions that affect him/her. This intricate balancing act requires significant skill on the part of the advocate.

- [6] The discourse and research in this area has not yet developed or settled to the extent that we will see a legislative change with respect to child representation. As you are all aware, child representation is a vexed issue. Until we can confidently incorporate alternate child representation schemes into legislation, we must work to promote and harness the participation options that are available.

- [7] My intention in presenting this paper is explorative, not determinative. I have arrived at this topic in response to criticisms levelled at the ILR model and/or solicitors' interpretation of what it means to be an ILR. The core question this paper seeks to unpack is: *how can ILRs enhance their role by undertaking participatory advocacy*.

- [8] I will investigate the tension between the ILR model and the Direct Legal Representative (DLR) model and will undertake a jurisdictional analysis. I will then highlight the skills that advocates can draw upon to improve their representation of children. I will conclude by canvassing some initiatives that appear to hold promise for the future of child representation.

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<sup>72</sup> I acknowledge the considerable help and valuable assistance in the preparation of this paper provided by the Children's Court Research Associate, Paloma Mackay-Sim.

## The tension between an independent legal representative and a direct legal representative

[9] The concept that 'children should be seen and not heard' has become redundant as society has developed an appreciation of the value that children and young people can add when they are empowered to participate.

[10] However, empowerment is subject to one important qualification – the paramountcy principle. Where participation does not accord with the child or young person's safety, welfare and well-being, the latter will prevail.

[11] Thomas argues that:

Rights should reflect children's developing competence, offering them protection as long as they need it combined with empowerment as soon as they are ready for it, with restrictions on their freedom and autonomy only where these can be justified in terms of maximising their future choices.<sup>73</sup>

[12] This qualification has been enshrined in Art 12 of the United Nations Convention on the Rights of the Child (UNCROC). While I recognise that you are all familiar with this provision, I will include it for completeness:

1. States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, *either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.*<sup>74</sup> [My emphasis.]

[13] As you can see, the participation principle in Art 12, is qualified by ss 8 and 9 of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act). The Care Act clarifies that a young person's participation in decision making is subject to ensuring their safety, welfare and well-being.<sup>75</sup>

[14] The Care Act also outlines the responsibilities the Secretary owes to the child to facilitate the child's participation in decisions made under the Act. This includes a responsibility to provide, inter alia, information about the matter, tailored to the child's communication needs and level of understanding; the opportunity to express his or her views freely and the opportunity to respond to decisions made under the Act.<sup>76</sup>

[15] In addition, the Act requires that:

due regard must be had to the age and developmental capacity of the child or young person.<sup>77</sup>

[16] The Independent Legal Representative (ILR) or "best interests" model is consistent with the need to consider the child's views whilst maintaining an overarching

<sup>73</sup> N Thomas, "Children's Rights: Policy into practice", *Centre for Children and Young People Background Briefing Series no 4*, Centre for Children and Young People, Southern Cross University.

<sup>74</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Treaty Series, vol 1577 at Art 12.

<sup>75</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 9(1).

<sup>76</sup> *ibid*, s 10.

<sup>77</sup> *ibid*, s 10(2).

commitment to safeguarding the child's interests. The ILR will consult with the child, but their overriding duty is to the Court, to act in accordance with the safety, welfare and well-being of the child.<sup>78</sup>

[17] The Direct Legal Representative (DLR) model requires that a DLR may be appointed for any child at the age of 12 or over who is capable of giving instructions. The DLR must then advocate as instructed by the child.<sup>79</sup>

[18] Many have argued that the qualification on children's right to participate is limiting and fails to privilege the valuable perspectives and knowledge that children can offer. Ross argues that the best interests principle:

... is embedded in welfare discourse that conceives of children as incompetent, dependent and vulnerable victims who are in need of protection by the legal apparatus of the state. "Best interests" is fundamentally about expert, adult interpretations of what is best for children.<sup>80</sup>

[19] The jurisdictional analysis that follows highlights the ways in which Australian jurisdictions have balanced providing the child with agency, whilst protecting their safety, welfare and well-being.

[20] In the Australian Capital Territory and South Australia children and young people are primarily represented in accordance with the DLR model.<sup>81</sup> However, in South Australia an ILR approach applies if a child is not capable of providing proper instructions to their solicitor.<sup>82</sup>

[21] In Western Australia, a child will be represented on a DLR basis<sup>83</sup> unless the child is not capable of giving proper instructions or where a child does not wish to give his/her solicitor instructions.

[22] In these circumstances, an ILR model will apply.<sup>84</sup> In addition, a judicial discretion applies as to whether a child should be represented by an ILR.<sup>85</sup>

[23] Interestingly, Queensland, the Northern Territory and Tasmania appear to have the most similar model to an ILR insofar as solicitors must present the child's views and wishes to the Court, if possible, but the best interests approach applies regardless of any instructions from the child.<sup>86</sup>

[24] In Tasmania, an additional qualification is added, providing that a care application cannot be decided by the Court unless the child is legally represented or the Court is satisfied that the child has made an informed and independent decision not to be represented.<sup>87</sup>

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<sup>78</sup> *ibid*, ss 99–99D.

<sup>79</sup> *ibid*.

<sup>80</sup> N Ross, "Images of Children: Agency, Art 12 and Models for Legal Representation" (2005) 19 *AJFL* 94 at 96.

<sup>81</sup> *Court Procedures Act 2004 (ACT)*, s 74E; *Children's Protection Act 1993 (SA)*, s 48(1).

<sup>82</sup> *Children's Protection Act 1993 (SA)*: s 48(2).

<sup>83</sup> *Children and Community Services Act 2004 (WA)*: s 148(4).

<sup>84</sup> *ibid*, s 148(4).

<sup>85</sup> *ibid*, s 148(2).

<sup>86</sup> *Child Protection Act 1999 (Qld)*, s 110(5); *Care and Protection of Children Act 2007 (NT)*, s 143A(1) and 143B(1)(b); *Children, Young Persons and Their Families Act 1997 (Tas)*, s 59.

<sup>87</sup> *Children, Young Persons and Their Families Act 1997 (Tas)*, s 59(1).

[25] In Victoria, a solicitor acting for a client must act in accordance with any instructions or wishes expressed by the child, so far as it is practicable to do so *having regard to the maturity of the child* (my emphasis).<sup>88</sup> Significantly, where a child is not considered mature enough to give instructions, the court has the power to adjourn the case to enable legal representation to be obtained, but only if there are exceptional circumstances in the best interests of the child.<sup>89</sup>

[26] The variety of approaches taken in Australian jurisdictions highlights the challenges implicit in defining an age, stage and methodical way of striking a balance between securing a child's safety, welfare and well being while also facilitating their participation.

[27] In *RCB (as litigation guardian of EKV, CEV, CIV and LRC) v The Honourable Justice Forrest*, the High Court articulated this complexity as a practical issue:

Determination of an application for a return order and, in particular, determination of any issues about the strength of a child's objection to return and the maturity of that child will affect the child's interests. Deciding issues about strength of objection and maturity of the child in a way that is procedurally fair to all who are interests in or affected by their decision — the parents, the child or children concerned and the Central Authority — presents an essentially practical issue. How is the court to be sufficiently and fairly apprised of what the child concerned wants, how strongly that view is held and how mature the child is?<sup>90</sup>

[28] The challenge of ensuring that you are sufficiently and fairly apprised of what a child wants, how strongly that view is held and how mature the child is, is one that ILRs must grapple with on a daily basis. The next section will canvass some of the skills ILRs can draw upon in order to ensure that they foster a child's participation.

### **Strengthening the role of the independent legal representative through participatory advocacy**

[29] In my view, providing children with a voice and choice to participate is critical to the performance of my role as a Judicial Officer. Therefore, I consider that advocating for participation acts as an important protective factor against "ivory tower" decision making. I have coined this term "participatory advocacy".

[30] Many of the children and young people who come before this Court have been denied a voice through a range of traumatic circumstances associated with, and dominated by, adults. Successful application of the participation principles recognises the voice of the child as valid and valuable.

[31] Stasiulis advises:

Rather than view children as "pre-citizens" or as silent, invisible, passive objects of parental and/or state control ... children are cast as full human beings, invested with agency, integrity and decision making capacities.<sup>91</sup>

<sup>88</sup> *Children, Youth and Families Act 2005* (Vic), s 524(9).

<sup>89</sup> *ibid*, s 524(4).

<sup>90</sup> *RCB (as litigation guardian of EKV, CEV, CIV and LRV) v The Honourable Justice Forrest* (2012) 247 CLR 304 at [44], French CJ, Hayne, Crennan, Kiefel and Bell JJ.

<sup>91</sup> D Stasiulis, "The active child citizen: lessons from Canadian policy and the Children's movement" (2002) 6(4) *Citizenship Studies* 507 at 508.

- [32] The question thus becomes how can practitioners engage children and encourage their participation when undertaking the role of ILR? The answer is simple. Trauma-informed communication.
- [33] Children and young people experience and perceive the world differently to adults and are generally able to communicate their needs, views and wishes when adults adopt appropriate methods of communication.
- [34] Principle D6 of the “Representation principles for children’s lawyers” provides you with a clear indication of what is required when communicating with children.<sup>92</sup>
- [35] The commentary includes a list of “Basic rules for practitioners”. This is a useful resource and one you should consider as a guide to the way you communicate with children.
- [36] I intend to supplement the guidance provided in Principle D6 with the knowledge I gained during my attendance at the “Speaking Their Language: Young People and the Courtroom” conference at the Judicial College of Victoria.<sup>93</sup> I was particularly struck by the research presented by Karen Hogan, on the impact of trauma, and the session by Professor Pamela Snow, on the oral language skills of children and young people.
- [37] We see children and young people on a daily basis, and recognise the impact trauma can have on young persons’ ability to articulate themselves and their ability to regulate their behaviours.
- [38] While it is important to understand the impact of language in the criminal jurisdiction, for example how to make a child witness feel at ease, in the care jurisdiction, the impact of language and its correlation with trauma is an important factor to understand and to add to your knowledge of the effects of abuse and neglect. What follows in this section, is my summary of the research presented.
- [39] Karen Hogan, the Director at the Gatehouse Centre of the Royal Children’s Hospital in Victoria explained that a history of trauma can lead to a wide variety of difficulties and challenges for children and young people. She explained that negative relational experiences at an early age can have a significant impact on the child or young person’s socialisation. Ms Hogan made the following assertion, which I consider to be particularly poignant:
- Children do well if they can. But trauma seriously impacts the opportunity for children to learn HOW to do well.<sup>94</sup>
- [40] Ms Hogan’s presentation was structured according to the effects that different types of abuse can have on a child. Her research showed that the effects of child abuse and family violence result in trauma that affects cortisol levels and neural development, impacting the structural and functional development of the brain and resulting in behavioural ramifications.<sup>95</sup>

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<sup>92</sup> The Law Society of NSW, “Representation principles for children’s lawyers”, 4th edn, 2014.

<sup>93</sup> Judicial College of Victoria conference, Speaking their language: young people and the courtroom, 19 and 20 October 2015.

<sup>94</sup> K Hogan, “The impact of trauma”, paper presented to the Judicial College Of Victoria conference, Speaking their language: young people and the courtroom, 19 October 2015.

<sup>95</sup> *ibid.*

- [41] These behavioural ramifications can be classified either as internalising behaviours or externalising behaviours. Internalising behaviours include fears or phobias, anxiety, obsessiveness and control; depression, lack of hope, withdrawal; self-harm and identity confusion. Externalising behaviours include aggression, poor concentration, hyper vigilance, acting out and risk taking behaviours, sexualised behaviours/sexual risk taking and destructive behaviours.<sup>96</sup>
- [42] Ms Hogan concluded by outlining the long term impacts of child abuse and family violence, especially where: the abuse is not recognised and stopped; the child/young person's experience is not validated; the child/young person is not assisted to feel safe, understand and manage their emotional experience; explore their loss and create a positive future.
- [43] Implicit in Ms Hogan's research and observations is the conclusion that trauma can significantly affect a child/young person's ability to identify and articulate abuse, which can leave the child/young person with unresolved issues and affect their long term health and development.
- [44] It follows then, that communication is a vital part of preserving the safety, welfare and well-being of the child. In Professor Pamela Snow's presentation, she described the different factors that can impact upon a child or young person's language development. Importantly, she stated that:
- We have evolved a special facility for oral language, such that it is innate **BUT** it is highly vulnerable to a range of developmental conditions eg hearing impairment, intellectual disability, autism spectrum disorders, brain injury and it is highly sensitive to environmental exposure.<sup>97</sup>
- [45] Professor Snow's presentation explained that articulating feelings is a "higher-order" communication skill which draws upon a range of cognitive, psychological and social factors. Importantly, she spoke of "Alexithymia" which means "having a lack of words for emotions". She explained that this was typically associated with autism spectrum disorders but may also occur in children who have either witnessed or been victims of trauma.<sup>98</sup>
- [46] A noteworthy aspect of Professor Snow's presentation was her reference to a 1995 study by Hart and Risley.<sup>99</sup> This study examined the link between language exposure and children of parents on welfare benefits, working class parents and professional parents
- [47] Hart and Risley's study examined children (aged 3) and found that:
- Children of parents on welfare benefits experienced 616 words per hour
  - Children of working class parents experienced 1251 words per hour, and
  - Children of professional parents experienced 2153 words per hour.

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<sup>96</sup> *ibid.*

<sup>97</sup> Professor P Snow, "Oral language competence: implications for the legal interface", paper presented for the Judicial College Of Victoria conference, Speaking their language: young people and the courtroom, 20 October 2015.

<sup>98</sup> *ibid.*

<sup>99</sup> B Hart and T Risley, *Meaningful differences in the everyday experiences of young American children*, Paul H Brookes Publishing, 1995.

- [48] Further, Hart and Risley conducted a longitudinal follow-up and examined these children at ages 9 and 10.
- [49] This longitudinal study showed strong links between language exposure at age 3 and academic outcomes later in life.
- [50] Professor Snow also identified a number of “red flags” that may indicate communication difficulties.
- [51] These are: a diagnosed developmental disability, special school attendance, academic under-achievement, teacher, parent, or employer concern, social/peer level interpersonal difficulties, restlessness, avoidance and poor eye-contact, overly acquiescent style, “yep, nup, dunno, maybe, whatever” responses and a history of either internalising or externalising mental health problems.
- [52] The research by Ms Hogan and Professor Snow show that there is a link between trauma and communication. It is important for ILRs to keep this guidance in mind when meeting the child.
- [53] In addition to the communication style enunciated in the representation principles, a general understanding of cognitive and language development will bolster an ILRs ability to engage in participatory advocacy.
- [54] This includes an understanding of cognitive and language skills from early childhood through to adolescence.
- [55] I will not examine the detail of these skills, but will draw your attention to cognitive and language acquisition skills that I consider to be particularly important for an ILR to have an awareness of the following.

### **Early childhood (3–6 years)**

#### **(a) Words and language:**

- Confuse the meaning of prepositions ie before, after, behind
- Interpret words literally and very narrowly or very broadly ie a child may understand that ‘touching’ only happens with a person’s hand and deny being touched because another body part was used
- Expect sentences to take the sequence subject-verb-object. Passive voice can be confusing, as are embedded phrases (use two separate questions instead) ie “Did the man chase you?” and “Was he wearing a red coat?” rather than “Was the man who chased you wearing a red coat?”
- Might be able to use specific words but may not understand the concepts behind them.

#### **(b) Cognitive:**

- Cannot self regulate emotions of understand comprehension. They will not be able to understand a question or when they need a break
- Young children can only focus on one thing at a time. If a question contains two parts, they will only be able to focus on one part.<sup>100</sup>

<sup>100</sup> Victoria Department of Justice and Regulation (prepared by the Child Witness Service), Factsheet, “Early childhood (3–6 years)”, 2015.

### **Middle years (7–10 years)**

#### **(a) Words and language:**

- Will learn an additional 5000 words during these years but will not always understand their meanings
- During this stage, children develop the ability to think about more than one idea at a time, however lack the linguistic skills to put all of the parts of a complex sentence together
- Understand generalisations and can give more than one meaning to a word ie a person's "house" can be an apartment, and that you can "touch" something with a part of your body other than your hand.

#### **(b) Cognitive:**

- Developing logical thinking so they can reason and solve problems. They can also predict events and understand some consequences. They employ these logical operations before they can identify or understand them
- Continue to have difficulty self-regulating emotion and monitoring comprehension, particularly under stress.<sup>101</sup>

[56] It is also vital for ILRs to understand the powerful role Authorised Clinicians (ACs) play in empowering children. ACs are in a position to either directly or indirectly facilitate the child or young person's participation. They do this by creating child friendly environments within which to conduct their assessments and communicate in plain English with the child or young person. For example, they might ask the child if they have a message to send to the "big boss" of the Court.

[57] ILRs can draw upon the professional expertise of ACs by taking into account the ways ACs have facilitated indirect participation of the child through their analyses and observations of attachment styles and non-verbal cues. Depending on the observations, a child may be indirectly communicating to the AC that they have an anxious or insecure attachment or if they are internalising or externalising behaviours.

[58] An ACs ability to understand the nature and quality of a child's behaviours and attachments, by using a trauma-informed approach, is a way of hearing the child's voice and facilitating the child's participation. ILRs can draw upon knowledge of developmental and social sciences and the specialised expertise of ACs to ensure that they are facilitating a child's participation without giving direct instructions.

### **Promising initiatives for enhancing child participation in the future**

[59] As we gather more and more knowledge about children, and develop greater consistency in child-centred, trauma-informed approaches across Australia, we may be able to implement some of the changes Kylie Beckhouse cites in her study of child representation schemes.<sup>102</sup>

<sup>101</sup> Victoria Department of Justice and Regulation (prepared by the Child Witness Service), Factsheet, "Middle Years (7–10 years)", 2015.

<sup>102</sup> K Beckhouse, "To investigate legal representation schemes for children in the US, Canada and the UK — administration, delivery and innovation", Winston Churchill Memorial Trust of Australia, 2014.

[60] My view is that any approach to child representation must be holistic and collaborative. I do not propose that practitioners become social workers, however, there is opportunity for a multi-agency approach of the kind Kylie speaks of.

[61] Tobin, in his discussion of taking a rights-based approach (in reference to Art 12 of UNCROC) bolsters this view:

In terms of practical steps, the first stage of a human rights-based approach must be to undertake an evaluation and identification of children's needs by reference to their rights.

This inquiry has to be linked to identification of various factors — social, cultural, economic, geographic, political, environmental and personal — that undermine the realisation of these rights. The collection of such data must then be used to develop a comprehensive strategy using all necessary measures — legislative, administrative, economic, educational and other social measures — to build the capacity of the people responsible for the realisation of children's rights and the elimination or minimisation of the various structural, social and institutional factors that have impeded this objective.<sup>103</sup>

[62] I wish to direct you to an exciting initiative for promoting active participation in the criminal justice system. The NSW Government is piloting the use of witness intermediaries in child sexual assault matters in the District Court.

[63] Witness intermediaries bridge the communication gap between counsel and child witnesses. Intermediaries are independent and owe their duty to the Court, acting in a similar capacity to interpreters by facilitating communication between the witness and counsel.

[64] Intermediaries can also play a part in providing advice or communication aids to assist counsel and the Court to ensure the use of tailored and appropriate communication.

[65] Intermediaries are a powerful resource in empowering the participation of children and young people. As Plotnikoff and Woolfson state:

Intermediaries are a great untold “good news” story of the criminal justice system.<sup>104</sup>

[66] While witness intermediaries are used and being piloted in the criminal justice system, they may play a role in care and protection matters in the future. The Court will be eager to read the evaluation of the pilot at its conclusion.

[67] There is capacity for a representation scheme to more effectively balance the need to support the participation of the child with an approach consistent with the safety, welfare and well-being of the child.

## Conclusion

[68] The role of the ILR is critical to ensuring that the participation principles of the Act are adhered to. ILRs can do this, while preserving the safety, welfare and well-being

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<sup>103</sup> J Tobin, “The development of children's rights” in G Monahan and L Young (eds) *Children and the Law in Australia*, 2008, Lexis Nexis Australia, pp 23–53.

<sup>104</sup> J Plotnikoff and R Woolfson (with a foreword by Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales), *Intermediaries in the criminal justice system: improving communication for vulnerable witnesses and defendants*, University of Bristol, Policy Press, UK, 2015 at p 304.

of the child, by using participatory advocacy. The future is bright and with scientific, psychiatric and sociological advancements, we will no doubt see further discussion of alternative schemes.

# Children's Court update 2016<sup>†</sup>

## [1-0170] Introduction

- [1] This paper has been prepared for the 2016 Local Court Southern Regional Conference, and is to be presented to country Magistrates at Kiama on 2 March 2016.<sup>105</sup>
- [2] First, I wish to acknowledge the traditional occupiers of the land on which we meet and pay my respects to their Elders past and present.
- [3] The purpose of this paper is to alert Local Court Magistrates to recent developments affecting the exercise of the Children's Court jurisdiction. The paper will build on similar previous presentations and is designed to be a reference resource that may be used to assist you when hearing matters involving children.
- [4] This paper will be presented in two main parts consistent with the bifurcated jurisdiction of the Children's Court. The first part will deal with the Court's care and protection jurisdiction and will be divided into three sub-parts that will conclude by traversing some recent significant case law. It follows then, that the second part will deal with the Court's criminal jurisdiction, divided into three sub-parts, which will conclude with an analysis of some recent relevant case law.
- [5] I have structured the paper in this way for editorial purposes. However, I wish to make it clear that whilst the Children's Court mainly exercises jurisdiction in two discrete areas that are distinguished by jurisprudence, this is not representative of the practicality and reality of the Children's Court.
- [6] As President of the Children's Court for over three years now, I have observed that there is an unequivocal correlation between a history of care and protection interventions and future criminal offending. This nexus between care and crime has been persuasively articulated by a number of respected commentators, including Dr Judith Cashmore.<sup>106</sup>
- [7] This tragic reality is one of a multitude of issues that have had a significant impact upon me and a reality that I have no doubt you have all been exposed to in the various locations within which you preside.
- [8] I continue to be astounded by the complexity of the issues that arise in this jurisdiction. 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 legal education and the need to work together as members of the Judicial community to address the ongoing issues needing to be addressed.

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<sup>†</sup> Judge Peter Johnstone, President of the Children's Court of NSW, District Court Annual Conference 2016, Wollongong, Wednesday 29 March 2016.

<sup>105</sup> I acknowledge the considerable help and valuable assistance in the preparation of this paper by the Children's Court Research Associate, Paloma Mackay-Sim.

<sup>106</sup> See also Judge M Marien, "'Cross-over kids' – childhood and adolescent abuse and neglect and childhood offending", paper originally presented at the South Pacific Conference of Youth and Children's Courts Annual Meeting, 25-27 July 2011, Vanuatu (and updated for the Third National Juvenile Justice Summit 2012, 27 March 2012, Melbourne).

- [9] Accordingly, one conclusion I have arrived at is that as Judicial Officers we cannot view the issues in the Children's Court jurisdiction through a strictly legal lens.
- [10] We must also view these issues in the context of the disadvantage and disempowerment that have defined the lives of generations of families who come before the Court.
- [11] As Judicial Officers, we have a social responsibility to perform our roles consistent with the administration of justice. But this is a particularly special jurisdiction that is imbued with the practice of therapeutic jurisprudence and restorative justice.
- [12] I hope, therefore, too impress upon you that the specialised nature of work relating to children and young people must be safeguarded and respected both in theory and practice.
- [13] 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.
- [14] The expansion contemplated is reflective of an enlightened view of an accessible and tailored justice system. It recognises the inherent value in applying consistent approaches across the whole State. There is also an added familiarity with the practices and procedures applied and with the nuances of decision making, through regular exposure to the relevant legislation and the applicable case law.
- [15] The Children's Court of NSW has been provided with two additional Children's Court Magistrates. In addition to a new Children's Magistrate based in Lismore, presiding over the Northern Rivers Circuit, there is also a new Magistrate, based at Parramatta, who is presiding over the new Hunter Circuit. Children's Court Magistrates now hear something like 90% of care cases in the State. The coverage for criminal matters remains, however, at about 60%. That is where you, the Local Court Magistrates exercising Children's Court jurisdiction, play such a hugely important role.
- [16] I view these forums as an important means by which the needs of Judicial Officers exercising this jurisdiction can be properly ventilated. Any discourse that facilitates collaboration, capacity building and information exchange is a discourse that is worth supporting.

### **Part one: the care and protection jurisdiction of the Children's Court**

- [17] In the introductory portion of this paper I reflected upon the complexity of the Children's Court jurisdiction. The jurisdiction is fraught with numerous challenges.
- [18] I do not have the time to traverse and clarify all of the complexities, so I have identified three current important issues to discuss this year, and three recent cases to review. These cover the following topics:
- (a) Unexplained injuries
  - (b) Cultural planning, with a particular focus on Aboriginal children
  - (c) The impact of trauma and the importance of language in the socialisation of children
  - (d) Interim orders; Joinder and the Aboriginal Placement Principles.

## Unexplained injuries

[19] Sadly, matters involving unexplained injuries are matters we frequently have to deal with as Judicial Officers exercising Children's Court jurisdiction. This is not just due to the high incidence of such cases, it is a result of the historical and intergenerational disadvantage that characterises the lives of many of the parents/caregivers with matters before this Court.

[20] As I illustrated earlier, we cannot administer the law blindly, we must train our minds to assess the law by reference to its social context. This exercise is particularly critical in matters involving unexplained injuries.

[21] Matters involving unexplained injuries to a child provoke significant challenges for Judicial Officers when making decisions consistent with the safety, welfare and well-being of the child. It is well established in research and amongst the medical profession that unexplained injuries, such as "shaken baby syndrome", arise out of circumstances that are generally consistent with the parent or caregiver's own disadvantage. For example, an inability to communicate or manage frustration, poor parental role models, youth, lack of support and lack of education.

[22] Perhaps these are some of the social reasons that make unexplained injury cases so challenging for Judicial Officers. The complexity of such cases is compounded by the fact that the Court is not dealing with absolutes. In cases of drug use or neglect, the Court can more clearly establish that either the parent was using drugs or was not, or left alone in an unkempt environment with no food, or not. With unexplained injuries, there are a greater range of intervening factors that could potentially exculpate the suspected perpetrator.<sup>107</sup>

[23] An additional area that may be confounding is that Care proceedings inquiring into unexplained injuries are not undertaken in accordance with the criminal standard to establish that a parent/caregiver's actions caused the injury to the child. Care proceedings do not revolve around the apportionment of guilt. The Judicial Officer must therefore be resolute in ensuring that the focus of the proceedings is directed toward the safety, welfare and well-being of the child.

[24] Lord Nicholls articulates this tension in the matter of *O & N* stating:

Whether or not an alleged event occurred in the past raises a question of proof. In truth, the event either happened or not. That is not so with a future forecast.

The future has not happened, and future human conduct is never certain. But in practice, the past is often as uncertain as the future. The Judge cannot know for certain what happened and can only assess the degree of likelihood that something happened. The same is true of the future. The decision maker has to assess the degree of likelihood that an inherently uncertain event will occur.<sup>108</sup>

[25] The High Court decision of *M v M* (1988) 166 CLR 69 enunciated the appropriate test to undertake in order to assess future risk of harm to the child. It was there held that in all decisions affecting children, the proper test to be applied when administering the paramount consideration of the safety, welfare and well-being of the child is

<sup>107</sup> S Herridge, "Non-accidental injury in care proceedings — a digest for practitioners", [2009] CLN 6 at p 11.

<sup>108</sup> *In re O & N (minors) (FC) In re B (minors)* (2002) (FC) [2003] UKHL 18 at [12].

that of “unacceptable risk” to the child.<sup>109</sup> The High Court said that in applying the unacceptable risk of harm test it is necessary to determine firstly whether a risk of harm exists and, secondly, the magnitude of that risk.

[26] Whether there is an unacceptable risk of harm to the child is to be assessed from the accumulation of factors proved according to the relevant civil standard.<sup>110</sup>

[27] In *Director-General of Department of Community Services; Re “Sophie”* [2008] NSWCA 250, His Honour Justice Sackville stated:

[67] The reasoning process I have outlined involves an error of law. The primary Judge, although stating the principles governing the burden of proof correctly did not apply them correctly. It was appropriate to take into account the gravity of the allegation of sexual misconduct made against the father, as required by s 104(2) of the *Evidence Act*. **It was not appropriate to find that the Director-General had failed to satisfy the burden of proof on the balance of probabilities simply because his Honour could not exclude a hypothesis that, although consistent with innocence, was highly improbable.** To approach the fact-finding task in that way was to apply a standard of proof higher than the balance of probabilities, even taking into account the gravity of the allegation made against the father. [Emphasis added.]

[68] As the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* at 171, statements to the effect that clear and cogent proof is necessary where a serious allegation is made are not directed to the standard of proof to be applied, but merely reflect the conventional perception that members of society do not ordinarily engage in serious misconduct and that, accordingly, a finding of such misconduct should not be made lightly. In the end, however, as Ipp JA observed in *Dolman v Palmer* at [47], the enquiry is simply whether the allegation has been proved on the balance of probabilities.

[28] The test in *M v M* is the most instructive guide to your decision making in matters of unexplained injury. A positive finding of an allegation of harm having been caused to a child should only be made where the Court is so satisfied according to the relevant standard of proof, with due regard to the matters set out in *Briginshaw*. Nevertheless, an unexcluded possibility of past harm to a child is capable of supporting a conclusion that the child will be exposed to unacceptable risk in the future from the person concerned. Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. If, on the balance of probabilities, you are satisfied that a risk of harm exists, and that the magnitude of that harm would require intervention, you would then examine what might be done to ameliorate that risk, for example, the nature and extent of parental contact, including any need for supervision.<sup>111</sup>

### **Cultural planning for Aboriginal children and young people**

[29] In my view, culture is central to the identity formation and socialisation of children and young people. It carries a young person through their formative years and provides a sense of belonging in the world. If a child is removed from its parents, culture remains important - whether the child is at an age in which they are cognisant of this process

<sup>109</sup> *M v M* (1988) 166 CLR 69 at [25].

<sup>110</sup> *Johnson v Page* [2007] FamCA 1235.

<sup>111</sup> Justice S Austin, “The enigma of unacceptable risk”, paper presented at the 2015 Hunter Valley Family Law Conference, 31 July 2015, Hunter Valley NSW.

or not. It follows then, that when making decisions about a child or young person's care, we must pay particular attention to providing options that will enhance a child or young person's socialisation and sense of belonging.

[30] I appreciate that I have raised this issue at previous conferences, but it is important that I continue to do so until comprehensive cultural planning is embedded at all levels of the care and protection process. While I have witnessed some improvements during my tenure at the Children's Court, I am not yet satisfied that there has been a widespread application and appreciation of this need.

[31] As you are aware, the *Care Act* is to be administered under the "paramountcy principle", that is, that the safety welfare and well-being of the child is paramount: s 9(1). In addition to this paramountcy principle, the *Care Act* sets out other particular principles to be applied in the administration of the *Care Act*: s 9(2).

[32] One of these principles is that account must be taken of concepts such as culture, language, identity and community.

[33] Since my last address at the Regional Conference in 2014, I have committed myself to safeguarding, monitoring and insisting upon the implementation of the Aboriginal and Torres Strait Islander Placement Principles, and as a corollary, the development of focussed cultural planning for Aboriginal children and young people.

[34] It is a principle to be applied in the administration of the Care Act that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as is possible: s 11.

[35] Further, Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Secretary, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12.

[36] Finally, a general order for placement of an Aboriginal or Torres Strait Islander child who needs to be placed in statutory out-of-home care is prescribed: s 13(1). In summary, the order for placement is, with:

- (a) a member of the child's or young person's extended family or kinship group, as recognised by the community to which the child or young person belongs,
- (b) a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs,
- (c) a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child's or young person's usual place of residence,
- (d) a suitable person approved by the Secretary after consultation with:
  - (i) members of the child's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and
  - (ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

[37] Before it can make a final Care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed: s 83(7).

- [38] Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security: s 78A. The plan must:
- (a) have regard, in particular, to the principle that if a child is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement: s 9(2)(e),
  - (b) meet the needs of the child: s 78A(1)(b), and
  - (c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements: s 78A(1)(c).
- [39] Culture is a critical element in the assessment of what is in a child's best interests and a critical consideration in assuring the safety, welfare and wellbeing of a child. It is critical that decision makers in child protection matters are provided with sufficient information to be able to appreciate the distinct role culture plays in the identity formation and socialisation of each child.
- [40] The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles and to adequately and appropriately address cultural planning are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.
- [41] The need for appropriate cultural planning is linked to the need to ensure that early intervention and pre-removal options are explored to their fullest extent.
- [42] Aboriginal cultural identity centres on an appreciation of the significance of culture, land/country, historical exclusion in decision-making and reconnection with family.
- [43] I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children.
- [44] As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4 at [94]:
- The Aboriginal and Torres Strait Islander Principles are in the *Care Act* 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons. They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters coming before the Children's Court.
- [45] I am happy to report that in the past year a template for a cultural action planning section in the Care Plan has been developed. The idea behind this template is to ensure that adequate casework is undertaken to appropriately identify a child's cultural origins, and to put in place fully developed plans for the child to be educated, and to fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.
- [46] I am optimistic that this will not be a superficial solution to a complex issue. I am committed to a future where Aboriginal children and young people understand their lineage and heritage. I strongly believe that if Aboriginal children and young people are culturally supported at a young age, they have a better chance of successfully progressing through their lives.

## **The impact of trauma and the importance of language in the socialisation of a child**

[47] The impetus for this topic arose from my attendance at the “Speaking their language: young people and the courtroom” conference at the Judicial College of Victoria.<sup>112</sup> I was particularly struck by the research presented by Karen Hogan, on the impact of trauma, and the session by Professor Pamela Snow, on the oral language skills of children and young people.

[48] We see children and young people on a daily basis, and recognise the impact trauma can have on young persons’ ability to articulate themselves and their ability to regulate their behaviours.

[49] While it is important to understand the impact of language in the criminal jurisdiction, for example how to make a child witness feel at ease, in the care jurisdiction, the impact of language and its correlation with trauma is an important factor to understand and to add to your knowledge of the effects of abuse and neglect. What follows in this section, is my summary of the research presented.

[50] Karen Hogan, the Director at the Gatehouse Centre of the Royal Children’s Hospital in Victoria explained that a history of trauma can lead to a wide variety of difficulties and challenges for children and young people. She explained that negative relational experiences at an early age can have a significant impact on the child or young person’s socialisation.

Ms Hogan made the following assertion, which I consider to be particularly poignant:

Children do well if they can. But trauma seriously impacts the opportunity for children to learn HOW to do well.<sup>113</sup>

[51] Ms Hogan’s presentation was structured according to the effects that different types of abuse can have on a child. Her research showed that the effects of child abuse and family violence result in trauma that affects cortisol levels and neural development, impacting the structural and functional development of the brain and resulting in behavioural ramifications.<sup>114</sup>

[52] These behavioural ramifications can be classified either as internalising behaviours or externalising behaviours. Internalising behaviours include fears or phobias, anxiety, obsessiveness and control; depression, lack of hope, withdrawal; self-harm and identity confusion. Externalising behaviours include aggression, poor concentration, hyper vigilance, acting out and risk taking behaviours, sexualised behaviours/sexual risk taking and destructive behaviours.<sup>115</sup>

[53] Ms Hogan concluded by outlining the long term impacts of child abuse and family violence, especially where: the abuse is not recognised and stopped; the child/young

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<sup>112</sup> Judicial College of Victoria conference, Speaking their language: young people and the courtroom, 19–20 October 2015.

<sup>113</sup> K Hogan, “The impact of trauma”, paper presented at the Judicial College of Victoria conference, Speaking their language: young people and the courtroom, 19 October 2015.

<sup>114</sup> *ibid.*

<sup>115</sup> *ibid.*

person's experience is not validated; the child/young person is not assisted to feel safe, understand and manage their emotional experience; explore their loss and create a positive future.

[54] Implicit in Ms Hogan's research and observations is the conclusion that trauma can significantly affect a child/young person's ability to identify and articulate abuse, which can leave the child/young person with unresolved issues and affect their long term health and development.

[55] It follows then, that communication is a vital part of preserving the safety, welfare and well-being of the child. In Professor Pamela Snow's presentation, she described the different factors that can impact upon a child or young person's language development. Importantly, she stated that:

We have evolved a special facility for oral language, such that it is innate **BUT** it is highly vulnerable to a range of developmental conditions eg hearing impairment, intellectual disability, autism spectrum disorders, brain injury and it is highly sensitive to environmental exposure.<sup>116</sup>

[56] Professor Snow's presentation explained that articulating feelings is a 'higher-order' communication skill which draws upon a range of cognitive, psychological and social factors. Importantly, she spoke of "Alexithymia" which means "having a lack of words for emotions". She explained that this was typically associated with autism spectrum disorders but may also occur in children who have either witnessed or been victims of trauma.<sup>117</sup>

[57] A noteworthy aspect of Professor Snow's presentation was her reference to a 1995 study by Hart and Risley. This study examined the link between language exposure and children of parents on welfare benefits, working class parents and professional parents.

[58] Hart and Risley's study examined children (aged 3) and found that:

- Children of parents on welfare benefits experienced 616 words per hour
- Children of working class parents experienced 1251 words per hour and
- Children of professional parents experienced 2153 words per hour.

[59] Further, Hart and Risley conducted a longitudinal follow-up and examined these children at ages 9 and 10. This longitudinal study showed strong links between language exposure at age 3 and academic outcomes later in life.

[60] Professor Snow also identified a number of "red flags" that may indicate communication difficulties.

[61] These are: a diagnosed developmental disability, special school attendance, academic under-achievement, teacher, parent, or employer concern, social/peer level interpersonal difficulties, restlessness, avoidance and poor eye-contact, overly acquiescent style, "yep, nup, dunno, maybe, whatever" responses and a history of either internalising or externalising mental health problems.

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<sup>116</sup> Professor P Snow, "Oral language competence: implications for the legal interface", paper presented at the Judicial College of Victoria conference, Speaking their language: young people and the courtroom, 20 October 2015.

<sup>117</sup> *ibid.*

[62] At the conclusion of her presentation, Professor Snow quoted a statement made in 2007 by the Former Chair of the UK Youth Justice Board, Rod Morgan:

It may be too much to say that if we reformed our schools, we would have no need for prisons. But if we better engaged our children and young people in education we would almost certainly have less need of prisons. Effective crime prevention has arguably more to do with education than sentencing policy.<sup>118</sup>

[63] This quote exemplifies the cross-over between care and crime. The research by Ms Hogan and Professor Snow show that there is a link between trauma and communication.

## Recent case law in care and protection

### Joinder of parties

[64] In proceedings under the Care Act, the parties will generally comprise the Secretary of the department, the child or children, the parent(s), the step-parent(s), and the legal representative(s), being the Independent Legal Representative for children under 12, or the Direct Legal Representative for children 12 and over, up to the age of 18.

[65] Other persons having a genuine concern for the safety, welfare and well-being of the child(ren) may be given leave to appear in the proceedings, or be legally represented, and examine and cross-examine witnesses.<sup>119</sup>

[66] Others who might be significantly impacted by a decision of the Children's Court, not being parties to the proceedings, are to be given "an opportunity to be heard on the matter of significant impact".<sup>120</sup> Historically, such persons were generally not made parties, but could present an affidavit. They could not, however, cross-examine or call witnesses of their own.

[67] There has been something of a change in approach on this topic in recent times, partly driven by the transfer of casework to the NGO sector, but also as a result of some recent pronouncements by superior courts. The Court is now increasingly receptive to joinder applications and more likely to make orders than in the past.

[68] In *Re June (No 2)* [2013] NSWSC 1111 (hereinafter referred to as *Re June*), McDougall J clarified the distinction between ss 87 and 98(3) of the *Care Act*:<sup>121</sup>

[186] The second point to note is that the opportunity to be heard is not the opportunity to participate in the proceedings either as a party as of right (s 98(1)) or as someone given leave (s 98(3)). Thus, it does not follow that the opportunity to be heard includes the right to examine or cross-examine witnesses at least generally.

[187] However, if the question of significant impact is one that is the subject of evidence, and if there are direct conflicts in that evidence, then in a particular case, the opportunity to be heard may extend to permitting cross-examination in that particular point.

[69] The more recent decision in *Bell-Collins Children v Secretary, Department of Family and Community Services* [2015] NSWSC 701, provides further clarification.

<sup>118</sup> *ibid* n 116.

<sup>119</sup> *Children and Young Persons (Care and Protection) Act* 1998: s 98(3).

<sup>120</sup> *Children and Young Persons (Care and Protection) Act* 1998: s 87(1).

<sup>121</sup> *Re June (No 2)* [2013] NSWSC 1111 at [186]–[187].

[70] During case management, the Children's Magistrate had refused the application of the grandparents to be joined as a party. At the hearing, which came before me at the Children's Court at Woy Woy,<sup>122</sup> I gave the grandparents an extensive opportunity to be heard, under s 87(1).

[71] In the de novo appeal to the Supreme Court, the grandparents renewed their application for joinder and the matter was considered by Justice Slattery.

[72] The significant aspect of Slattery J's decision was his distillation of the distinction between the opportunity to be heard under s 87(1) and the granting of leave to appear under s 98(3):

[33] ... In s 87(1) the threshold is one to ensure that non-parties who may suffer adverse impacts from Care Act orders will receive procedural fairness before such orders are made. The focus is on "impact on a person".<sup>123</sup>

[34] But the threshold for s 98(3) is more child-centred. The s 98(3) right is only available to a person who in the Court's opinion "has a genuine concern for the safety, welfare and well-being of the child". It is perhaps because the s 98(3) threshold is more altruistic than that under s 87 that the *Care Act* can afford a wider scope to participate to those who receive a grant of s 98(3) leave. Persons meeting s 98(3) leave will sometimes be, as the great grandparents are in this case, people who can by their participation fill an evidentiary gap in the proceedings that it may be in the best interests of that child to see filled in the proceedings. In my view that is the case here.<sup>124</sup>

[73] Accordingly, Slattery J granted the grandparents leave on terms under s 98(3). The grandparents were only granted leave to cross-examine and adduce evidence about their own suitability as alternative carers for the children.

[74] Finally, I wish to remind you of a decision by Magistrate Schurr delivered in 2003 in which an NGO, Anglicare, was joined as a party to Care proceedings: *In the matter of "Pamela"* [2003] CLN 3. In that matter, the Department of Community Services (as it was then designated) sought an order from the Court revoking the leave of Anglicare to appear as a party. The Secretary argued that the NGO had insufficient interest in the proceedings and that it was probable that the positions taken by the parties would be duplicated.

[75] Magistrate Schurr outlined Anglicare's involvement in proceedings as follows:

In late 1998 the Department of Community Services delegated to Anglicare the role of foster care agency, a role it continues to date. Anglicare does not exercise any powers of parental responsibility for this child, and these powers remain with the Minister. Anglicare workers do, however, supervise the foster carers, coordinate access by the birth family and liaise with the Department of Community Services through case conferences.<sup>125</sup>

[76] Anglicare had originally sought leave to be joined as a party to argue for an "independent assessment of the child and family members". Anglicare argued that once leave was granted there was no limit on their role in the proceedings.

<sup>122</sup> *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5.

<sup>123</sup> *Bell-Collins Children v Secretary, Department of Family and Community Services* [2015] NSWSC 701 at [33].

<sup>124</sup> *ibid* at [34].

<sup>125</sup> *In the matter of "Pamela"* [2003] CLN 3 at p 4.

[77] The Department argued that leave should only be granted to those persons with rights, powers and duties relating to children, by reference to the objects in s 8(a) of the *Care Act*. It was argued that Anglicare had neither parental responsibility nor the day to day care of the child and could not be granted leave.

[78] Magistrate Schurr concluded that Anglicare's involvement with the child was sufficient to bring it within the scope of s 98(3).

### **Interim orders**

[79] The next matter I will deal with is the topic of interim orders, and to remind you all of the decision of Blewitt ChM in *Re Mary* [2014] NSWChC 7. In this matter, Blewitt ChM considered the decision of Rein J in *Re Timothy* [2010] NSWSC 524 in relation to interim orders.

[80] Specifically, Blewitt ChM considered whether the Children's Court could rescind or vary an interim order allocating parental responsibility without the need for an application to be made under s 90 of the *Care Act*.

[81] Blewitt ChM concluded that interim orders allocating parental responsibility can be amended without the need for a s 90 application.

[82] Whilst a party is not precluded from making a s 90 application, it is not an essential requirement:

In the absence of express provisions in the *Care Act* that require the application of the provisions of s 90 to vary an existing interim order, and having regard to the inconclusive remarks of Rein J in *Re Timothy*, I find that the Court does have the power to entertain an oral application for varying of an existing interim order without the need for the moving party to file an application pursuant to s 90.<sup>126</sup>

[83] What this means, in practical terms, is that the Children's Court will be less likely in the future to make time limited orders for the allocation of parental responsibility to the Minister.

### **The Aboriginal and Torres Strait Islander Child Placement Principles**

[84] Consistent with my determination to ensure that application of the Aboriginal and Torres Strait Islander Child Placement Principles becomes an automatic, comprehensive process, it is apt that I discuss relevant case law to further emphasise this point.

[85] The Aboriginal and Torres Strait Islander Child Placement Principles represent a legislative recognition of the tremendous care, attention, thought and consideration required when making decisions to assure the safety, welfare and well-being of an Aboriginal or Torres Strait Islander child.

[86] Justice Muirhead described the discrete needs of Aboriginal children and young people in the matter of *Jabaltjari v Hammersley*:

The young Aboriginal is a child who requires tremendous care and attention, much thought, much consideration.<sup>127</sup>

<sup>126</sup> *Re Mary* [2014] NSWChC 7 at [33].

<sup>127</sup> *Jabaltjari v Hammersley* (1977) 15 ALR 94 at 98.

[87] As I mentioned above, the rationale behind these principles is to provide guidance with respect to preserving Aboriginal children's connection to their family, community, culture, history and identity. As the Commission for Children and Young People confirm:

The Aboriginal Child Placement Principle is based on the value that every Aboriginal child has the right to be raised within their own culture and community. It recognises the critical importance of cultural identity and connectedness to development and wellbeing: Aboriginal children and young people do better if they remain connected to their culture, community and country.<sup>128</sup>

[88] It follows, that application of these principles must not be superficial. In the decision of *Drake v Drake* [2014] FCCA 2950, Judge Sexton stated that the Department:

... adduces no evidence of the Children having the opportunity to enjoy their Aboriginal culture in more than a superficial way.<sup>129</sup>

[89] Judge Sexton went on to state that the Department had not complied with the Aboriginal Child Placement Principles when the children were removed and placed in out-of-home care. Significantly, Judge Sexton stated:

While the Department says it understands the importance of the Children remaining connected to their Aboriginal culture and their right to enjoy that culture, I find no basis to conclude that the Children's needs in this regard will be met if they remain in out-of-home care. For example, in the Department's Safety Assessment Reports of November 2013 and February 2014, the section "cultural identity" was marked "not applicable" for each Child, an entry Ms C was unable to explain. On the Department's proposal, I find it unlikely that the Children would have the opportunity to enjoy their culture or to participate in activities with others who share that culture. The authorities, as set out below, confirm Mr R's view that the Department's proposal in relation to connecting the Children to their culture does not meet the legislative requirements.<sup>130</sup>

[90] What the Department had proposed in this matter was that the children would attend the Aboriginal Medical Service, that the Department would make carers aware of events of Aboriginal and Torres Strait Islander cultural significance and that the children had been provided with Aboriginal stories and activity books.<sup>131</sup>

[91] Notably, Judge Sexton cited the following case law to elucidate the importance of addressing the cultural needs of Aboriginal children and young people. Judge Sexton cited the Full Court decision of *In the Marriage of B and R* (1995) FLC 92-636 at 82-396:

It is not just that Aboriginal children should be encouraged to learn about their culture, and to take pride in it in a manner in which other children might be so encouraged. What this issue directs our minds to is the particular problems and difficulties confronted throughout Australian history, and at the present time, by Aboriginal Australians in mainstream Australian society. The history of Aboriginal Australians is a unique one, as is their current position in Australian life ...<sup>132</sup>

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<sup>128</sup> Commission for Children and Young People, *Inquiry into compliance with the intent of the Aboriginal Child Placement Principle (ACPP) in Victoria*, 2015, at p 7.

<sup>129</sup> *Drake v Drake* [2014] FCCA 2950 at [187].

<sup>130</sup> *ibid* at [191].

<sup>131</sup> *ibid* at [189].

<sup>132</sup> *ibid* n 127 at [192].

[92] Judge Sexton went on to cite the matter of *Hort v Verran* [2009] FamCAFC 214 where the Full Court stated at [106]:<sup>133</sup>

In *Davis & Davis & Anor* (2008) 38 Fam LR 671; [2007] FamCA 1149 Young J said:

77. In *B & F* [1998] FamCA 239, Moore J considered the scope and meaning of the term “connection”. At 29–30 her Honour stated:

As I see it, the requirement to maintain a connection to their lifestyle, culture and traditions involves an active view of the child's need to participate in the lifestyle, culture and traditions of the community to which they belong. This need, in my opinion, **goes beyond a child being simply provided with information and knowledge about their heritage but encompasses an active experience of their lifestyle, culture and traditions. This can only come from spending time with family members and community. Through participation in the everyday lifestyle of family and community the child comes to know their place within the community, to know who they are and what their obligations are and by that means gain their identity and sense of belonging.**

[Emphasis added.]

[93] Judge Sexton concluded that the children be restored to the care of their grandmother.<sup>134</sup> Her decision and reasons provide context for the need to apply the Aboriginal Child Placement Principles and that any care plans produced *must* appropriately and adequately address the cultural needs of the children.

## **Part two: the criminal jurisdiction of the Children's Court**

[94] I now turn to address you on issues pertinent to the criminal jurisdiction of this Court. As I prefaced above, given the complexities of this jurisdiction, I am unable to address you on all of the present issues confronting the Children's Court. However, I have selected some important current issues to discuss and I review some recent case law.

[95] The topics highlighted are:

- (a) Diversion
- (b) Brain science
- (c) Communicating with children and young people
- (d) Doli incapax and special considerations for sentencing children.

[96] Before I commence my discussion of these topics I would like to remind you of the accommodation requirements prescribed by s 28 of the *Bail Act 2013*, which requires that accommodation is a pre-condition of release for a child or young person. In other words, the child or young person cannot be released until suitable accommodation is provided.

[97] Section 28(5) provides that the Court may direct “any officer of a Division of the Government Service” to provide information about the action being taken to obtain or secure suitable accommodation for the child. Clause 31 of the *Bail Regulation 2014* provides that this information may be provided in writing or orally at court, and must address where the accused person will reside.

<sup>133</sup> *ibid* at [195].

<sup>134</sup> *ibid* at [238].

- [98] If the accommodation requirement is imposed, s 28(4) requires the Court to re-list the matter at least every 2 days until suitable accommodation is secured.

## **Diversions**

- [99] I now turn to a discussion of diversion. One of the most effective ways of reducing juvenile offending is to begin prevention efforts as early as possible and to intervene aggressively with those who are already offending. Loeber, Farrington and Petechuk capture diversionary strategies as follows:

Of all known interventions to reduce juvenile delinquency, preventative interventions that focus on child delinquency will probably take the largest “bite” out of crime ... “The earlier the better” is a key theme in establishing interventions to prevent child delinquency, whether these interventions focus on the individual child, the home and family, or the school and community.<sup>135</sup>

- [100] Further, as Delfabbro and Day point out:

Attempting to develop interventions once young people have well established police records, incomplete schooling, and/or problematic peer groups, is likely to be very difficult.<sup>136</sup>

- [101] While research is useful and provides an important foundation for any dialogue about diversion, in my view, it is anecdotally incontrovertible that diversion is a critical pathway for young people. It may be a more resource intensive pathway, but by adequately addressing a child or young person's criminogenic needs, it has the potential to completely alter the course of a young person's life.

- [102] The acute need for diversion is emphasised by Bargaen:

... much more attention needs to be paid to deciding how to conceptualise and respond to young people in trouble with the law, and to their families, communities and victims, and how to listen and respond to what these people tell us about their lives and their aspirations. We can and should be able to create a humane system that is committed to the diversion of young people wherever possible and appropriate in line with international human rights norms and practice, and one which recognises the human right of young people in trouble with the law to be treated with dignity and respect and to be provided with conditions in which they can grow and flourish into happy, contributing and well-rounded adults — surely our responsibility as adults, and an aspiration we must have for *all* our children.<sup>137</sup>

- [103] I am guided by the responsibility and aspiration that Bargaen refers to and will continue to advocate for the use of diversionary options. I will therefore traverse ground that some of you have heard before, as I believe that the more we hear about diversion, the more likely we are to activate its use. And importantly, the more diversion is used, the less we will see at risk young people appearing before the Court.

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<sup>135</sup> R Loeber, DP Farrington and D Petechuk, “Child delinquency: early intervention and prevention”, Child Delinquency Bulletin Series, US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 2003, Washington DC at p 9.

<sup>136</sup> P Delfabbro and D Day, *Programs for anti-social minority youth in Australia and New Zealand — a literature review*, report prepared for the Centre for the Evaluation of Social Services, Stockholm, Sweden, 2003 at p 47.

<sup>137</sup> J Bargaen, “Embedding diversion and limiting the use of bail in NSW: a consideration of the issues related to achieving and embedding diversion into juvenile justice practices”, (2010) 21(3) *Current Issues in Criminal Justice* 467 at 477.

- [104] The *Young Offenders Act 1997* is a statutory embodiment of early intervention and offers three alternative options for dealing with young offenders. These options are: warnings, cautions and Youth Justice Conferences (YJC's). I will not cover the details of warnings and cautions as they are fairly self-explanatory. However, I will provide a brief exposition of YJC's and how this option brings the individual child, family and community together to prevent future offending.
- [105] At a YJC, a young offender is with his or her family, and is brought face to face with the victim and the victim's support person, to hear about the harm caused by their offending and to take accountability for their actions.
- [106] At the conference, the participants agree on a suitable outcome. The outcome may include an apology, reasonable reparation to the victim and steps to reintegrate the young person into the community.
- [107] A YJC is a valuable alternative to court as it is not an impersonal or exclusive process where the young person and the victim are adversaries. Rather, responsibility for dealing with the young offender is partially transferred from the State to the young person, their family, the victim and the wider community.
- [108] In New Zealand, a similar option to YJC's exists, entitled Family Group Conferences (FGC's). The statutory process of FGCs is similar to that of YJC's, however, the process allows for responses tailored to specific cultural needs to allow for stronger engagement with the process.
- [109] In NSW, the Department of Justice has the Youth on Track Scheme which employs a multi-agency approach, with the involvement of the Department of Education and Communities, the Department of Family and Community Services, the Department of Health and NSW Police, in addition to non-government organisations (NGOs).
- [110] Using this collaborative approach, services on the ground – such as Police and schools — identify “at risk” youth and refer them to the Youth on Track program. An NGO case manager is allocated responsibility for working with the young person to address criminogenic factors in their lives and to provide access to specialist services and ongoing support to the young person.
- [111] In my view, we must continue to improve diversionary processes, and we must continue to educate ourselves about what works.
- [112] Research has shown that there is a link between decision-making and memory.
- [113] Many children and young people who engage in offending behaviour have experienced traumas that activate their memory, resulting in a response that impacts upon their ability to make appropriate, considered decisions.<sup>138</sup> However, just as harm and trauma accumulate over time, so does a child's capacity to change in response to treatment.<sup>139</sup>
- [114] Consequently, while environmental factors such as parents, carers and teachers can aid development, environmental factors also have the ability to facilitate

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<sup>138</sup> K Nunn, “Decision-making in out-of-home care children who offend”, presented at the Children's Court magistrates section 16 conference, November 2013.

<sup>139</sup> K Nunn, “Bad, mad and sad: rethinking the human condition in childhood with special relevance to moral development” (2011) 47 *Journal of Paediatrics and Child Health* 624 at 625.

change and successful development. It is essential, therefore, that our response to offending behaviour combines therapeutic interventions with traditional criminal justice approaches.

[115] As Professor Kenneth Nunn so aptly put it:

Containment without treatment is custodial futility without any progress except maturation and chance encounters. Treatment without containment is powerless without any capacity to prevent flight away from help. Treatment and containment without education is recovery without skills to live in the real world.<sup>140</sup>

[116] It is at this stage that I note the provisions under the *Mental Health (Forensic Provisions) Act 1990*. These provisions enable Magistrates to divert mentally disordered young people from the criminal justice system: ss 32 and 33.

[117] Magistrates undertake a balancing exercise when deciding whether making use of this mechanism will produce better outcomes for the young person and the community.<sup>141</sup>

[118] This therapeutic response allows the Children's Court to dismiss the charges and discharge the young person into the care of a responsible person or on the condition that they obtain a mental health assessment or treatment. However, the lack of follow-up that could empower Magistrates with the ability to receive a report as to the young person's compliance with treatment, coupled with the lack of access to services, increases the reluctance of Magistrates to use this provision.

[119] The legislative scheme applicable to the Children's Court enables considerable flexibility in sentencing. Specifically, the provisions in s 6(a), (b) and (f) of the *Children (Criminal Proceedings) Act 1987*:

(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*.

[Emphasis added.]

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<sup>140</sup> *ibid* n 136.

<sup>141</sup> *Director of Public Prosecutions v El Mawas* (2006) 66 NSWLR 93 at [79].

[120] In the Children's Court, the *Children (Criminal Proceedings) Act 1987* provides the penalties applicable: s 33. Specifically, s 33(1)(c2):

The Children's Court ... "may make an order adjourning proceedings...to a specified date (not later than 12 months from the date of the finding of guilt) for any of the following purposes (but only if bail for the offence is or has been granted or dispensed with under the Bail Act 2013":

- (i) for the purpose of assessing the person's capacity and prospects for rehabilitation,
- (ii) for the purpose of allowing the person to demonstrate that rehabilitation has taken place,
- (iii) for any other purpose the Children's Court considers appropriate in the circumstances.

[121] The deferred sentencing model is one that I encourage Children's Magistrates to utilise.

[122] Where possible, the Children's Court seeks to divert a child away from a custodial sentence, and involves the young person in a consultative and participatory process that includes the relevant stakeholders. Issues of concern are identified for the young person. Methods of addressing these issues are then incorporated into an Action and Support Plan for the young person.

[123] The young person then has his/her actions taken into account on sentence and after hearing submissions the Judicial Officer will consider this information and impose an appropriate sentence. Notably, a full suite of sentencing options are available to the Judicial Officer.

[124] Another promising initiative in the Youth Justice arena is the development of a joint protocol to address the criminalisation of children and young people in out-of-home care (OOHC). In the 1999 Community Services Commission publication "The drift of children in care into the criminal justice system: turning victims into criminals", the following circumstances were identified as leading to police intervention for children in OOHC:

- Problematic behaviour that would be a disciplinary matter in a family home could lead to criminal charges in group homes. Staff would call police after incidents such as malicious damage and assault and an altercation would take place which then resulted in additional charges of resisting arrest, assaulting police and offensive language.
- When a child's placement broke down, the Department of Family and Community Services sometimes put out a warrant for a child resulting in their apprehension and detention.
- Incidents were reported where children in care would be returned to a residential facility under bail conditions after a court hearing. These bail conditions could involve keeping to a curfew or staying within a particular facility. If a child breached these conditions, it was possible staff would report the breaches to the police which could then result in detention.
- Carers were sometimes required to make a statement to the police in order to lodge a claim for victim's compensation, which operated as an incentive for them to contact police in matters of physical aggression and assault.
- Many services had explicit policies about using police as a "natural consequence" and a substitute for imposing their own disciplinary action.

- The staff of some funded services were reportedly simply “not up to it” and as a result sought assistance from the police to deal with the behaviour of the young person.<sup>142</sup>

[125] Further, 46% of all legal aid high service users had spent time in OOHC.<sup>143</sup> The imposition of criminal charges on children and young people who would have been, but for their placement in OOHC, dealt with in the family home is unreasonable and unfair. It victimises children and young people who have already suffered sufficiently to warrant their removal from their parents/carers.

[126] Additionally, policing children and young people in their private lives may perpetuate a cycle of negative labelling. By calling the police every time a young person displays challenging behaviours, young people may begin to see themselves as inherently bad. As Cuneen and White observe:

... if you tell someone sufficiently often that they are “bad” or “stupid” or “crazy” that person may start to believe the label and to act out the stereotypical behaviour associated with it.<sup>144</sup>

[127] I am pleased to report that the Children's Court, Legal Aid and the Deputy Ombudsman, Steve Kinmond, have collaborated to engage the NGO sector and the NSW Police Service to develop a protocol designed to reduce the contact of young people in residential OOHC with Police and the criminal justice system.

[128] The protocol has two objectives. First, to reduce the incidence of police being called as a result of incidents in residential OOHC, to ensure that police will only be called in appropriate circumstances, and not in cases of “trivial” offending or breaching house rules.

[129] The second objective of the protocol is to encourage police, when they are called, to view arrest as a last resort, and to consider other options such as cautions and warnings, or if it is necessary to take a more serious step, to proceed by way of a future CAN, rather than placing the young person in detention.

[130] Already we are seeing a reduction in remand rates in the various Juvenile Justice Detention centres.

[131] I am interested to see how this protocol will affect the decriminalisation of children in OOHC over the next year.

### **Brain science and its relevance to children and young people**

[132] As you are all aware from your own practical experience and the information I have presented above, there is no easy panacea for the problem of young offending. Its causes are often inextricably linked to disadvantage and are thus embedded, intergenerational and complex. However, as I have illustrated, early intervention, diversion and rehabilitation are critical if we are serious in attempting to break the cycle of disadvantage.

<sup>142</sup> Community Services Commission, *The drift of children in care into the criminal justice system: turning victims into criminals*, 1996, at pp 16–20; *Wards and juvenile justice*, 1999.

<sup>143</sup> P van de Zandt and T Webb, *High service users at Legal Aid NSW: profiling the 50 highest users of legal aid services*, Legal Aid NSW, 2013.

<sup>144</sup> C Cuneen and R White, *Juvenile justice: youth and crime in Australia*, chapter 2 on “Theories of juvenile offending”, 2 edn, Oxford University Press, 2002, pp 32–61 at p 46.

[133] The need to safeguard the rehabilitation of children and young people is internationally recognised in the United Nations Convention on the Rights of the Child (CROC). Article 40.4 highlights that looking after children in need is a multifactorial process, stating:

A variety of dispositions, such as care; guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence.<sup>145</sup>

[134] Similarly, the Beijing Rules provide a full list of considerations at rule 18.1 and state that:

A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalisation to the greatest extent possible.<sup>146</sup>

[135] In NSW the importance of rehabilitation for children and young people is embodied in s 6 of the *Children (Criminal Proceedings) Act 1987*:

- (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 reparation 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.

[136] In *R v GDP* (1991) 53 A Crim R 112 at 116, Mathews J (Gleeson CJ and Samuels JA agreeing) adopted comments by Yeldham J in *R v Wilcox* (unrep, 15/8/79, NSWSC):

In the case of a youthful offender ... considerations of punishment and of general deterrence of others may properly be largely discarded in favour of individualised treatment of the offender, directed to his rehabilitation.

[137] In *R v TVC* [2002] NSWCCA 325 at [13], Sperling J cited Wood J in *R v Hoai Vinh Tran* [1999] NSWCCA 109:

In coming to that conclusion his Honour made reference to the well-known principle that when courts are required to sentence a young offender considerations of punishment

<sup>145</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations.

<sup>146</sup> UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules"): resolution adopted by the General Assembly, 29 November 1985.

and general deterrence should in general be regarded as subordinate to the need to foster the offender's rehabilitation ... That is a sensible principle to which full effect should be given in appropriate cases. It can have particular relevance where an offender is assessed as being at the cross roads between a life of criminality and a law abiding existence.

[138] In addition to international legal principle, legislation and case law, children and young people also have the benefit of science — neurobiology — to explain their different legal status.

[139] The research available through the field of neurobiology has piqued my interest, particularly developmental neurobiology.

[140] This research has been undertaken over the 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>147</sup>

[141] Johnson, Blum and Giedd explain executive function as:

... a set of supervisory cognitive skills needed for goal-directed behaviour, including planning, response inhibition, working memory and attention. Poor executive function leads to difficulty with planning, attention, using feedback and mental inflexibility, all of which could undermine judgment and decision making.<sup>148</sup>

[142] Put simply, according to brain science, a young person is unable to make any rational choice, let alone the rational choice to commit a criminal act. If we take this science at its highest level, it would be remiss to argue that the focus should not be on rehabilitation.

[143] The developmental neurobiology of young people is compounded by intergenerational disadvantage and trauma associated with maltreatment and neglect.

[144] I draw your attention to this research, not to suggest that the findings from neurobiology research exculpate all young offenders from criminal responsibility. Rather, these findings indicate that there is a grey area between right and wrong when considering the culpability of offender.

### **Ameliorating communication with children and young people**

[145] Understanding the factors impacting upon brain development can have many negative implications. One such implication is that this misunderstanding results in a failure to properly communicate with young people.

[146] An understanding of the discrete cognitive processes that differentiate young people from adults is critical to effective communication.

[147] Ensuring that young people understand the legal implications of their offending behaviour may also combat against a distrust with, and disconnection from, the criminal justice system.

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<sup>147</sup> EC McGuish et al, "Psychopathic traits and offending trajectories from early adolescence", 2014 (42(1)) *Journal of Criminal Justice* pp 66–76.

<sup>148</sup> SB Johnson, RW Blum and JN Giedd, "Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy", 2009 (45(3)) *Journal of Adolescent Health* pp 216–221 at p 218.

- [148] Understanding that adolescence is a stage fraught with conflict is persuasively captured by Muncie, who states:
- Unlike the nouns “child” and “adult” which refer to definite periods of life, the period identified as “youth” is more nebulous and is normative because it conjures up troubling and emotive images.<sup>149</sup>
- [149] This amorphous period of life for all young people is further problematised by the disadvantage suffered by most of the children and young people appearing before the Children's Court.
- [150] The *2009 NSW Young People in Custody Health Survey* found that:
- 46% had a possible intellectual disability or borderline intellectual disability
  - 18% had mild to moderate hearing loss
  - 66% reported being drunk at least weekly in the year prior to being in custody
  - 65% had used an illicit drug at least weekly in the year prior to custody.<sup>150</sup>
- [151] Further, as you are all aware, many of the young people appearing before the Children's Court in the Care jurisdiction, frequently come before the Court in its Criminal jurisdiction later in life.
- [152] Dr Judith Cashmore, an eminent psychologist and researcher, has found an established link between childhood maltreatment and adolescent offending.<sup>151</sup>
- [153] Dr Cashmore's research correlates with the research I spoke to in the care section of this paper, regarding trauma and brain development. Her research showed that a number of factors may constitute childhood maltreatment and, consequently, brain development. These factors included: parenting issues, nutrition, health, social interactions and conflict. Additionally, the impact these factors have on brain development may be compounded by instability in the creation of developmental attachments through numerous OOHC placements.<sup>152</sup>
- [154] Given that the research shows links between brain development, trauma and criminal offending, it comes as no surprise that communication with children and young people is a discrete area of study in and of itself.
- [155] At the “Speaking their language conference”, referred to above, Judge Sexton, of the Victorian County Court provided an informative paper on communicating with children and young people.<sup>153</sup>
- Judge Sexton stated:
- Children are not “little adults”. They cannot be questioned over an extended period, as adults might be. Responsive answers might be obtained for a time, but after that, there are real issues about the veracity and accuracy of the answers. Challenging a child witness in cross examination is difficult.<sup>154</sup>

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<sup>149</sup> G Muncie, *Youth and Crime*, 3rd edn, Sage, 2009, at p 4.

<sup>150</sup> D Indig et al, *2009 NSW young people in custody health survey: full report*, Justice Health and Juvenile Justice, 2011.

<sup>151</sup> J Cashmore, *The link between child maltreatment and adolescent offending: systems of neglect of adolescents*, Australian Institute of Family Studies, Family Matters No 89, 2011.

<sup>152</sup> *ibid.*

<sup>153</sup> Judge M Sexton, “Communicating with children and young people”, paper presented at the Judicial College of Victoria conference, Speaking their language: young people and the courtroom, 19 October 2015.

<sup>154</sup> *ibid* at p 1.

[156] Judge Sexton has identified problems associated with gratuitous concurrence — agreeing or disagreeing to a proposition because the person being questioned thinks that is what the questioner wants to hear — when asking questions of children and young people, particularly those who have been exposed to trauma. In addition, she acknowledges:

Often adolescents are considered capable of communicating in an adult way, but if they have been subjected to trauma in their lives, there may be an underlying disability which means they are really functioning at the level of an under 12 year old, but will be too embarrassed to admit to not understanding.<sup>155</sup>

[157] Following a general discussion of the requirements for questioning child witnesses, determining competence and disallowing improper questions under the Victorian equivalent of the *Evidence Act* 1995,<sup>156</sup> Judge Sexton referred to a 1988 study analysing the transcript of the cross examination of child witnesses. Judge Sexton drew particular attention to 10 aspects from this study which can impact upon a child witness's ability to communicate in Court.<sup>157</sup> What follows is an abridged version of the 10 aspects referred to in Judge Sexton's paper.

### **Language**

[158] Language used must be appropriate to the age and culture of the child. Some specific words and concepts are only acquired at certain ages. For example, the distinction between “before” and “after” may only be mastered at age 7; between “come” and “go” and “bring” and “take” at between 7 and 8 years of age and between “ask” and “tell” between 7 and 10 years of age.

[159] Next, children's conceptualisation of time, frequency and ordering of events is gradually acquired. It is therefore necessary to provide concrete anchor points, using times or events that are relevant to the child, such as a birthday or having a broken arm.<sup>158</sup>

### **Structure of questions**

[160] It is important for child witnesses that they have some idea of the topic or direction of the questions. So the use of “signposting” is helpful. For example: “I want to ask you some questions about your father”. Next, for very young children, there should only be one “step” per question. Children under 12 have problems when the questions ask more than one thing at a time. A 5-year-old child cannot deal with more than three brief chunks of information.<sup>159</sup>

### **Length of questions**

[161] A useful “rule of thumb” is the number of words in a question should be equal to the age of the child eg 5 years old = 5 words.<sup>160</sup>

<sup>155</sup> *ibid* at p 4.

<sup>156</sup> *Evidence Act* 2008 (Vic).

<sup>157</sup> Sexton above n 49 at p 6 citing M Brennan and R Brennan, *Strange language: child victim witnesses under cross examination* (Wagga Wagga: CSU Literacy Studies Network, 1988). As noted in fn 282, AIJA Bench book for children giving evidence in Australian courts, 2015, pp 71–4.

<sup>158</sup> Above n 49 at pp 7-8.

<sup>159</sup> *ibid* at pp 8-9.

<sup>160</sup> *ibid* at p 10.

### Use of negatives

- [162] Generally, children do not understand questions put in the negative until around 11 or 12 years old. Tag questions such as “He didn’t do it, did he?” while appearing to the adult mind simple on the face of it, apparently requires at least seven cognitive operations to answer.<sup>161</sup> If the answer to the question “He didn’t do it, did he?” is “no”, that could mean that it is not right to say he didn’t do it, but would generally be taken by the adult listener to be the opposite. The question could be easily rephrased as “Did he really do it?”<sup>162</sup>
- [163] Cossins states that for example, to answer yes to a negative question does not necessarily mean that the child agrees with the statement — it may mean that the child does not have the capacity to refute it.<sup>163</sup>

### Repetitive questioning

- [164] Research has shown that repetitive questioning only decreases accuracy, it does not increase it.<sup>164</sup> Young children (to age 10) find persistent questioning very demoralising, particularly when they have previously indicated that they do not know the answer. Young children tend to assume that if the same question is repeated, the original answer must have been incorrect. Additionally, repetitive questioning may cause the child to believe that if the adult says something different to the child’s belief, adults know everything, so they must be right. That is why it is important for the Judicial Officer to reinforce, each time a suggestion is put, that they should agree if they believe what is said is true, and disagree if it is not true.<sup>165</sup>

### Voice and body language

- [165] Children, particularly those with language or cognitive difficulties, find it difficult to pick up on visual cues. Procedures designed to make giving evidence easier, such as the use of CCTV, do assist to reduce stress by preventing the child from seeing the defendant, but may also provide opportunities for miscommunication, and counsel may unintentionally appear to the child as intimidating when viewed through a TV screen.
- [166] Also, asking questions in a rapid fire manner may lead to a child eventually offering a random response to stop the questioning, and the response may therefore be unreliable.<sup>166</sup>

### Previous versions or other potential inconsistencies

- [167] Even adult witnesses find questioning on past versions confusing. For a child witness, there is a potential problem with focussing on trivial inconsistencies and presenting them as indicators of unreliability and lack of truthfulness in the child witness.

<sup>161</sup> *ibid* at p 10 citing A G Walker, *Handbook on questioning children: a linguistic perspective*, 2nd edn, American Bar Association (ABA) Centre on Children and the Law, p 10. As noted in fn 210 of the AIJA Bench book for children giving evidence in Australian courts, 2015.

<sup>162</sup> *ibid* n 49 at p 11.

<sup>163</sup> *ibid* citing A Cossins, “Cross-examination in child sexual assault trials: evidentiary safeguard or an opportunity to confuse?” [2009] *MULR* 3.

<sup>164</sup> *ibid* citing K J Saywitz, “Developmental underpinnings of children’s testimony”, in HL Westcott, GM Davies and R Bull (eds), *Children’s testimony: a handbook of psychological research and forensic practice*, Wiley, 2002, p 8.

<sup>165</sup> *ibid* n 49 pp 11–12.

<sup>166</sup> *ibid* p 12.

[168] The belief that a cross-examiner has uncovered a dishonest and inconsistent witness could, in the case of a child witness, actually mean that cross-examination has produced a confused and/or psychologically stressed child. Importantly, it is known that children may provide different, but nonetheless accurate details about the same event on different occasions of questioning (known as staggered or staged disclosure). So there may be genuine and reliable, yet different, memories in answer to the same questions out of court and in cross-examination.<sup>167</sup>

### **Ambiguous questions**

[169] While tricky for any witness to respond to, ambiguous questions may be even trickier for children.<sup>168</sup>

### **Questions which challenge the child's version**

[170] Child witnesses find it very difficult being challenged. They expect to come to court and tell their story to the Judge. Instead of a free-flowing narrative, which is the form considered in the literature most likely to be accurate, children find firstly that they are not speaking directly to the Judge about their story; secondly, they can only say things in answer to questions by lawyers, questions that leave out the opportunity to say things they remember but emphasise details that adults think are important.

[171] The challenge is made even more traumatic when the language used is aggressive.<sup>169</sup>

### **Demanding precise recollection of seemingly obscure facts**

[172] A child may feel obliged to answer these questions when they do not actually remember, in the belief that an adult would not be asking the questions if an answer was not expected.<sup>170</sup>

[173] Following a discussion of the types of questions that may confound a child witness, Judge Sexton accepts that it is part of the Judicial Officer's role and responsibility to intervene when an improper question is asked and cites former Chief Justice of the Supreme Court of NSW, Spigelman CJ in *R v TA* (2003) 57 NSWLR 444 who affirmed that the protective role of the Judicial Officer toward a witness is "perfectly consistent with the requirements of a fair trial".<sup>171</sup>

[174] In her conclusion, Judge Sexton states that apart from recognising the impropriety of questions, there are other ways where a Judicial Officer can work with Counsel to avoid the need for intervention. Judge Sexton emphasises her support for the use of the witness intermediary scheme in England and Wales, she cites the case of *R v Lubemba* [2014] EWCA Crim 2064 at [38]–[45].

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, not the other way round. They cannot insist upon any supposed right "to put one's case" or previous inconsistent statements to a vulnerable witness. If there is a right to "put one's case" (about which we have our

<sup>167</sup> *ibid* at p 13.

<sup>168</sup> *ibid* at p 14.

<sup>169</sup> *ibid* at p 14.

<sup>170</sup> *ibid* at p 15.

<sup>171</sup> *R v TA* (2003) 57 NSWLR 444 per Spigelman CJ at 446.

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>172</sup>

- [175] I support the witness intermediary scheme and any other model utilised to facilitate the effective co-operation and communication of children and young people. Intermediaries are a distinctly valuable resource that have the potential to revolutionise the adversarial system of criminal justice. As Plotnikoff and Woolfson state: "Intermediaries are the great untold 'good news' story of the criminal justice system".<sup>173</sup>
- [176] The Children's Court's submission to the NSW Government on the use of a witness intermediary scheme in NSW advocated that additional support was required in order to communicate effectively and ensure an inclusive and engaging process for children and young people.
- [177] Witness intermediaries bridge the communication gap between counsel and child witnesses. Intermediaries are independent and owe their duty to the Court, acting in a similar capacity to interpreters by facilitating communication between the witness and counsel. Intermediaries can also play a part in providing advice or utilising creative communication aids to assist counsel and the Court to ensure tailored, appropriate communication, avoid the risk of re-traumatisation or systems abuse and facilitate the fair and transparent administration of justice.
- [178] The witness intermediary concept will be piloted in child sexual assault matters in the District Court.
- [179] It will be exciting to evaluate the pilot and view the outcomes for improving communication for children and young people in court proceedings. I hope that I will be able to report on it further in the 2017 Regional Conferences.

## Recent case law in youth crime

### **Doli incapax — application of an objective or subjective test**

- [180] In the matter of *RH v Director of Public Prosecutions (NSW)* [2013] NSWSC 520, there was no issue as to the relevant facts. It was agreed that RH did commit an aggravated break and enter, the circumstances of aggravation being that he was in company with his cousin S at the time of the offence.
- [181] RH was aged 12 at the time of the offence. The only issue in the appeal was whether the evidence before his Honour was sufficient to rebut the presumption of doli incapax in favour of RH.
- [182] Hoeben CJ at CL found that the Magistrate had wrongly applied an objective test to the question of the young person's capacity, by basing his assessment of the child's capacity according to that of a "normal 12 year old".<sup>174</sup>

<sup>172</sup> Above n 49 at p 21.

<sup>173</sup> J Plotnikoff and R Woolfson, *Intermediaries in the criminal justice system: improving communication for vulnerable witnesses and defendants*, (with a foreword by Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales), University of Bristol, Police Press, 2015, at p 304.

<sup>174</sup> *RH v Director of Public Prosecutions (NSW)* [2013] NSWSC 520 at [23].

[183] Hoeben CJ at CL stated:

It was common ground that the relevant test was a subjective one and concerned the state of mind of the particular minor. It could not be applied on the basis of what a normal child of 12 would have known or thought.<sup>175</sup>

[184] Hoeben CJ at CL went on to consider whether by reference to the evidence as a whole, it was still open to his Honour to find that the presumption had been rebutted.<sup>176</sup>

[185] He endorsed the view of Hodgson JA in *BP v R; SW v R* [2006] NSWCCA 172, "there should not be a narrow view taken on what are circumstances of the offence that can operate as evidence".<sup>177</sup>

[186] Hodgson JA in *BP v R; SW v R* found that:

For example, in the present case, assuming the jury accepted LD's evidence that she was crying and screaming and struggling and asking BP to stop, these would in my opinion be factors that could support the inference that BP knew that what he was doing was causing great distress to another human being and as such was seriously wrong ...<sup>178</sup>

[187] In *RH v Director of Public Prosecutions (NSW)*, Hoeben CJ at CL found the evidence sufficient to establish beyond a reasonable doubt that *doli incapax* had been rebutted. Evidence included: that RH had used a jemmy to break into the station, which required some planning; and that particular words were used by RH when describing to his cousin what he had done.

[188] RH appealed to the NSW Court of Appeal in the matter of *RH v Director of Public Prosecutions (NSW)* (2014) 244 A Crim R 221, on the basis of error. The NSWCA upheld the appeal although the court was not unanimous as to the orders that should be made. The basis for the error was that after deciding that there was sufficient evidence before the court to rebut the presumption of *doli incapax*, Hoeben CJ at CL erred by applying s 55(1)(c) of the *Crimes (Appeal and Review) Act 2001* (NSW) to dismiss the appeal.

[189] McColl JA, determined that the court should set aside the conviction and remit the matter to the Local Court for redetermination in accordance with the court's orders.

[190] Basten JA at [43] approved Hoeben CJ at CL's finding that the children's magistrate had erred, by applying an objective and not a subjective test:

On an appeal limited to a question of law the findings as to error dictated the outcome, unless it could be said that, applying the correct test, there was only one conclusion open to the magistrate. The Chief Judge did not reach that conclusion, nor could he have done so on the material before him. Accordingly, the only course open was to set aside the conviction. The fact that it was open on the evidence for the Magistrate to conclude beyond reasonable doubt that the applicant had criminal capacity merely meant that the matter could be remitted for further hearing, rather than the charge being dismissed. It would have been open to the Chief Judge to set aside the decision and remit it pursuant to s 55(1)(b); that course was not taken.<sup>179</sup>

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<sup>175</sup> *ibid* at [22].

<sup>176</sup> *ibid* at [25].

<sup>177</sup> *BP v R; SW v R* [2006] NSWCCA 172 at [30].

<sup>178</sup> *ibid* at [30].

<sup>179</sup> *RH v Director of Public Prosecutions (NSW)* [2014] NSWCA 305 at [43].

[191] Accordingly, the appeal was allowed. However, given that 4 years had passed since the commission of the crime, Basten JA held that:<sup>180</sup>

In these circumstances, the administration of justice would not be served by returning the matter to the Local Court with an invitation to the parties to re litigate the issue, nor would it be sensible to invite the magistrate to re-decide the case, more than two years after he had heard the evidence and four years after the conduct occurred.

**Doli incapax — where several counts and presumption is rebutted on an earlier count**

[192] In the matter of *RP v R* (2015) 90 NSWLR 234, the Court of Criminal Appeal considered whether rebutting the presumption on an earlier count would take effect to rebut the presumption for later counts.

[193] The facts are summarised below.

[194] The applicant stood trial at Wagga Wagga District Court on an indictment containing four counts of sexual assault alleged to have been committed upon his younger brother TP.

[195] The applicant pleaded not guilty to all counts on the indictment. The sole issue at trial was doli incapax. The applicant was aged between 11 years 6 months and 12 years 3 months at the time of the offending.

[196] It was accepted by counsel appearing for the applicant that if the trial Judge found that the presumption of doli incapax had been rebutted beyond reasonable doubt by the Crown in relation to count 2, this would mean that the presumption had also been rebutted beyond reasonable doubt in relation to counts 2, 3 and 4 as it was accepted that they occurred later in time. It was also accepted that the only issue for determination was that of doli incapax.

[197] The applicant sought leave to appeal in NSWCCA on the grounds that:

**Ground 1:** the trial Judge erred in finding that he was satisfied that the evidence of circumstances surrounding the commission of count 2 established beyond reasonable doubt that the accused knew that what he was doing was seriously wrong and that no other rational inference arose;

**Ground 2:** the verdicts in counts 3 and 4 are also unreasonable;

**Ground 3:** the trial Judge erred in finding that “as a matter of logic” the accused must be guilty of counts 3 and 4.

[198] The decision by Davies J is instructive, as he considered what approach should be taken when dealing with a ground relating to unreasonable verdicts (as in Grounds 1 and 2).

[199] Justice Davies also considers the issue of doli incapax (Ground 3). My discussion of this case will centre on Ground 3. Davies J cites the trial Judge’s reasons for finding that the presumption of doli incapax was rebutted as follows:<sup>181</sup>

It is clear that the accused knew that the Complainant did not want to engage in the relevant act even before it occurred, that he used force upon the Complainant to commit it, and that he put his hand over the Complainant’s mouth in an obvious attempt to stop him calling out, no doubt to avoid detection.

<sup>180</sup> *ibid* at [44].

<sup>181</sup> *RP v R* (2015) 90 NSWLR 234 at [56].

During the act the Complainant was also crying and in pain and was trying to tell the accused to stop despite his mouth being covered, but the accused would not and persisted in the act for some time. I am satisfied beyond reasonable doubt by the obvious close proximity of the accused to the Complainant during the act that he was aware that what he was doing was causing great distress to another human being but nevertheless continued the act for a significant period, further, the accused only ceased the assault when an adult arrived back home at the residence. He then told the Complainant not to say anything. In my view the accused is obviously extremely concerned that his conduct would be discovered.

**These facts establish much more than a belief in the accused that what he was doing was naughty or mischievous. They establish clearly, and in my view beyond reasonable doubt, that the accused knew at the time that the act he was committing upon the Complainant was seriously wrong as understood.** [Emphasis added.]

[200] As I foreshadowed above, the critical issue for consideration in this matter was Ground 3: using the finding for count 2 in respect of counts 3 and 4. In the trial Judge's judgment, having found the presumption had been rebutted in respect of Count 2 (above), the trial Judge said:<sup>182</sup>

It follows from Ms Mendes' concession and as a matter of logic that the accused must also be guilty of counts 3 and 4 and I accordingly find him guilty of such counts.

[201] The concession was:<sup>183</sup>

MENDES ... The submission is this, that if your Honour found that count 2 was made out beyond reasonable doubt, then it would flow from that decision that verdicts of guilty would be entered with respect to counts 3 and 4.

And again,<sup>184</sup>

MENDES ... if your Honour was satisfied beyond reasonable doubt with respect to count 2 at some later stage, there would be a flow on effect.

[202] The reasoning was as follows:<sup>185</sup>

The enquiry on each count is whether the Applicant knew that the act charged was seriously wrong. In relation to count 3 the act charged was the same as charged in relation to count 2. Although surrounding circumstances such as the Complainant crying or being forcibly thrown down, or having his mouth covered by the Applicant's hand all contributed to the conclusion that the presumption was rebutted, the absence of those circumstances in count 3 does not have effect that the Applicant did not know that the act charged in count 3 was not seriously wrong. Although it is the Applicant's state of mind which must be examined it could not rationally be inferred that because the act was carried out less forcefully or with less resistance from the Complainant the Applicant's state of mind which must be examined it could not rationally be inferred that because the act was carried out less forcefully or with less resistance from the Complainant the Applicant could have believed that it was not seriously wrong in the light of what he had done in relation to count 2. The surrounding circumstances in relation to count 2 demonstrated that the Applicant knew that the act charged was seriously wrong.

<sup>182</sup> *ibid* at [73].

<sup>183</sup> *ibid* at [74].

<sup>184</sup> *ibid* at [75].

<sup>185</sup> *ibid* at [78].

When he committed the same act in relation to count 3 the absence of a number of the accompanying circumstances does not detract from his knowledge that the act itself was seriously wrong.

[203] Justice Davies separates Counts 2 and 3 from Count 4:<sup>186</sup>

[79] The position with count 4 is completely different. The same act was not involved. There was no direct touching of genitals. The evidence was that there was apparently no resistance from the Complainant until after about five minutes when he said that he was getting sick of what the Applicant was doing. At that point the Applicant stopped. It would not be unreasonable to infer that the Applicant might have thought that the Complainant consented to what he was doing. At that point the Applicant stopped. It would not be unreasonable to infer that the Applicant might have thought that the Complainant consented to what he was doing. That consent was only relevant to the issue of whether the Applicant thought that what he was doing was seriously wrong. It is difficult to see how what had earlier taken place, that is, the acts involved in counts 2 and 3 could throw any light on a conclusion about whether the Applicant thought what he did in respect to count 4 was seriously wrong.

[80] It was not open to the Trial Judge to find that the presumption had been rebutted in respect of count 4. The determination of guilt was unreasonable and the verdict should be set aside.<sup>187</sup>

### **Considerations when sentencing young offenders**

[204] In the matter of *R v MF* [2014] NSWDC 136, Haesler J articulates the relevant law to consider when sentencing children and young people. It is implicit in this judgment that sentencing children and young people is a fraught issue. I strongly encourage you to read this decision, as it brings to the fore critical issues relevant to exercising Children's Court jurisdiction.

[205] In this matter, MF was convicted of causing grievous bodily harm with intent to cause grievous bodily harm. The Director accepted that M (MF's uncle) coerced the young person MF to pour a flammable liquid over Ms K and set her on fire. His Honour considered the relevant sentencing principles under the heading "youth and immaturity".<sup>188</sup>

[206] Significantly, Haesler J stated:<sup>189</sup>

In recent years the focus has shifted from doing what is in the best interests of the child, to imposing on children adult penalties for what the courts regard as adult crimes. Two themes have emerged: one recognises the strong community interest in the rehabilitation of an immature young man whose criminal behaviour is not well formed; the other stresses the protective function of the court, particularly where the offending is objectively very serious.

[207] His Honour went on to state that the tension between the need to rehabilitate young offenders, with holding them accountable for their crimes in an "adult" way, is highlighted in the matter of *R v Pham & Ly* (1991) 55 A Crim R 128:<sup>190</sup>

... A court must refrain from sending young persons to prison, unless that course is necessary, but the gravity of the crime ... must be kept ... in mind otherwise the protective

<sup>186</sup> *ibid* at [79].

<sup>187</sup> *ibid* at [80].

<sup>188</sup> *R v MF* [2014] NSWDC 136 at [52]–[61].

<sup>189</sup> *ibid* at [54].

<sup>190</sup> *ibid* at [55] citing *R v Pham & Ly* (1991) 55 A Crim R 128.

aspect of the criminal court's function will cease to operate. In short, deterrence and retribution do not cease to be significant merely because persons in their late teens are the persons committing grave crimes ...

- [208] His Honour made the point that even for crimes that fall into the category of objectively serious offences, sentencing young people harshly according to the protective aspects of sentencing will often have a greater adverse impact on the community in the long term, than rehabilitating the young person. He cited<sup>191</sup> with approval the New Zealand Court of Appeal decision in *Slade v The Queen* [2005] NZCA 19 which refers to a psychologists report that was accepted by the NZCA and referred to in *R v Elliott and Blessington* (2006) 68 NSWLR 1 at [127].<sup>192</sup>

[43] It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults (Steinberg & Scott, 2003). Adolescents have difficulty regulating their moods, impulses and behaviours (Spear, 2001). Immediate and concrete rewards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely than adults to think through the consequences of their actions. Adolescents' decision-making capacities are immature and their autonomy constrained. Their ability to make good decisions is mitigated by stressful, unstructured settings and the influence of others. They are more vulnerable than adults to the influence of coercive circumstances such as provocation, duress and threat and are more likely to make riskier decisions when in groups. Adolescents' desire for peer approval, and fear of rejection, affects their choices, even without clear coercion (Moffitt, 1993). Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent.

- [209] Haesler J also referred to the remarks of Allen J in *R v Webster* (unrep, 15/7/91, NSWCCA), (the murder of a teenage girl by a young man):<sup>193</sup>

The protection of the community does not involve simply the infliction of punishment appropriate to the objective gravity of the crime. There are other considerations as well — principally although by no means only, the deterrence of others ... and the rehabilitation of the offender. The community have a real interest in rehabilitation. The interest is to no small extent relates to its own protection ... The community interest in respect to its own protection is greater where the offender is young and the chances of rehabilitation for almost all of the offender's adult life, unless he is crushed by the severity in sentence, is high.

- [210] Ultimately, his Honour weighed MF's youth, vulnerability, background, assistance to authorities against the extreme harm done to Ms K and decided that given the circumstances, no sentence other than full-time imprisonment is available. His Honour convicted MF and sentenced him to a non-parole period of 3 years with a head sentence of 6 years.<sup>194</sup>

- [211] His Honour summarised his reasons as follows:<sup>195</sup>

While many factors raised in mitigation overlap I have taken care not to double count them. Here also, many of the purposes of sentencing point in differing directions. While

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<sup>191</sup> *ibid* at [56].

<sup>192</sup> *ibid* at [56].

<sup>193</sup> *ibid* at [58].

<sup>194</sup> *ibid* at [69].

<sup>195</sup> *ibid* at [73].

the need to promote MF's rehabilitation and recognise his youth, remorse and assistance are compelling, he must also be held accountable for his actions. What he did must be denounced and the harm, the terrible harm, done to Ms K properly recognised.

### **Conclusion**

[212] The Children's Court is committed to the needs of children, young people and families and, as President, I am dedicated to education and improvement. I hope that you are able to use this paper as a reference resource and, as a corollary, that this paper enables you to have a more detailed understanding of this complex jurisdiction. My hope is that it will empower you with enthusiasm to learn more.



# Cross-over kids: the drift of children from the child protection system into the criminal justice system

Judge Peter Johnstone, President of the Children’s Court of NSW; the paper was first presented for the 2016 Aboriginal Legal Service Symposium on Aboriginal Children, Culture and the Law — Changing Practice on 5 August 2016.

## [1-0180] Introduction

- [1] This paper has been prepared for the 2016 Aboriginal Legal Service Symposium on Aboriginal Children, Culture and the Law — Changing Practice, and is to be presented to attendees on Friday, 5 August 2016. The topic I will be addressing today is “Cross-over kids: the drift of children from the child protection system into the criminal justice system”.<sup>196</sup>
- [2] First, I wish to acknowledge the traditional custodians of the land upon which we meet today, the Pambalong Clan of the Awabakal People, and pay my respects to their Elders past and present.
- [3] Throughout my time as President of the Children’s Court, I have observed that there is an unequivocal correlation between a history of care and protection interventions and future criminal offending. This nexus between care and crime has been persuasively articulated by a number of respected commentators, including Dr Judith Cashmore,<sup>197</sup> and former President of the Children’s Court, Judge Mark Marien, whose seminal paper on “Cross-over kids” examined the drift from children and young people in care into criminal offending.<sup>198</sup>
- [4] Notwithstanding that I have been President for four years, I continue to be astounded by the complexity of the issues that arise in this court.
- [5] The social disadvantage facing the children and young people appearing before this jurisdiction is a profound reminder of the need to work together to critically analyse the issues, build capacity and develop realistic and achievable options for improvement. We must never allow ourselves to sit idly by while children and young people are denied the human rights and opportunities they are entitled to as citizens of the world.
- [6] We were acutely reminded of the need to take action in the face of human rights abuses perpetrated against children and young people after the Four Corner’s investigation into the systemic abuse and mistreatment of children and young people at the Don Dale Youth Detention Centre in Darwin.<sup>199</sup> Of relevance to these reports,

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<sup>196</sup> I acknowledge the considerable help and valuable assistance in the preparation of this paper provided by the Children’s Court Research Associate, Paloma Mackay-Sim.

<sup>197</sup> J Cashmore, “The link between child maltreatment and adolescent offending: systems of abuse and neglect of adolescents” (2011) *Family Matters* 89, at 31–41.

<sup>198</sup> Judge M Marien, “‘Cross-over kids’ – childhood and adolescent abuse and neglect and childhood offending”, paper originally presented at the South Pacific Conference of Youth and Children’s Courts Annual Meeting, 25–27 July 2011, Vanuatu (and updated for the Third National Juvenile Justice Summit 2012, 27 March 2012, Melbourne).

<sup>199</sup> C Meldrum-Hanna et al, “Australia’s Shame”, originally aired on ABC Four Corners on Monday, 25 July 2016. Transcript accessible on [www.abc.net.au/4corners/stories/2016/07/25/4504895.htm](http://www.abc.net.au/4corners/stories/2016/07/25/4504895.htm).

and to the broader discussion today, is that over 90% of children and young people held in juvenile detention centers in the Northern Territory are Aboriginal or Torres Strait Islander.

[7] Without detailing the specific abuses, it is sufficient to state that they are abhorrent breaches of human rights that raise important questions, such as (to name a few): how could such egregious mistreatment occur in Australia today? Given that the events occurred in 2014, and despite two previous inquiries into the incident, why did it take two years for the government to establish a Royal Commission? How far have we really come in the 25 years since the Royal Commission into Aboriginal Deaths in Custody? What can we do in future to challenge the complex constellation of factors that continue to affect the treatment of Aboriginal and Torres Strait Islander peoples.

[8] As a response to these events, on Thursday, 28 July 2016, the Australian Government announced its establishment of a Royal Commission to examine the child protection and juvenile detention systems of the Northern Territory.<sup>200</sup> Specifically, the terms of reference state that the Royal Commission will examine:

- failings in the child protection and youth detention systems of the Government of the Northern Territory since 2006
- the effectiveness of any oversight mechanisms and safeguards to ensure the treatment of detainees was appropriate
- cultural and management issues that may exist within the Northern Territory youth detention system
- whether the treatment of detainees breached laws or the detainee's human rights, and
- whether more should have been done by the Northern Territory Government to take appropriate measures to prevent the reoccurrence of inappropriate treatment.<sup>201</sup>

[9] Despite the delay in conducting a Royal Commission into the child protection and juvenile justice systems in the Northern Territory, the establishment of a Royal Commission represents an important step in tackling the silence and shame surrounding the treatment of Aboriginal and Torres Strait Islander peoples in Australia.

[10] The baleful effects of silence, and the oppression so commonly associated with it, have remained recurring themes throughout history, influencing some of the most significant events affecting the lives of Aboriginal people. Silence can result in constructive agreement to individual misconduct, it can normalise abuse of process and departure from the precepts of natural justice, and it can entrench the systemic disintegration of the social contract. One of the most concerning implications of the oppression of silence is its ability to manipulate facts and frustrate or prevent progress.

[11] As John Stuart Mill famously pronounced:<sup>202</sup>

Bad men need nothing more to compass their ends, than that good men should look on and do nothing.

<sup>200</sup> Joint Media Release of Prime Minister the Hon. M Turnbull MP and Attorney-General, Senator the Honourable G Brandis QC, "Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory", Thursday, 28 July 2016, accessible at [www.attorneygeneral.gov.au](http://www.attorneygeneral.gov.au).

<sup>201</sup> *ibid.*

<sup>202</sup> J Mill, *The Inaugural Address, delivered to the University of St Andrews*, Longmans, 1867, p 74.

- [12] Silence has been an important factor in perpetuating Aboriginal disadvantage. In fact, silence was used to attempt to remove Aboriginal people from recorded history. Reynolds describes this phenomenon, stating:<sup>203</sup>
- The Great Australian Silence was a 20th century phenomenon. Most books written about the colonies in the 19th century devoted a chapter or two to the Aborigines and to their relations with Europeans, while the few major historical works produced before 1900 gave considerable attention to the great tragedy of destruction and dispossession. But during the first half of the 20th century the Aborigines were dispersed from the pages of Australian history as effectively as the frontier squatters had dispersed them from the inland plains a century before.
- [13] In addition to historical disempowerment through the denial of a legitimate voice, Aboriginal peoples' experiences of gratuitous concurrence in the face of authority have acted as a fetter on their ability to access justice and achieve equality before the law. This repudiation of meaningful participation is even more striking for children and young people, who face additional barriers by virtue of their age and lack of autonomy.
- [14] The importance of giving a child or young person the opportunity to have their voice heard and to participate in the decisions that affect them is recognised both nationally and internationally.<sup>204</sup> However, it cannot be ignored that complex social disadvantage and vulnerability impedes the ability of a significant majority of the young people accessing the Children's Court to meaningfully participate and engage in decisions that will have a long lasting impact on their life course.
- [15] Aboriginal and Torres Strait Islander children and young people are among the most vulnerable children that appear before both jurisdictions of the Children's Court. Cultural competence, and the failure to embed it across all levels of decision making, can function to deny these young people strong connections to their identity, connections that have been described as "intrinsic" to any assessment of what is in a child or young person's best interests.<sup>205</sup>
- [16] With all of this in mind, it is critical that we can get together at symposiums such as these to engage in productive discussions. These forums encourage discourse, advocacy and participation by professionals committed to constant improvement. Any discourse that facilitates collaboration, capacity building and information exchange is a discourse that is worth preserving and promoting.
- [17] Further, the outcomes we reach from these discussions can drive paradigm shifts regarding the preservation of the best interests of Aboriginal children and young people and, as a corollary, assure that the interests of Aboriginal children are placed at the forefront of community consciousness.
- [18] A group that does a fantastic job in countering the deleterious effects of silence are the Grandmothers Against Removals. I commend all grandparents who take responsibility for raising their grandchildren. I also acknowledge that informal kinship carers play a significant role in taking such responsibility and that this is not always recognised with the appropriate financial and social supports.

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<sup>203</sup> H Reynolds, *The breaking of the great Australian silence: Aborigines in Australian historiography 1955–1983*, University of London, Institute of Commonwealth Studies, Australian Studies Centre, 1984, p 1.

<sup>204</sup> Article 12 of the United Nations Convention on the Rights of the Child (to which Australia became a signatory in 1989); *Children and Young Persons (Care and Protection) Act 1998*, ss 9 and 10.

<sup>205</sup> *Department of Human Services and K siblings* [2013] VChC 1 per Magistrate B Wallington, at 5.

- [19] I thank you for your passionate presentation this morning and applaud you for the work you do in engaging with communities and ensuring that important voices are no longer silenced, abandoned or ignored.
- [20] I also wish to praise the hard work of the practitioners and other professionals working within this jurisdiction and acknowledge their commitment and advocacy toward safeguarding the best interests of Aboriginal children and young people.
- [21] Turning now to the specific challenges confronting Aboriginal children and young people in their experience of the drift from care to crime. After much consideration as to how I might do this topic justice, I have decided to distill the core elements of this subject, as I see them, into the following structure:
- Part 1: Identification of the extent of the cross-over
  - Part 2: Discussion of the causes of the cross-over
  - Part 3: Examination of options to address cross-over.
- [22] Whilst some of the material that I will discuss in this paper has been widely documented by respected academics and seasoned practitioners, I hope that my insights will add to this body of work and that this paper can be used as a valuable reference resource, with a focus on practical and positive directions for the future.

### **Part 1: Identification of the extent of the cross-over**

- [23] In order to embark upon an exploration of the extent of cross-over, the first step is to develop a familiarity with the jurisdiction of the Children’s Court of NSW. After developing this familiarity, it is necessary to define what the term “cross-over kids” denotes. It is only after this, that we can look at the scope of the problem and develop a true appreciation of the seriousness of this issue, its causes and what steps can be taken to ameliorate its effects.
- [24] The Children’s Court of NSW is empowered with the jurisdiction to make decisions in care and protection matters as well as criminal matters relating to all children and young people under the age of 18.<sup>206</sup> While most people are aware of criminal proceedings and juvenile justice, the care and protection jurisdiction is often misperceived, and therefore confounds many members of the community.
- [25] In care and protection matters, the NSW child protection agency, the Department of Family and Community Services (DFaCS), brings proceedings with respect to children and young people alleged to be at risk of significant harm. These are distinct from criminal proceedings. Care and protection matters are an inquisitorial process whereby a judicial officer, after hearing all of the evidence, makes a determination as to whether entrusting parental responsibility to the child or young person’s current parents/care givers represents an unacceptable risk of harm. If this is the case, the judicial officer will make an order for parental responsibility to the Minister until the young person attains the age of 18. The overarching, or paramount consideration, in all care and protection decision making is the safety, welfare and well-being of the child or young person.<sup>207</sup>

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<sup>206</sup> Note also the operation of the doctrine of *doli incapax* for children and young people between the ages of 10–14 years.

<sup>207</sup> *Children and Young Persons (Care and Protection) Act 1998*; the United Nations Convention on the Rights of the Child.

[26] The bifurcated nature of the care and protection and criminal jurisdictions has its origins in a number of reviews to child welfare laws in the 1980s. These reforms culminated in a package of legislation that clearly demarcated the child protection jurisdiction from the juvenile crime jurisdiction. Whilst this was a positive step at the time (given the need to reform the punitive criminalisation of child protection issues under the *Child Welfare Act 1939*) it has created structural and legal barriers that fail to acknowledge and address the practicality of these young people's lives. This practicality is that criminal offending and care and protection are not mutually exclusive.

[27] It is to this reality that we refer when we talk about the "cross-over between care and crime" or "cross-over kids". As I mentioned above, the black letter law recognises care and protection and juvenile crime as two separate jurisdictions. However, when viewed through a criminological and socio-legal lens, the practicality and reality of these young people's lives highlights that there is a distinct correlation between a history of care and protection interventions and criminal offending.

[28] Judge Mark Marien enunciated the complexity of this cross-over, wrestling with the issue of how to respond when social issues manifest in interactions with the legal system:<sup>208</sup>

A 13 year old who has left the family home and is living on the streets because of ongoing domestic violence and/or drug and alcohol abuse by their parents is very likely to become involved in offending behaviour because they are associating with a peer group which engages in offending behaviour. But does this "offending behaviour" by the 13 year old require a response within the criminal justice system (with the consequent stigmatising of the young person and the possible prejudicing of their future employment prospects) or should the child be dealt with within the child welfare system? Is there a risk in "criminalising" the behaviour of a young person with serious welfare needs? Alternatively, is there a risk that we may be "welfarising" our response to the criminal behaviour of young people ...

[29] Sadly, this "cross-over" conundrum is something that I witness numerous times a day when conducting my judicial functions. I see it when I preside over the criminal list, defended hearings, parole list, education list, care and protection list and care and protection hearings. Many defeatists have stated that the effects of such troubling work would make anyone resistant, dispirited and resigned to maintaining the status quo. However, I am no defeatist and every day that I experience this cross-over, I am emboldened with the drive and determination to achieve a generation of children and young people whose lives have not been characterised by cross-over.

[30] As President, I engage in continuous research in order to supplement my experiential data with statistical and critical commentary. Numbers have a way of slapping you across the face in a way that words cannot, and when accompanied by explanation and peer-reviewed research, the reader is afforded with a detailed and unequivocal picture of the issues.

[31] Therefore, in describing the extent of the cross-over between young Aboriginal people drifting from the care and protection system into the criminal justice system, I

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<sup>208</sup> Judge M Marien, "'Cross-over kids' — childhood and adolescent abuse and neglect and childhood offending", n 3.

propose to look at the following groups of statistics: data outlining the representation of *non-Aboriginal* children in care; the representation of *Aboriginal* children and young people in care; the representation of *non-Aboriginal* young people in detention; the representation of *Aboriginal* young people in detention and finally a comparison of the over-representation of Aboriginal young people who have been removed and later appear before the criminal jurisdiction of the court.

[32] As at 30 June 2014, across Australia, the rate of children in out-of-home care per 1000 children in the population aged 0–17 years by Indigenous status was the highest in the Northern Territory (14.3%) and NSW (10.8%) and lowest in Victoria (6.1%) and Western Australia (6.4%).<sup>209</sup>

[33] Between 2004–05 and 2013–14, the rate of Aboriginal and Torres Strait Islander children in out-of-home care per 1000 children in the Aboriginal and Torres Strait Islander population Australia-wide aged 0–17 years has more than doubled from 21.5% to 51.4% compared to 4.0% to 5.6% for non-Indigenous children.<sup>210</sup>

[34] Troublingly, across jurisdictions in 2013–14, the *rate* of Aboriginal and Torres Strait Islander children in out-of-home care per 1000 children is highest in NSW (71.3%), the ACT (67.3%) and Victoria (62.7%).<sup>211</sup> Whereas, the *proportion* of children and young people in out-of-home care by Indigenous status and jurisdiction is highest in the Northern Territory (85%), Western Australia (51%) and Queensland (40%).<sup>212</sup>

[35] In relation to young people in detention, the rate of young people aged 10–17 in detention on any average night in the June quarter of 2015 was 3.2 per 10,000 (or about 1 in every 3,150 young people). This represented a decrease from the rate in the June quarter 4 years earlier (3.6 per 10,000).<sup>213</sup> Over the period from the June quarter 2014 to the June quarter 2015, the rate of young people aged 10–17 in detention was between 2.9 and 3.3 per 10,000 each quarter.<sup>214</sup>

[36] In the June quarter of 2015, just over half (480 young people or 54%) of all those in detention on an average night were Aboriginal. Aboriginal young people outnumbered non-Aboriginal young people in detention in every quarter from March 2013 onwards.<sup>215</sup>

[37] The Australian Institute of Health and Welfare states that Indigenous over-representation can be explained by comparing the rate of Indigenous young people to that of the non-Indigenous young people in detention:<sup>216</sup>

The rate ratio shows that Indigenous young people aged 10–17 were 26 times as likely as non-Indigenous young people to be in detention on an average night in the June quarter 2015. This was an increase from 19 times as likely in the June quarter 2011.

<sup>209</sup> Productivity Commission, *Report on Government Services 2015*, Community services, Child protection, Vol F, Ch 15, Table 15A.18.

<sup>210</sup> *ibid.*

<sup>211</sup> *ibid.*

<sup>212</sup> *ibid.*

<sup>213</sup> Australian Institute of Health and Welfare (AIHW), *Youth detention population in Australia 2015*, AIHW Bulletin no 131, cat no Aus 196, 2015, p 6.

<sup>214</sup> *ibid.*

<sup>215</sup> *ibid.*, p 9.

<sup>216</sup> *ibid.*, p 11.

[38] Director of the NSW Bureau of Crime Statistics and Research, Dr Don Weatherburn, powerfully distills these statistics, stating:<sup>217</sup>

By the time they reached the age of 23, more than three quarters (75.6 per cent) of the New South Wales Indigenous population had been cautioned by police, referred to a youth justice conference or convicted of an offence in a New South Wales criminal court. The corresponding figure for the non-Indigenous population of New South Wales was just 16.9 per cent. By the same age, 24.5 per cent of the Indigenous population, but just 1.3 per cent of the non-Indigenous population, had been refused bail or given a custodial sentence (control order or sentence of imprisonment).

[39] These statistics present a concerning picture, bolstered further by a considerable amount of research that has been conducted to show that children that have been in care are over-represented in the juvenile justice system. In 2011, the results of the 2009 NSW young people in custody health survey report were released. This report was prepared by NSW Justice Health in conjunction with NSW Juvenile Justice and surveyed the views of 361 young people from all Juvenile Detention Centres in NSW.<sup>218</sup>

[40] The report arrived at a number of significant conclusions, one of which was a confirmation that children with a history in care are over-represented in the juvenile justice system in NSW. It also made a number of revealing findings with respect to the cross-over of young Aboriginal people from the care and protection system into the criminal justice system. Specifically, the report found (with respect to young people in detention):

- 27% had a history of being placed in care — 38% of those young people were Aboriginal and 17% were non-Aboriginal
- 45% had a parent who had been incarcerated — 61% Aboriginal and 30% non-Aboriginal.

[41] In addition to providing a statistical outline of the extent of cross-over between a history of care and protection and entry into juvenile detention, the findings of the survey above elucidate the number of contributory risk factors specific to Aboriginal and Torres Strait Islander children and young people. I will discuss these risk factors in greater detail in the following section.

## **Part 2: Discussion of the causes of the cross-over**

[42] My discussion of these causes will not focus upon the impacts of the colonisation of Aboriginal people. Nor will it examine the dispossession and disempowerment that resulted from the numerous abuses perpetrated on Aboriginal people over time. This paper accepts that the reticulated and entrenched social, economic and cultural disadvantages experienced by Aboriginal people are root causes of Aboriginal young people “drifting” from the care and protection system to the criminal justice system.<sup>219</sup>

[43] For the purposes of today’s discussion, I will settle on five well-recognised areas of disadvantage, specific to the complex manifestation of cross-over: child neglect and

<sup>217</sup> D Weatherburn, *Arresting incarceration: pathways out of Indigenous imprisonment*, Aboriginal Studies Press, 2014, p 5.

<sup>218</sup> D Indig et al, *2009 NSW young people in custody health survey: full report*, Justice Health and Juvenile Justice, 2011.

<sup>219</sup> Royal Commission into Aboriginal deaths in custody, *National report*, 1991, Vol 1.

abuse, poor school performance/early disengagement from education, unemployment, drug and alcohol abuse and disconnection from cultural identity.<sup>220</sup> These areas of disadvantage should be posited within the root causes of disadvantage and the broader, underlying impacts of Aboriginal cultural history.

[44] All of these areas and their correlation with the drift from care to crime are also present in the non-Indigenous population, as identified in the 2010 Strategic Review of the NSW Juvenile Justice System.<sup>221</sup> This review highlighted the following risk factors for juvenile offending:

- disengagement with the education system
- criminal lifestyles and associations
- alcohol and other drug misuse
- accommodation problems, relationship problems including family dysfunction, mental health
- intellectual disabilities, and
- lack of structured leisure and recreational pursuits.<sup>222</sup>

[45] Further, as the 2009 Young People in Custody Health Survey confirmed, children with a history of being placed in out-of-home care are grossly over-represented in the juvenile justice system and have been found to experience poorer mental and physical health, particularly difficulties in accessing education, employment and housing and have higher rates of early parenthood.<sup>223</sup>

[46] This disadvantage is augmented by a lack of availability of emotional, financial and social supports to young people as they transition to adulthood. Consequently, long-term social and economic costs to the young person and the wider community are high. These risk factors are intensified for Aboriginal young people and are often perpetuating and mutually dependent, creating an impenetrable cycle of disadvantage.

[47] A wealth of research exists to establish the adverse effects of child abuse and maltreatment on life-course outcomes for young people. Stewart et al summarise this research most eloquently when they state:<sup>224</sup>

Recently, the field of developmental criminology has focused attention on the impacts of exposure to risk and protective or resilience factors at different points in a child's development. Of particular interest are the factors that lead to the onset and end of criminal behaviour. While a number of risk factors have been identified as increasing the likelihood of offending, none are as consistent as the detrimental effect of child abuse and neglect.

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<sup>220</sup> D Weatherburn, *Arresting incarceration*, n 22, p 77; Senate Select Committee on Regional and Remote Indigenous Communities, *Indigenous Australians, incarceration and the criminal justice system*, Discussion Paper, 2010, pp 24–5.

<sup>221</sup> Noetic Solutions Pty Ltd, *A strategic review of the New South Wales juvenile justice system: report for the Minister of Juvenile Justice*, 2010.

<sup>222</sup> *ibid.*

<sup>223</sup> D Indig et al, *2009 NSW young people in custody health survey*, n 23, p 31.

<sup>224</sup> A Stewart et al, "Pathways from child maltreatment to juvenile offending", *Trends and issues in crime and criminal justice*, No 241, Australian Institute of Criminology, 2002, p 1.

- [48] As I have discussed above, Aboriginal children and young people are significantly over-represented in out-of-home care and, from this over-representation, we can infer that these children are much more likely to experience abuse and neglect than non-Aboriginal children.
- [49] The propensity for increased abuse and neglect can also be related to the crime rates in Indigenous communities and the likelihood of a child being exposed to family violence and other forms of antisocial behaviour from a young age.
- [50] This is reflected in the substantiated notification rates (rate by 1,000 of population) of child neglect and abuse by Indigenous status. In NSW, between 2009–2010, this rate was 55.3 in the Aboriginal community, compared to 6.3 of the non-Indigenous community, representing an Indigenous to non-Indigenous ratio of 8.8.<sup>225</sup>
- [51] With respect to poor school performance and disengagement from education, it is well established that Indigenous children are less likely to attend school regularly. It is also well established that a young person's attendance at school is closely correlated to their performance. This non-attendance can arise due to a number of pressures in the young person's home life and may be connected to early parentifying behaviours and the need for older siblings to look after their younger siblings due to child abuse, neglect and/or parental abuse or misuse of alcohol and other drugs.
- [52] The statistics regarding school attendance and performance clearly show that Aboriginal students perform more poorly than non-Indigenous students on all measures of educational achievement, including the achievement of minimum literacy and numeracy requirements.<sup>226</sup> In NSW, 17.3% of Indigenous students completed year 12, compared to 52.3% of non-Indigenous students.<sup>227</sup> Indigenous students meet 77.7% of the minimum reading standards, as compared to 93.7% of non-Indigenous students<sup>228</sup> and 83.5% of Indigenous students meet minimum writing standards, as compared to 95.7% of non-Indigenous students.<sup>229</sup> Finally, 80.9% of Indigenous students meet minimum numeracy requirements as compared to 95.3% of non-Indigenous students.<sup>230</sup>
- [53] Lack of educational attainment is closely correlated with poor future prospects of employment, exacerbating disadvantage and heightening the likelihood of engagement in antisocial behaviour.
- [54] The gap in unemployment rates between Indigenous and non-Indigenous people aged between 15–64 years is striking. In NSW in 2010, 48.1% of Indigenous people aged 15–64 were employed, compared to 71.8% of non-Indigenous people.<sup>231</sup>
- [55] Interestingly, and highly material to the issue of cross-over Indigenous young people, unemployment rates are much higher among young Indigenous people in their

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<sup>225</sup> Commonwealth Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous disadvantage: key indicators 2011 report*, 2011, Table 4A.10.2.

<sup>226</sup> *ibid.*

<sup>227</sup> *ibid.*, Table 4A.5.4 for 2008.

<sup>228</sup> *ibid.*, Table 4A.4.16 for NSW 2010.

<sup>229</sup> *ibid.*, Table 4A.4.17 for NSW 2010.

<sup>230</sup> *ibid.*, Table 4A.4.18 for NSW 2010.

<sup>231</sup> Australian Bureau of Statistics (ABS), *Labour force characteristics of Aboriginal and Torres Strait Islander Australians, estimates from the labour force survey, 2011*, ABS cat no 6287.0, 2011, Table 1 for NSW, persons aged 15–64 years, 2011.

“crime prone” years (15–24) than among non-Indigenous people during the same years. The data shows that 25% of Indigenous Australians aged 15–17 are unemployed, as compared with 13.5% non-Indigenous Australians.<sup>232</sup> In a 2001 Australian Bureau of Statistics study, Hunter found that the effect of being unemployed was substantially worse for those who were not in the labour force.<sup>233</sup>

[56] Referring once more to the 2009 NSW young people in custody health survey, the report revealed that a large proportion of Indigenous young people were mis-using or abusing alcohol or other drugs prior to their placement in custody. These drug or alcohol issues are often compounded by the fact that a large proportion of these young people are negotiating fraught, chaotic and dysfunctional home lives, including parental drug misuse or abuse.

[57] Drug or alcohol abuse is particularly problematic for young people, and can have a significant effect on their mental health. Mental illness and developmental disabilities are widespread among the young people attending the Children’s Court. This was further confirmed by the results of the 2009 NSW young people in custody health survey:<sup>234</sup>

- 46% had a possible disability or borderline intellectual disability
- 18% had mild to moderate hearing loss
- 66% reported being drunk at least weekly in the year prior to custody
- 65% had used an illicit drug at least weekly in the year prior to custody.

[58] Professor McGorry et al confirm, stating:<sup>235</sup>

... up to one in four young people in Australia are likely to be suffering from a mental health problem, most commonly substance misuse or dependency, depression or anxiety disorder or combinations of these. ... There is also some evidence that the prevalence may have risen in recent decades.

[59] Statistics regarding alcohol-induced deaths for Indigenous people suggest that alcohol abuse among Indigenous people is widespread. Between 2005–2009, 27.7% of Indigenous people, as compared with 4.8% of non-Indigenous people in NSW had alcohol-induced deaths. In Western Australia, 48.8% of Indigenous people versus 4.4% non-Indigenous died from alcohol related causes and in the Northern Territory, 55.5% of Indigenous people, as compared with 4.6% of non-Indigenous people died from alcohol-induced deaths.<sup>236</sup>

[60] In addition, data suggests that drug-related poisonings and drug-related mental/behavioural disorders are much more common among Indigenous Australians than non-Indigenous Australians — particularly with respect to the use of opioid and opioid derivatives.<sup>237</sup>

<sup>232</sup> D Weatherburn, *Arresting incarceration*, n 22, p 84.

<sup>233</sup> B Hunter, *Factors underlying Indigenous arrest rates*, NSW Bureau of Crime Statistics and Research, 2001.

<sup>234</sup> D Indig et al, *2009 NSW young people in custody health survey*, n 23.

<sup>235</sup> P McGorry et al, “Investing in youth mental health is a best buy” (2007) 187(7) *Medical Journal of Australia* 5.

<sup>236</sup> ABS, *Labour force characteristics of Aboriginal and Torres Strait Islander Australians*, n 36, Table 10A.3.17.

<sup>237</sup> *ibid*, Table 10A.4.6.

- [61] The final category is not as statistically marked as those identified above. However, in my view, it is one of the most significant causal factors for Aboriginal disadvantage generally, and the drift from care to crime more specifically. I will describe this factor as disconnection from cultural identity.
- [62] An abundance of research exists regarding the pivotal role of cultural identity in the socialisation of all children and young people. This is further supplemented by legislative recognition in the *Children and Young Persons (Care and Protection) Act* 1998.
- [63] Aronson-Fontes has conducted extensive research into culture and child protection and synthesises the role of culture as follows:<sup>238</sup>
- ... culture defines what is natural and expected in a given group. We all participate in multiple cultures: ethnic, national and professional, among others. We carry our cultures with us at all times and they have an impact on how we view and relate to people from our own and other cultures.
- [64] In relation to Aboriginal children and young people, a range of Aboriginal and Torres Strait Islander organisations have highlighted that connection to family, culture and community are central to the safety, welfare and well-being of Aboriginal young people.<sup>239</sup> As Libesman noted:<sup>240</sup>
- Cultural care is about being part of a family, community, extended network, knowing where you belong, and knowing what the difference is between two different nations.
- [65] The *Children and Young Persons (Care and Protection) Act* 1998 also places culture as a critical consideration in decision-making for both non-Aboriginal and Aboriginal children and young people.<sup>241</sup> For Aboriginal children and young people, the Aboriginal and Torres Strait Islander child placement principles make clear that the identity and socialisation needs of Aboriginal and Torres Strait Islander children and young people will be met most successfully in placements that foster Aboriginal culture and identity.<sup>242</sup>
- [66] It is clear that a fundamental understanding and positive association with Aboriginal cultural identity manifests in positive life-course outcomes and that:<sup>243</sup>
- Aboriginal children do better if they remain connected to their culture ...
- [67] A positive characterisation of Aboriginality can act as a protective factor in ensuring that culture is used constructively, rather than destructively. Cultural competence in this context is about challenging labels that associate Aboriginality with antisocial behaviour. Ms Eileen Cummings, Chair of the Northern Territory Stolen Generation Aboriginal Corporation, succinctly captures this challenge:<sup>244</sup>
- Children have always been loved and respected and nurtured and taught in the Aboriginal way. It is important that these values and systems are encouraged and that

<sup>238</sup> L Aronson-Fontes, *Child abuse and culture: working with diverse families*, Guildford Press, 2005, p 4.

<sup>239</sup> T Libesman, *Cultural care for Aboriginal and Torres Strait Islander children in out-of-home care*, Secretariat of National Aboriginal and Islander Child Care, 2011, pp 11–14.

<sup>240</sup> *ibid*, p 11.

<sup>241</sup> *Children and Young Persons (Care and Protection) Act* 1998, Ch 2, Pts 1 and 2.

<sup>242</sup> *ibid*, s 13.

<sup>243</sup> Commission for Children and Young People, *In the child's best interests: inquiry into compliance with the intent of the Aboriginal child placement principle in Victoria*, 2015, p 7.

<sup>244</sup> E Cummings, Chair, Northern Territory Stolen Generations Aboriginal Corporation, Committee Hansard, Darwin, 2 April 2015, p 28.

Aboriginal people are empowered to ensure the systems are once again taught to their children to bring back pride and dignity to the Aboriginal people and communities. Too often the focus is wholly on the negative, not the positive, of Aboriginal child rearing and the Aboriginal practices which give young people their identity, their values, their role and their purposes in life.

[68] We know from the well-established criminological theory of labeling, that when social institutions and processes ascribe certain, negative labels to young people during the crucial years in which self-identity is formed, the young person may begin to form their identity around this label. Cunneen and White state that:<sup>245</sup>

The process of labelling is tied up with the idea of the self-fulfilling prophecy. That is, if you tell someone sufficiently often that they are “bad” or “stupid”, or “crazy”, that person may start to believe the label and to act out the stereotypical behaviour associated with it.

[69] The concept of labelling is often perpetuated by “moral panic”, whereby public labeling and denouncement of certain groups as “bad”, “criminal” or “deviant” is amplified by the media.<sup>246</sup>

[70] Young Aboriginal people in their formative years are saturated by portrayals in media, social media and within the community that define Aboriginal people as a homogenous criminogenic group of inherently antisocial people.

[71] In addition, young people often respond as a collective, for example, they may form a gang in order to develop a sense of identity and community. This is likely to exacerbate the effects of peer pressure and in conjunction with the lack of a stable or secure home life, disengagement from education, unemployment and drug or alcohol misuse or abuse, it is easy to see how a young Aboriginal person might see that their only option is a life of crime and disadvantage.

[72] The resulting stereotypical behaviour associated with the label of “antisocial Aboriginal youth” can also limit a young Aboriginal person’s prospects of rehabilitation, further feeding and embedding the causative effects of cultural disconnection.

[73] I appreciate that I have discussed a number of issues that present a rather bleak picture for Aboriginal children and young people drifting from the care and protection to the juvenile justice jurisdiction. However, in the next section, I propose to look at some ways of countering these risk factors through the application and development of promising initiatives that use protective factors to address the multifactorial reasons underpinning cross-over.

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<sup>245</sup> C Cunneen and R White, “Theories of juvenile offending” in *Juvenile justice: youth and crime in Australia*, Oxford University Press, 2002, p 46.

<sup>246</sup> S Cohen, *Folk devils and moral panics*, MacGibbon and Kee, 1972.

### Part 3: Examination of options to address cross-over

[74] This paper has illustrated that the needs of Aboriginal and Torres Strait Islander children and young people are irrefutable and complex. Justice Muirhead eloquently enunciated the need for erudite application of the law for Aboriginal and Torres Strait Islander children and young people in *Jabaltjari v Hammersley*, stating:<sup>247</sup>

The young Aboriginal child is a child who requires tremendous care and attention, much thought, much consideration.

[75] Whilst all children and young people in care require a range of supports to address trauma and abuse, there is an additional need for Aboriginal and Torres Strait Islander children to be provided with cultural support through tailored counseling and collaboration, to assist in maintaining links to their family and culture.

[76] Ms Megan Mitchell, National Children’s Commissioner stated that it is necessary to collaborate and engage with Aboriginal communities in order to improve outcomes for children and young people:<sup>248</sup>

That includes things like improving the number of Aboriginal people that are in the child-protection and home-care workforce so that you can have effective engagement with families so that they become part of the solution and so that they are driving and owning the problem and solution. If we keep disempowering these communities and families, we will just create more of the same intergenerational disadvantage.

[77] One way of doing this is by encouraging the use of therapeutic jurisprudence and problem-solving courts. Therapeutic jurisprudence is directed toward looking at the law as a therapeutic agent and, as a consequence, improving the operation of the law in order to address the impact of legal practice and procedure on well-being.<sup>249</sup>

[78] Amongst other things, application of the precepts of therapeutic jurisprudence can improve policy and drafting, embed practice aimed at harm minimisation and the promotion of rehabilitation and encourage community trust and confidence in the administration of justice.<sup>250</sup>

[79] Accordingly, using therapeutic approaches to address the drift of Aboriginal children and young people from the care and protection jurisdiction to the criminal justice system may provide a more holistic, and therefore more curative, approach to reducing cross-over. With respect to the effects of therapeutic jurisprudence in the criminal sphere, a report prepared for the National Judicial Institute in Canada recognised that:<sup>251</sup>

Members of Aboriginal communities — overrepresented in our courts and in our jails — have advocated for a judicial system that both considers the complex social, economic and cultural factors that cause Aboriginal people to be in conflict with the law and that takes a healing approach to sentencing.

[80] As President of the Children’s Court, I have adopted a therapeutic jurisprudential approach to the over-representation of Aboriginal children and young people in the

<sup>247</sup> *Jabaltjari v Hammersley* (1977) 15 ALR 94 at 98.

<sup>248</sup> M Mitchell, National Children’s Commissioner, Committee Hansard, Sydney, 18 February 2015, pp 5–6.

<sup>249</sup> D Wexler, “An introduction to therapeutic jurisprudence” in D Wexler and B Winick, *Essays in therapeutic jurisprudence*, Carolina Academic Press, 1991, p 8.

<sup>250</sup> M King, “Restorative justice, therapeutic jurisprudence and the rise of emotionally intelligent justice”, (2008) 32 *Melbourne University Law Review* 1096 at p 1114.

<sup>251</sup> S Goldberg, *Judging for the 21st century: a problem solving approach*, Ottawa National Judicial Institute, 2005, accessed at [www.nji.ca](http://www.nji.ca).

care and criminal jurisdictions of the court. Additionally, I have agitated for the application of innovative responses to address the distrust and disconnection from the justice system experienced by many Aboriginal young people.

[81] One way the Children’s Court is actively implementing the precepts of therapeutic jurisprudence in the court’s criminal jurisdiction is through its establishment of a pilot Youth Koori Court (YKC), which has been in existence for over one-and-a-half years now. I acknowledge that the YKC is not a panacea, however, it does seek to provide the Aboriginal young people who appear before the court with an inclusive, empowering and culturally relevant legal process.

[82] I strongly support the YKC and note that the pilot has been established within existing resources and without the need for legislative change. The establishment and development of the YKC has been undertaken in consultation with an extensive group of stakeholders.<sup>252</sup> These include the Aboriginal Legal Service, Children’s Legal Services, Police Prosecutions, Daramu, Aboriginal Services Division of the Department of Justice, Juvenile Justice, Justice Health, the Children’s Court Assistance Scheme, Marist Youth Care, The Men’s Shed, The Lighthouse Project, DFACS and the Children’s Court Executive.

[83] The legislative scheme applicable to the YKC is consistent with the general principles informing the work of the Children’s Court. In particular, the provisions in s 6(a), (b) and (f) of the *Children (Criminal Proceedings) Act 1987* are included below [my emphasis]:

- (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*, ...

[84] In the Children’s Court, the *Children (Criminal Proceedings) Act* provides the penalties applicable at s 33. Specifically, s 33(1)(c2) provides:

(c2) it may not make an order adjourning proceedings against the person to a specified date (not later than 12 months from the date of the finding of guilt) for any of the following purposes (but only if bail for the offence is or has been granted or dispensed with under the *Bail Act 2013*):

- (i) for the purpose of assessing the person’s capacity and prospects for rehabilitation,
- (ii) for the purpose of allowing the person to demonstrate that rehabilitation has taken place,
- (iii) for any other purpose the Children’s Court considers appropriate in the circumstances, ...

<sup>252</sup> Note: a significant amount of information relied upon in this section on the Youth Koori Court (YKC) is taken from a paper presented to the Aotearoa Conference on Therapeutic Jurisprudence on 3 and 4 September 2015 by the Presiding Magistrate of the YKC, Magistrate Susan Duncombe; see also S Duncombe, “NSW Youth Koori Court Pilot Program: opportunities and challenges”, paper presented to the Australian Children’s Commissioners and Guardians, 17 November 2016, Sydney.

- [85] Simply put, the YKC uses a deferred sentencing model: s 33(1)(c2). In addition, it applies a culturally competent process through the participation of Elders.
- [86] The principles of mediation are used through a conference process, presided over by Specialist Magistrate Sue Duncombe. The young person is consulted and participates, as do the relevant stakeholders, and issues of concern are identified for the young person. Methods of addressing these issues are then incorporated in an Action and Support Plan for the young person. The young person must focus upon this plan over the 3–6 months prior to sentence.
- [87] The young person then has his/her actions taken into account on sentence and after hearing submissions from the prosecution and defence. Elders/respected persons are also provided with an opportunity to provide input. Juvenile Justice or the agency with the case coordination role will prepare a progress report. The judicial officer will consider this information and impose a sentence. Notably, the full suite of sentencing options are available to the judicial officer.
- [88] 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 by the young person.
- [89] 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.
- [90] The judicial officer sits with the Elders/respected persons around a table with the young person, his or her family or supporters, the prosecutor, the legal representative for the young person and representatives from agencies, including Juvenile Justice. The judicial officer is not robed until sentencing.
- [91] The YKC has been sitting for six months and 21 young people have been assessed as suitable and two of those have been sentenced in the YKC. Six young people are yet to attend a conference and develop their plans. Anecdotally, a profile of the young people involved demonstrates the enormity of the issues these young people face.
- [92] A formal process evaluation is being conducted by the University of Western Sydney. However, at this stage 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.
- [93] This development is indicative of an enlightened criminal justice system for young Aboriginal offenders. It is an exciting process to be involved in and has the real potential to significantly change outcomes for young Aboriginal people involved in the criminal justice system. The power of this change is articulated by a young person who stated (in an answer to a question from an Elder about how the person saw this court):<sup>253</sup>
- It is good. There is more support, heaps more. That support is more intensive. You can talk to the judge and the judge knows what's going on, not just reading the papers.
- [94] In its care and protection jurisdiction, I have used my influence to advocate for tailored cultural care planning for Aboriginal children and young people. As I stated above, culture is central to the identity formation and socialisation of children and young people.

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<sup>253</sup> *ibid.* De-identified quote from young person cited in S Duncombe, “NSW Youth Koori Court Pilot Program: opportunities and challenges”, p 14.

- [95] It carries a young person through their formative years and provides a sense of belonging in the world. If a child is removed from its parents, culture remains important — whether the child is at an age in which they are cognisant of this process or not. It follows then, that when making decisions about a child or young person’s care, we must pay particular attention to providing options that will enhance a child or young person’s socialisation and sense of belonging.
- [96] I appreciate that I have raised this issue at a variety of different forums, but it is important that I continue to do so until comprehensive cultural planning is embedded at all levels of the care and protection process. While I have witnessed some improvements during my tenure at the Children’s Court, I am not yet satisfied that there has been a widespread application and appreciation of this need.
- [97] In order to achieve this aim, I have committed myself to safeguarding, monitoring and insisting upon the implementation of the Aboriginal and Torres Strait Islander Placement Principles, and as a corollary, the development of focused cultural planning for Aboriginal children and young people.
- [98] The *Children and Young Persons (Care and Protection) Act* 1998 is to be administered under the “paramountcy principle”, that is, that the safety welfare and well-being of the child is paramount: s 9(1). In addition to this paramountcy principle, the *Children and Young Persons (Care and Protection) Act* sets out other particular principles to be applied in the administration of the Act: s 9(2).
- [99] One of these principles is that account must be taken of concepts such as culture, language, identity and community.
- [100] It is a principle to be applied in the administration of the *Children and Young Persons (Care and Protection) Act* that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as is possible: s 11.
- [101] Further, Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Secretary, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12.
- [102] Finally, a general order for placement of an Aboriginal or Torres Strait Islander child who needs to be placed in statutory out-of-home care is prescribed: s 13(1). In summary, the order for placement is, with:
- (a) a member of the child’s or young person’s extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or
  - (b) ... a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or

- (c) ... a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child's or young person's usual place of residence, or
- (d) ... a suitable person approved by the Secretary after consultation with:
  - (i) members of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and
  - (ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

[103] Before it can make a final care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed: s 83(7)(a).

[104] Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security: s 78A. The plan must:

- (a) have regard, in particular, to the principle that if a child is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement: s 9(2)(e),
- (b) meet the needs of the child: s 78A(1)(b), and
- (c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements: s 78A(1)(c).

[105] The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles and to adequately and appropriately address cultural planning are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

[106] The need for appropriate cultural planning is linked to the need to ensure that early intervention and pre-removal options are explored to their fullest extent.

[107] I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children. As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4:

The Aboriginal and Torres Strait Islander Principles are in the Care Act 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons. They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters coming before the Children's Court.

[108] I am happy to report that in the past year a template for a cultural action planning section in the Care Plan has been developed. The idea behind this template is to ensure that adequate casework is undertaken to appropriately identify a child's cultural origins, and to put in place fully developed plans for the child to be educated, and to fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.

[109] I am optimistic that this will not be a superficial solution to a complex issue. I am committed to a future where Aboriginal children and young people understand their

lineage and heritage. I strongly believe that if Aboriginal children and young people are culturally supported at a young age, they have a better chance of successfully progressing through their lives.

### **Conclusion**

[110] I hope that I have presented a comprehensive paper to address the complex factors associated with the drift of Aboriginal children from the care and protection system to the criminal justice system and I hope that this conversation will continue until we see a future where cross-over is no longer a problem to be addressed, but a chapter in past history that is not to be repeated.

[111] Until that happens, I will continue to ensure that I use my role as President of this significant jurisdiction to achieve concrete, long-lasting and empowering results for Aboriginal children and young people.

# The Children's Court: driving a paradigm shift

Judge Peter Johnstone, President of the Children's Court of NSW; the paper was first presented for the Legal Aid Care and Protection Conference 2016 on 12 August 2016.

## [1-0190] Introduction

- [1] This paper has been prepared for the Legal Aid Care and Protection Conference 2016, the general topic of which is "Challenging Complacency". My paper is to be presented to attendees on Friday, 12 August 2016. The topic I will be addressing today is titled "The Children's Court: driving a paradigm shift".<sup>254</sup>
- [2] First, I wish to acknowledge the traditional custodians of the land on which we meet today, the Gadigal people of the Eora Nation, and pay my respects to their Elders past and present.
- [3] Thank you for inviting me to speak at such an important forum. As professionals working within this jurisdiction, it is particularly important that we safeguard the integrity of justice in all of its processes and ensure that we challenge complacency in all of its iterations.
- [4] These are complex times, calling for comprehensive change. The Royal Commission into Institutional Responses to Child Sexual Abuse is in its final stages and is due to hand down its recommendations in 2017. Earlier this year, we received the benefit of the recommendations and report of the Victorian Royal Commission into Family Violence and, the Northern Territory Government has just established a Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory, which may extend to a national Royal Commission.
- [5] The establishment of these Royal Commissions represents the public interest inherent in placing children and young people's safety, welfare and well-being at the forefront of government and community consciousness.
- [6] Family violence and the over-representation of Aboriginal and Torres Strait Islander children and young people in the care and protection and criminal justice systems are not diametrically divergent issues. They are linked by the trifecta of social, cultural and economic disadvantage that characterise some of the most trying and confronting issues of our time. Inaction entrenches and perpetuates disadvantage. We must challenge complacency, break down this trifecta and drive cultural change by implementing practical and achievable strategies.
- [7] Empowerment or lack thereof, is another area where family violence and the over-representation of Aboriginal children and young people in the care and crime jurisdictions, converge. Empowerment plays a vital part in providing vulnerable people with the voice, and the platform, to meaningfully participate and engage in the decisions that affect their lives. Disempowerment silences and oppresses, and creates apathetic complacency amongst the communities it has infected.

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<sup>254</sup> I acknowledge the considerable help and valuable assistance in the preparation of this paper provided by the Children's Court Research Associate, Paloma Mackay-Sim.

[8] Therefore, as professionals working within two areas that are so interconnected, we are charged with the task of addressing both the nature and effects of complacency. The two strategies I will be discussing today are concerned with ameliorating these causative elements of complacency.

[9] Accordingly, this paper will be structured in two parts, directed at addressing these issues.

[10] Part 1 will provide an update on the key amendments to the *Crimes (Domestic and Personal Violence) Act 2007* (CDPV Act), concerning children and young people, and the associated project of improving the accessibility of justice through the simplified wording of standard orders. Part 2 will explore the reform of cultural care planning, including the introduction of a comprehensive cultural care plan template. Ms Penny Hood, Director of Innovation, Co-design and Implementation at the Department of Family and Community Services (DFaCS), will discuss the roll-out of these reforms within DFaCS and provide advice on the implications of this transition.

### **Part 1: amendments to the CDPV Act**

[11] I appreciate that you are all familiar with the context leading up to the amendments to the CDPV Act and you are no doubt aware of the devastating impacts of family violence. Despite this, I am still minded to direct some of this discussion to the context and impetus for the reforms, for the benefit of both completeness and to remind ourselves of the need to stay alert to this issue.

[12] The Royal Commission into Family Violence (Victoria) was established on Sunday, 22 February 2015. It provided its report and recommendations to the Victorian Government on Tuesday, 29 March 2016, and was tabled in Parliament on Wednesday, 30 March 2016.<sup>255</sup>

[13] From the perspective of the loss and harm experienced over a number of generations, as a result of family violence, the Royal Commission was long overdue. Its establishment came in the wake of a number of family violence related tragedies, reflecting enhanced public awareness of the nature and extent of family violence and recognising that existing responses to family violence were not adequately addressing the problem.<sup>256</sup>

[14] In her statement to the Royal Commission, Rosie Batty eloquently summed up the need for change:<sup>257</sup>

I think changing the culture is about raising awareness in the public domain to such a level that what we learn can't be unlearned, and what we know can't be unknown. I think it is imperative to raise this issue to the point where everyone knows it's an issue, everyone knows the statistics and everyone understands the different forms of family violence.

<sup>255</sup> Royal Commission into Family Violence (Victoria), *Report and Recommendations*, No 132 Session 2014–16, March 2016.

<sup>256</sup> See also ALRC and NSWLRC, *Family violence — a national legal response* (the Joint Commission Family Violence Report), ALRC Report 114 (Final report), NSWLRC Report 128 (Final report), 2010; Legislative Council Standing Committee on Social Issues, *Domestic violence trends and issues in NSW*, 2012.

<sup>257</sup> Statement of Batty, 6 August 2015 at [22] in n 2, Vol 1 at p 13.

[15] The terms of reference specifically addressed the need to challenge a culture of complacency by safeguarding the interests of children and young people affected by family violence, and tailoring outcomes to Aboriginal and Torres Strait Islander children and young people.<sup>258</sup>

[16] Whilst my interest in the reform to the CDPV Act is concerned with its broader application and implications, for the purposes of my brief discussion of the reforms today, I will focus on the specific changes relevant to the intersection of family violence with the care and protection jurisdiction of the Children's Court.

[17] The Royal Commission recognised the prolific and extensive effects of family violence, part of which involved focussed attention on the discrete needs of children and young people:<sup>259</sup>

Family violence can have serious effects on children and young people but they do not always receive necessary support. There is insufficient focus on their needs and on therapeutic and other interventions they may require to mitigate the effects of the violence. Although children are remarkably resilient, and many who experience violence and abuse go on to lead full and productive lives, there are many who will need counselling and/or other support to overcome the impacts of the abuse, which may otherwise render them vulnerable to becoming a victim of family violence as an adult, or using violence themselves. If we do not provide this support, the effects of family violence suffered by children may be carried on to the next generation.

[18] In addition, the Royal Commission noted the short-term and long-term consequences of children and young people experiencing family violence, such as: behavioural and mental health problems, disrupted schooling, homelessness, poverty and intergenerational family violence.<sup>260</sup> From the Children's Court's perspective, it is often these consequences that result in children and young people "crossing-over" into the criminal jurisdiction.

[19] However, children and young people are often silent victims of family violence, falling through the cracks of the ambit of many service providers, traditionally focussed upon supporting women.<sup>261</sup>

[20] The Royal Commission noted that:<sup>262</sup>

The negative effects of family violence can be particularly profound for children, who can carry into adulthood the burden of being victimised themselves or witnessing violence in their home.

[21] However, the Royal Commission emphasised the importance of ensuring that labelling is avoided, stating that:<sup>263</sup>

We know, too, that family violence victims — including children — demonstrate enormous resilience in the face of great adversity. Many of these survivors go on to live full and happy lives, develop healthy relationships and use their experience to help others.

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<sup>258</sup> See n 2, Vol 1, Appendix A at p 206–8.

<sup>259</sup> See n 2, Vol 1 at p 8.

<sup>260</sup> See n 2, Vol 1 at p 22.

<sup>261</sup> See n 2, Vol 1 at p 23.

<sup>262</sup> See n 2, Vol 1 at p 17.

<sup>263</sup> *ibid.*

- [22] Significant to the reforms, the Royal Commission also stated that:<sup>264</sup>
- There should be no onus on victims of family violence to manage risk; it is the unacceptable nature of perpetrators' behaviour that should be the focus of attention.
- [23] Turning now to the specific reforms from the perspective of the Children's Court. The reforms to the CDPV Act, contained in the *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016* received assent on the 28 June 2016, [relevantly commenced on 3 December 2016] and include a range of amendments to the CDPV Act.<sup>265</sup> I will only be referring to those that have specific implications for the Children's Court, however, I advise that you familiarise yourself with the amended Act for completeness.<sup>266</sup>
- [24] First, a new s 40A was introduced to empower the Children's Court with jurisdiction to make an ADVO in care and protection proceedings. These amendments will allow the Children's Court to make an ADVO with the child the subject of care proceedings to be named as the protected person, as well as that child's siblings and any adult affected by the same circumstances.<sup>267</sup>
- [25] The amendments also extend the jurisdiction of the Children's Court to vary or revoke any existing ADVO, on the application of a party, or on its own motion, where care proceedings are before the court and where the circumstances justify the making of the order. The Secretary of the DFACS and the Commissioner of Police will be notified and given the right of appearance before the Children's Court. The Children's Court was empowered with this jurisdiction in order to avoid concurrent proceedings arising from similar facts or circumstances.<sup>268</sup>
- [26] An additional measure to protect children and young people was introduced with a new s 41A, which operates to prohibit the defendant in an application for an ADVO from personally cross-examining a child. This amendment is consistent with the Local Court Practice Note for Domestic and Personal Violence Proceedings, which states that a child cannot be cross-examined by an unrepresented defendant and may only be questioned by a person appointed by the Court who is an Australian legal practitioner or other suitable person.<sup>269</sup>
- [27] A related amendment to s 40 allows evidence admitted in the District or Supreme Court in the hearing of a serious charge to be subsequently admitted in the Local Court or Children's Court in a related ADVO application, where the ADVO is remitted back to that court for final determination.<sup>270</sup>
- [28] The introduction of s 41A and the amendment to s 40 is consistent with a trauma-informed approach and the need to put mechanisms in place to ensure that victims are not exposed to additional trauma and distress by having to give their evidence more than once. This is particularly critical for children and young people.

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<sup>264</sup> See n 2, Vol 1 at p 23.

<sup>265</sup> *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1.

<sup>266</sup> *Crimes (Domestic and Personal Violence) Act 2007*.

<sup>267</sup> *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1[21].

<sup>268</sup> *ibid*.

<sup>269</sup> *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1[22]; Local Court Practice Note for Domestic and Personal Violence Proceedings (No 2 of 2012) at para 8.1.

<sup>270</sup> *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1[20].

- [29] Amendments will also be made to s 72 to ensure that the Commissioner of Police is notified of any application made to vary or revoke a police-initiated order. Importantly, the amendments also require that, where a person applies to vary/revoke a police-initiated AVO, and one of the protected persons is a child, the application requires leave of the court before such an application can be heard.<sup>271</sup> This ensures that safeguards are embedded to protect children and adult victims from intimidation and coercion to consent to applications for variations and revocations.
- [30] Finally, s 48 of the CDPV Act was amended to clarify the requirements with respect to ADVOs to protect children. The amendments made clear that the requirement for police to appear on behalf of the child applies only where the child is the sole person for whom protection is sought. This change is critical as it ensures that women and men with or without children can make an application for an ADVO in the same way, and overcomes the existing reluctance of some communities to involve police. This will ensure that children are protected, despite the existence of any historical distrust of police.
- [31] These reforms have supplemented work undertaken by the Department of Justice and the Department of Premier and Cabinet to improve the accessibility of language used in AVOs, and as a result, to improve understanding of, and compliance with, these orders. These newly worded AVOs have been termed "Plain English AVOs" or PEAVOs and s 36 of the CDPV Act was replaced and s 50 was amended.<sup>272</sup>
- [32] Improving the understanding and accessibility of AVOs by using tailored, simple language and removing complex legal language is critical in the Children's Court jurisdiction and is consistent with work the court has undertaken, in its criminal jurisdiction, through its "Explaining legal terms to children" quick reference guide.<sup>273</sup>
- [33] These reforms represent an important shift in the siloed application of practice and procedure and will hopefully operate to drive cultural change in the family violence sphere.

## **Part 2: reformed cultural care planning**

- [34] The Children's Court has been collaborating with relevant agencies to drive cultural change on a number of levels, one of which is cultural care planning for both culturally and linguistically diverse children and Aboriginal and Torres Strait Islander children. The focus of my discussion will be on the impetus for these reforms with specific reference to Aboriginal and Torres Strait Islander cultural care planning.
- [35] Throughout my time as President of the Children's Court, I have acted as a staunch advocate for change regarding the over-representation of Aboriginal and Torres Strait Islander children and young people in the care and protection jurisdiction of this court. In order to address this issue, I have steadfastly supported comprehensive and tailored cultural care planning for Aboriginal and Torres Strait Islander children.

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<sup>271</sup> *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1[27]. Also note that s 72(5)–(8) of the CDPV Act has been repealed so that a defendant can no longer apply for a revocation of an ADVO even though the order has expired.

<sup>272</sup> *Crimes (Domestic and Personal Violence) Amendment (Review) Act 2016*, Sch 1[17] and [25].

<sup>273</sup> "Explaining legal terms to children" quick reference guide at [www.childrenscourt.justice.nsw.gov.au/Documents/EXPLAINING%20LEGAL%20TERMS%20TO%20CHILDREN\\_QRG%20v0.4.pdf](http://www.childrenscourt.justice.nsw.gov.au/Documents/EXPLAINING%20LEGAL%20TERMS%20TO%20CHILDREN_QRG%20v0.4.pdf), accessed 29 June 2017.

[36] I do not suggest that cultural care planning is a panacea to this irrefutable and complex issue. However, I submit that adequate, appropriate and comprehensive cultural care planning can act as a step toward challenging complacency and driving a paradigm shift.

[37] In order to arrive at this view, I have undertaken a great deal of research, both experiential and formal, to establish the nexus between cultural identity and socialisation. Aronson Fontes has conducted extensive research into culture and child protection and synthesises the role of culture as follows:<sup>274</sup>

... culture defines what is natural and expected in a given group. We all participate in multiple cultures: ethnic, national and professional, among others. We carry our cultures with us at all times and they have an impact on how we view and relate to people from our own and other cultures.

[38] In relation to Aboriginal children and young people, a range of Aboriginal and Torres Strait Islander organisations have highlighted that connection to family, culture and community are central to the safety, welfare and well-being of Aboriginal young people.<sup>275</sup> As Libesman states:<sup>276</sup>

Cultural care is about being part of a family, community, extended network, knowing where you belong, and knowing what the difference is between two different nations.

[39] The *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) also places culture as a critical consideration in decision-making for both non-Aboriginal and Aboriginal children and young people.<sup>277</sup> For Aboriginal children and young people, the Aboriginal and Torres Strait Islander child placement principles make clear that the identity and socialisation needs of Aboriginal and Torres Strait Islander children and young people will be met most successfully in placements that foster Aboriginal culture and identity.<sup>278</sup>

[40] It is clear that a fundamental understanding and positive association with Aboriginal cultural identity can manifest in positive life-course outcomes and that:<sup>279</sup>

[Aboriginal children] do better in terms of their emotional, physical and psychological wellbeing if they have a strong connection to cultural identity.

[41] A positive characterisation of Aboriginality can act as a protective factor in ensuring that culture is used constructively, rather than destructively. Cultural competence in this context is about challenging labels that associate Aboriginality with antisocial behaviour.

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<sup>274</sup> L Aronson Fontes, *Child abuse and culture: working with diverse families*, Guildford Press, 2005, p 4.

<sup>275</sup> T Libesman, *Cultural care for Aboriginal and Torres Strait Islander children in out of home care — Report 2011*, Secretariat of National Aboriginal and Islander Child Care, 2011, pp 11–14.

<sup>276</sup> *ibid*, p 11.

<sup>277</sup> *Children and Young Persons (Care and Protection) Act 1998*, Ch 2, Pts 1 and 2.

<sup>278</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 13.

<sup>279</sup> Commission for Children and Young People, Victoria, *In the child's best interests: inquiry into compliance with the intent of the Aboriginal Child Placement Principle in Victoria*, 2015, p 13.

[42] Ms Eileen Cummings, Chair of the Northern Territory Stolen Generation Aboriginal Corporation succinctly captures this challenge:<sup>280</sup>

Children have always been loved and respected and nurtured and taught in the Aboriginal way. It is important that these values and systems are encouraged and that Aboriginal people are empowered to ensure the systems are once again taught to their children to bring back pride and dignity to the Aboriginal people and communities. Too often the focus is wholly on the negative, not the positive, of Aboriginal child rearing and the Aboriginal practices which give young people their identity, their values, their role and their purposes in life.

[43] Whilst all children and young people in care require a range of supports to address trauma and abuse, there is an additional need for Aboriginal and Torres Strait Islander children to be provided with cultural support through tailored counselling and collaboration, to assist in maintaining links to their family and culture.

[44] Ms Megan Mitchell, National Children's Commissioner, stated that it is necessary to collaborate and engage with Aboriginal communities in order to drive a paradigm shift and improve outcomes for children and young people:<sup>281</sup>

That includes things like improving the number of Aboriginal people that are in child-protection and home-care workforce so that you can have effective engagement with families so that they become part of the solution and so that they are driving and owning the problem and the solution. If we keep disempowering these communities and families, we will just create more of the same intergenerational disadvantage.

[45] Using this research as my foundation, I have formed the view that culture is central to the identity formation and socialisation of children and young people.

[46] Culture carries a young person through their formative years and provides a sense of belonging in this world. If a child is removed from their parents, culture remains important — whether the child is at an age when they are cognisant of this process or not. It follows then, that when making decisions about a child or young person's care, we must pay particular attention to providing options that will enhance a child or young person's socialisation and sense of belonging.

[47] Hence, I have committed myself to safeguarding, monitoring and insisting upon the implementation of the Aboriginal and Torres Strait Islander Placement Principles, and as a corollary, the development of focussed cultural planning for Aboriginal children and young people.

[48] As you are aware, the Care Act is to be administered under the "paramountcy principle", that is, that the safety, welfare and well-being of the child or young person is paramount: s 9(1). In addition to this paramountcy principle, the Care Act sets out other particular principles to be applied in its administration: s 9(2).

[49] One of these principles is that account must be taken of concepts such as culture, language, identity and community.

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<sup>280</sup> E Cummings, Chair, Northern Territory Stolen Generations Aboriginal Corporation, *Committee Hansard*, Darwin, 2 April 2015, p 28, referred to in Australian Senate, Community Affairs References Committee, *Out of home care*, 2015, Chapter 8, pp 220–1.

<sup>281</sup> M Mitchell, National Children's Commissioner, *Committee Hansard*, Sydney, 18 February 2015, pp 5–6, referred to in Australian Senate, Community Affairs References Committee, *Out of home care*, p 219.

- [50] It is a principle to be applied in the administration of the Care Act that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as is possible: s 11(1).
- [51] Further, Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12.
- [52] Finally, a general order for placement of an Aboriginal or Torres Strait Islander child who needs to be placed in statutory out-of-home care is prescribed: s 13(1). In summary, the order for placement is, with:
- (a) a member of the child's or young person's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or
  - (b) a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs, or
  - (c) a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child's or young person's usual place of residence, or
  - (d) a suitable person approved by the Secretary after consultation with:
    - (i) members of the child's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and
    - (ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.
- [53] Before it can make a final care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed: s 83(7)(a).
- [54] Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security: s 78A. The plan must:
- (a) have regard, in particular, to the principles set out in, inter alia, s 9(2)(e), that if a child or young person is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's or young person's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement: s 78A(1)(a), and
  - (b) meet the needs of the child or young person: s 78A(1)(b), and
  - (c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements: s 78A(1)(c).
- [55] The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles and to adequately and appropriately address cultural planning are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

- [56] The need for appropriate cultural planning is linked to the need to ensure that early intervention and pre-removal options are explored to their fullest extent.
- [57] I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children. As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4 at [94]–[95]:
- The Aboriginal and Torres Strait Islander Principles are in the Care Act 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons.
- They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters coming before the Children's Court.
- [58] I am happy to report that in the past year a template for a cultural action planning section in the care plan has been developed by the Children's Court, in conjunction with DFaCS, the Aboriginal Child, Family and Community Care State Secretariat (NSW), the Aboriginal Legal Service (NSW/ACT) and Legal Aid NSW. The idea behind this template is to ensure that adequate casework is undertaken to appropriately identify a child's cultural origins, put in place fully developed plans for the child to be educated and fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.
- [59] I am optimistic that this will not be a superficial solution to a complex issue. I am committed to a future where Aboriginal children and young people understand their lineage and heritage. I strongly believe that if Aboriginal children and young people are culturally supported at a young age, they have a better chance of successfully progressing through their lives.
- [60] I now hand over to Ms Penny Hood, Director of Innovation, Co-design and Implementation at the DFaCS, to detail the roll-out of the redesigned cultural care plan template to caseworkers and the work the DFaCS is undertaking to ensure that cultural planning becomes a core and mandatory part of caseworker activity.



# Expert clinical evidence in care proceedings

His Honour Judge Peter Johnstone, President of the Children’s Court of NSW; the paper was first presented for the Australian and New Zealand Association of Psychiatry, Psychology and Law (ANZAPPL), Annual General Meeting, 1 March 2017, Sydney.<sup>282</sup>

## [1-0200] Introduction

- [1] The relationship between psychiatry, psychology and the law is of significant relevance to the Children’s Court, as we rely heavily on developments in these areas to inform our understanding of the children who come before the court, and assist us in shaping our decision-making to better address the issues of care and protection and youth crime.
- [2] The first part of my paper is about the specialist nature of the Children’s Court jurisdiction. In the second part, I will explore the use of expert clinical evidence, particularly in Care cases. Finally, in the third part, I will canvass the emerging importance of advances in the understanding of brain development in dealing with issues in the Children’s Court, particularly in the area of youth crime.
- [3] My hope is that my discussion may provide some relevant insight into the operation and work of the Children’s Court, and help promote a better understanding between ANZAPPL and the Children’s Court of the expert’s role in court proceedings. As professionals working within these areas that are so interconnected, we are charged with the task, and indeed the privilege, of collaboration and consultation, in order to better understand those children and young people that we seek to support.

## Specialist nature of the Children’s Court role and structure of the Children’s Court

- [4] Today, the Children’s Court of NSW consists of a President, 15 specialist Children’s Court magistrates and 10 Children’s Registrars. It sits permanently in seven locations, and conducts circuits on a regular basis at country locations across NSW.
- [5] The Children’s Court of NSW deals with both care and protection matters and offences committed by children under 18.
- [6] Although these are two separate jurisdictions, there is a distinct correlation between a history of care and protection interventions and future criminal offending. 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”<sup>283</sup> — 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. In Judge Marien’s

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<sup>282</sup> I acknowledge the considerable help and valuable assistance in the preparation of this paper by the Children’s Court Research Associate, Elizabeth King.

<sup>283</sup> M Marien, “‘Cross-over kids’ — childhood and adolescent abuse and neglect and juvenile offending”, paper presented to the National Juvenile Justice Summit, 26 and 27 March 2012, Melbourne. See “Cross-over kids: the drift of children from the child protection system into the criminal justice system” at [1-0180].

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>284</sup>

[7] 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.

[8] 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 NSW**

[9] 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 tracing back to 1850.

[10] 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.

[11] 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>285</sup>

[12] The first special provision recognising the need to treat children differently was the *Juvenile Offenders Act 1850*.<sup>286</sup>

[13] This legislation was enacted to provide speedier trials and address the “evils of long imprisonment of children”.

[14] Then, in 1866, further reforms were introduced, including the *Reformatory Schools Act 1866*.<sup>287</sup>

[15] This Act provided for the establishment of reformatory schools as an alternative to prison, and the *Destitute Children Act 1866*,<sup>288</sup> under which public and private “industrial schools” were established, to which vagrant and destitute children could be sent.<sup>289</sup>

[16] 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.

<sup>284</sup> J Cashmore, “The link between child maltreatment and adolescent offending” (2011) 89 *Family matters* 31 at <https://aifs.gov.au/publications/family-matters/issue-89/link-between-child-maltreatment-and-adolescent-offending>, accessed 28 March 2018.

<sup>285</sup> State Library of NSW Research Guides, “First Fleet Convicts” at [www.sl.nsw.gov.au](http://www.sl.nsw.gov.au), accessed 28 March 2018.

<sup>286</sup> 14 Vic No II, 1850.

<sup>287</sup> 30 Vic No IV, 1866.

<sup>288</sup> 30 Vic No II, 1866 (otherwise known as the *Industrial Schools Act 1866*).

<sup>289</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.

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

- [17] 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: s 16(1)(d). 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.
- [18] 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.
- [19] I continue to be astounded by the complexity of the issues that arise in this area. 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. The evidence arising from the public hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse, and more recently, the Royal Commission into the protection and detention of children in the Northern Territory, exemplify the systemic failures that can arise when silos are maintained and networks are broken.
- [20] In particular, the need for ongoing collaboration between the scientific and legal community is absolutely crucial, as the ability of judicial officers to understand and make decisions in the best interests of children relies heavily on our ability to understand the social, emotional and psychological development of children, and to be able to identify areas for prevention, early intervention, diversion and rehabilitation.
- [21] 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 Court magistrates.
- [22] 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. However, this is a particularly special jurisdiction that is imbued with the practice of therapeutic jurisprudence and restorative justice.
- [23] 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.
- [24] 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.
- [25] Children's Court magistrates now hear something like 90% of care cases in the State.
- [26] 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

[27] 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).

[28] 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).

[29] 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>290</sup>

[30] 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.

[31] Specifically, it states that the following principles are to be applied with regard to the administration of the Act:<sup>291</sup>

- (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 reparation 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.

[32] The YOA is a statutory embodiment of early intervention and diversion, providing the option of warnings, cautions and Youth Justice Conferences (YJCs). 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.

<sup>290</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 60.

<sup>291</sup> *Children (Criminal Proceedings) Act 1987*, s 6.

[33] YJCs 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. Further, YJCs facilitate co-operation between the young person and police and foster collaboration and input from the individual offender, victims, families and communities. I am particularly supportive of the use of YJCs. In my view, they produce fruitful results for both the individual offender and the community.

[34] 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>292</sup>

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

[35] 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.

[36] 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. Additionally, police do not wear their uniforms or carry their appointments in court.

[37] 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.

[38] 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*:<sup>293</sup>

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.

[39] In addition, the Children's Court has the benefit of assistance from the Children's Court Clinic.

[40] The Children's Court Clinic (which I will refer to in short form as 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.

[41] Upon the making of an assessment order by the court, the Clinic may provide a psychological or psychiatric assessment of a child,<sup>294</sup> or an assessment of a person's capacity to carry out parental responsibility.<sup>295</sup>

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<sup>292</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.

<sup>293</sup> [2014] EWCA Crim 2064 at [38]–[45].

<sup>294</sup> *Children and Young Persons (Care and Protection) Act 1998*, s 53.

<sup>295</sup> *ibid* s 54.

[42] I will canvas the use of expert evidence, including the giving of expert evidence by clinicians shortly.

[43] 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.

[44] Organisations such as ANZAPPL have the benefit of many decades of wisdom and knowledge in the areas of psychology and psychiatry. Any discourse that facilitates collaboration, capacity building and information exchange is a discourse that is worth supporting. Accordingly, I see this as an opportunity to share our respective wisdom and expertise.

### **The use of expert clinical evidence**

[45] The court may receive the benefit of expert evidence from different classes of experts, including a clinician from the Children’s Court Clinic. Clinicians are effectively single witness experts in the sense that they are appointed by the court, and are not qualified or retained by a party. However, it is also possible for a party to retain an external expert, such as a psychologist or a psychiatrist, a surgeon or speech therapist.

[46] The Children’s Court expects all experts, including clinicians, to be aware of, to apply and to adhere to the provisions of the Expert witness code of conduct (the Code) set out at Sch 7 of the *Uniform Civil Procedure Rules 2005*. Experts must not advocate for a party. It is the expert’s paramount duty, overriding any other duty, or loyalty to the person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness.

[47] External experts retained by a party such as the mother or father of a child, are bound by this duty of impartiality in the same way a clinician is, however the independence of an external expert is impacted by the terms of reference given to the expert by the contracting party.

[48] Therefore, although the Code applies equally to clinicians and external experts, I will discuss the role of the clinician first, and then canvass some more general requirements of all expert witnesses.

### **The role of the clinician**

[49] It is important to distinguish the role of the clinician from the role of the court.

[50] As I have set out above, the court only intervenes where there is a need for care and protection. This is a “critical first step” that reflects the UN Convention on the Rights of the Child (CROC) in acting as a safeguard, protecting families from unnecessary state intervention into their lives.<sup>296</sup>

Once having intervened, the role of the Court then differs from other Courts. One would normally expect a court to have powers of compulsion, to require parties before it to do certain things so as to resolve the issue in dispute. In fact, the Children’s Court has very few powers of compulsion. It can compel people to attend before it or produce documents to it. It can reallocate parental responsibility — notwithstanding the disagreement of everyone before the Court to the orders that the Court proposes to make.

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<sup>296</sup> J Mason, “Courts, DoCS and Child Protection in NSW”, Judicial Commission of NSW, District Court of NSW Seminar, 20 May 2009, at p 7.

The Court can also compel attendance as part of a therapeutic program. But beyond those very limited powers all of the other powers of the Children's Court require the consent and co-operation of at least one of the child, the family, DoCS (now DFACS) or other agencies.

This can prove extraordinarily frustrating for judicial officers. It is however a natural element which reflects the peculiarities of making an order in one point of time which will potentially bind a child and family for years to come.

[51] Thus, for example, the court cannot order restoration. It can only decide to accept or reject the assessment of the Secretary. The court cannot direct the permanent placement. It can only approve or not approve the Secretary's permanency plan.

[52] The court is, however, required to make findings. The role of the clinician, in simple terms, is to assist the court in making those findings. It is absolutely critical, therefore, that the clinician be, and be seen to be, completely impartial and independent of the parties, whether it be the department, or family members, or any of the lawyers and caseworkers involved.

[53] Perhaps one way of looking at it is to say, in accordance with the paramountcy principle; their role is to assist the court to make decisions that best promote the safety, welfare and well-being of the child.

[54] The clinician's role, to impartially assist the court, has several practical consequences.

[55] Assist means not attempting to guide or shape the outcome, or to pre-empt a finding, or to attempt to inappropriately influence the judicial officer. Clinicians must not try to be the lawyer and purport to interpret the Care Act or the CROC in forming their opinion. Their assessment should focus on clinical matters, consistent with their expertise, not the legal principles.

[56] Clinicians must not say what they think the parties want to hear. They must be aware of the audience, but where necessary, be firm, and frank, about deficiencies in the parents or others. It is for the court to apply the law to the facts as it finds them, with the clinician's assistance as to what those facts are.

[57] The first way in which clinicians assist the court is by the provision of an expert opinion.

[58] That opinion must derive first from a body of specialised knowledge, obtained by clinicians by reason of their training, experience and study. Thus, clinicians should clearly identify and be able to demonstrate what that specialised knowledge is, and how they obtained it. Clinicians must not, therefore, stray outside their area of expertise.

[59] For example, a general practitioner should not express a view on a matter of psychiatry, or at least should make clear that the view is based on a limited level of general medical knowledge derived from study or general practice.

[60] Secondly, the opinion must derive from facts, that is, it must be based on matters that the clinician has observed, or assumed to be accepted facts, or which are assumed to be subsequently proved or disproved. The facts or assumed facts upon which a clinician or expert relies should be set out and differentiated, in the sense that they are matters which have been personally observed, read or been informed about, or which have been assumed or hypothesised (usually in cross-examination).

[61] Thirdly, clinicians should articulate the reasoning process they have used to come to any opinion or conclusion, and be in a position to defend it.

[62] In addition to providing the court the benefit of their expertise, clinicians in the Children's Court have another very important facet to the way they assist the court. They provide information, not necessarily in the form of an opinion, but a hybrid factual form of evidence, which can greatly assist the judicial officer. Because they observe the protagonists over a period of time, interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes, they can provide the court with insights and nuances that might not otherwise come to its attention. They can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the court, trammelled by the adversarial process and the "snapshot" nature of a court hearing, the benefit of which it would not otherwise have.

[63] Importantly, clinicians must not approach issues in the same way as a treating medical practitioner, who will accept and rely on a history of given symptoms described or signs recorded, generally at face value, to diagnose and treat a patient. In contrast, clinicians should question histories, particularly if at odds with other material they have read or heard, or observed. They should objectively assess and test the facts they rely on, consistent with their duty of impartiality and independence. Clinicians cannot take things at face value, as they otherwise risk misleading or confusing the court.

[64] Clinicians should also be prepared to change their view, or have their view rejected by the court, where the facts upon which their opinion was based are found not to have been established, or where a different set of facts about which the expert was not aware emerges, or the significance of which was not fully appreciated by the expert. As Mark Allerton has said on a previous occasion:<sup>297</sup>

it is important to show that you have canvassed a range of views and information, but have made your own assessment of their validity and accuracy, and assessed the extent to which they support or weaken your own findings.

[65] I set out now something I wrote about a clinician, as it seems to encapsulate some of the points I have been making:

I am persuasively guided by the opinion of the Clinician. He is, after all the court's witness (as counsel was at pains to remind me), and may therefore be presumed to be unbiased and objective. There was no suggestion that he wasn't. It is one thing for a judge to listen to the mother as she gave her evidence for a short period of time, and to observe her demeanour in the cloistered environment of the courtroom. She was undoubtedly on her best behaviour, which was at odds with some of the evidence emerging from the documentary material, and with the way she appears to have conducted herself at the hearing in the Children's Court ... On the other hand, the Clinician has had extensive contact not only with the mother, but also with the children and the carers, including observation of them all during contact sessions, and at the homes of the carers. He has also carried out and interpreted the results of an extensive array of psychological tests and assessments. This and his experience as a clinician over

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<sup>297</sup> M Allerton, "How to be a real expert, and not just an old drip under pressure", August 2008, p 4.

many years of practice in this area make him far more equipped than me, and with respect, the Department's personnel, to evaluate the mother. I found the Clinician to be a most impressive witness.

I've had occasion to hear evidence from a number of psychologists over the past eighteen months, and he was a stand out for lucidity, objectivity, thoroughness, careful reasoning and thoughtfulness.

[66] There is no substitute for common sense.

### **Giving expert evidence**

[67] Given the audience before me today, it would be beneficial for me to reinforce some of the requirements for expert evidence in the Children's Court, which applies to clinicians as well as all other appointed experts, as outlined in the Code and the relevant Practice Notes.<sup>298</sup>

[68] An expert's assessment report should clearly set out the name and address of the expert, an acknowledgement by the expert that they have read the Code and agree to be bound by it, as well as their qualifications in preparing the report.<sup>299</sup> Additionally, the expert must clearly set out any written material which has been considered or relied upon, and also any examinations, tests or investigations which have been relied upon.

[69] To the extent to which any opinion expressed by the expert involves the acceptance of another person's opinion, the identification of that person and the opinion expressed by that person, including any literature should be provided.<sup>300</sup>

[70] By way of example, I recently presided over a matter where two psychologists broke almost every rule in relation to the giving of expert evidence.

[71] They failed to describe their expertise, qualifications and experience in the report, and there was no formal scope for their retainer, or letter of instructions. They were unaware of the Code and the Children's Court Practice Note, and were therefore unable to comply with either. Most importantly, they also failed to list the documents they considered as part of their investigation. I was asked to reject their report in its entirety, and if I had been in any other jurisdiction than the Children's Court, I would have done so.

[72] Expert evidence plays a crucial role in care proceedings at the Children's Court, whether it be provided by a clinician or an external expert retained by a party. It is absolutely crucial, therefore, that experts be aware of the Code and the Practice Note, and comply accordingly so as to present valuable evidence which will assist the court in determining the best interests of the child with regard to safety, welfare and wellbeing. To do so otherwise is to risk wasting the court's time and resources.

[73] It is important to distinguish between criminal trials and civil trials, where the burden of proof is significantly lower. In criminal matters the Crown is generally required to prove a fact beyond reasonable doubt, hence it is common to see a defence run along the lines of causing confusion, or "muddying the waters", to create a reasonable doubt.

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<sup>298</sup> Practice Note No 6, "Children's Court Clinic assessment applications and attendance of authorised clinicians at hearings, dispute resolution conferences and external mediation conferences", 2011, Children's Court of NSW; Practice Note No 9, "Joint conference of expert witnesses in care proceedings", 2012, Children's Court of NSW.

<sup>299</sup> Uniform Civil Procedure Rules 2005, Sch 7, cl 3(a), (b) and (c).

<sup>300</sup> *ibid*, cl 3(e), (g) and (h).

- [74] In care cases, however, the facts need only be established on the balance of probabilities: s 93(4) of the Care Act. In applying that standard, the court will have regard to the gravity and importance of the matters to be determined in accordance with the principles in *Briginshaw v Briginshaw*;<sup>301</sup> *Director General of Department of Community Services; Re “Sophie”*.<sup>302</sup> Thus, the court will not lightly make any findings in respect of the serious allegations: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*.<sup>303</sup>
- [75] The point might be demonstrated by a case study, in a case involving the so-called shaken baby syndrome, decided in the District Court on appeal in 2010: *SS v Department of Human Services*.<sup>304</sup>
- [76] The Secretary’s case was that the baby in question had suffered a non-accidental abusive head injury causing severe brain damage, and that the perpetrator(s), although not identified, were, on the balance of probabilities the mother and/or the father.
- [79] Reliance was placed principally on the hospital records and the evidence of the Staff Specialist Paediatrician of the Child Protection Unit at the Children’s Hospital at Westmead, a specialist paediatric ophthalmologist who had worked in the area for 21 years, and Professor David Isaacs, a senior staff specialist in General Paediatrics and Paediatric Infectious Diseases at Westmead Children’s Hospital.
- [80] The parents contended that, upon analysis, the medical conclusion of a “shaken baby” was based on less than unassailable foundations.
- [81] They submitted that the existence of alternative hypotheses, together with the “circular reasoning” of the “science” of shaken baby syndrome, led to the position where the court could not be comfortably satisfied that the Secretary had proved the case against the parents.
- [82] The so-called alternative hypotheses as to the possible cause of the baby’s brain damage, including for example meningitis, or a congenital condition, were advanced by two doctors from the United States, qualified on behalf of the parents and brought to Australia to give evidence. The reality was that these two American doctors were professional expert witnesses who were nothing more than “hired guns”, whose evidence was not directed at discovering the true cause, rather it was designed to create doubt as to the Secretary’s hypothesis of shaken baby syndrome.
- [83] The court said of the American doctors:<sup>305</sup>

Dr Gabaeff and Dr Gardner approached the task from a prejudiced and pre-judged perspective. Their evidence, which was wholly concerned to debunk the notion of shaken baby syndrome, is to be approached with considerable caution. The medical evidence led by the [Secretary], on the other hand, involved a logical evaluation of all available material, was concerned to consider other possibilities, and was carefully and logically reasoned. That evidence is consistent with mainstream paediatric medical opinion. By their own admission, Dr Gabaeff and Dr Gardner are outside that conventional paradigm.

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<sup>301</sup> (1938) 60 CLR 336.

<sup>302</sup> [2008] NSWCA 250.

<sup>303</sup> (1992) 67 ALJR 170.

<sup>304</sup> [2010] NSWDC 279.

<sup>305</sup> *SS v Department of Human Services* [2010] NSWDC 279 at [99], [105].

...

[They] were unashamedly partisan, and the totality of their evidence must be viewed with suspicion.

[84] The point was that creating a doubt may have been enough for a criminal jury to have a reasonable doubt as to the guilt of the parents, but in a Care case, where the paramount concern is the safety, welfare and well-being of the children, the court looks at the probabilities. Hence, the judge concluded:<sup>306</sup>

I am comfortably satisfied, on the balance of probabilities, that the proximate cause of the brain damage observed following [the baby's] hospitalisation on that day was non-accidental shaking in the previous 24 hours. The only persons who, on the balance of probabilities, were in the available pool of perpetrators, were the parents.

[85] Where the court is asked to accept an opinion of an expert, it will look to the substance of the opinion expressed.

[86] Accordingly, the cogency of the reasoning process plays an important role: *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [92]. A reasoned explanation or conclusion must be presented.

[87] This requires the expert to explain the methodology employed to reach the conclusion expressed, that is, to identify the chain of reasoning leading to the conclusion.

[88] It is also important to be aware that the judicial officer is required to express a view about an expert's evidence, especially where it conflicts with someone else giving evidence about the same issue. This means experts should be measured in any criticism they make of other witnesses, objective but not pejorative. Conversely, experts should not take criticism of their views personally. It is in the nature of litigation that criticism will be made. If everything was straightforward and clear cut, there would be no need for court cases.

[89] Finally, I want to make a few observations about future directions in expert evidence.

[90] The Clinic has already made some forays into joint opinion writing. There are difficulties with that, as it gives rise to practical issues such as who expressed what opinion, who has what expertise, and who should be cross-examined about what.

[91] On the other hand, there is great value in having the experts get together in advance of a hearing, or even during the hearing, to confer and identify what they agree about, and what they differ on and why. I, for my part, will be utilising these techniques in the Children's Court in the future.

[92] In the recent case, referred to above involving the joint report, I put the two authors into the witness box together to be cross-examined together. I doubt a judge would get away with this "technique" in any other court.

### **The emerging importance of advances in the understanding of brain development, particularly in the area of youth crime**

[93] Throughout my time at the Children's Court, I have undertaken some research into the issues and circumstances surrounding the reasons young people commit offences.

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<sup>306</sup> *ibid* at [108].

- [94] Given the expertise of the audience before me today, I will only briefly outline the research relating to adolescent brain development, and will discuss why it is so important why we must continue to grow our knowledge in this area, in order to better respond to youth offending.
- [95] 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>307</sup>
- [96] 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.
- [97] A further complication is that brain development differs depending upon a number of variables and that “neuroscientific data are continuous and highly variable from person to person; the bounds of ‘normal’ development have not been well delineated.”<sup>308</sup>
- [98] Despite this, the 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.
- [99] Executive function of the prefrontal cortex is explained by Johnson, Blum and Giedd as:<sup>309</sup>
- a set of supervisory cognitive skills needed for goal-directed behavior, including planning, response inhibition, working memory, and attention ... Poor executive functioning leads to difficulty with planning, attention, using feedback, and, mental inflexibility, all of which could undermine judgment and decision making.
- [100] If we liken executive function of the pre-frontal cortex to a type of control centre of the brain, we can recognise that during adolescence, this control centre is under construction. As such, a young person’s ability to undertake clear, logical and planned decision-making prior to acting is also under construction.
- [101] Neurobiological development will continue beyond adolescence and into a person’s twenties, and different people will reach neurobiological maturity at different ages.<sup>310</sup>
- [102] 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.
- [103] This is not to say that the findings from neurobiology research exculpate all young offenders from criminal responsibility.

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<sup>307</sup> E McCuish et al, “Psychopathic traits and offending trajectories from early adolescence to adulthood” (2014) *Journal of Criminal Justice* 42 at 66–76; D Kenny, “The adolescent brain: implications for understanding young offenders” (2016) 28 *JOB* 23.

<sup>308</sup> S Johnson, R Blum, J Giedd, “Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy” (2009) 45 *Journal of Adolescent Health* 216 at 218.

<sup>309</sup> *ibid* at 217.

<sup>310</sup> B Midson, “Risky business: developmental neuroscience and the culpability of young killers” (2012) 19(5) *Psychiatry, Psychology and Law* 692 at 700. See also, S Gruber, D Yurgelun-Todd, “Neurobiology and the law: a role in juvenile justice?” (2006) 3 *Ohio State Journal of Criminal Law* 321 at 332.

- [104] Rather, these findings indicate that there is a grey area between right and wrong when considering the culpability of a young offender.
- [105] 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.
- [106] 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.
- [107] Dr Cashmore's research<sup>311</sup> shows links between brain development, trauma and criminal offending, and therefore it comes as no surprise that communication with children and young people is a discrete area of study in and of itself.
- [108] Judge Sexton, of the Victorian County Court, presented a paper titled "Communicating with children and young people" at the Speaking their Language conference in 2015, which highlighted the impact of brain development on the ability for children to give evidence.
- [109] Judge Sexton has identified problems associated with gratuitous concurrence — agreeing or disagreeing with a proposition because the person being questioned thinks that is what the questioner wants to hear — when asking questions of children and young people, particularly those who have been exposed to trauma. In addition, she acknowledges:<sup>312</sup>
- Often adolescents are considered capable of communicating in an adult way, but if they have been subjected to trauma in their lives, there may be an underlying disability which means they are really functioning at the level of an under 12 year old, but will be too embarrassed to admit to not understanding.
- [110] The growing recognition of the relevance of "brain science" has driven the need for policy and legislation to "match" the research.
- [111] This issue was addressed in detail by the Principal Youth Court Judge of New Zealand, Judge Andrew Becroft, in a comprehensive paper delivered in 2014 at the Australasian Youth Justice Conference in Canberra.<sup>313</sup> He pointed out that the first decade of this century has been called the "decade of the teenage brain", an expression coined by the Brainwave Trust Aotearoa, a not-for-profit organisation working in the field of adolescent brain development.<sup>314</sup>
- [112] In his paper, Judge Becroft said some important things:<sup>315</sup>

In recent years, a wealth of neurobiological data from studies of Western adolescents has emerged, suggesting that biological maturation of the brain begins (and continues) much later in life than was generally believed. Many neuroimaging studies mapping

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<sup>311</sup> Cashmore, above, n 3. See also Kenny, above, n 26.

<sup>312</sup> M Sexton, *Communicating with children and young people*, Speaking their Language Conference, Judicial College of Victoria, 19 October 2015 at p 4.

<sup>313</sup> A Becroft, "'From little things, big things grow' — emerging youth justice themes in the South Pacific", Australasian Youth Justice Conference, 20 May 2013, Canberra.

<sup>314</sup> See [www.brainwave.org.nz](http://www.brainwave.org.nz), accessed 26 June 2018.

<sup>315</sup> Becroft, above, n 32 p 5.

changes in specific regions of the brain have shown that the frontal lobes (which are responsible for “higher” functions such as planning, reasoning, judgement and impulse control) only fully mature well into the 20s (some even suggest that they are not fully developed until halfway through the third decade of life). Brain science research also shows that when a young person’s emotions are aroused, or peers are present, the ability to impose regulatory control over risky behaviour is diminished.

[113] Judge Becroft argues that these findings have implications for youth justice policy and will affect our perceptions of young people’s culpability for their actions and the establishment of an appropriate age of criminal responsibility. He states:<sup>316</sup>

They also affect our understanding of “what works” with young offenders and what our expectations should be with respect to various responses and interventions ... Finally, they change any presumption that young people are simply “mini-adults” and that the same responses to offending should be used for both adults and young people ...

A key challenge for Australasian Courts is how to make use of this growing body of irrefutable research ...

It is a constant challenge for those involved in youth justice to keep learning more about adolescent brain development, and to take this into account.

[114] In addition to Judge Becroft’s paper, I was particularly attracted to the research undertaken by Richards in “What makes juvenile offenders different from adult offenders?” published by the Australian Institute of Criminology.<sup>317</sup>

[115] The central theme of Richards’s paper is that “most juveniles will ‘grow out’ of offending and adopt law-abiding lifestyles as they mature”.<sup>318</sup>

[116] The paper goes on to argue that a range of factors, including lack of maturity, the propensity to take risks and a susceptibility to peer influence, combined often with intellectual disability, mental illness and victimisation, operate to increase the risk of contact of juveniles with the criminal justice system.

[117] These factors, combined with the unique capacity of juveniles to be rehabilitated can require intensive and often expensive interventions.

[118] The paper postulates that crime is committed disproportionately by young people. Persons aged 15 to 19 years are more likely to be processed by police for the commission of a crime than are members of any population group. This does not mean, however, that juveniles are responsible for the majority of recorded crime.

[119] On the contrary, police data indicates that 10 to 17 year olds comprise a minority of all offenders who come into contact with police. This is primarily because offending peaks in late adolescence, when young people are aged 18 to 19 years.

[120] Thus, rates of offending peak in late adolescence and decline in early adulthood.

[121] Although most juveniles grow out of crime, they do so at different rates. A small proportion of juveniles continue offending well into adulthood. This small “core” has repeated contact with the criminal justice system and is responsible for a disproportionate amount of crime.

<sup>316</sup> *ibid*, pp 5–6.

<sup>317</sup> K Richards, “What makes juvenile offenders different from adult offenders?” (2011) 409 *Trends & issues in crime and criminal justice* 1 at <http://aic.gov.au/publications/current%20series/tandi/401-420/tandi409.html>, accessed 3 April 2018.

<sup>318</sup> *ibid* at 1.

- [122] The paper goes on to demonstrate that juveniles disproportionately commit certain types of offence (graffiti, vandalism, shoplifting and fare evasion).
- [123] Conversely, very serious offences (such as homicide and sexual offences) are less frequently committed by juveniles, as they are incompatible with developmental characteristics and life circumstances. On the whole, juveniles are more frequently apprehended in relation to offences against property than offences against the person. Juveniles are more likely than adults to come to the attention of police, for a variety of reasons, including:
- they are usually less experienced at committing offences
  - they tend to commit offences in groups, and to commit their offences close to where they live
  - they often commit offences in public areas, such as shopping centres, or on public transport.
- [124] Further, by comparison with adults, juveniles tend to commit offences that are attention seeking, public and gregarious, and episodic, unplanned and opportunistic.
- [125] In my view, it is our job to do our best to help juveniles through these problem years until they mature. In light of these advances in brain science and the implications these findings have for young offenders and their treatment in the criminal justice system, it is important to also consider a final reason why children must be treated differently.
- [126] There is a growing body of evidence that supports the proposition that incarceration of children and young persons is both less effective and more expensive, and doing away with juvenile incarceration will not increase the risk to the community.
- [127] 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. For example, Wald and Martinez assert that no experience is more predictive of future adult difficulty than confinement in a juvenile facility.<sup>319</sup>
- [128] Young people who go into custody mix with some other young people who are already deeply involved in criminal offending. Some will form friendships with more experienced offenders and be influenced to commit further offences as a result. This is often referred to as the “contamination” effect.
- [129] A further important consideration is the “inoculation” effect. If the young person goes into custody for a day and is then released, one of the outcomes is that some will conclude that being in custody wasn’t all that bad, especially in comparison to their circumstances in the community.
- [130] If this happens on a few occasions, even for slightly longer periods of time, the deterrent effect of going into custody diminishes greatly.<sup>320</sup>

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<sup>319</sup> M Wald and T Martinez, “Connected by 25: improving the life chances of the country’s most vulnerable 14–24 year olds”, William and Flora Hewlett Foundation Working Paper, 2003, at [www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf](http://www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf), accessed 3 April 2018.

<sup>320</sup> P Mulrone, “Illustrating the impact of bail refusal”, a paper presented at the Reducing Indigenous youth incarceration conference, 27 September 2012, Sydney.

- [131] Children who have been incarcerated are more prone to further imprisonment. Recidivism studies in the United States show consistently that 50–70% of youths released from juvenile correctional facilities are re-arrested within 2–3 years.<sup>321</sup> Further, children who have been incarcerated achieve less educationally, work less and for lower wages, fail more frequently to form enduring families, and experience more chronic health problems (including addiction), than those who have not been confined.<sup>322</sup>
- [132] Baldwin asserts that confinement in a secure facility all but precludes healthy psychological and social development.<sup>323</sup> This view is further bolstered by the research findings that incarceration actually interrupts and delays the normal pattern of “aging out”.<sup>324</sup>
- [133] Enlightened with these advances in the science of adolescent brain development, we are able to better understand, empower, protect, divert and rehabilitate children and young people falling into the youth justice system.

### Conclusion

- [134] The Children’s Court jurisdiction is a sensitive, specialised and complex jurisdiction. In NSW, the juvenile justice system is moving in the right direction, notwithstanding the oversimplification of juvenile offending through popular media reporting of young offending.
- [135] The NSW Bureau of Crime Statistics and Research (BOCSAR) reported on 30 January 2017 that the number of juveniles in custody in NSW has now fallen by 38%, from a peak of 405 detainees in June 2011 to 250 in December 2016.<sup>325</sup>
- [136] This rapid fall in the number of juveniles in custody reflects, I believe, the growing understanding of the impact of brain development on juvenile offending, and a shift in legal policy towards more effective methods of dealing with children and young people.
- [137] This is a positive step towards what I believe should be the ultimate aim of an enlightened juvenile justice system: to have no children in detention.
- [138] We can continue to strengthen and bolster the intersections of important areas, such as law, psychology and psychiatry, through meaningful collaboration and dialogue. In doing so, we move closer to the aim of no children in detention, and towards a more positive and empowering future for our children.

<sup>321</sup> Justice Policy Institute, *The costs of confinement: why good juvenile justice policies make good fiscal sense*, 2009, Washington DC, at [www.justicepolicy.org/images/upload/09\\_05\\_rep\\_costssofconfinement\\_jj\\_ps.pdf](http://www.justicepolicy.org/images/upload/09_05_rep_costssofconfinement_jj_ps.pdf), accessed 3 April 2018.

<sup>322</sup> See B Holman and J Ziedenberg, *The dangers of detention: the impact of incarcerating youth in detention and other secure facilities*, Justice Policy Institute, 2006, Washington DC, at [www.justicepolicy.org/research/1978](http://www.justicepolicy.org/research/1978), accessed 3 April 2018; E Mulvey, *Highlights from pathways to desistance: a longitudinal study of serious adolescent offenders*, Juvenile Justice Fact Sheet, Office of Juvenile Justice and Delinquency Prevention, US Department of Justice, 2011, Washington DC, at [www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf](http://www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf), accessed 3 April 2018.

<sup>323</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 3 April 2018.

<sup>324</sup> Holman and Ziedenberg, above n 35, p 6.

<sup>325</sup> BOCSAR, “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 3 April 2018.

# The Children’s Court of NSW: 2019

Judge Peter Johnstone, President of the Children’s Court of NSW, NSW Bar Association CPD Conference, 30 March 2019, Sydney Hilton, Sydney<sup>326</sup>

## [1-0210] Care and protection and the Children’s Court of NSW

Proceedings relating to the care and protection of children and young persons in NSW, including first instance matters before the Children’s Court, and appeals from its decisions, are public law proceedings, governed, both substantively and procedurally, by the *Children and Young Persons (Care and Protection) Act* 1998 (the Care Act).

Care proceedings<sup>327</sup> 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. The rules of evidence do not apply, the proceedings are non-adversarial and they are required to be conducted with as little formality and legal technicality and form as the circumstances permit.

### The guiding principles in the Care Act

Decisions in Care proceedings, at first instance and on appeal, are to be made consistently with the objects, provisions and principles provided for in the Care Act, and where appropriate, the United Nations’ *Convention on the Rights of the Child* 1989.<sup>328</sup>

The Care Act contains an inextricable mixture and combination of both judicial and administrative powers, duties and responsibilities. It is often difficult to precisely discern where the Department’s powers and responsibilities begin and end as opposed to those of the court. In summary, however, the Act establishes a regime under which the primary, and ultimate, decision-making as to children rests with the court.<sup>329</sup>

I will be concentrating, in this paper, on the judicial aspects of the legislation.

The objects of the Care Act located in s 8, are to provide:

- (a) that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and
- (a1) recognition that the primary means of providing for the safety, welfare and well-being of children and young persons is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement in accordance with the permanent placement principles, and
- (b) that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and

<sup>326</sup> This is the second part of the presentation. The first part of the presentation on youth crime and the Children’s Court of NSW can be found in *Criminal matters — background material* at [5-0180].

<sup>327</sup> Defined in Care Act s 60.

<sup>328</sup> *Re Tracey* (2011) 80 NSWLR 261; *Re Henry*; *JL v Secretary, DFaCS* [2015] NSWCA 89 at [208]ff.

<sup>329</sup> *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, November 2008 (the “Wood Report”) at 11.2 at <https://apo.org.au/sites/default/files/resource-files/2008/11/apo-nid2851-1183596.pdf>, accessed 26 June 2019.

- (c) that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

The Care Act sets out a series of principles governing its administration. These principles are largely contained in s 9, but also appear in other parts of the Act.

First and foremost is what is sometimes referred to as the paramountcy principle: s 9(1). This principle requires that, in any action or decision concerning a child or young person, the safety, welfare and well-being of the child or young person are paramount.

This principle, therefore, is the underpinning philosophy by which all relevant decisions are to be made.

This paramountcy principle operates, expressly, to the exclusion of the parents, the safety, welfare and well-being of a child or young person removed from the parents being paramount over the rights of those parents.

It is now well-settled law that the proper test to be applied is that of “unacceptable risk to the child”: *M v M* (1988) 166 CLR 69 at [25]. That case dealt with past sexual abuse of a child but the principles there set out apply to other forms of harm, such as physical and emotional harm.<sup>330</sup> A positive finding of an allegation of harm having been caused to a child should only be made where the court is satisfied according to the relevant standard of proof, with due regard to the matters set out in *Briginshaw*.<sup>331</sup> Nevertheless, an unexcluded possibility of past harm to a child is capable of supporting a conclusion that the child will be exposed to unacceptable risk in the future from the person concerned.<sup>332</sup>

The Secretary, will not fail to satisfy the burden of proof on the balance of probabilities simply because hypotheses cannot be excluded which, although consistent with innocence, are highly improbable: *Director General of Department of Community Services; Re “Sophie”* [2008] NSWCA 250 at [67]–[68], per Sackville AJA.

His Honour said in that decision:

The reasoning process I have outlined involves an error of law. The primary Judge, although stating the principles governing the burden of proof correctly did not apply them correctly. It was appropriate to take into account the gravity of the allegation of sexual misconduct made against the father, as required by s 140(2) of the *Evidence Act*. It was not appropriate to find that the [Secretary] had failed to satisfy the burden of proof on the balance of probabilities simply because his Honour could not exclude a hypothesis that, although consistent with innocence, was “*highly improbable*”. To approach the fact-finding task in that way was to apply a standard of proof higher than the balance of probabilities, even taking into account the gravity of the allegation made against the father.

As the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* at [171], statements to the effect that clear and cogent proof is necessary where a serious allegation is made are not directed to the standard of proof to be applied, but merely reflect the conventional perception that members of society do not ordinarily engage in

<sup>330</sup> *A v A* (2000) 26 Fam LR 382.

<sup>331</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336.

<sup>332</sup> *M v M* (1988) 166 CLR 69 at [26].

serious misconduct and that, accordingly, a finding of such misconduct should not be made lightly. In the end, however, as Ipp JA observed in *Dolman v Palmer* at [47], the enquiry is simply whether the allegation has been proved on the balance of probabilities.

Whether there is an “unacceptable risk” of harm to the child is to be assessed from the accumulation of factors proved: see *Johnson v Page* [2007] FamCA 1235. This is an exercise in foresight. The court must examine what the future might hold for the child, and if a risk exists, assess the seriousness of the risk and consider whether that risk might be satisfactorily managed or otherwise ameliorated, for example, the nature and extent of parental contact, including any need for supervision.<sup>333</sup>

Thus, one needs to examine the likelihood of the feared outcome occurring, and secondly, the severity of any possible consequences. The risk of detriment must be balanced against the possibility of benefit to the child.

Secondary to the paramount concern, the Care Act sets out other, particular principles to be applied in the administration of the Act. These are set out in ss 9(2), 10, 10A, 11, 12 and 13. There are also special principles of self-determination and participation to be applied in connection with the care and protection of Aboriginal and Torres Strait Islander children: ss 11, 12 and 13.

- Wherever a child is able to form their own view, they are to be given an opportunity to express that view freely. Those views are to be given due weight in accordance with the child's developmental capacity, and the circumstances: s 9(2)(a). See also s 10.
- Account must be taken of the culture, disability, language, religion and sexuality of the child and, if relevant, those with parental responsibility for the child or young person: s 9(2)(b).
- Any action to be taken to protect the children from harm must be the least intrusive intervention in the life of the children and their family that is consistent with the paramount concern to protect them from harm and promote their development: s 9(2)(c).
- If children are temporarily or permanently deprived of their family environment, or cannot be allowed to remain in that environment in their own best interests, they are entitled to special protection and assistance from the State, and their name, identity, language, cultural and religious ties should, as far as possible, be preserved.
- Any out-of-home care arrangements are to be made in a timely manner, to ensure the provision of a safe, nurturing, stable, and secure environment, recognising the children's circumstances and, the younger the age of the child, the greater the need for early decisions to be made: s 9(2)(e).

Unless contrary to the child's best interests, and taking into account the wishes of the child, this will include the retention of relationships with people significant to the children: s 9(2)(f).

- Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young persons with as much self-determination as is possible: s 11(1).

<sup>333</sup> S Austin, “The enigma of unacceptable risk”, paper delivered at the Hunter Valley Family Law Practitioners Association, 2015 Hunter Valley Family Law Conference, 31 July 2015, Hunter Valley.

- Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Minister, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12.
- Where possible, any out-of-home placement of an Aboriginal or Torres Strait Islander child is to be with a member of the extended family or kinship group.
- If that is not possible, the Act provides for a descending process of placement with an appropriate Aboriginal and Torres Straits Islander carer before, as a last resort, placement with a non-Aboriginal and Torres Straits Islander carer, after consultation: s 13(1).
- In determining where a child is to be placed, account is to be taken of whether the child identifies as an Aboriginal or Torres Strait Islander and the expressed wishes of the child: s 13(2).
- A permanency plan must address how the plan has complied with the Aboriginal and Torres Strait Islander Child and Young Person Placement Principles in s 13: s 78A(3).

The Care Act is not the most precise or orderly piece of legislation one could hope for. There are, however, a number of key concepts that principally occupy the exercise of the Care jurisdiction, about which I will say something. They include:

- removal of children and interim orders
- the need for care and protection — establishment
- permanent placement
- realistic possibility of restoration
- parental responsibility
- out-of-home care
- contact.

### **Removal of children from their parent(s) or carer(s)**

If the Secretary forms the opinion that a child is in need of care and protection, he or she may take whatever action is necessary to safeguard or promote the safety, welfare and well-being of the child: s 34(1).

Removal of a child into state care may be sought by seeking orders from the court (s 34(2)(d)), by the obtaining of a warrant (s 233), or, where appropriate, by effecting an emergency removal: s 34(2)(c); see also ss 43 and 44.

Where a child is removed, or the care responsibility of a child is assumed, by the Secretary, he or she is then required to make a Care application to the Children's Court within 3 working days and explain why the child was removed: s 45.

The court may then make interim Care orders: s 69. An "interim order" is an order of a temporary or provisional nature pending the final resolution of the proceedings in which an applicant "generally speaking, does not have to satisfy the court of the merits of its claim": *Re Jayden* [2007] NSWCA 35 at [77]. It may be made if it is not in the best interests of the safety, welfare and well-being of the child that he or she remain

with the parent or parents, or that it is appropriate for the safety (s 69(2)), welfare and well-being of the child (s 70), or that an interim order is necessary, and is preferable to an order dismissing the proceedings: s 70A.<sup>334</sup>

The usual interim order is for the allocation of parental responsibility to the Minister until further order.<sup>335</sup> Such an order enables appropriate investigation and planning to be undertaken by Departmental caseworkers while the child is in a protected environment.

The making of an interim order in effect puts the position of the parties in a holding pattern, without prejudice, and without any admissions.

The Care Act, as recently amended, makes it clear that parties may apply to vary an interim order without the need to follow the formal process that applies to the rescission or variation of final Care orders.

This overcomes a problem thought to be posed by the Supreme Court decision in *Re Timothy* [2010] NSWSC 524, to the effect that an application to vary an interim order needed to be brought under s 90 of the Care Act, such that a formal application was required seeking leave to apply, and evidence adduced to satisfy the court that there had been a significant change in circumstances.<sup>336</sup> The Children's Court may now vary interim orders at any time if considered appropriate, including on oral application in matters currently before the court.<sup>337</sup>

### **The need for care and protection**

After removal or assumption of a child into care, and the making of an interim order allocating parental responsibility to the Minister, the proceedings then focus on the past and current circumstances of the child. This first phase of care proceedings is generally referred to as the establishment phase. Thus, before the court moves to the second phase of the proceedings, in which the focus is on the child's future, the proceedings are required to be "established".<sup>338</sup>

The establishment precondition is satisfied if there has been a finding that there is an existing need of care and protection pursuant to s 71 of the Care Act: *VV v District Court of NSW* [2013] NSWCA 469 at [20]. It does not matter whether the conduct constituting a reason or part thereof for the purposes of s 71 occurred wholly or partly outside NSW: s 71A.

The rationale for the requirement that protective proceedings be established has been described as a safeguard against arbitrary intervention by the State into the lives of children and their families.<sup>339</sup>

The establishment issue is a threshold issue. It is a statutory precondition to the making of final Care orders in the second, welfare phase of protective proceedings. Establishment, or a finding, is not concerned with the issue of restoration, nor is it concerned with considerations of unacceptable risk of harm, nor with the amelioration of risk. These are matters for the second, welfare stage of protection proceedings.<sup>340</sup>

<sup>334</sup> *Re Jayden* [2007] NSWCA 35 per Ipp J at [70].

<sup>335</sup> *Re Mary* [2014] NSWChC 7.

<sup>336</sup> *Re Timothy* at [59]–[60].

<sup>337</sup> Care Act s 90AA.

<sup>338</sup> *Re Alistair* [2006] NSWSC 411 at [69].

<sup>339</sup> *ibid* at [64]–[65] per Kirby J.

<sup>340</sup> *DFaCS and Nicole* [2018] NSWChC 3.

For care proceedings to be “established” a finding is required that the child is in need of care and protection for any reason or was in need of care and protection at the time the Application was made.

Section 71(1) of the Care Act relevantly provides:

**Grounds for Care orders:**

The Children's Court may make a Care order in relation to a child or young person if it is satisfied that the child or young person is in need of care and protection for any reason including without limitation any of the following:

- (a) there is no parent available to care for the child or young person as a result of death or incapacity or for any other reason
- (b) the parents acknowledge that they have serious difficulties in caring for the child or young person and, as a consequence, the child or young person is in need of care and protection
- (c) the child or young person has been, or is likely to be, physically or sexually abused or ill-treated
- (d) subject to s 71(2), the child's or young person's basic physical, psychological or educational needs are not being met, or are likely not to be met, by his or her parents or primary care-givers
- (e) the child or young person is suffering or is likely to suffer serious developmental impairment or serious psychological harm as a consequence of the domestic environment in which he or she is living
- (f) in the case of a child who is under the age of 14 years, the child has exhibited sexually abusive behaviours and an order of the Children's Court is necessary to ensure his or her access to, or attendance at, an appropriate therapeutic service
- (g) the child or young person is subject to a care and protection order of another State or Territory that is not being complied with,
- (h) s 171(1) applies in respect of the child or young person.<sup>341</sup>

Thus, the need for “care and protection” is not conclusively defined, and the concept is at large; a finding may be made for “any reason”. The Care Act does, however, specify a range of circumstances that, without limitation, are included in the definition, or to which the definition extends: s 71.

The court is not bound by the rules of evidence unless it so determines: s 93(3). Nevertheless the court must draw its conclusions from material that is satisfactory in a probative sense so as to avoid decision-making that might appear capricious, arbitrary or without foundational material.<sup>342</sup>

The significance of a finding that a child is in need of care and protection is that it forms the basis for the making of final Care orders under the Care Act.<sup>343</sup>

Once proceedings are established, they enter the so-called second phase, sometimes referred to as the “welfare phase” during which planning for the child is undertaken, and following which final Care orders may be made. Establishment is a statutory precondition to the making of final Care orders in the welfare phase.<sup>344</sup>

<sup>341</sup> Section 171(1) deals with a child or young person residing in unauthorised statutory or supported out-of-home care.

<sup>342</sup> *JL v Secretary DFaCS* [2015] NSWCA 88 at [148].

<sup>343</sup> Care Act ss 71(1) and 72(1).

<sup>344</sup> *Re Henry; JL v Secretary, DFaCS* [2015] NSWCA 89 at [36]–[37].

My preference is to describe this second phase as the “placement” phase given the important threshold construct that the Secretary must first address after establishment as to whether there is a realistic possibility of restoration. Only if there is no realistic possibility of restoration will alternative placements be required to be considered as part of the permanency planning, in the welfare or placement of proceedings, in a Care Plan that the Secretary is required to prepare pursuant to s 78 of the Care Act.

### **The placement phase of Care proceedings**

Once a child has been found to be in need of care and protection the Secretary is required to undertake planning for the child's future. In most cases the Secretary will prepare a formal Care Plan that addresses the needs of the child.<sup>345</sup>

The Secretary is required to consider what permanent placement is required to provide a safe, nurturing, stable and secure environment for the child.<sup>346</sup> Permanent placement is to be made in accordance with the permanent placement principles prescribed.<sup>347</sup> The “hierarchy” established might be summarised as follows:

- if it is practicable and in the best interests of the child, the first preference for permanent placement is for the child to be restored to the parent(s)
- the second preference for permanent placement is guardianship of a relative, kin or other suitable person
- the next preference (except in the case of an Aboriginal or Torres Strait Islander child) is for the child to be adopted
- the last preference is for the child to be placed under the parental responsibility of the Minister
- in the case of an Aboriginal or Torres Strait Islander child, if restoration, guardianship or the allocation of parental responsibility to the Minister is not practicable or in the child's best interests, the child is to be adopted.

### **Realistic possibility of restoration**

Thus the Secretary must first assess whether there is a realistic possibility of restoration of the child to the parent(s) within a reasonable period, having regard firstly to the circumstances of the child; and secondly, to the evidence, if any, that the parents are likely to be able to satisfactorily address the issues that have led to the removal of the child.<sup>348</sup>

The court must then decide whether to accept the assessment of the Secretary: s 83(5). If the court does not accept the assessment of the Secretary, it may direct the Secretary to prepare a different permanency plan: s 83(6).

The phrase “realistic possibility of restoration”, therefore, involves an important threshold construct, which informs the planning that is to be undertaken in respect of any child that has been removed from parents or assumed into care and found to be in need of care and protection.

There is no definition of the phrase “realistic possibility of restoration” in the Care Act.

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<sup>345</sup> Care Act s 3(1).

<sup>346</sup> s 10A(1).

<sup>347</sup> s 10A(3).

<sup>348</sup> s 83(1).

However, the principles concerning the interpretation and application of the phrase were comprehensively considered in the Supreme Court by Slattery J in 2011: *In the matter of Campbell* [2011] NSWSC 761. This decision was cited with approval by the Court of Appeal: *Re Henry; JL v Secretary, DFACS* [2015] NSWCA 89 at [44].

Importantly, Slattery J held that it is at the time of the determination that the court must make the assessment. It must be a realistic possibility at that time, not merely a future possibility. This restriction has been removed by recent amendments to the Care Act.

The amendments inserted the additional words “within a reasonable time” into the relevant subsections of s 83. It is necessary, therefore, to look more closely at the significance of the addition of those words.

In my view, the effect of those words has been to remove the restriction formulated by Slattery J in *In the matter of Campbell*, when he said:

It is going too far to read into the expression a requirement that an applicant must always at the time of hearing ... have demonstrated participation in a program with some significant “runs on the board”.<sup>349</sup>

Instead, now, the court may take into account the formulation originally articulated by Senior Magistrate Mitchell in a submission to the *Report of the Special Commission of Inquiry into Child Protection Services in NSW*:<sup>350</sup>

The Children's Court does not confuse realistic possibility of restoration with the mere hope that a parent's situation may improve. The body of decisions established by the court over the years requires that usually a realistic possibility be evidenced at the time of hearing by a coherent program already commenced and with some significant “runs on the board”. The court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted.<sup>351</sup>

The principles relating to the phrase “a realistic possibility of restoration” may now be summarised therefore, by reference to *In the matter of Campbell* and *Re Tanya*,<sup>352</sup> a decision by Rein J in the Supreme Court, and *The Department of Community Services v “Rachel Grant”, “Tracy Reid”, “Sharon Reid and “Frank Reid”* [2010] CLN 1 at [61].

- A possibility is something less than a probability; that is, something that it is likely to happen. A possibility is something that may or may not happen. That said, it must be something that is not impossible.
- The concept of realistic possibility of restoration is not to be confused with the mere hope that a parent's situation may improve.
- The possibility must be “realistic”, that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon “unlikely hopes for the future”. It needs to be “sensible” and “commonsensical”.
- A realistic possibility may be evidenced at the time of hearing by a coherent program already commenced and with some significant “runs on the board”. The

<sup>349</sup> *In the matter of Campbell* [2011] NSWSC 761 at [56].

<sup>350</sup> *Re Saunders and Morgan v Department of Community Services* [2008] CLN 10 Johnstone J at [11] and above n 4.

<sup>351</sup> *In the matter of Campbell* [2011] NSWSC 761 at [55].

<sup>352</sup> *Re Tanya* [2016] NSWSC 794 at [50]–[51].

court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted.

- There are two limbs to the requirements for assessing whether there is a realistic possibility of restoration. The first requires a consideration of the circumstances of the child or young person. The second requires a consideration of the evidence, if any, that the parent(s) are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.
- The determination must be undertaken in the context of the totality of the Care Act, in particular the objects set out in s 8 and other principles to be applied in its administration, including the notion of unacceptable risk of harm.

### **Permanency planning**

Where the Secretary assesses that there is a realistic possibility of restoration to a parent, and the court accepts that assessment, the Secretary is to prepare a permanency plan<sup>353</sup> that includes a description of the minimum outcomes that need to be achieved before the child is returned to the parent, services to be provided to facilitate restoration, and a statement of the length of time during which restoration should be actively pursued.<sup>354</sup>

If the Secretary assesses that there is no realistic possibility of restoration to a parent, the Secretary is to prepare a permanency plan for another suitable long-term placement in accordance with the permanent placement principles discussed above, as set out in s 10A of the Care Act.

Permanency planning means the making of a plan that aims to provide a child with a stable, preferably permanent, placement that offers long-term security and meets their needs.<sup>355</sup> The court must not make a final Care order unless it expressly finds that permanency planning has been appropriately and adequately addressed.<sup>356</sup>

The permanency plan must have regard to the principle of the need for timely arrangements, the younger the child, the greater the need for early decisions, and must avoid the instability and uncertainty that can occur through a succession of different placements or temporary care arrangements. The planning must also make provision for the allocation of parental responsibility, the kind of placement proposed, the arrangements for contact, and the services that need to be provided.<sup>357</sup>

A permanency plan does not need to provide details as to the exact placement in the long term, but must be sufficiently clear and particularised so as to provide the court with a reasonably clear picture as to the way in which the child's needs, welfare and well-being will be met in the foreseeable future.<sup>358</sup>

If the child is an Aboriginal or Torres Straits Islander there are particular additional requirements to be addressed. The permanency planning must address how the plan has

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<sup>353</sup> s 83(2).

<sup>354</sup> s 84.

<sup>355</sup> s 78A(1).

<sup>356</sup> s 83(7).

<sup>357</sup> s 78.

<sup>358</sup> s 78A(2A).

complied with the principles of participation and self-determination set out in s 13 of the Care Act.<sup>359</sup> It should also address the principle set out in s 9(2)(d) which requires that the child's identity, language and cultural ties be, as far as possible, preserved. Proper implementation requires an acknowledgement that the cultural identity of an Aboriginal child or young person is "intrinsic" to any assessment of what is in the child's best interests.<sup>360</sup> It follows that the need to consider Aboriginality and ensure the participation of families and communities must be applied across all aspects of child protection decision-making.

### **Parental responsibility**

Parental responsibility means all the duties, powers, responsibilities and authority which, by law, parents have in relation to their children.<sup>361</sup> The primary care-giver is the person primarily responsible for the care and control of a child, including day-to-day care and responsibility.

If the Children's Court finds that a child is in need of care and protection, it may make a variety of orders allocating parental responsibility, or specific aspects of parental responsibility.<sup>362</sup>

The specific aspects of parental responsibility that might be separately or jointly allocated are unlimited, but include residence, contact, education, religious upbringing and medical treatment.<sup>363</sup>

When allocating parental responsibility, the court is required to give particular consideration to the principle of the least intrusive intervention, and be satisfied that any other order would be insufficient to meet the needs of the child.<sup>364</sup>

Where a person is allocated all aspects of parental responsibility, the court may make a guardianship order: see ss 79A–79C.

The maximum period for which an order may be made allocating all aspects of parental responsibility to the Minister, following approval of a permanency plan involving restoration, guardianship or adoption, is 24 months,<sup>365</sup> unless there are special circumstances that warrant a longer period.<sup>366</sup>

This restriction marks an upper limit for the reasonable period within which there might be a realistic possibility of restoration.

It also places the onus on the Secretary to bring an application for rescission under s 90 of the Care Act if a staged restoration breaks down within that two year period.

### **Out-of-home care**

Where the Secretary assesses that there is no realistic possibility of restoration, a permanency plan for another suitable long-term placement is submitted to the court: s 83(3). The Secretary may consider whether adoption is the preferred option: s 83(4).

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<sup>359</sup> s 78A(3).

<sup>360</sup> *Department of Human Services and K Siblings* [2013] VChC 1 per Magistrate Wallington at 5.

<sup>361</sup> s 3.

<sup>362</sup> s 79(1).

<sup>363</sup> s 79(2).

<sup>364</sup> s 79(3).

<sup>365</sup> s 79(9).

<sup>366</sup> s 79(10).

A long-term placement following the removal of a child which provides a safe, nurturing and secure environment may be achieved by placement with a member or members of the same kinship group as the child or young person, or placement with an authorised carer: s 3.

Out-of-home care means residential care and control provided by a person other than a parent, at a place other than the usual home: s 135.

Decisions concerning out-of-home placement of children in need of care and protection are not decisions that the court undertakes lightly or easily. But at the end of the day, a risk assessment is required, in accordance with the principle that the safety, welfare, and well-being of the children are paramount.

The permanency plan need not provide details as to the exact placement, but must provide sufficient detail to enable the court to have a reasonably clear understanding of the plan: s 83(7A).

The permanency plan will generally consist of a care plan: s 80, together with details of other matters about which the court is required to be satisfied. The care plan must make provision for certain specified matters: s 78. These are:

- (a) the allocation of parental responsibility between the Minister and the parents of the child for the duration of any period of removal;
- (b) the kind of placement proposed, including:
  - (i) how it relates in general terms to permanency planning,
  - (ii) any interim arrangements that are proposed pending permanent placement and the timetable proposed for achieving a permanent placement,
- (c) the arrangements for contact between the child and his or her parents, relatives, friends and other persons connected with the child,
- (d) the agency designated to supervise the placement in out-of-home care
- (e) the services that need to be provided to the child or young person.

### **Contact**

Importantly, where there is not to be a restoration, the permanency planning must also include provision for appropriate and adequate arrangements for contact.<sup>367</sup>

In addition, the court may, on application, make orders in relation to contact, including orders for contact between children and their parents, relatives or other persons of significance but only for a maximum period of up to 12 months. The court may make a range of contact orders, both as to frequency and duration, and whether or not the contact should be supervised.<sup>368</sup>

The introduction of s 86 into the Care Act in 2000 permitted the Children's Court, for the first time, to make contact orders beyond the life of the particular proceedings. The section does not, however, create any right or other entitlement to contact in Care cases. Nor, in my view, does it create any presumption that contact should exist. Contact,

<sup>367</sup> ss 9(2)(f), 78(2).

<sup>368</sup> s 86.

although recognised in s 9(2)(f), remains subject always to the safety, welfare and well-being of the child. An order under s 86 mandating contact arrangements should, therefore, only be used sparingly, in cases of demonstrated need, such as intransigence, inflexibility, or a failure to have proper regard to the needs and best interests of the child.

The issue of appropriate contact for children who have been permanently removed from the care of their parents, particularly young children, remains vexed, and there continues to be a wide range of opinion as to the value of contact.

Perceived benefits to be derived by children from contact include developing and continuing meaningful relationships. On the other hand, contact can have an unsettling effect on a child, act as a distraction, impede attachment to new carers and disrupt the placement.

It is generally accepted that a child benefits from some contact with the family of origin (except in extreme cases). Much depends on the level of trust and co-operation that exists between the carers and the birth family. In some cases the birth family can play a positive and supportive role. In other cases, members of the birth family can put the stability of the placement at risk. There is a strong body of opinion that contact should not interfere with a child's growing attachment to the new family. The younger the child, and the less time the child has been with the birth parents, the less the need for other than minimal contact, for identification purposes.

There are some relevant judicial pronouncements that guide the resolution of contact issues, including the decisions in *Re Liam* [2005] NSWSC 75, *George v Children's Court of NSW* (2003) 59 NSWLR 232 and *Re Felicity (No 3)* [2014] NSWCA 226 at [42].

In 2011 the Children's Court issued Contact Guidelines designed to provide assistance to Judicial Officers, practitioners and parties, which were based upon available research and the court's "accumulated expertise and experience as a specialist court" in Care proceedings.

The issue of contact in Care cases requires the consideration of a range of factors, having regard to the exigencies and circumstances of the particular case, both advantageous and disadvantageous, and balancing the benefits against the risks, the primary focus being on the needs and best interests of the child, and any risk of unacceptable harm: *Re Helen* [2004] NSWLC 7.

The decision should be based on relevant, reliable and current information.

Factors include the level of attachment to the relevant member of the birth family, the degree of animosity displayed by the birth family against the carers, the level of demonstrated co-operation and engagement with the carers, and the commitment to supporting the placement, the degree of any abusive experience while in the care of the birth family and any ongoing emotional sequelae, the competing demands of the children's educational, cultural, social and sporting activities, the proposed location of the contact, the travel and other disruption involved, the quality of the contact, the safety of the children during contact, and any other risk factors associated with contact, including the potential for denigration of the carers or other undermining of the placement, and the potential for other negative persons or influences to be present at the visit.

Preferably, contact should be left to the discretion of the person having parental responsibility, taking into account the advice of any professionals retained to assist with the children and the views of all those affected, including the children themselves (having regard to their age, their level of emotional and psychosocial development, and other factors).

The regime for contact should be flexible, recognising that circumstances change as children grow older and their emotional, social and other needs develop.

Some relevant statements in the Children's Court Contact Guidelines are:<sup>369</sup>

For some children the benefit of contact will be primarily that they understand who they are in the context of their birth family and cultural background. Contact might also help ensure that the child has a realistic understanding of who their parent is and that the child does not idealise an unsuitable parent and develop unrealistic hopes of being reunited with the parent.

The focus must always be on the needs of the child and what is in the best interests of the child. How will the child benefit from contact with parents and siblings? Some benefit may be achieved over a long term, ie by providing the foundation for a relationship between the child and the parent which will develop later.

...

Younger children will usually need more frequent contact for a shorter duration than older children to maintain a relationship. Younger children especially should not be subjected to long travel to attend contact.

...

Children and carer families will have their own commitments and patterns involving such things as sport, cultural activities, spending time with friends and church attendance. It is important to ensure that a child is not made to feel greatly different from others in the household because they are at contact rather than participating in carer family events. It is also important that the child does not resent attendance at contact because it takes them away from something that they enjoy doing.

It is very important to see children in the context of their extended family and not just their parents. Particular attention should be paid to supporting sibling relationships. Even if extended family members are unable to care for a child it is still likely that contact will be beneficial — providing information and family and cultural identity. Existing healthy relationships should be supported even if a child is to remain in out-of-home care.

Balancing extended family contact and placement stability and normality requires careful consideration. For example, what would be usual contact with grandparents if the child were not in care?

...

Contact can occur in other ways than face-to-face. In some situations it will be necessary to limit or prohibit indirect contact or to ensure that it is supervised. It may also be necessary to prohibit a parent from making any reference to the child on a social networking website. Alternatively, especially if the parent is at some distance from the child, the use of electronic communication should be encouraged.

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<sup>369</sup> The Children's Court of NSW, *Contact Guidelines*, pp 2–5 at [www.childrenscourt.justice.nsw.gov.au/Documents/contact\\_guidelines.pdf](http://www.childrenscourt.justice.nsw.gov.au/Documents/contact_guidelines.pdf), accessed 27 June 2019.

...

A long-term contact order may create problems as a child's circumstances change, particularly if the contact is to be relatively frequent. School, sport, cultural activities and friendship dynamics are just some of the factors which change over time. As a child gets older less frequent but longer contact may be appropriate.

The need for contact to be supervised may also change as the child and the parents' circumstances change.

## Particular aspects of the care jurisdiction

### Practice and procedure

Care proceedings, including appeals, are to be conducted in closed court (s 104B), and the name of any child or young person involved, or reasonably likely to be involved, whether as a party or as a witness, must not be published: s 105(1).

This prohibition extends to the periods before, during and after the proceedings. The prohibition includes any information, picture or other material that is likely to lead to identification: s 105(4).

There are exceptions, such as where a young person (ie a person aged 16 or 17) consents, where the Children's Court consents, or where the Minister with parental responsibility consents: s 105(3).

The media is entitled to be in court for the purpose of reporting on proceedings, subject to not disclosing the child's identity. But, the court has a discretion to exclude the media.

In my view, the discretion would only be exercised in exceptional circumstances, because the provisions of s 105 of the Care Act are usually sufficient protection: *R v LMW* [1999] NSWSC 1111.

Under the common law principles of open justice, the balance would lie in favour of the newspaper: *John Fairfax & Sons Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 465 at 476 at G. In *AM v DoCS; Ex p Nationwide News* [2008] NSWDC 16, I held that the common law principle of open justice is secondary to the principles in s 9 of the Care Act, in particular the paramountcy principle. In that case, I held that the newspaper, which had previously published material tending to identify the children, had not satisfied me that this sort of publication was not likely to re-occur.

I excluded the reporter from remaining in court. I went on to say at [15]:

However, in the interests of a balancing exercise and applying the principle of open justice to the extent that it applies subject to s 9(a), I would be prepared to allow this newspaper to come back with some evidence which might convince me that it would be appropriate for me to be satisfied that, with acceptable undertakings, there could be a basis upon which I might allow its reporters to remain in court during the hearing.

Interestingly, the newspaper concerned did not take up that invitation.

Care and protection proceedings, including appeals, are not to be conducted in an adversarial manner: s 93(1).

The proceedings are to be conducted with as little formality and legal technicality and form as the circumstances permit: s 93(2).

In *Re Emily v Children's Court of NSW* [2006] NSWSC 1009 at [48] the Supreme Court set out the manner in which Care proceedings are to be dealt with by the court.

The learned Magistrate was required by the explicit terms of the Care Act to deal with the matter before him in the manner for which express provision is made in, relevantly, sections 93, 94 and 97 of the Care Act. It is no doubt the case that those sections, broadly expressed though they are, do not empower a Children's Court Magistrate to take some sort of free-wheeling approach to an application, proceeding in virtually complete disregard of what ordinary common-sense fairness might be thought to require in the particular case. *The [court] is, however, both empowered and required to proceed with an informality and a wide-ranging flexibility that might be thought not entirely appropriate in a more formally structured Court setting and statutory context.* [Emphasis added]

The court is not bound by the rules of evidence, unless it so determines: s 93(3). Nevertheless, the court must draw its conclusions from material that is satisfactory, in the probative sense, so as to avoid decision-making that might appear capricious, arbitrary or without foundational material: *JL v Secretary, DFACS* [2015] NSWCA 88 at [148].

In *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 Meagher JA said at [79] in relation to a similar provision governing a tribunal:

Although the Tribunal may inform itself in any way "it thinks fit" and is not bound by the rules of evidence, it must base its decision upon material which tends logically to show the existence or non-existence of facts relevant to the issues to be determined. Thus, material which, as a matter of reason, has some probative value in that sense may be taken into account: *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 36 FLR 482 at 491–493; *The King v The War Pensions Entitlement Appeal Tribunal; Ex parte Bott* [1933] HCA 30.

It is difficult to imagine circumstances in which a court might make such a determination that the rules of evidence should apply. The only situation that has so far occurred to me, apart from the rule as to relevance, relates to the provisions of the *Evidence Act* 1995 concerning self-incrimination: s 128.

The standard of proof in Care proceedings is on the balance of probabilities: s 93(4) of the Care Act. The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved: *Director General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250.

The provisions of the United Nations' *Convention on the Rights of the Child* 1989<sup>370</sup> (UNCROC) are capable of being relevant to the exercise of discretions under the Care Act: *Re Tracey* (2011) 80 NSWLR 261.

The circumstances in *Re Tracey* were unusual and unique. Nevertheless, it may be important to draw the parties out on the question of whether any aspect of UNCROC

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<sup>370</sup> United Nations, *Convention on the Rights of the Child*, in force 2 September 1990, at [www.ohchr.org/en/professionalinterest/pages/crc.aspx](http://www.ohchr.org/en/professionalinterest/pages/crc.aspx), accessed 27 June 2019.

is specifically relied upon. If so, it will need to be addressed, to the extent that it raises some questions for additional consideration. Otherwise, it is prudent to advert to UNCROC, in any reasons, as not having any additional relevance. I usually add a paragraph along the following lines:

Most, if not all, of the provisions in UNCROC have been incorporated into or are reflected in the Care Act. The parties in the present matter made no submissions based on the Convention.

Nor did anything occur to me as to any provision in UNCROC such that there was some different requirement, some additional principle, or some gloss that required the court to have particular regard to, in determining this case or in considering the permanency planning proposed, such that I was required to go beyond the Care Act and the case law interpreting it.

The Court of Appeal approved a similar statement in *Re Kerry (No 2)* [2012] NSWCA 127.

More recently, in *Re Henry; JL v Secretary, DFaCS* [2015] NSWCA 89 at [208]–[220], McColl J discussed the application of the Convention, confirming that its provisions are capable of being relevant in Care proceedings but the circumstances in which that might occur were limited. Not all failures to refer to UNCROC in the context of the Care Act will attract relief on appeal: at [217].

### **Expeditious disposition of proceedings**

Time is of the essence for the disposal of Care cases. The Care Act provides that all Care matters are to proceed as expeditiously as possible: s 94(1). The court is required to avoid adjournments, which should only be granted where it is in the best interests of the child or there is some other cogent or substantial reason: s 94(4). The Children's Court aims to complete 90% of Care cases within 9 months of commencement and 100% of cases within 12 months.

The timetable for each matter is to take account of the age and developmental needs of the child: s 94(2). Directions should be made with a view to ensuring that the timetable is kept: s 94(3). Practice Note 5 deals with case management in Care proceedings.<sup>371</sup> It deals with each of the stages of a Care application and provides for a series of standard directions at [16.6] with prescribed times for the completion of various interlocutory processes, leading to the earliest resolution or allocation of a hearing date in contested matters.

### **Children's legal representatives**

The Care Act provides for the participation of a child or young person in the proceedings through their representation by either an independent legal representative (ILR) or a direct legal representative (DLR): s 99A. An ILR will be appointed to act as the representative for a child under 12: s 99B. An ILR must consult with the child, but their duty is to act in accordance with the paramountcy principle. Whereas, a DLR may be appointed for any child at the age of 12 or over who is capable of giving proper instructions: s 99C. The DLR must then advocate as instructed by the child.

<sup>371</sup> Children's Court of NSW, *Practice Note 5 Case management in care proceedings*, at [www.childrenscourt.justice.nsw.gov.au/Documents/Practice%20Note%20No.5%20-%20Final%20Version.pdf](http://www.childrenscourt.justice.nsw.gov.au/Documents/Practice%20Note%20No.5%20-%20Final%20Version.pdf), accessed 27 June 2019.

In addition to these provisions, the Law Society of NSW has prepared *Representation Principles for Children's Lawyers*.<sup>372</sup> These guidelines set out a number of important duties and obligations for practitioners representing children.

I will not discuss the document in full, however I will canvass some of the principles these guidelines detail. The guidelines set out the following: a definition of who is the client; the role of the practitioner; determining whether a child has the capacity to give instructions; taking instructions and appropriate communication; duties of representation; confidentiality; conflicts of interest; access to documents and reports; interaction with third parties and ending the relationship with the child.

Importantly, Principle D6 (dealing with communication) emphasises the importance of tailored communication to practitioners. The commentary to the principles state:

It is important that practitioners are prepared and informed before any meeting with the child. The child must always be treated with respect — this involves listening and giving the child the opportunity to express him or herself without interrupting, addressing the child by his or her name, accepting that the child is entitled to his or her own view etc.<sup>373</sup>

### **Support persons**

Under s 102, a participant in proceedings before the Children's Court may, with leave of the Children's Court, be accompanied by a support person. Leave must be granted unless the support person is a witness or the court, having regard to the wishes of the child or young person, is of the view that leave should not be granted or if there is some other reason to deny the application.

However, the Children's Court can withdraw leave at any time if a support person does not comply with any directions given by the court. A support person, however, cannot act on behalf of a party.

### **Examination and cross-examination**

The Care Act provides that a Children's Magistrate may examine and cross-examine a witness in any proceedings to the extent that the Children's Magistrate considers appropriate in order to elicit information relevant to the exercise of the Children's Court's powers.<sup>374</sup>

The Care Act also provides guidance as to the nature of examination and cross-examination of witnesses.<sup>375</sup>

This guidance accords with the inquisitorial nature of Care proceedings insofar as proceedings are required to be conducted in a non-adversarial manner, with as little formality and legal technicality and form as the circumstances permit.

The Act prohibits the use of offensive or scandalous questions by excusing a witness from answering a question that the court regards to be offensive, scandalous, insulting, abusive or humiliating unless the court is satisfied that it is essential to the interests of justice that the question be asked or answered.<sup>376</sup>

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<sup>372</sup> The Law Society of NSW, *Representation Principles for Children's Lawyers*, 4th edn, 2014, at [www.lawsociety.com.au/sites/default/files/2018-03/Representing%20Children.pdf](http://www.lawsociety.com.au/sites/default/files/2018-03/Representing%20Children.pdf), accessed 26 June 2019.

<sup>373</sup> *ibid* at p 22.

<sup>374</sup> s 107(1).

<sup>375</sup> s 107.

<sup>376</sup> s 107(2).

Further, oppressive or repetitive examination of a witness is prohibited unless the court is satisfied that it is essential in the interests of justice for the examination to continue or for the question to be answered.<sup>377</sup>

### **Joinder**

In proceedings under the Care Act, the parties will generally comprise the Secretary of the Department, the child or children, the parent(s), the step-parent(s), and the legal representative, being the Independent Legal Representative for children under 12, or the Direct Legal Representative for children 12 and over, up to the age of 18.

Other persons having a genuine concern for the safety, welfare and well-being of a child may be given leave to appear in the proceedings, or be legally represented, and examine and cross-examine witnesses.<sup>378</sup>

Others who might be significantly impacted by a decision of the Children's Court, not being parties to the proceedings, are to be given "an opportunity to be heard on the matter of significant impact".<sup>379</sup> Historically, such persons were generally not made parties, but could present an affidavit. They could not, however, cross-examine or call witnesses of their own.

There has been something of a change in approach in relation to the joinder of parties to Care proceedings in recent times, partly driven by the transfer of casework to the NGO sector, but also as a result of some recent pronouncements by superior courts. The court is now increasingly receptive to joinder applications and more likely to make orders than in the past. In *Re June (No 2)* [2013] NSWSC 1111, McDougall J clarified the distinction between ss 87 and 98(3) of the Care Act:

The second point to note is that the opportunity to be heard is not the opportunity to participate in the proceedings either as a party as of right (s 98(1)) or as someone given leave (s 98(3)).

Thus, it does not follow that the opportunity to be heard includes the right to examine or cross-examine witnesses, at least generally. However, if the question of significant impact is one that is the subject of evidence, and if there are direct conflicts in that evidence, then in a particular case, the opportunity to be heard may extend to permitting cross-examination on that particular point.<sup>380</sup>

The more recent decision in *Bell-Collins Children v Secretary, DFACS* [2015] NSWSC 701, provides further clarification. During case management, the Children's Magistrate had refused the application of the grandparents to be joined as parties. At the hearing, which came before me at the Children's Court at Woy Woy,<sup>381</sup> I gave the grandparents an extensive opportunity to be heard, under s 87(1).

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<sup>377</sup> s 107(3).

<sup>378</sup> s 98(3).

<sup>379</sup> s 87(3).

<sup>380</sup> *Re June (No 2)* [2013] NSWSC 1111 at [186]–[187].

<sup>381</sup> *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5.

In the de novo appeal to the Supreme Court, the grandparents renewed their application for joinder and the matter was considered by Slattery J. The significant aspect of Slattery J's decision was his distillation of the distinction between the opportunity to be heard under s 87(1) and the granting of leave to appear under s 98(3):

In section 87(1) the threshold is one to ensure that non-parties who may suffer adverse impacts from Care Act orders will receive procedural fairness before such orders are made. The focus is on "impact on a person".<sup>382</sup>

But the threshold for s 98(3) is more child-centred. The s 98(3) right is only available to a person who in the court's opinion "has a genuine concern for the safety, welfare and well-being of the child". It is perhaps because the s 98(3) threshold is more altruistic than that under s 87 that the Care Act can afford a wider scope to participate to those who receive a grant of s 98(3) leave. Persons meeting s 98(3) leave will sometimes be, as the great grandparents are in this case, people who can by their participation fill an evidentiary gap in the proceedings that it may be in the best interests of that child to see filled in the proceedings. In my view that is the case here.<sup>383</sup>

Accordingly, Slattery J granted the grandparents leave on terms under s 98(3). The grandparents were only granted leave to cross-examine and adduce evidence about their own suitability as alternative carers for the children.

Finally, on the issue of joinder, I draw attention to a decision by Sackar J in which he further discusses the principles surrounding the joinder of persons having a genuine concern for the safety, welfare and well-being of a child, in the context of an application of a corporate FSP (NGO):

It is clear that despite s 93(1) of the Act, including the requirement that proceedings are not to take place in an adversarial manner, that the Act explicitly contemplates examination and importantly cross-examination. This seems to me clearly to recognise that parties in such proceedings, like parties in other litigation, will be conducting their cases through advocates exclusively pursuing the interests of their respective clients. The mere tendering of affidavits to support the [NGO's] position overlooks the idiosyncratic nature of each piece of litigation and the realities, practical and ethical. Any cross examination to be effective should be directed to the pursuit of a particular party's interest. It could hardly be otherwise.<sup>384</sup>

### **Rescission and variation of Care orders: s 90**

Peculiar to the Care jurisdiction is the power to rescind or vary final Care orders, at a later date.<sup>385</sup> This statutory power enables a review of orders without the need for an appeal, where there has been a "significant change in any relevant circumstances" since the original order.

Applications for rescission or variation of Care orders require the Applicant to obtain leave.

A refusal of leave is an "order" for the purposes of s 91(1) of the Care Act: *S v Department of Community Services* [2002] NSWCA 151 at [53]. Refusal to grant leave may, therefore, be the subject of an appeal de novo from the Children's Court.

<sup>382</sup> *Bell-Collins Children v Secretary, Department of Family and Community Services* [2015] NSWSC 701 at [33].

<sup>383</sup> *ibid* at [34].

<sup>384</sup> *EC v Secretary, NSW DFACS* [2019] NSWSC 226 at [81].

<sup>385</sup> s 90.

The former President of the Children's Court expressed the view that if, on appeal, leave is granted, the hearing of the substantive application should then be remitted to the Children's Court for hearing.<sup>386</sup>

With respect to appeals against a refusal by the Children's Court to grant leave under section 91(1), in my view if the District Court upholds the appeal and grants leave it should remit the proceedings to the Children's Court to determine the substantive section 90 application. Having granted leave the District Court would not have jurisdiction to hear the substantive application as the only "order" before the court (being the subject of an appeal under section 91(1)) is the order refusing leave. Further, if the District Court proceeded to hear the substantive section 90 application following it granting leave, the unsuccessful party on the substantive application in the District Court would be deprived of a statutory right of appeal.

The Care Act s 90(2C) sets out a number of additional matters that the court must take into account before granting leave:

- (a) the age of the child or young person, and
- (b) the nature of the application, and
- (c) the plans for the child or young person, and
- (d) the length of time for which the child or young person has been in the care of the present carer, and
- (e) whether the applicant has an arguable case, and
- (f) matters concerning the care and protection of the child or young person that are identified in:
  - (i) a report under section 82, or
  - (ii) a report that has been prepared in relation to a review directed by the Children's Guardian under section 85A or in accordance with section 150.

Once leave is granted, the Care Act goes on to prescribe another set of requirements that must be taken into account when the rescission or variation sought relates to an order that placed the child under the parental responsibility of the Minister, or that allocated specific aspects of parental responsibility from the Minister to another person: s 90(6).

The matters specified in s 90(6) are:

- (a) the age of the child or young person,
- (b) the wishes of the child or young person and the weight to be given to those wishes,
- (c) the length of time the child or young person has been in the care of the present caregivers,
- (d) the strength of the child's or young person's attachments to the birth parents and the present caregivers,
- (e) the capacity of the birth parents to provide an adequate standard of care for the child or young person,
- (f) the risk to the child or young person of psychological harm if present care arrangements are varied or rescinded.

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<sup>386</sup> Per M Marien, "Care proceedings and appeals to the District Court" presented at Judicial Commission of NSW, Annual Conference of the District Court of New South Wales, 28 April 2011, at [2-0225] and <https://jirs.judcom.nsw.gov.au/conferences/conference.php?id=1051>, accessed 26 June 2019.

In the decision by Slattery J *In the matter of Campbell* [2011] NSWSC 761, his Honour discussed the concepts of “a relevant circumstance” and “significant” change in a relevant circumstance in the context of an application for leave.

As to what constitutes a “relevant circumstance”, Slattery J said at [42]:

The range of relevant circumstances will depend upon the issues presented for the court's decision. They may not necessarily be limited to a “snapshot” of events occurring between the time of the original order and the date the leave application is heard. This broader approach reflects the existing practice of the Children's Court on s 90 applications: see for example *In the matter of OM, ZM, BM and PM* [2002] CLN 4.

As to what constitutes a “significant” change in a relevant circumstance, he referred to *S v Department of Community Services (DoCS)* [2002] NSWCA 151 where the Court of Appeal held at [23] that the change must be “of sufficient significance to justify the consideration [by the court] of an application for rescission or variation of the order”.

Justice Slattery said there are dangers in paraphrasing the s 90(2) statutory formula for the exercise of the discretion beyond this statement of the Court of Appeal: [43]. He also made it clear that the court's discretion to grant leave is not only limited by s 90(2), but also by the requirement to take into account the list of considerations in s 90(2A). Therefore, establishing a significant change in a relevant circumstance under s 90(2) is a necessary, but not a sufficient, condition for the granting of leave.

As to the requirement of an “arguable case”, Slattery J held that this does not relate to the application for leave, but relates to the case for the rescission or variation sought, taking into account the matters in s 90(6). Therefore, the matters in s 90(6) must be taken into account in determining whether the applicant for leave has an arguable case. Justice Slattery agreed with Marien DCJ that the interpretation of “arguable case”, as expressed in *Dempster v National Companies and Securities Commission* (1993) 9 WAR 215, should be adopted; namely, that an arguable case is a case that is “reasonably capable of being argued” and has “some prospect of success” or “some chance of success”: at [50].

These principles were considered and applied in *Kestle v DFACS* [2012] NSWChC 2, in which a helpful summary of the principles to be applied in a s 90 application is set out at [22]:

- (i) In determining whether to grant leave the court must first be satisfied under s 90(2) that there has been a significant change in a relevant circumstance since the Care order was made or last varied.
- (ii) The range of relevant circumstances will depend upon the issues presented for the court's decision. They may not necessarily be limited to just a “snapshot” of events occurring between the time of the original order and the date the leave application is heard.
- (iii) The change that must appear should be of sufficient significance to justify the court's consideration of an application for rescission or variation of the existing Care order: *S v Department of Community Services* [2002] NSWCA 151.
- (iv) The establishment of a significant change in a relevant circumstance is a necessary but not a sufficient condition for leave to be granted. The court retains a general discretion whether or not to grant leave.

- (v) Having been satisfied that a significant change in a relevant circumstance has been established by the applicant, the court must take into account the mandatory considerations set out in s 90(2A) in determining whether to grant leave.
- (vi) The s 90(2A) mandatory considerations include that the applicant has an “arguable case” for the making of an order to rescind or vary the current orders.
- (vii) An arguable case means a case “which has some prospect of success” or “has some chance of success”.
- (viii) In determining whether an applicant has an arguable case and whether to grant leave, the court may need to have regard to the mandatory considerations in s 90(6).

The judgment went on to specifically consider whether leave could be granted on a specific basis.

The mother had submitted that it was not open to the court to grant leave on a discrete issue such as contact.

She submitted that once leave is granted, all issues (including restoration and contact) may be re-visited by the court at the substantive hearing.

The court did not accept this argument and held that the court has a wide discretion under s 90(1) to grant leave, referring to the decision of Mitchell CM in *Re Tina* [2002] CLN 6, and said at [53]:

In my view, the wide discretion available to the court in granting leave under s 90(1) allows the court to also exercise a wide discretion as to the terms and conditions upon which leave is granted. Accordingly, the court may restrict the grant of leave to a particular issue or issues. This would be appropriate, for example, where the court determines that an applicant parent does not have an arguable case for restoration of the child to their care, but does have an arguable case on the issue of increased parental contact.

In a careful judgment in *Re Bethany* [2012] NSWChC 4, Children's Magistrate Blewitt AM applied these principles at [49]–[50].

### **Costs in Care proceedings**

Costs in Care proceedings are not at large. The Care Act limits the power to make an order for an award of costs. Section 88 provides:

The Children's Court cannot make an order for costs in care proceedings unless there are exceptional circumstances that justify it in doing so.

Under the common law a successful party has a “reasonable expectation” of being awarded costs against the unsuccessful party: *Oshlack v Richmond River Council* (1998) 193 CLR 72 at [134]. Fairness dictates that the unsuccessful party typically bears the liability for costs: *Oshlack* at [67]. This means that the successful party in litigation is generally awarded costs, unless it appears to the court that some other order is appropriate, either as to the whole or some part of the costs: *Currabubula Holdings Pty Ltd v State Bank of NSW* [2000] NSWSC 232.

The common law position is, however, displaced by the Care Act, which provides for a comprehensive statutory scheme for care proceedings in which the power of the court to award costs is circumscribed by s 88, so that costs may only be awarded where exceptional circumstances exist.

The policy basis behind the restriction on the power to award costs is self-evidently based in the notion that parties involved in Care proceedings should have as full

an opportunity to be heard as is reasonably possible, and should not be deterred from participating in such proceedings by adverse pecuniary consequences, the safety, welfare and well-being of the child being the paramount concern.<sup>387</sup>

The meaning of “exceptional circumstances” in the context of s 88 of the Care Act, and when they might exist, has been considered and discussed in various decisions, most notably in the judgments in *SP v Department of Community Services* [2006] NSWDC 168; *Department of Community Services v SM and MM* [2008] NSWDC 68; *XX v Nationwide News Pty Ltd* [2010] NSWDC 147 and *Director-General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3.

I will not review those decisions here, but it may be said that the situations in which “exceptional circumstances” might be found are not exhaustively defined or limited by them.

Some general propositions are nevertheless apt. The discretion to award costs must be exercised judicially and “according to rules of reason and justice, not according to private opinion ... or even benevolence ... or sympathy” (*Williams v Lewer* [1974] 2 NSWLR 91 at 95), and is not to be exercised arbitrarily or capriciously, or on no grounds at all: *Oshlack*, above, at [22].

The underlying idea is of fairness, having regard to what the court considers to be the responsibility of each party for the costs incurred: *Commonwealth of Australia v Gretton* [2008] NSWCA 117 at [121].

The court may have regard to the particular circumstances of the case, including the evidence adduced, the conduct of the parties and the ultimate result: *Knight v Clifton* [1971] Ch 700.

The purpose of an order for costs is to compensate the person in whose favour it is made and not to punish the person against whom the order is made: *Allplastics Engineering Pty Ltd v Dornoch Ltd* [2006] NSWCA 33 at [34]; *Dr Douglass v Lawton Pty Ltd (No 2)* [2007] NSWCA 90 at [22].

Where an order for costs is made, I suggest that the order specify whether the costs are awarded on an indemnity basis, or that the costs should be quantified on the ordinary basis, as defined in s 3 of the *Civil Procedure Act 2005*.

I am also of the view that the Children's Court has the power to award a fixed sum of costs. The various provisions of the Care Act, including s 93(2), are sufficient to give the Children's Court the power to do so.<sup>388</sup>

Judicial Officers have traditionally been reluctant to order the payment of specified sums of costs. Nevertheless the cases suggest a number of circumstances in which it might be appropriate to make such an order, such as the avoidance of the expense, delay and aggravation involved in protracted litigation which might arise out of taxation (or assessment): *Sherborne Estate (No 2)*; *Re Vanvalen v Neaves* (2005) 65 NSWLR 268 at [38]; *Australian Competition and Consumer Commission v Dataline.Net.Au Pty Ltd* (2006) 236 ALR 665 at [121]; *Keen v Telstra Corp (No 2)* [2006] FCA 930 at [4].

<sup>387</sup> *The Secretary, DFaCS (NSW) and the Knoll Children (Costs)* [2015] NSWChC 2.

<sup>388</sup> *ibid.*

In my view, it will generally be appropriate to make orders for specified sums of costs in Care proceedings.

But, the power is to be exercised judicially: *Idoport Pty Ltd v National Australia Bank Ltd* [2007] NSWSC 23 at [8]–[10]; and there must be proper factual foundation for the order: *Roberts v Rodier* [2006] NSWSC 1084 at [40]–[44]; *Ventouris Enterprises Pty Ltd v DIB Group Pty Ltd (No 4)* [2011] NSWSC 720.

The court arrives at an estimate of the proper costs by examining, on the basis of particulars provided, whether the quantification is logical, fair and reasonable: *Lo Surdo v Public Trustee* [2005] NSWSC 1290 at [7]; *Roberts v Rodier*, above, at [40]–[44].

The courts have, however, tended to apply a discount, having regard to the “broad-brush” approach involved: *Idoport*, above, at [13]; *Ginos Engineers Pty Ltd v Autodesk Australia Pty Ltd* (2008) 249 ALR 371 at [23].

The power to award costs in the Children's Court, however, does not extend to awards of costs against non-parties, or legal practitioners.<sup>389</sup>

There are, however, some exceptions to this principle, which arise under the general law.

The exceptions include persons who are not parties in the strict sense, but are closely connected with the proceedings, such as nominal parties: *Burns Philp & Co Ltd v Bhagat* [1993] 1 VR 203 at 217; or “relators”: *Wentworth v Attorney-General (NSW)* (1984) 154 CLR 518; or “next friends”: *Palmer v Walesby* (1868) LR 3 Ch App 732; and tutors: *Yakmor v Hamdoush (No 2)* (2009) 76 NSWLR 148.

Then there are persons who appear in the proceedings for some specific limited purpose, who are in effect a party, for that limited purpose, such as someone appearing to maintain a claim for privilege: *ACP Magazines Pty Ltd v Motion* [2000] NSWSC 1169; or to obtain a costs order: *Wentworth v Wentworth* (2001) 52 NSWLR 602.

It might also be arguable that such orders may also be made against persons who are bound by an order or judgment of the court and fail to comply, or who breach an undertaking given to the court, or persons in contempt or who commit an abuse of process.

These are issues for determination in the future.

### **Cultural planning**

The Care Act is to be administered under the “paramountcy principle”, that is, that the safety, welfare and well-being of the child is paramount.<sup>390</sup> In addition to this paramountcy principle, the Care Act sets out other particular principles to be applied in the administration of the Care Act.<sup>391</sup>

One of these principles is that account must be taken of concepts such as culture, language, identity and community.<sup>392</sup> Additionally, it is a principle to be applied in the

<sup>389</sup> *Director General of the Department of Family and Community Services v Amy Robinson-Peters* [2012] NSWChC 3; *In the matter of Mr Donaghy (Costs)* [2012] NSWChC 11.

<sup>390</sup> s 9(1).

<sup>391</sup> s 9(2).

<sup>392</sup> s 9(2)(d).

administration of the Care Act that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as is possible.<sup>393</sup>

Further, Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Secretary, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under the Care Act that concern their children and young persons.<sup>394</sup>

Finally, a general order for placement of an Aboriginal or Torres Strait Islander child who needs to be placed in statutory out-of-home care is prescribed.<sup>395</sup> In summary, the order for placement is, with:

- (a) a member of the child's or young person's extended family or kinship group, as recognised by the community to which the child or young person belongs,
- (b) a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs,
- (c) a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child or young person's usual place of residence,
- (d) a suitable person approved by the Secretary after consultation with:
  - (i) members of the child's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and
  - (ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

Before it can make a final Care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed.<sup>396</sup>

Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security.<sup>397</sup> The plan must:

- (a) have regard, in particular, to the principle that if a child is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement,<sup>398</sup> and
- (b) meet the needs of the child,<sup>399</sup> and
- (c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements.<sup>400</sup>

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<sup>393</sup> s 11.

<sup>394</sup> s 12.

<sup>395</sup> s 13(1).

<sup>396</sup> s 83(7).

<sup>397</sup> s 78A.

<sup>398</sup> s 9(2)(e).

<sup>399</sup> s 78A(1)(b).

<sup>400</sup> s 78A(1)(c).

Culture is a critical element in the assessment of what is in a child's best interests and a critical consideration in assuring the safety, welfare and well-being of a child. It is vital that decision makers in child protection matters are provided with sufficient information to be able to appreciate the distinct role culture plays in the identity formation and socialisation of each child.

The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles, and to adequately and appropriately address cultural planning, are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

There are various cases over recent years that address the Aboriginal and Torres Strait Islander Principles set out in the Care Act. These include: *Re Kerry (No 2)* [2012] NSWCA 127; *DFaCS (NSW) re Ingrid* [2012] NSWChC 19; *RL and DJ v DoCS* [2009] CLN 3; *In the matter of Victoria & Marcus* [2010] CLN 2 at [49]; *Re Simon* [2006] NSWSC 1410; *Re Earl and Tahneisha* [2008] CLN 7 and *Shaw v Wolf* (1998) 83 FCR 113.

I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children. As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4 at [94]:

The Aboriginal and Torres Strait Islander Principles are in the Care Act 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons. They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters before the Children's Court.

I am happy to report that in the past year a template for a cultural action planning section in the Care Plan has been developed. The idea behind this template is to ensure that adequate casework is undertaken to appropriately identify a child's cultural origins, and to put in place fully developed plans for the child to be educated, and to fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.

## Care appeals

### Procedure

A party dissatisfied with a decision of the Children's Court may appeal to the District Court: s 91(1). The decision of the District Court in respect of an appeal is taken to be a decision of the Children's Court and has effect accordingly: s 91(6).

The appeal is by way of a new hearing and fresh evidence, or evidence in addition to or in substitution for the evidence on which the order was made by the Children's Court, may be given on the appeal: s 91(2). The District Court may decide to admit the transcript or any exhibit from the Children's Court hearing: s 91(3).<sup>401</sup>

Judges of the District Court hearing such appeals have, in addition to any functions and discretions that the District Court has, all the functions and discretions that the Children's Court has under Ch 5 and 6 of the Care Act ie ss 43–109X: s 91(4).

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<sup>401</sup> Marien at n 61 discusses the nature of the appeal in his 2011 paper at [4.1].

The provisions of the Care Act (Ch 6) relating to procedure apply to the hearing of an appeal in the same way as they apply in the Children's Court: s 91(8).

It is important, therefore, for District Court Judges hearing such appeals to understand the Care Act, its guiding principles, and its procedural idiosyncrasies.

### **The Children's Court Clinic**

The Children's Court Clinic (which I will refer to in short form as 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 specialist advice and guidance.

The court may make an assessment order, which may include a physical, psychological, psychiatric, or other medical examination, or an assessment, of a child: s 53. The court may also make an order for the assessment of a person's capacity to carry out parental responsibility (parenting capacity): s 54.<sup>402</sup>

In addition, the court may make an order for the provision of other information involving specialist expertise as may be considered appropriate: s 58(3).

The court is required to appoint the Clinic for the purpose of preparing assessment reports and information reports, unless it is more appropriate for some other person to be appointed. The reports are made to the court, and are not evidence tendered by a party.

It is absolutely critical, therefore, that the clinician be, and be seen to be, completely impartial and independent of the parties.

The Clinic has limited resources. Great care should be exercised in the making of assessment orders and, if made, the purpose should be clearly identified and spelled out for the clinician. It is important to remember that the court has a discretion as to whether it will make an assessment order. An assessment order should not be made as a matter of course. In particular, the court must ensure that a child is not subjected to unnecessary assessment: s 56(2).

In considering whether to make an assessment order, the court should have regard to whether the proposed assessment is likely to provide relevant information that is unlikely to be obtained elsewhere.

Having said that, the court can derive considerable assistance from an Assessment Report. In addition to providing independent expert opinion, the clinician can provide a hybrid factual form of evidence not otherwise available. Because they observe the protagonists over a period of time, interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes, clinicians can provide the court with insights and nuances that might not otherwise come to its attention.

Thus, a clinician can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the court, trammelled by the adversarial process and the "snapshot" nature of a court hearing, would not otherwise have the benefit of.

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<sup>402</sup> For a more detailed discussion of Assessment Orders, see Marien *ibid* at [5].

The Children's Court expects clinicians to be aware of, apply and adhere to the provisions of the *Expert Witness Code of Conduct* set out at Sch 7 of the *Uniform Civil Procedure Rules 2005* (UCPR).

### **Alternative Dispute Resolution (ADR) in Care matters**

Where intervention by Community Services is necessary, it is preferable that the intervention occurs early and at a time that allows for genuine engagement with the whole family, with a view to avoiding, wherever possible, escalation of problems into the court system. Once cases do need to come to court it remains important that the court also has processes available that will facilitate bringing the parties together with a view to them coming to a mutually acceptable resolution, that is in the best interest of the child, thereby avoiding lengthy, emotionally draining and often irrevocably divisive formal hearings.

Over the past few years, the Children's Court has initiated and entrenched alternative dispute resolution processes, which has involved an expansion and development of the involvement of Children's Registrars in Care matters. Prior to the introduction of these new initiatives the use of ADR in the Children's Court was restricted not only by the resources available, but also by an adversarial culture within the jurisdiction that favoured traditional court processes.

The ADR processes in the Children's Court are available in an appeal to the District Court.

The Dispute Resolution Conference (DRC) model has now become an integral aspect of Children's Court proceedings.

The conferences involve the use of a conciliation model. This means Children's Registrars have an advisory, as well as a facilitation role.

Conferences are now regularly conducted at the court by Children's Registrars who have legal qualifications and are also trained mediators (see s 65 of the Care Act), and are based at Parramatta, Broadmeadow, Campbelltown and Port Kembla Children's Courts, and Lismore and Albury Local Courts.

Importantly, however, Children's Registrars will travel to any court throughout the State and conduct DRCs.

The DRC process has brought about a significant shift in culture that has impacted on cases in the Children's Court more generally. The Australian Institute of Criminology (AIC) has evaluated the use of ADR in the area of care and protection, and found high levels of participation and satisfaction. Family members involved found the process to be useful, and felt they were listened to and were treated fairly. The AIC evaluation found that approximately 80% of mediations conducted have resulted in the child protection issues in dispute being narrowed or resolved.<sup>403</sup>

The timing of a referral of disputed proceedings to a DRC can sometimes be important.

Like all referrals for mediation, it is a matter of judgment when to do so. Sometimes it is necessary for the issues to be sufficiently defined to make the mediation viable.

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<sup>403</sup> A Morgan, H Boxall, K Terer, N Harris, *Evaluation of alternative dispute resolution initiatives in the care and protection jurisdiction of the NSW Children's Court*, Australian Institute of Criminology, Canberra, 2012 at <https://aic.gov.au/publications/rpp/rpp118>, accessed 4 July 2019.

On other occasions, it is better to refer as soon as possible, even if all the relevant documentation and information is not necessarily available.

The importance of confidentiality in the DRC model was reaffirmed in *Re Anna* [2012] NSWChC 1.

In that case the father said something during the DRC that was described by the Secretary as an admission that may have been relevant to the father's capacity to be responsible for the safety, welfare and well-being of his daughter. The Secretary sought leave to file an affidavit by a caseworker who was present at the DRC in which he refers to the alleged admission made by the father.

In rejecting the application to file the affidavit, the court said at [12]–[13]:

A pivotal feature of alternative dispute resolution (ADR) is that, except in defined circumstances, what is said and done in the course of ADR is confidential in the sense that it cannot be admitted into evidence in court proceedings. This important protection of confidentiality encourages frank and open discussions between the parties outside the formal court process.

...

The encouragement of frank and open discussion between the parties is particularly important in ADR in child protection cases. ADR provides parents with the opportunity to freely discuss with the Department, in a safe and confidential setting, the parenting issues of concern to the Department and, most importantly, it provides the Department with the opportunity to discuss with the parents in that setting what needs to be done by the parents to address the Department's concerns.

The court went on to say, however, that the protection is not absolute. He referred to a clause in the *Children and Young Persons (Care and Protection) Regulation 2000* (now repealed). ADR is now provided by Ch 15A Care Act and the Children's Court Practice Note No 3.

Section 244A defines "alternative dispute resolution", which includes a DRC. It goes on to provide that evidence of anything said or of any admission made, during alternative dispute resolution is not admissible in any proceedings: s 244B.

Similarly, a document prepared for the purposes of, or in the course of, or as a result of, ADR is not admissible in evidence in any proceedings before any court, tribunal or body.

Section 244C(2) enables the disclosure of information obtained in connection with the alternative dispute resolution, but only in very limited circumstances, and only by the person conducting the ADR. The permissible circumstances include where the relevant persons consent, or in accordance with a requirement imposed by or under a law (other than a requirement imposed by a subpoena or other compulsory process).

In *Re Anna*, the court made various important observations at [17] and [18], including:

However, [the clause] does not impose a general prohibition against disclosure of information obtained in connection with ADR. [The clause] does not, therefore, prohibit a person attending a DRC disclosing information obtained in connection with the DRC to a third party. For example, the clause does not prohibit a parent disclosing to their treating professional what was said at a DRC nor does it prohibit a lawyer who appears at a DRC as an agent disclosing to their principal what transpired at a DRC.

Nor does [the clause] prohibit a party attending a DRC using information disclosed by another party at the DRC to make independent inquiries and tender in evidence in the proceedings the result of those independent inquiries. [See *Field v Commissioner for Railways for New South Wales* [1957] HCA 92.]

The exceptions enabling disclosure of information obtained in ADR appear in s 244C(2) which provides as follows:

A person conducting alternative dispute resolution may disclose information obtained in connection with the alternative dispute resolution only in any one or more of the following circumstances:

- (a) with the consent of the person from whom the information was obtained,
- (b) if there are reasonable grounds to believe that the disclosure is necessary to prevent or minimise the danger of injury to any person or damage to any property,
- (c) if, as a result of obtaining the information, the person conducting alternative dispute resolution has reasonable grounds to suspect that a child or young person is at risk of significant harm within the meaning of Part 2 of Chapter 3,

**Note:** See section 23.

- (d) in accordance with a requirement imposed by or under a law of the State (other than a requirement imposed by a subpoena or other compulsory process) or the Commonwealth.

I do not propose here to consider in detail today the circumstances under which a disclosure made at a DRC might be admissible. That is a discussion for another day. For the moment, be aware that the power exists, but it is limited to disclosure by the person conducting the ADR, that is the Children's Registrar, and not the parties or others in attendance, or the caseworkers or legal practitioners involved.

## Conclusion

I hope the contents of this paper have been helpful in guiding judges hearing Care appeals.

Additional resources may be found at the following sites:

- (a) the website of the Children's Court contains numerous resources including the Practice Notes, the Contact Guidelines and various protocols. Most important, however, is the Children's Law News site (CLN), which contains various cases and articles collected over the last decade relating to Children's Law. It contains a helpful index
- (b) there is a chapter in the *Civil Trials Bench Book* on Child care appeals at [5-8000]
- (c) there is a chapter in the *Local Court Bench Book* on the Children's Court — Care and Protection Jurisdiction at [47-000].

Finally, please feel free to ring me at any time to discuss issues of law or procedure in Care matters.

# **Children’s Court update 2019 (care and protection jurisdiction)**

Judge Peter Johnstone, President of the Children’s Court of NSW, Local Court Regional Conference, 27–29 March 2019, Port Macquarie<sup>404</sup>

## **[1-0220] Introduction**

I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Biripi people, and pay my respects to their Elders past, present and emerging. I acknowledge and respect their continuing culture and the contribution they make to the life of this region.

The purpose of this paper is to alert Local Court Magistrates to recent developments affecting the exercise of Children’s Court jurisdiction, and is designed to be a reference resource which may assist you in relation to children’s matters in either care or crime.

I will firstly canvass some more general developments affecting the Children’s Court over the past year or so, and then discuss some updates in the criminal and care jurisdictions, followed by a brief discussion of some recent case law.

## **Updates in the care and protection jurisdiction**

There are several important updates and developments in the care and protection jurisdiction of the Children’s Court, which I will canvass briefly here.

### **Department of Family and Community Services Report on the outcomes of consultations: shaping a better child protection system**

Following consultations in 2017 and 2018, DFaCS published a report on the outcomes of these consultations in October 2018. The report, titled “Shaping a Better Child Protection System”, outlines a summary of overall feedback from stakeholders, and communicates the NSW Government’s position in relation to the child protection system.<sup>405</sup>

Notably, the report recommended that the *Children and Young Persons (Care and Protection) Act 1998* (the “Care Act”) be amended to provide that if a child or young person is assessed as at risk of significant harm, their family must be offered alternative dispute resolution before Care orders are sought from the Children’s Court, except where it would not be appropriate due to exceptional circumstances.

The NSW Government also recommended an amendment to the Care Act to extend the obligation of government agencies and government funded NGO’s to cooperate in the delivery of services to children and young persons, for the provision of prioritised access to services for children and young persons at risk of significant harm and their families.

This recommendation was made in light of the fact that the issues that families present to the health, education and justice systems are often associated with child protection risks.

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<sup>404</sup> This is an extract of the presentation relevant to the care and protection jurisdiction. The remainder of the presentation is contained at [5-0190].

<sup>405</sup> Family and Community Services, “Shaping a better child protection system”, at [www.facs.nsw.gov.au/about/reforms/children-families/better-child-protection](http://www.facs.nsw.gov.au/about/reforms/children-families/better-child-protection), accessed 4 July 2019.

The report recommended that the Children's Court be empowered to make a guardianship order by consent, where the suitability assessments around guardianship have been satisfied and all parties and children have received independent legal advice.

It was recommended that all parties to care proceedings may apply to vary an interim order without the requirement of a s 90 application to be filed. This would likely shorten care proceedings and provide further procedural fairness to participants.

The NSW government also recommended that where the Children's Court approves a permanency plan involving restoration, guardianship or adoption, that the maximum period for which an order may be made allocating all aspects of parental responsibility to the Minister is 24 months, unless the Children's Court is satisfied that there are special circumstances that warrant a longer period.

As such, it was recommended that s 83 be amended so that, "realistic possibility of restoration" means a realistic possibility of the child or young person being restored to his or her parents within a reasonable period, not exceeding two years.

The NSW Government recommended that an amendment to the Care Act be made to empower the Children's Court to make contact orders for more than 12 months duration for children and young persons who are the subject of a guardianship order, where it is in the best interests of the child or young person.

It was also recommended that s 90 be amended to introduce primary and additional considerations that the Children's Court must consider before granting leave to vary or rescind a Care order.

Finally, the Government recommended that the time limit in s 136(3) be amended from 6 months to 12 months to enable greater flexibility in the restoration process.

### **Amendments to the Children and Young Persons (Care and Protection) Act 1998 and Adoption Act 2000**

The *Children and Young Persons (Care and Protection) Amendment Act 2018* commenced on 4 February 2019. The Act amends the Care Act and the *Adoption Act 2000* to support current child protection reforms.

The amendments aim to strengthen services to keep children safely at home with their families and restore children to their families when it is safe to do so. When this is not possible, a safe home will be secured for children through guardianship or open adoption.

The amendments aim to support further reductions in the number of children and young people in out-of-home care and improve the timeliness and quality of services for these children and their families.

The key amendments focus on:

- earlier family preservation and restoration
- permanency for children and young people, and
- streamlined court processes.

Earlier intervention with families is central to the legislative changes. Alternative Dispute Resolution, such as Family Group Conferencing, must be offered to a family before orders are sought from the Children's Court. This provides families an opportunity to work together to develop their own plan to keep their children safe.

The Department of Family and Community Services can ask an agency or funded service provider to give prioritised access to services for children at risk of significant harm and their family.

The Children's Court is able to assess the realistic possibility of restoration in a 24 month period, allowing the court to consider whether restoration will be possible into the future. Children and young people will be able to be restored to their parents up to 12 months before a court order involving restoration expires.

The amendments also focus on greater permanency for children and young people. Shorter term court orders will focus on casework planning to secure long-term permanency outcomes sooner, and reduce the time children spend in out-of-home care. For care plans involving restoration, guardianship or adoption, the maximum period of an order giving parental responsibility to the Minister will be 24 months, unless the Children's Court is satisfied that special circumstances exist.

The changes to legislation also aim to streamline court processes to focus on each child's experience and what is in their best interest. The changes are designed to minimise lengthy litigation processes and respond to a child's needs quickly.

The Children's Court is able to:

- make a guardianship order where both parents consent, without the need to make a finding that there is no realistic possibility of restoration of the child to their parents
- make contact orders for longer than 12 months where a guardianship order is made and it is in the child's best interest
- relist a matter and review progress in implementing the Care plan if the court is not satisfied that proper arrangements have been made for the child's care and protection
- prioritise the views of children in applications for leave to vary or rescind a Care order
- discuss an application for leave to vary or rescind a Care order if the court is satisfied that it is frivolous, vexatious, an abuse of process, or one of a series of unsuccessful attempts by the applicant, and
- vary an interim order on an application by a party during proceedings if the court is satisfied that it is appropriate to do so.

There are a number of other ad hoc changes to care and protection proceedings. For example:

- when a guardian or carer with full parental responsibility dies, care responsibility will sit with the Secretary for 21 days. This will give the Secretary time to ensure appropriate care arrangements have been made
- the publication or broadcast of the names of children in a way that identifies them as being in out-of-home care will be prohibited in most situations,
- supported out-of-home care will only be provided for the placement of a child in care with a relative or kin where a relevant court order exists, consistent with existing practice.

The Department of Family and Community Services will monitor and report on the changes to ensure that they are supporting better outcomes for children, families and Aboriginal communities.

### **The Role of an Independent Legal Representative**

The concept that “children should be seen and not heard” has become redundant as society has developed an appreciation of the value that children and young people can add when they are empowered to participate.

The qualification has been enshrined in Art 12 of the United Nations’ *Convention on the Rights of the Child* 1989 (UNCROC). It states:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.<sup>406</sup>

The participation principle in Art 12 is qualified by ss 8 and 9 of the Care Act. The Care Act clarifies that a young person’s participation in decision-making is subject to ensuring their safety, welfare and well-being.<sup>407</sup>

The Independent Legal Representative (ILR) or “best interests” model is consistent with the need to consider the child’s views whilst maintaining an overarching commitment to safeguarding the child’s interests. The ILR will consult with the child, but their overriding duty is to the court, to act in accordance with the safety, welfare and well-being of the child.

The Direct Legal Representative (DLR) model requires that a DLR may be appointed for any child at the age of 12 or over who is capable of giving instructions. The DLR must then advocate as instructed by the child.

A practitioner who has been appointed as a DLR may make an application to the court for a declaration that a child aged 12 years or older is incapable to giving proper instructions and that the practitioner should act as an ILR instead of a DLR. Practitioners should make such an application where the practitioner forms the view that this is appropriate.

Section 99D(b) of the Care Act provides that the role of an ILR includes the following:

- (i) if a guardian ad litem has been appointed for the child or young person — acting on the instructions of the guardian ad litem;
- (ii) interviewing a child or young person after becoming the independent legal representative
- (iii) explaining to the child or young person the role of an independent legal representative

<sup>406</sup> United Nations, *Convention on the Rights of the Child*, in force 2 September 1990, at [www.ohchr.org/en/professionalinterest/pages/crc.aspx](http://www.ohchr.org/en/professionalinterest/pages/crc.aspx), accessed 27 June 2019.

<sup>407</sup> Care Act s 9.

- (iv) presenting direct evidence to the Children's Court about the child or young person and matters relevant to his or her safety, welfare and well-being
- (v) presenting evidence of the child's or young person's wishes (and in doing so the independent legal representative is not bound by the child's or young person's instructions)
- (vi) ensuring that all relevant evidence is adduced and, where necessary, tested
- (vii) cross-examining the parties and their witnesses
- (viii) making applications and submissions to the Children's Court for orders (whether final or interim) considered appropriate in the interest of the child or young person,
- (ix) lodging an appeal against an order of the Children's Court if considered appropriate.

The role of the ILR is critical to ensuring that the participation principles of the Act are adhered to. ILRs can do this, while preserving the safety, welfare and well-being of the child, by using participatory advocacy. The future is bright and with scientific, psychiatric and sociological advancements, we will no doubt see further discussion of alternative schemes.

### **Conclusion**

I hope this paper has been useful in outlining the changes in the Children's Court jurisdiction which have occurred over the past few years, and which will continue to unfold over the course of the year.



# Care and protection matters

## — practice and procedure

The following practice and procedure material that deal with care and protection matters have been included in this section:

### Guidelines

- Contact guidelines for magistrates at [2-0100]
- Contact guidelines for magistrates: background paper at [2-0150]
- Conducting a dispute resolution conference guidelines at [2-0200]

### Articles and other resources

- Judge Mark Marien SC, Care proceedings and appeals to the District Court, 28 April 2011 (revised) at [2-0225]
- Children’s Court: new arrangements for dispute resolution procedures in care and protection matters: Bulletin Number 2011/0021 at [2-0250]

See also *Local Court Bench Book* in **Children’s Court — Care and protection jurisdiction** at [47-000]ff.

### [2-0100] Contact guidelines for magistrates

These guidelines are intended to assist magistrates to identify issues to be considered in making a decision regarding contact in care and protection proceedings. They assume the law as it stood on [date] at which time the court had power to make contact orders regarding all care matters, both those involving restoration and those where there will be no restoration.

#### What is the purpose of contact

- *Restoration to the care of a parent or other carer?*

If an order that will result in restoring the child to a care of a parent is made, contact will need to be sufficiently frequent to maintain or develop the relationship between the parent and child.

- *Maintenance of a relationship which has some positive features*

Some parents will be unable to care for their child but will nevertheless be able to love and affirm the child and not undermine the placement with another carer. It is necessary to ask whether the frequency of visits enhance or destabilise the current placement.

- *Maintaining a sense of identity regarding kinship and culture*

For some children the benefit of contact will be primarily that they understand who they are in the context of their birth family and cultural background. Contact might

also help ensure that they have a realistic understanding of who the parent is and do not idealise an unsuitable parent and develop unrealistic hopes of being reunited with them.

### **Look at contact from the child’s perspective**

The focus must be on the needs of the child. How will the child benefit? Some benefit may be over long term ie providing the foundation for a relationship which will develop later.

### **Restoration contact**

If contact is part of a restoration plan it must be sufficiently frequent to allow a positive healthy relationship between parent and child to be maintained or to develop. It will ideally be in a situation that is as natural and relaxed as possible. It may need to increase as restoration nears.

### **How old and at what developmental stage is the child?**

Younger children will usually need more frequent contact for a shorter duration than older children to maintain a relationship. Older children may benefit more from less frequent (and thus less intrusive in carer family, sporting, cultural or friendship activities) contact of greater duration.

### **What are the child’s wishes regarding contact**

- *How do they react to contact that is occurring?*

Often a child’s wishes can be deduced from their behaviour at contact. Older children should be able to express their views and care should be taken to ensure that this expression is not influenced. The child’s legal representative will have an important role here.

Negative reactions immediately before or following a contact visit may not necessarily indicate that the child is not enjoying and benefiting from contact with their birth family, but that contact visits tend to bring out strong emotions in both the child and the parents and that any negative behaviours exhibited by the child may simply be an indication of their heightened emotional state. For recently removed children there may be some separation anxiety which will need to be addressed. This could involve gradually reduced contact or a brief suspension of contact or some way of reassuring the child regarding

- *Should the child be able to refuse to attend contact at a particular age?*

As a child matures their views about contact should have increased weight. Great care should be taken about agreeing with a young child who refuses contact when there is not an apparently sound reason. It may be difficult to get an older child to contact that they don’t wish to attend without causing greater harm than the benefit to be derived from the contact. The burden placed on carers to get an unwilling child to contact should be considered.

- Older children asked to reflect on contact arrangements often wish that they had more contact than occurred.

### **How healthy is the attachment or relationship between children and their birth parents?**

- *How long was the child in the care of the parent before removal from their care?*

In most cases there will be a strong attachment between a child and a parent who has been their carer for a long time. It is likely that the child will be adversely affected if contact becomes minimal in the absence of reasons to believe that the child will be harmed by contact. An infant or very young child will not have this strength of relationship.

- *How does the parent behave at contact?*

Some behaviour by parents at contact if persisted with should result in limited contact eg attending contact substance affected, denigrating others, not actively interacting with their child, favouring one child over the other.

- *Has the parent failed to attend contact without good reason?*

Persistent non-attendance will be harmful to a child whose expectations will be disappointed. This will often have impacts on their behaviour and possibly affect their placement.

- *Is there a strong relationship that is dysfunctional?*

For some children there will be a strong relationship with a parent that will be dysfunctional. The parent may encourage poor behaviour ie violence, challenging appropriate limits on behaviour, diet etc. It is better to look at the health of the relationship.

### **What are the practical considerations?**

- *Is there a substantial distance to be travelled?*

Younger children especially should not be subjected to long travel to attend contact.

- *Are there limitations on people travelling to contact eg cost, disability?*

Sometimes a carer will live at some distance from the parent either because the care was not able to be found in the local community or because a parent has changed address. Ordinarily the onus should be on the parent to travel to the contact rather than having the child travel, especially younger children. If a parent is to be travelling cost issues might need to be addressed.

- *Will there be disruption cause to the child or the household in which the child is living?*

Children and carer families will have their own commitments and patterns involving such things as piano lessons, basketball games, church attendance. It is important to ensure that a child is not made to feel greatly different from others in the household because they are at contact rather than carer family events. It is also important that the child does not resent attendance at contact because it takes them away from something that they enjoy doing.

### **What are the arrangements for contact with siblings, extended family and other significant people?**

It is very important to see children in the context of their extended family and not just their parents. Particular attention should be paid to supporting sibling relationships. Even if extended family members are unable to care for a child it is still likely that contact will be beneficial — providing information and family and cultural identity. Existing healthy relationships should be supported even if a child is to remain in and out of home care.

Balancing extended family contact and placement stability and normality requires careful consideration. For example what would be usual contact with grandparents if the child was not in care?

In some situations provision for contact with a carer will be very important even though a child is being restored to the care of a parent or moving to another carer.

### **What indirect contact arrangements are appropriate?**

- *Do arrangements need to be made regarding phone calls, cards and letters, email and social networking (eg Facebook/MySpace/Twitter/Skype)*

Contact can occur in other ways than face-to-face. In some situations it will be necessary to limit or prohibit indirect contact or to ensure that it is supervised. For example, it may be necessary to prohibit a parent from making any reference to the child on a social networking website. Alternatively, especially if the parent is at some distance from the child the use of electronic communication should be encouraged.

### **Are there special events that should be provided for — birthdays, religious events, special cultural events?**

Events such as these are important ways of maintaining identity and heritage. It should also be recognised that carer families will wish to celebrate some of these events as well. Often an order that contact near a particular date will be the best outcome.

### **What length of order is realistic?**

- *How will the needs and circumstances of the child change over time?*

A long term order for contact may create problems as a child's circumstances change, particularly if the contact is to be relatively frequent. School, sport, cultural activities and friendship dynamics are just some of the factors which change over time. As a child gets older less frequent but longer contact may be appropriate.

The need for contact to be supervised may also change as the child and parent's circumstances change.

- *How will the needs and circumstances of the carers/parents/others change over time?*

Carers are often unknown at this stage of the proceedings. In cases where carers are known their attitudes to contact should be considered, as some of the literature suggests that their attitudes can have a powerful influence on the quality and frequency of contact.

### **What does the care plan contain regarding contact?**

- *Is there a need for a specific order or is the care plan sufficient?*
- *Does the plan include provision for determining location?*
- *Will a written contact plan be provided to parent/child/carers/others? Will this include contact rules?*

For many parents and children it is difficult to predict future circumstances, particularly if a specific long-term carer has not been identified. Care should be exercised in ensuring that an unduly limiting contact order is not made. It may be preferable to ensure that plans for contact are clearly set out in the care plan without

contact orders being made. Even if an order is made it is likely to be for a short duration rather than until the child turns 18 so the care plan should contemplate as much of the longer term future as possible.

### **Aboriginal and Torres Strait Islander families**

Contact, whether with parents or with extended family, is likely to assist in maintaining cultural identity when a child is placed outside of kinship or community. If family contact is limited there will need to be an appropriate cultural plan in the care plan.

### **What is appropriate for an interim contact order?**

In making an interim order the court must to some extent predict the likely outcome of the proceedings and make orders that are in keeping with this. Nevertheless interim orders can also assist transition. For example it may be appropriate to provide for more frequent contact in an interim order than will be contemplated long-term. It may also be appropriate to provide for declining or increasing amounts of contact that are in keeping with a move to the likely outcome.

### **Are there real risks to the safety, welfare and wellbeing of the child?**

- *Should contact be supervised?*
  - (i) Where a child has been removed from his or her family as a result of physical or sexual abuse, contact visits will most likely need to be supervised in order to ensure the safety of the child. If there has been trauma caused by a parent a child may not feel safe unless contact is closely supervised.
  - (ii) If there is a real risk that a parent is likely to be substance affected, affected by uncontrolled mental illness, is likely to behave in a way at contact which will be detrimental to the child or the placement general supervision will be needed.
  - (iii) In some situations where restoration is planned contact can be used to help a parent improve their parenting skills. It would need to be specifically planned that this would be the case. Specific orders or undertakings may be needed to support this educative purpose.
- *Who should supervise contact?*
  - (i) **Other family or friends.** There is often no reason that contact needs to be supervised by a Caseworker or contact worker organised by Community Services. Grandparents, other family friends may be suitable *if there is evidence that they are going to be sufficiently protective and reliable*. It is more likely that timing and location of contact will be flexible and more suited to a child's needs than if organised by Community Services. It may also mean that the contact can take place in the first language of the child and the parent if it is not English.
  - (ii) **CS or delegate.** In some situations the risk to the child will require that professional contact supervisors are involved.
- *Are written guidelines necessary eg re non-denigration of others, not being substance affected, communication in language other than English?*

For some parents it will be necessary to provide rules governing such matters as advance confirmation of attendance, the importance of not denigrating other people,

that the contract may be cancelled if they attend substance affected, that they are not to communicate with the child in a language not spoken by the contact supervisor, etc. This will make it clearer that there may be consequences if the rules are broken.

- *Should contact with parents and others occur separately from each other?*

If there is a real risk of conflict between adults present at contact separate contact should be ordered, or contact rules provide for the cessation of contact if conflict arises.

### **Should contact be prohibited or restricted?**

In some circumstances a child will experience trauma at contact because of

- trauma that they have suffered at the hands of or with the acquiescence of a parent, or
- distressing behaviour by a parent at contact — intoxication, verbal abuse, favouritism towards one child, denigration of carers.

### **As a last resort**

In rare cases contact may need to be prohibited for a period of time or subject to considerable restriction. This should only be done after careful assessment of the possibility of distress or harm to the child.

## **[2-0150] Contact guidelines for magistrates: background paper**

Prepared by Tijana Jovanovic, Research Associate to his Honour Judge M Marien SC, President Children’s Court of NSW, July 2010.

### **Introduction — making “contact” decisions**

Making a decision regarding contact is often very challenging for any magistrate, particularly where different parties strongly disagree on the nature and frequency of contact. The Court is often caught between upholding the principle that there should be a continuance of a relationship between a child in out of home care and the child’s birth family, and ensuring that the safety, welfare and well-being of a child is a paramount consideration in any decision.

As Magistrate Crawford noted:

Even if the desirability of “ongoing contact” is a matter of common ground between the parties, the translating of this principle into the specifics of a workable arrangement that can be evidenced in terms of a court order, can be a difficult task. Similarly there can be the difficulty of integrating “contact” into the broader future planning for the child. The varying interests of the child and many other persons must be taken into account if a contact order is to work satisfactorily over the longer term as this necessarily requires the co-operation of all persons involved in the process.<sup>1</sup>

To make matters more complicated, his Honour pointed out that:

It is important that any decision concerning the making of a contact order be based on adequate, relevant, current and specific information. *Often such information is not available.*<sup>2</sup> (Emphasis added.)

The purpose of this paper is to enable magistrates to make better informed contact orders by highlighting the main functions and purposes of contact visits, outlining key

<sup>1</sup> Magistrate Crawford, “Considerations in Making a Contact Order”, 2005(9), *Children’s Law News* 3.

<sup>2</sup> Ibid.

arguments in favour and against contact between children in care and their family members, analysing specific issues which children in care may encounter as a result of contact and outlining factors which may inhibit contact and which magistrates will need to carefully consider if contact is to be fostered and encouraged.

### **Contact orders under the Children and Young Persons (Care and Protection) Act 1998**

Currently the Children's Court has the power to make contact orders in accordance with s 86 of the *Children and Young Persons (Care and Protection) Act 1998* ("Care Act") which states:

1. If a child or young person is the subject of proceedings before the Children's Court, the Children's Court may, on application made by any party to the proceedings, do any one or more of the following:
  - (a) make an order stipulating minimum requirements concerning the frequency and duration of contact between the child or young person and his or her parents, relatives or other persons of significance to the child or young person,
  - (b) make an order that contact with a specified person be supervised,
  - (c) make an order denying contact with a specified person if contact with that person is not in the best interests of the child or young person.
2. The Children's Court may make an order that contact be supervised by the Director-General or a person employed in that part of the Department comprising those members of staff who are principally involved in the administration of this Act only with the Director-General's or person's consent.
3. An order of the kind referred to in subsection (1)(a) does not prevent more frequent contact with a child or young person with the consent of a person having parental responsibility for the child or young person.
4. An order of the kind referred to in subsection (1)(b) may be made only with the consent of the person specified in the order and the person who is required to supervise the contact.

### **Findings of the Wood Special Commission of Inquiry into the Child Protection Services in NSW regarding contact**

#### ***Review of the Children's Court's powers under s 86***

The Wood Special Commission of Inquiry into the Child Protection Services in NSW reviewed the current system of making contact orders and concluded:

The Inquiry is of the view that, on balance, the Children's Court should retain its power to make contact orders with respect to those children and young persons about whom the Court has accepted the assessment of the Director-General that there is a realistic possibility of restoration. For all other children and young persons, that is those where the Court has accepted that there is no such possibility, the Court should have no power with respect to making orders as to contact.<sup>3</sup>

The NSW Government supports Commissioner Wood's recommendation. As a result, the Government presently proposes an amendment to s 86 of the Care Act limiting

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<sup>3</sup> New South Wales, Special Commission of Inquiry into Child Protection Services in NSW, *Report of the Special Commission of Inquiry into Child Protection Services in NSW*, 2008, at [11.227].

the Court's power to make contact orders only in cases where restoration is a realistic possibility. Until the proposed amendment comes into effect, the court will retain its power to make contact orders in both cases where restoration is and is not a realistic possibility.

### ***Need for contact guidelines***

The Inquiry was informed that there appears to be some discrepancy in the nature of contact orders made by different judicial officers. The Inquiry noted that:

Determining the duration, frequency and supervision needs for contact between children and young persons in care and those significant to them, is a complex matter. The Inquiry is aware of the competing views in the literature concerning the benefits which may accrue to a child or young person from contact being maintained, and balancing the need for stability, the likelihood of restoration, the developmental requirements of a child or young person as well as changes in the circumstances of birth families and the quality of the contact, all within the context of the best interests of the child or young person.<sup>4</sup>

The Inquiry was of the view that discrepancies may arise not only as a result of unique circumstances of each care and protection case, but due to a lack of guidance regarding matters which judicial officers should consider, and the approach which they should adopt in making contact orders. As a result, the Inquiry recommended that:

Evidence based guidelines for Magistrates should be prepared in relation to orders about contact made under s 86 of the Children and Young Persons (Care and Protection) Act 1998.<sup>5</sup>

A number of Children's magistrates informed the court that they experienced some difficulties when faced with the task of making contact orders, and that these difficulties could be minimised by providing them with some guidance on how to approach these orders. In these circumstances, some form of guidelines would appear to be beneficial, both by informing magistrates of various matters which should be taken into account when making contact orders thereby leading to better informed decisions, and by ensuring consistency of the court's decisions.

### **Basic arguments in favour and against contact**

There are a number of recurring arguments in favour and against contact. It is important to note that as the circumstances of each case are unique, these arguments do not apply across the board, and the ultimate decision regarding contact needs to be based on the particular circumstances of the case.

- Contact encourages reunification with the birth family
- Contact maintains/encourages attachment to the birth family
- Contact prevents idealisation of the birth family
- Contact maintains links and cultural identity
- Contact enhances the psychological well-being of the children in care
- Contact is a means by which the quality of the relationship between the birth family and the child can be assessed.<sup>6</sup>

<sup>4</sup> Ibid at [11.199].

<sup>5</sup> Ibid, recommendation 11.6.

<sup>6</sup> S Taplin, "Is all contact good contact?", NSW Department of Community Services, Discussion Paper, 2005, p 7.

On the other hand, the following are the most cited arguments against contact:

- Multiple attachments create confusion for children or conflict of loyalties
- The threat of harm to the child or to the new parents may undermine the placement
- Birth parents need to be helped towards closure as the best way of dealing with feelings of loss and guilt
- Demands placed on new parents adversely affect the recruitment of new adopters
- It is too risky to make such complex placements without adequate professional skills and resources which need to extend far beyond adoption
- The push for contact arises less from the evidence on benefits than from professional desires to undo the pain of separation or because they themselves feel they have failed the birth family.<sup>7</sup>

In addition some studies have found that contact with birth families may lead to:

- Continuation of unhealthy relationships, for example inappropriately dominant or bullying relationships, or controlling relationships.
- Undermining the child's sense of stability and continuity by deliberately or inadvertently setting different moral standards or standards of behaviour.
- Experiences lacking in endorsement of the child as a valued individual eg where little or no interest is shown in the child himself, or contact where the parent is unable to consistently sustain the prioritisation of the child's needs.
- Unreliable contact in which the child is frequently let down or feels rejected, unwanted and of little importance to the failing parent.

Where a child is continuing to attend contact even though expressing a view that he doesn't want the contact can make the child feel undermined.<sup>8</sup>

### **Different models of contact and their influence on contact orders**

Before exploring specific issues which arise in relation to contact, it is useful to consider different models of contact. These models broadly demonstrate different functions of contact visits, and broadly illustrate the approach to be taken in making contact orders, depending on the function which contact is intended to serve in a particular case.

There are four basic models of contact. Namely, the rehabilitation model, the continuity model, the disruption model and the deterrence model:

- ***Rehabilitation model***

Here the function of contact is to facilitate the resumption of care by a parent. When rehabilitation (restoration) occurs (as is the objective of contact), the transition from care will then be less stressful for the child. Contact allows the parent to develop caring skills gradually. Contact can be used to assess the abilities of the parent and for social workers to “teach” caring skills to the parent. Contact keeps alive the possibility of the separated parent resuming full-time care. In summary, contact under this model is a means to an end.

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<sup>7</sup> Ibid, p 12.

<sup>8</sup> See Children's Magistrate Elizabeth Ellis, “Contact Orders”, 2004, p 6.

- ***Continuity model***

Where restoration is not an objective, contact benefits the child and parent by supplying emotional security through the continuance of that relationship. Contact can help create a sense of identity for the child. As the child grows older, such contact may provide a crucial link to the past, as well as a sense of his/her own background and root. Contact is an end in itself.

- ***Disruption model***

This model argues that whilst contact is desirable when restoration is an objective, if it ceases to be so then continued contact with the non-caring parent creates confusion, uncertainty and disruption for the child. Stability for the child is what is important and the social parents should replace the natural parents entirely. Non-rehabilitative contact may create confusion for the child and worry in the child's mind of removal from the new carers.

- ***Deterrence model***

This model is developed within the context of the English legislation that provides for orders “freeing” children in care for adoption. The concern that this model addresses is that potential adoptive parents will be deterred from adopting by the prospect of having to accommodate continuing contact with the natural family.

In care proceedings both the “rehabilitation” and “continuity” models are used as a justification for the making of contact orders. The “disruption” model is sometimes used to justify the restriction or termination of contact.<sup>9</sup>

By adopting these models and determining which function contact visits are meant to serve in a particular case at the outset, magistrates will gain a broad idea of how frequent contact will need to be, whether any third parties will need to be involved, and whether visits need to be structured in any way. For example, if the circumstances of a case indicate that restoration is a realistic possibility, the Court will need to adopt a rehabilitation model of contact. As a result, the Court may consider making contact visits more frequent, and involving Community Services caseworkers who can teach the parent good parenting skills. If, on the other hand, there is no realistic possibility of restoration but the parent and child have a healthy and close relationship, the Court may adopt the continuance model and order regular, though not necessarily frequent contact. Regular visits would enable the child to maintain a sense of identity and learn about his or her history while not disrupting the child's placement through overly frequent visits.

### **Purposes of contact**

According to the literature, contact visits between a child and his or her birth family may serve a number of specific purposes.

- Visitation can be a positive intervention for the entire family and can promote successful reunification.
- Visits reassure children that their families are alive and well and still care about them. Frequent contact with parents can reduce children's anxiety associated with separation. Other types of contact, including exchange of phone calls, cards, and letters, will also serve this purpose.

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<sup>9</sup> Magistrate Crawford, above n 1, pp 8–9.

- Frequent visitation reassures parents that the agency is committed to maintaining and strengthening family relationships.
- Visits present the caseworker with a valuable opportunity to help family members identify their needs and strengths. By observing family members together, the worker can elicit important information about the quality of the parent-child relationship, as well as gain insight into the parents' developmental needs, motivation, and capacity to resume care of their children.
- Family visits can be used as interventions to achieve specific objectives. For example, foster or relative caregivers may use visits to model parenting skills and to share child management strategies. During visits, parents can practice newly acquired parenting strategies and can receive immediate, constructive feedback and coaching from the caseworker or caregiver.
- Visits may help parents understand the importance of permanency for their child. The visits can help them make a final decision regarding whether they want to diligently pursue reunification or relinquish their parental rights, thereby allowing their child to achieve permanency through another plan, such as adoption or guardianship.
- Sibling visitation allows these important relationships to be maintained, even when siblings must be placed in separate homes.
- Visitation with extended family is encouraged whenever possible. Extended family connections are important to the child's development and often serve as alternative permanency plans if reunification does not take place.<sup>10</sup>

### **Potential effects of contact on children in care**

In order to make contact visits which promote the best interests of the child and support the goals of a care plan, magistrates need to be aware of the impact of contact on family reunification as well as the child's psychological wellbeing.

### ***Family reunification***

As the court will soon be limited to making contact orders only in cases where restoration is a realistic possibility, it is necessary to have regard to some of the literature which analyses the impact of contact on family reunification. In particular, a considerable amount of literature supports the notion that the greater the amount of contact between a child and his or her birth family, the stronger the likelihood that the child will return home.<sup>11</sup> It is important to note however, that some authors argue that while contact may be associated with reunification, it may not necessarily cause it.<sup>12</sup> A variety of factors quite independent of contact will shape the ultimate decision to return a child to his or her birth family. As a result, in cases where the Court has determined on

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<sup>10</sup> Maine Department of Health and Human Services, Child and Family Services Manual, Part V.E. accessed from [http://www.maine.gov/dhhs/ocfs/cw/policy/index.html?i\\_\\_d\\_\\_practice\\_model.htm](http://www.maine.gov/dhhs/ocfs/cw/policy/index.html?i__d__practice_model.htm) on 22/03/10.

<sup>11</sup> J Richards, "Contact — it still needs to be encouraged" (1995) 19(3) *Adoption and Fostering*, at pp 43–45; E Farmer, "Family reunification with high risk children: lessons from research" (1996) 18 *Children and Youth Services Review*, pp 403–424; P Hess, "Visiting between children in care and their families: a look at current policy", 2003, A Report for the National Resource Centre for Foster care Permanency Planning, Hunter College School of Social Work: A Service of the Children's Bureau.

<sup>12</sup> K Wilson and I Sinclair, "Foster care: policies and practice in working with foster placements" (2003) in M Bell and K Wilson (eds), *The Practitioner's Guide to Working with Families*, Palgrave Macmillan, Basingstoke, 2003, pp 229–245; D Fanshel, *On the road to permanency*, Child Welfare League of America, New York, 1982; D Browne and A Moloney, "Contact Irregular: a qualitative analysis of the impact of visiting patterns of natural parents on foster placements" (2002) 7 *Child and Family Social Work*, 35.

the basis of the evidence before it, that restoration is a realistic possibility, the studies suggest that orders encouraging frequent contact may further assist the child's return to the family.

***Birth/foster family attachment, loyalty conflict and the child's psychological wellbeing***

A number of studies have noted that frequent contact can have a significant impact on the child's attachment to his or her birth family. As a result, a few studies have focused on the impact of birth family attachment on foster family attachment, and the extent to which any dual attachment produces loyalty conflict in turn causing behavioural and psychological problems for the child. The results of these studies are rather mixed. This may be in part due to different time periods over which these studies were carried out. That is, patterns of placement and contact may have been quite different twenty years ago from today. Equally, patterns may vary across countries. Further, it is difficult to compare sample sizes used in various studies. Nevertheless, these studies may be of some assistance in cases where the child is expected to return home, and should therefore be encouraged through various means including contact to retain some attachment to their birth parents, while developing an attachment to their new foster parents.

In 1990 Fanshel found that parental contact was positively related to children's negative behavioural outcomes.<sup>13</sup> His study concluded that children who had regular contact with their birth families had more emotional and behavioural problems both in their foster homes and as young adults.<sup>14</sup> Fanshel hypothesized that the reason for the children's greater disturbance may be that they come from highly dysfunctional families and that they may be drawn into their parents' stressful life events or difficulties.<sup>15</sup> However, as Leathers points out this hypothesis appears inconsistent with Fanshel's earlier study which found that children with more frequent parental contact had greater adjustment problems in their foster homes and weaker attachment to their new families, even after controlling for the biological mother's disturbance and capacity to function in the maternal role.<sup>16</sup>

Poulin's study concluded that frequency of contact fostered stronger biological family allegiance which in turn produced loyalty conflict.<sup>17</sup> This finding was supported by a number of later studies which also concluded that while contact is beneficial to children in short term foster placements, children in long term foster care were likely to experience loyalty conflict when visited frequently as a result of having to manage allegiances to multiple parents. The impact of loyalty conflict is not only relevant in cases where a child is placed in permanent foster care. Children who are expected to return home eventually but who remain in foster care for an extended period of time are likely to experience the same difficulties as children who are placed in permanent care but who are frequently visited by their birth parents. These findings suggest that magistrates making contact orders in cases where restoration is a realistic possibility may face the difficult task of crafting orders which encourage family reunification

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<sup>13</sup> S Leathers, "Parental visiting, conflicting allegiances and emotional and behavioural problems among foster children" (2003) 52(1) *Family Relations* 53, 54.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

while at the same time limit the adverse effect that frequent contact may have on children who spend a considerable amount of time in care. On the other hand, the findings imply that in cases where there is no realistic possibility of restoration, contact should be kept to a minimum so as to prevent the child from experiencing loyalty conflict.

On the other hand Cantos et al made the following findings in relation to children in care who display behavioural difficulties in their placements and were consequently referred to therapy:

Regular parental contact in contrast to no or irregular contact was shown to be related to the child's behavioural difficulties as reported by foster parents even when behavioural differences accounted for by the duration of the children's stay in care and the number of placements they have been in were taken into consideration. The children who were visited regularly were rated as exhibiting fewer behaviour problems, especially problems of an internalising nature (ie withdrawal, depression, anxiety) than the children who were visited irregularly or not at all.<sup>18</sup>

Similarly McWey and Mullis found that children who were visited more frequently and who had higher attachment to their parents had "fewer behavioural problems, were less likely to take psychiatric medication, and were less likely to be termed 'developmentally delayed' than children with lower levels of attachment".<sup>19</sup>

In a most recent study, Leathers made the following findings in relation to visiting and its impact on loyalty conflict:

Most children were not reported to have a high level of loyalty conflict ... As expected, how often children had visited with their mothers was not related to the severity of their depression, anxiety, oppositional defiant behavior, or conduct problems.<sup>20</sup>

Leathers also noted:

As expected, greater loyalty conflict was associated with having a strong allegiance to both a foster family and a biological mother.

Strength of allegiance to a foster family also had a weak, negative correlation with strength of allegiance to a biological mother suggesting that maintaining strong relationships with both a biological mother and a foster family might be difficult for some children.<sup>21</sup>

Differences were also found between the effects that biological mother allegiance had on foster family allegiance of boys and girls. According to the study:

Among the subsample of girls, strong biological mother allegiance was a significant predictor of weaker foster family allegiance ... Among the subsample of boys, allegiance to biological mother was a nonsignificant predictor of foster family allegiance.<sup>22</sup>

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<sup>18</sup> A Cantos, L Gries, and V Slis, "Behavioral correlates of parental visiting during family foster care" (1997) 76(2) *Child Welfare*, 309, 324.

<sup>19</sup> L McWey and A Mullis, "Improving the lives of children in foster care: the impact of supervised visitation" (2004) 53(3) *Family Relations* 293, 298.

<sup>20</sup> Leathers, above n 13, p 58.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

Aside from birth and/or foster family allegiance, foster parents' attitude to contact visits was also found to have a direct impact on children's behavioural problems. Foster parents who were opposed to, or anxious about contact, were more likely to have children with the greatest number of behavioural problems, whereas the opposite was true for foster parents who encouraged contact with the birth family.<sup>23</sup>

Overall the study concluded that "frequency of parental visiting is not directly related to the emotional and behavioural problems of young adolescents who have been placed in non-relative foster care longer than a year".<sup>24</sup> Instead loyalty conflict was directly related to biological and foster family allegiance. Specifically "children who have strong allegiances to both their foster families and their mothers are likely to experience loyalty conflict, but also that loyalty conflict might be associated with weaker foster family allegiance".<sup>25</sup>

In light of the above findings it is not surprising that a number of studies have noted that children who were visited frequently and who had strong attachment to their biological families had more difficulty attaching to their foster family which in turn caused placement disturbances. These findings could have significant implications for the making of contact orders where restoration is contemplated. The literature suggests that children with strong birth family allegiance are most likely to experience loyalty conflict and placement disturbances. Given that family allegiance would be encouraged when a child is expected to return home, contact visits will need to be organised in a way that seeks to minimise loyalty conflict. Literature suggests that supportive foster carers may, to some extent, help minimise these difficulties. However foster carer support is an independent factor which may be difficult, if at all possible, to influence through court-imposed contact orders. On the other hand, the literature suggests that where restoration is not a realistic possibility, it may be more appropriate to reduce or even completely cease contact between a child and his or her birth family, as the emotional disturbance and difficulty of forming attachment to the foster carers may override the benefits of contact, and may not be in the best interests of the child.

### **Factors which may inhibit contact**

#### ***Length of stay in care***

A few studies have found that the longer children stayed in care the more likely they were to experience a gradual decline in contact with their birth families.<sup>26</sup> Although Leathers' study noted that stronger foster family allegiance resulted in less frequent maternal visits, the studies do not make it clear whether growing attachment to the foster family or increasing barriers to contact were the cause of reduced contact.

This is another factor which will need to be considered when making contact orders — if restoration is a case plan goal it will be necessary to ensure that the child is not placed in care for an extended period of time which may negatively affect the child's contact with the birth family. Alternatively, contact orders may need to impose more frequent contact which could counter the effect of lengthy stay in foster care, as long as the frequency of visits does not lead to loyalty conflict.

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<sup>23</sup> D Scott, C O'Neil and A Minge, *Contact between children in out-of-home care and their birth families — Literature review*, NSW Department of Community Services, 2005, p 23.

<sup>24</sup> Leathers, above n 13, p 59.

<sup>25</sup> Ibid, p 61.

<sup>26</sup> Scott et al, above n 23, p 14.

### ***Kinship care***

A number of studies have found that kinship care encourages more contact than non-kinship care. In fact, according to Berrick et al “56% of children in kinship care received at least monthly contact visits, compared with 32% of children in non-kin care”.<sup>27</sup> As a result contact orders for children in this type of care will need to reflect these differences.

Interestingly, despite increased contact between the child and his or her birth parents, children in kinship care tend to remain in care for longer than children in ordinary foster care. Kovalsky suggests that placing children in kinship care reduces the parents’ motivation to address their substance abuse or other issues which lead to the child’s removal.<sup>28</sup>

If the court is of the view that the child should be restored to the family, it may be necessary to impose strict contact guidelines to ensure that the child’s placement with kin does not jeopardise his or her return to birth parents.

### ***Domestic violence, sexual abuse and parental imprisonment***

Where a child has been removed from his or her family as a result of physical or sexual abuse, contact visits will most likely need to be supervised in order to ensure the safety of the child. In addition, the following matters will need to be considered prior to making contact orders:

- Permanently placed children who have suffered severe maltreatment may be re-traumatised when they have contact with the maltreating parent
- Children may therefore experience the permanent carers as unable to protect them and keep them safe. This will interfere with the child’s ability to develop a secure attachment with their new carers
- Severely maltreated children who feel unsafe and insecure will continue to employ extreme psychological measures of defence which may lead to a variety of aggressive, controlling and distancing behaviours. These behaviours place great strains on the carer-child relationship and increase the risk of placement breakdown
- In contact cases where children suffer re-traumatisation, the need to make the child feel safe, protected and secure becomes the priority. Contact in the medium term would therefore not be indicated. This decision does not rule out the possibility of some form of contact at a later date, but this will depend upon whether or not the child has achieved levels of resilience ... that will equip them to deal with the emotional arousal that renewed contact with a once traumatising parent will initially trigger.<sup>29</sup>

On the other hand where a parent has been imprisoned and the reasons for the parent’s imprisonment are not linked to the child’s removal, contact should proceed particularly if the parent is expected to be incarcerated for a short time and reunification is a case plan goal. Consideration will however need to be given to the impact of visiting a parent in prison and other physical aspects of visitation in this unique setting.<sup>30</sup>

<sup>27</sup> J Duerr Berrick, “What works in kinship care” (2000), in Scott et al, above n 22, p 17.

<sup>28</sup> A Kovalsky, “Factors affecting mother-child visiting identified by women with histories of substance abuse and child custody loss” (2001) 80(6) *Child Welfare* p 749.

<sup>29</sup> D Howe and M Steele, “Contact in cases in which children have been traumatically abused or neglected by their birth parents” in E Neil and D Howe (eds), *Contact in adoption and permanent foster care: research, theory and practice*, British Association for Adoption & Fostering, London, 2004.

<sup>30</sup> P Hess and K Proch, *Family visiting in out of home care: a guide to practice*, Child Welfare League of America, Washington, 1988.

### *Parents' psychiatric illnesses*

Where the safety of the child is not an issue, the Children's Court Clinic supports ample contact with the birth parent who is suffering from a psychiatric illness. Frequent contact reassures the child that his or her parent is coping with the separation and may also alleviate any fears that the child will develop the same psychiatric issues. If the child has inherited the parent's mood or psychiatric disorder, contact can provide a forum in which the child can discuss their mental health with their parent, and gain a better understanding of how to cope with the illness or disorder. If the child has expressed a desire to have contact with the parent contact visits will help the child feel less powerless and insignificant about his or her situation.

### *Supervision*

In order to ensure the safety and welfare of a particular child, a contact visit may need to be supervised. Where the need for supervision is evident, the court is required to make that order and is not permitted to leave the requirement for supervision to the discretion of the Director-General of Community Services.<sup>31</sup>

### *Factors which may warrant supervision*

Circumstances where it may be appropriate that the contact be supervised by another person include (but are not limited to) situations where:

- there are allegations that the contact parent has a psychiatric disorder, or where a parent's emotional or mental stability may be in issue;
- there are allegations of child abuse, whether physical, sexual or psychological in nature;
- a child may be expressing strong views that they are reluctant to see the contact parent alone;
- a parent's alcohol or drug consumption may be a possible threat to a child;
- the contact parent's conduct is anti-social and there is a risk that such behaviour may impinge upon the welfare of the child;
- there is a history of the contact parent engaging in abusive behaviour;
- the child has witnessed physical or verbal abuse between the parents;
- it will help the contact parent and the child adjust to new arrangements;
- the child is very young and the contact parent needs assistance;
- the child has not seen the contact parent for a long time; and/or
- the contact parent is expected to experience some parenting difficulty.<sup>32</sup>

### *Effect of supervision on contact visits — children's experience*

Children view supervised visits both positively and negatively. For example, children often viewed contact services personnel as helping them to have contact in a safe environment that is free from parental conflict.<sup>33</sup> A number of children indicated that attending contact services premises significantly decreased the incidence of domestic

<sup>31</sup> *Re Liam* [2005] NSWSC 75 at [48].

<sup>32</sup> Redfern Legal Centre's *Lawyers Practice Manual New South Wales* at [2.3.208].

<sup>33</sup> G Sheehan et al, *Children's contact services: expectation and experience*, Final Report, 2005, 147.

violence or conflict between their parents, which made them feel safer.<sup>34</sup> These children also stated that the presence of a contact services provider made them feel safer to be with parents who had substance abuse problems, as the providers would intervene as soon as the parent became agitated or abusive.<sup>35</sup> On the other hand some children expressed the view that the presence of a contact services provider felt like an invasion of their privacy and prohibited them from openly engaging with their parent both verbally and physically.<sup>36</sup> Further, some children expressed their frustration at the inflexibility of re-organising contact visits, which lead to them missing out on sporting or social events.<sup>37</sup> This view was most commonly held by older children, suggesting that the need for and nature of supervision may need to change as the child gets older, and that there should be more flexibility in contact visit arrangements. Finally some children expressed the desire for other family members who are related to the visiting parent (and who they rarely saw) to attend supervised contact visits.<sup>38</sup>

#### *Who should supervise contact visits?*

When making supervised contact orders, the court should consider who would be the most suitable supervisor in the particular circumstances of the case. Preference should be given to a family member or a family friend, unless there is a specific need for a Community Services caseworker or a delegate to supervise the visits. Experience shows that when a family member supervises visits, particularly if they do so in their own home, members of the child's extended family often attend these contact visits. The child consequently has contact with members of the family they rarely see when contact visits occur at Community Services premises under the supervision of a caseworker, helping the child feel more as a part of his or her family despite their removal.

#### *Resource implications of contact*

Finally, magistrates making contact orders will need to be conscious of the resource implications of their orders. While it is important that contact orders adequately address a child's needs, it is also important not to make orders which may be too burdensome on either foster carers, birth parents or Community Services. Where a child cannot be placed in close proximity to his or her birth parents the cost of travel will need to be taken into account prior to making contact orders. As the Court of Appeal clarified in *George v Children's Court of NSW* [2003] NSWCA 389, the court cannot order the Director-General of Community Services to bear the cost of travel incurred by birth parents in the course of attending contact visits.

#### **Aboriginal and Torres Strait Islander children — need for special consideration**

When making contact decisions about Aboriginal or Torres Strait Islander (ATSI) children it is important to keep in mind principles governing care and protection orders in relation to those children, which are set out in ss 11, 12, 13 and 14 of the Care Act. Namely, contact orders should, as far as possible, encourage ATSI children to maintain links with their culture.

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<sup>34</sup> Ibid.

<sup>35</sup> Sheehan, above n 34, p 148.

<sup>36</sup> Sheehan, above n 34, p 153.

<sup>37</sup> Sheehan, above n 34, p 154.

<sup>38</sup> Sheehan, above n 34, p 158.

If a child cannot be placed with an ATSI carer, special care should be taken in placing a child in a location/community where the child may form and maintain those links with the Aboriginal culture even if it's immediate carers are not Aboriginal. In addition, when making contact orders in relation to ATSI children and particularly when, for whatever reason, the child does not have regular contact with its birth parents, the Magistrate making those orders should determine whether there are any other family or kinship members with respect to whom contact orders should be made. Further, Magistrates should also be aware of special cultural events and should craft contact orders which take these events into account.

### **Some views on contact**

#### ***Children in care***

The New South Wales Community Services Commission interviewed a number of children and young people in care as part of its “Voice of Children and Young People in Foster Care” project. The Commission was informed by the children who were interviewed that:

The majority (47) wanted more contact and connection with their family members and other significant people in their lives. The only exceptions to this were those children and young people who had been placed in long-term care at a very early age and had remained in long-term stable placements with little or no family contact since. Even amongst this group however, there were many requests for more information about their families.<sup>39</sup>

The Commission also found that:

Many children and young people involved in the consultations had lost significant relationships or had these relationships seriously diminished since coming into care.<sup>40</sup>

In addition:

Some children and young people had lost multiple relationships while in care. For example, one young person, aged over 13 years at the time of the consultation, who had been in DoCS care since preschool age had lost contact with a grandmother, aunt and brother who lived a short distance away, both parents who lived interstate. The young person had never seen, since entering care, several siblings who lived interstate.<sup>41</sup>

The importance of contact with birth family for children in care is evident from individual accounts reproduced in the report. Many of these accounts indicated strong feelings of sadness, frustration and confusion on the part of the child in care.<sup>42</sup> On the other hand a young person who was placed with her own brother indicated that that was the best aspect of foster care.<sup>43</sup>

#### ***Barnardos***

Barnardos acknowledge the need for children in care to remain in contact with their birth families. Barnardos also recognise that a child's need for contact does not remain

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<sup>39</sup> Community Services Commission, *Voices of children and young people in foster care*, Consultation Report, 2000, 84.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid, p 85

<sup>42</sup> Ibid, p 84–90.

<sup>43</sup> Ibid, p 84.

static as they get older and that there is a need to regularly review contact plans and tailor them to the child's specific needs. For example, Barnardos recognise that infants and very young children who have not formed a very strong attachment to their birth parents prior to removal will require less contact than children in their pre-pubescent or adolescent years. However, Barnardos also stress the need for a realistic understanding of the difficulties of finding and maintaining foster or adoptive families and the importance of encouraging the child's attachment to the new family, particularly if the child is not expected to return home. According to Barnardos' *Establishing permanency for children — the issue of contact between children in permanent foster care and their birth families* monograph:

For children in permanent out of home care, contact must be set at a level, which does not interfere with the child or young person's growing attachment to their new family. A child's attachment to their new family and their potential for future stability can be placed at risk by too many visits. Unrealistic visitation plans can jeopardise the child's chances of permanency as it can make finding and keeping a new family extremely difficult.<sup>44</sup>

Where a child is expected to remain in long-term care, Barnardos place paramount importance on the child's need to form an attachment to their new family, rather than on maintaining contact with their birth family. While this position is understandable, magistrates making contact orders in cases where restoration is not a realistic possibility should still have regard to the views expressed to the Community Services Commission by children in care, including views of children who had been in long-term care at the time of the interviews, and who also indicated that they needed some contact with their birth family, at the very least for identity and information purposes.

### ***Children's Court Clinic's experience***

For children who come from families with a history of mental illnesses, and who may be predisposed to developing a similar illness, contact visits can help the child deal with his or her removal from the family, understand his or her parent's mental illness, and address, at an early stage, any inclination to develop similar thinking patterns to those of their parents.

Speaking of a child in these circumstances, a Children's Court clinician explained the importance of contact in the following way:

It is important for children's identity formation and psychosocial adjustment to know their parents as they really are, rather than idealize or demonize them in fantasy. Only access can do this.

At times contact may be emotionally fraught or disappointing to the children, which makes access visits disruptive and burdensome for foster parents who may understandably wish to minimise access.

However, it should be remembered L has 2 parents and an uncle who suffer psychiatric disorders ... research clearly indicates that the thinking of individuals who are prone to mood disorder is characterised by pessimism and beliefs in their own helplessness ... It is very important that L does not feel helpless and hopeless in her family situation, thinking from a young age that what she wants makes no difference.

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<sup>44</sup> Barnardos Monograph 50, *Establishing permanency for children — the issue of contact between children in permanent foster care and their birth families*, 2003.

Having formed an attachment to her mother, she should be helped to sustain it. Having been disappointed by her mother, she should be given every opportunity to express her anger to her mother by rejecting her. Her mother should show she is hurt but keep coming back until she is forgiven. Keeping them apart will make L feel little and powerless.<sup>45</sup>

### ***Children’s mental health professionals***

Children’s mental health professionals also view contact as essential to a child’s development of identity and means of dealing with any experiences of loss. In particular the professionals state that:

In our view, identity is not a static, historically based concept. We see it as a dynamic developing process, formed within the context of ongoing relationships ... We think this contributes to a sense of self in terms of self-esteem and self-worth. A positive sense of identity can only be developed in a relationship that supports that identity ...<sup>46</sup>

However, they warn that the reverse is also true:

Contact with a parent who is unable to do those things could have the opposite effect as it maintains the child’s idea of him/herself as worthless and not valued by the parent.<sup>47</sup>

### **A guide to making contact orders**

#### ***Community Services’ approach***

Community Services suggests that the following questions should be asked when making contact orders:

1. Is the goal reunification or not?
2. How strong is the attachment or relationship between children and their birth parents?
3. Are there real risks to the safety of the child? If a child has been abused it is necessary to ensure that there is no further abuse and that contact with an abusive parent does not compromise the child’s foster placement due to their perception that the foster parents cannot protect them from harm.
4. Are the children’s wishes for and reactions to contact taken into account?
5. How old and at what developmental stage is the child?
6. How supportive are the foster carers?
7. Are there changes in the relationships and situations since last assessment? In long-term fostering placements it is important that contact arrangements are monitored and reviewed over time.
8. Will the contact visits involve significant traveling and disruption to the child’s routines? It is important that the frequency of any birth family contact should not be such that it interferes with the child and new parents spending enough time together consolidating their position as a new family.
9. When more frequent visits are required under a reunification plan or interim orders, practical issues may need to be taken into consideration.

<sup>45</sup> Magistrate Ellis, above n 8, p 5.

<sup>46</sup> R Harris and C Lindsey, “How professionals think about contact between children and their birth parents” (2002) 7 *Clinical Child Psychology and Psychiatry* 147, 153.

<sup>47</sup> Ibid.

10. How have the birth parents reacted to contact arrangements? Decisions about continuing contact visits should consider the reliability of the parents' visiting to date and the impact of missed visits on the child.
11. Has contact with fathers and other family members been considered?
12. Has indirect contact been considered?
13. Where are the contact visits to take place?<sup>48</sup>

Once the above questions have been addressed and the overall relationship between the child and his or her parent/s has been assessed it is imperative to tailor contact arrangements to suit those needs and the nature of the particular relationship. The literature suggests that any prescriptive guidelines which do not adequately take into account the multifaceted nature of a particular parent child relationship, (like the ones proposed by CS), would not be an appropriate guide to making contact orders. Instead sufficient flexibility and judicial discretion needs to be permitted in order to create the most effective contact orders.

### ***The Children's Court's current approach***

In *Re Helen* [2004] NSWLC 7 Magistrate Mitchell held that in making contact orders it is imperative to have regard to the particular circumstances of the case, and make orders which specifically address those circumstances. Magistrate Mitchell stated that the making of contact orders should be approached in the following way:

I think the best approach in a case such as this may be for the Court to identify the range of contact arrangements which will properly answer the needs of the individual child or young person, taking into account *his or her age, developmental level, background, attachments, life experiences, personality, talents, emotional resilience, deficits and wishes*. Then, when the appropriate range or spectrum of contact arrangements has been identified, the Court should consider the *safety of the child or young person, the circumstances which brought him or her into care, the fitness and willingness of the parents to cooperate in the contact process and the degree to which the parents might support the child in the placement or act to undermine it*. Those are matters which, in some cases, may impact adversely on the viability of contact. Finally, if the details of the placement are known or can be predicted with reasonable certainty, *the Court should consider the circumstances of the placement and the needs of the foster carers*. Clearly, there may be instances where proposed foster carers may be so unreasonable and heedless of the proper needs of a child for contact with a significant attachment figure that the contact order should be made and fresh placement arrangements then be made to accommodate the contact order. That might happen when a proposed foster carer is so bitterly opposed to contact with a particular parent that he or she simply refuses to facilitate contact which the Court has decided is necessary or where a proposed foster carer has difficulty tolerating a child's contact with family members of a particular racial background or religious persuasion ... (Emphasis added.)

Magistrate Mitchell further held that the scarcity of foster placements as well as agency policies should not dictate the manner in which contact orders are made, nor should they be seen as more important than the child's need for contact. His Honour specifically stated:

Sometimes, as in the present case, it will be argued that the scarcity of viable placements and the difficulty of recruitment of foster carers should influence the Court in the type of

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<sup>48</sup> NSW Department of Community Services, *Making decisions about contact*, 2006.

contact orders which it should make. But, that influence should apply, firstly, only where there is compelling evidence as to the unavailability of a suitable placement capable of accommodating the child's or young person's need for contact as determined by the Court and, secondly, only where the level of contact which the proposed placement can and will support falls within that range or spectrum of contact choices which the Court can still regard as an appropriate response to the child's needs. As to the first, I doubt that the Court should be much influenced in its decisions as to contact by the existence of a policy maintained by the agencies or even by Community Services unless that policy has been measured against and tailored to suit the particular contact needs of the individual child or young person, the subject of the particular proceedings. Secondly, the Court is unlikely to endorse the making a long term placement without reference to the child's or young person's contact needs as determined by the Court and it should not be assumed that those contact needs are of less than critical importance for the welfare of the child or will be met adequately by a contact regime tailored primarily to the feelings and desires of carers or potential carers or the perceived needs of the agencies.

### ***The need for review***

Once contact orders are made, they should be regularly reviewed. As Hess pointed out, contact will lose much of its treatment capacity if not “used flexibility in a carefully and continuously planned process”.<sup>49</sup> Regular review should be left to Community Services who are best placed to monitor and review contact. However, the extent to which the Community Services will follow any prescriptions in relation to review of contact plans is questionable, particularly if the New South Wales experience mirrors that of other states. Gilbertson and Barber found that in South Australia annual case plan reviews were not conducted as frequently as prescribed by the legislation. In particular they found that “in 1998, 1999/2000 and 2000/2001, a review had been conducted within the last 12 months in [only] 47%, 40% and 48% of cases, respectively”.<sup>50</sup> Given the importance of regularly reviewing contact plans and maintaining their flexibility, the court may need to involve itself in this aspect of contact orders as well.

### **Conclusion**

Decisions regarding the appropriate level, nature and frequency of contact are difficult to make since their effectiveness invariably depends on the extent to which they address the particular circumstances of the case, and there can consequently be no definitive formula which applies to all cases. Nevertheless, determination of any application under s 86 of the Care Act must always begin by establishing whether contact is in the best interests of the child. As already indicated, this decision will be based on the particular characteristics of the child and the circumstances of his or her case, while some guidance can be obtained from the general arguments in favour and against contact, and the extent to which any of these arguments apply to the particular situation. Once the court is satisfied that continued contact with the parents or other family members promotes the child's best interests, the court should approach the task of crafting contact orders by determining what functions or purposes contact visits are intended to serve in the particular circumstances. The court should then consider adverse effects which contact may have on children in particular situations and moderate the frequency of contact in order to prevent these effects. The court must

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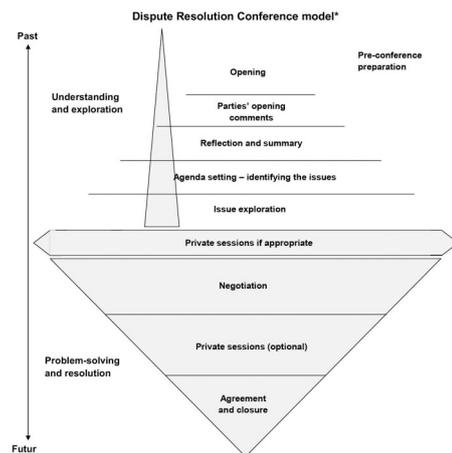
<sup>49</sup> P Hess, “Case and context” (1988) 67(4) *Child Welfare* 311.

<sup>50</sup> See Scott et al, above n 23, p 12.

also be aware of the factors which may in some circumstances inhibit contact visits or affect their quality, and as far as possible tailor contact orders so as to overcome these factors. Finally, when making contact orders magistrates should have regard to the views expressed by children in care and about contact, and in particular their frequent desires to have more contact with their parents, siblings and other family members.

## [2-0200] Guidelines for Conducting a Dispute Resolution Conference

The following model is based on the LEADR Model of Mediation\*



### Purpose of a Dispute Resolution Conference

The purpose of a Dispute Resolution Conference (DRC) is to provide a safe environment that promotes frank and open discussion between the parties in a structured forum to encourage the parties to agree on action that should be taken in relation to the child or young person concerned.

A DRC should aim to:

- Identify the risks and safety concerns that have led to the intervention or involvement of Community Services
- Identify and clarify the strengths within the family, including any progress made by family members in addressing those concerns
- Hear and consider the views of the child(ren) either directly or indirectly through the child's legal representative
- Focus the parties attention on the child's (or children's) best interests
- Identify and clarify disputed issues
- Identify and clarify areas of agreement
- Develop options and consider alternatives
- Enhance communication between the parties
- Reach agreement on issues of dispute between parties to avoid, or limit the scope, of any hearing
- Formulate final or interim orders that may be made by consent.

### **The role of the Children’s Registrar in the Dispute Resolution Conference**

The Children’s Registrar is an independent convenor acting with the authority of the Court.

In that capacity, the Children’s Registrar shall generally follow this model but can apply discretion in particular cases where the Children’s Registrar believes that certain features of the model will not promote the purpose of the particular DRC or are inconsistent with their role as an officer of the Court.

The Children’s Registrar is responsible for controlling the proceedings and ensuring that each participant has the opportunity to participate fully in a safe environment.

When conducting a DRC, the Children’s Registrars should adopt an independent and objective approach, free of bias. They should encourage the participation of the parties in shaping decisions that are fair, practical and achievable and that are made in the child’s best interests.

The Children’s Registrar should also be familiar with the facts and issues involved in the application that is the subject of the conference, prior to the commencement of the conference.

In conducting a DRC, the Children’s Registrar should:

- Create an environment where everyone feels able to discuss and negotiate the issues in dispute and encourage parties, particularly families, to directly participate and contribute to the process
- Clearly explain how the conference will be conducted and its purpose
- Explain that the conference is confidential and explain the limits to the confidentiality of the process
- Address any power imbalances that arise in the conference through appropriate strategies which allow all parties to express their views freely and without fear of intimidation
- Intervene appropriately if a participant becomes antagonistic or aggressive
- Confirm that legal representatives have the most up-to-date instructions from their clients
- Clarify the risks and safety concerns that led to the intervention of Community Services
- Lead a discussion with the participants regarding the strengths within the family
- Assist the parties to identify/clarify the facts, views, interests and opinions of parties to the conference and to identify and clarify areas of agreement
- Provide a “court perspective” on cases of a similar nature (whilst not providing legal advice) to help parties “reality test” their positions and provide information to assist parties to identify those matters which may be of particular concern to the Children’s Court, if it were considering the case
- Develop options for resolution and consider alternatives to negotiation and settlement. Assist the parties to clearly understand what is likely to happen if they cannot agree to an appropriate way forward
- Structure the process to ensure that each party understands the problems and options for settlement

- Outline, with the assistance of the parties and/or their legal advisers, how each party's views/options for settlement promote, or fail to promote, the best interests of the child
- Introduce options that could be considered by parties, after they have had an opportunity to generate those options themselves
- Endeavour to establish agreements or settlement in appropriate cases
- Ensure that the written agreement is accurate and is understood by the parties
- Ensure that all parties understand that in the event that agreement is reached as to any final orders the Court can only make those orders if it independently approves them and determines that they accord with the requirements of the *Children and Young Persons (Care and Protection) Act 1998* (the Act) and are in the best interests of the child.

Where a Children's Registrar has a conflict of interest or is unable to be independent and objective, they should disqualify themselves from participating in the DRC.

### **Pre-conference preparation**

Prior to the DRC, the Children's Registrar will familiarise themselves with all material in the proceedings that has been filed to date in the Children's Court.

The Children's Registrar will speak with each of the parties (or their legal representative) approximately one week prior to attending the DRC to establish who will be in attendance, and of those, who is seeking to participate in the conference. The Children's Registrar will resolve any questions that may arise regarding the appropriateness of a person's participation in the DRC. In general, the participation of all who have an interest in the outcome of the proceedings should be encouraged.

The Children's Registrar will also consider any issues that may affect the manner in which the conference is conducted (ie the potential need for a shuttle conference to be conducted using separate rooms, or one party attending via AVL).

### **Conference structure**

#### ***1. Opening — by Children's Registrar***

At the commencement of a DRC, the Children's Registrar will:

- Explain the purpose of the DRC
- Emphasise that the central consideration will always be the safety, welfare and wellbeing of the child
- Explain the DRC process, including the availability of private sessions and time outs with legal representatives if required
- Outline to the parties that the purpose of a DRC is to attempt to reach agreement about the resolution of the application through the parties discussing and negotiating about their point of view. When it is not possible or appropriate to reach a final agreement about the resolution of the application, it remains the purpose of a DRC to identify what has been agreed and what are the points of disagreement
- Discuss the role of the Children's Registrar, and the role of the other parties and legal representatives and the role of any support persons
- Explain the potential for a second DRC in appropriate circumstances

- Explain the confidentiality provisions of cl 19 *Children and Young Persons (Care and Protection) Regulation 2012*, including limitations to confidentiality in a way that can be understood by the parties
- Explain the need for the parties to participate in good faith in a way that can be understood by the parties
- Explain how the DRC fits in within the Court hearing process and the differences between a DRC and a Court hearing
- Explain the role of the Court in independently approving any agreement reached by the parties during the DRC to ensure that any orders accord with the requirements of the Act and are consistent with the best interests of the child
- Explain that the conference has been scheduled for a minimum of 2 hours and obtain assurances from the parties as to their availability for that period
- Explain the contents of the report to the Children’s Court following the conclusion of the DRC
- Ensure that the parties are aware of the location of rest rooms etc.

The Children’s Registrar will explain the following guidelines:

- Everyone is expected to behave in a polite and considerate manner
- When a person is talking, they must be allowed to complete what they are saying
- If a person is talking “too much” and preventing or affecting the opportunity for others to have their say, the Children’s Registrar may intervene.

The Children’s Registrar will also explain that the conference can be terminated if in his/her opinion:

- One or more of the participants is behaving inappropriately
- There are particular problems affecting the operation of the conference
- There are concerns for the safety and well-being of participants.

## **2. Parties’ opening comments**

The Children’s Registrar will:

- Summarise his/her understanding of:
  - the current application(s) before the court
  - the current situation regarding placement of child(ren)
  - any court orders currently in place
  - the orders sought by Community Services
 and seek confirmation from the participants.
- Give each of the parties an opportunity to state what they hope to achieve at the DRC.

Parties will be encouraged to express their views on the current situation, and their current goal. The Children’s Registrar will encourage the parties to speak for themselves, but acknowledge that some parties may find this difficult and may prefer to have their legal representatives speak on their behalf.

Parties who present the second and subsequent opening comments will be encouraged to identify all the issues that are important to them and discouraged from limiting their comments to a response to the first party's comments.

### ***3. Reflection and summary***

After all of the parties have spoken, the Children's Registrar will summarise the main interests and concerns of the parties and request, if necessary, clarification of any issues.

### ***4. Agenda setting – identifying the issues***

The Children's Registrar should, in consultation with all of the parties, develop an agenda for the conference. This agenda should include all key issues that parties raised in their opening statements.

The agenda should be both neutral and mutual. The agenda should be written down. The agenda should reflect issues that are clear from the documents that have been filed as well as issues raised by the parties in their opening statements.

### ***5. Issue exploration***

The parties should work through each of the issues identified in the agenda. The Children's Registrar should encourage the parties to directly speak with each other as a means of clarifying their respective views.

The Children's Registrar should ask open questions that allow the parties to fully explore each issue.

The Children's Registrar can assist parties to identify and clarify interests that have caused the parties to feel as they do. Identifying motivating interests allows the parties to see that there may be more than one way to satisfy their interests.

The Children's Registrar should not narrow the exploration of the issues at this time to legal issues. However, the Children's Registrar should correct or confirm a party's understanding of the legal issues relevant to the case when appropriate.

### ***6. Private sessions***

After each of the issues identified have been fully explored, the Children's Registrar should conduct private sessions with each of the parties. The private session is considered to be a very valuable tool in which the Children's Registrar can reality test the positions of the parties. The Children's Registrar has the discretion not to conduct private sessions where they feel it is inappropriate in the particular circumstances. The following issues should be considered when deciding to hold a private session:

(a) Is one of the parties unrepresented?

If one of the parties is unrepresented the Children's Registrar should consider

- (i) whether that party may feel unfairly pressured during a private session given the authority that the Children's Registrar holds as an officer of the court
- (ii) whether there is a real risk that the party may misrepresent statements made by a Registrar during a private session

and whether these concerns can be remedied by

- (i) conducting a limited private session utilising mediation techniques only rather than conciliation techniques or

- (ii) holding a private session with another party (for example where another party's interest are similar to those of the unrepresented party or with the child's legal representative).
- (b) Do you have personal safety concerns about conducting a private session with one of the parties?

If such concerns are held the Children's Registrar should consider whether holding the private session in conjunction with another party will alleviate the concerns. If the concerns cannot be alleviated the private session should not be held.

If the Children's Registrar decides not to hold a private session with one party, private sessions cannot be conducted with the other parties.

The Children's Registrar also has the discretion to invite more than one party to the private session.

In conducting the private session, the Children's Registrar should confirm the confidentiality of the session both at the beginning and at the end. This time should be used to discuss the needs of each party, and whether all issues have been adequately covered.

The Children's Registrar should discuss options that have been identified with the party, and reality test their propositions against the alternatives available if there is no settlement.

### ***7. Negotiation***

The Children's Registrar will facilitate direct negotiation between the parties, and assist the parties to explore options for settlement.

The Children's Registrar will discuss the options that have been considered thus far with the parties and what each party will need to do to make the option(s) work. The parties will be asked to identify how the option(s) is/are in the best interests of the child. The Children's Registrar will seek advice from parties about how realistic and achievable the option(s) is/are having regard to the legislative tests and caselaw.

Children's Registrars should provide a "reality check" for the parties, encouraging them to consider the practicality of the options; implications of the options; and whether the Court is likely to find that particular option(s) is/are within the child's best interests.

If the conference is not considering options that appropriately safeguard the best interests of the child, the Children's Registrar may provide further options for the parties to consider. It is preferable for any options introduced by the Children's Registrar to be so introduced during joint sessions between the parties.

### ***8. Private sessions (optional)***

The Children's Registrar may conduct additional private sessions if necessary. This phase is optional, and is to be conducted at the Children's Registrar's discretion, or at the request of one of the parties.

These sessions will be used to reflect on the options generated and any issues still outstanding, in private.

### **9. Agreement and closure**

The Children’s Registrar will seek to clarify the agreement(s) reached and strive to ensure that all parties feel and/or appreciate that the agreement is accurate, fair, realistic and appropriate to ensure the best interests of the child.

The Children’s Registrar will confirm with the parties that the Children’s Court is the final arbiter and that the Court will decide if the proposed agreement is in the best interests of the child.

If agreement has been reached with respect to any proposed order, one of the legal practitioners present at the DRC will be nominated to draft the Minute of Care order. This ideally will be done on the day of the DRC, and will be circulated to all parties present.

Where agreement has been reached, the Children’s Registrar will announce the end of the DRC and the commencement of directions. The Children’s Registrar must make it clear that the confidentiality provisions no longer apply. Where possible, an order from the Court should be sought on the same day.

Where no agreement has been reached, the Children’s Registrar will identify with the parties the issues that there is agreement on, and those that are still in dispute. Directions may also be given for the future conduct of the matter.

The Children’s Registrar will provide a report to the Children’s Court as a record of the outcome of the conference, as detailed in the form “Outcome of Dispute Resolution Conference — Report to Court”.

## **[2-0225] Care proceedings and appeals to the District Court<sup>51</sup>**

Judge Mark Marien SC, President, Children’s Court of NSW, 28 April 2011 (revised)

A paper delivered at the 2011 Annual Conference of the District Court of NSW

### **1 Introduction**

In this paper I propose to first deal with some of the general legal principles applicable to care proceedings in the Children’s Court and the District Court (with reference both to the relevant legislation and to some authorities) and then to more specifically deal with the conduct of care appeals to the District Court.

### **2 The objects and principles of the Care Act**

Sections 8 and 9 of the *Children and Young Persons (Care and Protection) Act 1998* (the Care Act) set out the objects and principles of the Act.

Section 7 provides that the objects and principles of the Act are intended:

... to give guidance and direction in the administration of this Act. They do not create, or confer on any person, any right or entitlement enforceable at law.

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<sup>51</sup>An appeal or review under ss 91, 91I, 109V, 231K and 231O *Children and Young Persons (Care and Protection) Act 1998* is, if the appeal relates to a decision of the Presidential Children’s Court, taken to be an appeal to (or a review by) the Supreme Court and is subject to any relevant rules of court applying to appeals to (or reviews by) the Supreme Court: cl 5 *Children’s Court Regulation 2019*.

Section 9(1) sets out the “paramourncy principle”. The section provides:

This Act is to be administered under the principle that, in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount.

The paramourncy principle partly reflects Article 3 of the United Nations Convention on the Rights of the Child (1989) (“the Convention”). (Article 3 of the Convention states that the best interests of the child “shall be a primary consideration”.) The paramourncy principle is to be taken into account in making all decisions and determinations under the Care Act.

Further principles for administration of the Care Act are set out in s 9(2). Of particular importance is the principle contained in s 9(2)(c) (formerly s 9(d)) which provides:

In deciding what action it is necessary to take (whether by legal or administrative process) in order to protect a child or young person from harm, the course to be followed must be *the least intrusive intervention* in the life of the child or young person and his or her family *that is consistent* with the paramount concern to protect the child or young person from harm and promote the child’s or young person’s development. (Emphasis added.)

The least intrusive intervention principle was considered recently by the Court of Appeal in *Re Tracey* [2011] NSWCA 43 [(2011) 80 NSWLR 261 and [4-0150]. The court also considered the relevance of the Convention in care and protection proceedings as well as the requirements for a care plan under the Care Act. I shall return to this decision later in the paper.

### 3 Important legal principles under the Care Act

#### 3.1 “Attachment theory” and the need for expedition in care proceedings

Attachment theory is now generally accepted in the field of child psychology. Following considerable empirical and research validation, it has become a pivotal consideration in the field of child protection and in care and protection proceedings in courts. Under the theory the earliest bonds formed by children with their primary caregiver/s (particularly before 4 years of age) have a profound impact upon the child (affecting neurological, physical, cognitive, emotional and social development), which continues throughout their life. The theory’s most important tenet is that an infant needs to develop a positive relationship with at least one primary care giver for social and emotional development to occur normally, and that further relationships build on the patterns developed in these first relationships.

The following is a description of attachment theory provided Mr Mark Allerton, Clinical Psychologist, who is the Director of the Children’s Court Clinic:

Attachment behaviours are the means by which infants elicit care and even ensure their survival, and different patterns of attachment result from each individual’s adaptation to the quality of care-giving he or she has received.

Under the theory, the breaking of a positive and secure attachment between a child and their primary caregiver/s during the crucial early years of the child’s life can have a

seriously detrimental effect on the child's future social and emotional development. To break an attachment is distressing, and can potentially place a child at risk. Transient effects are expected when the first change in placement occurs before 6–9 months of age. After 9–12 months of age, there will be distress, with longer-term effects of the change increasing with the child's age. From 1 to 3 years, separation is a traumatic loss and a developmental crisis. Even if the loss occurs after approximately 3–5 years of age, some persistent loss of security in new relationships is to be expected.

Children who have had secure attachments adapt to change more easily than children who have had anxious relationships. When the prior relationship included either abuse or neglect, then the change process is likely to be more difficult, ambivalent, and attenuated. Children can manage to believe that their current placement is permanent through one or two changes. With additional changes, it becomes increasingly difficult for children to form a committed relationship with the new caregiver, because their prior experience prepares them to expect disruption. This means that each successive placement is more likely to fail than previous placements. The changes are likely to be accompanied by an initial “honeymoon”, followed by outbursts of uncontrolled anger, fear, or desire for comfort. The last of these is sometimes displayed as inappropriate sexualized behaviour. Outcomes will vary, but effects of broken attachments may include anxiety, depression, and angry rejection of others throughout the lifespan.

[This is from the (2011) *Family Forensic Court Protocol* generated by The International Association for the Study of Attachment (IASA). Mr Allerton is a member of the IASA.]

The critical importance of a child forming secure positive attachments in infancy and early childhood is partly the basis for the need for permanency planning under the Care Act (see ss 78A, 83 and 84) and requires that care proceedings, particularly when relating to very young children, be determined as expeditiously (and hopefully as successfully) as possible. The need for expedition in care hearings is a key feature of the Care Act. Principle 9(2)(e) provides:

If a child or young person is placed in out-of-home care, arrangements should be made, ***in a timely manner***, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's or young person's circumstances and that, ***the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement***. (Emphasis added.)

Further, s 94(1) provides:

All matters before the Children's Court are to proceed ***as expeditiously as possible*** in order to minimise the effect of the proceedings on the child or young person and his or her family and to finalise decisions concerning the long-term placement of the child or young person. (Emphasis added.)

This need for expedition is reflected in the Children's Court's Time Standards which require that 90% of care cases are to be finalised within 9 months of commencement and that 100% be finalised within 12 months of commencement.

### ***3.2 Need of care and protection — “establishment”***

Section 71(1) of the Care Act provides that the court may make a care order in relation to a child or young person “if it is satisfied that the child or young person is in need of care and protection”. (“Care order” is defined in s 60.) The finding that a child is

in need of care and protection is sometimes referred to as “establishment”. Grounds upon which a child or young person may be found to be in need of care and protection are set out in the sub-section. Those grounds are not exhaustive.

Section 72 of the Care Act provides:

**Determination as to care and protection**

- (1) A care order in relation to a child or young person may be made only if the Children’s Court is satisfied that the child or young person is in need of care and protection or that even though the child or young person is not then in need of care and protection:
  - (a) the child or young person was in need of care and protection when the circumstances that gave rise to the care application occurred or existed, and
  - (b) the child or young person would be in need of care and protection but for the existence of arrangements for the care and protection of the child or young person made under section 49 (Care of child or young person pending care proceedings), section 69 (Interim care orders) or section 70 (Other interim orders).
- (2) If the Children’s Court is not so satisfied, it may make an order dismissing the proceedings.

A finding that a child or young person is in need of care and protection is not a final determination as to the rights of the parties. The finding simply gives the court jurisdiction to make certain final care orders, for example, an order allocating parental responsibility under s 79 of the Care Act. The court does not have to make that finding before it can make an interim order: see *Re Fernando and Gabriel* [2001] NSWSC 905 per Bell J at [41] and *Re Jayden* [2007] NSWCA 35 at [74]. Nor does the court have to make that finding prior to registering a care plan under s 38 of the Care Act or registering a parental responsibility contract under s 38A of the Care Act.

**3.3 “Realistic possibility of restoration”**

Pursuant to s 83(1) of the Care Act, if the Director-General seeks a final order for removal of a child or young person, the Director-General must assess whether there is “a realistic possibility of the child or young person being restored to his or her parents” having regard to:

- (a) the circumstances of the child or young person, and
- (b) the evidence, if any, that the child or young person’s parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.

Curiously, s 83 does not expressly state that the court cannot make a final order for the removal of a child or young person unless the court has determined that there is no realistic possibility of restoration. But in my view, it is a necessary implication of the section that the court must make that determination before making a final order for removal of a child from the care of his or her parents. There is, however, an express requirement in s 83(7)(b) that, prior to approving a permanency plan involving restoration, the court must find that there is a realistic possibility of restoration.

In the vast majority of contested cases, which come before the Children’s Court, the central issue for determination, is whether there is a realistic possibility of restoration of the child or young person to their parents’ care.

As to the meaning of “realistic possibility of restoration” see *Saunders and Morgan v Department of Community Services (NSW)* (District Court of NSW, Johnstone DCJ, 12 December 2008); [2008] CLN 10. In the course of his judgment, Judge Johnstone referred to the following passage from the submission of the former Senior Children’s Magistrate Mr Scott Mitchell to The Special Commission of Inquiry into Child Protection Services in NSW (the Wood Inquiry):

The Children’s Court does not confuse realistic possibility of restoration with the mere hope that a parent’s situation may improve. The body of decisions established by the court over the years requires that usually a realistic possibility be evidenced at the time of hearing by a coherent program already commenced and with some significant “**runs on the board**”. The court needs to be able to see that a parent has already commenced a process of improving his or her parenting, that there has already been significant success and that continuing success can confidently be predicted.

What is required can be likened to a prima facie case where absent some unforeseen and unexpected circumstance a safe and appropriate restoration will be possible in the near future. (Emphasis added.)

In relation to this passage Judge Johnstone said at [12]–[15]:

This passage has elements that resonate. With respect, however, to liken the determination to the concept of a prima facie case is alien to the fact that these are civil proceedings. It is also at odds with the natural meaning of the words themselves, and in my view a purposive and beneficial construction of the legislation does not require such an onerous test.

There are aspects of a “possibility” that might be confidently stated as trite. First, a possibility is something less than a probability; that is, something that it is likely to happen. Secondly, a possibility is something that may or may not happen. That said, it must be something that is not impossible.

The section requires, however, that the possibility be “realistic”. That word is less easy to define, but clearly it was inserted to require that the possibility of restoration is real or practical. It must not be fanciful, sentimental or idealistic, or based upon “unlikely hopes for the future”. Amongst a myriad of synonyms in the various dictionaries I consulted, the most apt in the context of the section were the words “sensible” and “commonsensical”.

Furthermore, the determination must be undertaken in the context of the totality of the *Care Act*, in particular the objects set out in s 8 and other principles to be applied in its administration. The object import notions of safety, welfare, well-being, health, needs, a safe and nurturing environment, and the like. Section 9 and other sections set out the principles to be applied. Some that are particularly apposite to the issues in this appeal include, in summary:

- The safety, welfare and well-being of the children must be the paramount consideration, paramount even over the rights of the parents: s 9(a).
- The views of the children are to be given due weight: s 9(b), and the interests of the siblings must be taken into account: s 103.
- Any action to be taken must be the least intrusive intervention in the life of the children and the family that is consistent with the paramount concern to protect them from harm and promote their development: s 9(d).
- That the children retain relationships with people of significance: s 9(g).

- That any out-of-home care arrangements are made in a timely manner, to ensure the provision of a safe, nurturing, stable, and secure environment, recognising the children’s circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to a permanent placement: s 9(f) and s 78A.
- The Department bears the burden of proof on the balance of probabilities.

Later in *Re Leonard* [2009] CLN 2 Mitchell SCM said at [30]:

It may be important to keep in mind, too, when considering “*realistic possibility of restoration*”, that section 83 is cast in the present rather than the future tense. The realistic possibility needs to be shown as existing at the time of the hearing even if the appropriate time for effecting the restoration has not yet arrived. A court is unlikely to be satisfied merely because a party is about to begin or is contemplating commencing a process from which a realistic possibility of restoration might (or might not) emerge. It is for that reason that the Children’s Court generally looks for “*runs on the board*” and some success, already achieved, in addressing parenting deficits. Further, even if some successes have been achieved by the parent, the Children’s Court will need to assess the likely time frame in which the restoration might be effected and may need to take into account the viability of such a restoration given the delay and the age, level of maturity, wishes and developing attachments of the child or young person. Further, the ability to predict a viable restoration may become less and less reliable as time passes. (Emphasis added.)

### 3.4 Care plans and permanency planning

If the Director-General applies to the court for a final order, not being an emergency protection order, for the removal of a child or young person from the care of his or her parents, the Director-General must present a care plan to the court before final orders are made: s 78(1).

The care plan must set out the allocation of parental responsibility; the kind of placement proposed and how it relates in general terms to permanency planning; proposed arrangements for contact between the child and his or her parents, relatives, friends and other relevant persons; the services that need to be provided to the child or young person and the agency designated to supervise the placement in out-of-home care: s 78(2).

As to the form and other required contents of a care plan see cl 22 of the *Children and Young Persons (Care and Protection) Regulation* 2012.

The court cannot make a final order for the removal of a child from the care and protection of his or her parents, or, for the allocation of parental responsibility in respect of the child, unless it has considered the Director-General’s care plan: s 80.

The requirement for the court to have a care plan before it does not apply to interim orders: *Re Fernando and Gabriel* [2001] NSWSC 905 at [45].

In *Re Tracey*, the Court of Appeal dealt with the requirements of a care plan. In that case the Department placed before the District Court on an appeal the same care plan that had been before the Children’s Court. That care plan proposed that the child was to be placed in the long-term care of two carers. However, since the matter had been in the Children’s Court, one of the two proposed carers had died and the care plan had

not been revised so as to provide that the child was to be placed in the long-term care of the surviving carer only. Nor were the proposed orders for parental responsibility in the care plan amended. Giles JA said at [90]:

As a matter of common sense, for compliance with s 80 the care plan presented to the Court must be a relevant care plan, proposing rules for the carer or carers under the Court’s consideration for those roles. It would be absurd if a care plan contemplating exercise of some parental responsibility by A were sufficient for an order whereby that parental responsibility was exercised by B.

His Honour went on to say at [93]–[94]:

The revised care plan may not have differed greatly from the 15 May 2009 care plan, but presentation of a care plan and its consideration by the Court is not a formality. The Court then decides the removal of the child or the allocation of parental responsibility with regard to a care plan apt to the current circumstances. The Court may not be obliged to give effect to the care plan (see *George v Children’s Court of New South Wales* [2003] NSWCA 389 at [58]) but that does not warrant presentation or consideration of a care plan which can not be implemented. In my opinion, there was jurisdictional error in that the judge did not consider a care plan as required by s 80 of the Care Act.

The decision means that a care plan will need to be very carefully scrutinised by the court to ensure that it accurately reflects the Department’s proposals with respect to allocation of parental responsibility, placement and contact arrangements. If the care plans fails to accurately reflect those proposals it may not be a valid care plan.

### ***3.5 The meaning of “permanency planning” under the Care Act***

Where the Director-General assesses that there is no realistic possibility of restoration of the child to their parents’ care, the Director-General is to prepare a permanency plan for another suitable long-term placement for the child and submit it to the court for consideration: s 83(3) of the Care Act.

If the Director-General assesses that there is a realistic possibility of restoration, the Director-General is to prepare a permanency plan involving restoration and submit it to the court for consideration: s 83(2).

The court is then to decide whether it accepts the assessment of the Director-General and if the court does not accept the assessment, it may direct the Director-General to prepare a different permanency plan: s 83(5) and (6).

Section 83(7)(a) of the Care Act provides that the court must not make a final care order unless it *expressly* finds that “permanency planning” for the child or young person has been “appropriately and adequately addressed”.

Sections 78A, 83(7A) and 84 deal with the meaning and requirements of permanency planning under the Care Act. Sections 78A(2A) and 83(7A) are recent amendments. These amendments mirror the applicable law concerning permanency planning as referred to in *Re Rhett* [2008] CLN 1 by Mitchell SCM, namely, that a permanency plan, whilst not needing to provide details as to the exact placement in the long-term of the child or young person concerned, must be:

... sufficiently clear and particularised so as to provide the Children’s Court with a reasonably clear picture as to the way in which the child’s or young person’s needs, welfare and well-being will be met in the foreseeable future

See further in relation to these provisions: *Re Hamilton* [2010] CLN 2 (also at [4-0160]).

### ***3.6 Aboriginal and Torres Strait Islander Placement principles — s 13 of the Care Act***

With respect to an Aboriginal or Torres Strait Islander child or young person who needs to be placed in statutory out-of-home care, placement principles in s 13 of the Care Act provide a general order for placement with extended family and kinship groups. The effect of the principles is that if an Aboriginal child is to be placed in statutory out-of-home care, then priority is to be given to a placement with family or kinship groups in preference to other placements. However, pursuant to s 13(1), the general order for placement is “[s]ubject to the objects in section 8 and the principles in section 9”. The Aboriginal placement principles are not to be blindly implemented without regard to those objects and principles, in particular, the paramount interests of the child: see *Re Victoria and Marcus* [2010] CLN 2 at [49] [see also [4-0190]].

The Aboriginal placement principles only apply when the child “needs to be placed in statutory out-of-home care” as defined in ss 135 and 135A of the Care Act. Under s 135(3)(b), “out-of-home care” does not include any care provided by a “relative” unless:

- (i) the Minister has parental responsibility by virtue of an order of the Children’s Court, or
- (ii) the child is in the care of the Director-General, or
- (iii) it is provided pursuant to a supported out-of-home care arrangement under s 153.

The Regulations may prescribe what is not to be regarded as out-of-home care: (s 135(3)(c)) — see cl 28 of the *Children and Young Persons (Care and Protection) Regulation 2012* (the Regulation).

Clause 4 of the Regulation defines “related” and “relative” for the purposes of the Care Act.

As to the meaning of “Aboriginal” and “Torres Strait Islander” see s 5 of the Care Act. Under the section “Aboriginal” has the same meaning as Aboriginal person has in the *Aboriginal Land Rights Act 1983* and “Aboriginal child or young person” means a child or young person “descended” from an Aboriginal and includes a child or young person who is the subject of a determination under s 5(2).

Under the *Aboriginal Land Rights Act*, an “Aboriginal person” means a person who:

- (a) is a member of the Aboriginal race of Australia, and
- (b) identifies as an Aboriginal person, and
- (c) is accepted by the Aboriginal community as an Aboriginal person.

Section 5(2) of the Care Act provides that despite the definition of “Aboriginal person” in the *Aboriginal Land Rights Act*, the Children’s Court may determine that a child or young person is an Aboriginal for the purposes of the Care Act if the court is satisfied that that child is of Aboriginal descent.

As to the meaning of an “Aboriginal descent”, see *Re Simon* [2006] NSWSC 1410 per Campbell J where it was held that “descended” refers to “linear descent”. See also *Re Earl and Tahneisha* [2008] CLN 7 per Mitchell SCM where his Honour said at [13]:

I respectfully adopt the view expressed by the Law Reform Commission of NSW [Research Report 7 (1997) — The Aboriginal Child Placement Principle] that “a ‘descent’ definition, such as ‘a child of Aboriginal descent’ is a broad definition which would include all Aboriginal child under the Principle. This would ensure that issues regarding a child’s Aboriginality are considered regardless of the ‘degree’ of Aboriginal blood...” Accordingly, I have taken the view that, if there is sufficient evidence that the great great grandfather of Earl and Tahneisha was an Aboriginal person, they would be entitled to a finding of Aboriginal descent whatever one might say about the “degree”.

In relation to the reliability of Aboriginal descent, Mitchell SCM referred to *Shaw v Wolf* [1989] 83 FCR 113 where Merkel J, when considering Aboriginality in the context of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), noted:

it may be that community recognition, given the inadequacy of written records, will be the best evidence of proof of descent.

As to the operation of the placement principles generally see also: *RL and DJ v DoCS* [2009] CLN 3 per Garling DCJ.

### **3.7 Contact orders**

The Wood Report found there to be significant inconsistencies across the State in the kinds of matters taken into account when making contact orders under s 86 of the Care Act. Accordingly, it was recommended that “evidence based guidelines” for contact orders be developed by the Children’s Court to assist Magistrates and to achieve a greater degree of consistency in the kinds of matters taken into account when making contact orders.

The Children’s Court has now developed these guidelines. The guidelines do not have the status of a Practice Note but are intended to be used purely as a guide. The guidelines seek to identify the variety of issues which may arise for consideration in making a contact order.

The guidelines are publicly available on the Children’s Court website.

## **4 Care appeals to the District Court**

Pursuant to s 91(1) of the Care Act an appeal to the District Court may be brought against an order (other than an interim order) of the Children’s Court. As to the meaning of “order” for the purposes of s 91(1) see: *S v DoCS* [2002] NSWCA 151 at [52] and [53].

An appeal is to be brought within 28 days after the Children’s Court order is made. The time for bringing the appeal may be extended by the District Court: UCPR r 50.3.

District Court Practice Note DC (Civil) No 5 relates to care appeals in the District Court. An information hand-out in relation to care appeals, “Information for Parties — Appeals from the Children’s Court in Care Matters” is available on the District Court website.

The majority of appeals from the Children’s Court to the District Court are appeals:

- (i) against final orders allocating parental responsibility
- (ii) against refusals by the Children’s Court to grant leave under s 90(1) of the Care Act to bring an application for variation or rescission of a care order, or
- (iii) against the Children’s Court dismissal of a substantive application under s 90 to vary or rescind a care order.

#### ***4.1 Is an appeal a re-hearing or a hearing de novo?***

Section 91(2) allows for a completely new hearing in the District Court. The sub-section refers to a “new hearing” (not a “rehearing”) and provides that not only may “fresh evidence” be given on the appeal but also “additional evidence” to the evidence led in the Children’s Court. The sub-section provides that the appellant may even adduce evidence on the appeal “in substitution for” the evidence led in the Children’s Court. There is no requirement in s 91(2) for leave before fresh evidence or additional evidence may be adduced on the appeal.

However, when you come to s 91(3) it is a very different picture. Under this sub-section, the District Court may determine that in conducting the appeal no fresh evidence may be adduced on the appeal and that the appeal is to be conducted only upon the transcript of the proceedings in the Children’s Court together with any exhibit tendered during those proceedings.

Whether a care appeal is to be conducted as a hearing de novo or a rehearing on the transcript appears to be a matter entirely within the discretion of the District Court. How then should the discretion be exercised? The District Court may take the view in a particular case that little has allegedly changed since the case was before the Children’s Court and that the appeal should properly be conducted on the transcript together with any fresh evidence. However, in a case where there appears to have been a substantial change in the situation of the parents and/or the child since the case was before the Children’s Court, the District Court may take the view that the appeal should properly be conducted as a completely new hearing.

However, the usual practice in the District Court is that a care appeal is conducted upon the transcript of the Children’s Court hearing together with any additional evidence admitted with the court’s leave. Practice Note DC (Civil) No 5 states at 2.1:

For the efficient disposal of cases it is generally desirable to deal with appeals based on the transcript plus any new evidence. Any objection to this course should be notified to the Court well in advance of the hearing.

In relation to new evidence, cl 9 of the District Court information sheet for parties states as follows:

If any party to an appeal wishes to rely upon fresh evidence or evidence in addition to, or in substitution for, evidence before the Children’s Court, that party will be required to inform the Court at an early stage:

- (a) the nature of the evidence
- (b) to what issue it is relevant
- (c) why the evidence was not relied on in the Children’s Court.

I would suggest that when an appeal is conducted upon the transcript from the Children’s Court, the District Court is required to have regard to the reasons of the Magistrate in which findings on credibility of witnesses may be found: see *Paterson v Paterson* (1953) 89 CLR 212 at 222–4 in relation to civil appeals generally.

#### ***4.2 Functions and discretions of the District Court on a care appeal***

Upon the hearing of an appeal, the District Court has, in addition to its functions and discretions that it has apart from s 91 of the Care Act (eg its functions and discretions under the *Civil Procedure Act* 2005 and the UCPR) all the functions and discretions that the Children’s Court has under Chapters 5 and 6 of the Care Act: s 91(4). Accordingly, an appeal hearing in the District Court is not to be conducted in an adversarial manner (s 93(1)); is to be conducted with as little formality and legal technicality and form as the circumstances of the case permit (s 93(2)); is not subject to the rules of evidence, or such of those rules as are specified by the court, are to apply to the proceedings or parts (s 93(3)). Further, the District Court may only make an order for costs under s 88 of the Act: see Costs orders below.

The decision of the District Court in respect of an appeal is deemed to be the decision of the Children’s Court and is given effect accordingly: s 91(6).

In relation to Care appeals to the District Court Rules rr 50.17–50.20 of the UCPR are also relevant. On the question of costs when appeal proceedings are discontinued also see r 42.19(3) of the UCPR: see **Costs orders** at [7] below.

#### ***4.3 Disposal of appeals***

On an appeal, the District Court may (subject to its functions and discretions under s 91(4)) confirm, vary or set aside the decision of the Children’s Court: s 91(5).

#### ***4.4 Appeals and permanency planning***

As stated earlier, the court cannot make a final care order unless it expressly finds “that permanency planning for the child or young person has been appropriately and adequately addressed”: s 83(7)(a). As an appeal in the District Court is to be conducted as either a re-hearing or a hearing de novo, if the District Court makes an order either for restoration or for long-term parental responsibility to be placed with the Minister, the District Court (like the Children’s Court) must expressly find that permanency planning for the child has been appropriately and adequately addressed by the Director-General before making a final care order.

Further, the court must not make an order allocating parental responsibility unless it has given “particular consideration” to the principle in s 9(2)(c) of the Care Act (the least intrusive intervention principle) and “is satisfied that any other order would be insufficient to meet the needs of the child or young person”: s 79(3).

The statutory requirement that, before making a final care order, the court needs to be satisfied that permanency planning for the child has been appropriately and adequately addressed, is an important requirement as circumstances pertaining to the child, the parents or the carers may have significantly changed since the matter was before the Children’s Court. If the Court is not satisfied that permanency planning has been appropriately and adequately addressed in the care plan, it should require the Director-General to prepare a revised or amended permanency plan.

#### ***4.5 Appeals in relation to applications under s 90 for variation or rescission of a care order***

An application to vary or rescind an order of the Children’s Court requires leave: s 90(1). A refusal of leave is an “order” for the purposes of s 91(1) of the Care Act: *S v DoCS* at [53] and accordingly, such refusal (or the granting) of leave may be the subject of a statutory appeal to the District Court.

In relation to the question of leave under s 90(1), the court may only grant leave “if it appears that there has been a significant change in any relevant circumstance since the care order was made or last varied”: s 90(1A).

Before granting leave, the court must take into account the matters in s 90(2A). One of those matters is whether the applicant for leave has an “arguable case”: s 90(2A)(e).

For a recent decision concerning the operation of the above provisions relating to the granting of leave under s 90(1) and the meaning of “significant change in any relevant circumstance” and “arguable case” in s 90(2A)(e) see: *Re Troy* [2010] CLN 2.

If the court grants leave, before making an order to vary or rescind a care order that places a child under the parental responsibility of the Minister, or that allocates specific aspects of parental responsibility from the Minister to another person, the court must take into consideration the matters set out in s 90(6).

#### ***4.6 Section 90 remittals to the Children’s Court***

With respect to appeals against a refusal by the Children’s Court to grant leave under s 91(1), in my view if the District Court upholds the appeal and grants leave it should remit the proceedings to the Children’s Court to determine the substantive s 90 application. Having granted leave the District Court would not have jurisdiction to hear the substantive application as the only “order” before the court (being the subject of an appeal under s 91(1)) is the order refusing leave. Further, if the District Court proceeded to hear the substantive s 90 application following its granting leave, the unsuccessful party on the substantive application in the District Court would be deprived of a statutory right of appeal.

#### ***4.7 Interim orders and s 90 – a source of new appeals to the District Court?***

Section 91(1) provides that a party cannot appeal to the District Court against an interim order. However, it appears that certain decisions made by the Children’s Court with respect to an interim order may be the subject of an appeal.

#### ***4.8 The legislative scheme for interim orders under the Act***

Section 62 of the Care Act provides that a care order may be made as an interim order or a final order, except as provided by Ch 5 Pt 2 of the Care Act.

Section 61(1) provides that “[a] care order may be made only on the application of the Director-General, except as provided by [Ch 5]”. An application for an interim order under ss 69 and 70 of the Care Act is an application for a care order: see s 60.

Section 70A provides that an interim care order should not be made unless the Children’s Court is satisfied that “the making of the order is necessary, in the interests of the child or young person, and is preferable to the making of a final order or an order dismissing the proceedings”.

Only the Director-General may make an application for an interim order under ss 69 or 70 of the Act: see s 61(1) and *Re Timothy* [2010] NSWSC 524 at [49], [52] and [57] per Rein J. In seeking an interim order under s 69, the Director-General must establish:

that it is not in the best interests of the safety, welfare and well-being of the child or young person that he or she should remain with his or her parents or other persons having parental responsibility: s 69(2).

Section 69 relates to the making of an interim order which has the effect of removing a child or young person from the person or persons who have parental responsibility: *Re Fernando and Gabriel* [2001] NSWSC 905 at [48] and *Re Timothy* at [45].

An interim order under s 69 can only be made “after a care application is made and before the application is finally determined”. A “care application” is defined in s 60 to mean “an application for a care order”.

In making an interim order under s 69 placing parental responsibility in the Minister the court must also consider the least intrusive intervention principle expressed in s 9(2)(c) of the Act: *Re Fernando and Gabriel* at [50].

In relation to other interim orders (ie orders other than orders which have the effect of removing a child from the care of their parents or others having parental responsibility), the power to make such order derives from s 70 rather than s 69. Section 70 does not permit the court to make orders removing children from the care of the person or persons who have parental responsibility: *Re Timothy* at [46]. Under s 70 the court may make such other interim orders “as it considers appropriate for the safety, welfare and well-being of a child or young person”. Interim supervision orders (under s 76) and interim undertaking orders (under s 73) are examples of interim orders, which may be made under s 70 rather than s 69.

#### ***4.9 Can a s 90 application be brought with respect to an interim order?***

In *Re Timothy*, Rein J followed *Re Elizabeth* [2007] NSWSC 729 per Palmer J and *Re Alan* (2008) 71 NSWLR 573 per Gzell J which found that an application under s 90 of the Care Act to vary or rescind an order may be brought with respect to an interim order. However, in *Re Edward* (2001) 51 NSWLR 502 at [55] Kirby J came to the view that a s 90 application can only be made with respect to a final order.

In relation to variation or rescission of an interim order under ss 69 or 70 of the Care Act, in *Re Edward* Kirby J at [52] held that such an order can be varied by the bringing of a further application under ss 69 or 70. His Honour said in this way interim orders can be varied by going outside the scheme in s 90. This view of Kirby J was expressly approved in *Re Fernando and Gabriel* by Bell J at [49]. On this issue see the paper of Robert McLachlan, “Re Alan — Do the requirements of section 90 apply to any application seeking to vary or rescind an interim order?” [2008] CLN 7. In referring to *Re Alan* and *Re Elizabeth*, Mr McLachlan states:

It is unclear from the judgment of *Re Elizabeth* and *Re Alan* the extent to which the Court’s attention was taken and their Honours minds were turned to the question of the jurisdiction for making interim care orders under the care legislation.

While the weight of authority in the Supreme Court appears to be against Kirby J in *Re Edward* on the issue whether a s 90 application can be brought with respect to an

interim order, his conclusion that a s 90 application can only be brought with respect to a final order has a great deal of force and seems sensible. His Honour's view is supported by the terms of s 90. The whole scheme of s 90 requiring the granting of leave and requiring the consideration of a number of matters including the wishes of the child (s 90(6)(b)), the length of time the child has been in the care of the present caregivers (s 90(6)(c)), the strength of the child's attachments to the birth parents and the present caregivers (s 90(6)(d)) and the risk to the child of psychological harm if present care arrangements are varied or rescinded (s 90(6)(f)) clearly suggests that the section is directed towards an application to rescind or vary a final order rather than an interim order.

The Care Act does not expressly require that any of the matters in ss 90(2A) or 90(6) be taken into account by the court when making an interim order. To obtain an interim order under s 69 the Director-General must only establish that "it is not in the best interests of the safety, welfare and well-being of the child or young person that he or she should remain with his or her parents or other persons having parental responsibility". Why then is it necessary for the multitude of matters referred to in ss 90 (2A) (re leave) and 90(6) (re the substantive application) to be taken into consideration in determining whether to vary or rescind an interim order?

The conclusion of Kirby J that s 90 does not apply to an interim order is supported by the very nature of an interim order. It has been held (in the context of interim orders made under the *Family Law Act 1975*) that at an interim hearing the court needs to exercise considerable caution against being drawn into matters properly dealt with in the trial process and ordinarily, at interim hearings, the court should not be drawn into issues of fact or matters relating to the merits of the substantive cases of each of the parties: see *Cowling v Cowling* (1998) FLC 92-801 at [18] and *Goode & Goode* [2006] FamCA 1346 at [66].

The inability of a parent to bring a s 90 application to vary or rescind an interim order which places the child under the parental responsibility of the Minister, would not disadvantage the parent. An interim order is made on the basis that it has effect until a specific time or "until further order". The parent may therefore apply to the court at any time to seek discharge of the interim order without the necessity to proceed via the cumbersome and time-consuming procedures under s 90.

The reason I raise these issues about interim orders in a paper dealing with care appeals to the District Court is because as a result of the clear finding in *Re Timothy* that only the Director-General can bring an application for an interim order, we have recently been seeing more applications in the Children's Court under s 90 brought by parents for variation or rescission of an interim order of parental responsibility to the Minister. Whilst there is no right of appeal to the District Court from an interim order, an order either refusing leave under s 90 or refusing the substantive s 90 application (after leave was granted) to vary or rescind an interim order would be an order which may be the subject of an appeal to the District Court: see *S v DoCS* at [52] and [53].

It is clearly incongruous that whilst there is no statutory right of appeal to the District Court against an interim order made by the Children's Court, there should be a statutory right of appeal with respect to an order of the Children's Court refusing an application to vary or rescind an interim order (or refusing leave to bring such an application).

I expect that in the future you may be seeing more appeals against such orders.

## 5 Assessment applications and the Children’s Court Clinic

The Children’s Court Clinic (the Clinic) is established under s 15B(1) of the *Children’s Court Act* 1987. Pursuant to s 15B(2) of that Act the Clinic has the following functions:

- (a) making clinical assessments of children
- (b) submitting reports to courts
- (c) such other functions as may be prescribed by the rules.

The Clinic is provided with further powers under s 58 of the Care Act. In the event that the court makes an assessment order under s 53 and/or s 54 of the Care Act, the court is to appoint the Clinic to prepare and submit the assessment report: s 58(1). In the event that the Clinic informs the court that it is unable to prepare the assessment report or that it is of the opinion that it is more appropriate for the assessment to be prepared by another person, the court is to appoint a person whose appointment is, so far as possible, to be agreed to by all the parties: s 58(2).

Under s 53(1) of the Care Act the court may make an order for:

- (a) the physical, psychological, psychiatric or other medical examination of a child or young person, or
- (b) the assessment of a child or young person, or both.

The Clinic is not presently resourced to carry out physical examinations of children (other than by way of simple observation).

Under s 54(1) the court may order the assessment of “the capacity of a person with parental responsibility, or who is seeking parental responsibility, for a child or young person to carry out that responsibility”. Such an assessment can only be carried out with the consent of the person to be assessed: s 54(2).

It is important to remember that the court has a discretion as to whether it will make an assessment order. An assessment order should not be made as a matter of course. Section 56(1) provides that in considering whether to make an assessment order, the court is to have regard to the following:

- (a) whether the proposed assessment is likely to provide relevant information that is unlikely to be obtained elsewhere,
- (b) whether any distress the assessment is likely to cause the child or young person will be outweighed by the value of the information that might be obtained,
- (c) any distress already caused to the child or young person by any previous assessment undertaken for the same or another purpose,
- (d) any other matter the Children’s Court considers relevant.

Section 56(2) provides that:

In making an assessment order, the Children’s Court must ensure that a child or young person is not subjected to unnecessary assessment.

An assessment report submitted to the court under ss 53 and/or 54 is taken to be independent from the parties as it is a report to the Children’s Court rather than evidence tendered by a party: s 59.

I will shortly be issuing a Children’s Court Practice Note in relation to the Clinic to ensure it is used more effectively. In particular, the Practice Note will deal with the procedures for the making of an Assessment Application, the forwarding of documents to the Clinic following the making of an assessment order and the procedures for requesting the attendance of the Authorised Clinician at court.

### ***5.1 Assessment applications***

In ordering an assessment, the Clinic needs an assessment order with clear and unambiguous questions from the court. The Children’s Court will soon issue a new form of Assessment Application. This will be a useful model to help the District Court frame the questions that the Clinic can most helpfully answer.

The proposed new Assessment Application:

- (i) consolidates multiple children in a sibling group into the one application, while allowing for separate questions for individual children, if required,
- (ii) outlines the reasons for making an assessment order,
- (iii) includes a brief list of issues to be addressed by the clinician,
- (iv) states whether a clinician with specific expertise is required,
- (v) includes contact details for all children, other parties and the legal representatives, and
- (vi) lists all the documents upon which the assessment is to be based, including all relevant previous clinical assessments undertaken of the child, children or family.

Clinic assessments are of greatest assistance to the court when the Clinic is asked to address specific and clear questions. Usually by the time a case has gone on appeal to the District Court, the issues which the Clinic is asked to address should be quite confined.

Problems can be encountered in preparing an assessment report when the parent is:

- in gaol,
- allegedly suffering from significant alcohol or other drug problems which are not being addressed,
- in residential treatment for drug dependence or mental illness, or
- about to give birth.

In each of these situations, a Clinic assessment may not be viable. For example, for a parent serving a lengthy sentence of imprisonment an assessment of parenting capacity would probably be of no utility. Further, it is extremely difficult (if not impossible) to carry out a proper parenting capacity assessment in the setting of a prison.

Following the making of an assessment order, all relevant documents must be sent to the Clinic as soon as possible together with the assessment order. Under the proposed Practice Note all documents upon which the assessment is to be based (which will be particularised in the Assessment Application and agreed to by all the parties) must be forwarded to the Clinic within **5 working days** from the making of the assessment order.

The documents provided to the Clinic should provide the Authorised Clinician conducting the assessment with all relevant documents pertaining to the assessment being sought (including all prior assessments) and details of prior interventions. In

addition to documents used to establish a case, other documents to be provided should include previous clinical assessments undertaken of the child, children or family (eg paediatric, psychological, psychiatric, social work assessments or reports, school reports, previous Children’s Court Clinic assessments and hospital discharge summaries relevant to the terms of the Assessment Order).

Assessment reports usually take six weeks to complete from when the Clinic receives the assessment order and all the relevant documents (“the file of documents”). This may need to be extended at the request of the Clinic due to case complexity, availability of clinicians, missed appointments, etc. It is obviously undesirable for the court to have to re-list a matter due to delays in the Clinic assessments, however, these delays can be avoided if the implications of conducting an assessment are considered carefully beforehand by the parties and the court.

### ***5.2 The Authorised Clinician attending at court***

In the event that an Authorised Clinician is requested by a party or parties to attend at court for cross-examination the court should ensure, by making appropriate directions, that the Clinician is requested to appear in good time, and also that he or she is provided with any updating documents early enough (no later than **three weeks** before the hearing) to be able to properly consider them before giving evidence.

Before a care case is listed for hearing it is important that the parties ensure that the Authorised Clinician (if required for cross-examination) is available to attend on a particular day. This may be done by either enquiring through the Clinic or directly with the Clinician. When the matter is listed for hearing, the court registry is to forward to the Clinic a Notice to Authorised Clinician to Attend Court (which is to be filed by a party requesting the attendance of the Clinician).

The Clinic website <[www.lawlink.nsw.gov.au/ccc](http://www.lawlink.nsw.gov.au/ccc)> has guidelines on the kind of questions that the Clinic can most usefully answer. It also has more detailed information to help develop Assessment Orders and requests for court appearance. You may contact the Clinic through its phone and fax numbers (Ph: 8688 1530, Fax: 8688 1520), and email address: [childrens\\_court\\_clinic@agd.nsw.gov.au](mailto:childrens_court_clinic@agd.nsw.gov.au). The Clinic Director, Mr Mark Allerton, is very happy to discuss any matters relating to assessment orders and the Clinic with a judicial officer or a practitioner. He is also happy to give presentations on the Clinic to judicial officers and practitioners.

## **6 New Alternate Dispute Resolution procedures in the Children’s Court**

In accordance with a number of Wood recommendations, the Children’s Court has now implemented the greater use of alternative dispute resolution (ADR) procedures in care and protection proceedings. The Court is doing this in two ways — first, through dispute resolution conferences (DRCs) conducted by a Children’s Registrar under s 65 of the Care Act, and, secondly, by the Court referring cases to external mediation pursuant to s 65A of the Care Act under a pilot being conducted at the Children’s Court at Bidura. Under the pilot, cases at Bidura are referred to mediation conducted by experienced mediators from the Legal Aid Panel.

### ***6.1 Children’s Court Practice Note 3 — “Alternative Dispute Resolution Procedures in the Children’s Court”***

Recently issued Practice Note No 3 “Alternative Dispute Resolution Procedures in the Children’s Court” establishes the model under which internal DRCs are conducted:

see [2-0320]. These procedures took effect from 7 February [2011]. The Practice Note also refers to the Bidura pilot. The Practice Note is available on the Children's Court website [and a link can be found at [2-0320]].

### **6.2 Dispute Resolution Conferences (DRCs) under s 65**

The Practice Note states that DRCs are to be conducted by Children's Registrars. DRCs are scheduled to run for a minimum of two hours, and personal attendance is required by:

- all parties (except children) and their legal representative (if the party is legally represented)
- the child's legal representative
- the Community Services Caseworker, and Casework Manager.

DRCs are conducted as a conciliation process. In this sense, a DRC is a process in which the parties, with the assistance of the Children's Registrar, identify the issues in dispute, develop options, consider alternatives and endeavour to reach an agreement. Under a conciliation model, the Children's Registrar has an advisory role, but not a determinative one, and might, for instance, express views on what the Court may consider relevant if the matter goes to a hearing. The Children's Registrar is also responsible for managing the DRC, including setting the ground rules, managing any apparent power imbalance between the participants and ensuring the participants conduct themselves appropriately.

The usual confidentiality arrangements apply to a DRC, pursuant to cl 19 of the *Children and Young Persons (Care and Protection) Regulation 2012*. Following the DRC, the Children's Registrar will report back to the Court whether agreement was reached by the parties in relation to any issues, and, if agreement has not been reached, the Children's Registrar will, in consultation with the parties, identify the issues remaining in dispute to allow the court to allocate hearing time.

Where all the parties have reached agreement, proposed consent orders will be prepared and provided to the Court at the next mention of the matter. The Court will then determine whether it is appropriate to make the consent orders which are sought taking into account the objects and principles of the Care Act as well as other relevant provisions of the Care Act. If the court declines to make the orders sought the Court will make directions for the further conduct of the matter.

### **6.3 External mediation pilot at Bidura Children's Court**

The external mediation pilot commenced in the Bidura Children's Court on 9 September 2010. A number of external mediations have now been held dealing with a variety of care and protection issues.

Mediations, unlike DRCs, are scheduled for a minimum duration of three hours and are conducted at Legal Aid's Castlereagh St offices. Those required to attend an external mediation session are the same as those required to attend a DRC under s 65. Participants are also asked to sign a confidentiality agreement.

The Bidura Pilot will run for approximately 12 months. During this time, cases from Bidura that are suitable for mediation will go to the external mediation pilot, rather than a DRC.

#### **6.4 Legal practitioners' training regarding new procedures**

Information sessions have been held for care and protection legal practitioners throughout the State. A pod cast recording of this information is available on the Children's Court website.

Separate training has also been provided to Community Services staff.

Promotional material (including a DVD) is being developed for participants in both programs (including children and young people).

#### **6.5 Evaluation**

An external evaluation of both the new model of DRC and the external mediation pilot will be conducted, using a sample of 100 cases from each, and a control group of 100 cases that did not undergo any form of ADR. The purpose of the evaluation is to determine the costs and benefits of each model, and how they can best complement each other. Children's Magistrates and Children's Registrars will be consulted during the evaluation.

While the DRC model has only very recently commenced, the feedback from practitioners who have participated in the Bidura pilot so far has been very positive.

#### **6.6 ADR and appeals to the District Court**

As the District Court, when conducting a care appeal, has all the functions and powers of the Children's Court, the District Court may refer an appeal at any time to a DRC under s 65 of the Care Act or to external mediation under s 65A.

If the District Court wishes to refer a case to a DRC under s 65 to a Children's Registrar in the Children's Court, arrangements can be made through the Conference Co-ordinator on telephone (02) 8688 1471 or the conference assistant on telephone (02) 8688 1469.

Should the District Court wish to refer a case to external mediation under s 65A, enquiries can be made of Legal Aid as to whether it is able to refer the case to mediators on the Legal Aid panel. Alternatively, the Department may, in some circumstances, agree to funding other external mediation. For evaluation purposes, the Bidura external mediation pilot is restricted to cases referred from the Children's Court at Bidura.

### **7 Costs orders**

Under s 88 of the Care Act, an order for costs cannot be made in care proceedings "unless there are exceptional circumstances that justify the court in doing so". The restriction on costs orders in care proceedings arises because proceedings relating to the welfare of a child are not to be regarded — at least not to be regarded for all purposes — as normal adversary litigation *inter partes*: *S v Minister for Youth and Community Services* (unrep, 3/4/86, NSWSC) per Powell J.

What constitutes "exceptional circumstances" for the purposes of s 88 has been considered in a number of Children's Court and District Court decisions including *Re Jackson* [2007] CLN 2; *SP v DoCS* [2006] NSWDC 168; *DoCS v SM and MM* [2008] NSWDC 68; *BS v DoCS* (unrep, 26/8/09, NSWDC); *Joy Alleyne as Independent Legal Representative for LC v Director-General DoCS* (No 2) [2009] NSWDC 171 and *XX v Nationwide News Pty Ltd* [2010] NSWDC 147.

In *SP v DoCS*, Rein DCJ upheld an appeal from the Magistrate’s award of costs against the Department on the basis that he did not consider it an exceptional circumstance that a solicitor would be out of pocket because of the impecuniosity of his client. After referring to a number of authorities, his Honour stated that some guidance can be gained from the cases as to the meaning of exceptional circumstances. His Honour summarised the points as follows:

1. Cases where circumstances are found or not found to be exceptional or not all turn on their own facts and circumstances (see *Murray Publishers Pty Ltd v Valuer-General* (1994) 84 LGERA 13).
2. Unusual circumstances do not make the circumstances exceptional. A council’s error, for example, in its dealings with the applicant are insufficient.
3. Even circumstances out of the ordinary or even appalling breakdowns or misunderstandings in communication do not, of themselves, amount to exceptional circumstances (see *Australian Recyclers Pty Ltd v Environment Protection Authority of NSW* (2000) 110 LGERA 171).
4. Refusal of counsel to act on recommendations of officers or advice of experts is not sufficient.
5. Acting upon a serious or fundamental error of fact, acting capriciously or deliberately attempting to frustrate or cause delay or expense to the applicant would be sufficient.

His Honour goes on at [36] to identify the following types of matters which would or at least arguably might fall within the description of exceptional circumstances for the purposes of s 88 of the Care Act:

1. Deliberate misleading of the court or opponents
2. Other misconduct or wrongful conduct
3. Contumelious disregard or orders of the court or the principles set out in s 93 of the Care Act (General nature of proceedings)
4. The raising of baseless allegations for which the party had no reasonable belief as to their existence
5. The raising of false issues that bear no relation to the facts or are contrary to clearly established case law
6. Maintenance of proceedings solely for an ulterior motive or the undue prolongation of a case by groundless contentions
7. Gross negligence in the conduct of a case at least where that has led to an extensive waste of the court’s time and that of other parties
8. Where the proceedings involve a blatant abuse of process and/or are both mischievous and misconceived.

Having identified these matters as the types of matters which may constitute exceptional circumstances, his Honour said that whilst the categories of conduct are not closed, “there is a theme or flavour about these categories that I have already outlined as falling within the ambit, in my view, of section 88”.

The “theme or flavour” of the categories of exceptional circumstances identified by his Honour clearly relates to the conduct of the parties and requires either deliberate improper/wrongful conduct, abuse of process or gross negligence or incompetence.

In *DoCS v SM and MM* Garling DCJ expressly approved the matters which might arguably fall within the description of exceptional circumstances as identified by Rein DCJ in *SP v DoCS*. Garling DCJ also referred to the decision of Campbell J in *Yacoub v Pilkington (Australia) Ltd* [2007] NSWCA 290 concerning the meaning of exceptional circumstances in r 31.18 [as in force in September 2006] of the UCPR.

In *Yacoub* Campbell J referred to *San v Rumble (No 2)* [2007] NSWCA 259 and said:

I shall state such of the conclusions as seem to me applicable in the construction of rule 31.18(4) [which related to “exceptional circumstances” in September 2006]

- (a) Exceptional circumstances are out of the ordinary course or unusual, or special, or uncommon. They need not be unique, or unprecedented, or very rare, but they cannot be circumstances that are regularly, routinely or normally encountered: *R v Kelly (Edward)* [2000] 1 QB 198 (at 208).
- (b) Exceptional circumstances can exist not only by reference to quantitative matters concerning relative frequency of occurrence, but also by reference to qualitative factors: *R v Buckland* [2000] 1 WLR 1262; [2000] A All ER 907 (at 1268; 912–913).
- (c) Exceptional circumstances can include a single exceptional matter, a combination of exceptional factors, or a combination of ordinary factors which, although individually of no particular significance, when taken together are seen as exceptional: *Ho v Professional Services Review Committee No 295* [2007] FCA 388 (at [26]).
- (d) In deciding whether circumstances are exceptional within the meaning of a particular statutory provision, one must keep in mind the rationale of that particular statutory provision: *R v Buckland* (at 1268; 912–913).
- (e) Beyond these general guidelines, whether exceptional circumstances exist depends upon a careful consideration of the facts of the individual case: *Awa v Independent News Auckland* [1996] 2 NZLR 184 (at 186).

Campbell J then said:

... any decision about whether there are exceptional circumstances would need to bear in mind the explicit statement of objectives of a court in the management of litigation ...

In *DoCS v SM and MM*, in awarding costs against the Department, Garling DCJ identified the following as exceptional circumstances:

- The appeal had no merit
- The Magistrate made the only reasonable order available
- There were no grounds to seek an appeal from that order nor was there additional evidence which may have caused the District Court to reach a different decision from the Magistrate.

Judge Garling found that the position the Department took on the appeal was unreasonable being a position which was not based upon the available expert evidence. Further, his Honour found that the fact that the respondent parents were not entitled to legal aid and had to pay their own legal costs as a result of the Department’s appeal, was also relevant to the consideration of exceptional circumstances.

In *BS v Minister for Community Services & Ors Robison DCJ*, after referring to *DoCS v SM and MM* and *SP v DoCS*, said at [4]:

Exceptional circumstances can and, indeed, in many cases include a broad variety of factors. There can be a difference of view as to what amounts to an exceptional circumstance. The judges of this court in those two decisions had indicated certain views about what are considered to be exceptional circumstances. At the end of the day each case needs to be determined in the context of the proceedings and the matters which were brought to the attention of the court during the course of the proceedings. Certainly a relevant matter is the conduct of the parties to proceedings of this nature.

His Honour stated at [5] that any order for costs under s 88 could only be made with respect to the appeal proceedings before the District Court (not to the proceedings in the Children’s Court). In finding that exceptional circumstances existed and ordering the Department to pay the mother’s legal costs, his Honour found that the Department had an “entrenched immovable view” from an early stage and rejected expert opinion which supported the mother’s case even though it had no expert evidence to contradict that expert opinion. His Honour noted that while s 94 of the Care Act requires that proceedings should proceed as expeditiously as possible, the entrenched and immovable view of the Department resulted in the proceedings not proceeding expeditiously.

In *Joy Alleyne as Independent Legal Representative for LC v DG Dept Community Services Goldring DCJ*, in refusing to award costs against the Department, said at [11]:

I do not regard the matters set out by Rein J in *SP* as an exhaustive statement of what might constitute “exceptional circumstances” for the purposes of s 88, though they give a clear indication of some matters that may constitute such circumstances. *BS* also indicates matters of a different type, which may give rise to such circumstances. It may be that, in some circumstances, the financial position of a party may give rise to a finding of “exceptional circumstances”. It may be that the factual situation is so complex, or the Department had taken such an unreasonable position, as Robison J found in *BS v Minister for Community Services*, that either would make for exceptional circumstances. The facts of this case do not.

In *XX v Nationwide News Pty Ltd*, the defendant, The Australian newspaper, had published a number of articles concerning certain care proceedings in the Children’s Court. Although the articles did not directly name the child the subject of the proceedings, there was evidence before the Children’s Court that facts about the case referred to in the articles had identified the child. It was clear that the contents of the articles were likely to identify the child in breach of s 105(1) of the Care Act.

In the Children’s Court the plaintiff successfully obtained a non-publication order against the newspaper defendants. However, the court refused the plaintiff’s application for costs with respect to their successful application. The Children’s Court found that the conduct of the newspaper did not fall within the categories of exceptional circumstances referred to by Rein DCJ in *SP v DoCS*.

The plaintiff appealed to the District Court against the order refusing costs. Gibson DCJ held at [47] that the requirement that exceptional circumstances be established placed “a heavy burden” upon a party seeking costs in care proceedings. Her Honour re-affirmed that the list of matters set out by Rein DCJ in *SP v DoCS* is not exhaustive. In overturning the Magistrate’s decision and awarding costs against the newspaper,

her Honour found that its conduct did fall within the kinds of conduct referred to in *SP v DoCS* as its breach of implied undertakings as to documents obtained in the litigation process was capable of amounting to wrongful conduct, amounted to contemptuous disregard to the principles of the Care Act and that it had been guilty of gross negligence in not removing articles from its website.

Her Honour declined to award indemnity costs although she stated at [59] that while there is no provision in the Care Act for awarding indemnity costs, “that does not necessarily mean that indemnity costs cannot be awarded: see, by analogy, *Vero Insurance Scriven* [2010] FMCA 352 at [45]”.

### **7.1 Discontinuing proceedings — costs**

In relation to costs orders where appeal proceedings are discontinued, r 42.19(3) of the UCPR provides that the defendant’s costs in the appeal are not payable by the plaintiff unless the court finds there are “special circumstances to justify an order for their payment”.

## **8 Recent decision — Re Tracey [2011] NSWCA 43**

This is an important recent decision of the Court of Appeal relating to the operation and applicability of the “least intrusive intervention” principle contained in s 9(2)(c) of the Care Act and the applicability of the United Nations Convention on the Rights of the Child. The case also deals with the statutory requirements for a care plan under the Care Act.

In *Re Louise and Belinda* [2009] NSWSC 534 Forster J at [54] said the following with respect to the operation of the least intrusive intervention principle in s 9(2)(c) of the Care Act:

In my opinion, the section is ambulatory. In the case of a care application made under section 60 of the Act, it has the effect of requiring the court to be reluctant to remove a child from its natural parents unless there is a compelling reason to do so. On the other hand, where an application is made not under section 60, but under section 90, for the rescission or variation of a care order, the sub-section has a different effect. In that case, the least intrusive form of intervention would normally mean not interfering with existing care arrangements. Needless to say, the force of the requirement imposed by section 9(d) [now s 9(2)(c)] will vary from case to case, and a court will undoubtedly have regard inter alia to the strength of the respective bonds that a child may have with his or her natural parents and his or her foster carers.

In *Re Tracey* Giles JA (with whom Spigelman CJ and Beazley JA agreed) said that this explanation by Forster J as to the operation of s 9(2)(c) was erroneous as the least intrusive intervention principle has no application when it is not necessary to take action to protect a child from harm. Giles JA said at [79] that the principle’s prescription is confined “to when it is necessary to take action in order to protect a child from harm, and when taking action it is necessary the course to be followed must be one of least intrusive intervention...”. Giles JA said “there must be a prospect of harm if action is not taken, and the question is then the nature of the action.”

The case is also important as the Court of Appeal found (per Spigelman CJ and Beazley JA) that the trial Judge was in error in failing to take into account as a relevant consideration, in exercising her discretion under s 90, Australia’s treaty obligations under the Convention. The case involved a mother who was to be deported

to Cambodia following her conviction for drug offences. If the child remained in the care of the Minister the child would therefore have no contact with her mother as the child was to remain in Australia. In finding that the Judge was in error in not having regard to the Convention, Spigelman CJ referred particularly to Article 7.1 which provides, in part, that a child has a right “to be cared for by his or her parents”.

Although the paramountcy principle contained in s 9(1) of the Care Act partly reflects Article 3.1 of the Convention, the decision in *Re Tracey* means that the court will be required to take into account all relevant Articles of the Convention in determining what is in the best interests of the child; in particular, Article 3.1, Article 3.2, Article 5 together with Article 9.1, Article 8(1) and Article 29.

As stated earlier in this paper, *Re Tracey* also deals with the requirements of a valid care plan for the purposes of s 80 of the Care Act.

### **9 Local Court Bench Book**

Very useful and instructive material relating to the conduct of care proceedings may also be found in the Local Court Bench Book on the JIRS website. Go to the link “Bench Books” then [“Local Court Bench Book”, followed by “Contents” then] “Children’s Court” and then to “Care and Protection Jurisdiction”.

### **[2-0250] Children’s Court: new arrangements for dispute resolution procedures in care and protection matters: Bulletin Number 2011/0021**

Following recommendations of the Special Commission of Inquiry into Child Protection Services, a new model of alternative dispute resolution commenced operation in the Children’s Court from 7 February 2011.

Further information about the background to the changes, details on how the new model will operate generally and information about a trial of external mediation operating through Bidura Children’s Court is explained in a podcast that can be accessed by following the link below:

[http://infolink/lawlink/childrens\\_court/ll\\_cc.nsf/pages/CC\\_adr\\_programs#Part1](http://infolink/lawlink/childrens_court/ll_cc.nsf/pages/CC_adr_programs#Part1)

Essentially, Children’s Registrars will now conduct dispute resolution conferences (DRCs) under s 65 *Children and Young Persons (Care and Protection) Act 1998* in lieu of preliminary conferences. DRCs will be conducted under a conciliation model in accordance with Practice Note 3 that was issued by the President of the Children’s Court on 7 February 2011 [see [2-0310]].

Children’s Registrars are now based at Parramatta, Broadmeadow, Campbelltown and Port Kembla Children’s Courts and Lismore and Wagga Wagga Local Courts.

Referrals to a DRC will be made by a Magistrate, although in some cases a Children’s Registrar will direct a DRC at courts where the Children’s Registrar conducts a regular call-over. Magistrates have been provided specific listing dates at locations where the Children’s Registrars are based and at some other locations where there is a high demand for this service. At all other locations a date for a DRC will be arranged by the Conference Co-ordinators located at Parramatta Children’s Court. It is anticipated that in the ordinary course a DRC will be conducted not less than 2 weeks after referral and within 4 weeks of referral.

The following instructions apply to registry staff once a direction for a DRC is made:

At all courts (except Parramatta Children's Court) registry staff should complete Form K — Dispute Resolution Conference Booking Form [not reproduced] and send the form to the DRC Conference Co-ordinators by:

- (a) facsimile to (02) 8688 1478 or
- (b) by email to [Childrens\\_Court\\_Conference\\_Co-Ordinator@agd.nsw.gov.au](mailto:Childrens_Court_Conference_Co-Ordinator@agd.nsw.gov.au)

The Form K must indicate the date allocated by the Court for the DRC at courts where listing dates have been provided. Where the date of the DRC is to be arranged by the Conference Co-ordinators the Court is asked to nominate three dates that are available to the parties and their legal representatives.

The DRC Conference Co-ordinators will arrange for a Children's Registrar to be allocated the matter and will confirm the date of listing with the parties and the Registrar of the Court where the matter is listed. Information to assist parties to prepare for a DRC will then be sent to all the parties by the conference co-ordinators.

In cases where the Magistrate is of the view that an urgent DRC should be arranged registry staff should contact the Conference Co-ordinators by telephone to enquire whether an urgent conference can be arranged. The conference co-ordinators can be contacted on:

- (a) (02) 8688 1471 or
- (b) (02) 8688 1469

The Children's Registrar allocated the matter will contact the registry where the matter is listed to obtain access to the file. At locations where the Children's Registrar attends on a regular weekly or fortnightly basis the Children's Registrar will arrange to view the file at the registry. At other locations the Children's Registrar will request that relevant portions of the file be photocopied and sent or scanned and emailed to the Children's Registrar. Registry staff are to assist with such requests as adequate time for both the Children's Registrar and the parties to prepare for a conference is seen as essential to the success of this new model.

The Children's Registrar will then contact the parties approximately 1 week prior to the listing of the conference to check on the preparedness of the parties for the conference and to ensure that appropriate arrangements are in place to conduct the conference.

Enquiries concerning arrangements for the conduct of DRCs should be directed to the Conference Co-ordinators on the above phone numbers or the Senior Children's Registrar on (02) 8688 1465.



## Care and protection matters — practice notes

Links to the following Children’s Court Practice Notes that deal with care and protection matters can be found below:

- Practice Note 2: Initiating report and service of the relevant portion of the community services file in care proceedings (see [2-0310])
- Practice Note 3: Alternative dispute resolution procedures in the Children’s Court (see [2-0320])
- Practice Note 4: Short term care orders pilot project and STCO practice sites (see [2-0330])
- Practice Note 5: Case management in care proceedings (see [2-0340])
- Practice Note 6: Children’s Court Clinic assessment applications and attendance of authorised clinicians at hearings, dispute resolution conferences and external mediation conferences (see [2-0350])
- Practice Note 7: Legal representation for children and young persons in proceedings for compulsory schooling orders (see [10-0310])
- Practice Note 9: Joint conference of expert witnesses in care proceedings (see [2-0370])
- Practice Note 10: Parent capacity orders (see [2-0375]).

**[2-0310] Practice Note 2: Initiating report and service of the relevant portion of the community services file in care proceedings**

Practice Note 2 was issued 23 July 2010 and last amended 1 July 2016.

**[2-0320] Practice Note 3: Alternative dispute resolution procedures in the Children’s Court**

Practice Note 3 commenced 7 February 2011 and last amended 13 November 2015.

**[2-0330] Practice Note 4: Short term care orders pilot project and STCO practice sites**

Practice Note 4 is dated 2 September 2011 and last amended 12 April 2013.

**[2-0340] Practice Note 5: Case management in care proceedings**

Practice Note 5 first issued 2 September 2011 and last amended 30 June 2017 (commenced 3 July 2017).

**[2-0350] Practice Note 6: Children’s Court Clinic assessment applications and attendance of authorised clinicians at hearings, dispute resolution conferences and external mediation conferences**

Practice Note 6 first issued 2 September 2011 and last amended 30 June 2017 (commenced 3 July 2017).

**[2-0370] Practice Note 9: Joint conference of expert witnesses in care proceedings**

Practice Note 9 commenced 28 May 2012.

**[2-0375] Practice Note 10: Parent capacity orders**

Practice Note 10 commenced 29 October 2014.

## Care and protection matters — legislation

The following pieces of legislation are useful in the consideration of care and protection matters:

- *Children and Young Persons (Care and Protection) Act 1998* at [3-0100]
- *Children and Young Persons (Care and Protection) Regulation 2012* at [3-0110]
- *Children (Protection and Parental Responsibility) Act 1997* at [3-0150]
- *Children’s Court Act 1987* at [3-0200]
- *Children’s Court Regulation 2014* at [3-0205]
- *Children’s Court Rule 2000* at [3-0210]
- *Community Welfare Act 1987* at [3-0250].

See also legislation for criminal matters at [7-0100]ff.

### **[3-0100] Children and Young Persons (Care and Protection) Act 1998**

Children and young persons — care and protection — necessary for their safety, welfare and well-being — provision of environment free of violence and exploitation — provision of services that foster children’s health, developmental needs, spirituality, self-respect and dignity — assistance to parents to promote a safe and nurturing environment — principle of participation — Aboriginal and Torres Strait Islander principles — roles of the Minister and Director-General — requests for assistance and reports — investigations and assessment — principles of intervention — use of alternative dispute resolution — care plans and parent responsibility contracts — registration of plans and contracts — Children’s Court hearings — emergency protection and assessment — care applications — Children’s Court procedure — support for children and young persons in crisis — out-of-home care — medical examination and treatment — Children’s Guardian — children’s employment — offences involving children and young persons — transfer of child protection orders and proceedings — removal of persons and entry of premises and places — administrative review — exchange of information and co-ordination of services.

### **[3-0110] Children and Young Persons (Care and Protection) Regulation 2012**

Children and young persons — care and protection — access to certain information and records kept under the Children and Young Persons (Care and Protection) Act 1998 — records, reporting and information — protection of communications made from disclosure except in certain circumstances — forms and contents of care plans and alternative parenting plans — medical examination and treatment — carrying out certain medical treatments on children — matters relating to out-of-home care — matters relating to the Children’s Guardian — Code of Conduct for Authorised Carers — conditions of accreditation of designated agency — registered agencies — condition of registration.

**[3-0150] Children (Protection and Parental Responsibility) Act 1997**

Children and young persons — care and protection — parental responsibility — guiding principles for courts — welfare of children in public places — local crime prevention — safer environment — fostering community involvement in the development of local crime prevention plans — preparation of local crime prevention plans — approval of local crime prevention plans — administration, duration and revocation of approval — proceedings for offences.

**[3-0200] Children’s Court Act 1987**

Children — Children’s Court of NSW — constitution — jurisdiction — Children’s Court Advisory Committee — Children’s Court Clinic — functions of the president — reports — venue — contempt — judicial notice of signatures — appeals — rules — practice notes — directions may be given in circumstances not covered by the rules or the practice notes — provisions relating to Children’s Magistrates.

**[3-0205] Children’s Court Regulation 2014**

Children — Children’s Court of NSW — appeals in relation to decisions of Presidential Children’s Court — appeals etc under *Children and Young Persons (Care and Protection) Act 1998* — appeals under *Crimes (Appeal and Review) Act 2001* — appeals relating to apprehended violence orders — appeals relating to forfeiture orders under Sch 2 to the *Bail Act 2013* — appeals relating to youth conduct orders — definitions — savings.

**[3-0210] Children’s Court Rule 2000**

Children — Children’s Court of NSW — general practice and procedure — application of the Rule — administration of the court, including seal, venue, sittings and delegation of functions — filing, lodgment and service of documents — care proceedings — functions of Children’s Registrars — applications — children and young persons as witnesses — evidence of school attendance — application for appointment of a person to act as guardian ad litem — record of proceedings — subpoenas — criminal proceedings — Children’s Court Clinic — Children’s Court Advisory Committee — forms.

**[3-0250] Community Welfare Act 1987**

Promote, protect, develop, maintain and improve the welfare of the family — provision of services to persons disadvantaged by, inter alia, lack of adequate family support, family problems, breakdown of the family as a social unit, age — promotion of the welfare of Aborigines — community welfare and social development — functions of the Minister and Director-General — Council and committees — constitution and procedure — general welfare assistance — disaster welfare assistance.

## Care and protection matters — important cases

### [4-0000] Children’s Law News

Also check the latest issues of Children’s Law News.

### [4-0100] Decisions concerning care and protection matters

The following cases have been included in this Resource Handbook:

- Interim orders — *Re Jayden* [2007] NSWCA 35 (see [4-0110]), *Re Timothy* [2010] NSWSC 524 (see [4-0120])
- Standard of proof, sexual abuse — *Re Sophie (No 2)* [2009] NSWCA 89 (see [4-0130])
- Basis of finding does not limit facts considered regarding placement — *Re Alistair* [2006] NSWSC 411 (see [4-0140])
- Least intrusive intervention, UN CROC — *Re Tracey* [2011] NSWCA 43 (see [4-0150])
- Realistic possibility of restoration — *Re Tracey* [2011] NSWCA 43 (see [4-0150])
- Permanency planning — *Re Hamilton* [2010] CLN 2 (see [4-0160])
- Section 90 application to vary order — *Re Campbell* [2011] NSWSC 761 (see also [4-0170]), *FaCS v Kestle* [2012] NSWChC 2 (see [4-0180])
- Aboriginal and Torres Strait Islander placement principles — *Re Victoria and Marcus* [2010] CLN 2 (see [4-0190])
- Standard of proof for sexual abuse matters — *M v M FC 88/063* [1988] HCA 68 (see [4-0200])
- Jurisdictional error — *AQY & AQZ v Administrative Decisions Tribunal of NSW* [2013] NSWSC 1028 (see [4-0210])
- Challenge application by foster carers — *Re June* [2013] NSWSC 969 (see [4-0220])
- Making of adoption orders — *Adoption of SRB, CJB and RDB* [2014] NSWSC 138 (see [4-0230])
- Unsuccessful application for leave to apply to rescind care orders — *JL v S, DFaCS* [2015] NSWCA 88 (see [4-0235])
- Assessment of a “realistic possibility of restoration” — *Re Henry; JL v S, DFaCS* [2015] NSWCA 89 (see [4-0240])
- Exceptional circumstances to justify a costs order — *S, DFaCS and the Knoll Children (Costs)* [2015] NSWChC 2 (see [4-0245])
- Invocation of parens patriae jurisdiction of the Supreme Court — *TF v Department of Family and Community Services (NSW)* [2015] NSWSC 694 (see [4-0250])

- Exercise of parens patriae jurisdiction — *S, DFaCS re “Lee”* [2015] NSWSC 1276 (see [4-0255])
- Effect of admission of young person to mental health facility — *Police v DMO* [2015] NSWChC 4 (see [4-0260])
- Transfer of proceedings to Supreme Court denied — *Re Madison (No 2)* [2015] NSWSC 27 (see [4-0265])
- Father excluded from proceedings due to exceptional circumstances — *S, DFaCS and the Marks Children* [2016] NSWChC 2 (see [4-0270])
- Realistic possibility of restoration to father — *S, DFaCS and the Harper Children* [2016] NSWChC 3 (see [4-0275])
- Where magnitude of risk not sufficient to meet unacceptable risk threshold — *DFaCS re Eggleton* [2016] NSWChC 4 (see [4-0280])
- Taking into account the views of the children — *Bondelmonte v Bondelmonte* (2017) 259 CLR 662 (see [4-0285])
- Whether child in need of care and protection when mechanism of injuries unexplained — *SL v S, DFaCS* [2016] NSWCA 124 (see [4-0290])
- Whether serious risk of harm where step-father charged but not convicted of sexual assault — *AA v DFaCS* [2016] NSWCA 323 (see [4-0295])
- No realistic possibility of restoration to mother who did not show full insight into her situation — *Re M (No 6)* [2016] NSWSC 170 (see [4-0300]) and *Re M (No 8)* [2016] NSWSC 641 (see [4-0305])
- Restoration to mother not realistic possibility given relationship with known paedophile — *Re Tanya* [2016] NSWSC 794 (see [4-0310])
- Application dismissed to prevent removal of child from temporary carer — *Re Tilly v Minister, FaCS* [2015] NSWSC 1208 (see [4-0315])
- Application for placement of child into maternal grandmother’s care refused — *C v S, FaCS* [2016] NSWDC 103 (see [4-0320])
- Application in Children’s Court dismissed because the Family Law Court is the preferable forum in private disputes not involving the Care Act — *DFaCS and the Eastway Children* [2017] NSWChC 3 (see [4-0325])
- Joinder of appellant great-grandmother to adduce suitability as an alternative carer of child — *GO v S, DFaCS* [2017] NSWDC 198 (see [4-0330])
- Report under s 29 Care Act not admissible in criminal proceedings — *R v Hayward* [2017] NSWSC 1170 (see [4-0335])
- Appeal dismissed as court does not have jurisdiction to hear s 90 application where children not residing in State — *DFaCS and the Slade Children* [2017] NSWChC 4 (see [4-0340])
- Appellant successful in having orders set aside so court can properly investigate care situation — *Re Jeremy (a pseudonym); DM v S, DFaCS* [2017] NSWCA 220 (see [4-0345])

- Appeal costs paid by Department of Family and Community Services due to exceptional circumstances — *Re A Foster Carer v DFACS (No 2)* [2018] NSWDC 71 (see [4-0350])
- Application to return children to their carers — *Re Benji and Perry* [2018] NSWSC 1750 (see [4-0355])
- Reports made to Department of Family and Community Services inadmissible in criminal proceedings in Supreme Court — *Hayward v R* [2018] NSWCCA 104 (see [4-0360])
- Risk of significant harm report and identities of makers of report inadmissible in criminal proceedings — *Secretary, Department of Family and Community Services v Hayward (a pseudonym)* [2018] NSWCA 209 (see [4-0365])
- Grounds for care orders under s 71 Care Act — *DFACS and Nicole* [2018] NSWChC 3 (see [4-0370])
- Obligation on court not to conduct proceedings in adversarial manner — *D v C; Re B (No 2)* [2018] NSWCA 310 (see [4-0375])
- Supreme Court cannot resolve factual issues unresolved in Children’s Court — *A v Secretary, Family and Community Services (No 2)* [2019] NSWSC 43 (see [4-0380])
- Application by Barnardos to be joined to proceedings under s 98(3) Care Act — *EC v Secretary, NSW Department of Family and Community Services* [2019] NSWSC 226 (see [4-0385])
- Appeal from Children’s Court to District Court to vary or rescind a care order — *LZ v Secretary, Department of Family and Community Services* [2019] NSWDC 156 (see [4-0390])
- Clarification of “within a reasonable period” in s 83 Care Act — *DFACS and the Steward Children* [2019] NSWChC 1 (see [4-0395])
- Independent Legal Representative for one child has standing to bring an application for all siblings — *DFACS and the Prince Children* [2019] NSWChC 2 (see [4-0400])
- Leave granted to the Independent Legal Representative to bring an application pursuant to s 90 for leave to vary or rescind care order as no long-term permanency plan — *DFACS and Leo* [2019] NSWChC 3 (see [4-0405])
- Leave to vary or rescind a care order — *DFACS and Bridget* [2019] NSWChC 4 (see [4-0410])
- Realistic possibility of restoration of child to father within a reasonable period — *The Secretary of the Department of Communities and Justice (DCJ) and Fiona Farmer* [2019] NSWChC 5 (see [4-0415])
- Psychologist report may support s 32 *Mental Health (Forensic Provisions) Act* 1990 application in certain circumstances — *Jones v Booth* [2019] NSWSC 1066 (see [4-0420])

**[4-0110] Re Jayden [2007] NSWCA 35**

Children — care and protection — care and responsibility — review of interim care responsibility orders — interim order conferring parental responsibility of children on Minister for Community Services — serious issue to be tried as to whether final order should be made — Director-General of the Department of Community Services obtaining discharge of contact order to enable Minister to send children to New Zealand prior to final order — whether this amounts to an abuse of process — ss 69, 70, 70A and 72 *Children and Young Persons (Care and Protection) Act 1998* considered — legal practitioners — parties to proceedings — whether legal practitioners appointed by the Children’s Court pursuant to s 99 *Children and Young Persons (Care and Protection) Act* to represent children the subject of proceedings should be named as parties to proceedings in the Supreme Court.

**[4-0120] Re Timothy [2012] NSWSC 524**

Children — care and protection — administrative law — judicial review — grounds of review — jurisdictional error and procedural fairness — decisions of Children’s Court Magistrates — who may make application for interim order regarding placement — Aboriginal Care Circle.

**[4-0130] Re Sophie (No 2) [2009] NSWCA 89**

Children — care and protection — *Children and Young Persons (Care and Protection) Act 1998* — application for care order — child welfare — whether child in need of care and protection — child infected with a sexually transmitted disease — whether child was sexually abused by the father who had the same sexually transmitted disease — onus of proof — history of litigation chequered — appeal — father seeking an order in the nature of certiorari quashing orders upon the ground of an error of law on the face of the record — whether trial judge failed to place onus on the Director-General of proving sexual abuse on the balance of probabilities — summons dismissed.

**[4-0140] Re Alistair [2006] NSWSC 411**

Children — care and protection — finding child in need of care and protection — challenge to Magistrate’s decision to permit re-examination of evidence when considering placement — application *res judicata*/issue estoppel rejected — discretion to receive evidence miscarried — Magistrate when exercising discretion required to balance competing interests — *In re B (Minors) Care Proceedings: Issue Estoppel* (1997) 2 WLR 1 applied — pending criminal proceedings — appropriate remedy.

**[4-0150] Re Tracey [2011] NSWCA 43**

Children — care and protection — *Children and Young Persons (Care and Protection) Act 1998* — Convention on the Rights of the Child (CROC) — application by mother for parental responsibility — treaty obligations under the CROC may be a relevant consideration to the exercise of discretion in determining care application — judge erred in failing to take into account CROC Articles in exercising her discretion.

**[4-0160] Re Hamilton [2010] CLN 2**

Children — care and protection — application to rescind a care order and restore one child to the father — application for restoration abandoned — application for a contact order sought instead — whether contact with the father is in the best interests of the children — father has a serious criminal record for sexual offences against children and for indecent exposure — children exposed to domestic violence between the parents — possible sexual abuse and sexual grooming of the children by the father — meaning of “unacceptable risk of harm” — meaning of “permanency planning” — no realistic possibility of restoration — whether permanency planning has been appropriately and adequately addressed — importance of maintaining contact between siblings who are not placed together — children with special needs — autism and post traumatic stress disorder.

**[4-0170] Re Campbell [2011] NSWSC 761**

Children — care and protection — application under *Children and Young Persons (Care and Protection) Act* 1998 for s 90 leave to vary or rescind care orders — significant change in relevant circumstances — arguable case — realistic possibility of restoration — least intrusive form of intervention principle — *Re Tracey* [2011] NSWCA 43 — proposal by carer for adoption.

**[4-0180] FaCS v Kestle [2012] NSWChC 2**

Children — care and protection — application under *Children and Young Persons (Care and Protection) Act* 1998 for s 90 leave to vary or rescind care orders — relevance of arguable case for leave — consideration of Statement of Wishes by children — consideration of paramountcy principle in leave applications — discretion to restrict grant of leave to particular issue or issues — s 94(4) and granting of adjournments.

**[4-0190] Re Victoria & Marcus [2010] CLN 2**

Children — care and protection — leave to bring an application to rescind a care order — application of Aboriginal and Torres Strait Islander Placement Principles — importance of encouraging and preserving the children’s Aboriginal cultural identity — children with special needs — autism.

**[4-0200] M v M FC 88/063 [1988] HCA 68**

Children — care and protection — standard of proof for sexual abuse matters — wife’s allegation that the father sexually abused the daughter of the marriage — trial judge not satisfied that the father had sexually abused the child but considered that there was a possibility that the child had been sexually abused by the husband — in the interests of the child the risk of abuse would be eliminated by denying access to the husband, including supervised access — appeal to the Full Court of the Family Court dismissed — appeal to the High Court for an order that the father be granted access to the child — paramountcy of the welfare of the child — whether the resolution of an allegation of sexual abuse against a parent is subservient and ancillary to the court’s determination of what is in the best interests of the child — High Court dismissed appeal — to achieve

a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.

**[4-0210] AQY & AQZ v Administrative Decisions Tribunal of NSW [2013] NSWSC 1028**

Children — care and protection — jurisdictional error — whether Administrative Decisions Tribunal of NSW has jurisdiction to review the decision of the Director-General of the Family and Community Services to not grant certain persons the responsibility for the daily care and control of the child — whether decision is one in relation to the preparation of a permanency plan or the enforcement of a permanency plan that has been embodied in, or approved by, an order or orders of the Children’s Court — need for court to make a finding that permanency planning has been adequately addressed and approved of before final orders made — *ex tempore* judgment — urgent matter — finding that the Tribunal had jurisdiction to entertain the application.

**[4-0220] Re June [2013] NSWSC 969**

Children — care and protection — application by foster carers challenging decision of the Children’s Court — whether magistrate erred in failing to admit relevant evidence — need to weigh advantages of admitting probative evidence against disadvantages of admitting improperly obtained evidence — whether magistrate failed to comply with s 9(2)(c) *Children and Young Persons (Care and Protection) Act 1998* — whether magistrate failed to properly apply s 79(3) *Children and Young Persons (Care and Protection) Act* — whether foster carers were entitled to an opportunity to be heard on matters of significant impact — what constitutes an opportunity to be heard — s 87 *Children and Young Persons (Care and Protection) Act* — where an order may have a significant impact on a person who is not a party to proceedings, there is a need for that person to be given an opportunity to be heard on that issue — *ex tempore* judgment — whether foster carers have standing to seek relief under s 69 *Supreme Court Act 1970* — if not, whether manifest defects in hearing before and reasons of Children’s Court constitute “exceptional circumstances” — whether Supreme Court may, in the exercise of *parens patriae* jurisdiction, grant relief under s 69 — order quashed and matter remitted to the Children’s Court to be heard by a magistrate other than the magistrate who made the order that has been quashed.

**[4-0230] Adoption of SRB, CJB and RDB [2014] NSWSC 138**

Children — care and protection — adoption — children were removed from their birth parents’ care pursuant to a child protection order, on the grounds, *inter alia*, that they were living in an unsafe environment due to issues of domestic violence and substance abuse (including alcohol, cannabis and heroin) on the part of their birth parents — whether making of adoption orders clearly preferable to any other legal action which can be taken in respect of the care of the children — focus of the adoption order must be on the best interests of the child, not the wishes and aspirations of the adoptive applicants or birth parents — factors to consider as to whether adoption order preferable to other long-term orders — finding that the making of the adoption orders

were clearly preferable to any other action which can be taken with respect to the care of the children — *ex tempore* judgment — s 64B(2)(b) *Family Law Act 1975* (Cth) — ss 8, 59, 67(1)(d), 90, 91, 118 *Adoption Act 2000*.

**[4-0235] JL v S, DFaCS [2015] NSWCA 88**

Children — care and protection — care and protection orders — unsuccessful application for leave to apply to rescind care orders — appeal — whether error of law on the face of the record or jurisdictional error established — whether District Court correctly applied provisions of the *Children and Young Persons (Care and Protection) Act 1998*, s 90 — whether judge biased in approach to assessing applicant’s case — whether there was a denial of procedural fairness — what are the duties of a judicial officer to an unrepresented litigant — relevance of international treaty obligations (United Nations Convention on the Rights of the Child) to exercise of discretion — whether judge placed excessive or too little weight on applicant’s evidence.

**[4-0240] Re Henry; JL v S, DFaCS [2015] NSWCA 89**

Children — care and protection — care and protection orders — judicial review — appeal from Children’s Court to District Court — whether the District Court correctly construed and applied the provisions of s 106A *Children and Young Persons (Care and Protection) Act 1998* — challenge to Children’s Court order placing child under parental responsibility of Minister until aged 18 years of age — the court must assess, at the time the application is before it, whether there is a “realistic possibility of restoration”, that is to say, whether the “possibility of restoration is real or practical [and not] ... fanciful, sentimental or idealistic, or based upon ‘unlikely hopes for the future’”: *In the matter of Campbell* [2011] NSWSC 761 (at [55]) — relevance of United Nations Convention on the Rights of the Child — what are the duties of a judicial officer to an unrepresented litigant.

**[4-0245] S, DFaCS and the Knoll Children (Costs) [2015] NSWChC 2**

Children — care and protection — application for costs under s 88 *Children and Young Persons (Care and Protection) Act 1998* — application for costs to be paid to the carers by the paternal grandmother — whether there are exceptional circumstances to justify a costs order — application dismissed.

**[4-0250] TF v DFaCS [2015] NSWSC 694**

Children — care and protection — invocation of *parens patriae* jurisdiction of the Supreme Court — whether the Children’s Court had jurisdiction to make orders under ss 4(a) and 4(c) *Children and Young Persons (Care and Protection) Act 1998* — jurisdictional error — Children’s Court order quashed.

**[4-0255] S, DFaCS re “Lee” [2015] NSWSC 1276**

Children — care and protection — exercise of *parens patriae* jurisdiction — where orders in place for parental responsibility and secure accommodation — continued availability of jurisdiction where child soon to attain 18 years of age but is not

capable of managing her affairs — importance of ability to detain and restrain child to ensure proper care — where guardianship order does not include powers to detain and restrain — where guardianship order does not provide adequate safety net as alternative to parental responsibility and secured accommodation orders — unwillingness to discharge court orders upon child's attaining 18 years of age until satisfied appropriate replacement orders in place.

**[4-0260] Police v DMO [2015] NSWChC 4**

Children — care and protection — young person pleaded guilty to intimidating police officer in execution of his duty — matter set down for defended hearing — whether admission of young person to mental health facility under s 33(1)(b) *Mental Health (Forensic Provisions) Act 1990* (MHFP Act) operates to finalise charges — no decisions of intermediate or higher courts dealing with the interpretation of s 33 — an order under s 33(1)(b) where the person is detained in the mental health facility does not operate to finalise charges — s 33 provides court with a mechanism to have persons who appear to be suffering from mental illness to be assessed by an authorised medical officer at a mental health facility — the contention that once the person is admitted the charges cannot be relisted could not have been the legislature's intention — no requirement in MHFP Act to establish link between offences charged and the mental illness.

**[4-0265] Re Madison (No 2) [2015] NSWSC 27**

Children — care and protection — *parens patriae* jurisdiction — application to vary orders for parental responsibility — orders sought for specific financial assistance — orders sought to transfer proceedings from Children's Court to NSW Supreme Court — Minister in better position than father to discharge parental responsibilities — father's financial request beyond Ministerial responsibilities — Supreme Court should not intervene, unless in exceptional circumstances, in proceedings that are ongoing in a specialist Tribunal which has been established to hear them.

**[4-0270] S, DFACS and the Marks Children [2016] NSWChC 2**

Children — care and protection — application that father is not the children's "parent" — alternative application to exclude father from the proceedings — exceptional circumstances — allegations of domestic violence, sexual interference, abduction and threats to kill the children — father in immigration detention — father and legal representative not to be served with materials — father prohibited from having contact with the children — father found to be a "parent" for the purposes of these proceedings — compelling reasons that it is in the children's best interests that the father be excluded from proceedings — father poses unacceptable risk to the children.

**[4-0275] S, DFACS and the Harper Children [2016] NSWChC 3**

Children — care and protection — mother's application for restoration under *Children and Young Persons (Care and Protection) Act 1998* — Secretary, DFACS proposed care plan restoring children to their father — unacceptable risk of harm test — allegations mother deliberately injected fecal matter into eldest child via an intravenous

line — mother poses an unacceptable risk of harm to children — no realistic possibility of restoration of the children to their mother — realistic possibility of restoration to their father.

**[4-0280] DFaCS re Eggleton [2016] NSWChC 4**

Children — care and protection — *parens patriae* jurisdiction — application under *Children and Young Persons (Care and Protection) Act 1998* — application of the unacceptable risk of harm test — parental history of alcohol and drug abuse — accidental death of younger sibling — realistic possibility of restoration — strong and positive attachment between child and parents — magnitude of risk not sufficient to meet the threshold for unacceptable risk of harm.

**[4-0285] Bondelmonte v Bondelmonte (2017) 259 CLR 662**

Children — care and protection — children taken overseas by father in breach of parenting order — primary judge made interim order for children's return pending further relocation orders — father's appeal to the Full Court of the Family Court dismissed — father's appeal to the High Court that the primary judge failed to take into consideration the views of the children in relation to the interim parenting orders — court not required to seek the views of the child but is required to consider any expressed view under s 60CC(3)(a) *Family Law Act 1975* (Cth) — court not obliged to take into consideration the children's views in the case of interim, temporary arrangements — parenting order may be made in favour of a parent of the child or some other person making interim orders in circumstances of urgency under s 64C *Family Law Act* — appeal dismissed.

**[4-0290] SL v S, DFaCS [2016] NSWCA 124**

Children — care and protection — judicial review in the supervisory jurisdiction of the Supreme Court — challenge to Children's Court maternal grandparent parental order — whether District Court applied correct provisions of the *Children and Young Persons (Care and Protection) Act 1998* subject to relevant amendments in 2014 — whether error of law on the face of the record or jurisdictional error — child suffered life-threatening head injuries when with mother — mother diagnosed with juvenile myoclonic epilepsy — whether injuries were non-accidental — whether child in need of care and protection — mechanism of injuries unexplained — no realistic possibility of restoration — whether there had been failure to make an appropriate contact order — whether reasons adequate for permanency planning — role of independent legal representative in care proceedings.

**[4-0295] AA v DFaCS [2016] NSWCA 323**

Children — care and protection — whether actions of DFaCS under the *Children and Young Persons (Care and Protection) Act 1998* valid — father charged interstate but not convicted of indecent and sexual assault involving a child under 12 years — regular absences of oldest child from school — risk of harm report about the father's alleged history of sexual assaults — risk of violence alerts — mother's three older children from a former marriage assumed into care — older children living with biological father — DFaCS joined as an intervener in Family Court proceedings — older children

subject to an emergency care and protection order — high risk birth alert issued for impending birth of child and any future children — whether DFACS's assumption of care order and the high risk birth alert valid — whether DFACS statements about the children's status and the character of the parents were misleading and should be withdrawn or removed from files — parents sought declarations, prerogative relief and damages — essentially sought judicial review of DFACS decisions — claim for exemplary damages of \$39 million — DFACS case in totality conveyed a serious risk of harm — parents did not establish grounds for relief — allegations of misconduct against DFACS officers not found — DFACS not motivated by ill-will but acted in the children's best interests.

**[4-0300] Re M (No 6) [2016] NSWSC 170**

Children — care and protection — appeal care orders made by a Presidential Children's Court — Five children from three fathers removed from mother's care — Children's Court orders granted parental responsibility of the three youngest children to children's fathers — whether realistic possibility of restoration to mother — mother pursued a peripatetic lifestyle, alienation from the fathers and her family, physical neglect, poor relationship with her children and a poor attitude to the DFACS — mother not demonstrated that she had full insight into her situation — order for a rescission or variation of the care orders refused.

**[4-0305] Re M (No 8) [2016] NSWSC 641**

Children — care and protection — appeal by the mother for leave for rescission or variation of orders under s 90 *Children and Young Persons (Care and Protection) Act* 1998 — mother did not demonstrate that her conduct was likely to change in a way that would justify the court exploring the questions raised — application dismissed.

**[4-0310] Re Tanya [2016] NSWSC 794**

Children — care and protection — child with Down's syndrome and intellectual disability — whether child in need of care and protection — restoration to mother not realistic possibility given relationship with a known paedophile — restoration to father realistic possibility.

**[4-0315] Re Tilly v Minister, FaCS [2015] NSWSC 1208**

Children — care and protection — *parens patriae* jurisdiction — application to prevent removal of child from temporary carer — carer accused of assaults against other children in her care — the presence of risk, as determined by the Children's Guardian, an automatic bar to a person being engaged in child-related work — statutory obligation on FaCS to remove child — *parens patriae* power not capable of dispensing with statutory obligations — residual *parens patriae* power to remove child from Minister's care in aid of statutory care responsibilities — court has power to make child ward of the court — best interest of the child in out-of-home care — where removal would undermine the child's bonds with the temporary carer — where need to protect child from risk of harm — where exercising jurisdiction would circumvent statutory child protection regime — court (not without regret) did not exercise *parens patriae* jurisdiction.

**[4-0320] C v S, FaCS [2016] NSWDC 103**

Children — care and protection — child placed in out-of-home care — placement into maternal grandmother’s care refused — refusal by Children’s Court to place the child in grandmother’s care because of the Office of the Children’s Guardian refusal to issue grandmother with the relevant clearance to work with children — reports from FaCS supported restoration to the grandmother — renewal of AVOs against child’s mother and abusive former spouse — orders of Children’s Court set aside — interim order for parental responsibility for the child to be allocated to grandmother — final orders to be made after FaCS prepares permanency plan.

**[4-0325] DFaCS and the Eastway Children [2017] NSWChC 3**

Children — care and protection — mother sought rescission of final Care orders — Secretary of Department consented to exercise of jurisdiction by Family Law Court (FLC) — mother sought FLC parenting orders for shared parental responsibility and for children to reside with her — father applied to Children’s Court for varying contact arrangements but not to vary parental responsibility allocation — mother withdrew Children’s Court application — mother and Secretary sought dismissal of father’s application — matter is a private dispute not requiring involvement of the Care Act, the Children’s Court or the Department — FLC is the preferable forum — case dismissed.

**[4-0330] GO v S, DFaCS [2017] NSWDC 198**

Children — care and protection — joinder of person with genuine concern for the welfare of a child to care proceedings — appellant great-grandmother of child subject to care proceedings and carer of mother — leave to appeal decision of Children’s Court for joinder — magistrate erred in finding that appellant and mother held same position in care proceedings — leave granted to appellant to cross-examine and adduce evidence as to suitability as an alternative carer of child.

**[4-0335] R v Hayward [2017] NSWSC 1170**

Children — care and protection — offences relating to physical abuse of a child — accused seeks to rely on subpoenaed material from the Department about mother’s history of inflicting injuries on the child/children — s 29 *Children and Young Persons (Care and Protection) Act 1998* provides reports only admissible for limited proceedings in the Supreme Court — accused argued application to criminal proceedings in the Supreme Court — Second Reading Speech consulted and where reports are admissible intended to be “child welfare proceedings” — criminal proceedings do not fall within s 29(1)(d) even if the victim was a child — held s 29(1) report is not admissible in criminal proceedings in the Supreme Court.

**[4-0340] DFaCS and the Slade Children [2017] NSWChC 4**

Children — care and protection — application to transfer case management from NSW to Victoria — parental responsibility allocated to grandmother — grandmother and children moved to Victoria — children listed in AVO as persons in need of protection — orders sought by Secretary that care orders be rescinded, parental responsibility

transferred to Minister and then to Victoria — court does not have jurisdiction to hear s 90 application where children not present in NSW or who are subject to a report — risk of harm reports not filed, so court unable to exercise function of the *Children and Young Persons (Care and Protection) Act 1998* — appeal dismissed for want of jurisdiction.

**[4-0345] Re Jeremy (a pseudonym); DM v S, DFaCS [2017] NSWCA 220**

Children — care and protection — application for leave to vary care orders — significant change in any relevant circumstances — appellant mother of four children in the care of Minister — appellant sought orders of allocation of sole parental responsibility of two children — leave required for application s 90 *Children and Young Persons (Care and Protection) Act 1998* — appellant entitled to have court properly investigate care situation — judge erred in law failing to apply provisions of Act — orders set aside, remitted to District Court for appeal.

**[4-0350] Re A Foster Carer v DFaCS (No 2) [2018] NSWDC 71**

Children — care and protection — s 88 *Children and Young Persons (Care and Protection) Act 1998* — the appellant’s appeal costs to be paid by DFaCS due to exceptional circumstances — exceptional circumstances arose because DFaCS’s position was based on flawed care agency investigation report.

**[4-0355] Re Benji and Perry [2018] NSWSC 1750**

Children — care and protection — Children’s Court ordered children to be returned to their carers — “unacceptable risk of harm” test in *M v M* (1988) 166 CLR 69 — s 9(1) *Children and Young Persons (Care and Protection) Act 1998* — necessary to balance possibility of harm if children are returned to their carers with probability of psychological harm if they are not returned — application dismissed.

**[4-0360] Hayward v R [2018] NSWCCA 104**

Children — care and protection — s 29(1)(d)(iii) *Children and Young Persons (Care and Protection) Act 1998* — whether reports made to DFaCS admissible in criminal proceedings in Supreme Court — the phrase “in relation to” limits the scope of s 29(1)(d)(iii) to proceedings which affect the legal rights and interests of a child or young person in proceedings which concern their welfare — subpoena material which the applicant sought to admit is not admissible in the present proceedings in the Supreme Court — appeal dismissed.

**[4-0365] Secretary, Department of Family and Community Services v Hayward (a pseudonym) [2018] NSWCA 209**

Children — care and protection — ss 24, 29(1)(e), 29(1)(f)(ii) *Children and Young Persons (Care and Protection) Act 1998* — s 29(1)(e) forbids use of compulsory process to produce or give evidence regarding contents of risk of significant harm report — no exception in criminal proceedings as s 29(1)(f)(ii) limits use to “proceedings relating to the report” — whether court in criminal case can compel

disclosure of report makers' identities — no power to order the Secretary to identify the maker of a report, nor to produce the unredacted reports, nor to provide information from which the identity of that person could be deduced — notice of motion dismissed.

**[4-0370] DFACS and Nicole [2018] NSWChC 3**

Children — care and protection — s 71 *Children and Young Persons (Care and Protection) Act 1998* — whether there is a realistic possibility of restoration — child is in need of care and protection — Secretary to prepare, file and serve Care Plan — case relisted for response to Care Plan.

**[4-0375] D v C; Re B (No 2) [2018] NSWCA 310**

Children — care and protection — appeal to District Court from Children's Court — ss 80, 83(7), 93, 107 *Children and Young Persons (Care and Protection) Act 1998* — obligation on court not to conduct proceedings in adversarial manner — procedural fairness required adjournment where trial judge departed from case put by appellant — respondent sought to adduce further evidence — denial of procedural fairness — application refused — matter relisted for hearing in the District Court.

**[4-0380] A v Secretary, Family and Community Services (No 2) [2019] NSWSC 43**

Judicial review — *parens patriae* — Error on the face of the record — Jurisdictional error — Denial of procedural fairness — orders sought in relation to proceedings in Children's Court for care and protection — Orders of prohibition and declaratory relief sought in relation to proceedings still being heard in the Children's Court — Supreme Court cannot resolve any factual issues unresolved in Children's Court — basis for orders sought not established — no error in conduct of Children's Court proceedings established — no jurisdictional error regarding provision of care plans — denial of procedural fairness in relation to the care plan not established — Supreme Court does not have power to direct removal of documents from Children's Court file — orders refused — summons dismissed.

**[4-0385] EC v Secretary, NSW Department of Family and Community Services [2019] NSWSC 226**

Children — care and protection — ss 91, 98(3) *Children and Young Persons (Care and Protection) Act 1998* — appeal from the Presidential Children's Court to Supreme Court of NSW — application by Barnardos to be joined to proceedings — meaning of "person" in s 98(3) — Barnardos has "genuine concern for the safety, welfare and well-being" of children — discretion exercised for Barnardos to be joined as a party as in best interests of children — s 98(3) not limited to "natural person" — appeal dismissed.

**[4-0390] LZ v Secretary, Department of Family and Community Services [2019] NSWDC 156**

Children — care and protection — s 90 *Children and Young Persons (Care and Protection) Act 1998* application for leave to rescind orders — appeal from Children's

Court to District Court — no significant change in any relevant circumstances under s 90(2) — child secure in foster placement — child expressed wish to remain with foster parents — 3-month transition period for restoration too short — mother fails to understand damage done to child by being away from her for lengthy periods — appeal dismissed.

**[4-0395] DFACS and the Steward Children [2019] NSWChC 1**

Children — care and protection — application by father for restoration within a reasonable period under s 83 *Children and Young Persons (Care and Protection) Act 1998* — “within a reasonable period” clarified — parent must have commenced a process of improving his or her parenting and that there has already been some significant success on the part of the parent which enables a confident assessment that continuing success might be predicted — AVO restricting father from having any contact with his children or the mother — no realistic possibility of restoration of children to mother or father.

**[4-0400] DFACS and the Prince Children [2019] NSWChC 2**

Children — care and protection — Leave application by Independent Legal Representative (ILR) of one child to vary or rescind care orders in relation to all 5 children — Minister for Community Services in NSW exercises parental responsibility for older children — all children reside in Qld with their mother — children remain subject to final orders made by NSW court — ILR for one child has standing to bring an application pursuant to s 90 *Children and Young Persons (Care and Protection) Act 1998* for all siblings — NSW Children’s Court has jurisdiction to hear and determine an application pursuant to s 90 for variation or rescission of the orders.

**[4-0405] DFACS and Leo [2019] NSWChC 3**

Children — care and protection — Application pursuant to s 90 by Independent Legal Representative (ILR) for leave to vary or rescind care order — Children’s Court made a Final order of parental responsibility to the Minister and no restoration to mother — agency designated to provide permanent placement failed to do so and explored restoration contrary to court’s decision — no alternative long-term care options identified by Community Services or agency — Leave is granted to ILR to bring an application pursuant to s 90.

**[4-0410] DFACS and Bridget [2019] NSWChC 4**

Children — care and protection — s 90 *Children and Young Persons (Care and Protection) Act 1998* application for leave to rescind or vary previous care orders — father has drug addiction issues and history of criminal offending — mother is drug-free, maintains a safe home and is committed to contact with child — mother has separated from father — Leave granted.

**[4-0415] DCJ and Fiona Farmer [2019] NSWChC 5**

Children — care and protection — application by father for restoration under s 83(4) — mother has mental health issues which affect her ability to parent — father

demonstrated lack of understanding of mother's health incapacity and failed to protect child — father has separated from mother — risk is minimal and is capable of being addressed — realistic possibility of restoration to father within a reasonable period — Secretary to prepare a different permanency plan involving restoration.

**[4-0420] Jones v Booth [2019] NSWSC 1066**

Civil — mental health — declaratory relief sought concerning qualifications of a psychologist to furnish a report in support of a s 32 *Mental Health (Forensic Provisions) Act 1990* application — report rejected by magistrate as it was not a psychiatric report — report later accepted by different magistrate — application under s 32 later successful — type of report which may be appropriate will depend on particular case — court should consider the qualifications and expertise of author, together with report contents, to determine whether report should be admitted and what weight is given to it — conditions which fall within the definition of “cognitive impairment” are frequently reported on by psychologists — live controversy does not exist for grant of declaratory relief — declaration refused.



## **Criminal matters — background material**

The following background material that deal with criminal matters have been included in this section at the following paragraph numbers:

### **Articles and other resources**

- Socioeconomic circumstances of young offenders — 2009 young people in custody health survey fact sheet: key findings for all young people at [5-0050]
- D Weatherburn and J Baker, “Transient offenders in the 1996 secondary school survey: a cautionary note on juvenile justice diversion” at [5-0100]
- K Richards, “What makes juvenile offenders different from adult offenders” at [5-0120]
- D Weatherburn, S Vignaendra and A McGrath, “The specific deterrent effect of custodial penalties on juvenile reoffending” at [5-0130]
- Judge Peter Johnstone, “The grey matter between right and wrong: neurobiology and young offending” at [5-0140]
- Judge Peter Johnstone, “Early intervention, diversion and rehabilitation from the perspective of the Children’s Court of NSW” at [5-0150]
- Judge Peter Johnstone, “Updates in the Children’s Court jurisdiction” at [5-0160]
- H Fatouros, “Is our youth justice system really broken?” at [5-0170]
- Judge Peter Johnstone, “The Children’s Court of NSW: 2019” at [5-0180]
- Judge Peter Johnstone, “Children’s Court update 2019 (criminal jurisdiction)” at [5-0190]



# **Socioeconomic circumstances of young offenders — 2009 young people in custody health survey fact sheet: key findings for all young people**

Number of young people surveyed: 361.

Sample: 88% male with an average age of 17 years.

## **[5-0050] Social determinants**

- 27% of young people had been placed in care before the age of 16 years.
- 45% have had a parent in prison.
- 38% were attending school prior to custody.
- 26% were working in the six months prior to custody.
- 27% had been bullied and 52% had bullied others.
- 6% of young people reported being unsettled or having no fixed place of abode (six months prior to custody), with young women representing 18%.
- More than one-quarter (27%) had moved two or more times in the six months prior to custody, and this was more for Aboriginal young people at nearly a third (32%).
- Young women were more likely than young men to have moved four or more times in the six months prior to custody.
- Aboriginal young people more likely to have moved four or more times in the six months prior to custody.

## **Mental health**

- 60% had a history of child abuse or trauma.
- 14% had a possible intellectual disability (IQ 69 and under).
- 32% scored in the borderline intellectual disability range (IQ 70 to 79).
- 87% were found to have any psychological disorder, with conduct disorder (59%), substance use (49%), alcohol abuse (44%) or ADHD (30%) the most common.
- 16% had thought about suicide and 10% had ever attempted suicide.
- 21% had thought about self-harm and 16% had ever self-harmed.

## **Offending behaviour**

- 79% had reported previous time in custody.
- The average age of first time in custody was 14.3 years.
- On average, young people had previously spent five times in custody.

**Physical health**

- 42% were overweight or obese.
- 18% had a mild to moderate hearing loss.
- 23% have ever had asthma.
- 32% have had a head injury resulting in unconsciousness.
- Poor nutrition is a common risk factor and diet improved while in custody — eating fresh fruit three or more times a week increased from 43% in the community to 90% since in custody; and eating vegetables three or more times a week increased from 57% in community to 77% since in custody.
- 37% of young people reported currently taking prescribed medications. The most common medication was for mental illness.
- There was a low prevalence of blood-borne viruses and sexually transmissible infections, with no young people found with HIV, gonorrhoea or syphilis. Four young people were found to have antibodies to Hepatitis C, six had Hepatitis B and six had chlamydia.

**Smoking, alcohol and drugs**

- 94% had ever smoked cigarettes with a mean age of starting smoking at 12 years.
- 46% indicated they currently smoked cigarettes or would smoke on release from custody.
- 93% had ever been drunk with an average age first drunk of 13 years.
- 66% reported being drunk at least weekly the year prior to custody.
- 61% of young people identified that their alcohol consumption had caused them problems in the past year (with school, friends, health, police, parents).
- 78% were found to be risky drinkers.
- 89% had tried illicit drugs, with cannabis (87%) the most common used, followed by ecstasy (41%), and meth/amphetamines (29%).
- 65% had used an illicit drug at least weekly in the year prior to custody.
- 65% reported committing crime to obtain alcohol or drugs.
- 20% were intoxicated (on alcohol, drugs or both) at the time of their offence.

The report is available on the Juvenile Justice website. Visit: [www.djj.nsw.gov.au/publications.htm#healthsurveys](http://www.djj.nsw.gov.au/publications.htm#healthsurveys)

# **Transient offenders in the 1996 secondary school survey: a cautionary note on juvenile justice diversion**

Don Weatherburn (Director, NSW Bureau of Crime Statistics and Research) and Joanne Baker (Senior Research Officer, NSW Bureau of Crime Statistics and Research) based on a paper read at the Australian Institute of Criminology Conference: Mapping the Boundaries of Australia's Criminal Justice System, Rydges Canberra Hotel, 22–23 March 1999.

## **[5-0100] Introduction**

Criminology, both here and overseas, is experiencing something of a renaissance of interest in the possibility of preventing juvenile crime through programs directed at actual or potential offenders. The renaissance has sprung from evidence that programs directed at families and their children during the early years of a child's life (Yoshikawa 1994, Tremblay & Craig, 1995, Pathways to Prevention 1999) can significantly reduce the likelihood and depth of juvenile involvement in crime. As might be expected, success in preventing crime through early childhood intervention has fostered optimism about the prospects for successful intervention in adolescence and beyond. Indeed, some now characterise child and adolescent development as a "pathway", with "critical transition points" distributed along it where timely and appropriate intervention can reduce the future risk of juvenile involvement in crime (Pathways to Prevention 1999).

Despite its apparent freshness this new zeitgeist of enthusiasm for early intervention has an element of *deja vu* about it. The reason, as Carney (1999) has pointed out, is that deterministic criminology experienced a similar high-water mark during the 1960s with the emergence of what Kittrie (1971) called the "therapeutic" state. Kittrie used this term to describe the newly emerging techniques of psychiatric intervention and treatment which were widely regarded at the time as offering a more scientific means of controlling future offending behaviour than sanctions imposed by the courts. Then, as now, scholarly support for State intervention was underpinned by a beneficent rather than punitive attitude toward offenders. Paradoxically this beneficent motivation tended to blind supporters of "early intervention", 1960s style, to the fact that their "interventions" were often more onerous and restrictive of individual liberty than the punishments they were meant to supplant.

It would be unfair to cast all current approaches to early intervention in the same light as those which prevailed during the 1960s. For one thing, some modern forms of early intervention involve nothing more intrusive or coercive than the provision of parenting advice and support to disadvantaged families. This is wholly unobjectionable and there is good evidence of its value (see Olds et al 1998; Moffit & Harrington 1996). Some contemporary proponents of early intervention with juvenile offenders have also shown themselves quite sensitive to issues of civil rights. Braithwaite and Mugford (1994), for example, recommended procedural safeguards to prevent unfairness during re-integrative shaming conferences. It should also be pointed out that psychiatry in the

1960s promised far better control over criminal behaviour than it actually delivered. By contrast, at least some of the currently popular forms of early intervention have been shown in randomised controlled trials to be effective in reducing recidivism. Furthermore, New South Wales, at least, has been quite anxious to ensure that its diversion schemes do not target first or minor offenders. Under the NSW *Young Offenders Act 1997 s 7*, for example, diversion into the conferencing program does not take place unless the juvenile in question has failed to respond to less intrusive forms of intervention such as warnings and formal cautions. Similar caveats govern the placement of juveniles on the Youth Drug Court Program (NSW Department of Attorney General 2000).

It would be a mistake, nonetheless, to assume that all the risks associated with unbridled enthusiasm for early intervention are well and truly behind us. Offenders may no longer be at serious risk of indefinite psychiatric detention for minor offences but enthusiasm for new forms of early intervention is beginning to outpace the growth in evidence for its efficacy and appropriateness in all contexts (Carney 1999; Blagg 1997; Cunneen 1997). Perhaps most importantly, though it is obvious to criminologists, policy makers in Australia often show little appreciation of the fact that most juvenile involvement in crime is self-limiting, that is, it stops without any need for any form of intervention, early or otherwise. The Commonwealth Government, for example, recently added a \$111 million contribution over four years to various State-based diversion programs for young offenders without any serious regard to whether diversion and treatment were appropriate, or moreover, cost-effective for the groups of young offenders served by these schemes (Commonwealth of Australia 1999). The problem is not unique to Australia. Perhaps the extreme example of this somewhat uncritical support for diversion into treatment is California's proposed Proposition 36, under which all minor drug offenders (eg those convicted for the first time of possessing or using drugs) are required to undergo treatment (Riley et al 2000).

Of course, one argument commonly made in favour of diversion (including that entailed by Proposition 36) is that it helps reduce dependence on more intrusive measures, such as imprisonment. On this account, the justification for diversion is not the fact that it is a better way of reducing crime but the fact that it protects young people from iatrogenic forms of intervention, such as imprisonment. This is an important point but sanctions designed to reduce the use of imprisonment are more often promised than delivered in practice, at least in Australia. The history of sentencing in this country is replete with examples of sanctions expressly designed to reduce the use of imprisonment but which ended up, despite all hope to the contrary, doing little more than splitting the non-custodial vote (Chan & Zdenkowski 1986; Bray 1990). Thus, while the NSW Government should be credited with its attention to the risks of net-widening, it remains to be seen whether efforts to prevent net-widening will actually prove successful. The views of judicial officers about the best use of sanctions, after all, are not always consistent with the stated intentions of the legislation creating them (Bray & Chan 1991).

The purpose of this article, then, is to sound a cautionary note about juvenile justice diversion using Australian self-reported crime data. By juvenile justice diversion programs we mean programs designed to intervene early in the supposed "criminal careers" of juvenile offenders. The argument we make is in some ways not that new, at least in countries which routinely conduct surveys on self-reported offending.

To date, however, it has not been made with the benefit of evidence drawn from a large-scale Australian survey on self-reported offending. We are interested in three specific questions. The first concerns the prevalence of juvenile involvement in crime. This is important for two reasons; firstly, because it helps highlight both the need for effective ways of reducing juvenile crime but, secondly, because it helps highlight the limits of criminal justice intervention as a means of achieving this goal. The second and third questions concern the amount of crime committed by juveniles who do get involved in crime and the degree to which juveniles persist in crime once they are involved. These questions are important because they reinforce the need to look beyond the criminal justice system for effective options in dealing with juvenile crime.

### **Survey methodology**

Full details of the survey methodology can be found in Baker (1998). In brief, the survey involved a self-completion questionnaire administered during 1996 to a randomly selected sample of 5,178 NSW public and private secondary school students from years 7 to 12. The questions on offending were derived from those employed in the US National Youth Survey. The questionnaire contained six offences — assault (on and off the sporting field), motor vehicle theft, break and enter, receiving or selling stolen goods, shoplifting goods worth \$20 or more and malicious damage. Student participants were asked whether they had ever committed each offence. If a student answered any question affirmatively they were then asked how many times they had committed that offence in their lifetime and how many times they had committed that offence in the last 12 months. Frequency was measured on a six-interval scale that ranged from “none” to “20 or more”.

Assurances of confidentiality were given but students were also reminded of the importance of giving honest answers, with reminders about confidentiality and honesty included in the questionnaires before sensitive questions. It is important to note, however, that no attempt was made to target adolescents who had left school before Year 12. Adolescents who leave school early are likely to have different characteristics from those of adolescents who stay at school, and in particular are more likely to be involved in crime. This is especially the case if they left school early because they disliked it or were expelled (Jarjoura 1993; Thornberry, Moore & Christenson 1985). Our findings are probably not generalisable to adolescents who leave school early, but it should be noted that the exclusion of these students probably means that we have underestimated, rather than overestimated, the prevalence of juvenile participation in crime.

## **Results**

### **Prevalence**

To provide some context, we begin by summarising the basic findings reported in Baker (1998). Table 1, below, shows the estimated prevalence of juvenile involvement in each of the six offences. Note that the population estimates were calculated by weighting the survey data to ensure the results were representative of the NSW secondary school population and subsequently extrapolating the weighted data to the population.

**Table 1: Crime participation rates of NSW secondary school students<sup>a</sup>**

	Ever committed (population estimates) <sup>b</sup>		Committed in 12 mths prior to the survey (population estimates) <sup>c</sup>	
	n	%	n	%
Assault during sport	138,500	31.4	110,300	25.0
Assault outside sport	173,400	39.3	128,000	29.0
Malicious damage	170,300	38.6	120,000	27.2
Receiving/selling stolen goods	100,600	22.8	67,500	15.3
Shoplifting (\$20 or more)	62,200	15.0	41,000	9.3
Break and enter	41,500	9.4	23,800	5.4
Motor vehicle theft	30,000	6.8	20,700	4.7
Any of the six offences <sup>d</sup>	270,900	61.4	210,500	47.7

<sup>a</sup> The total population of NSW secondary school students in 1996 was 441,234.

<sup>b</sup> Population estimates have been rounded to the nearest 100.

<sup>c</sup> Population estimates have been rounded to the nearest 100.

<sup>d</sup> Assault during sport is not included here.

The distinctive feature of Table 1 is the high estimated prevalence of juvenile involvement in crime. The pattern is typical (see Snyder & Sickmund 1999; Brener et al 1999, Graham & Bowling 1995, Moffitt & Silva 1988; Blumstein et al 1986) and highlights an obvious point: juvenile offending is far more prevalent than the official figures on juvenile offending suggest. As we show later in the discussion, this point appears frequently overlooked by those who believe that the criminal justice system offers a significant source of leverage over juvenile crime.

The media response to evidence that juvenile involvement in crime is ubiquitous is usually sensationalist (Cooke & Murphy 1998). This is because the media (and most elected officials) assume that, if a juvenile offends at all, they almost certainly offend a lot. Figures 1(a) to 1(f) show, for each of the six offences listed in Table 1, the lifetime frequency of offending amongst those who have ever committed that offence. Figure 1(g) shows the total number of offences committed in a lifetime (across all of the six offences) amongst those who have ever offended.

Figure 1a - number of offences committed in a lifetime by lifetime participants (assault)

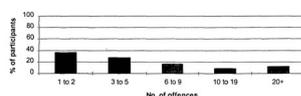


Figure 1b - number of offences committed in a lifetime by lifetime participants (malicious damage)

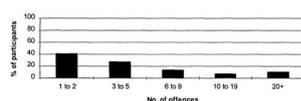
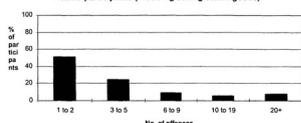
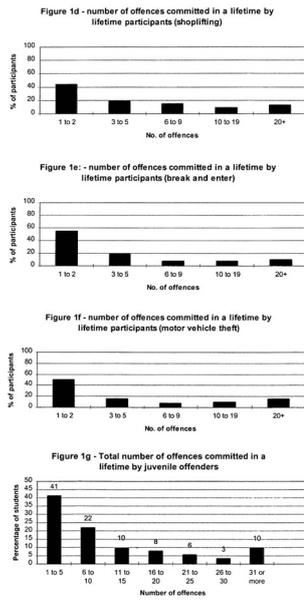


Figure 1c - number of offences committed in a lifetime by lifetime participants (receiving/selling stolen goods)





It is clear that, despite the high prevalence of juvenile involvement in crime, most juveniles offend infrequently. The modal lifetime frequency of offending (at the time of the survey) for every offence is in the range 1–2 offences, with a substantial proportion of offenders committing less than five offences in their lifetime within any particular category. Almost two-thirds of offenders report committing a lifetime total of 10 or fewer offences across all of the six offences.

**Desistance and persistence**

Now it might be objected that the data presented in Figures 1(a) to (f) only describe the progress of juvenile offending at the time of the survey. Juveniles may continue to offend throughout their school career and beyond. To the extent that they do, Figures 1(a) to (g) would presumably understate the total number of offences committed by active juvenile offenders. There is no direct means of testing this hypothesis with the present data but we can see what proportion of juveniles ever involved in crime were criminally active in the last year. If juveniles tend to persist in crime one would expect most of those ever involved in crime to have been active in the past year.

**Table 2 : Proportion of juvenile offenders who were criminally active/inactive in the last year**

Offence type	Proportion of lifetime offenders who have not offended in the last year (%)	Proportion of lifetime offenders who have offended in the last year (%)
Assault	25	75
Malicious damage	27	73
Receiving	28	72
Shoplifting	35	65
Break and enter	36	64
Motor vehicle theft	24	76

Table 2 indicates that between a quarter and a third of all juveniles who offend at some point in their lifetime were not criminally active in the year prior to the survey. It is, of course, equally true that the majority were criminally active in the year prior to

the survey. However, as can be seen from Table 3, below, the majority of currently active offenders in most offence categories only commenced offending in the year of the survey. Whether offenders commenced offending in the year of the survey or prior to it was determined by comparing lifetime and annual offending frequency.

**Table 3 : Active offenders and commencement of offending**

Offence type	Percentage of active offenders who started offending in year of survey (%)	Percentage of active offenders who started offending prior to the survey year (%)
Assault	42	58
Malicious damage	49	51
Receiving	60	40
Shoplifting	60	40
Break and enter	62	38
Motor vehicle theft	69	31

Table 4 provides one final piece of evidence highlighting the transient nature of juvenile offending. It shows that the proportion of juveniles who offend at some point in time but have not offended in the past year tends to increase with each year of school for all the offences except motor vehicle theft. This suggests that most juvenile criminal “careers” are coming to an end by the time a young person leaves school.

**Table 4: Proportion of juvenile offenders who were criminally inactive in the last year by year level**

Year level	Assault (%)	Malicious damage (%)	Receiving (%)	Shoplifting (%)	Break and enter (%)	Motor vehicle theft (%)
7	20	27	31	28	26	32
8	20	25	29	26	31	14
9	22	23	24	34	31	29
10	28	26	27	35	37	24
11	31	27	26	40	45	29
12	37	40	42	49	55	30

## Discussion

Our findings confirm for Australia what has so frequently been observed overseas but never fully appreciated by policy makers here; namely that the characteristic pattern of juvenile involvement in crime is one of high prevalence but low frequency and low persistence. Coumarelos and Weatherbum (1995) reached a similar conclusion some years ago in an analysis based on an analysis of juvenile court appearances. Studies based on official records of crime, however, are always vulnerable to the criticism that officially recorded offending gives a false or misleading picture of the magnitude of juvenile involvement in crime, both in terms of its prevalence and its frequency or persistence. The present findings show that such criticism is without foundation. To the extent to which we can judge the matter from the self-reports of secondary school students, juvenile “criminal careers” are mercifully short and unproductive. The same is not likely to be true of all juveniles who leave school prior to year 10 but, on the other hand, they make up a small minority of the school age population.

Of course our findings also run against the grain of popular (ie media) social constructions of juvenile crime, which usually depict it as the work of (a relatively small group of) dangerous, persistent and predatory criminals. While our findings certainly do not contradict the claim that a small group of juveniles commit a large amount of crime, they do illustrate the fact that a very large proportion of juvenile crime is the work of secondary school students who merely dip their "toe" into the "water" of crime. In other words much juvenile crime is committed by typical everyday students who desist from crime of their own accord without the need for any significant intervention (whether this be in the form of juvenile justice diversion programs or punitive sanctions such as a custodial sentence).

Somewhat paradoxically, the sheer scale of transient juvenile involvement in crime is another reason for not relying too heavily on juvenile justice diversion programs to control juvenile crime. In 1995/6, for example, (the period closest to the year of the survey) the number of distinct individuals appearing in the NSW Children's Court for break and enter, vehicle theft and property damage were, respectively, 1,587, 970 and 826. Taken together with the data on the prevalence of juvenile offending presented in Table 1, these figures indicate that, at best, only about 7 per cent of juvenile burglars, 5 per cent of juvenile car thieves and 1 per cent of juveniles committing malicious damage to property during 1995/6 ended up in court. It is obvious that juvenile justice diversion programs are only ever likely to reach a tiny minority of those who actually offend. Such programs would therefore seem only likely to prove cost-effective when restricted to persistent offenders or those whose antecedents suggest they are at serious risk of becoming persistent offenders (eg juveniles who commit a serious offence at a very young age).

What, then, of transient juvenile offenders? We are not suggesting that this group of offenders be ignored altogether. The harm done by individual juvenile offenders may generally be small, but it is plain from the prevalence data in Table 1 that, collectively, juvenile offenders make a sizeable contribution to the overall cost of crime. The solution to this problem, however, is not to expand the reach of juvenile justice diversion programs so as to touch the lives of all or most of those at risk of involvement in crime. Indeed, based on our data such programs would need to be directed at over half of the school-aged population. The solution lies in recognition of the fact that transient or adolescent-limited offending is predominantly imitative and opportunistic (Silva & Stanton 1996). This suggests that rather than attempting to control transient offending through juvenile justice diversion strategies, we would be better off attempting to control the incentives, opportunities and triggers for juvenile involvement in crime.

Control of these opportunities, incentives and triggers can be very effective in preventing crime. To name just a few examples in the domain of situational crime prevention, improvements in anti-theft devices have proved extremely successful in reducing the rate at which vehicles are stolen (Laycock & Tilley 1995). Changes in marketing strategies have proved effective in combating store theft (Shapland 1995). Property marking, conducted properly, can reduce burglary (Clarke 1995). Rapid repair of public facilities can reduce vandalism (Clarke 1995). Responsible alcohol serving practices can reduce violence (Hauritz et al 1998). Consistent enforcement of school rules can prevent school violence (Gottfredson 1997). Weapon confiscation can prevent lethal youth violence (Sherman et al 1995).

While the evidence for their efficacy is not as strong, programs designed to strengthen neighbourhood informal social controls and/or expand the range of employment opportunities for young people in disadvantaged neighbourhoods are also deserving of greater attention than they currently receive. Informal social controls are controls exercised by members of the community (eg citizen intervention to discourage disturbances in public space or delinquent acts by teenage peer groups) as opposed to those enforced by agencies of the State. Sampson, Raudenbush and Earls (1997) have highlighted the damaging effects which a breakdown in informal social controls can have on levels of neighbourhood violence. Sampson and Wilson (1995) make a convincing case on the strength of this evidence that measures designed to strengthen local neighbourhood institutions, reduce geographic mobility and increase the level of social cohesion in neighbourhoods (eg through provision of adequate public housing, the maintenance of municipal services and the strengthening of local clubs and other community organisations) are potentially very important in fostering the involvement of citizens in managing nascent threats to law and order.

Programs designed to reduce unemployment and improve employment earnings potential, particularly among the young, are another neglected area of crime prevention. This is partly because aggregate-level studies of the relationship between unemployment and crime have produced such inconsistent results (Chiricos 1987) and partly because the general fall in unemployment rates in Australia over the last few years has encouraged a degree of complacency about the issue. There is an emerging body of evidence from longitudinal studies of unemployment and crime, however, which suggests that unemployment does cause crime and that the relationship between the two is more subtle than traditionally assumed (see Polk & White 1999). Briefly summarised, this evidence suggests that effect of unemployment on criminal participation appears to be concentrated among those whose long-term labour market prospects are fairly bleak and/or who reside in disadvantaged neighbourhoods (Fagan & Freeman 1999).

This is an important observation. Its significance stems from the fact that, over the last two decades, Australia has experienced a progressive spatial concentration of unemployment in areas of acute disadvantage (Gregory & Hunter 1995). Despite the low general level of unemployment in Australia these are areas where unemployment remains stubbornly high. Youth unemployment also remains particularly high among those whose educational attainment is fairly limited (Chapman & Gray 2000). As we have already noted, these are precisely the conditions identified by criminological research as conducive to involvement in crime. Programs designed to improve the labour market prospects or earnings potential of young people in poor areas may be of significant assistance in combating the effects of boredom or inadequate income on crime.

These are prosaic forms of crime control, to be sure. Some will never be content with crime prevention measures which seek no restitution from or retribution against offenders or, worse yet, which seek to improve their lot in life. Others will never be content with measures which leave the offender's "deviant inner world" intact, seeking only to thwart its expression and then only in certain circumstances. Still, if we are serious about crime prevention we should not allow ourselves to be distracted by the promise of personal transformation so often made on behalf of diversion programs. If they can be shown to work with persistent and/or serious offenders such strategies have

their place. But involvement in crime should not be taken, ipso facto, as evidence of the need for State intervention in the lives of young offenders to rectify some enduring and dangerous personal maladjustment.

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# What makes juvenile offenders different from adult offenders

K Richards, Trends & issues in crime and criminal justice, No 409 February 2011

## [5-0120] Foreword

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Responding to juvenile offending is a unique policy and practice challenge. While a substantial proportion of crime is perpetuated by juveniles, most juveniles will “grow out” of offending and adopt law-abiding lifestyles as they mature. This paper outlines the factors (biological, psychological and social) that make juvenile offenders different from adult offenders and that necessitate unique responses to juvenile crime. It is argued that a range of factors, including juveniles' lack of maturity, propensity to take risks and susceptibility to peer influence, as well as intellectual disability, mental illness and victimisation, increase juveniles' risks of contact with the criminal justice system. These factors, combined with juveniles' unique capacity to be rehabilitated, can require intensive and often expensive interventions by the juvenile justice system. Although juvenile offenders are highly diverse, and this diversity should be considered in any response to juvenile crime, a number of key strategies exist in Australia to respond effectively to juvenile crime. These are described in this paper.

## [Introduction]

Historically, children in criminal justice proceedings were treated much the same as adults and subject to the same criminal justice processes as adults. Until the early twentieth century, children in Australia were even subjected to the same penalties as adults, including hard labour and corporal and capital punishment (Carrington & Pereira 2009).

Until the mid-nineteenth century, there was no separate category of “juvenile offender” in Western legal systems and children as young as six years of age were incarcerated in Australian prisons (Cunneen & White 2007). It is widely acknowledged today, however, both in Australia and internationally, that juveniles should be subject to a system of criminal justice that is separate from the adult system and that recognises their inexperience and immaturity. As such, juveniles are typically dealt with separately from adults and treated less harshly than their adult counterparts. The United Nations' (1985: 2) *Standard Minimum Rules for the Administration of Juvenile Justice* (the “Beijing Rules”) stress the importance of nations establishing:

a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed to meet the varying needs of juvenile offenders, while protecting their basic rights.

In each Australian jurisdiction, except Queensland, a juvenile is defined as a person aged between 10 and 17 years of age, inclusive. In Queensland, a juvenile is defined

as a person aged between 10 and 16 years, inclusive. In all jurisdictions, the minimum age of criminal responsibility is 10 years. That is, children under 10 years of age cannot be held legally responsible for their actions.

### **How juvenile offending differs from adult offending**

It is widely accepted that crime is committed disproportionately by young people. Persons aged 15 to 19 years are more likely to be processed by police for the commission of a crime than are members of any other population group.

In 2007–08, the offending rate for persons aged 15 to 19 years was four times the rate for offenders aged more than 19 years (6,387 and 1,818 per 100,000 respectively; AIC 2010). Offender rates have been consistently highest among persons aged 15 to 19 years and lowest among those aged 25 years and over.

### **The proportion of crime perpetrated by juveniles**

This does not mean, however, that juveniles are responsible for the majority of recorded crime. On the contrary, police data indicate that juveniles (10 to 17 year olds) comprise a minority of all offenders who come into contact with the police. This is primarily because offending “peaks” in late adolescence, when young people are aged 18 to 19 years and are no longer legally defined as juveniles.

The proportion of all alleged offending that is attributed to juveniles varies across jurisdictions and is impacted by the counting measures that police in each state and territory use. The most recent data available for each jurisdiction indicate that:

- juveniles comprised 21% of all offenders processed by Victoria Police during the 2008–09 financial year (Victoria Police 2009);
- Queensland police apprehended juveniles (10 to 17 year olds) in relation to 18% percent of all offences during the 2008–09 financial year (Queensland Police Service 2009);
- juveniles comprised 16% of all persons arrested in the Australian Capital Territory during the 2008–09 period (AFP 2009);
- 18% of all accused persons in South Australia during 2007–08 were juveniles (South Australia Police 2008);
- juveniles were apprehended in relation to 13% of offence counts in Western Australia during 2006 (Fernandez et al. 2009); and
- in the Northern Territory during 2008–09, 8% of persons apprehended by the police were juveniles (NTPF&ES 2009).

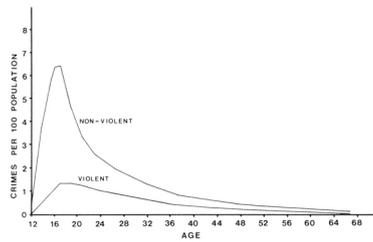
It should be acknowledged in relation to the above that the proportion of offenders comprised by juveniles varies according to offence type. This is discussed in more detail below.

### **Growing out of crime: the age-crime curve**

Most people “grow out” of offending; graphic representations of the age-crime curve, such as that at Figure 1, show that rates of offending usually peak in late adolescence and decline in early adulthood. Although the concept of the age-crime curve has been

the subject of much debate, critique and research since its emergence, the relationship between age and crime is nonetheless “one of the most generally accepted tenets of criminology” (Fagan & Western 2005: 59). This relationship has been found to hold independently of other variables (Farrington 1986).

#### Example of an age-crime curve<sup>1</sup>



#### Juvenile offending trajectories

Research consistently indicates, however, that there are a number of different offending patterns over the life course. That is, while most juveniles grow out of crime, they do so at different rates. Some individuals are more likely to desist than others; this appears to vary by gender, for example (Fagan & Western 2005). The processes motivating desistance have not been well explored and it appears that there may be multiple pathways in and out of crime (Fagan & Western 2005; Haigh 2009).

Perhaps most importantly, a small proportion of juveniles continue offending well into adulthood. A small “core” of juveniles have repeated contact with the criminal justice system and are responsible for a disproportionate amount of crime (Skardhamar 2009).

The study of Livingstone et al (2008) of a cohort of juveniles born in Queensland in 1983 or 1984 and with one or more finalised juvenile court appearances identified three primary juvenile offending trajectories:

- *early peaking–moderate offenders* showed an early onset of offending, with a peak around the age of 14 years, followed by a decline. This group comprised 21% of the cohort and was responsible for 23% of offences committed by the cohort;
- *late onset–moderate offenders*, who displayed little or no offending behaviour in their early teen years, but who had a gradual increase until the age of 16 years, comprised 68% of the cohort, but was responsible for only 44% of the cohort’s offending; and
- *chronic offenders*, who demonstrated an early onset of offending with a sharp increase throughout the timeframe under study, comprised just 11% of the cohort, but were responsible for 33% of the cohort’s offending (Livingstone et al 2008).

#### The proportion of juvenile who come into contact with the criminal justice system

Despite the strong relationship between age and offending behaviour, the majority of young people never come into formal contact with the criminal justice system. The longitudinal study by Allard et al (2010) found that of all persons born in Queensland

<sup>1</sup> Source: Farrington 1986.

in 1990, 14% had one or more formal contacts (caution, youth justice conference or court appearance) with the criminal justice system by the age of 17 years, although this varied substantially by Indigenous status and sex. Indigenous juveniles were 4.5 times more likely to have contact with the criminal justice system than non-Indigenous juveniles. Sixty-three per cent of Indigenous males and 28% of Indigenous females had had a contact with the criminal justice system as a juvenile, compared with 13% of non-Indigenous males and 7% of non-Indigenous females (Allard et al 2010).

### **The types of offences that are perpetrated by juveniles**

Certain types of offences (such as graffiti, vandalism, shoplifting and fare evasion) are committed disproportionately by young people. Conversely, very serious offences (such as homicide and sexual offences) are rarely perpetrated by juveniles. In addition, offences such as white collar crimes are committed infrequently by juveniles, as they are incompatible with juveniles' developmental characteristics and life circumstances.

On the whole, juveniles are more frequently apprehended by police in relation to offences against *property* than offences against the *person*. The proportion of juveniles who come into contact with the police for property crimes varies across jurisdictions, from almost one-third in New South Wales to almost two-thirds in Victoria (Richards 2009). Differences among jurisdictions can result from a variety of factors, including legislative definitions of offences, counting measures used to record offences and recording practices, as well as genuine differences in rates of offending. Although not available for all jurisdictions, the most recent data indicate that:

- in Victoria during 2008–09, 66% of juvenile alleged offenders, compared with 46% of adult alleged offenders, recorded by police were apprehended in relation to property crime (Victoria Police 2009);
- in Queensland during the same period, property offences comprised 58% of offences for which juveniles were apprehended by police, compared with 22% of offences for which adults were apprehended (Queensland Police Service 2009); and
- in South Australia during 2007–08, property crimes comprised 46% of all crimes for which juveniles were apprehended, compared with 24% for adults (South Australia Police 2008).

Offences for which juveniles were most frequently adjudicated by the Children's Courts in Australia during 2007–08 were acts intended to cause injury (16%), theft (14%), unlawful entry with intent (12%), road traffic offences (11%) and deception (fare evasion and related offences — also 11%; ABS 2009). Combined, these offences accounted for nearly two-thirds of defendants appearing before the Children's Courts during this period (ABS 2009).

By comparison, offences for which adults were most frequently adjudicated in the Higher Courts during 2007–08 were acts intended to cause injury (23%), illicit drugs offences (18%), sexual assault (15%), robbery/extortion (11%) and unlawful entry with intent (9%; ABS 2009). Offences for which adults were most frequently adjudicated in the Magistrates Courts during 2007–08 were road traffic offences (45%), public order offences (11%), dangerous or negligent acts endangering persons (9%), acts intended to cause injury (8%), offences against justice procedures (6%), theft (5%) and illicit drugs offences (also 5%; ABS 2009).

### **The nature of juvenile offending**

Juveniles are more likely than adults to come to the attention of police, for a variety of reasons. As Cunneen and White (2007) explain, by comparison with adults, juveniles tend to:

- be less experienced at committing offences;
- commit offences in groups;
- commit offences in public areas such as on public transport or in shopping centres; and
- commit offences close to where they live.

In addition, by comparison with adults, juveniles tend to commit offences that are:

- attention-seeking, public and gregarious; and
- episodic, unplanned and opportunistic (Cunneen & White 2007).

Some offences committed disproportionately by juveniles, such as motor vehicle theft, have high reporting rates due to insurance requirements (Cunneen & White 2007). This may result in young people coming to police attention more frequently. In addition, some behaviours (such as underage drinking) are illegal solely because of the minority status of the perpetrator. Research has demonstrated that some offence types committed disproportionately by juveniles (such as motor vehicle thefts and assaults) are the types of offences most likely to be repeated (Cottle, Lee & Heilbrun 2001).

It is also important to note that broad legislative or policy changes can disproportionately impact upon juveniles and increase their contact with the police. Farrell's (2009) analysis of police "move on" powers clearly demonstrates, for example, that the introduction of these powers has disproportionately affected particular groups of citizens, including juveniles.

### **Why juvenile offending differs from adult offending**

It is clear that the characteristics of juvenile offending are different from those of adult offending in a variety of ways. This section summarises research literature on why this is the case.

#### **Risk-taking and peer influence**

Research on adolescent brain development demonstrates that the second decade of life is a period of rapid change, particularly in the areas of the brain associated with response inhibition, the calibration of risks and rewards and the regulation of emotions (Steinberg 2005). Two key findings have emerged from this body of research that highlight differences between juvenile and adult offenders. First, these changes often occur before juveniles develop competence in decision making:

Changes in arousal and motivation brought on by pubertal maturation precede the development of regulatory competence in a manner that creates a disjunction between the adolescent's affective experience and his or her ability to regulate arousal and motivation (Steinberg 2005: 69–70).

This disjuncture, it has been argued, is akin to "starting an engine without yet having a skilled driver behind the wheel" (Steinberg 2005: 70; see also Romer & Hennessy 2007).

Second, in contrast with the widely held belief that adolescents feel “invincible”, recent research indicates that young people do understand, and indeed sometimes overestimate, risks to themselves (Reyna & Rivers 2008). Adolescents engage in riskier behaviour than adults (such as drug and alcohol use, unsafe sexual activity, dangerous driving and/or delinquent behaviour) despite understanding the risks involved (Boyer 2006; Steinberg 2005). It appears that adolescents not only consider risks cognitively (by weighing up the potential risks and rewards of a particular act), but socially and/or emotionally (Steinberg 2005). The influence of peers can, for example, heavily impact on young people’s risk-taking behaviour (Gatti, Tremblay & Vitaro 2009; Hay, Payne & Chadwick 2004; Steinberg 2005). Importantly, these factors also interact with one another:

Not only does sensation seeking encourage attraction to exciting experiences, it also leads adolescents to seek friends with similar interests. These peers further encourage risk taking behavior (Romer & Hennessy 2007: 98–99).

It has been recognised that young people are more at risk of a range of problems conducive to offending — including mental health problems, alcohol and other drug use and peer pressure — than adults, due to their immaturity and heavy reliance on peer networks. Alcohol and drugs have also been found to act in a more potent way on juveniles than adults (LeBeau & Mozayani cited in Prichard & Payne 2005) and substance use is a strong predictor of recidivism (Cottle, Lee & Heilbrun 2001). As Haigh (2009) explains, adolescence is a time of complex physiological, psychological and social change. Progression through puberty has been shown to be associated with statistically significant changes in behaviour in both males and females and may be linked to an increase in aggression and delinquency (Najman et al 2009).

### **Intellectual disability and mental illness**

Intellectual disabilities are more common among juveniles under the supervision of the criminal justice system than among adults under the supervision of the criminal justice system or among the general Australian population. Three per cent of the Australian public has an intellectual disability and 1% of adults incarcerated in New South Wales prisons was found to have an IQ below 70 in a recent study (Frize, Kenny & Lennings 2008). By comparison, 17% of juveniles in detention in Australia have an IQ below 70 (Frize, Kenny & Lennings 2008; see also HREOC 2005). Frize, Kenny and Lennings’ (2008) study of 800 young offenders on community-based orders in New South Wales found that the over-representation of intellectual disabilities was particularly high among Indigenous juveniles and that juveniles with an intellectual disability are at a significantly higher risk of recidivism than other juveniles.

Mental illness is also over-represented among juveniles in detention compared with those in the community. The *Young People In Custody Health Survey*, conducted in New South Wales in 2005, found that 88% of young people in custody reported symptoms consistent with a mild, moderate or severe psychiatric disorder (HREOC 2005).

### **Young people as crime victims**

Young people are not only disproportionately the *perpetrators* of crime; they are also disproportionately the *victims* of crime (see Finkelhor et al 2009; Richards 2009). Young people aged 15 to 24 years are at a higher risk of assault than any other age group in Australia and males aged 15 to 19 years are more than twice as likely to

become a victim of robbery as males aged 25 or older, and all females (AIC 2010). Statistics also show that juveniles comprise substantial proportions of victims of sexual offences. In 2007, the highest rate of recorded sexual assault in Australia was for 10 to 14 year old females, at 544 per 100,000 population (AIC 2008). For males, rates were also highest among juveniles, with 95 per 100,000 population 10 to 14 year olds reporting a sexual assault (AIC 2008).

In addition, it is important to recognise that juveniles are frequently the victims of offences committed by other juveniles. Between 1989–90 and 2007–08, almost one-third of homicide victims aged 15 to 17 years, for example, were killed by another juvenile (Richards, Dearden & Tomison forthcoming). As Daly's (2008) research demonstrates, the boundary between juvenile *offenders* and juvenile *victims* can easily become blurred. Cohorts of juvenile victims and juvenile offenders are unlikely to be entirely discrete and research consistently shows that these phenomena are interlinked.

The high rate of victimisation of juveniles is critical to consider, as it is widely acknowledged that victimisation is a pathway into offending behaviour for some young people.

### **The challenge of responding to juvenile crime**

Preventing juveniles from having repeated contacts with the criminal justice system and intervening to support juveniles desist from crime are therefore critical policy issues. Assisting juveniles to grow out of crime — that is, to minimise juvenile recidivism and to help juveniles become “desisters” (Murray 2009) — are key policy areas for building safer communities.

Although juvenile crime is typically less serious and less costly in economic terms than adult offending (Cunneen & White 2007), juvenile offenders often require more intensive and more costly interventions than adult offenders, for a range of reasons.

### **Juvenile offenders have complex needs**

Juvenile offenders often have more complex needs than adult offenders, as described above. Although many of these problems (substance abuse, mental illness and/or cognitive disability) also characterise adult criminal justice populations, they can cause greater problems among young people, who are more susceptible — physically, emotionally and socially — to them. Many of these problems are compounded by juveniles' psychosocial immaturity.

### **Juvenile offenders require a higher duty of care**

Juvenile offenders require a higher duty of care than adult offenders. For example, due to their status as legal minors, the state provides in loco parentis supervision of juveniles in detention. Incarcerated juveniles of school age are required to participate in schooling and staff-to-offender ratios are much higher in juvenile than adult custodial facilities, to enable more intensive supervision and care of juveniles. For these reasons, juvenile justice supervision can be highly resource-intensive (New Economics Foundation 2010).

### **Juveniles may grow out of crime**

As outlined above, many juveniles grow out of crime and adopt law-abiding lifestyles as young adults. Many juveniles who have contact with the criminal justice system are

therefore not “lost causes” who will continue offending over their lifetime. As juveniles are neither fully developed nor entrenched within the criminal justice system, juvenile justice interventions can impact upon them and help to foster juveniles’ desistance from crime. Conversely, the potential exists for a great deal of harm to be done to juveniles if ineffective or unsuitable interventions are applied by juvenile justice authorities.

### **Juvenile justice interventions**

A range of principles therefore underpin juvenile justice in Australia. These are designed to respond to juvenile offending in an appropriate and effective way.

#### **The doctrine of doli incapax**

The rate at which children mature varies considerably among individuals. Due to their varied developmental trajectories, children learn the difference between right and wrong — and between behaviours that are seriously wrong and those that are merely naughty or mischievous — at different ages. The legal doctrine doli incapax recognises the varying ages at which children mature. In Australia, juveniles aged 10 to 13 years inclusive are considered to be doli incapax. Doli incapax is a rebuttable legal presumption that a child is “incapable of crime” under legislation or common law. In court, the prosecution is responsible for rebutting the presumption of doli incapax and proving that the accused juvenile was able at the relevant time to adequately distinguish between right and wrong. A contested trial can only result in conviction if the prosecution successfully rebuts this presumption.

The principle of doli incapax has existed since at least the fourteenth century (Crofts 2003) and is supported by the United Nations’ (1989: 12) *Convention on the Rights of the Child*, which requires signatory states to establish “a minimum age below which children shall be presumed not to have the capacity to infringe the penal law”. There has, nonetheless, been a great deal of debate about its continued relevance (Crofts 2003; Urbas 2000) and the principle was abolished in 1998 in the United Kingdom.

#### **Welfare and justice approaches to juvenile justice**

Western juvenile justice systems are often characterised as alternating between welfare and justice models. The welfare model considers the needs of the young offender and aims to rehabilitate the juvenile. Offending behaviour is thought to stem primarily from factors outside the juvenile’s control, such as family characteristics. The justice model conceptualises offending as the result of a juvenile’s free will, or choice. Offenders are seen as responsible for their actions and deserving of punishment.

In reality, the welfare and justice models are ideal types and juvenile justice systems rarely reflect purely welfare or justice models. Instead, individual elements of the juvenile justice system in Australia reflect each of these paradigms. Even specific policies such as restorative justice conferencing (see Richards forthcoming for an overview) can be underpinned by both welfare and justice principles. As noted above, juvenile justice systems are, on the whole, more welfare-oriented than adult criminal justice systems.

#### **Reducing stigmatisation**

A range of measures aim to protect the privacy and limit the stigmatisation of juveniles. Prohibitions on the naming of juvenile offenders in criminal proceedings, for example,

exist in all Australian jurisdictions (Chappell & Lincoln 2009). In each jurisdiction, except the Northern Territory, juveniles' identities must not be made public, although exceptions are sometimes allowed. In the Northern Territory, the reverse is the case — juvenile offenders can be named, unless an application is made to suppress identifying information (Chappell & Lincoln 2009).

In some instances, juveniles' convictions may not be recorded. This strategy aims to avoid stigmatising juveniles and assist juveniles to “grow out” of crime rather than become entrenched in the criminal justice system. In most jurisdictions, for example, juveniles who participate in a restorative justice conference and complete the requisite actions resulting from the conference (such as apologising to the victim and/or paying restitution), do not have a conviction recorded, even though they have admitted guilt. Similarly, in some jurisdictions, a juvenile can be found guilty of an offence without being convicted. In the Australian Capital Territory during the three month period from January to March 2008, 25% of juveniles who appeared before the ACT Children's Court pleaded guilty but did not have a conviction recorded. A further 18% pleaded not guilty and did not have a conviction recorded (although no juvenile who pleaded not guilty during this period was acquitted; ACT DJCS 2008). The proportion of juveniles' convictions that were not recorded varied by offence type, from zero percent for homicide and sexual assault offences to 100% for public order offences. Although these calculations are based on very small numbers and must be interpreted cautiously, they demonstrate the principle of avoiding the stigmatisation of juveniles. It is unknown to what extent this occurs in jurisdictions other than the Australian Capital Territory (Richards 2009).

It is important to consider in this context the extent to which juveniles' psychosocial immaturity affects their pleading decisions in court. One study found that juveniles aged 15 years and younger are significantly more likely than older adolescents and adults to have compromised ability to act as competent defendants in court (Grisso et al 2003). One-third of 11 to 13 year olds and one-fifth of 14 to 15 year olds were found to be “as impaired in capacities relevant to adjudicative competence as are seriously mentally ill adults who would likely be considered incompetent to stand trial” (Grisso et al 2003: 356). This pattern of age differences was found to apply even when gender, ethnicity and socioeconomic status were controlled for and was evident among both juveniles who had had contact with the criminal justice system and those in the general community. This demonstrates that immaturity is a significant factor in shaping juveniles' competence in court, irrespective of other influences.

Related to the above discussion is the theory of labelling. Labelling theory, which emerged in the 1960s, posits that young people who are labelled “criminal” by the criminal justice system are likely to live up to this label and become committed career criminals, rather than growing out of crime, as would normally occur. The stigmatisation engendered by the criminal justice system therefore produces a self-fulfilling prophecy — young people labelled criminals assume the identity of a criminal.

Labelling and stigmatisation are widely considered to play a role in the formation of young people's offending trajectories — whether young people persist with, or desist from, crime. Avoiding labelling and stigmatisation is therefore a key principle of juvenile justice intervention in Australia.

### Addressing juveniles' criminogenic needs

Underpinned by the welfare philosophy, many juvenile justice measures in Australia and other Western countries are designed to address juveniles' criminogenic needs. Outcomes of juveniles' contacts with the police, youth justice conferencing and/or the children's courts often aim to address needs related to juveniles' drug use, mental health problems and/or educational, employment or family problems. Youth policing programs, for example, often focus on increasing juvenile offenders' engagement with education, family or leisure pursuits. Specialty courts, such as youth drug and alcohol courts (see Payne 2005 for an overview), are informed by therapeutic jurisprudence and seek to address specific needs of juvenile offenders, rather than punish juveniles for their crimes.

Although many of the measures described in this paper — including specialty courts, restorative justice conferencing and diversion — are also available for adult offenders in Australia, this is the case to a far more limited extent. Many of these approaches are differentially applied to juveniles, whose youth, inexperience and propensity to desist from crime make these strategies especially appropriate for young people. This is also demonstrated by the range of measures that have recently emerged specifically for young adult offenders, such as Victoria's dual-track system (under which 18 to 20 year old offenders can be detained in a juvenile rather than an adult correctional facility) and restorative justice measures that specifically target young adult offenders (People & Trimboli 2007). These measures further demonstrate the criminal justice system's focus on helping young people desist from crime without being "contaminated" by older, life-course persistent criminals and the importance of providing constructive interventions that will assist young people to grow out of crime and adopt law-abiding lifestyles.

### Diversion of juveniles

Each of Australia's jurisdictions has legislation that emphasises the diversion of juveniles from the criminal justice system (see Table 1). Although there are variations among the jurisdictions, juveniles are often afforded the benefit of warnings, police cautions and youth justice conferences rather than being sent directly to court. As Richards (2009) shows, this is the case for about half of all juveniles formally dealt with by the police, although this proportion varies according to a number of factors, including offence type and juveniles' age, gender and Indigenous status. Even those juveniles adjudicated in the Children's Court are overwhelmingly sentenced to non-custodial penalties, such as fines, work orders and community supervision (ABS 2009).

**Table 1 Main juvenile justice legislation in Australia, by jurisdiction**

NSW	<i>Young Offenders Act (1997)</i>
Vic	<i>Children, Youth and Families Act (2005)</i>
Qld	<i>Youth Justice Act (1992)</i>
WA	<i>Young Offenders Act (1994)</i>
SA	<i>Young Offenders Act (1993)</i>
NT	<i>Youth Justice Act 2005</i>
ACT	<i>Children and Young People Act (2008)</i>
Tas	<i>Youth Justice Act (1997)</i>

In all jurisdictions' juvenile justice legislation, detention is considered a last resort for juveniles. This reflects the United Nations' (1989) *Convention on the Rights of the Child*.

### **Avoiding peer contagion**

It is widely recognised that some criminal justice responses to offending, such as incarceration, are criminogenic; that is, they foster further criminality. It is accepted, for example, that prisons are "universities of crime" that enable offenders to learn more and better offending strategies and skills, and to create and maintain criminal networks. This may be particularly the case for juveniles, who, due to their immaturity, are especially susceptible to being influenced by their peers. As Gatti, Tremblay and Vitaro (2009: 991) argue, peer influence plays a fundamental role in orienting juveniles' behaviour and "deviant behavior is no exception". Separate juvenile and adult criminal justice systems were established, in part, because of the need to prevent juveniles being influenced by adult offenders (Gatti, Tremblay & Vitaro 2009).

Gatti, Tremblay and Vitaro's (2009) longitudinal study of 1,037 boys born in Canada who attended kindergarten in Montreal, Canada in 1984, found that intervention by the juvenile justice system greatly increased the likelihood of adult criminality among this cohort. Even when the effect of other relevant variables had been controlled for, Gatti, Tremblay and Vitaro (2009) found that contact with the juvenile justice system increased the cohort's odds of adult judicial intervention by a factor of seven. An increase in the intensity of interventions was also found to increase negative impacts later in life. The more restrictive and intensive an intervention, the greater its negative impact, with juvenile detention being found to exert the strongest criminogenic effect. Gatti, Tremblay and Vitaro (2009) therefore recommend early prevention strategies, the reduction of judicial stigma and the limitation of interventions that concentrate juvenile offenders together.

### **Conclusion**

Juvenile offenders differ from adult offenders in a variety of ways, and as this paper has described, juveniles' offending profiles differ from adults' offending profiles. In comparison with adults, juveniles tend to be over-represented as the perpetrators of certain crimes (eg graffiti and fare evasion) and under-represented as the perpetrators of others (eg fraud, road traffic offences and crimes of serious violence).

In addition, by comparison with adults, juveniles are at increased risk of victimisation (by adults and other juveniles), stigmatisation by the criminal justice system and peer contagion. Due to their immaturity, juveniles are also at increased risk of a range of psychosocial problems (such as mental health and alcohol and other drug problems) that can lead to and/or compound offending behaviour.

Some of the key characteristics of Australia's juvenile justice systems (including a focus on welfare-oriented measures, the use of detention as a last resort, naming prohibitions and measures to address juveniles' criminogenic needs) have been developed in recognition of these important differences between adult and juvenile offenders.

It should be noted, however, that while juvenile offenders differ from adults in relation to a range of factors, juvenile offenders are a heterogeneous population

themselves. Sex, age and Indigenous status, for example, play a part in shaping juveniles' offending behaviour and criminogenic needs and these characteristics should be considered when responding to juvenile crime.

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# The specific deterrent effect of custodial penalties on juvenile reoffending

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## [5-0130] Executive summary

Only 10.3% of the 6,488 juveniles who appeared in the NSW Children's Court in 2007 were given a control order, yet 48% of the budget of the NSW Department of Juvenile Justice is spent keeping juvenile offenders in custody. To date, however, only two Australian studies have examined the effect of custodial sentences on juvenile reoffending.

Kraus (1974) matched each of 350 juveniles given a non-custodial sanction against a comparable offender given a custodial sanction. Juveniles were matched on year of birth, category of offence, age at time of first offence, number of previous (proven) offences, type of previous proven offence and number of previous custodial sanctions. He found lower rates of reoffending among vehicle thieves who received a custodial penalty, but higher rates of offending for those receiving custodial penalties in each other category of offence.

Cain (1996) examined reconviction rates among a sample of 52,935 juveniles convicted in the NSW Children's Court between 1986 and 1994. He found that juveniles given custodial sentences were more likely to reoffend than juveniles given non-custodial sentences, but the study included no controls for prior criminal record or Indigenous status.

The Kraus (1974) and Cain (1996) studies both have limitations. Kraus (1974) was not able to control for a wide range of other factors potentially relevant to penalty choice and risk of reoffending (eg school performance, level of parental supervision, race, socioeconomic status). His methods of analysis were also relatively unsophisticated by modern standards. Cain (1996) used more sophisticated analytical methods and a much larger sample than Kraus (1974) but was similarly restricted in the range of controls he was able to use.

This study seeks to build on the work carried out by Kraus (1974) and Cain (1996) by using more sophisticated methods of analysis than Kraus (1974) and a much wider range of controls than Cain (1996). The question addressed in the study is whether, other things being equal, juveniles who receive a custodial penalty are less likely to reoffend than juveniles who receive a non-custodial custodial penalty.

The data for the current study were obtained from a longitudinal cohort study of juvenile offenders. Two groups of offenders (152 given a detention sentence, 243 given a non-custodial sentence) were interviewed at length about their family life, school performance, association with delinquent peers and substance abuse. They were then followed up to determine what proportion in each group was reconvicted of a further offence. Cox regression was used to model time to reconviction.

The study found no significant difference between juveniles given a custodial penalty and those given a non-custodial penalty in the likelihood of reconviction.

## **Introduction**

On an average day in 2006–07, 941 young people were held in detention across Australia (AIHW 2008: 51). The costs associated with juvenile detention are very high. For example, although only 10.3% of the 6,488 juveniles who appeared in the NSW Children’s Court in 2007 were given a control order, 48% of the budget of the NSW Department of Juvenile Justice is spent keeping juvenile offenders in custody (NSW Department of Juvenile Justice, personal communication 2009).

Given the high cost of juvenile detention, one would expect to find a large body of Australian research examining its potential benefits. To date, however, little research has been conducted on the effect of custodial sentences on juvenile recidivism. It is known that more than two-thirds of the young people who receive a control order from the NSW Children’s Court are convicted of a further offence within two years of their custodial order. It is not known what their reconviction rate would have been had they not received a custodial penalty. This study addresses this issue.

## **Deterrence theory**

Conventional economic theories of crime (eg Becker 1968) contend that offenders allocate their time to legitimate and illegitimate activities according to the expected returns (ie costs and benefits) from each. A number of sociologists, however, have argued that imprisonment actually increases the risk of reoffending. There are three main variants of this argument. The first contends that prison is criminogenic because it is an environment which reinforces deviant values and which is conducive to the acquisition of new criminal skills (Clemmer 1940; Sykes 1958). The second variant contends that prison is criminogenic because it stigmatises offenders (Becker 1963; Braithwaite 1988; Lemert 1951). The third contends that prison increases the risk of reoffending because it reduces the offender’s capacity (on release) to obtain income by legitimate means (Fagan & Freeman 1999).

## **The evidence on specific deterrence**

There have been four major reviews of the evidence on deterrence over the last 10 years (Doob & Webster 2003; Nagin, Cullen & Jonson forthcoming; Villettaz, Killias & Zoder 2006) but only the Villettaz, Killias and Zoder (2006) and Nagin, Cullen and Jonson (forthcoming) reviews focus on specific deterrence.

Nagin, Cullen and Jonson (forthcoming) observed that most studies on the specific deterrent effects of custodial sanctions find these sanctions have a criminogenic effect. Nonetheless, given the many shortcomings among studies they reviewed, they concluded that “[t]he jury is still out on ... [custody’s] effect on re-offending” (Nagin, Cullen & Jonson forthcoming: np). Villettaz, Killias and Zoder (2006) reviewed 27 studies published between 1961 and 2002 that on the Sherman et al (1997) scale would be considered to be very reliable (ie level 4 and above). Only two obtained evidence favourable to the specific deterrent effect of imprisonment. Ten of the remainder found no effect of imprisonment, four found mixed effects of imprisonment (some statistically non-significant, some favourable to the criminogenic hypothesis) and 11

found evidence uniformly supportive of the criminogenic effect of imprisonment. Five of the studies that found either no effect or a criminogenic effect were randomised controlled trials.

Only two Australian studies have looked at the specific deterrent effect of custodial penalties on juvenile reoffending. Kraus (1974) matched each of 350 juveniles given a non-custodial sanction against a comparable offender given a custodial sanction. Juveniles were matched on year of birth, category of offence, age at time of first offence, number of previous (proven) offences, type of previous proven offence and number of previous custodial sanctions. He found lower rates of reoffending among vehicle thieves who received a custodial penalty but higher rates of offending for those receiving custodial penalties in each other category of offence. Cain (1996) examined reconviction rates among a sample of 52,935 juveniles convicted in the NSW Children's Court between 1986 and 1994. He found that juveniles given custodial sentences were more likely to reoffend than juveniles given non-custodial sentences, but the study included no controls for prior criminal record or Indigenous status.

### **The present study**

The Kraus (1974) and Cain (1996) studies both have limitations. Kraus (1974) made a commendable effort to match juveniles receiving custodial and non-custodial sanctions, but was not able to control for a wide range of other factors potentially relevant to penalty choice and risk of reoffending (eg school performance, level of parental supervision, race, socioeconomic status). His methods of analysis were also relatively unsophisticated by modern standards. Cain (1996) used more sophisticated analytical methods and a much larger sample than Kraus (1974) but was similarly restricted in the range of controls he was able to use.

This study seeks to build on the work carried out by Kraus (1974) and Cain (1996) by using more sophisticated methods of analysis than Kraus (1974) and a much wider range of controls than Cain (1996). The question we seek to address is whether, other things being equal, juveniles who receive a custodial penalty are less likely to reoffend than juveniles who receive a non-custodial custodial penalty. The data for the current study were obtained from a longitudinal cohort study of juvenile offenders. A sample of juvenile offenders who received custodial and non-custodial sanctions were surveyed and then followed up to determine whether, after controlling for other factors likely to influence recidivism, juvenile offenders who received control (custody) orders reoffended more quickly than juvenile offenders who received non-custodial sentences.

### **Survey procedure**

The survey took the form of an interview using a written questionnaire comprising 95 closed-ended questions. The questionnaire was designed largely to test certain theories about the relationship between recidivism and juvenile reactions to the court process (McGrath 2009). As such, many of the questions included in the questionnaire are not of interest here. Some of the questions included in the questionnaire, however, are of interest because of their potential relevance as controls. The variables used in the present study are discussed in more detail below.

The interviews took place between 1 December 2004 and 30 June 2007 at children's courts and juvenile justice centres in New South Wales. Most interviews took 15 to

20 minutes to complete. Very few interview participants declined to answer questions, despite being given the option to do so. The end of the follow-up period for the study was 1 January 2008; six months after the last study participant was interviewed.

### Response rate and subject attrition

The names and dates of birth of study participants were matched with the NSW Bureau of Crime Statistics and Research reoffending database (ROD) to determine prior criminal history for each study participant and instances of post-index offence reoffending, if any. In ROD, prior criminal history in the form of prior children's court sentences was obtained from the NSW Department of Juvenile Justice Children's Court Information System until January 2006. For further information about ROD, see Hua and Fitzgerald (2006).

Two interviewers carried out the non-custodial interviews. The response rate for one interviewer was 71%. The response rate for the second interviewer was 70%. One interviewer carried out the custodial interviews. The response rate for the custodial group was 93%. Data attrition from various sources (eg duplicate interviews, record linkage problems) resulted in the exclusion of a number of cases. The final sample comprised 395 people—152 on custodial orders at the time of the interview and 243 people on non-custodial orders at the time of the interview.

### Variables

The measure of reoffending used in the present study is free time to reoffend, defined as the time between the date of the index court appearance and the date of the next proven offence (ie the next offence proved at a court appearance after the index court appearance). The term 'free' is used in this context because in measuring the time to reconviction, any time spent in custody between the end of the index sentence and the first proven offence or end of the follow-up period has been subtracted. Information on the dependent variable was obtained from ROD.

In order to isolate the effect of penalty type on juvenile recidivism, factors associated with the choice of penalty that might also influence risk of reconviction need to be controlled for. There is, unfortunately, no consensus on what these factors are. The selection of controls in this study was guided partly by the meta-analysis conducted by Cottle, Leigh and Heilbrun (2001) and partly by exploratory analysis of the dataset used in this study. The list of factors examined in this study for potential inclusion in the multivariate analysis appears below in Table 1. The appendix shows each variable, along with the method of construction of each factor (where relevant) and the p-value from the bivariate log-rank tests conducted for time to reoffend.

**Table 1 Factors examined for potential inclusion in the multivariate analysis**

Gender	Parental status (sole parent vs other)
Race	Parenting style
Socioeconomic status	Level of parental supervision
Age	Association with delinquent peers
Age first contact with the law	School attendance
Prior criminal record	Substance abuse
Number of prior commitments to custody	Geographic mobility
Principal offence	Perceived certainty of arrest

Number of concurrent offences	Perceived stigmatisation
Whether a victim of abuse	Whether received a custodial sentence

### Analysis

The analysis proceeded in two stages. In the first stage, bivariate (log-rank) tests were conducted to see which of the variables listed in Table 1 had an association with time to reconviction at  $p < 0.25$ . The variables found to have a significant relationship with time to reconviction were then ranked in order of p-value from smallest to largest. In the second stage, a series of Cox regression models was constructed. In the first, time to reconviction was regressed against penalty type without controlling for any other factors (unadjusted relationship). In the second, control variables were added to the model one by one, commencing with the variable with the smallest p-value from stage one. The process continued until a control variable was reached that added nothing to the explanatory power of the model (ie its coefficient was not found to be statistically significant at  $p < 0.05$ ). That variable was then removed and the final model consisted of the custody variable and those variables found to make a significant independent contribution to time to reconviction.

### Results

Fifty-two percent of the sample had a proven offence subsequent to their index sentence during the follow-up period. The mean time to reconviction (for those who were reconvicted) was 163 days (median=110 days), with a standard deviation of 178 days. Tables 2 and 3 contain descriptive statistics for variables found to have a statistically significant relationship with time to reconviction at  $p < 0.25$ .

Table 4 shows the results of the Cox regression analysis. Two models are shown. Model A gives the unadjusted effect of penalty type on time to reconviction. Model B gives the adjusted effect of penalty type on time to reconviction, after controlling for number of prior court appearances. Surprisingly, this was the only factor among those listed in Table 1 that remained significant when included in the multivariate analysis with a variable measuring type of penalty imposed.

**Table 2 Descriptive statistics for bivariate predictors of time to reconviction (continuous variables)**

Variables	n	Mean	Standard deviation
Illicit drug use in the 12 months prior to the interview	393	8.5	5.3
How long (years) have you been in that situation (ie living with the same people respondent is living with now)?	214 <sup>a</sup>	16.3	1.8

<sup>a</sup> This item is restricted to people who have no other address

**Table 3 Descriptive statistics for bivariate predictors of time to reconviction (discrete variables)**

Discrete variables	n	%
<b>Whether on custodial or non-custodial order at time of interview</b>		
Custodial	152	38.5

<b>Discrete variables</b>	<b>n</b>	<b>%</b>
Non-custodial	243	61.5
<b>Age at first conviction</b>		
10–13 yrs	79	20.0
14–15 yrs	170	43.0
16 yrs and over	146	37.0
<b>Age group (at index court appearance)</b>		
13–16 yrs	209	51.9
17 yrs	117	29.6
18 + yrs	73	18.5
<b>Number of prior court appearances</b>		
0	126	31.9
1 or more	269	68.10
<b>Number of prior proven offences</b>		
0	164	41.5
1 or more	231	58.5
<b>Number of prior supervised orders</b>		
0	235	59.5
1 or more	160	40.5
<b>Number of prior custodial episodes</b>		
0	335	84.8
1 or more	60	15.2
<b>Number of concurrent offences</b>		
1	138	35.0
2 or more	257	65.0
<b>Offence type (using ASOC descriptions)</b>		
Violent	171	43.3
Property	136	34.4
Other	88	22.3
<b>Sex</b>		
Female	69	17.5
Male	326	82.5
<b>ATSI status</b>		
ATSI	95	24.1
Non-ATSI	299	75.9
Missing value	1	–
<b>Whether living with single parent</b>		
Yes	164	59.2
No	113	40.8
Missing values	118	–
<b>Do parents know where young person is when young person is away from home?</b>		
Never	96	24.9
Sometimes/often/always	290	75.1
Missing values	9	–
<b>What would parent do if caught young person taking cannabis?</b>		
Nothing	88	22.7

<b>Discrete variables</b>	<b>n</b>	<b>%</b>
Discuss/scold/punish	299	77.3
Missing values	8	–
<b>Do parents chop and change the rules?</b>		
Never	255	66.2
Sometimes/often/always	130	33.8
Missing values	10	–
<b>Do parents know what the young person thinks and feels?</b>		
Never	110	28.6
Sometimes/often/always	275	71.4
Missing values	10	–
<b>How often does young person hang out with friends who have been in trouble with the police?</b>		
Never	66	16.8
Sometimes/often/always	328	83.2
Missing values	1	–
<b>How many of young person's friends have shoplifted or stolen?</b>		
None	95	24.1
One or more	299	75.9
Missing	1	–
<b>How many of young person's friends have used illegal drugs?</b>		
None	103	26.2
One or more	290	73.8
Missing	2	–
<b>How many of young person's friends have been in trouble with the police?</b>		
None	31	7.9
One or more	363	92.1
Missing	1	–
<b>How often have you been/were you suspended at school?</b>		
Never	63	16.0
Sometimes/often/always	330	84.0
Missing values	2	–
<b>How often have you wagged/did you wag at school?</b>		
Never	87	22.1
Sometimes/often/always	306	77.9
Missing value	2	–
<b>Alcohol consumption at last sitting</b>		
2–5 drinks over the maximum standard recommended amount per day	108	45.8
6 or more drinks over the maximum standard recommended amount per day	128	54.2
Missing values	159	–
<b>Frequency of alcohol consumption over the maximum standard amount per day in the 12 months prior to the interview</b>		
At least 1 day/week	157	39.9
2–3 days/month or less	237	60.1

Discrete variables	n	%
Missing values	1	–
<b>Young person's perception of their likelihood of being caught by the police if they commit crime in the future</b>		
Very unlikely/unlikely	165	41.8
Very likely/likely	230	58.2

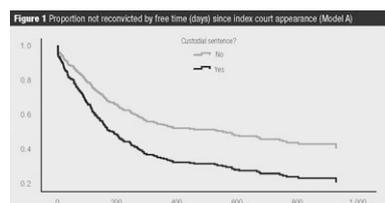
**Table 4 Effect of custody on time to reconviction (unadjusted and adjusted estimates)**

Model	Variables	$\beta$	SE	p-value	HR	95% HR CI	
A (unadjusted)	Custody vs non-custody	0.55	0.15	<0.01	1.74	1.29	2.33
B (adjusted)	One or more prior court appearance vs none	0.61	0.16	<0.01	1.85	1.35	2.52
	Custody vs non-custody	0.29	0.16	0.08	1.33	0.97	1.84

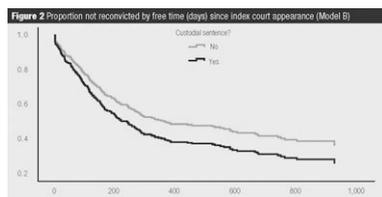
Note: The column labeled  $\beta$  shows the regression coefficient associated with each variable in each model. The column labeled "SE" shows the standard error associated with the regression coefficient. The column labeled "p-value" shows the probability of obtaining the observed value of  $\beta$  by chance. p-values less than .05 indicate that the variable in question is exerting a significant effect on time to reoffend. The column labeled "HR" shows the hazard ratio associated with the variable. A hazard ratio of more than one indicates that the variable in question increases the instantaneous risk of reoffending. A hazard ratio of less than one indicates that the variable in question reduces the instantaneous risk of reoffending. The final columns show the 95 percent confidence interval around the estimated hazard ratio.

The first point to note is that the hazard ratio associated with the custody variable in Model A is 1.74, which indicates that, prior to the introduction of controls, juvenile offenders given a custodial sentence are 74% more likely to be reconvicted at any given time than those who receive a non-custodial penalty. When prior criminal record is introduced into the model (see Model B), juveniles given a custodial sanction remain more likely to be reconvicted, but the hazard ratio associated with the custody variable falls from 1.74 to 1.33 and is no longer statistically significant.

Figures 1 and 2 illustrate this effect. The X axis in each figure shows free time since the index court appearance. The Y axis shows the proportion of offenders in each group who have not yet been reconvicted of a further offence. Figure 1 shows the unadjusted difference in time to reconviction between the custody and non-custody groups. Figure 2 shows the adjusted difference. It can be seen from Figure 1 that, prior to controlling for previous court appearances, the survival (non-reconviction) rate in the custodial group is substantially lower than the survival rate in the non-custodial group throughout the follow up period. The same pattern appears in Figure 2, but the differences between the groups are obviously much smaller.

**Figure 1: Proportion not reconvicted by free time (days) since index court appearance (Model A) Custodial sentence?**

**Figure 2: Proportion not reconvicted by free time (days) since index court appearance (Model B) Custodial sentence?**



## Conclusion

The results of this study suggest that, other things being equal, juveniles given custodial orders are no less likely to reoffend than juveniles given non-custodial orders. These results are inconsistent with the two previous Australian studies on specific deterrence, both of which found evidence that juveniles given custodial penalties are more likely to be reconvicted. The difference in findings is probably due to the fact that the present study more effectively controlled for prior criminal record.

The finding that prison exerts no specific deterrent effect is consistent with overseas evidence on the specific deterrent effect of custodial penalties reviewed earlier in this article. It is important to consider, however, that the long-term effects of custodial penalties might be quite different to their short-term effects. Fagan and Freeman (1999), for example, using data from a national panel study of 5,332 randomly selected youths, found that incarceration produced a significant negative effect on future employment prospects, even after adjusting for the simultaneous effects of race, human capital and intelligence. There have been no studies on the effect of juvenile detention on juvenile employment prospects in Australia, but Hunter and Borland (1999) examined the effect of an arrest record on Indigenous employment prospects using data from the 1994 National Aboriginal and Torres Strait Islander Survey. Controlling for age, years completed at high school, post-school qualifications, whether the respondent had difficulty speaking English, alcohol consumption and whether the respondent was a member of the “stolen generation”, they found that an arrest record reduced Indigenous employment for males and females by 18.3 and 13.1 percentage points, respectively (Hunter & Borland 1999). On this basis, Hunter and Borland (1999) estimated that differences in arrest rates for Indigenous and non-Indigenous Australians might explain about 15% of the difference in levels of employment between these two groups.

These adverse effects of imprisonment on employment outcomes and the absence of strong evidence that custodial penalties act as a specific deterrent for juvenile offending suggest that custodial penalties ought to be used very sparingly with juvenile offenders. Fortunately, a range of non-custodial programs now exist which, in the United States at least, have been shown to be very effective in reducing juvenile recidivism. In the United States, they have been found to be considerably less expensive than a custodial sentence (Aos, Miller & Drake 2006). Western Australia and New South Wales are currently trialing an intensive supervision program (ISP) known in the United States as multi-systemic therapy. The NSW Bureau of Crime Statistics and Research is currently evaluating the ISP. It will be interesting to see whether it proves as effective here as it has been in the United States (MacKenzie 2002).

## Appendix

### Factors examined for potential inclusion in the multivariate analysis and their relationship with time to reconviction

Variable/factor	Measure	Relationship with time to reconviction (dependent variable) p-value
Gender	Sex — Q36 of questionnaire	0.0763
Race	ATSI status Q37 of questionnaire	0.0002
Socioeconomic status	SEIFA Australian decile ranking	0.7577
	Household crowding — compute Q66 and Q67 of questionnaire	0.8639
Age	Interview date minus DOB and regrouped into three groups: 10–15 yrs; 16–17 yrs; 18 yrs and over	0.2421
Age at first contact with the law	The age at time of first proven offence (either a prior offence or a reference offence) — from ROD regrouped into three groups: 10–13 yrs; 14–15 yrs; 16 yrs and over	0.0043
Prior criminal record	Number prior court appearances — grouped into “none” and “one or more” — from ROD	<0.0001
	Number prior proven offences — grouped into “none” and “one or more” — from ROD	<0.0001
	Number prior supervision orders — grouped into “none” and “one or more” — from ROD	<0.0001
Number of prior commitments	Number prior custodial episodes—grouped into “none” and “one or more” — from ROD	0.0010
Number of concurrent offences	Number concurrent offences (including principal offence) — grouped into “one” and “two or more” — from ROD	0.0208
Type of crime at index court appearance	Offence type, created from four digit Australian Standard Offence Classification (ASOC) descriptions of offences in ROD and grouped into three groups: violence; property and other	0.0644
Victim of abuse	Q57 from questionnaire — Do your parents punish you by slapping or hitting you? — grouped into “never” and “sometimes/often/always”	0.6460
Single parent	Compare options 1 (both parents) with options 2 and 3 (one parent) from Q43 of questionnaire — Who are you currently living with?	0.0903
Parenting	Do parents congratulate and encourage? (Q58) — grouped into “never” and “sometimes/often/always”	0.2601
	Are parent(s) aware of what their child thinks and feels? (Q61) — regrouped into “never” and “sometimes/often/always”	0.1538
	How close does young person feel to parents? (Q63) — regrouped into “not close at all” and “quite close/close/very close”	0.7784
	When parents make up rules do they explain them to young person? (Q52) — regrouped into “never” and “sometimes/often/always”	0.7083
	Does young person think that the rules that their parents make up are fair? (Q56) — regrouped into “never” and “sometimes/often/always”	0.5146

Variable/factor	Measure	Relationship with time to reconviction (dependent variable) p-value
	Does young person think that their parents chop and change the rules? (Q59) — regrouped into “never” and “sometimes/often/always”	0.1423
	Do parents follow through on their rules? (Q60) — regrouped into “never” and “sometimes/often/always”	0.3275
	Do parents nag young person about little things? (Q62) — regrouped into “never” and “sometimes/often/always”	0.3306
	How well does young person get on with their mother? (Q46) — regrouped into “badly” and “okay/well/very well”	0.6740
	How well does young person get on with their father? (Q47) —regrouped into ‘badly’ and ‘okay/well/very well’	0.4438
	Does young person feel rejected by parents? (Q51) — regrouped into “never” and “sometimes/often/always”	0.6523
	What would parents do if they found out young person had destroyed or damaged property on purpose? (Q53) — regrouped into “nothing” and “discuss seriously/scold not punish/punish”	0.6140
	What would parents do if they found out young person was using cannabis? (Q54) — regrouped into “nothing” and “discuss seriously/scold not punish/punish”	<0.0001
	What would parents do if they found out young person had taken something from a store? (Q55) — regrouped into “nothing” and “discuss seriously/scold not punish/punish”	0.8782
	How well do parents get along? (Q45)—regrouped into “badly” and “okay/well/very well”	0.9970
	Do parents argue or fight in front of young person? (Q48) — regrouped into “not at all” and “a bit/quite a bit/a lot”	0.9846
Supervision	Do parents know where young person is when young person is out of house? (Q49) — regrouped into “never” and “sometimes/often/always”	<0.0001
	Do parents know who young person is with when young person is out of house? (Q50) — regrouped into “never” and “sometimes/often/always”	0.4740
Delinquent peers	How many of young person’s friends had been in trouble with the police? — regrouped into “one” and “more than one”	0.0499
	How many of young person’s friends had shoplifted or stolen? — regrouped into “one” and “more than one”	0.1228
	How many of young person’s friends had vandalised? — regrouped into “one” and “more than one”	0.3331
	How many of young person’s friends had drunk alcohol under age? — regrouped into “one” and “more than one”	0.9624
	How many of young person’s friends had used illegal drugs? — regrouped into “one” and “more than one”	0.2197
	How often did young person hang out with friends who had been in trouble with the police? — “never” and “sometimes/often/all the time”	0.0068
	Q72/78 of questionnaire — How often do/did you wag? — grouped into “never” and “sometimes/often/always”	0.0161

Variable/factor	Measure	Relationship with time to reconviction (dependent variable) p-value
School attendance	Q73/79 of questionnaire — How often have you been/were you suspended? — grouped into “never” and “sometimes/often/always”	0.2177
Substance abuse	Monthly cigarette consumption — Q89 of questionnaire	0.7188
	Yearly cigarette consumption — Q89 of questionnaire	0.2208
	Monthly illicit drug consumption — Q90, Q91, Q92, Q93 of questionnaire	0.2237
	Yearly illicit drug consumption — Q90, Q91, Q92, Q93 of questionnaire	0.0262
	Have you ever injected drugs? — Q94 of questionnaire	0.4604
	Alcohol consumption — Q85/87 of questionnaire — regrouped into “every day” and “less frequently than every day”	<0.0001
	Alcohol consumption frequency — Q86/88 of questionnaire — regrouped into “at least one day/week” and “2–3 days/month or less”	<0.0001
Change of address	Q65 of questionnaire — How many times have you moved in your life?	0.7835
	Q44 of questionnaire — How long have you lived in that situation? (in days and excluding “whole life”)	0.7708
	Q44 of questionnaire — How long have you lived in that situation? (“whole life”)	0.2363
Certainty of arrest	Q2 of questionnaire — If you commit a crime in the future, how likely is it that you will be caught by the police?	0.0037
Court stigmatisation	Sum of Q22, Q23, Q24 Q25, Q28 and Q29 of questionnaire	0.5130
Custodial sentence	Identified in advance of interviews during sentencing at court (yes/no)	0.0003

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# The grey matter between right and wrong: neurobiology and young offending

Judge Peter Johnstone, President of the Children's Court of NSW for the Children's Legal Service Conference, Saturday, 11 October 2014, Rydges World Square.

## [5-0140] Introduction

1. This paper has been prepared for the Children's Legal Service Annual Conference, and is to be presented to Criminal Lawyers, Children's Court practitioners and those with an interest in the crime jurisdiction of the Children's Court.<sup>2</sup>

2. The paper covers the fields of psychiatry, psychology and the criminal law. Whilst I am not an expert in psychiatry or psychology, I believe it is important for us to all develop an understanding of how these fields interconnect, influence and affect our work as practitioners.

3. Throughout my time at the Children's Court, I have undertaken a great deal of research into the issues and circumstances surrounding the reasons young people commit offences.

4. In undertaking this research the area of neurobiology, or brain development, has piqued my interest. In this paper, I will not be discussing the principle of *doli incapax*. I will, however, be discussing the grey area between right and wrong by reference to neurobiology — brain science.

5. I will first examine briefly traditional theories regarding moral culpability in sentencing. Following this, I will canvass neurobiological research regarding brain development during adolescence. Thirdly, I will discuss the connection between brain development and the young people who come before the Children's Court, many of whom have suffered significant maltreatment and neglect. I will conclude by traversing the ways you may use this information to assist you in practice.

6. Before embarking on that discussion, on my own behalf and on behalf of all of the specialist Children's Magistrates in the Court, I wish to sincerely acknowledge your hard work and dedication to this challenging area of law and practice. I am continually impressed by your professionalism, passion and commitment to this jurisdiction. You are all performing a significant service to the community and your work does not go unrecognised.

7. Given your familiarity with this jurisdiction, I appreciate that you are all aware that children and young people process situations very differently from the way in which you and I process the same situations.

8. If we cast our minds back to when we were teenagers, with the benefit of hindsight and more mature insight, most of us can identify moments when we made bad decisions. While we can identify these moments and reflect upon our own experiences, it is critical that we are able to posit these experiences within the broader theoretical

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<sup>2</sup> I acknowledge the considerable help and valuable assistance in the preparation of this paper provided by the Children's Court Research Associate, Paloma Mackay-Sim.

and scientific context by asking the simple question. Why? Why did I behave that way? Why did I think that behaviour was okay? And for some of us, “Why did I ever wear that?”.

9. While we may never have specific clarity on any of these questions, a broader understanding of adolescent brain development may assist in understanding not only our own experience of adolescence, but the experiences of our clients.

10. Additionally, this research may impact upon the way you communicate and engage with your clients, and may alleviate the frustrations you experience when your clients do not understand the gravity of the consequences facing them.

11. This research may also assist your understanding of the best alternative justice processes and services to propose to the Court in your submissions on sentence.

12. Most importantly however, this research will add to our collective understanding as professionals of the children and young people in this jurisdiction and ensure that we observe and uphold the principles enunciated in s 6 of the *Children (Criminal Proceedings) Act 1987* (CCPA), the *Young Offenders Act 1997* and the United Nations Convention on the Rights of the Child.

13. Therefore, my primary objective in presenting this information to you is to begin a dialogue, not to present a settled thesis. The intention of this paper is to inform with a view to improving our collective understanding of young people and the ways in which they think and behave.

## Part 1 — Moral culpability and sentencing

14. As far as sentencing is concerned, the concept of the moral culpability or individual responsibility of the offender serves as an important framework informing the sentencing process. It is an historical model of punishment, arising in some part from theories of rational choice and deterrence.<sup>3</sup> Whilst it is not the only theory informing sentencing, it is one theory of punishment, a consequence of which is the apportionment of blame.

15. The deterrence and rational choice paradigms propose that the offender is able to weigh a number of factors prior to committing a criminal offence. Specifically, that the offender is in a position to consider the legal implications of their behaviour, what the likely cost will be to victims and the community, and weigh those factors against the rewards.

16. These paradigms assume that an offender makes an informed decision to act, having rationally deliberated the positives and negatives of their actions.

17. Paternoster cogently articulates this concept stating that these theories describe:

... the idea of a thinking, rational offender who calculates the advantages and disadvantages of offending ...<sup>4</sup>

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<sup>3</sup> The link between these theories has been well established in numerous articles, including: Cornish, D, Clarke, R (eds) *The Reasoning Criminal: Rational Choice Perspectives on Offending* (1986) [Transaction Publishers, 2014 reprint]; Klepper, S, Nagin, D “The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited” (1989) 27 *Criminology* 721; Paternoster, R “Decisions to Participate in and Desist from Four Types of Common Delinquency: Deterrence and the Rational Choice Perspective” (1989) 23 *Law Society Review* 7.

<sup>4</sup> Paternoster, R “Absolute and Restrictive Deterrence in a Panel of Youth: Explaining the Onset, Persistence/Desistance and Frequency of Delinquent Offending” (1989) *Social Problems* 36(3) at p 292.

18. The notion that young people can be expected to rationalise in the same way as adults is recognized by many members of the community. Paternoster states:

Nevertheless, youths as well as adults can be expected to consciously weigh the expected benefits of legal and illegal courses of action, the moral significance of their infractions, and the implications of such action for important social relationships in their lives. We can expect them also to be sensitive to the opportunities for legal as well as illegal action.<sup>5</sup>

19. Rational choice models also note that when considering whether to commit an illegal act, offenders consider whether they have better alternatives.

20. As Clarke and Cornish assert:

It is presumed that those with fewer satisfying alternatives will find illegal actions more appealing.<sup>6</sup>

21. The fact that some offenders may have ‘fewer satisfying alternatives’ links to the broader sociological reasons people commit criminal offences.

22. Bennett and Broe assert that theories suggesting that the commission of crime is consequent upon the choice of the offender mask the broader reasons for offending. They state:

Thus, whilst an individual who commits a crime will most certainly be considered as a “proximate” cause of that crime (and to that extent, personally responsible) crime research also suggests there are a consistent set of risk factors, more “distal” causes, that also make significant contributions to whether or not a crime is carried out.<sup>7</sup>

23. I am certain that you are all aware of the “distal” causes Bennett and Broe refer to, including but not limited to, low socio-economic status, childhood maltreatment and drug and alcohol issues.<sup>8</sup> I will return to a discussion of these ‘distal’ causes of crime in chapter three, when I discuss the neurobiological impacts of children who have suffered maltreatment.

24. Whilst general sentencing theories focus upon rational choice and moral culpability, these theories are somewhat tempered by the principles enunciated in s 6 of the CCPA.

25. Specifically, s 6(b):

That children who commit offences bear responsibility for their actions, but, because of their state of dependency and immaturity, require guidance and assistance.

26. We can infer that s 6(b) of the CCPA to some extent dilutes the paradigms of moral culpability and rational choice. The inclusion of ‘immaturity’ reflects an understanding of the cognitive and neurobiological processes at play when young people commit crimes.

27. I must emphasise that this paper is not directed to a discussion of *doli incapax*. I will not be discussing the age at which a child or young person is able to identify the difference between right and wrong or the controversy surrounding this issue.

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<sup>5</sup> *ibid* at p 293.

<sup>6</sup> Clarke, RV, Cornish, D “Modeling Offenders’ Decisions: A Framework for Research and Policy” (1985) in Tonry, M and Morris, N (eds) *Crime and Justice, Volume 6, An Annual Review of Research*, University Chicago Press, Chicago, 1985, pp 147–185.

<sup>7</sup> Bennett, H, Broe, GA, “Brains, biology and socio-economic disadvantage in sentencing: implications for the politics of moral culpability” (2008) 32 *Criminal Law Journal* pp 167–179 at p 168.

<sup>8</sup> *ibid* at p 168.

28. However, I will be speaking to the ‘immaturity’ of children and young people from a neurobiological perspective. I will address this issue by reference to the brain processes associated with adolescent development.

29. Before moving onto the nuts and bolts of brain science, I thought it apt to refer you to Zimring’s particularly articulate enunciation of the effect of this immaturity. Zimring states:

The immaturity of an actor has a pervasive influence on a large number of subjective elements of the offense, including cognition, volition and the appreciation that behaviour such as setting a fire can produce results like the death of a person.”<sup>9</sup>

## Part 2 — Neurobiology and adolescent development

30. A great deal of research has been undertaken over the 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>10</sup>

31. 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.

32. 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>11</sup>

33. Despite this, the 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 adults possess.

34. Executive function of the prefrontal cortex is explained by Johnson, Blum and Giedd, as:

... a set of supervisory cognitive skills needed for goal-directed behaviour, including planning, response inhibition working memory and attention. Poor executive functioning leads to difficulty with planning, attention, using feedback and mental inflexibility, all of which could undermine judgment and decision making.<sup>12</sup>

35. If we liken executive function of the prefrontal cortex to a type of control centre of the brain, we can recognise that during adolescence, this control centre is under construction. As such, a young person’s ability to undertake clear, logical and planned decision making prior to acting in also under construction.

<sup>9</sup> Zimring, FE “The Hardest of the Hard Cases: Adolescent Homicide in Juvenile and Criminal Courts” (1999) *Virginia Journal of Social Policy and the Law* 6 at p 437.

<sup>10</sup> McCuish, EC, Corrado, R, Lussier, P and Hart, SD “Psychopathic traits and offending trajectories from early adolescence” (2014) *Journal of Criminal Justice* 42, pp 66–76.

<sup>11</sup> Johnson, SB, Blum, RW, Giedd, JN “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 p 220.

<sup>12</sup> *ibid* at p 218.

36. Neurobiological development will continue beyond adolescence and into a person's twenties and different people will reach neurobiological maturity at different ages.<sup>13</sup>

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

38. This is not to say that the findings from neurobiology research exculpate all young offenders from criminal responsibility. Rather, these findings indicate that there is a grey area between right and wrong when considering the moral culpability of a young offender.

### **Part 3 — Brain development and childhood maltreatment**

39. A reality faced by all practitioners in this jurisdiction is that the young people we deal with are often what former President of the Children's Court, Judge Marien, described as "Cross-over Kids".<sup>14</sup> Specifically, young people who have been before the court in its Care jurisdiction frequently come before the Court in its Crime jurisdiction later in life.

40. In Judge Marien's paper he cites the work of the eminent psychologist Dr Judy Cashmore AO, who asserts that there is an established link between childhood maltreatment and subsequent offending in adolescence.<sup>15</sup>

41. It follows then, that childhood maltreatment will significantly impact upon the child or young person's brain development. The distal factors affecting brain development may be exemplified by parenting issues, nutrition, health as well as social interactions and conflict. This impact may be compounded by instability in the creation of developmental attachments through numerous out-of-home care placements, resulting in criminal offending.<sup>16</sup>

42. It is well established that children who have experienced maltreatment, particularly in cases of severe neglect or abuse, may experience developmental issues as a result. For example, Bennett and Broe describe the "stress response" by the brain catalysed by childhood maltreatment.<sup>17</sup>

43. Bennett and Broe go on to articulate the following:

Child neglect and abuse is considered to have neurobiological effects well beyond this "stress response". These findings provide neuro-scientific evidence for the notion that parenting and childcare and education are not "soft" factors ... but factors that have a direct impact upon the neurobiological development of the individual.<sup>18</sup>

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<sup>13</sup> Midson, B "Risky Business: Developmental Neuroscience and the Culpability of Young Killers" (2012) *Psychiatry, Psychology and the Law* 19(5) pp 692–710 at p 700. See also Gruber, SA, Yurgelun Todd, DA "Neurobiology and the Law: A Role in Juvenile Justice" (2006) *Ohio State Journal of Criminal Law* 3, pp 321–340 at p 332.

<sup>14</sup> "Cross-over kids" – childhood and adolescent abuse and neglect and juvenile offending", Judge Mark Marien SC, paper presented to the National Juvenile Justice Summit, Melbourne, 26 and 27 March 2012.

<sup>15</sup> Cashmore, J "The link between child maltreatment and adolescent offending: systems of neglect of adolescents" (2011) *Family Matters, Australian Institute of Family Studies*, Issue no 89.

<sup>16</sup> *ibid*.

<sup>17</sup> above n 6 at p 172. See also Delima, J, Vimpani, G "The neurobiological effects of childhood maltreatment: an often overlooked narrative related to the long-term effects of early childhood trauma?" (2011) *Family Matters, Australian Institute of Family Studies*, Issue no 89.

<sup>18</sup> above n 6 at p 173.

44. A young person may have other cognitive impairments sustained as a result of childhood maltreatment, such as foetal alcohol syndrome, brain injury as a result of “shaken baby syndrome” or other unexplained injuries and psychological impairments.

45. As brain development is a fluid process, it is critical that we maintain an awareness that we are not only dealing with the developmental issues affecting adolescents generally when dealing with young offenders. We must supplement our understanding of the developmental processes affecting adolescents, with the developmental processes that affect those adolescents who can be classified as “cross-over” kids.

#### **Part 4 — Conclusion**

46. I appreciate the numerous pressures placed upon all of you as practitioners in this jurisdiction and again, I applaud you for your diligence. Accordingly, I can appreciate that you are all wondering what practical relevance this paper holds for all of you.

47. I understand that some practical issues are common to all of you as practitioners in the children’s jurisdiction. Specifically, issues relating to mental health, drugs and alcohol, rehabilitation and alternative justice procedures.

48. Accordingly, I submit that this paper is relevant to you for a number of practical reasons. Firstly, by providing an academic overview of the neurobiological factors contributing to adolescent behaviour, you may develop an understanding of why your client behaves in certain ways.

49. You may also be able to better communicate and engage with your clients by appreciating that they are less likely to understand the proceedings, process what is going on and understand the consequences.

50. Additionally, an understanding of the neurobiological processes affecting your clients may assist in submissions regarding mental health issues in addition to submissions on sentence. The fact that a young person’s brain is still developing makes them more likely to respond to rehabilitative and alternative justice processes.

# Early intervention, diversion and rehabilitation from the perspective of the Children’s Court of NSW

Judge Peter Johnstone, President of the Children’s Court of NSW, for the 6th Annual Juvenile Justice Summit, Friday, 5 May 2017, Sydney.<sup>19</sup>

## [5-0150] Introduction

[1] 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 5th Annual Juvenile Justice Summit in 2014, when I had been President of the Children’s Court of NSW for nearly two years. I have now been the President of the Children’s Court of NSW for almost five years, and have had the opportunity to observe and implement some remarkable developments in the youth justice system.

[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 (YKC), Justice Reinvestment and the *Young Offenders Act 1997* (YOA).

[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 seven locations, and conducts circuits on a regular basis at country locations across NSW.

[7] The Children’s Court deals with both care and protection matters and offences committed by children under 18 years.

[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 Mark 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>20</sup>

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<sup>19</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.

<sup>20</sup> J Cashmore, “The link between child maltreatment and adolescent offending”, (2011) 89 *Family matters* 31, at <https://aifs.gov.au/publications/family-matters/issue-89/link-between-child-maltreatment-and-adolescent-offending>, accessed 10 April 2018.

(See also “Cross-over kids: the drift of children from the child protection system into the criminal justice system” at [1-0180].)

[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 NSW**

[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.

[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 years 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>21</sup>

[16] The first special legislation recognising the need to treat children differently was the *Juvenile Offenders Act* 1850,<sup>22</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>23</sup>

[18] This Act provided for the establishment of reformatory schools as an alternative to prison, and the *Destitute Children Act* 1866,<sup>24</sup> under which public and private “industrial schools” were established, to which vagrant and destitute children could be sent.<sup>25</sup>

[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: s 16(1)(d). I am also required to chair an Advisory Committee

<sup>21</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>22</sup> 14 Vic No II, 1850.

<sup>23</sup> 30 Vic No IV, 1866.

<sup>24</sup> 30 Vic No II, 1866 (otherwise known as the *Industrial Schools Act* 1866).

<sup>25</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 Professional, 1989.

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 into the protection and detention of children in 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 Court 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>26</sup>
- [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 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:<sup>27</sup>
- (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.
- [37] The YOA is a statutory embodiment of early intervention and diversion, providing the option of warnings, cautions and Youth Justice Conferences (YJCs).
- [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] YJCs 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, YJCs facilitate co-operation between the young person and police and foster collaboration and input from the individual offender, victims, families and communities.

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<sup>26</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the Care Act), Ch 5, Pt 2, "Care applications".

<sup>27</sup> *Children (Criminal Proceedings) Act 1987* (CCPA), s 6.

[41] I am particularly supportive of the use of YJCs. In my view, they produce fruitful results for both the individual offender and the community.

[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>28</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.

[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* at [45]:<sup>29</sup>

... 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 ...

[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.

### **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.

<sup>28</sup> Care Act, ss 104 and 105; CCPA, s 15A; and, *Young Offenders Act 1997* (YOA), s 65.

<sup>29</sup> *R v Lubemba* [2014] EWCA Crim 2064; see also [38]–[45].

- [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%, from a peak of 405 detainees in June 2011 to 250 in December 2016.<sup>30</sup>
- [57] Furthermore, three juvenile detention centres have been closed over the past five 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 six 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.
- [60] In particular, I credit Judge Andrew 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>31</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

<sup>30</sup> Bureau of Crime Statistics and Research, “NSW custody statistics: quarterly update December 2016”, [www.bocsar.nsw.gov.au](http://www.bocsar.nsw.gov.au), accessed 21 February 2017.

<sup>31</sup> Judge A Becroft, “From little things, big things grow: emerging youth justice themes in the South Pacific”, paper presented at the Australasian Youth Justice Conference: Changing trajectories of offending and reoffending, 21–22 May 2013, Canberra, pp 5–6.

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>32</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 “neuroscientific data are continuous and highly variable from person to person; the bounds of ‘normal’ development have not been well delineated”.<sup>33</sup>

[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:<sup>34</sup>

... when a young person’s emotions are aroused, or peers are present, the ability to impose regulatory control over risky behaviour is diminished.

[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>35</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.

[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.

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<sup>32</sup> E McCuish et al, “Psychopathic traits and offending trajectories from early adolescence” (2014) 42(1) *Journal of Criminal Justice* 66.

<sup>33</sup> S Johnson, R Blum and J Giedd, “Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy” (2009) 45(3) *Journal of Adolescent Health* 216 at 218.

<sup>34</sup> A Becroft, “From little things, big things grow”, above n 13, at p 5.

<sup>35</sup> B Midson, “Risky business: developmental neuroscience and the culpability of young killers” (2012) 19(5) *Psychiatry, Psychology and the Law* 692 at 700. See also S Gruber and D Yurgelun-Todd, “Neurobiology and the law: a role in juvenile justice?” (2006) 3 *Ohio State Journal of Criminal Law* 321 at 332–333.

[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>36</sup>

[76] For example, young people had said:<sup>37</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.

[79] I attended a wonderfully informative seminar series hosted by the Office of the Advocate for Children and Young People (ACYP) on 22 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, Senior Clinical Advisor, Child and Family Health, NSW Health, described how babies are born with 25% of their brains developed, and that by age three they will have developed 80% of the brain for life.<sup>38</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 1,000 days of life, this may lead to difficulty later in life, especially during adolescents, but even during adulthood.

<sup>36</sup> M Stephenson, “Youth justice in New Zealand: not perfect ... but responding” (2017) 76 (March) *Court in the Act* 4 at 4–5, at [www.districtcourts.govt.nz/youth-court/newsletters/](http://www.districtcourts.govt.nz/youth-court/newsletters/), accessed 6 March 2017.

<sup>37</sup> *ibid.*

<sup>38</sup> See G Allen, “Early intervention: the next steps: an independent report to Her Majesty’s Government”, HM Government, UK, 2011, at [www.gov.uk/government/publications/early-intervention-the-next-steps--2](http://www.gov.uk/government/publications/early-intervention-the-next-steps--2), p xiii, accessed 17 April 2018.

[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] At the ACYP seminar, Dr Michael Brydon, Chief Executive, The Sydney Children's Hospitals Network, discussed a fascinating study by Professor 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.

[84] Professor 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 children 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>39</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.

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<sup>39</sup> K Richards, "What makes juvenile offenders different from adult offenders" (2011) 409 *Trends & issues in crime and criminal justice*, Australian Institute of Criminology.

- [94] No experience is more predictive of future adult difficulty than confinement in a juvenile facility.<sup>40</sup>
- [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>41</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>42</sup>
- [97] Confinement all but precludes healthy psychological and social development.<sup>43</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.
- [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 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.

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<sup>40</sup> M Wald and T Martinez, *Connected by 25: improving the life chances of the country’s most vulnerable 14–24 year olds*, Stanford University, 2003, at [www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf](http://www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf), accessed 18 April 2017.

<sup>41</sup> E Mulvey, “Highlights from pathways to desistance: a longitudinal study of serious adolescent offenders”, *Juvenile Justice Fact Sheet*, US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 2011.

<sup>42</sup> *ibid.*

<sup>43</sup> Wald and Martinez, above n 22.

[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>44</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.

### ***The Youth Koori Court***

[110] The Children's Court began trialling the YKC in February 2015 at Parramatta Children's Court.<sup>45</sup>

[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) of the CCPA. 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 CCPA 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*,

<sup>44</sup> NSW Ombudsman, "Joint protocol to reduce the contact of young people in residential out-of-home-care with the criminal justice system" at [www.community.nsw.gov.au/?a=408679](http://www.community.nsw.gov.au/?a=408679), accessed 17 April 2018.

<sup>45</sup> S Duncombe, "NSW Youth Koori Court Pilot Program commences" (2015) 27 *JOB* 11.

...

- (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,*

...

[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 is available to the judicial officer.

[120] The YKC has been sitting [since 6 February 2015], and we celebrated the two-year milestone in February [2017], 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 YKC, 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 [May] 2017, we have 11 young people continuing or referred, and two have been sentenced so far this year. [As at June 2018, 92 young people have been referred to 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 YKC 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>46</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 three or six 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.

### ***Section 33 of the Children (Criminal Proceedings) Act 1987 (NSW)***

- [137] Section 33 of the 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 33 represents an important diversionary process, one which I believe is under-utilised.

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<sup>46</sup> P Van de Zandt and T Webb, "High service users at Legal Aid NSW: profiling the 50 highest users of legal aid services", Legal Aid NSW, 2013.

[140] In my experience, it is very effective to utilise s 33 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 YKC, allows an offender time to reach out within their community (if appropriate), and seek help in the form of such solutions as drug and alcohol rehabilitation, mental health and trauma counselling, community service.

[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] Section 28 of the *Bail Act 2013* 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 have articulated as the “10 characteristics of a good youth justice system”.<sup>47</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 YOA:
- 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>48</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>49</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.
- [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 NSW.
- [163] The fourth characteristic is timely decision-making and resolution of charges, which is reflected in s 9 of the CCPA.
- [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

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<sup>47</sup> Judge C Harding and Judge A Becroft, “10 characteristics of a good youth justice system”, a paper presented at the Pacific Judicial Development Programme, Family Violence and Youth Justice Workshop, 12–15 February 2013, Port Vila, Vanuatu.

<sup>48</sup> *ibid*, p 2.

<sup>49</sup> *ibid*, p 3.

for young people, whilst acknowledging the harm caused and the reasons why this occurred. The YKC 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 YKC 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, which has been sparked recently, 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>50</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.

[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>51</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>50</sup> F McNeill, “A desistance paradigm for offender management” (2006) 6(1) *Criminology & Criminal Justice* 39 at 50, at <http://journals.sagepub.com/doi/pdf/10.1177/1748895806060666>, accessed 23 April 2017; see also S Farrall, “Rethinking what works with offenders: probation, social context and desistance from crime”, Willan Publishing (UK), 2002.

<sup>51</sup> *Children, Young Persons and Their Families Act 1989* (NZ), [renamed the *Oranga Tamariki Act 1989*], ss 280, 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>52</sup> This view is further bolstered by research findings that incarceration actually interrupts and delays the normal pattern of “aging out”.<sup>53</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 YKC.
- [181] I believe it is necessary to expand these services, particularly the YKC, 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 and family counselling.
- [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.

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<sup>52</sup> J Baldwin, *Juvenile justice reform: a blueprint*, Youth Transition Funders Group, 2012, p 6, 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>53</sup> B Holman and J Ziedenberg, *The dangers of detention: the impact of incarcerating youth in detention and other secure facilities*, Justice Policy Institute (US), 2006, p 6.



# Updates in the Children’s Court jurisdiction: 2018

His Honour Judge Peter Johnstone, President of the Children’s Court of NSW, Children’s Legal Service Conference, 24 February 2018, Sydney.<sup>54</sup>

## [5-0160] Introduction

- [1] First, I wish to acknowledge the traditional occupiers of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to Elders past, present and future.
- [2] Secondly, I would like to acknowledge and thank the legal practitioners who appear in the Children’s Court for their dedication, professionalism and integrity in the work they undertake in this jurisdiction. 2017 was a particularly busy year with many reforms, consultations and changes happening throughout the criminal and care jurisdictions.
- [3] This paper will firstly canvass some general updates in the Children’s Court, as well as updates affecting the criminal jurisdiction, including some recent case law. This paper will then consider the “10 easy steps” to turn a child offender into an adult criminal, as articulated by Judge Andrew Becroft, Principal Youth Court Judge and Children’s Commissioner for New Zealand, and reflect upon the key messages which can be found in this paper, and my hopes for the future.

## General updates

### President of the Children’s Court of NSW reappointed

- [4] I was very pleased to be reappointed as the President of the Children’s Court of NSW by Attorney General Mark Speakman in June last year. My new term as President began on 1 June 2017 and expires on 7 July 2021.
- [5] I look forward to another exciting and rewarding term as President.

### Closure of Bidura Children’s Court and opening of the new Surry Hills Children’s Court

- [6] The Children’s Court on Glebe Point Road known as Bidura Children’s Court closed permanently on Friday 7 July 2017 and the new Surry Hills Children’s Court opened on 15 January 2018, located on Albion Street, Surry Hills.
- [7] The refurbished four-court complex includes state-of-the-art AVL facilities, two conciliation rooms, witness protection rooms as well as space for support services and agencies.
- [8] The new Surry Hills Children’s Court honours the solid foundations, history and heritage of the former Metropolitan Children’s Court, and acknowledges the troubled history whilst incorporating new features to reflect the needs of modern court users and the specialist nature of the Children’s Court jurisdiction.

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<sup>54</sup> The author acknowledges the considerable help and valuable assistance in the preparation of this paper by the Children’s Court Research Associate, Elizabeth King.

[9] It is inspiring and empowering to reflect upon and to witness the changes which have occurred since the original building opened in 1911, which are a stark reminder of the need to continually advocate for the best outcomes for the most vulnerable members of our community.

[10] With the opening of the Surry Hills Children’s Court, there have been some changes to catchments and circuits. Sutherland Children’s Court will continue to sit as a Children’s Court for criminal matters from St George, Sutherland and Miranda Local Area Commands.

[11] Criminal matters from Ashfield, Burwood, Ku-ring-gai, Marrickville, North Shore and Ryde Local Area Commands have been re-directed to Surry Hills Children’s Court.

### **Magistrate capacity and circuits**

[12] I am pleased to report that this year the Children’s Court has the full complement of Children’s Magistrates. Children’s Magistrate Virgo commenced in January 2018 and will be responsible for the Western and Riverina circuits, and Children’s Magistrate Crompton has replaced Children’s Magistrate Murphy who retired in 2017. We continue to host rotating magistrates throughout the year.

[13] The Mid-North Coast circuit has been extended to cover criminal matters at Port Macquarie as well as Kempsey. The Illawarra Children’s Court has expanded to include both Moss Vale and Goulburn Children’s Courts.

[14] Children’s Court magistrates hear roughly 90% of care cases in the State, up from 45% in 2011, and the coverage for criminal matters remains around 67%.

### **National Judicial College of Australia “Family Violence in the Court” training for the Children’s Court of NSW**

[15] The specialist Children’s Magistrates and Children’s Registrars and myself attended an excellent training day hosted by the National Judicial College of Australia on “Family Violence in the Court Room” on 6 October 2017.

[16] The training day involved informative presentations on the nature and impact of domestic and family violence, as well as a unique virtual reality experience, which holds some great potential as an engaging training tool.

[17] Domestic and family violence is now recognised as a serious and widespread problem in Australia, with significant costs to the individuals who are victimised and to the community.

[18] As judicial officers we have responsibilities such as enabling the best evidence to be given by witnesses and managing safety within the court room. This is an important area of learning for all stakeholders, and the training day was valuable in continuing to develop and enhance the specialist nature of the Children’s Court in dealing with complex children and families.

### **The continuing relevance of brain science**

[19] 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.

- [20] 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.
- [21] I touched on some of this brain science when I presented at the Children’s Legal Service Conference in 2015, however 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 forward. 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. I will explore these developments in a later section of the paper.
- [22] 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>55</sup>
- [23] 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>56</sup>
- [24] 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.
- [25] 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>57</sup>
- [26] 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.
- [27] 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>58</sup>
- [28] 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.

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<sup>55</sup> A Becroft, “‘From little things, big things grow’ — emerging youth justice themes in the South Pacific”, Australasian Youth Justice Conference, Changing Trajectories of Offending and Reoffending, 20–22 May 2013, Canberra.

<sup>56</sup> E McCuish, R Corrado, P Lussier, and S Hart, “Psychopathic traits and offending trajectories from early adolescence” (2014) *Journal of Criminal Justice* 42 at 66–76.

<sup>57</sup> S Johnson, R Blum, J Giedd, “Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy” (2009) 45(3) *Journal of Adolescent Health* 216 at 220.

<sup>58</sup> B Midson, “Risky business: developmental neuroscience and the culpability of young killers” (2012) 19(5) *Psychiatry, Psychology and Law* 692 at 700. See also, S Gruber, D Yurgelun-Todd, “Neurobiology and the law: a role in juvenile justice” (2006) 3 *Ohio State Journal of Criminal Law* 321 at 332.

- [29] Over the past year I have become aware of some important research which has enormous implications for the way in which the criminal justice system treats young people, and also on our understanding of the importance of early development, as the manner of this development can impact on care and protection matters as well as criminal matters.
- [30] I attended a wonderfully informative seminar series hosted by the Advocate for Children and Young People on 30 March 2017, and some fascinating insights into science and child development were shared by leaders in the field.
- [31] For example, Associate Professor Elisabeth Murphy described how babies are born with 25% of their brains developed, and that by age 3 they will have developed 80% of the brain for life.<sup>59</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.
- [32] 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 adolescence but even during adulthood.
- [33] Dr Michael Brydon discussed a fascinating study by Professor 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.
- [34] Antonovsky questioned why it was 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.<sup>60</sup>
- [35] 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.
- [36] Furthermore, I am deeply troubled by the important findings of a recent study conducted in Western Australia, where it was found that 89% of the young people in detention who were assessed as part of the study had at least one domain of severe neurodevelopmental impairment, and 36% were diagnosed with Fetal Alcohol Spectrum Disorder (FASD).<sup>61</sup>
- [37] This study shows that the majority of young people with FASD have severe impairment in the academic, attention, executive functioning and/or language domains. Severe impairment in memory, motor skills and cognition were also commonly found in young people with FASD.<sup>62</sup>
- [38] For the majority of these young people, FASD and severe neurodevelopmental impairment had not previously been identified.

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<sup>59</sup> G Allen, *Early intervention: the next steps*, 2011, at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284086/early-intervention-next-steps2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284086/early-intervention-next-steps2.pdf), accessed 6 April 2018.

<sup>60</sup> A Antonovsky, *Unraveling the mysteries of health — how people manage stress and stay well*, Jossey-Bass Publishers, 1987.

<sup>61</sup> C Bower, R Watkins, R Mutch, "Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia" (2018) 8(2) *BJM Open* 1.

<sup>62</sup> *ibid* at 6.

[39] The report clearly identifies that impairment in these domains may contribute to offending behaviours and/or difficulties in negotiating all aspects of the justice system.<sup>63</sup>

[40] Whilst this particular report is limited to WA, FASD has been identified as an “issue that is not confined to a particular community or demographic; it is a disorder that crosses socio-economic, racial and education boundaries”.<sup>64</sup>

[41] Emerging insights from research such as this continue to highlight the vulnerability of young people and the need for there to be appropriate services available within the community to identify issues experienced by children and a clear pathway to support and wrap-around services for the child or young person and their family.

### **Schooling issues**

[42] Education plays a significant role in a child or young person’s life, and presents a valuable opportunity for early identification of risk factors as well as interventions and diversion from problematic and offending behaviour.

[43] It has come to my attention that roughly 40% of the children coming before the Children’s Court in its criminal jurisdiction are not attending and are totally disengaged from school. Recent, informal observations at one of the Children’s Courts located in Sydney indicate that the number of children in the criminal jurisdiction of the court who are not attending school is, in fact, much higher than 40%, and that the rates of non-attendance reflect a chronic and complex pattern, which is deeply troubling.

[44] Furthermore, the Children’s Court has been informed that roughly 40% of children in residential out-of-home care are not attending school.

[45] I have been advocating for a solution to this problem, and was pleased to jointly host a roundtable discussion with the Department of Education and key stakeholders in August last year. I believe there are opportunities for justice agencies and education agencies to work together to divert children from long-term involvement with the justice system.

[46] For example, I am hopeful that in NSW we can adopt the Victorian Education Justice Initiative whereby officers of the Department of Education are placed in the Children’s Court to assist in identifying those children who are not attending school and to help support them to re-engage in school.

[47] This promising initiative is an innovative demonstration of diversionary processes working in parallel with court processes, and would be of significant benefit to children and young people in NSW.

## **Updates in the criminal jurisdiction**

### **Declining number of children in detention**

[48] The NSW Bureau of Crime Statistics and Research reported on 30 October 2017 that the juvenile detention population has decreased by roughly 29% since the peak of 405

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<sup>63</sup> *ibid.*

<sup>64</sup> Australian Medical Association, “Fetal Alcohol Spectrum Disorder (FASD) — 2016”, 24 August 2016, at <https://ama.com.au/position-statement/fetal-alcohol-spectrum-disorder-fasd-2016>, accessed 6 April 2018.

detainees in June 2011. The number of children and young people in detention has decreased significantly over the past six years, which is in stark contrast to the adult prison population which continues to rise.

[49] Furthermore, three juvenile detention centres have closed over the past six years due to the falling number of young people in detention. Now only six juvenile detention centres remain in NSW.

[50] 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 us to gain 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.

[51] I am a strong advocate for the approach of Justice Reinvestment, which is an idea for rethinking the criminal justice system. Under this philosophy, the savings from the closure of three juvenile detention centres should be reinvested back into the community to provide services and supports to children and young people.

[52] In 2016, I participated in the discourse on Justice Reinvestment in relation to the pilot project to be implemented in Cowra, and I look forward to seeing some more Justice Reinvestment programs established in regional areas.

### **Youth Koori Court**

[53] The Youth Koori Court (YKC) was established as a pilot in 2015 at Parramatta Children's Court and has now been operating for almost three years.

[54] The YKC was established in response to the devastating over-representation of Aboriginal young people in the justice system.

[55] The YKC seeks to contribute to a solution to the over-representation of Aboriginal young people through the inclusion of Elders and professionals who are Aboriginal, providing low volume case management mechanisms that will facilitate greater understanding of, and participation in, the court process by the young person, identifying relevant risk factors that may impact on the young person's continued involvement with the criminal justice system, and monitoring appropriate therapeutic interventions to address these risk factors.

[56] The process that has been developed for the YKC involves an application of the deferred sentencing model (*Children (Criminal Proceedings) Act 1987*, s 33(1)(c2)) as well as an understanding of, and respect for, Aboriginal culture.

[57] A formal process evaluation has been conducted by Western Sydney University, and the final report is currently before the Attorney General.

[58] Whilst the evaluation has not yet been formally released, several positive outcomes including improved cultural connection, education and employment, accommodation, health and management of drug and alcohol use have been identified in the report.

[59] The Children's Court was very pleased to hear the Attorney General announce in June 2017 a sum of \$220,000 in funding for Marist180 to provide a casework position dedicated to assisting clients in the YKC.

[60] I will continue to advocate for the expansion of the YKC, particularly to communities in Dubbo and Redfern.

**Criminal case law**

[61] This section will provide a brief summary of some recent criminal case law.

**RP v The Queen (2016) 259 CLR 641**

[62] The appellant was convicted on two counts of sexual intercourse with a child under 10 years. At the time of offending the appellant was aged approximately 11 years and 6 months, and the complainant, who was the appellant’s half-brother, was approximately 6 years and 9 months. By grant of special leave, the appellant appealed to the High Court.

[63] The High Court held that the Court of Criminal Appeal erred in finding that the appellant’s convictions were not unreasonable in circumstances where there was insufficient evidence to rebut the presumption that he, as a child of 11, did not know his behaviour was seriously wrong in a moral sense. The court ordered that the convictions be quashed and entered verdicts of acquittal.

**Director of Public Prosecutions (NSW) v GW [2018] NSWSC 50**

[64] This decision concerns an appeal from the DPP in relation to an order of the Local Court made at Dubbo Children’s Court dismissing proceedings against the defendant for various offences following a *voir dire*.

[65] On appeal it was held that there was an error of law due to the brevity of the reasons and the failure to explain that which rendered the conduct an impropriety or to undertake the balancing exercise required by s 138 of the *Evidence Act 1995*, which rendered the judgement inadequate.

[66] The court ordered that the appeal be allowed in part, and that the matter be remitted to the Children’s Court at Dubbo for determination.

**Director of Public Prosecutions (NSW) v Saunders [2017] NSWSC 760**

[67] In this case, the respondent was charged with assault after he spat in the face of a three-month-old child. When the matter came before the Local Court, a magistrate dismissed the charge and made an order under s 32(3)(b) of the *Mental Health (Forensic Provisions) Act 1990* with conditions requiring the respondent to attend a “psychiatrist” but did not name any specific person or place. The DPP appealed to the Supreme Court and contended that the magistrate erred in the formulation of the conditions.

[68] It was held on appeal that s 32(3)(b) of the *Mental Health (Forensic Provisions) Act 1990* requires a magistrate to nominate a particular person upon whom, or a particular place at which, the defendant is to attend for assessment of the defendant’s mental health condition and/or treatment.

**“How to turn a child offender into an adult criminal — in 10 easy steps”**

[69] The Principal Youth Court Judge for New Zealand, Judge Andrew Becroft, delivered a compelling and engaging paper at the Children and the Law International Conference in 2009, titled “How to turn a child offender into an adult criminal — in 10 easy steps”.<sup>65</sup>

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<sup>65</sup> A Becroft, “How to turn a child offender into an adult criminal — in 10 easy steps”, Children and the Law International Conference, 7 September 2009, Tuscany, Italy.

[70] The paper is approached from a perspective that is “deliberately contrary to all but the most committed devil’s advocate”,<sup>66</sup> and the blatant inversion of decades of youth justice wisdom is particularly meaningful at this point in time, with the conclusion of the Royal Commission into the Protection and Detention of Children in the Northern Territory and a clear appetite for change.

[71] It will be useful to examine these “10 easy steps” and reflect upon the current practice in NSW, with a mind to acknowledging the best practice which has been set, but also the areas in which we must continue to improve.

**Step 1: Leave families alone to sort themselves out: “Ignore risk and erode resiliency”**

Since we know that parents and parenting contribute significantly as a risk factor (or a filter for other risk factors) for adolescent anti-social behaviour, it makes sense for the state and other agencies to let at-risk families get on with fostering those risks without intervention.<sup>67</sup>

[72] The influence of family on a child’s wellbeing and development is crucial. As I mentioned earlier, research shows that the development of brain connections is dependent on stimulation and experiences in early childhood, and will shape the wellbeing and cognitive development of a person as they continue to grow into adulthood.

[73] Children are particularly vulnerable to experiences such as abuse and neglect, family violence, drug and alcohol abuse (including FASD), socio-economic disadvantage, disengagement from education, criminal behaviour of parents/family members and health issues. These are all recognised risk factors for criminal offending.

[74] Families need support to overcome these issues, to break the cycle of intergenerational trauma and disadvantage, and to engage in pro-social, positive parenting.

[75] I have become aware of a significant shift within DFACS in the last two years, with a renewed focus on early intervention and family preservation services, including the use of some evidence-based international models known as Functional Family Therapy — Child Welfare (FFT-CW) and Multi-systemic Therapy — Child Abuse and Neglect (MST-CAN).

[76] The introduction of these new models is part of a broad suite of reforms under “Their futures matter: a new approach”, known as the Permanency Support Program.<sup>68</sup> It is hoped that these intensive, wrap-around family preservation services will help stem the number of children entering out-of-home care in NSW, and lead to better outcomes for vulnerable children and young people.

[77] Interestingly, the number of children entering in out-of-home care decreased in the 2016/2017 financial year by 24% compared to the previous year.<sup>69</sup>

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<sup>66</sup> *ibid* at 3.

<sup>67</sup> *ibid* at 6.

<sup>68</sup> NSW Government, “Their futures matter: a new approach” at [www.theirfuturesmatter.nsw.gov.au](http://www.theirfuturesmatter.nsw.gov.au), accessed 6 April 2018.

<sup>69</sup> NSW Department of Family and Community Services, *Annual Report 2016–2017*, 2017 at p 22 at [www.facs.nsw.gov.au/about\\_us/publications/annual-reports](http://www.facs.nsw.gov.au/about_us/publications/annual-reports), accessed 6 April 2018.

[78] Addressing risk factors within the family may have an enormous effect on the welfare and wellbeing of a child, and may create or reinforce some protective factors against offending behaviour.

[79] I look forward to following the outcomes of these reforms and the impact of improved supports for families in NSW.

**Step 2: Make the age of criminal responsibility as young as possible and get children into court as soon as possible**

Child offenders need to face the reality of their criminal futures and learn to deal with, and be sorted out by “the system” at an early age.<sup>70</sup>

[80] The features of the justice system underlying this second “step” include the principles of early intervention and diversion, which are critical pillars in an enlightened youth justice system.

[81] In NSW the age of criminal responsibility is 10, and the rebuttable presumption of *doli incapax* applies between the ages of 10 and 14.

[82] The Children’s Court has recently expressed its support for the recommendation made by the Royal Commission into the Protection and Detention of Children in the Northern Territory, to amend legislation to provide that the age of criminal responsibility be raised to 12 years.

[83] In a submission to the Legislative Assembly Committee on Law and Safety Inquiry into the adequacy of youth diversionary programs in NSW, the Children’s Court recommended that close consideration be given to raising the age of criminal responsibility, as this would align NSW with contemporary scientific research, as well as with the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice*<sup>71</sup> which stipulates that the minimum age set should recognise emotional, mental and intellectual maturity.

[84] Raising the age would also likely reduce the number of children coming before the courts at an early age which increases the risk that they will become desensitised to the court process (the “inoculation” effect),<sup>72</sup> reducing the effectiveness of the court process as a deterrent.

[85] However, in order to successfully divert children from the justice system where the minimum age of criminal responsibility is 12, there must be processes, supports and services in place to identify and respond to the needs of children who are engaging in offending behaviour at a younger age. Without access to appropriate diversionary services, there is a risk that contact with the court system will simply be delayed until the child reaches the age of 12, with no positive interventions in the interim period, and no successful diversion from further offending.

[86] There are several diversionary programs and mechanisms in NSW, which are informed by enlightened policy and practice, such as the *Young Offenders Act 1997* (YOA), which provides police with the option of a warning, caution or Youth Justice Conference (YJC).

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<sup>70</sup> Becroft, above n 12, at 10.

<sup>71</sup> Adopted by General Assembly resolution 40/33 of 29 November 1985 at [www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf](http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf), accessed 6 April 2018.

<sup>72</sup> P Johnstone, “Emerging developments in juvenile justice: the use of intervention, diversion and rehabilitation to break the cycle and prevent juvenile offending” (2016) 12(4) *TJR* 456 at 464.

- [87] The Children's Court has recently suggested there may be value in lowering the threshold of the requirement for an admission of guilt, to something along the lines of a "concession of wrongdoing" or to "not deny" the offence rather than an admission to the specifics of the offence.
- [88] In New Zealand the young person is required to "not deny" the offence in order to have access to a diversionary mechanism called a family group conference. The Royal Commission into the Protection and Detention of Children in the Northern Territory recently recommended that the Police General Order be amended to remove the requirement that a child or young person admit to committing an offence, and instead require that the young person "does not deny" the offence.<sup>73</sup>
- [89] The effectiveness of the YOA in diverting young offenders relies, to a great extent, on the awareness of police officers of this diversionary mechanism.
- [90] I have been in ongoing discussions with NSW Police with a view to ensuring that all police officers receive specialised training tailored to the unique nature of children and young people and the diversionary mechanisms available to police to divert children and young people away from long-term involvement with the criminal justice system and into support services.
- [91] The Children's Court is also supportive of the Royal Commission's recommendation that children under the age of 14 should not be ordered to serve a time of detention except in certain circumstances.<sup>74</sup> This would reflect practices in international jurisdictions such as Belgium, Switzerland, Finland, Scotland and England which require children under a certain age to be dealt with through a therapeutic, protective response.
- [92] This recommendation is supported by a growing body of evidence which shows that the incarceration of children and young people is both less effective and more expensive than community-based programs, without any decrease in risk to the community. Studies have shown that incarceration is no more effective than probation or community-based sanctions in reducing criminality.<sup>75</sup>
- [93] No experience is more predictive of future adult difficulty than confinement in a juvenile facility.<sup>76</sup>
- [94] Children who have been incarcerated are more prone to further imprisonment. Statistics from the NSW Bureau of Crime Statistics and Research (BOCSAR) show that in 2015 66.2% of young offenders exiting detention were reconvicted of another

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<sup>73</sup> Commonwealth of Australia, *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Final Report, vol 2B, 2017, at 227 (Recommendation 25.12), at <https://issuu.com/ntroyalcommission/docs/2b-final?e=31933818/55836163>, accessed at 6 April 2018.

<sup>74</sup> *ibid*, Recommendation 27.1.

<sup>75</sup> K Richards, "What makes juvenile offenders different from adult offenders" (2011) 49 *Trends and Issues in Crime and Criminal Justice* 1.

<sup>76</sup> M Wald and T Martinez, "Connected by 25 — improving the life chances of the country's most vulnerable 14–24 year olds", 2003, at [www.hewlett.org/library/connected-by-25-improving-the-life-chances-of-the-countrys-most-vulnerable-youth/](http://www.hewlett.org/library/connected-by-25-improving-the-life-chances-of-the-countrys-most-vulnerable-youth/), accessed 6 April 2018.

offence within the next 12 months.<sup>77</sup> Recidivism studies in the United States show consistently that 50% to 70% of young people released from juvenile correctional facilities are re-arrested within 2 to 3 years.<sup>78</sup>

[95] Furthermore, children who have been incarcerated achieve less educationally, work less and for lower wages, fail more frequently to form enduring families and experience more chronic health problems (including addiction) than those who have not been confined.<sup>79</sup> Confinement all but precludes health, psychological and social development.<sup>80</sup>

[96] Detention, therefore, is not the best answer to the multiple, complex and traumatic problems experienced by, and caused by, young offenders.

[97] Rather, early intervention and diversionary mechanisms and services should be invested in and utilised to their greatest potential to ensure that children and young people receive the care and support they need to become positive and engaged members of society.<sup>81</sup>

### Step 3: Criminalise welfare issues

It does not matter what lies behind child offending, and it is not relevant if inadequate parental and family care and protection issues are the root cause. The starting point is that a child has offended, and has then created a victim. There must be criminal accountability for law breaking, and consequential punishment.<sup>82</sup>

[98] There is a well-established link between childhood maltreatment and subsequent offending in adolescence.<sup>83</sup>

[99] Children and young people who have been in care are grossly over-represented in the criminal justice system. This phenomenon is known as the “cross-over” of children from care to crime, and characterises the lives of many children and young people that I, and my colleagues, the specialist Children’s Magistrates, see on a daily basis.

[100] One important measure which has been taken in NSW is the Joint Protocol to reduce the level of contact of young people in residential out-of-home care with the criminal justice system.<sup>84</sup>

<sup>77</sup> NSW Bureau of Crime Statistics and Research, “Re-offending Statistics for NSW”, at [www.bocsar.nsw.gov.au/Pages/bocsar\\_pages/Re-offending.aspx](http://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx), accessed 9 April 2018.

<sup>78</sup> E Mulvey, “Highlights from pathways to desistance — a longitudinal study of serious adolescent offenders”, Office of Juvenile Justice and Delinquency Prevention, at [www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf](http://www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf), accessed 9 April 2018.

<sup>79</sup> E Mulvey, “A road map for juvenile justice reform”, The Annie E Casey Foundation, at [www.scribd.com/document/43676341/A-Road-Map-for-Juvenile-Justice-Reform](http://www.scribd.com/document/43676341/A-Road-Map-for-Juvenile-Justice-Reform), accessed 14 May 2018.

<sup>80</sup> M Wald and T Martinez, above n 23.

<sup>81</sup> P Johnstone, above n 19; P Johnstone, “Early intervention, diversion and rehabilitation from the perspective of the Children’s Court of NSW”, paper presented at the 6th annual Juvenile Justice Summit, 5 May 2017, Sydney.

<sup>82</sup> Becroft, above n 12.

<sup>83</sup> J Cashmore, “The link between child maltreatment and adolescent offending”, (2011) 89 *Family Matters* 1, at: <https://aifs.gov.au/publications/family-matters/issue-89/link-between-child-maltreatment-and-adolescent-offending>, accessed 9 April 2018.

<sup>84</sup> NSW Ombudsman, “Joint protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system” at [http://d3n8a8pro7vhmx.cloudfront.net/youthaction/mailings/145/attachments/original/Joint\\_protocol\\_to\\_reduce\\_the\\_contact\\_of\\_young\\_people\\_in\\_residential\\_out-of-home\\_care\\_with\\_-\\_Final.pdf?1490153506](http://d3n8a8pro7vhmx.cloudfront.net/youthaction/mailings/145/attachments/original/Joint_protocol_to_reduce_the_contact_of_young_people_in_residential_out-of-home_care_with_-_Final.pdf?1490153506), accessed 9 April 2018.

[101] The protocol recognises that children and young people exhibit challenging behaviours, particularly when they have experienced trauma, abuse or neglect, and that this behaviour should be managed within the service itself.

[102] Responding to behaviour with criminal charges is not an appropriate response in these circumstances, and essentially ensures a child or young person crosses over from the care jurisdiction to the crime jurisdiction.

[103] I have also been strongly advocating for a “secure welfare” power, or a power to refer a child in the criminal justice system to the care and protection system. Victorian and WA legislation provides for a power to make arrangements for the placement of a child in a secure care facility, which is sometimes necessary in extreme cases where a child or young person is putting themselves or others at risk, and requires intensive care.<sup>85</sup>

[104] Similarly, the ACT has enacted legislative provisions which enable the court to refer a child in the criminal list who is in need of care and protection to the care system.<sup>86</sup>

[105] Such a power could contribute to the successful diversion of a child or young person with complex needs away from the criminal justice system in NSW.

**Step 4: Treat all young offenders as if they were the same.**

**Step 5: Always arrest the child if they offend, especially the first time no matter what the circumstances. Be firm and disrespectful, and always bring them to court.**

[106] The importance of tailored and targeted supports within the community which identify and respond to the individual needs of each child cannot be overstated.

[107] Programs such as Youth on Track and the Family Investment Model allow for a holistic approach to a young person’s criminal behaviour, with the aim of addressing criminogenic risk factors in order to successfully divert a young person away from continuing interactions with the justice system.

[108] Furthermore, given the invariably complex causes of offending in children and young people, flexibility is critical when sentencing young offenders, as it provides Children’s Magistrates with the ability to enforce tailored solutions which can address the underlying causes of a young person’s offending, as well as promote rehabilitation and deliver community-focused outcomes.

[109] I am continuing to advocate for a broader range of flexible sentencing options which could provide opportunities for intensive supervision and casework by Juvenile Justice.

**Step 6: Sideline the child offender in the justice response. Ensure the child is marginalised and does not participate. Prevent any contact between the offender and the victim**

[110] I am particularly supportive of Youth Justice Conferences as a diversionary option in NSW, as they facilitate cooperation between the young person and police, and foster collaboration and input from the individual offender, the victim/s, families and communities.

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<sup>85</sup> *Children and Community Services Act 2004* (WA), s 88C; *Children, Youth and Families Act 2005* (Vic).

<sup>86</sup> *Court Procedures Act 2004* (ACT), s 74K.

[111] A Youth Justice Conference has the capacity to improve trust in the criminal justice system and there is scope within the process to reinforce cultural connections for Aboriginal and Torres Strait Islander young people.

[112] In my view, they produce fruitful results for both the offender and the community.

**Step 7: Always enter a conviction on the child’s record. And make no allowance for youth at sentencing: “adult time for adult crime”**

**Step 8: Convicted young people need a sharp shock; in praise of corrective training, boot camps, and scared straight programmes**

[113] The specialised practices and procedures of the Children’s Court reflect an enlightened judicial understanding of the issues and risks impacting on children and young people, as well as a comprehensive understanding of important legislative principles distinguishing children and young people from adult offenders.

[114] The specialist nature of the Children’s Court also operates as a safeguard to the detrimental exposure of children to the adult court environment and to adult offenders.

[115] I am an advocate for the expansion of the specialist Children’s Court across as much of NSW as might realistically be achieved, to ensure that all children and young people receive the benefit of the specialised treatment from trained professionals and diversionary programs within the Children’s Court jurisdiction, and consistency of opportunity and outcomes.

**Step 9: Segregate young offenders from their families, communities and victims. Wherever possible, aggregate them together in treatment facilities and in prison**

**Step 10: If all else fails, use “what works” for child offenders, but deliver it badly**

[116] The evidence arising from the Royal Commission into the Protection and Detention of Children has highlighted the systemic failures that can arise in the care and protection and the criminal justice system when silos are maintained and networks are broken.

[117] Many of the findings and recommendations explore and challenge the pathway to detention, and have highlighted the need for specialist training, knowledge and experience for all practitioners and stakeholders dealing with children and young people.

[118] It is very encouraging to see an appetite for change to a more therapeutic approach to children who need care, are not attending school or who are committing crimes. It is also pleasing to see that many of the recommendations made by the Royal Commission are already implemented and practiced in NSW.

[119] Examining and challenging the social disadvantage and disempowerment that have defined the lives of generations of families who come before the Children’s Court seems, at times, overwhelming.

[120] However, I continue to be inspired and motivated by the resilience and courage shown by children and young people, and their capacity to change, adapt and thrive, despite the enormous challenges and difficulties they face. I hope you all find a similar sense of encouragement in the important work you undertake.



## Is our youth justice system really broken?

Helen Fatouros, Executive Director, Criminal Law Services, Victoria Legal Aid, Castan Centre for Human Rights Law Conference, 22 July 2016, Monash University, Victoria.

### [5-0170] Introductory comments

According to the headlines, Victoria is in the grip of a “youth crime wave”. If all we relied upon to found our reality was tabloid media, this statement would be accepted as fact. Triggered by the Moomba riots earlier this year, there is now an almost daily focus on youth crime in our popular media. The “Apex gang” has become a regular conversation point at barbecues even if Victoria Police and other experts have disavowed the use of the word “gang”.

The imagery of anti-social teenagers engaging in dangerous behaviour is never far away from a newspaper headline. This is not a new social problem. However, there are some unique and corrosive aspects to the current media coverage that warrant increased scrutiny and challenge both in and out of the courtroom.

The predominant narrative shaping community perceptions is of rioting gangs, mostly of migrant “thugs” brazenly committing terrifying home invasions and car-jackings. The link to ethnicity is particularly divisive and taps into broader fears and anxieties around uncontrolled immigration, terrorism and an increasingly unstable international landscape.

One of the main vices of sensationalised media narratives on complex social issues, such as youth offending, is that they invariably lead to short-term problem solving. They create pressured environments that militate against the making of good policy. In recent years, this kind of media has proven potently successful in influencing politicians of all persuasions — resulting in reactionary justice policies that add unnecessary complexity to judicial and administrative decision-making processes.

In some instances, punitive changes to the law appear to be contributing to increased recidivism, disproportionate rates of imprisonment when one considers population and crime rates, and perverse outcomes that erode rights and entrench disadvantage and inequality.

Too often the focus is on more prisons, harsher sentencing laws, more offences and more police being the solution — at significant cost to the taxpayer and in the face of growing evidence that such law and order approaches do not work. We have, with some notable and recent policy exceptions, lost sight of the bigger picture, namely, how we might prevent offending and reduce re-offending by young people over the long-term.

In order to protect against short-term law and order solutions that will have alarming longer term consequences for young offenders and the broader community, we need to shift our attention away from an oversimplified suggestion that, in response to incidents of serious youth crime, more punishment for all young people is required.

In challenging the sensationalised and unbalanced narrative, we should of course not fail to genuinely acknowledge that there are pockets of increasingly serious offending being committed by a very small number of young offenders. The significant harm to victims and the community should not be overlooked. Although a last resort, strict supervision or detention orders will likely be the most appropriate sentencing option

for some of these more serious young offenders. How we work with young people that commit serious crimes in supervisory and custodial settings, and how we support them when released, should receive far more of our attention, remembering always that a teenager — even one on the cusp of young adulthood — is rarely, if ever, beyond saving.

However, this small number of offenders should not overshadow how we view or reform the whole system. The empirical data shows an overall decline in youth offending over a number of years, where most children are diverted from the criminal justice system.

Taking an evidence-driven approach to solutions and reform requires us to move beyond the individual high-profile case. Whilst each case must be determined fairly and in accordance with the law, we need to look at the system and at society as a whole to understand youth crime in a way that lends itself to long-term strategies which enable early intervention to prevent offending and reduce the rate of re-offending.

We should also look beyond our shores to find creative solutions that have worked in other communities. There are many examples of justice re-investment approaches that seek to re-direct money spent on prisons to community-based initiatives that address the causes of crime. Such initiatives have transformed communities and policing strategies, particularly within ethnically diverse communities previously locked in a cycle of distrust.

Current Government policy settings in youth justice are on the whole moving in the right direction, and they should not be disrupted. Recent announcements around a State-wide youth diversion scheme and the reversal of certain bail laws, will strengthen the system and hopefully reduce the high number of un-sentenced children on remand.

There is much common sense in many of the current sentencing laws applicable to children and young people, and the research and evidence supports the law's focus on rehabilitation. The system is not broken but it can be improved.

Intuitively and from our shared human experience — irrespective of culture or ethnicity — we know that adolescence is marked by the complexity of negotiating identity and belonging, independence, impulsivity, susceptibility to peer influence, empathy, judgment, consequences and responsibility. For the vast majority of young offenders, the role models, familial supports and other safety nets many of us take for granted are simply not present as they negotiate the turbulence of adolescence. Correspondingly, interventions addressing adolescent offending must be designed with these complexities in mind and the age-related risks that mean troubled young people may not fully engage the first time we try to intervene.

More broadly, the Victorian Government's *Roadmap for reform: strong families; safe children*,<sup>87</sup> which arose out of recommendations from the Royal Commission into Family Violence,<sup>88</sup> sets out a broad agenda for early intervention and prevention, and community-focused service integration. There have been many announcements in recent months around community initiatives and pilots designed to start delivering

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<sup>87</sup> Department of Health and Human Services, "Roadmap for reform: strong families; safe children", April 2016, at [www.strongfamiliesafechildren.vic.gov.au/roadmap-for-reform-strong-families-safe-children](http://www.strongfamiliesafechildren.vic.gov.au/roadmap-for-reform-strong-families-safe-children), accessed 13 April 2018.

<sup>88</sup> Royal Commission into Family Violence, Report and recommendations, March 2016 at [www.rcfv.com.au/Report-Recommendations](http://www.rcfv.com.au/Report-Recommendations), accessed 4 May 2018.

on the promise of this overarching framework. A missing link seems to be a focused justice strategy or plan that connects education, children, youth and family systems to the police and court responses to youth crime.

At the Victoria Police Youth Summit, we heard directly from a diverse group of young people. For those working at the coal face with young people, the stories were not surprising. Consistent themes emerged of hopelessness and disconnection. Many young people felt they had no employment prospects. Some spoke of racism that not only blocked their path to finding work, but also had a dehumanising effect that “broke them down”.

Young people at the summit also commented on the negative impact of being bombarded by 24/7 media which labelled them and their families. Much of what the community currently experiences about the extent and nature of offending by young people “remains predominantly based on anecdote and popular mass media imagery”.<sup>89</sup> The primary stories and images currently being sold are unbalanced, inaccurate and as one of the young people at the summit indicated, hurtful.

Inequality at all levels was described by these young people and by those working directly with them. For many young people, particularly ethnically diverse young people, this led to feeling “locked out”. VLA’s young clients have similar stories of exclusion. Many of our clients have experienced trauma and victimisation, they are disconnected from school, are struggling with drug and alcohol addiction and they have much higher rates of mental health problems. Family supports are often absent, and there is overlap with children being in residential care and the child protection system.

Listening to young people, it becomes clear that alongside the policing and court response, we have to work more on understanding the “why” examining the individual and societal factors that are operating to drive certain offending. What happens in the home, classroom and on the street is often far more instructive than what happens in court. We need to create real opportunities and a sense of hope, so we can crowd out seductive criminal pathways which make false promises of status and belonging. That requires close work in the community with young people.

Characterisations of young offenders as “thugs” who are inherently “bad” can lead to life-long stigmatisation, increased re-offending and the further risk of minority suburban youth becoming entrenched in crime well into adulthood. It is an irrefutable fact that children who come from circumstances of disadvantage are heavily over-represented in the youth justice system. There is a role for governments and other agencies to dispel fear and distrust through leadership, research, education and community campaigns that engage young people directly, particularly disadvantaged young people. As such, part of any strategy to address youth crime must tackle the causes of disadvantage.<sup>90</sup>

Policy makers should not be tempted to depart from a well-established welfare and rights-based youth justice framework, supported by decades of accepted research and

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<sup>89</sup> N Papalia, et al, “Changes in the prevalence and nature of violent crime by youth in Victoria, Australia” (2015) 22(2) *Psychiatry, Psychology and Law* 213 at 214.

<sup>90</sup> P Grant, “Youth justice: getting the early years right” (2013) 8 *Insight: Crime and Justice* 15 at 17, at <http://vcoss.org.au/documents/2013/06/Insight.PaulGrant.pdf>, accessed 13 April 2018.

evidence, in favour of a quick-fix punitive approach.<sup>91</sup> Smart community policing approaches in early development should not be disrupted in favour of tougher arrest, bail or sentencing regimes.

Once we get to the courtroom we should be focusing on more integrated or multi-disciplinary approaches that link legal and non-legal services alongside a greater and more intensive use of therapeutic and restorative justice approaches. For example, group and victim focused conferencing and more broadly available therapeutic orders that can be tailored to suit the rehabilitative needs of the young offender.

Our ability to make a real and lasting difference exists in large part because the offender is young. We cannot squander the best time we have to help each young offender when they need it most and when it can make the greatest difference.

Finally, Victoria's *Legal Aid Act 1978* (VLA) requires that the community be provided with improved access to justice and legal remedies. The Act also requires that we look at ways to innovatively reduce the need for legal services in a way that dispels fear and distrust. With the conferral of such great statutory purpose comes great responsibility but also opportunity. In working to dispel that fear and distrust, VLA is committed to working with everyone in the system to execute that duty diligently on behalf of the community, particularly for its youngest and most vulnerable members.

### **Why treat children differently?**

It is well established — internationally and within the Australian sentencing context — that children should be dealt with differently than adult offenders, and that as far as possible, sentencing should promote a child's rehabilitation. There are a number of reasons for this.

### **Characteristics of young offenders**

Adolescence is a formative period of development. Research suggests that adolescent brains do not fully mature until well into the early twenties.<sup>92</sup> This immaturity may undermine an adolescent's ability to self-regulate and refrain from criminal behaviour.<sup>93</sup> Affiliation with offending peers is also a particularly important risk factor for criminal behaviour in young people.<sup>94</sup> Substantial evidence shows that “teens are

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<sup>91</sup> B Sellers, “Community-based recovery and youth justice” (2015) 42 (1) *Criminal Justice and Behavior* 58 at 59.

<sup>92</sup> Sentencing Advisory Council, *Sentencing children and young people in Victoria*, April 2012, p 11, at [www.sentencingcouncil.vic.gov.au/publications/](http://www.sentencingcouncil.vic.gov.au/publications/), accessed 13 April 2018 referring to E Sowell et al, “Mapping continued brain growth and gray matter density reduction in dorsal frontal cortex: inverse relationships during postadolescent brain maturation” (2001) 21 *Journal of Neuroscience* 8697 at 8819; E Goldberg, *The executive brain: frontal lobes and the civilized mind*, New York Oxford University Press, 2001; S Blakemore and S Choudhury, “Development of the adolescent brain: implications for executive function and social cognition” (2006) 47(3) *Journal of Child Psychology and Psychiatry* 296.

<sup>93</sup> E Scott and L Steinberg, *Rethinking Juvenile Justice*, Harvard University Press, 2008.

<sup>94</sup> A Petitclerc et al, “Effects of juvenile court exposure on crime in young adulthood” (2013) 54 *Journal of Child Psychology and Psychiatry* 291.

more oriented toward peers and responsive to peer influence than adults”,<sup>95</sup> and a desire for peer approval and fear of rejection means that young people are “far more likely than adults to commit crimes in groups”.<sup>96</sup>

Compared with adults, young people are more likely to come into contact with the criminal justice system due to their inexperience as offenders, their propensity to offend in groups,<sup>97</sup> opportunistic and unplanned offending, offending in visible public spaces closer to home<sup>98</sup> and racial profiling.<sup>99</sup> Despite this, the number of young offenders in Victoria aged 10 to 19 years has been declining.<sup>100</sup>

It has also been shown that the vast majority of young people who commit anti-social acts desist from those activities as they mature, and that only a small percentage become “life course persistent offenders”.<sup>101</sup> This is borne out by the “age-crime curve”, which has been used by researchers to demonstrate that criminal activity increases after pre-adolescence, peaks around age 17, and then declines, with disengagement in the early twenties.<sup>102</sup>

Research has identified eight major, well-validated risk factors for re-offending amongst both adults and adolescents. These include a history of anti-social behaviour, association with anti-social peers, anti-social cognition and anti-social personality pattern, level of education or engagement with other learning opportunities, unemployment, substance abuse, and relationship problems.<sup>103</sup> Young offenders have also been found to have a higher prevalence of mental illness and intellectual disability than young people in the general population.<sup>104</sup>

Other commonly recognised social risk factors include Indigenous status, ethnicity, low socioeconomic status, homelessness or inadequate housing, and/or a history of

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<sup>95</sup> E Cauffman and L Steinberg, “Emerging findings from research on adolescent development and juvenile justice” (2012) 7(4) *Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice* 428 at 434.

<sup>96</sup> *ibid* at 435.

<sup>97</sup> Sentencing Advisory Council, n 6, p 8.

<sup>98</sup> *ibid*, pp 11–12; K Richards, “Blurred lines: reconsidering the concept of ‘diversion’ in youth justice systems in Australia” (2014) 14(2) *Youth Justice* 122 at 128.

<sup>99</sup> T Hopkins, *Monitoring Racial Profiling — introducing a scheme to prevent unlawful stops and searches by Victoria Police*, Flemington & Kensington Community Legal Centre, 2016, at [www.policeaccountability.org.au/wp-content/uploads/2017/08/monitoringRP\\_report\\_softcopy\\_FINAL\\_22082017.pdf](http://www.policeaccountability.org.au/wp-content/uploads/2017/08/monitoringRP_report_softcopy_FINAL_22082017.pdf), accessed 13 April 2018.

<sup>100</sup> The number of unique offenders decreased from 73,443 in 2006–10 to 62,437 in 2011–15: M Millsted and P Sutherland, “Downward trend in the number of young offenders, 2006 to 2015”, *In Fact*, Crime Statistics Agency, 2016 at [www.crimestatistics.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2016/05/b7/c7dfd6ae9/201603010\\_final\\_in\\_fact1.pdf](http://www.crimestatistics.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2016/05/b7/c7dfd6ae9/201603010_final_in_fact1.pdf), accessed 13 April 2018. Victoria experienced the largest decrease in youth offenders in Australia between 2013–14 and 2014–15, with a decrease of 11%, which accounted for 83% of the overall decline in the Victoria offender population: Australian Bureau of Statistics (ABS), *Recorded Crime — Offenders, 2014–15 — Victoria*, 4519.0 at [www.abs.gov.au/ausstats](http://www.abs.gov.au/ausstats), accessed 13 April 2018.

<sup>101</sup> C Chu and J Ogloff, “Sentencing of adolescent offenders in Victoria: a review of empirical evidence and practice” (2012) 19(3) *Psychiatry, Psychology and Law* 325 at 331 referring to D Farrington, “Developmental and life-course criminology: key theoretical and empirical issues” (2006) 41 *Criminology* 221; T Moffitt, “Adolescence-limited and life-course-persistent antisocial behavior: a developmental taxonomy” (1993) 100 *Psychological Review* 674.

<sup>102</sup> Cauffman and Steinberg, n 9 at 325, 331.

<sup>103</sup> A Fougere et al, “A study of the multiple and complex needs of Australian young adult offenders” (2013) 48 *Australian Psychologist* 188 at 188.

<sup>104</sup> *ibid* at 188–189.

involvement in the child protection system.<sup>105</sup> Young people aged between 10–17 years from areas of the lowest socioeconomic status are around seven times more likely to be under supervision as those from areas of highest socioeconomic status.<sup>106</sup>

These risk factors are also borne out in recent research conducted by Victoria Legal Aid (VLA). High contact users (the top 1% of users) of legal aid services in Victoria have been found to have had early contact with legal aid services prior to 18 years and had criminally offended between 10–17 years. Frequent users were also identified as having a psychiatric issue, acquired brain injury or a cognitive disability, and/or identified as an Aboriginal or Torres Strait Islander. They were also more likely to have received legal aid services for a child protection or family violence issue before the age of 18.<sup>107</sup>

Designing community, rehabilitative and restorative programs with these risks in mind is critically important to reducing the risk of re-offending. We should also work closely within and across communities, including with young people, to examine how those factors interact, and develop evidence-based strategies to prevent offending and engage the more serious young offenders seduced by the dynamics of negative peers and impulsivity powered by social media.<sup>108</sup>

### A “human rights” context

a rights based and inclusive approach can help to enable the self-confidence, resilience and capacities of marginal youth in efforts to counter social exclusion.<sup>109</sup>

The importance of taking a different approach to youth crime than to offending committed by adults is well recognised in international human rights jurisprudence.

The enunciation of children’s rights, like all human rights, “emerged as a tool to regulate the relationship between the powerful and the powerless, between the governed and the governing — to respond to the perceived failings and excesses of particular approaches to governance and power distribution within society”.<sup>110</sup>

Children’s rights are specifically and comprehensively dealt with by the United Nations *Convention on the Rights of the Child* (the Convention).<sup>111</sup> Drawing from

<sup>105</sup> Sentencing Advisory Council, n 6, at 11.

<sup>106</sup> Australian Institute of Health and Welfare, “Youth justice in Australia 2013–14” (2015) 127 *Bulletin* 1 at 10 at [www.aihw.gov.au/getmedia/9a0f579a-71c1-44b2-be20-3f45626ea333/18612.pdf.aspx?inline=true](http://www.aihw.gov.au/getmedia/9a0f579a-71c1-44b2-be20-3f45626ea333/18612.pdf.aspx?inline=true), accessed 16 April 2018.

<sup>107</sup> Victoria Legal Aid, “Victoria Legal Aid client profiles — high-contact users of legal aid services” at [www.legalaid.vic.gov.au/about-us/research-and-analysis/client-profiles/client-profiles-analysis-of-2003-13-data](http://www.legalaid.vic.gov.au/about-us/research-and-analysis/client-profiles/client-profiles-analysis-of-2003-13-data), accessed 16 April 2018.

<sup>108</sup> Children and Youth Area Partnerships (Area Partnerships) were established in Victoria in 2013 to create formal links between local community sector organisations and broader State-wide social services. Area Partnerships are an existing collaborative framework, which could be utilised for examining these risk factors and developing effective strategies to prevent offending at the local level.

<sup>109</sup> M Wearing, “Strengthening youth citizenship and social inclusion practice — the Australian case: towards rights based and inclusive practice in services for marginalized young people” (2011) 33 *Children and Youth Services Review* 534 at 534.

<sup>110</sup> J Tobin, “Justifying children’s rights” (2013) 21 *The International Journal of Children’s Rights* 395 at 410.

<sup>111</sup> United Nations General Assembly, *Convention on the rights of the child*, UN Doc A/RES/44/25, 1989, was ratified in Australia in December 1990 and became binding in 1991.

the principles in “The Beijing Rules”,<sup>112</sup> the Convention sets out a number of civil, cultural, economic, political and social rights relating to people under 18 years of age and the manner in which those rights are to be protected.<sup>113</sup>

The preamble to the Convention acknowledges that children, by reason of their physical and mental immaturity, and their “special vulnerability”, need special safeguards and care, including appropriate legal protection.<sup>114</sup> Several principles that are relevant to sentencing young offenders including:

- the best interests of the child as a primary consideration in decision-making;<sup>115</sup>
- where appropriate, diversion from judicial proceedings;<sup>116</sup>
- proportionate sentencing;<sup>117</sup>
- an emphasis on rehabilitation;<sup>118</sup> and
- the use of detention as a last resort and for minimal time.<sup>119</sup>

Under the Convention, children accused of offending behaviour are also entitled to various guarantees,<sup>120</sup> including the opportunity to be heard and involved in proceedings.<sup>121</sup>

Article 37(b) of the Convention stipulates that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time.

The Convention also supports the establishment of youth diversion programs. According to Article 40.3(b), parties to the Convention should, whenever appropriate and desirable, promote the establishment of laws and measures for dealing with children who have been accused of committing a crime without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

Many of the principles enunciated in the Convention are also reflected in other international instruments, including the *United Nations rules for the protection of juveniles deprived of their liberty*<sup>122</sup> and the “The Beijing Rules”.<sup>123</sup>

Although these instruments are not directly incorporated into Australian law, many of the principles espoused in the *Children, Youth and Families Act 2005 (Vic) (CYFA)*

<sup>112</sup> United Nations General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, UN Doc A/RES/40/33, 1985.

<sup>113</sup> Sentencing Advisory Council, n 6, at 61.

<sup>114</sup> Tobin, n 24, at 410.

<sup>115</sup> Art 3.1. See also “The Beijing Rules”, r 17.1(d).

<sup>116</sup> Art 40.3(b).

<sup>117</sup> Art 40.4.

<sup>118</sup> Art 40.1.

<sup>119</sup> Art 37(b).

<sup>120</sup> Art 40.

<sup>121</sup> Art 12. See also “The Beijing Rules”, Article 14.2 (proceedings to be conducted in an atmosphere conducive to participation).

<sup>122</sup> United Nations General Assembly, *United Nations rules for the protection of juveniles deprived of their liberty*, UN Doc A/RES/45/113, 1990.

<sup>123</sup> T Hutchinson, “Making the fun stop: youth justice reform in Queensland” (2014) 19(2) *Deakin Law Review* 243 at 260.

are “consistent with the human rights covenants”.<sup>124</sup> For example, under the CYFA, detention may not be imposed if another sanction is appropriate.<sup>125</sup> International children’s rights are also reflected in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). For example, under the Charter a child has a right to be tried without unreasonable delay<sup>126</sup> and the right to a procedure that takes into account the age of a child and the desirability of promoting the child’s rehabilitation.<sup>127</sup>

Victorian courts have been prepared to take rights enunciated in international instruments into account in considering principles applicable to child offenders. In *Director of Public Prosecutions v TY (No 3)*,<sup>128</sup> Bell J held that the Convention was significant in that it supplied a further basis for, and reinforced “the existing principle of giving primary emphasis to youth and rehabilitation as a mitigating factor when sentencing children”.<sup>129</sup> However, Bell J was careful to point out that other considerations should be taken into account where the crime is very serious, and the Convention can “cut both ways” where the victim is a child.<sup>130</sup>

A number of other international frameworks relating to youth justice stress the importance of diversion for young offenders. For example, the *United Nations Guidelines for the Prevention of Juvenile Delinquency* (“The Riyadh Guidelines”) recommend that law enforcement and other relevant personnel should be familiar with and use, to the maximum extent possible, programs and referral possibilities for the diversion of young people from the justice system.<sup>131</sup>

Human rights and social inclusion agendas are an important way to “underpin the urgency for services to develop explicit frameworks on inclusive practice for marginal and excluded young people”,<sup>132</sup> including Indigenous youth.

### **Protecting the Children’s Court jurisdiction in Victoria**

One of the risks that may arise from a continued focus on the punishment of young offenders is the erosion of the “distinctive”<sup>133</sup> criminal jurisdiction of the Children’s Court. For example, changes that result in fewer young offenders being dealt with in the Children’s Court, or punitive principles of sentencing only appropriate in the adult jurisdiction, being allowed to creep into the court’s jurisdiction.

As former President of the Children’s Court, Judge Grant, has stated:

We have a Children’s Court because we accept, as a community, that young offenders should be dealt with differently to adults.<sup>134</sup>

The Children’s Court of Victoria was established as an independent court in 1906. This followed an increasing recognition in the second half of the nineteenth century of the

<sup>124</sup> *Herald and Weekly Times Pty Ltd v AB* [2008] VChC 3 at [20] per Judge Grant.

<sup>125</sup> CYFA s 361.

<sup>126</sup> Charter s 25(2)(c).

<sup>127</sup> Charter s 25(3).

<sup>128</sup> *Director of Public Prosecutions v TY (No 3)* (2007) 18 VR 241.

<sup>129</sup> *ibid* at [51]. Refer also to Sentencing Advisory Council 2012, n 6, at 63.

<sup>130</sup> *ibid* at [48]. Refer also to Sentencing Advisory Council 2012, n 6, at 63.

<sup>131</sup> Art 58, UN Doc A/RES/45/112 (14 December 1990) in Richards, n 12, at 7.

<sup>132</sup> Wearing, n 23, at 540.

<sup>133</sup> *Webster (A Pseudonym) v The Queen* (2016) 258 A Crim R 301 at [7] per Maxwell P and Redlich JA.

<sup>134</sup> *R v P* [2007] VChC 3 at [20] per Judge Grant.

need for specialised responses for dealing with children, and the establishment in 1880 of the first Australian Children’s Court in South Australia. Victoria’s Children’s Court is governed by the CYFA.

The Victorian Children’s Court is granted jurisdiction to hear and determine most matters relating to children. The Children’s Court has jurisdiction over all summary matters and most indictable matters. Seven death-related offences are explicitly excluded from the Children’s Court jurisdiction.<sup>135</sup> “Child” is defined in the CYFA (in the context of criminal offending) as a person who at the time of the alleged commission of the offence was under the age of 18 years but of or above the age of 10 years. It does not include any person who is of or above the age of 19 years when a proceeding for the offence is commenced in the court.<sup>136</sup>

It is conclusively presumed that children under the statutory threshold of 10 years of age are unable to commit a criminal law offence<sup>137</sup> as they are unable to form the requisite criminal intent. While children above the age of 10 are capable of being charged, there is a rebuttable presumption at common law in Victoria that a child aged under 14 is “incapable of crime” (*doli incapax*).

It has long been recognised that prescribing a biological age as the threshold for criminal responsibility is arbitrary in light of the significant differences in capacity among children and the fact that children mature at inconsistent rates.<sup>138</sup>

Sentencing in the Children’s Court is different from sentencing in courts of adult jurisdiction. The *Sentencing Act* 1991 (Vic) instructs courts of adult jurisdiction that the purposes for which a sentence may be imposed are punishment, deterrence, rehabilitation, denunciation and protection of the community. In contrast, the principles set out in the CYFA are largely focused on the needs of the offender.

For example, in determining which sentence to impose on a child, s 362 of the CYFA requires the court to consider factors, including the need to strengthen and preserve the relationship between the child and the child’s family, the desirability of allowing the child to live at home and continue with education, training or employment, the need to minimise stigma to the child and the suitability of the sentence to the child.

It is consistent with well-established legal principle that rehabilitation is the overarching or core principle in the Children’s Court. According to former President of the Children’s Court, Judge Grant, in *Herald and Weekly Times Pty Ltd v AB*:

It has been said often enough that one of the great aims of the criminal law is the rehabilitation of the young offender. That is generally the focus of orders in the Children’s Court.<sup>139</sup>

Writing separately on youth justice in 2013, Judge Grant referred to a 2007 Victoria Supreme Court case in which the court gave two reasons for describing youth as a mitigating consideration of the first importance — acknowledgement that young

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<sup>135</sup> CYFA s 516(1)(b): Offences the court considers unsuitable to be determined summarily given “exceptional circumstances” are also excluded. Refer also s 356(3)(b).

<sup>136</sup> CYFA s 3(1).

<sup>137</sup> CYFA s 344.

<sup>138</sup> Sentencing Advisory Council, n 6, 40.

<sup>139</sup> [2008] VChC 3 at [24] per Judge Grant. Refer also Sentencing Advisory Council, n 6, at 52.

people lack the degree of insight, judgment and self-control possessed by an adult, and recognition that the community has a very strong interest in the rehabilitation of young offenders.<sup>140</sup>

The Victorian Court of Appeal most recently considered the jurisdiction of the Children’s Court in *Webster (A Pseudonym) v The Queen*.<sup>141</sup> Maxwell P and Redlich JA stated as follows:

First, the statutory framework for juvenile justice compels the court sentencing a young offender (almost always the Children’s Court) to adopt the offender-centred (or “welfare”) approach, rather than the “justice” or “punishment” approach. Secondly, and just as importantly, this strong legislative policy is well supported by the extensive research into adolescent development conducted over the past 30 years.<sup>142</sup>

Rehabilitation of the youth offender under the welfare approach recognises the community’s long-term interests in the possibility for positive behavioural change.<sup>143</sup>

In *Webster*, the Victorian Court of Appeal drew attention to research in relation to the process of development and maturity of young people, which it saw as providing a unique opportunity for rehabilitation and therefore for minimising the risk of re-offending.<sup>144</sup> The court cited the earlier case of *CNK v The Queen*<sup>145</sup> for drawing attention to research, which had “highlighted the potential for the immature brain to respond to punitive punishments in such a way as to make recidivism more rather than less likely”.<sup>146</sup>

In *CNK*, the Victorian Court of Appeal determined that, on a proper construction of s 362(1) of the CYFA, general deterrence was excluded from consideration in the sentencing of children.<sup>147</sup> Although this was cited with approval by the court in *Webster*, it was recognised that there would still be offenders and offending for which the emphasis on rehabilitating the offender is qualified, in appropriate cases, by the need to protect the community and ensure accountability and specific deterrence of the offender.<sup>148</sup>

This reflects s 362(1)(f) and (g) of the CYFA, which recognise the need to ensure that children are required to take responsibility for their actions, where this is appropriate, and the need to protect the community or any person from the violent or other wrongful behaviour of the child.

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<sup>140</sup> P Grant, n 4, at 17.

<sup>141</sup> (2016) 258 A Crim R 301.

<sup>142</sup> *ibid* at [28] per Maxwell P and Redlich JA. Reference was made to K Richards, “Trends in juvenile detention in Australia” (2011) 416 *Trends & Issues in Crime and Criminal Justice* 1 at 6 and Chu, Ogloff, n 15.

<sup>143</sup> Sentencing Advisory Council, *Changes to sentencing practice: young adult offenders — report*, 2015 at [1.10] at [www.sentencingcouncil.vic.gov.au/publications/](http://www.sentencingcouncil.vic.gov.au/publications/), accessed 16 April 2018.

<sup>144</sup> (2016) 258 A Crim R 301 at [8] per Maxwell P and Redlich JA.

<sup>145</sup> (2011) 212 A Crim R 173.

<sup>146</sup> *Webster (A Pseudonym) v The Queen* (2016) 258 A Crim R 301 at [28] per Maxwell P and Redlich JA quoting *CNK v The Queen* (2011) 212 A Crim R 173 at [77]. In *CNK*, Maxwell P, Harper JA and Lasry AJA cited L Steinberg, “Adolescent Development and Juvenile Justice” (2009) 47 *Annual Review of Clinical Psychology* 65–68.

<sup>147</sup> *CNK*, *ibid* at [4]–[16] referred to in *Webster*, *ibid* at [67]

<sup>148</sup> In *Webster* at [78] Maxwell P and Redlich JA recognised that there would still be offenders and offending which justified a sentence of detention.

Often, the need to increase “public confidence” is used as a justification for pursuing more punitive sentencing approaches. However, a perceived lack of confidence cannot be sufficient; there must be actual and informed lack of confidence. The evidence to date suggests that, when properly informed, public views of appropriate sentencing outcomes are roughly consistent with the outcomes imposed.<sup>149</sup>

In the very recent case of *Herald and Weekly Times Pty Ltd v DM*,<sup>150</sup> a media application was made to the President of the Children’s Court for permission to publish pictures and video recordings of children who were involved in proceedings in the Criminal Division of the court. One of the children was yet to be sentenced. The President examined s 534 of the CYFA, which restricts the publication of a report of proceedings, or a picture of a child, where it contains any particulars likely to lead to the identification of a child in that proceeding, where permission from the President has not first been obtained.

Judge Chambers considered this application “in the context of the harm sought to be ameliorated by s 534(1) of the Act”, and found that the public interest in the publication of details and images relating to the offending did not override the competing interest in avoiding stigma to the child, protecting their privacy, and facilitating the child’s rehabilitation to reduce the risk of further offending and promote community safety.<sup>151</sup>

In so doing, her Honour reinforced the purpose of this provision, being to protect against stigmatisation of the child, promote rehabilitation, and enforce the fundamental rights of the child (as expressed in the Convention) to privacy at all stages of proceedings, which were held to have outweighed the public interest in publication.

### **Is the system broken?**

By and large, the court and sentencing processes, as they apply to young people, operate effectively in Victoria. The laws supporting sentencing are drawn from considered policy and human rights discourses, backed by research and evidence.

The courts have appropriate sentencing powers to deal with more serious offending by young people. Judicial officials sentence young people to a variety of dispositions on a daily basis, often with agreement between police and the defendant’s lawyer that the young offender’s rehabilitation is a primary objective of the sentencing process for most offences. Appeals are not being brought by police or prosecutors in any great numbers.

Despite the headlines, the number of young offenders in Victoria aged between 10–19 years has declined over a ten-year period.<sup>152</sup> Similar trends have been observed

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<sup>149</sup> Sentencing Advisory Council, *Sentencing Guidance in Victoria Report*, June 2016, p 64 at [www.sentencingcouncil.vic.gov.au/publications/](http://www.sentencingcouncil.vic.gov.au/publications/), accessed 16 April 2018.

<sup>150</sup> [2016] VChC 3.

<sup>151</sup> *ibid*, [21], [23]–[24].

<sup>152</sup> There were 73,443 unique offenders aged 10–19 years between the years 2006–10, compared with 62,437 between the years 2011–15. The decline was largely in the 10–14 age group: Millstead, n 14. Between 2013–14 and 2014–15, youth offenders decreased by 1,801 persons or 11% to 15,222 youth offenders in Victoria. According to the ABS, this was the largest decrease in youth offenders across the States and territories and accounted for 83% of the overall decline in the Victorian offender population: ABS, 4519.0, n 14.

in NSW, and internationally in the United States and the United Kingdom.<sup>153</sup> Serious criminal offending is relatively infrequent across the general youth population, with most offending of a relatively minor nature.<sup>154</sup>

This is not to ignore the small proportion of youth who are responsible for a disproportionate number of crimes, with 3.8% of high-frequency offenders aged 10–24 years, who were recorded for 11 or more incidents, responsible for 28.9% of all reported incidents for that cohort in 2015–16.<sup>155</sup> The average number of charges per case sentenced in the Children’s Court has also increased between 2013–14 and 2014–15, indicating “that a smaller number of offenders are being sentenced for more offences in the Children’s Court”.<sup>156</sup>

So, in answer to the question is our youth justice system broken — the response is a resounding no. However, whilst the system is not broken it is far from perfect. It requires continuous improvement to meet the challenges of changing and dynamic community settings, and service needs.<sup>157</sup>

## Some key areas for improvement

### Current court and service settings

Firstly, we must shift our criminal justice system away from one that is reactive toward one that proactively facilitates more effective and early intervention in tandem with legal and non-legal services.

We can do more to maximise the court event in a way that further incorporates targeted therapeutic, restorative and multi-disciplinary approaches. Victorian Children’s Court Magistrates who were interviewed in a 2010 study supported the notion of the court “as a therapeutic, jurisprudence-informed, problem-solving court”.<sup>158</sup> However, more can be accomplished with the expansion and greater resourcing of multi-disciplinary and restorative approaches consistently across the State. For example, the Melbourne-based Education Justice Initiative has demonstrated positive results and could be resourced far more intensively.<sup>159</sup>

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<sup>153</sup> Millsteed *ibid.*

<sup>154</sup> N Boni, “Youth and serious crime: directions for Australasian researchers into the new millennium”, paper presented at the Children and Crime: Victims and Offenders Conference, Australian Institute of Criminology, 17–18 June 1999, Brisbane, p 4.

<sup>155</sup> 1,685 of 44,735 unique offenders aged 10–24 accounted for 32,592 of 112,770 recorded incidents in 2015–16: M Millsteed and P Sutherland, “How has youth crime in Victoria changed over the past 10 years?”, *In Fact*, Crime Statistics Agency, Number 3, at [www.crimestatistics.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2016/07/5f/06b914686/20160706\\_in\\_fact3.pdf](http://www.crimestatistics.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2016/07/5f/06b914686/20160706_in_fact3.pdf), accessed 23 April 2018.

<sup>156</sup> This is even after accounting for the new bail-related offences. According to the Sentencing Advisory Council, the average number of cases “has increased from a consistent average of around 4.5 charges per case for the years 2010–2013, to an average of 5.2 charges per case in 2014 and then 6.4 charges per case in 2015”: Sentencing Advisory Council, *Sentencing Children in Victoria: Data update report*, July 2016, pp xi, 13–14, at [www.sentencingcouncil.vic.gov.au/publications/](http://www.sentencingcouncil.vic.gov.au/publications/), accessed 16 April 2018.

<sup>157</sup> Refer also to Grant, n 4, at 17.

<sup>158</sup> A Borowski and R Sheehan, “Magistrates’ perspectives on the Criminal Division of the Children’s Court of Victoria” (2013) 66 *Australian Social Work* 375 at 387–8.

<sup>159</sup> According to the Youth Affairs Council of Victoria (YACVic), an initial evaluation of the Initiative found that “school enrolments rose from 51% to 75% and school attendance rose from 9% to 54%”: YACVic, “Out of sight, out of mind? The exclusion of students from Victorian schools”, 2016, p 9 at

Another enduring challenge is the patchwork of youth bail, training, alcohol, drug and mental health support services and programs. Significant “postcode injustices” are currently experienced by many young people, particularly in regional Victoria. Often beneficial outcomes for young people are reliant on the relationships fostered by hard working professionals in specific areas. The recent announcements around targeted funding of intensive bail and other support programs may address this issue to an extent, but there remain significant gaps, and State-wide access to quality services has yet to be achieved.

Other areas that may benefit from reform include an examination around whether the age of responsibility should be lifted and spent convictions. Importantly, vulnerable children in residential care often find themselves subject to criminal charges for behaviour that would ordinarily not attract the attention of police outside of the residential setting. “Over-policing” children in State-care creates a vicious and unfair cycle.

Greater focus also needs to be placed on more effectively facilitating critical transition points, for example when a child leaves State care or when a child is released from custody. Ensuring a young person is given every opportunity at success often requires links to many supports. Post-sentence, such efforts will fail if the young person is not supported intensively through the availability of real opportunities to participate as a valued member of society through education, employment and inclusion in community life, not as an outsider unable to ever move beyond their conviction.<sup>160</sup>

Our reform and investment focus in youth justice should therefore be more heavily weighted in favour of supporting family, health, education, community development and ultimately greater socioeconomic equality — for it is primarily in the interplay between these contexts that most youth crime has its origins.

### **The importance of early intervention**

International research shows that early intervention is critical to preventing youth offending.<sup>161</sup> Escalating a matter through the court system may place young people on a more criminal path than the one they might follow if released, cautioned or diverted.<sup>162</sup>

Young people who are developing their identities are particularly affected by stigmatisation that can result from others knowing about their offending. This can subsequently cause problems obtaining employment and exclusion from conventional social networks, and place the young person at risk of further re-offending.<sup>163</sup>

Retaining or re-constructing connections with home, family, education and employment at an early stage assists a young person to develop socially, educationally

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<http://yacvic.org.au>, accessed 16 April 2018. YACVic referred to Victoria University, “Education offers hope to young offenders”, 14 December 2015 at [www.vu.edu.au/news-events/news/education-offers-hope-to-young-offenders](http://www.vu.edu.au/news-events/news/education-offers-hope-to-young-offenders), accessed 16 April 2018.

<sup>160</sup> According to YACVic, “young people who do not obtain a Year 12 qualification (or a Year 10 qualification) may find themselves more marginalized than ever”: YACVic, *ibid*, p 5.

<sup>161</sup> Boni, n 68, at p 8.

<sup>162</sup> Petitclerc, n 8.

<sup>163</sup> N Ascani, “Labeling theory and the effects of sanctioning on delinquent peer association: a new approach to sentencing juveniles” (2012) *Perspectives* 80 at <https://cola.unh.edu/sociology/perspectives/perspectives-spring-2012/labeling-theory-and-effects-sanctioning-delinquent>, accessed 23 April 2018.

and productively without the label of “criminal” flowing from conviction for a criminal offence. As youth unemployment rates in Victoria are approximately twice that of the general population, it is important that attempts by young people to obtain employment are not thwarted by the stigma attached to a criminal conviction.<sup>164</sup>

It is important to help people as soon as they need it, rather than when their lives have reached a crisis point. The Royal Commission into Family Violence stated that the “existing focus on crisis response and justice system mechanisms must be matched by a similar focus on, and investment in, prevention, early intervention and recovery”.<sup>165</sup>

One of VLA’s strategic directions for the next two years is the investment in timely intervention, especially for children and young people. Providing timely intervention works for all clients and particularly benefits vulnerable groups, such as those experiencing homelessness or family violence, young people living in out-of-home care, people with a disability or mental illness and people from Indigenous or culturally and linguistically diverse communities.

However, it is especially beneficial for children. We want to see fewer children in the justice system because we know that in the long term that will lead to fewer adult offenders and ultimately a safer community.

Children who are born into disadvantage or who experience neglect have fewer opportunities and greater life challenges. Many frequent users of legal aid services first come to us between the ages of 10–17 years. By investing in legal services for vulnerable children and young people we aim to help them achieve safety and stability, so they can lead productive lives and minimise their risk of becoming future legal aid clients.

The Legal Australia Wide Survey confirmed the close and mutually reinforcing relationship between legal problems and social exclusion and other life problems. It also confirmed that non-legal professionals like doctors and social workers are routinely advised at an earlier stage than lawyers of people’s legal problems.

VLA considers that better integration of legal services with the broader non-legal service sector, and with organisations that routinely come into contact with disadvantaged individuals, would:

- encourage and make it easier for disadvantaged individuals to obtain the help they need to resolve their problems at an early stage;
- increase the likelihood of an individualised response to their circumstances and the likelihood of meaningful and enduring positive results; and
- promote broad dissemination of legal information to a diverse range of communities, thereby expanding the reach of legal assistance.

Examples of recent positive announcements include the “Navigator” pilot, which will support students with low attendance at school to re-engage,<sup>166</sup> and further funding

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<sup>164</sup> YACVic, n 73, at n 5 referring to Australian Bureau of Statistics (ABS), “Labour Force”, 6202.0, December 2015, pp 5, 13, 25.

<sup>165</sup> Royal Commission into Family Violence, *Summary and recommendations*, No 132, 2016, Victorian Government Printer, p 11.

<sup>166</sup> Department of Education and Training, “Fact sheet: navigator”, *The Education State*, 2017, at [www.education.vic.gov.au/Documents/about/educationstate/education-state-initiatives-fact-sheet.pdf](http://www.education.vic.gov.au/Documents/about/educationstate/education-state-initiatives-fact-sheet.pdf), accessed 16 April 2018.

for the School Focused Youth Service to support 10–18 year olds who are showing signs of disengagement.<sup>167</sup> However, a whole of sector approach would see a clear link between these initiatives and the justice system’s response to youth offending.

The integration of legal assistance with social and community services requires establishing and maintaining strong links with the target communities and their support organisations, the location of services in places frequented by the target group, effective marketing of services, appropriate staffing and resources, effective referral systems with support organisations, and appropriate quality, monitoring and evaluation.

### **The absence of a legislated State-wide diversion scheme**

Intervening early to divert young people away from the criminal justice system should continue to be a key policy direction. The evidence suggests that steps need to be taken at an earlier stage to avoid intensive engagement at a later stage in the criminal justice system when efforts at rehabilitation become more complex and less likely to succeed.

Victoria is often acknowledged as a leader in its approach to youth justice due to significantly lower rates of young people on remand or serving custodial sentences.<sup>168</sup> Despite this, we lack a diversion scheme, which is flexible, appropriately funded and consistently accessible to all young people across the State. Paradoxically, an adult diversion scheme has been in place for many years.

Along with others in the sector, VLA has long advocated for a legislated State-wide youth diversion scheme where diversion as an outcome is court determined. The State Government’s recent announcement of \$5.6m in funding for a State-wide diversion scheme will be a vital addition long overdue in Victoria. However, legal services, which play an essential role in supporting and implementing existing ad-hoc and pilot diversionary outcomes for young people, were omitted from this recent funding announcement. The expertise of specialist legal practitioners is critical to any scheme’s successful implementation and VLA’s in-house youth crime lawyers work alongside private practitioners on a daily basis in the Children’s Court. The overwhelming majority of young offenders are legally aided. Youth lawyers play a vital role in early intervention and the brokering of outcomes that maximise the effectiveness of court therapeutic and restorative processes.

Over the last 12 months a successful pilot diversion program has been running across regional and metropolitan locations in Victoria. More than 90% of over 270 participants have successfully completed the program, with positive impacts demonstrated in engagement with education and specialist services.<sup>169</sup>

### **More effectively dealing with the over-representation of Indigenous youth in our criminal justice system**

The Royal Commission into Aboriginal Deaths in Custody “found that Indigenous people, particularly Indigenous youth, were significantly over-represented at all

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<sup>167</sup> YACVic, n 73, p 8.

<sup>168</sup> L Jordan and J Farrell, “Juvenile justice diversion in Victoria: a blank canvas?” (2013) 24(3) *Current Issues in Criminal Justice* 419 at 424

<sup>169</sup> Jesuit Social Services, “Youth diversion helps young people avoid lifetime involvement with the justice system”, 2016 at <http://jss.org.au/youth-diversion-helps-young-people-avoid-lifetime-involvement-with-the-justice-system/>, accessed 16 April 2018.

stages of the criminal justice process, largely because of the social, economic and cultural disadvantages faced by Indigenous people in Australian society”.<sup>170</sup> However, criminal justice processes, including court, sentencing and policing procedures, were also influential.<sup>171</sup>

Some 25 years after these recommendations were handed down, Indigenous children and youth remain grossly overrepresented in the criminal justice and child protection system. They are around 15 times as likely as non-Indigenous youth to be under supervision on an average day.<sup>172</sup> This should be one of the most urgent justice priorities across the country. We are failing indigenous children so profoundly that we must recommit to understanding the challenges they face in accessing justice at all points across the system so we can come up with culturally appropriate solutions in true partnership with Indigenous leaders and service providers.<sup>173</sup>

The new State-wide diversion scheme should be designed to include additional safeguards and pathways through which Indigenous children and young people can be linked in with the right services and supports as early as possible. Integrating youth justice responses to the *Roadmap for reform: strong families; safe children*<sup>174</sup> and the *Youth policy: building stronger youth engagement in Victoria*<sup>175</sup> holds great long term promise for a holistic approach.

### **Policing, restorative justice and justice reinvestment**

Youth crime must be viewed within the context of the wider community. The process of development toward maturity “is one of reciprocal interaction” between the individual and his or her social context.<sup>176</sup> Community collaboration, the modification of local environments and the creation of opportunities for social inclusion can assist to prevent crime.<sup>177</sup>

A justice reinvestment approach would see less money spent on detention and prisons, and increased investment in specialist and problem-solving courts, and community-based initiatives that address the causes of offending to interrupt offending cycles and build safer communities.<sup>178</sup> This approach would also create additional opportunities to divert young offenders away from future contact with the criminal justice system by requiring them to think about what caused their behaviour, its

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<sup>170</sup> Sentencing Advisory Council, n 6, at 85–86.

<sup>171</sup> *ibid*, at 86.

<sup>172</sup> Australian Institute of Health and Welfare, n 20, at 8.

<sup>173</sup> Victoria’s *Roadmap for reform* commits the State Government to working with the Aboriginal community to develop an Aboriginal children and families strategy, and Aboriginal children’s panels. Consistent with the cross-sector approach expounded in this paper, access to justice for Indigenous youth should be examined alongside the development of this strategy.

<sup>174</sup> Department of Health and Human Services, n 1.

<sup>175</sup> Department of Health and Human Services, *Youth policy: building stronger youth engagement in Victoria*, 2016 at [www.youthcentral.vic.gov.au/file/721/download?token=G439DAFr](http://www.youthcentral.vic.gov.au/file/721/download?token=G439DAFr), accessed 16 April 2018.

<sup>176</sup> Cauffman and Steinberg, n 9.

<sup>177</sup> R White, “Police and community responses to youth gangs”, (2004) 274 *Trends & issues in crime and criminal justice* 1 at <http://aic.gov.au/publications/>, accessed 16 April 2018.

<sup>178</sup> Smart Justice, *Justice reinvestment: investing in communities not prisons*, 2015 at [www.smartjustice.org.au/resources/SJ\\_JusticeReinvest.pdf](http://www.smartjustice.org.au/resources/SJ_JusticeReinvest.pdf), accessed 16 April 2018.

impact on the victim, and how to change their lives to prevent future or more serious re-offending. This is the direction in which the justice system needs to evolve if we want to see real change.<sup>179</sup>

Although Victoria still has a long way to go in terms of adopting formal, system-wide, justice reinvestment policies, our therapeutic courts and some of our existing restorative justice approaches form a good basis upon which to build and intensify further reform.

The Children's Koori Court, which was established in Victoria in 2005, is an example of a justice reinvestment and problem-solving approach, with its provision during the court process for Elders or Respected Persons from the Aboriginal community to engage directly with young offenders to require them to think about the offending behaviour, understand what caused it and consider what supports may be needed to address the young person's behaviour.<sup>180</sup> In 2009 the Australian Human Rights Commission released its Social Justice Report, in which it recommended justice reinvestment as the method through which to address the disproportionately high Indigenous incarceration rate.<sup>181</sup>

Youth Justice Group Conferencing is an effective way of responding to the criminal behavior of young people. This program takes a problem-solving approach based on restorative justice principles with the aim of diverting young people from further or more serious offending. It encourages the offender to take responsibility for the harm done to the victim and to make reparation to the victim and the community.<sup>182</sup> Group conferencing allows for recognition of victims and gives them a voice in the criminal justice process.<sup>183</sup> It is a key way of developing empathy in immature young offenders and encourages families to play an active role in the young person's rehabilitation.<sup>184</sup>

Following recent changes, group conferencing is now available for a wider range of cases across different types of offending behaviour, but greater take up needs to be encouraged. Given the benefits of this program for the offender and the victim, further consideration should also be given to enhancing this model further, with appropriate professionals working alongside lawyers and the court even in the more serious and complex cases.

The role of the police is obviously critical, with the first interaction with police often being a defining point for young people. The support from Victoria Police for the recent diversion pilot and the current review into police cautioning are important steps

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<sup>179</sup> Victoria Legal Aid, *Submission to the Access to Justice Review*, 2016, p 5 at [www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/access-to-justice-review](http://www.legalaid.vic.gov.au/about-us/strategic-advocacy-and-law-reform/access-to-justice-review), accessed 16 April 2018.

<sup>180</sup> Refer to P Grant, "Interventions that work: dealing with young people in conflict with the law", *Young people, crime and community safety: engagement and early intervention*, Australian Institute of Criminology International Conference, 2008, Melbourne, p 11.

<sup>181</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010*, Report No 1/2010, at [www.humanrights.gov.au](http://www.humanrights.gov.au), accessed 16 April 2018.

<sup>182</sup> Sentencing Advisory Council, n 6, 46–7.

<sup>183</sup> Grant, n 94, at p 10.

<sup>184</sup> KPMG, *Review of the youth justice group conferencing program: final report*, p 64, at <https://childdetentionnt.royalcommission.gov.au/NT-public-hearings/Documents/evidence-2017/evidence12may/Exh-382-004.pdf>, accessed 16 April 2018.

in the right direction. The Flemington and Kensington Community Legal Centre's Police Accountability Project aims to drive the political, cultural and systemic change required for police accountability, in particular in the context of racial profiling.<sup>185</sup>

In addition to more reinvestment and therapeutic approaches to offending, there is need for a greater use of formal and informal police cautioning to divert young people away from the justice system at the earliest point, whilst at the same time linking young people to appropriate community supports to prevent future re-offending. How police interact with legal and other social services in terms of referrals in the cautioning context is another opportunity for early intervention and prevention.

### **A missing link?**

Even though there is much that could be improved and the concern around youth crime is currently acute, in Victoria, we do find ourselves at an encouraging juncture. An ambitious and integrated family, youth and education vision has been articulated through the recently announced *Roadmap for reform*.

Unfortunately, the policy and funding links which connect education, children, youth and families on the one hand, and police and justice bureaucracies on the other, were not made clear at the Youth Summit.

More importantly, these links are not clearly discernible operationally given the complex network of new policies, reforms and pilots, overlaid on existing services not always well designed, funded, monitored or evaluated. It is of course early days and the promise of these reforms will be seen in the long term. They will however, require sustained effort and investment to embed them structurally.

The risk remains that police and justice responses will be piecemeal and more about “boots” on the ground, rather than being linked in with the longer term vision for communities, health and education systems. In many ways there needs to be a gap analysis to balance short and longer term justice solutions, given the pressure for immediate “action”. The different activities must work together, not against each other. A high degree of government, sector and police collaboration is required for this to occur successfully.

A specific justice strategy addressing young offenders would enable deliberate design of interventions and services guided by clear outcomes around rehabilitation, re-integration and the reduction of re-offending. This kind of plan is critical to how we identify and prioritise immediate and longer term police and justice solutions. We can then connect these solutions more readily to the whole-of-system agendas, or to existing pilots and programs which are working and can perhaps be scaled up or modified quickly and responsively. A deliberate and carefully planned approach will be essential to the success of crime prevention strategies and other legal interventions.

Commissioning resources to capture complete and accurate data sets will ensure that we get our service settings and early intervention points right not to mention connected. Data and case information is currently fragmented across multiple systems. Mapping the pathways which lead children into crime, and the points in the systems where failure and disengagement from services is common, will inform the design and quality of interventions based on risk and need. The transitions between childhood,

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<sup>185</sup> Hopkins, n 13.

adolescence and young adulthood are where the most marginalised and disadvantaged young offenders often get lost or disconnected from siloed services and systems that do not interface well. To achieve recovery and re-integration, young offenders need holistic case management and supports.

Police and legal services are uniquely placed to work together in a more connected and purposeful way in the community, before a young person is charged or even gets to court. The current policy and operational settings are “light on” in terms of how these sorts of improvements link in with the overarching child, youth and family framework.

An integrated youth justice strategy would also ensure government and sector accountability and no doubt avoid some of the frustration and cynicism expressed by parts of the sector at the Youth Summit about the “same old issues”. A more focused youth justice strategy could enable a State-wide review of services, with attention to quality and evaluation. A systemic approach to funding existing programs that work would deliver planning and service certainty, and ultimately help make the *Roadmap for reform* vision a reality.

Given the small number of young offenders in Victoria, a less complex whole of system approach that links family, education, health, child-protection, police and justice responses at all levels should not be so elusive or radical.<sup>186</sup> Depending on how the State-wide youth diversion scheme is designed and implemented, it could act as the central bridge between the broader family, education and youth systems and the police and justice systems.

The Youth Summit remains a heartening start to an important conversation. Approached correctly, a continuing conversation could lead to long called for improvements. However, as the Chief Commissioner indicated, the police alone cannot provide the total solution. In the absence of a focused youth justice plan that supports truly integrated responses on the ground, we risk continuing to view the challenges and known areas of improvement in a siloed way, with bursts of disjointed activity that are superficially or loosely connected without clarity of purpose or outcome. This just leaves us more vulnerable to law and order options and we will not get far if our approach is to address youth crime concerns through the narrow policy lens of public order, divorced from their broader social context.

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<sup>186</sup> Literature on youth offending suggests that the most successful policy frameworks are those that seek to engage in a “multi-systemic” or “whole-of-community” approach: D Wells, “What works for juvenile offenders?”, Research Summary, 2014; Australian Institute of Criminology, “What works in reducing young people’s involvement in crime? Review of current literature on youth crime prevention” (2002) *Australian Institute of Criminology Report and Literature Review 7* at <https://aic.gov.au/publications/archive/what-works-in-reducing-young-peoples-involvement-in-crime>, accessed 23 April 2018.

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# The Children’s Court of NSW: 2019

Judge Peter Johnstone, President of the Children’s Court of NSW, NSW Bar Association CPD Conference, 30 March 2019, Sydney Hilton, Sydney<sup>187</sup>

## [5-0180] Introduction

The Children’s Court of New South Wales is a unique specialist court that deals predominantly with youth crime and the care and protection of children and young persons. It is established and governed by the *Children’s Court Act 1987* and derives its jurisdiction principally from the *Children’s (Criminal Proceedings) Act 1987*, the *Young Offenders Act 1997*, and the *Children and Young Persons (Care and Protection) Act 1998*. It also has the youth parole jurisdiction, pursuant to the *Children (Detention Centres) Act 1987*.

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

Historically, the criminal law did not distinguish between children and adults, and children were subject to the same laws and same punishments as adults and were dealt with in adult courts.

Indeed there were a number of children under 18 years transported to NSW in the First Fleet of 1788 as convicts.

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>188</sup>

The first special provision in NSW recognising the need to treat children differently was the *Juvenile Offender Act 1850*.<sup>189</sup> This legislation was enacted to provide speedier trials and to address the “evils of long imprisonment” of children.

Then, in 1866, further reforms were introduced, including the *Reformatory Schools Act 1866*,<sup>190</sup> which provided for the establishment of reformatory schools as an alternative to prison, and the *Destitute Children Act 1866*,<sup>191</sup> under which public and private “industrial schools” were established, to which vagrant and destitute children could be sent.<sup>192</sup>

Since those early beginnings there was a steady, albeit piecemeal, progression of reform that increasingly recognised and addressed the need for children to be treated differently and separately from adults in the criminal justice system.

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<sup>187</sup> This is the first part of the presentation. The second part of the presentation on proceedings relating to the care and protection of children and young persons in NSW can be found in *Care and protection matters — background material* at [1-0210].

<sup>188</sup> State Library of NSW Research Guides, “First Fleet Convicts” at [www.sl.nsw.gov.au](http://www.sl.nsw.gov.au), accessed 19 June 2019.

<sup>189</sup> 14 Vic No II, 1850.

<sup>190</sup> 30 Vic No IV, 1866.

<sup>191</sup> 30 Vic No II, 1866 (otherwise known as the *Industrial Schools Act 1866*).

<sup>192</sup> R Blackmore, “History of children’s legislation in New South Wales — the Children’s Court”, extracted from R Blackmore, *The Children’s Court and community welfare in NSW*, Longman Professional, 1989.

Ultimately, in 1905, specialist, discrete Children's Courts were established at Sydney, Newcastle, Parramatta, Burwood and Broken Hill. Two "Special Magistrates" appointed from the ranks of existing magistrates commenced sitting at Ormond House, Paddington in October 1905.

Since then, the idea of a separate specialist jurisdiction to deal with children has prospered and developed until the present time.

Over that time the legislation that governs the way in which the Children's Court deals with cases has become more complex but the fundamental principle upon which the court was established remains the same: that children should be dealt with differently, and separately from adults.

Today, the Children's Court of NSW consists of a President, 15 specialist Children's Magistrates and 10 Children's Registrars. Children's Magistrates are situated in seven locations across the state: Parramatta, Surry Hills, Lismore, Woy Woy, Broadmeadow, Campbelltown and Port Kembla.

Children's Court circuits are conducted on a regular basis in various other regions: the Mid North Coast, the Upper Hunter, the Riverina and the near Western Region. It regularly assists the Local Court in remote locations, under the Country Assistance Protocol, by sending the President or a Children's Magistrate to hear cases of two or more days' duration. Accordingly, the Children's Court hears and disposes of the majority of cases in NSW involving youth crime, or the care and protection of children.

The President of the Children's Court is a District Court Judge who has judicial leadership and other, statutory responsibilities as prescribed by the *Children's Court Act 1997*, which include the administration of the court and the arrangement of sittings and circuits; the appointment of Children's Magistrates in consultation with the Chief Magistrate; convening meetings of Children's Magistrates and overseeing their training; convening and chairing meetings of the Advisory Committee which is responsible for providing advice to the Attorney General and Minister for Family and Community Services; and conferring regularly with community groups and social agencies on matters involving children and the court.

## **Youth crime and the Children's Court of NSW**

The Children's Court is specifically mandated to give priority to the rehabilitation of children, such that considerations of retribution, deterrence and punishment are secondary considerations in the sentencing process.

Section 6 *Children's (Criminal Proceedings) Act 1987* specifically provides that the following principles are to be applied in children's proceedings:

- (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.

The philosophy under which the Children's Court currently operates in its youth crime jurisdiction is based on what I describe as the four pillars of an enlightened youth justice approach. Those four pillars are: prevention, early intervention, diversion, and rehabilitation.

I propose to deal with issues relevant to each of these pillars later, but first I wish to address some preliminary considerations.

### **Approaches to youth offending**

Oversimplification of the causes of youth offending arises in part out of a tension between welfare and justice approaches to crime reduction and prevention. This involves a tug of war between those who believe young people require help and guidance and those who believe young people are given too many chances and should be treated as accountable and autonomous adults.

The justice approach is informed by deterrence theory, which seeks to hold children to account for their actions. Specifically, offending is the result of the offender's choice and they are responsible for their actions and deserving of punishment.<sup>193</sup> The welfare approach, on the other hand, focuses on behaviour change and crime reduction through interventions to address the underlying social causes of offending.

Specifically, the welfare approach posits the young person's behaviour as deriving generally from factors outside of the young person's control — such as their family environment, their health, or other external factors.

The research that has attracted my attention indicates that progressive juvenile justice systems benefit from a combination of primary, secondary and tertiary strategies to address the discrete risk factors contributing to juvenile crime. Primary crime prevention strategies aim to prevent offending before it begins. Secondary and tertiary crime prevention is more concerned with reduction in offending and the avoidance of re-offending, topics I will address more fully below.

### **Why children should be treated differently**

It is appropriate that I address why it is that I have been persuaded that children should be treated differently, and separately, within the criminal justice system. What follows is a brief excursus on the considerations that I see as determinative.

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<sup>193</sup> A Chrzanowski and R Wallis, "Understanding the Youth Justice System", in A Stewart, T Allard and S Dennison (eds), *Evidence based policy and practice in youth justice*, The Federation Press, Sydney, 2011.

I have grouped these considerations into three broad categories: philosophical, scientific and pragmatic.

The philosophical basis for treating children differently, or perhaps more correctly, the anthropological basis, is a wider topic.

I will content myself here to a reference to the Preamble to the United Nations' *Convention on the Rights of the Child* 1989,<sup>194</sup> and the following quote from the great humanitarian, Nelson Mandela:

There can be no keener revelation of a society's soul than the way in which it treats its children.<sup>195</sup>

The second category of the considerations that require a different approach to offending children is in fact based in science.

The growing recognition of the relevance of "brain science" has driven the need for policy and legislation to "match" the research.

This issue was addressed in detail by the Principal Youth Court Judge of New Zealand, Judge Andrew Becroft, as he then was, in a comprehensive paper delivered in 2014 at the Australasian Youth Justice Conference in Canberra.<sup>196</sup>

He pointed out that the first decade of this century has been called the "decade of the teenage brain", an expression coined by the Brainwave Trust Aotearoa, a not-for-profit organisation working in the field of adolescent brain development.<sup>197</sup>

In recent years, a wealth of neurobiological data from studies of Western adolescents has emerged, suggesting that biological maturation of the brain begins (and continues) much later in life than was generally believed. Many neuroimaging studies mapping changes in specific regions of the brain have shown that the frontal lobes (which are responsible for "higher" functions such as planning, reasoning, judgement and impulse control) only fully mature well into the 20s (some even suggest that they are not fully developed until halfway through the third decade of life). Brain science research also shows that when a young person's emotions are aroused, or peers are present, the ability to impose regulatory control over risky behaviour is diminished.<sup>198</sup>

Judge Becroft argued that these findings have implications for youth justice policy and will affect our perceptions of young people's culpability for their actions and the establishment of an appropriate age of criminal responsibility.

They also affect our understanding of "what works" with young offenders and what our expectations should be with respect to various responses and interventions ... Finally, they change any presumption that young people are simply "mini-adults" and that the same responses to offending should be used for both adults and young people ...

A key challenge for Australasian Courts is how to make use of this growing body of irrefutable research ...

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<sup>194</sup> Convention on the Rights of the Child, adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49, at [www.ohchr.org/en/professionalinterest/pages/crc.aspx](http://www.ohchr.org/en/professionalinterest/pages/crc.aspx), accessed 3 April 2019.

<sup>195</sup> N Mandela, Nelson Mandela Children's Fund launch, 8 May 1995, Pretoria, South Africa.

<sup>196</sup> A Becroft, "From little things, big things grow" — emerging youth justice themes in the South Pacific", Australasian Youth Justice Conference, Changing Trajectories of Offending and Reoffending, 20–22 May 2013, Canberra.

<sup>197</sup> See [www.brainwave.org.nz](http://www.brainwave.org.nz), accessed 3 April 2019.

<sup>198</sup> Becroft, above n 10, at p 5.

It is a constant challenge for those involved in youth justice to keep learning more about adolescent brain development, and to take this into account.<sup>199</sup>

Research also demonstrates that there is a range of factors (biological, psychological and social) that make young offenders different from adult offenders, which justify unique responses to youth crime.

A paper entitled “What Makes Juvenile Offenders Different from Adult Offenders?” published by Kelly Richards has particularly attracted my interest and attention.<sup>200</sup> The central theme of Richards’s paper is that “most juveniles will ‘grow out’ of offending and adopt law-abiding lifestyles as they mature”.<sup>201</sup>

The paper goes on to argue that a range of factors, including lack of maturity, the propensity to take risks and a susceptibility to peer influence, combined often with intellectual disability, mental illness and victimisation, operate to increase the risk of contact of young people with the criminal justice system. These factors, combined with the unique capacity of young people to be rehabilitated, can require intensive and often expensive interventions.

The paper postulates that crime is committed disproportionately by young people. Persons aged 15–19 years are more likely to be processed by police for the commission of a crime than are members of any other population group. This does not mean, however, that young people are responsible for the majority of recorded crime.

On the contrary, police data indicates that 10–17 year olds comprise a minority of all offenders who come into contact with police. This is primarily because offending peaks in late adolescence, when young people are aged 18–19 years.

Thus, rates of offending peak in late adolescence and decline in early adulthood.

Although most young people grow out of crime, they do so at different rates. A small proportion of youths continue offending well into adulthood. This small “core” has repeated contact with the criminal justice system and is responsible for a disproportionate amount of crime.

The paper goes on to demonstrate that young people commit certain types of offence disproportionately (graffiti, vandalism, shoplifting and fare evasion). Conversely, very serious offences (such as homicide and sexual offences) are less frequently committed by young people, as they are incompatible with developmental characteristics and life circumstances.

On the whole, young people are more frequently apprehended in relation to offences against property than offences against the person. Young people are more likely than adults to come to the attention of police, for a variety of reasons, including:

- they are usually less experienced at committing offences
- they tend to commit offences in groups and to commit their offences close to where they live
- they often commit offences in public areas, such as shopping centres, or on public transport.

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<sup>199</sup> *ibid* at pp 5–6.

<sup>200</sup> K Richards, “What makes juvenile offenders different from adult offenders?” (2011) 409 *Trends & issues in crime and criminal justice* 1 at <http://aic.gov.au/publications/current%20series/tandi/401-420/tandi409.html>, accessed 3 April 2019.

<sup>201</sup> *ibid*.

Further, by comparison with adults, young people tend to commit offences that are attention seeking, public and gregarious, and episodic, unplanned and opportunistic.

The paper next looks in detail at the characteristics of youth offending and how they differ from adult offending.

For present purposes, it is sufficient to list some of them:

- risk-taking and peer influence
- changes due to pubertal maturation
- immature competence in decision-making
- engagement in negative activity despite understanding the risks involved (such as drug and alcohol use, unsafe sexual activity, dangerous driving, and other delinquent behaviour).

This is all food for thought, but my view is that our job is to do our best to help young people through these problem years, until they mature.

Finally, under the heading of justification for treating young offenders differently, I will refer to 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 the risk to the community.

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>202</sup>

No experience is more predictive of future adult difficulty than confinement in a juvenile facility.<sup>203</sup>

Some will form friendships with more experienced offenders and be influenced to commit further offences as a result. This is often referred to as the “contamination” effect.

A further important consideration is the “inoculation” effect. If the young person goes into custody for a day and is then released one of the outcomes is that some will conclude that being in custody wasn't all that bad, especially in comparison to their circumstances in the community. If this happens on a few occasions, even for slightly longer periods of time, the deterrent effect of going into custody diminishes greatly.<sup>204</sup>

Children who have been incarcerated are more prone to further imprisonment. Recidivism studies in the United States show consistently that 50–70% of youths released from juvenile correctional facilities are re-arrested within 2–3 years.<sup>205</sup>

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<sup>202</sup> Becroft, above n 10, at p 7.

<sup>203</sup> M Wald and T Martinez, “Connected by 25: improving the life chances of the country’s most vulnerable 14–24 year olds”, *William and Flora Hewlett Foundation Working Paper*, 2003, at [www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf](http://www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf), accessed 3 April 2019.

<sup>204</sup> P Mulrone, “Illustrating the impact of bail refusal”, a paper presented at the Reducing Indigenous youth incarceration conference, 27 September 2012, Sydney.

<sup>205</sup> E Mulvey, “Highlights from pathways to desistance — a longitudinal study of serious adolescent offenders”, Office of Juvenile Justice and Delinquency Prevention, at [www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf](http://www.ncjrs.gov/pdffiles1/ojjdp/230971.pdf), accessed 3 April 2019.

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), from those who have not been confined.<sup>206</sup>

Confinement all but precludes healthy psychological and social development.<sup>207</sup> Incarceration actually interrupts and delays the normal pattern of “ageing-out” discussed above.<sup>208</sup>

## Prevention

An enlightened society seeks to tackle youth crime at its very roots.

Thus, the primary focus must be on the situations that will impact upon a young person's likelihood of committing crime, to prevent offending before it begins.<sup>209</sup>

The risk factors for youth offending are well established in research and involve: family “dysfunction”, such as family violence, parental unemployment and parental criminal history; child abuse and neglect,<sup>210</sup> including removal and placement in out-of-home care; physical, intellectual or learning disabilities; and mental health issues.

Poverty is the largest common denominator for juvenile offending.<sup>211</sup>

Alcohol and other drug issues frequently play a predominant role in these factors.

Thus, juvenile offenders are more likely to have been the subject of socio-economic disadvantage, neglect,<sup>212</sup> and residential instability; to have lived in crowded dwellings;<sup>213</sup> and to have experienced interrupted or sporadic participation in formal education.

Situational crime prevention focuses on altering the physical environment to reduce such indicators for crime.<sup>214</sup> We must continue to investigate and appropriately address the root causes of juvenile offending. This requires that we are accurately informed about what causes youth crime and that we base our knowledge and understanding from credible sources rather than sensational moral panic.

In my view, schooling is a major factor in the reduction of youth offending.

<sup>206</sup> E Mulvey, “A road map for juvenile justice reform”, The Annie E Casey Foundation, at [www.scribd.com/document/43676341/A-Road-Map-for-Juvenile-Justice-Reform](http://www.scribd.com/document/43676341/A-Road-Map-for-Juvenile-Justice-Reform), accessed 3 April 2019.

<sup>207</sup> Wald, above n 17.

<sup>208</sup> B Holman and J Ziedenberg, *The dangers of detention: the impact of incarcerating youth in detention and other secure facilities*, Justice Policy Institute, 2006, Washington DC, at [www.justicepolicy.org/research/1978](http://www.justicepolicy.org/research/1978), accessed 3 April 2019.

<sup>209</sup> Australian Institute of Criminology, *Annual Report 2002–2003*, Canberra, 2003 at <https://aic.gov.au/publications/annualreport/2003> accessed 3 April 2019.

<sup>210</sup> A Nellis and R Hooks Wayman, *Back on track — Supporting youth re-entry from out-of-home placement to the community*, Youth Re-entry Task Force of the Juvenile Justice and Delinquency Prevention Coalition, 2009 at [www.njcn.org/uploads/digital-library/resource\\_1397.pdf](http://www.njcn.org/uploads/digital-library/resource_1397.pdf), accessed 3 April 2019.

<sup>211</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 3 April 2019.

<sup>212</sup> M Marien, “‘Cross-over kids’ — childhood and adolescent abuse and neglect and juvenile offending”, paper presented to the National Juvenile Justice Summit, 26 and 27 March 2012, Melbourne. See “Cross-over kids: the drift of children from the child protection system into the criminal justice system” at [1-0180].

<sup>213</sup> D Weatherburn, B Lind and S Ku, “Hotbeds of crime? Crime and public housing in urban Sydney” (1999) 45(2) *Crime and Delinquency* 256.

<sup>214</sup> Australian Institute of Criminology, above n 23.

I think everyone would generally accept as a universal truth that education of our youth is a critically important aspect of an enlightened society: that it is the pathway of social inequality and a mechanism for breaking the cycle of disadvantage, and creates opportunities for advancement and betterment.

I have had a number of concerns that have emanated from observations of the youth justice system over the last seven years, including such factors as:

- the high number of children who commit crimes who are not attending school. We estimate this to be some 40% of the young people coming before our court
- the fact that there is a very high proportion of children who go into detention who are assessed as having delayed educational development, or have deficiencies in literacy skills and numeracy skills
- the effectiveness of the system of schooling orders and the achievement of therapeutic outcomes, as to which we have been engaged in a dialogue with the Department of Education over the past few years
- the incidence of cross-over between care and crime and statistics such as the high rate of non-attendance at school by children in residential out-of-home care
- reports of high levels of non-attendance at some country schools, take Walgett as an example, where the attendance rate was reported to be less than 50%.

As a result of a series of submissions to government and specific representations to the Department of Education, a number of initiatives have been implemented in consultation with Juvenile Justice, DFACS, Education and Justice Health to address some of these problems. These include a “wraparound service solution” called “A Place to Go”, the main features of which are:

- a court-based multidisciplinary team that includes DFACS liaison officers, Education liaison officers and an additional Justice Health Clinician working with existing Juvenile Justice caseworkers and Children's Court Assistance Scheme workers
- a DFACS caseworker working directly with police at Penrith police station to identify and find alternative solutions to young persons entering custody
- accommodation (4 beds) providing a short to medium term (up to 12 weeks) accommodation option to avoid young people remaining in custody
- an Education Coordinator to work more intensively with a smaller cohort of young people from the Penrith Police Area Command to pursue solutions to education barriers
- additional multidisciplinary health workers in the Nepean Blue Mountains area to take referrals directly from the project to provide health solutions
- integrated case panels to monitor progress of young people who have agreed to be part of project.

Another initiative has been the utilisation of Children's Registrars to convene compulsory schooling order conferences under s 22C *Education Act* 1990. This initiative is designed to encourage meaningful participation by parents and children

in the conference process through facilitation by a neutral third party. It is also hoped that the specialised mediation skills of Children's Registrars will promote a holistic approach to conferences in considering support needed to improve the attendance of children's attendance at school.

Other prevention issues include health (particularly mental health), employment and vocational training, drug and alcohol issues, family violence issues and the availability of community facilities for young people. In this regard, I welcome the new website recently launched by the Advocate for Children and Young People (ACYP) called "Our Local" which was designed and created by kids to find local opportunities, activities and services, particularly in regional and remote areas.<sup>215</sup>

### **Early intervention and diversion**

I turn, therefore to discuss secondary and tertiary crime prevention strategies concerned with reduction in offending and the avoidance of re-offending.

Secondary crime prevention aims to target at risk young people:

They may also target the reduction or avoidance of crime before it reaches the notice of the authorities or becomes more serious.<sup>216</sup>

Secondary strategies may consist of early intervention youth programs, or other programs designed to mobilise communities:

to develop interventions once young people have well established police records, incomplete schooling, and/or problematic peer groups is likely to be very difficult.<sup>217</sup>

Tertiary crime prevention seeks to reduce re-offending by "interventiing in the lives of known offenders".<sup>218</sup>

Tertiary prevention strategies include other programs for early intervention and for diversion into community-based programs.

much more attention needs to be paid to deciding how to conceptualise and respond to young people in trouble with the law, and to their families, communities and victims, and how to listen and respond to what these people tell us about their lives and their aspirations. We can and should be able to create a humane system that is committed to human rights norms and practice, and one which recognises the human right of young people in trouble with the law to be treated with dignity and respect and to be provided with the conditions in which they can grow and flourish and be happy, contributing and well-rounded adults — surely our responsibility as adults, and an aspiration we must have for all our children.<sup>219</sup>

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<sup>215</sup> [www.ourlocal.nsw.gov.au](http://www.ourlocal.nsw.gov.au), accessed 4 April 2019.

<sup>216</sup> D Singh and C White, *Rapua Te Huarahi Tika — Searching for solutions: A review of research about effective interventions for reducing offending by indigenous and ethnic minority youth*, Ministry of Youth Affairs, Wellington, New Zealand, 2000, p 23.

<sup>217</sup> P Delfabbro and A Day, *Programs for anti-social minority youth in Australia and New Zealand — A literature review*, Centre for Evaluation of Social Services, Stockholm, Sweden, 2003, at p 47.

<sup>218</sup> Australian Institute of Criminology, "Approaches to understanding crime prevention", *Crime Reduction Matters*, no 1, Canberra, 2003, at p 1.

<sup>219</sup> J Bargaen, "Embedding diversion and limiting the use of bail in NSW: a consideration of the issues related to achieving and embedding diversion into juvenile justice practices", paper presented at the National Juvenile Justice Summit, 25–26 February 2010, Melbourne.

One of the most effective ways of reducing youth offending is to begin prevention efforts as early as possible and to intervene aggressively with those who are already offending:

Of all known interventions to reduce juvenile delinquency, preventative interventions that focus on child delinquency will probably take the largest “bite” out of crime.

...

“The earlier the better” is a key theme in establishing interventions to prevent child delinquency, whether these interventions focus on the individual child, the home and family, or the school and community.<sup>220</sup>

Early intervention programmes in NSW include the Youth on Track program and the Family Investment Model.

The Youth on Track scheme has a multi-agency approach, with the involvement of the Department of Education, the Department of Family and Community Services and the Department of Health, in addition to non-government organisations (NGO's).

Using this collaborative approach, services on the ground — such as police and schools — identify at risk youth and refer them to the Youth on Track program.

An NGO case manager is allocated responsibility for working with the young person to address criminogenic factors in their lives and provide access to specialist services that will provide ongoing support to the young person.

This model recognises that young people who come into contact with the criminal justice system at a young age are more likely to offend for longer, more frequently and to receive a custodial sentence. An evaluation of the social outcomes of this program clearly demonstrates the value of this approach and provides strong evidence of “what works” in interventions for children and young people.

The Youth on Track program is a step in the right direction for an enlightened juvenile justice system. The program is consistent with the principles enunciated in the United Nations' *Convention on the Rights of the Child*, specifically that children and young people must be given the opportunity to express their views and to have them taken into account in matters affecting them.<sup>221</sup>

Similarly, the Family Investment Model provides a “one stop shop” to help disadvantaged families with complex and entrenched needs in Dubbo and Kempsey. This model is a two-year pilot which began in late 2016 which aims to reduce exposure to the criminal justice system and human services agencies by addressing underlying needs and factors. The Family Investment Model identifies families with complex needs who require support across multiple government agencies, and develops a plan for the whole family with a particular focus on children. Through the provision of programs and supports, the Family Investment Model is able to help families reduce immediate risks and address long-term issues which may impact on a child or young person's risk of involvement with the justice system.

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<sup>220</sup> R Loeber, D Farrington and D Petechuk, “Child delinquency: early intervention and prevention”, *Child delinquency bulletin series*, US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, May 2003, p 9.

<sup>221</sup> Convention on the Rights of the Child, above n 8, Art 12.

Through addressing criminogenic risks and needs at an early stage, these programs and models are able to provide an effective, wraparound service to children, young people and their families in the community, and contribute to successful diversion away from problematic behaviour and involvement with the justice system.

Another early intervention consideration arises from the reality that children and young people in need of care and protection are often the same children and young people who commit offences. There is an unequivocal correlation between a history of care and protection interventions and future criminal offending.

The nexus between care and crime has been persuasively articulated by several commentators.

In her paper, "The link between child maltreatment and adolescent offending: systems neglect of adolescents", distinguished Developmental Psychologist, Dr Judy Cashmore AO, states that the link between child maltreatment (abuse and neglect) and adolescent offending is well established and that there is now "significant evidence" that the timing of this maltreatment matters.<sup>222</sup>

### **The Young Offenders Act 1997**

Important diversionary processes in NSW are provided for under the *Young Offenders Act 1997* (YOA).

In NSW a child or young person's first contact with the youth justice system will usually occur through coming into contact with police. At this point, police are, in appropriate circumstances, able to utilise the YOA which is a statutory embodiment of early intervention and diversion. Under the YOA, police are provided with the diversionary option of a warning, caution or Youth Justice Conference (YJC).

I will not traverse the details of warnings and cautions as they are fairly self-explanatory. However, I will provide a brief explanation of YJCs and how this option brings the individual child, family and community together to prevent future offending.

At a YJC, a young offender is with his or her family, and is brought face to face with the victim, and the victim's support person, to hear about the harm caused by their offending and to take accountability for their actions. At the conference, the participants agree on a suitable outcome.

The outcome may include an apology, reasonable reparation to the victim and steps to reintegrate the young person into the community.

A YJC is a valuable alternative to court as it is not an impersonal or exclusive process where the young person and the victim are adversaries. Rather, responsibility for dealing with the young offender is partially transferred from the State to the young person, their family, the victim and the wider community.

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<sup>222</sup> J Cashmore, "The link between child maltreatment and adolescent offending", (2011) 89 *Family Matters* 1, at <https://aifs.gov.au/publications/family-matters/issue-89/link-between-child-maltreatment-and-adolescent-offending>, accessed 9 April 2019; see also K McFarlane, *Care-criminalisation: the involvement of children in out of home care in the NSW Criminal Justice System*, Doctoral dissertation, University of New South Wales, 2016; Commonwealth of Australia, *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, Final Report, vol 3B, ch 35, 2017, at 277 (Recommendation 25.12), at <https://issuu.com/ntroyalcommission/docs/2b-final?e=31933818/55836163>, accessed 6 April 2019.

A similar option exists in New Zealand, entitled Family Group Conferences (FGCs).

The statutory process of FGCs is similar to that of YJCs, however the process allows for responses tailored to specific cultural needs to allow for stronger engagement with the process.

The Children's Court believes there is scope for increased use of the diversionary mechanisms provided for under the YOA.<sup>223</sup>

In examining the effectiveness of the YOA as a diversionary mechanism, it is necessary to consider the impact of the requirement for a child or young person to admit the offence in order for police to be able to issue a caution or a warning. Requiring an admission of guilt may discourage some young offenders from participating and from being diverted from the court system.

In New Zealand the young person is required to "not deny" the offence in order to have access to a diversionary mechanism called a family group conference. The Royal Commission into the Protection and Detention of Children in the Northern Territory recommended that the Police General Order be amended to remove the requirement that a child or young person admit to committing an offence, and instead require that the young person "does not deny" the offence.<sup>224</sup>

### **s 32 Mental Health (Forensic Provisions) Act 1990**

The *Mental Health (Forensic Provisions) Act 1990*<sup>225</sup> (MH(FP) Act) enables the Children's Court to divert mentally disordered young people from the criminal justice system. Judicial officers undertake a balancing exercise wherein they consider whether using this diversionary mechanism will produce better outcomes for the individual and the community.<sup>226</sup>

Parliamentary debates from 22 March 1990 clearly indicate that the intent of the legislature in enacting s 32 MH(FP) Act was to divert those with mental illnesses or developmental disabilities out of the criminal justice system, away from punishment and into rehabilitation.

This therapeutic response allows judicial officers to dismiss the charges and discharge the young person into the care of a responsible person or, on the condition that they obtain mental health assessment or treatment. Young people appearing before the criminal jurisdiction of the Children's Court face a number of challenging circumstances. Mental illness and developmental disabilities are widespread and, according to Professor McGorry et al:

Up to one in four young people are likely to be suffering from a mental health problem, most commonly substance misuse or dependency, depression or anxiety disorders or combinations of these ... There is also some evidence that the prevalence may have risen in decades.<sup>227</sup>

<sup>223</sup> Children's Court Submission to the NSW Legislative Inquiry into the adequacy of youth diversionary programs in NSW, 8 February 2018, at [www.parliament.nsw.gov.au/ladocs/submissions/59799/Submission%2019.pdf](http://www.parliament.nsw.gov.au/ladocs/submissions/59799/Submission%2019.pdf), accessed 13 June 2019.

<sup>224</sup> Commonwealth of Australia, *Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory*, above n 36.

<sup>225</sup> ss 32 and 33.

<sup>226</sup> *DPP v El Mawas* (2006) 66 NSWLR 93 at [79].

<sup>227</sup> P McGorry, R Purcell, I Hickie and A Jorm, "Investing in youth mental health is a best buy" (2007) 87(7) *Medical Journal of Australia* 187.

The difficulty encountered by the Children's Court when considering the option of making an order under s 32 MH(FP) Act is two pronged.

First, there is a general reluctance to use s 32, as while magistrates appreciate the importance of diversion for young people with a mental illness or developmental disability, many believe that the lack of enforceability of this option detracts from its intent. As Gotsis states:

the issue of enforceability is central to the ability of s 32 orders to provide an effective therapeutic jurisprudence mechanism for offenders with a mental disorder.<sup>228</sup>

The second, but related issue, is that many Children's Court magistrates consider six months to be too short a period to properly address mental health issues or to provide adequate treatment and supports for young people with a developmental disability.

A possible option available to magistrates is to adjourn the proceedings before orders are made under s 32(3). Justice Adams in *Mantell v Molyneux* [2006] NSWSC 955 at [43] made it clear that after the magistrate has determined the s 32(1)(b) issue, the proceedings can be adjourned before orders are made under s 32(3):

At the same time, the general power to adjourn proceedings must permit a magistrate to do so before making any decision under s 31(1). I note also that it appears from the terms of s 32(3) that the magistrate is not bound to make an order dismissing the charge although, having decided that the conditions of s 32(1) are satisfied and having decided not to take action under s 32(2), it seems inevitable that an order must be made under s 32(3). I mention these matters simply to demonstrate that it might have been open to the learned magistrate to have adjourned the proceedings in exercise of His Honour's general power to see how the appellant was coping with the regime then in place pursuant to the bond.

## Rehabilitation

In NSW, the paramountcy of rehabilitation, so far as children are concerned, is provided for in s 6 *Children (Criminal Proceedings) Act 1987* (the CCPA).<sup>229</sup>

The modern common law recognises that rehabilitation is the primary consideration in sentencing children. In her judgment in *R v GDP* (1991) 53 A Crim R 112 at 116 Mathews J (Gleeson CJ and Samuels JA agreeing) adopted comments in *R v Wilcox* (unrep, NSWSC, 15/8/79):

in the case of a youthful offender ... considerations of punishment and of general deterrence of others may properly be largely discarded in favour of individualised treatment of the offender, directed to his rehabilitation.

In the matter of *R v TVC* [2002] NSWCCA 325 Sperling J at [13] cited Wood J in *R v Hoai Vinh Tran* [1999] NSWCCA 109 at [9]:

In coming to that conclusion his Honour made reference to the well-known principle that when courts are required to sentence a young offender, considerations of punishment and general deterrence should in general be regarded as subordinate to the need to foster

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<sup>228</sup> T Gotsis and H Donnelly, "Diverting mentally disordered offenders in the NSW Local Court", *Monograph 31*, Judicial Commission of NSW, March 2008 at p 22, at <https://jirs.judcom.nsw.gov.au/publish/mono31/monograph31.pdf>, accessed 13 June 2019.

<sup>229</sup>See above p 2.

the offender's rehabilitation ... That is a sensible principle to which full effect should be given in appropriate cases. It can have particular relevance where an offender is assessed as being at the crossroads between a life of criminality and a law abiding existence.

As I mentioned earlier, there are a number of psychosocial and developmental processes that separate young people from adults. A wealth of research now exists establishing that adolescence is a period of rapid change, particularly in the areas of the brain associated with response inhibition, the identification of risks and rewards and the regulation of emotions.<sup>230</sup> Neurobiological research undertaken over the last 16 years in particular, reveals the pre-frontal cortex of the brain (the frontal lobe) is the last part of the human brain to develop.

The frontal lobe is that part of the brain associated with identifying and assessing risk, managing emotion, controlling impulses and understanding consequences.

The research has shown that there is a link between decision making and memory. Many of the children and young people who engage in offending behaviour have experienced traumas that activate their memory, resulting in a response that impacts upon their ability to make appropriate decisions.<sup>231</sup> However, just as harm and trauma accumulate over time, so does a child or young person's capacity to change in response to treatment.<sup>232</sup> Consequently, whilst environmental factors such as parents, carers and teachers can hinder development, environmental factors also have the ability to facilitate change and successful development. It is essential, therefore, that our response to offending behaviour combines therapeutic interventions with traditional criminal justice approaches.

As Professor Kenneth Nunn so aptly put it:

Containment without treatment is custodial futility without any progress except maturation and chance encounters.

Treatment without containment is powerless without any capacity to prevent flight away from help.

Treatment and containment without education is recovery without skills to live in the real world.<sup>233</sup>

Diversion and rehabilitation are examples of therapeutic interventions that seek to address the complex constellation of risk factors related to offending by children and young people.

In NSW in 2007–2008, \$103.3 million was spent on juvenile detention.<sup>234</sup> Diverting funds to bolster community and social supports is logical for a number of reasons. In

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<sup>230</sup> L Steinberg, "Adolescent Development and Juvenile Justice" (2009) 5 *Annual Review of Clinical Psychology* 459.

<sup>231</sup> K Nunn, "Decision-making of out-of-home-care children who offend", presentation to the Children's Court s 16 meeting, 1 November 2013, Westmead, Sydney.

<sup>232</sup> K Nunn, "Bad, mad and sad: rethinking the human condition in childhood with special relevance to moral development" (2011) *Journal of Pediatrics and Child Health* 624 at 625.

<sup>233</sup> K Nunn, above n 45.

<sup>234</sup> Aboriginal and Torres Strait Islander Social Justice Commissioner, "Chapter 2: Justice Reinvestment — a new solution to the problem of Indigenous over-representation in the criminal justice system", Australian Human Rights Commission, *Social Justice Report 2009*, 2009, p 9 at [www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-1](http://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-report-1), accessed 13 June 2019.

particular, the money spent on imprisonment could be spent in a way that prevents crime and increases community cohesion, as communities are involved in identifying the causes and solutions to crime.

The concept also reinforces the philosophy of detention as the last resort as a core principle for children and young people.

Finally, I wish to address Aboriginal over-representation in the justice system. This problem is most starkly manifested in the Children's Court. In 2015 the number of Aboriginal children in detention was over 60% of the overall number of children in Juvenile Justice facilities across the State,<sup>235</sup> and the number of families from whom Aboriginal children were being removed was in excess of 40%.<sup>236</sup>

In response, the Children's Court launched the Youth Koori Court (YKC) at Parramatta four years ago, on 6 February 2015, on the initiative of the court itself, utilising existing resources and processes, without the need for legislative change. The Children's Court identified that the court itself had a role in relation to the distrust and disconnection experienced by the Aboriginal community from the criminal justice system. Although disconnection with the court process is not uncommon for young people regardless of the cultural identity, the perception of bias and the lack of connection to the process have an historical context for the indigenous community.

It was considered that this needed to be addressed if the legal process was to have any significant deterrent or diversionary effect. This was achieved by involving Aboriginal elders and respected persons in the process.

The Youth Koori Court (YKC) is an excellent example of a holistic process which involves interventions and collaboration amongst professionals to identify relevant risk factors which impact on a young person's continued involvement with the justice system, and actively monitors the holistic interventions implemented to address these risk factors.

The process involves an application of the deferred sentencing model under s 33(1)(c2) *Children (Criminal Proceedings) Act 1987* as well as an understanding of and respect for Aboriginal culture. Mediation principles and practices are employed in a conference process to identify issues of concern and develop an Action and Support Plan for the young person to focus on for three to six months prior to sentence.

The success of the YKC at Parramatta has resulted in its expansion to Surry Hills, where it commenced sitting in February 2019 following a ceremonial sitting attended by the Attorney-General and others.

Currently, the Children's Court does not have a program similar to the Magistrate's Early Referral Into Treatment (MERIT) program. A similar program, tailored to the needs of young people would provide this court with greater opportunities to effectively deal with young offenders who have drug and alcohol issues that need addressing.

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<sup>235</sup> Australian Institute of Health and Welfare, "Youth detention population in Australia 2015", *Bulletin 131*, Canberra, 2015 at [www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2015/data](http://www.aihw.gov.au/reports/youth-justice/youth-detention-population-in-australia-2015/data), accessed 4 July 2019.

<sup>236</sup> Australian Institute of Health and Welfare, "Young people in child protection and under youth justice supervision 2014–15", *Data Linkage Series No 22*, Canberra, 2016 at [www.aihw.gov.au/reports/youth-justice/young-people-in-youth-justice-supervision-2014-15/data](http://www.aihw.gov.au/reports/youth-justice/young-people-in-youth-justice-supervision-2014-15/data), accessed 4 July 2019.

The Children's Court believes that there are a number of aspects of the design of the MERIT program that would not be suitable for young people, however with appropriate modification, the process may prove highly rewarding.

### **Conclusion**

In NSW, the youth justice system is moving in the right direction. There has been a dramatic reduction in the past seven years in the number of children in detention, resulting in the closure of three of the nine Youth Detention Centres in this State.

In addition to the children in detention, there are a further 2,000 or so children under supervision; that is, they are serving sentences involving suspended sentences or community service; or they are under good behaviour bonds, probation orders or on extended bail (Griffith remand). They are supervised by caseworkers from Juvenile Justice. Most of them are undergoing drug and alcohol programs, occupational training, anger management courses, or other rehabilitation programs.

Finally, I wish to briefly mention a number of other important initiatives that are proceeding that impact on the administration of youth justice in this State. These include:

- (1) The report of the Legislative Assembly Law and Safety Committee Inquiry into the adequacy of youth diversionary programs in NSW, the recommendations of which are currently being considered by various government departments and agencies, in conjunction with the Final Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory (2017).
- (2) The Justice Reinvestment program operating at Bourke (Maranguka) and Cowra.
- (3) The work of the NSW Bar Association Joint Working Party on the over-representation of Indigenous people in the NSW Criminal Justice System.

# Children’s Court update 2019 (criminal jurisdiction)

Judge Peter Johnstone, President of the Children’s Court of NSW, Local Court Regional Conference, 27–29 March 2019, Port Macquarie<sup>237</sup>

## [5-0190] Introduction

I would like to begin by acknowledging the traditional custodians of the land on which we meet, the Biripi people, and pay my respects to their Elders past, present and emerging. I acknowledge and respect their continuing culture and the contribution they make to the life of this region.

The purpose of this paper is to alert Local Court Magistrates to recent developments affecting the exercise of Children’s Court jurisdiction, and is designed to be a reference resource which may assist you in relation to children’s matters in either care or crime.

I will firstly canvass some more general developments affecting the Children’s Court over the past year or so, and then discuss some updates in the criminal and care jurisdictions, followed by a brief discussion of some recent case law.

## General updates

### Youth Koori Court evaluation

The Youth Koori Court pilot in Parramatta began in February 2015. Western Sydney University were engaged to evaluate the program and delivered the findings in May 2018.<sup>238</sup>

The study determined the model to be an effective and culturally appropriate means of addressing the underlying issues that lead many Aboriginal and Torres Strait Islander young people to engage with the criminal justice system.

In conducting the review, researchers observed hearings; interviewed young people and Elders; analysed Action and Support plans; and compared the time in custody for those involved in the program.

The evaluation found that prior to the Youth Koori Court, the 33 young people involved in the study each spent on average 57 days in detention. During their involvement with the court, they only spent on average 25 days in custody.

Furthermore, over the research period, over half of the items listed on young peoples’ action plans were completed by the time of sentence — with most success reported in getting identity documents and managing harmful drug and alcohol habits.

The Youth Koori Court works to defer sentencing for young people until the factors which place them at risk of re-offending are addressed. For many of the young people

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<sup>237</sup> This is the second part of the presentation relating to the Criminal jurisdiction in the Children’s Court. The first part of the presentation on proceedings relating to care and protection of children and young persons can be found at [1-0220].

<sup>238</sup> M Williams, D Tait, L Crabtree, M Meher, “Youth Koori Court: Review of Parramatta Pilot Project”, *Evaluation Report*, Western Sydney University, 2018.

who participate in the program, their issues with the law are either as a direct result of, or compounded by, the issues they face in their daily lives, such as jobs, safe housing and access to essential services.

### **Opening of Surry Hills Youth Koori Court**

Following the success of the Youth Koori Court pilot in Parramatta, in May 2018 the NSW Attorney General Mark Speakman and Treasurer Dominic Perrottet announced that the Koori Court would be expanded from Parramatta to the Surry Hills Children's Court, with a \$2.7 million funding boost over three years.

The Youth Koori Court in Surry Hills opened on 6 February 2019 with a ceremonial sitting to mark its commencement. The Attorney General, Mark Speakman and other distinguished guests were welcomed to the Surry Hills Children's Court for the occasion. The ceremonial sitting commenced with a welcome to country and a smoking ceremony, followed by the formal sitting which included speeches from the President, the Attorney General, Brendan Thomas, CEO of Legal Aid and Nadine Miles, Chief Legal Officer of the Aboriginal Legal Service, Indigenous elder Joanne Selfe and Children's Court Magistrate Sue Duncombe.

Children's Court Magistrate, Sue Duncombe, who presides over the Youth Koori Court, said the court was working to confront the effects of intergenerational trauma, noting that the judiciary has a "moral, ethical and legal responsibility to change that record".<sup>239</sup>

The expansion of the Youth Koori Court to Surry Hills will enable the Children's Court to work with more Aboriginal and Torres Strait Islander young people to address the behaviour that has brought them before the court and to access tools with which they can improve their lives.

The Youth Koori Court will continue one day per week at Parramatta Children's Court, and initially on a fortnightly basis at Surry Hills Children's Court.

### **Memorandum of Understanding to facilitate the expedition of Working with Children Checks in care proceedings**

In July 2018, the Children's Court of NSW, the Office of the Children's Guardian and the Department of Family and Community Services entered into a Memorandum of Understanding to facilitate the expedition of Working with Children's Checks in care proceedings.

The Office of the Children's Guardian is an independent statutory authority in NSW Government and administers the Working with Children Check under the *Child Protection (Working with Children) Act 2012*. Authorised carers and their adult household members are required to have a Working with Children Check clearance.

Where an application is made to the Children's Court for an order allocating parental responsibility for a child to the Minister, a relative or kin or another person, whether or not the child's proposed carer or the person proposed to hold parental responsibility for the child has a valid Working with Children clearance is a relevant consideration.

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<sup>239</sup> M Whitbourn, "'Rehabilitation, not punishment': Youth Koori Court opens in Surry Hills", *The Sydney Morning Herald*, 6 February 2019, [www.smh.com.au/national/nsw/rehabilitation-not-punishment-youth-koori-court-opens-in-surry-hills-20190206-p50w0g.html](http://www.smh.com.au/national/nsw/rehabilitation-not-punishment-youth-koori-court-opens-in-surry-hills-20190206-p50w0g.html), accessed 6 June 2019.

The Office of the Children's Guardian is not usually aware whether a matter is currently before the Children's Court when a person lodges an application for a Working with Children's Check. However, being notified of such information can help to expedite the Office of the Children's Guardian of an application.

The Department of Family and Community Services case workers and legal officers would be aware when a matter is before the Children's Court. Where a care application is soon to be filed and that a proposed carer and any other adult member of the proposed carer's household, has or will be applying to the Office of the Children's Guardian for a Working with Children's Check. By notifying the Office of the Children's Guardian of this information, the Office can expedite the Working with Children's Check application. This process will assist in avoiding delays in the Children's Court proceedings.

### **The continuing relevance of brain science**

Ongoing research into brain science and knowledge around adolescent brain development continues to be of importance to the Children's Court in understanding children and young people, and responding appropriately to their needs.

A great deal of research has been undertaken in recent years to show that the pre-frontal cortex of the brain (the frontal lobe) is the last part of the human brain to develop. The frontal lobe is that part of the brain associated with identifying and assessing risk, managing emotion, controlling impulses and understanding consequences.<sup>240</sup>

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.

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>241</sup>

Despite this, the 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.

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.

This is not to say that the findings from neurobiology research exculpate all young offenders from criminal responsibility. Rather, these findings indicate that there is a grey area between right and wrong when considering the culpability of a young offender.

In light of these advances in brain science and the implications these findings have for young offenders and their treatment in the criminal justice system, it is important to also consider a final reason why children must be treated differently to adults.

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<sup>240</sup> E McCuish, R Corrado, P Lussier and S Hart, "Psychopathic traits and offending trajectories from early adolescence" (2014) 42 *Journal of Criminal Justice* 66.

<sup>241</sup> S Johnson, R Blum, J Giedd, "Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy" (2009) 45(3) *Journal of Adolescent Health* 216 at 220.

There is a growing body of evidence that supports the proposition that incarceration of children and young persons is both less effective and more expensive.

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.

Enlightened with these advances in the science of adolescent brain development, we are able to better understand, empower, protect, divert and rehabilitate children and young people falling into the youth justice system. In my view, it is our job to do our best to help juveniles through these problems years until they mature and outgrow these behaviours.

## **Updates in the criminal jurisdiction**

### **Declining number of children in detention**

The NSW Bureau of Crime Statistics and Research (BOCSAR) reported on 30 January 2019 that the juvenile detention population has decreased by roughly 40% since the peak of 405 detainees in June 2011.<sup>242</sup> The number of children and young people in detention has decreased significantly over the past six years, which is in stark contrast to the adult prison population which continues to rise.

Furthermore, three juvenile detention centres have closed over the past six years due to the falling number of young people in detention. Now only six juvenile detention centres remain in NSW.

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 us to gain 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.

I am a strong advocate for the approach of Justice Reinvestment, which is an idea for rethinking the criminal justice system. Under this philosophy, the savings from the closure of three juvenile detention centres should be reinvested back into the community to provide services and supports to children, young people and their families.

### **Youth Koori Court**

As discussed in my general updates, the Youth Koori Court (YKC) continues to operate in Parramatta Children's Court and has recently commenced at Surry Hills Children's Court.

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<sup>242</sup> NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics Quarterly Update December 2018*, 30 January 2019 at [www.bocsar.nsw.gov.au/Documents/custody/NSW\\_Custody\\_Statistics\\_Dec2018.pdf](http://www.bocsar.nsw.gov.au/Documents/custody/NSW_Custody_Statistics_Dec2018.pdf), accessed 4 April 2019.

**Note:** For comparison purposes, the custody statistics in 2011 can be obtained at NSW Bureau of Crime Statistics and Research, *New South Wales Custody Statistics Quarterly Update March 2013*, 11 July 2013 at [www.bocsar.nsw.gov.au/Documents/nswcustodystatisticsmar2013.pdf](http://www.bocsar.nsw.gov.au/Documents/nswcustodystatisticsmar2013.pdf), accessed 6 June 2019.

The YKC was established as a pilot in 2015 at Parramatta Children's Court and has now been operating for almost three years.

The YKC was established in response to the devastating over-representation of Aboriginal young people in the justice system.

The YKC seeks to contribute to a solution to the over-representation of Aboriginal young people through the inclusion of Elders and professionals who are Aboriginal, providing low volume case management mechanisms that will facilitate greater understanding of and participation in the court process by the young person, identifying relevant risk factors that may impact on the young person's continued involvement with the criminal justice system, and monitoring appropriate therapeutic interventions to address these risk factors.

The process that has been developed for the YKC involves an application of the deferred sentencing model (s 33(1)(c2) *Children (Criminal Proceedings) Act 1987*) as well as an understanding of and respect for Aboriginal culture.

I will continue to advocate for the expansion of the YKC, particularly to communities in Dubbo.

### **New website for children and young people**

The Advocate for Children and Young People launched a new website called "Our Local".<sup>243</sup> The website was built in response to feedback from children and young people who asked for an easy way to find local and State-wide opportunities, activities, services and events

The "Our Local" website may be a valuable tool for judicial officers engaging with young people. Notably, 40% of opportunities on the website are in regional and remote areas of NSW.

### **Criminal Legislation Amendment (Child Sexual Abuse) Act 2018**

The *Criminal Legislation Amendment (Child Sexual Abuse) Act 2018* was assented to by the NSW Parliament in June 2018 and partially proclaimed in August and December 2018. The Bill was introduced in response to the criminal justice recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* made a suite of reforms to a number of Acts. I would like to discuss three important amendments that were made under these reforms that are relevant to cases involving children and young people.

#### ***Section 80AG Crimes Act 1900***

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* introduced s 80AG *Crimes Act 1990*. Section 80AG creates a defence of similar age in relation to certain child sex offences.

Section 80AG(1) provides that:

It is a defence to a prosecution for an offence ... if the alleged victim is of or above the age of 14 years and the age difference between the alleged victim and the accused person is no more than 2 years.

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<sup>243</sup> See [www.ourlocal.nsw.gov.au](http://www.ourlocal.nsw.gov.au), accessed 4 April 2019.

In any criminal proceedings involving the defence of similar age, the prosecution has the onus of proving, beyond reasonable doubt, that the alleged victim was less than 14 years of age or that the difference in age between the alleged victim and the accused person is more than two years: s 80AG(2).

### ***Section 91H Crimes Act 1900***

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* amended s 91H *Crimes Act*. Section 91H(3) was inserted to provide that proceedings for an offence related to the production, dissemination or possession of child abuse material against a child or young person may only be instituted by or with the approval of the Director of Public Prosecutions.

The amendments to s 91H also allows for an exception for the possession of child abuse material under s 91HAA if the possession occurred when the accused person was under the age of 18 years, and a reasonable person would consider the possession as acceptable having regard to the following circumstances:

- the nature and content of the material
- the circumstances in which the material was produced and came into the possession of the accused person
- the age, intellectual capacity, vulnerability or other relevant circumstances of the child depicted in the material
- the age, intellectual capacity, vulnerability or other relevant circumstances of the accused person at the time the accused person first came into possession of the material and at the time that the accused person's possession of the material first came to the attention of the police officer, and
- the relationship between the accused person and the child depicted in the material.

Finally, the amendment also created a defence to s 91H. Subsections 91HA(9) and (10) now provide that it is a defence in proceedings for an offence against s 91H of possessing child abuse material if the only person depicted in the material is the accused person, if the production or dissemination of the material occurred when the accused person was under the age of 18 years. The onus of proving either defence lies with the accused person on the balance of probabilities.

### ***Section 3C Child Protection (Offenders Registration) Act 2000***

The *Criminal Legislation Amendment (Child Sexual Abuse) Act* also made an amendment to the *Child Protection (Offenders Registration) Act 2000*. The amending Act inserted s 3C into the Act, which provides courts with the discretion to treat child offenders as non-registrable.

The amendment permits a court that sentences a person for a sexual offence committed by the person when the person was a child to make an order declaring that the person is not to be treated as a registrable person in respect of that offence. The *Child Protection (Offenders Registration) Act 2000* provides for certain obligations to be placed on registrable persons, including reporting obligations.

The court may make an order only if the victim of the offence was under 18 years of age, the offender has not been convicted of certain other offences, the court does

not impose a sentence of full-time detention or a control order in respect of the offence and the court is satisfied that the person does not pose a risk to the lives or sexual safety of children.

### **Amendments to the Children (Criminal Proceedings) Act 1987: Early appropriate guilty pleas and committals**

The *Justice Legislation Amendment (Committals and Guilty Pleas) Act 2017* was passed by the NSW Government in October 2017 and commenced on 30 April 2018. The amendments aim to address indictable offences at the early stage of the justice process by the early appropriate guilty plea reforms.

That Act made significant amendments to committal proceedings generally, including the addition of Pt 3, Div 3A to the *Children (Criminal Proceedings) Act 1987* which creates separate committal procedures for children charged with certain indictable offences.

I will outline some of the key changes made to the *Children (Criminal Proceedings) Act 1987* in relation to committal proceedings and early guilty pleas.

Pursuant to s 31(1) of the *Children (Criminal Proceedings) Act 1987*, an offence before the Children's Court will be dealt as a summary proceeding under Ch 4 *Criminal Procedure Act 1986* unless it is a serious children's indictable offence or unless, and until, it is to be dealt with as a committal proceeding under ss 31(2), (3) or (5) *Children (Criminal Proceedings) Act 1987*.

If the young person pleads not guilty in a summary proceeding, the court will direct the prosecutor to serve the brief of evidence within four weeks and the court will adjourn the case for seven weeks to allow the young person to reply to the brief.

This will not be required for an offence for which a brief is not required under cl 24 *Criminal Procedure Regulation 2017* or the offence is a domestic violence offence as defined in s 11 *Crimes (Domestic and Personal Violence) Act 2007* but is not a prescribed sexual offence as defined by s 3 *Criminal Procedure Act 1986*.

On the next court date if the young person maintains his or her plea of not guilty, the case will be listed for hearing at the earliest opportunity.

If the young person pleads guilty, or the court finds the young person guilty, the court may sentence the young person on the same day or the case may be adjourned for sentence with a background report being provided by Juvenile Justice.

If the court directs that a background report be prepared by Juvenile Justice, the court will adjourn the case for six weeks in the case of a young person who is not in custody and two weeks in the case of a young person who is in custody.

If a prosecutor intends to make a submission to the Children's Court that the court should consider exercising its discretion under ss 31(3) or (5) *Children (Criminal Proceedings) Act 1987*, the prosecutor is to advise the young person and the court at the earliest opportunity and no later than:

- (a) in respect of a s 31(5) application: the time that a guilty plea is entered for the offence for which the application relates and the matter is adjourned for a background report;
- (b) in respect of a s 31(3) application: the time that the court adjourns the matter for a summary hearing.

If the young person intends to inform the Children's Court that he or she wishes to have the case dealt with according to law under s 31(2), the young person is to notify the prosecutor and the Children's Court at the earliest opportunity.

### **Useful case law**

This section will canvass some recent case law which is relevant to, or impacts on the exercise of the Children's Court care and protection and criminal jurisdiction.

These cases have been published on the *Children's Law News* website in 2018.<sup>244</sup>

#### **R v AH [2018] NSWSC 973**

The offender was convicted of the offence of doing an act in preparation for, or planning a terrorist act. The offender is sentenced to 12 years imprisonment, to date from 24 April 2016, expiring 23 April 2028. A non-parole period is fixed at 9 years, expiring 23 April 2025. The offender is to be detained as a juvenile until [the date of his 21st birthday].

The NSW Supreme Court held that pursuant to s 105A.23 *Criminal Code Act 1995*, the offender is warned that an application may be made under Div 105A *Criminal Code* for a continuing detention order requiring that the offender be detained in a prison after the end of his sentence for the offence.

See further at [8-0665].

#### **DM v R [2018] NSWCCA 305**

The NSW Criminal Court of Appeal held that the sentencing judge made a factual error in finding that the applicant knew that the victim had nowhere to go on the night of the offence, made a material factual error in finding that the applicant was in a position of leadership in relation to the offending conduct and erred in failing to make a finding of objective seriousness.

The court allowed the appeal, quashing the sentence imposed at first instance. The offender was sentenced to imprisonment for four years and six months with a non-parole period of two years and five months.

#### **Johnson v R (2018) 92 ALJR 1018**

The High Court of Australia unanimously dismissed an appeal that concerned convictions for historical sexual offences, and whether the evidence of alleged sexual misconduct was admissible on the trial of certain counts. The High Court unanimously found that the impugned evidence had relevance in its connection to the family background in which the complainant and appellant were raised.

### **Conclusion**

I hope this paper has been useful in outlining the changes in the Children's Court jurisdiction which have occurred over the past few years, and which will continue to unfold over the course of the year.

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<sup>244</sup> Children's Court of NSW, *Children's Law News*, at [www.childrenscourt.justice.nsw.gov.au/Pages/publications/lawnews/cln-2018.aspx](http://www.childrenscourt.justice.nsw.gov.au/Pages/publications/lawnews/cln-2018.aspx), accessed 4 April 2019. See also Criminal matters — important cases at [8-0000]ff.

# Forensic evidence in child protection proceedings

Judge Peter Johnstone, President of the Children's Court of NSW, International symposium on shaken baby syndrome and abusive head trauma, 16 September 2019, Sydney.<sup>245</sup>

## [5-0200] Introduction

I would like to acknowledge the traditional custodians of the land upon which we meet today, the people of the Eora Nation, and pay my respects to their Elders, past, present and emerging.

I would also like to recognise the over-representation of Aboriginal and Torres Strait Islander children and families in the Children's Court jurisdiction and acknowledge that this over-representation is deeply intertwined with historical and ongoing experiences of intergenerational trauma, institutionalisation, and colonisation.

Cases involving instances of shaken baby syndrome are among the most emotive, controversial and challenging within the care and protection jurisdiction of the Children's Court of NSW.

Decision making in care and protection proceedings is complex, and necessitates that judicial officers engage in the difficult task of considering and evaluating the multiple factors which combine to impact on the child's future safety, welfare and well-being.<sup>246</sup> This process is especially complex in cases involving non-accidental head injury where there is typically no direct evidence to the alleged abuse, and the explanations offered by carers are usually inconsistent with the physical findings.<sup>247</sup> (Throughout this paper, I will use the term "non-accidental head injury", as it encompasses all cases with evidence of head trauma as well as brain injuries.)

This paper aims to explore the role of forensic evidence in care and protection proceedings involving non-accidental head injury. It will look first at the role of the Children's Court in care and protection proceedings in NSW. Secondly, it will discuss current research in non-accidental head injury. Thirdly, it will provide an overview of three cases involving suspected non-accidental head injury in the Children's Court, and analyse decision-making processes employed by judicial officers in establishing whether there is an unacceptable risk of harm. Finally, the paper will discuss the role of forensic and other evidence in care and protection proceedings involving non-accidental head injury in the Children's Court.

## Specialist nature of the Children's Court

The Children's Court of NSW is a specialist court which deals with both care and protection matters and offences committed by children and young people under 18.

The Children's Court of NSW consists of a President, 15 specialist Children's Magistrates and 14 Children's Registrars. It sits permanently in 7 locations, and conducts circuits on a regular basis at other country locations across NSW.

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<sup>245</sup> The author acknowledges the considerable help and valuable assistance in the preparation of this paper by the Children's Court Research Associate, Darcy Jackman.

<sup>246</sup> K Kozłowska and S Foley, "Attachment and risk of future harm: a case of non-accidental brain injury" (2006) 27(2) *Australian and New Zealand Journal of Family Therapy* 75.

<sup>247</sup> *Department of Family and Community Services (NSW) and the Bell-Collins Children* [2014] NSWChC 5.

### Care and protection proceedings

Care and protection proceedings are conducted in the Children’s Court of NSW under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (‘the Care Act’).

The objects of the Care Act, as set out in s 8, are:

- that children and young persons receive such care and protection as is necessary for their safety, welfare and well-being, having regard to the capacity of their parents or other persons responsible for them, and
- recognition that the primary means of providing for the safety, welfare and well-being of children and young persons is by providing them with long-term, safe, nurturing, stable and secure environments through permanent placement in accordance with the permanent placement principles, and
- that all institutions, services and facilities responsible for the care and protection of children and young persons provide an environment for them that is free of violence and exploitation and provide services that foster their health, developmental needs, spirituality, self-respect and dignity, and
- that appropriate assistance is rendered to parents and other persons responsible for children and young persons in the performance of their child-rearing responsibilities in order to promote a safe and nurturing environment.

The paramountcy principle under which the Care Act is to be administered provides that in any action or decision concerning a particular child, their safety, welfare and well-being is paramount.<sup>248</sup> This principle prevails over all other considerations, even where it conflicts with the rights or interests of the parents.

Care and protection proceedings in the Children’s Court are conducted in two main stages: the establishment stage and the placement stage.

Establishment is a threshold issue that grounds the court’s continuing jurisdiction in care and protection matters. A final Care order can only be made if the court is satisfied, on the balance of probabilities that the child is in need of care and protection.

It is now well settled law that critical decisions under the Care Act relating to such issues as restoration, contact, parental responsibility and placement, the proper test to be applied is that of “unacceptable risk of harm to the child”, as established in the High Court decision in *M v M* (1988) 166 CLR 69. Whether there is an unacceptable risk of harm to the child is to be assessed from the accumulation of factors proved according to the relevant civil standard. The High Court held that in applying the unacceptable risk of harm test it is necessary to determine firstly whether a risk of harm exists and, secondly, the magnitude of that risk, as it may be determinative of the issues involved in the particular proceedings.

The unacceptable risk of harm test was applied in the matter of *DFaCS Re Eggleton* [2016] NSWChC 4 in which I noted at [18]:

It seems to me ... that the unacceptable risk of harm that is said to be presented to the child by his parents needs to be evaluated against the prospect of it actually occurring, and against the protective measures that might be put in place to ameliorate or minimise that risk ...

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<sup>248</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 9(1).

The onus of proof in care and protection matters is upon the Secretary. The standard of proof is on the balance of probabilities.<sup>249</sup> The High Court decision in *Briginshaw v Briginshaw* (1938) 60 CLR 336 is relevant in determining whether the burden of proof, on the balance of probabilities, has been achieved. Further, the Secretary will not fail to satisfy the burden of proof on the balance of probabilities simply because hypotheses cannot be excluded which, although consistent with innocence, are highly improbable.<sup>250</sup> This was determined by Sackville AJA in *Director-General of Department of Community Services; Re "Sophie"* [2008] NSWCA 250 at [67]–[68], where he said:

The reasoning process I have outlined involves an error of law. The primary Judge, although stating the principles governing the burden of proof correctly did not apply them correctly. It was appropriate to take into account the gravity of the allegation of sexual misconduct made against the father, as required by s 140(2) of the *Evidence Act 1995* (NSW). It was not appropriate to find that the Director-General had failed to satisfy the burden of proof on the balance of probabilities simply because his Honour could not exclude a hypothesis that, although consistent with innocence, was “*highly improbable*”. To approach the fact-finding task in that way was to apply a standard of proof higher than the balance of probabilities, even taking into account the gravity of the allegation made against the father.

As the High Court pointed out in *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* at [171], statements to the effect that clear and cogent proof is necessary where a serious allegation is made are not directed to the standard of proof to be applied, but merely reflect the conventional perception that members of society do not ordinarily engage in serious misconduct and that, accordingly, a finding of such misconduct should not be made lightly. In the end, however, as Ipp JA observed in *Dolman v Palmer* at [47], the enquiry is simply whether the allegation has been proved on the balance of probabilities.

Once a child or young person has been found to be in need of care and protection, the Secretary of the Department of Family and Community Services must assess whether there is a realistic possibility of the child being restored to his or her parents within a reasonable period of time, not exceeding two years, having regard to the circumstances of the child and any evidence that the parents are likely to be able to satisfactorily address the issues that led to the removal of the child from their care.<sup>251</sup>

The assessment as to whether or not there is a realistic possibility of restoration to a parent involves an important threshold construct which informs the planning that is to be undertaken in respect of any child, and determines whether some other course of action is appropriate, such as placement with a family member or with someone else, in foster care.

The Care Act provides that it is for the Secretary to make the assessment in the first instance. It is then for the court to decide whether to accept that assessment.

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<sup>249</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 93(4).

<sup>250</sup> *MXS v Department of Family and Human Services (NSW)* [2012] NSWDC 63.

<sup>251</sup> *DFaCS & the Steward Children* [2019] NSWChC 1.

In considering whether to accept the Secretary's assessment, the court must have regard to two matters:

1. The circumstances of the child or young person, and
2. The evidence, if any, that the child or young person's parents are likely to be able to satisfactorily address the issues that have led to the removal of the child or young person from their care.

There is no definition of the phrase "realistic possibility of restoration" in the Care Act. However, the principles concerning the interpretation and application of the phrase were comprehensively considered in the NSW Supreme Court by Slattery, J *In the matter of Campbell* [2011] NSWSC 761.

This decision was cited with approval by the NSW Court of Appeal in *Re Henry; JL v Secretary, Department of Family and Community Services* [2015] NSWCA 89. The case law suggests that for a court to make a finding of realistic possibility of restoration the possibility must be "realistic", that is, it must be real or practical. The possibility must not be fanciful, sentimental or idealistic, or based upon "unlikely hopes for the future". It needs to be "sensible" and "commonsensical".

If the court does not accept the assessment of the Secretary as to restoration, it may direct the Secretary to prepare a different permanency plan.<sup>252</sup> The Secretary is then required to address the permanency planning for the child in accordance with the decision as to restoration or otherwise.<sup>253</sup>

### **Evidence in care and protection proceedings**

The Care Act confers a unique jurisdiction on the Children's Court. As Wilson J observed in the High Court in *J v Lieschke* (1987) 162 CLR 447 at [3] in relation to the *Child Welfare Act 1939*, "[n]eglect proceedings are truly a creature of statute, neither civil or criminal in nature".

The Children's Court has a wide discretion to admit evidence in care and protection proceedings, such as hearsay evidence, that would not be admissible in other courts. Nevertheless, it must draw its conclusions from material that is satisfactory, in the probative sense, so as to avoid decision making that might appear capricious, arbitrary or without foundational material.<sup>254</sup>

The court is required to examine the sources of evidence, particularly quasi-opinion and secondary evidence, to determine its strength and the weight to be given to it.<sup>255</sup>

The court must take into account all the evidence and consider each piece of evidence in the context of all the other evidence. In *Re T* [2004] EWCA Civ 558 at [33], Dame Elizabeth Butler-Sloss P observed:

Evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof.

<sup>252</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 83(6).

<sup>253</sup> *ibid* s 78.

<sup>254</sup> *JL v Secretary, Department of family and Community Services* [2015] NSWCA 88 at [148]; see also *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 at [79].

<sup>255</sup> *LZ and QJ v FACS* [2017] NSWDC 414 at [150].

When considering cases of suspected non-accidental head injury the court will frequently be required to consider and evaluate evidence from experts, particularly medical witnesses. Their evidence is opinion evidence.

Despite the Children's Court's broad discretion to admit evidence, in matters concerning expert scientific evidence the court tends to apply the usual rules of evidence relating to expert testimony.<sup>256</sup>

The law sets out a number of specific requirements in respect of opinion evidence.

In *Makita (Australia) Pty Ltd v Sprowles* Heydon JA, then a justice of the NSWCA, summarised the applicable law in relation to the admissibility of expert evidence:<sup>257</sup>

1. there must be field of "specialised knowledge" in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert;
2. the opinion proffered must be "wholly or substantially based on the witness's expert knowledge";
3. so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert;
4. so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way;
5. it must be established that the facts on which the opinion is based form a proper foundation for it; and the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert, and on which the opinion is "wholly or substantially based" applies to the facts assumed or observed so as to produce the opinion propounded.

Thus, expert witnesses must exercise their independent professional judgement in relation to issues.

Doctors should not stray outside their area of expertise. For example, a general practitioner should not venture to express a view on a matter of psychiatry, or at least should make clear that the view is based on a limited level of general medical knowledge derived from study or general practice. The expert should clearly set out any written material considered, and all the people consulted with, and specify which aspects of that material were regarded as persuasive in forming the opinion. Medical experts should identify any paper or study they have relied on, and should articulate the reasoning process they have used to come to any opinion or conclusion, and be in a position to defend it.

Expert witnesses in the Children's Court must comply with the Expert Witness Code of Conduct<sup>258</sup> as set out in the Uniform Civil Procedure Rules 2005.<sup>259</sup>

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<sup>256</sup> A Stephens, *Legal outcomes in non-accidental head injury ("shaken baby syndrome") cases: inevitable inconsistencies*, PhD Thesis, The University of Sydney, 2011.

<sup>257</sup> (2001) 52 NSWLR 705 at [85].

<sup>258</sup> Children's Court of New South Wales, *Joint Conference of Expert Witnesses in Care Proceedings*, Practice Note 9 at [www.childrenscourt.justice.nsw.gov.au/Documents/practice\\_note\\_9\\_joint\\_conferences.pdf](http://www.childrenscourt.justice.nsw.gov.au/Documents/practice_note_9_joint_conferences.pdf), accessed 26 September 2019.

<sup>259</sup> Uniform Civil Procedure Rules 2005, r 31.18.

## Non-accidental head injury

It is not possible to analyse the role of forensic evidence in care and protection proceedings involving suspected non-accidental head injury without an attempt to survey the present realities of abusive head trauma in infants.

The issue of non-accidental head injury has been the subject of profound and sometimes passionate disagreement.

Shaking as a mechanism for inflicting intracranial injury in infants was first described in an article in the *British Medical Journal* in 1971. The research relied upon was published a few years prior wherein rhesus monkeys were placed in fibreglass chairs on tracks and then, with their heads free to rotate, subjected to accelerations similar to those in rear end motor vehicle collisions. Some of the animals were found thereafter to have suffered intracranial injury and some were found to have a concomitant neck injury. The resulting proposition that rotational acceleration of sufficient magnitude could cause intracranial injury without impact, and therefore without external evidence of injury, appeared to be an explanation for hitherto unexplained injury in infants.

In 1987 however, a major study of 48 children aged one month to two years with suspected shake injury was published in the *Journal of Neurosurgery*. The experiment concluded that the accelerations established for shakes were smaller by a factor of 50 to one than those for impacts. The study ended:<sup>260</sup>

It is our conclusion that the shaken baby syndrome, at least in its most severe acute form, is not usually caused by shaking alone. Although shaking may, in fact, be a part of the process, it is more likely that such infants suffer blunt impact. The most likely scenario may be a child who was shaken, then thrown into or against a crib, or other surface, striking the back of the head and thus undergoing a large, brief deceleration.

In 2005, the United Kingdom Court of Appeal heard appeals by four carers in whose care infants had died or suffered brain injury. The court heard ten expert medical witnesses called on the behalf of the appellants and 11 called on behalf of the Crown. The essential issues in the appeals was a challenge to the then accepted hypothesis concerning shaken baby syndrome and the proposition that the coincidence of the “triad” — encephalopathy, subdural haemorrhage and retinal haemorrhage — in a child, was the “hallmark” of non-accidental head injury.<sup>261</sup>

A team of distinguished doctors, led by Dr Jennian Geddes, produced three papers which cumulatively challenged the supposed infallibility of the “triad”.<sup>262</sup> In *R v Harris* [2005] EWCA Crim 1980, the court disregarded Dr Geddes’ research as a credible or alternative explanation of the triad injuries. It continued at [69]–[70]:

There are many other medical issues involved in cases of non-accidental head injury. Further, there remains a body of medical opinion which does not accept that the triad is an infallible tool for diagnosis. This body of opinion, whilst recognising that the triad is consistent with non-accidental head injury, cautions against its use as a certain diagnosis in the absence of other evidence.

<sup>260</sup> A Duhaime, et al, “The shaken baby syndrome: a clinical, pathological, and biomechanical study” (1987) 66(3) *Journal of Neurosurgery* 409.

<sup>261</sup> *R v Harris* [2005] EWCA Crim 1980 at [56].

<sup>262</sup> *Ministry of Social Development v Tilo* [2017] NZFC 2593 at [32].

Whilst a strong pointer to non-accidental head injury on its own we do not think it is possible to find that it [the triad] must automatically and necessarily lead to a diagnosis of non-accidental head injury. All the circumstances, including the clinical picture, must be taken into account.

In 2009, researchers confronted the circularity of reasoning issue which lies at the centre of the proposition that the triad are, without evidence of external injury, capable of establishing shaken infant syndrome.<sup>263</sup>

Further, a French report published the following year on the study of 112 cases over a 4-year period, in 29 of which the perpetrator had confessed to violence towards the child.<sup>264</sup> These were compared with 112 cases in which there was no confession. It was found that there was no statistically significant difference between the two groups for gender ratio, number of deaths, main symptoms, presence of fractures, retinal haemorrhages or subdural haemorrhages. Significantly, 11 of the 29 children of the confessed deliberate shaking group were listed to have had no skin lesions, fractures, other injuries or previous injuries.

Finally, in 2016 the Swedish Agency for Health Technology Assessment and Assessment of Social Services published a controversial report.<sup>265</sup> The report addressed the methodologies of the enormous number of pieces of research on the issue. Of 1065 pieces selected for initial survey, 1035 were excluded because they did not meet the inclusion criteria. Of the remaining 30 studies, only two were assessed to have moderate quality, and none of high quality.

I end this survey by acknowledging its limitations. As a judicial officer I am limited in my understanding of medical processes, and although I have engaged in research and reading on the topic of non-accidental head injury, I am by no means a specialist on the topic.

### **Non-accidental head injury in care proceedings**

Care and protection proceedings involving suspected non-accidental head injury are among the most emotive, controversial and challenging matters judicial officers face. Decision making is complex, and necessitates that the court engage in the difficult task of considering and evaluating the multiple factors which combine to impact on the child's future safety, welfare and well-being.

In matters involving suspected non-accidental head injury, the Children's Court is tasked with deciding whether the child has suffered significant harm, or if there is a real possibility of significant harm in the future. Critical to this decision-making process is establishing whether there is an unacceptable risk of harm to the child.

Proving on the balance of probabilities that injuries occurred through abuse and non-accidental means can be challenging. Even in matters where the court is able to

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<sup>263</sup> M Vinchon, et al, "Confessed abuse versus witnessed accident in infants: comparison of clinical, radiological and ophthalmological data in corroborated cases" (2009) 26 *Child's Nervous System* 637.

<sup>264</sup> C Adamsbaum, et al, "Abusive head trauma: judicial admissions highlight violent and repetitive shaking" (2010) 126 *Pediatrics* 546.

<sup>265</sup> Swedish Agency for Health Technology Assessment and Assessment of Social Services, *Traumatic shaking — the role of the triad in medical investigations of suspected traumatic shaking*, SBU Report Number 255E, 2016 at [www.sbu.se/en/publications/sbu-assesses/traumatic-shaking--the-role-of-the-triad-in-medical-investigations-of-suspected-traumatic-shaking/](http://www.sbu.se/en/publications/sbu-assesses/traumatic-shaking--the-role-of-the-triad-in-medical-investigations-of-suspected-traumatic-shaking/), accessed 26 September 2019.

make a finding that the injuries were caused through abuse, ascertaining the identity of the offender is often difficult, if not impossible, as the circumstances of the alleged crimes are not precisely determined by the pathological findings and perpetrators' accounts of the events are rarely accurate and consistent.<sup>266</sup>

In order to illustrate the role of forensic evidence in care and protection proceedings involving suspected non-accidental head injury and the decision-making processes employed by courts, this paper will conduct a survey of four matters involving head trauma.

## Relevant case law

### **SS v Department of Human Services (NSW) [2010] NSWDC 279**

In the matter of *SS v Department of Human Services (NSW)* [2010] NSWDC 279 an 11-week-old baby, J, was admitted to Mount Druitt Hospital suffering from diarrhoea, fever, lethargy and a rash on his cheeks. Clinical examination revealed multiple problems including seizures, a bulging fontanelle, acute bilateral subdural haemorrhaging and bilateral retinal haemorrhaging. There was no evidence of trauma, either by way of skin damage, or by way of bone fractures.

J was later transferred to the Children's Hospital at Westmead where he was diagnosed as having sustained brain damage. Subsequently, a notification was made to the Joint Investigation Response Team (JIRT) for investigation and assessment of the cause of his brain damage. Following the investigation, J was assumed into the care of the Minister of the Department of Human Services. J remained at Westmead Hospital until he was transferred to a rehabilitation hospital.

The Department of Human Services filed a Care Plan in the Children's Court seeking final orders allocating parental responsibility for J to the Minister until he turned 18. The Children's Court found that it was more likely than not that J's injuries were caused by non-accidental shaking. The court determined that restoration of J to the parents care involved an unacceptable risk of harm inconsistent with his safety, welfare and well-being, and accordingly, there was a finding of no realistic possibility of restoration.

The parents appealed to the District Court from the orders made by the Children's Court by way of new hearing and evidence in addition to and in substitution for the evidence on which the orders were made by that court. They contended that the Director-General did not establish, to the relevant evidentiary standard, that care orders should be made. They submitted, therefore, that the appeal should be allowed and the orders of the Children's Court set aside, with the result that J should be returned to their care.

The outcome of the appeal and the orders were dependent upon the determination of the pivotal issue, that is, whether the brain damage sustained by J was the result of non-accidental shaking by one of the parents.

The parents' explanation of events in support of their appeal was as follows. According to the mother's evidence, she found J lying on the lounge one afternoon.

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<sup>266</sup> Stephens, above n 12.

She noticed he was pale, lying there drifting off to sleep. The father told her J had not been eating a lot and was not as active as usual. She noticed J make a sudden and quick movement of his head. She picked him up and gave him some water to drink.

The mother noticed he was looking at her in a blank way, and when she clicked her fingers in front of his eyes he didn't blink. She became concerned and took J to Mount Druitt Hospital.

In support of their appeal, the parents relied upon two overseas medical witnesses, Dr Gabaeff and Dr Gardner.

Dr Gabaeff, a physician practicing in emergency medicine and clinic forensic medicine in the United States, argued that in his opinion, the brain damage suffered by J was the result of meningitis. He disagreed with the studies in the medical literature that identified the diagnostic value of subdural haematoma and retinal haemorrhages, and the absence of signs of impact, as good indicators of inflicted head injuries.

Dr Gardner, a retired ophthalmologist from the United States, further suggested that there were a number of possible alternative causes of the retinal haemorrhages suffered by J, including birth haemorrhages, infections, blood disorders and alterations in intrathoracic, intra-abdominal, intracranial and intravascular pressure.

The Director-General submitted that the parents presented an unacceptable risk of harm to J, and argued that parental responsibility should remain allocated in accordance with the orders of the Children's Court. The Director-General's case relied upon the hospital records and the evidence of Dr Stachurska, Dr Hing and Professor Isaacs.

Dr Anna Stachurska, a specialist paediatrician in the Child Protection Unit, and Mr Mark Palmer, the Senior Clinician in the Child Protection Unit at Westmead Hospital, provided the court with J's initial Assessment Report. The report found no medical condition that could explain J's presentation. Rather, it pointed towards a finding that J's injuries were non-accidental: "It is highly concerning that J has significant unexplained injuries, which are indicative of inflicted head injury on more than one occasion (most probably due to shaking)".<sup>267</sup>

In providing evidence to the court, Dr Stachurska, reiterated that she was of the view that J's injury was most likely caused by being shaken. She disagreed with the evidence of the two doctors called by the parents, Dr Gabaeff and Dr Gardner, that an available alternative cause was meningitis.

Dr Hing and Dr Isaacs supported the findings of the initial assessment. Dr Stephen Hing, a medical practitioner specialising in ophthalmology, was of the view that it was extremely likely that J's brain injury was caused by non-accidental means. He also disagreed with Dr Gabaeff and Dr Gardner that an available alternative cause of the injuries was meningitis. He noted that although retinal haemorrhages can occur from meningitis, they do not look like the severe retinal haemorrhages suffered by J. Further, Professor David Isaacs, a senior staff specialist in General Paediatrics and Paediatric Infectious Diseases at Westmead Children's Hospital, said that he was almost certain J was severely shaken on several occasions, causing bleeding in the brain and eyes. He also disputed meningitis as a cause.

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<sup>267</sup> *SS v Department of Human Services (NSW)* [2010] NSWDC 279 at [37]

The determination of the issue of whether the brain damage sustained by J was the result of non-accidental shaking involved a consideration of the competing bodies of medical opinion. The court concluded, at [99], [105]–[106], that it preferred the body of medical evidence presented on behalf of the Director-General rather than the evidence of Dr Gabaeff and Dr Gardener:

An overall assessment of the medical evidence revealed the Director General's evidence to be the more objective. Dr Gabaeff and Dr Gardener approached the task from a prejudiced and pre-judged perspective. Their evidence, which was wholly concerned to debunk the notion of shaken baby syndrome, is to be approached with considerable caution. The medical evidence led by the Director General, on the other hand, involved a logical evaluation of all available material, was concerned to consider other possibilities, and was carefully and logically reasoned. That evidence is consistent with mainstream paediatric medical opinion. By their own admission, Dr Gabaeff and Dr Gardener are outside that conventional paradigm.

...

The plaintiffs' experts... were unashamedly partisan, and the totality of their evidence must be viewed with suspicion.

Their evidence was found wanting in a number of important respects. Dr Gardner's position, upon analysis, is to the effect that there were other possible explanations for J's presentation. But, because Dr Gardner does not accept shaken baby syndrome as a valid diagnosis, the explanation must be otherwise. To my mind that was circular reasoning. Dr Gabaeff's position was entirely premised on the diagnosis of meningitis. Flaws in his reasoning process were exposed in cross-examination, including for example his reliance on an incorrectly assumed fever, and a theory as to the possible mechanism of infection being the immunisation injections, which was discredited. I preferred the evidence of the Westmead experts and I find that J's brain damage was not caused by meningitis.

The court found that it was satisfied, on the balance of probabilities, that the proximate cause of the brain damage observed following the hospitalisation of J was non-accidental shaking in the previous 24 hours. The only persons who, on the balance of probabilities, were in the available pool of perpetrators, were the parents.

### **Re Lincoln and Raymond [2009] CLN 5**

In the matter of *Re Lincoln and Raymond* [2009] CLN 5, Lincoln, was admitted to Royal Alexandra Hospital for Children at Westmead suffering seizures, a bulging fontanelle and low grade temperature, although there were no external signs of trauma. Further investigations showed Lincoln had bilateral acute haemorrhages, chronic subdural haemorrhages, retinal haemorrhages and extensive bilateral bleeding. There was a subsequent emergency care and protection order which allocated parental responsibility for the child to the Minister pending further order.

The Director-General sought an order that the Minister have parental responsibility of Lincoln until he attained the age of 18 years.

A number of expert witnesses were called on behalf of the Director-General. The overwhelming bulk of medical opinion among those who treated Lincoln or consulted regarding his care was that his injuries were non-accidental and caused by having been shaken without impact to his head.

The parents argued that there was a realistic possibility of restoration to their care. They denied having done anything which may have occasioned Lincoln's injuries. They suggested that perhaps Lincoln had been suffering from a medical abnormality, such as meningitis, or that a vaccination may have been responsible for his injuries. The parents' views were supported by Dr Innes, a medical practitioner, who suggested, at [46] that:

Lincoln suffered a subdural haemorrhage brought on by a coagulopathy — a tendency to bleed spontaneously. The cause of the coagulopathy was a deficiency of vitamin K which caused the condition known as the “late form of Haemorrhagic Disease of the New Born”.

The court preferred the evidence presented by the Director-General over that presented by the parents. The Senior Children's Magistrate came to this conclusion after an analysis of all the presented evidence. He noted at [47]–[48]:

In the first place, Dr Stachurska has treated Lincoln and was involved with him when he presented at hospital. In contrast to Dr Innes who has never met the child, conducted no tests, undertook no consultations and had access to very few of the records, Dr Stachurska treated Lincoln at RAHC Westmead and was responsible for his care. It was she who ordered a variety of tests and, armed with a wide range of written material including hospital and nursing notes and records and test results, she had the opportunity to consult with colleagues, experts in a variety of fields, and to explore Lincoln's symptoms and the origin of his injuries.

Secondly, as I think Dr Innes would recognise, Dr Stachurska, when she gave her evidence and expressed her clinical opinions ... represented the majority of medical opinion in this country and around the world. Unlike Dr Innes, she has no axe to grind and no special theory to advance. She is not a crusader for or an apostle of any particular medical theory whereas Dr Innes is a man seized of a theory, convinced of its truth and eager to proselytise. Dr Stachurska presented her evidence calmly and respectfully. She did not accuse her medical colleagues of “talking nonsense” and treat their opinions with derision as Dr Innes did. It is difficult to see her speaking so blithely about the Baby P case or writing in protest about the jury verdict as Dr Innes did. It seemed to me that, in contrast to Dr Innes' evidence, Dr Stachurska's evidence was sober, well considered and internally consistent and that there was no suggestion that she was grasping at straws upon which she might build a hypothesis.

The court concluded that it was more likely than not that Lincoln's injuries were caused by shaking. Senior Children's Magistrate Mitchell concluded at [58], [59], on all the evidence, that there was an unacceptable risk of harm to Lincoln:

The question for the Children's Court in the present case, then, is not whether the parents or, for that matter, any other person is responsible for Lincoln's injuries but whether the proposals put to the court for his care and for the care of his brother constitute an acceptable or unacceptable risk so far as the safety, welfare and well-being of each of the children is concerned. In assessing risk, the court should have particular regard to the following:

- the egregious nature and extent of the injuries which have been inflicted on Lincoln
- the fact that neither parent has offered an acceptable explanation of those injuries
- the opportunity which each of Lincoln's parent has had to inflict injury
- the relative lack of opportunity which any other person has had to mistreat Lincoln

- the on-going extreme vulnerability of Lincoln in particular and his and Raymond's need of and entitlement to protection
- the extent of Lincoln's continuing disabilities and the degree to which his on-going care will call for special skills and special qualities including patience and empathy
- the reservations regarding the reliability and suitability of his parents which prudently are entertained in the circumstances of Lincoln's injuries while in the care of his parents
- the consequences of Lincoln's long term separation from his parents, particularly with regard to his attachments
- the attachments of each of the boys
- the suitability of the father as a carer for Raymond and the boy's progress while in his father's care
- the unavailability of any other family member to take care of the children
- the risks and unknowns necessarily involved in out-of-home care and separation from parents.

Taking all those matters into account and having considered them in detail, my assessment is that the proposal of [the parents] that Lincoln be restored to their care involves an unacceptable risk to the child and is not consistent with his safety, welfare and well-being. Accordingly, there is no realistic possibility of a restoration in his case.

### **Re Anthony [2008] NSWLC 21**

In the matter of *Re Anthony* [2008] NSWLC 21, Anthony, then aged 10 weeks, presented at Sydney Children's Hospital at Randwick. Following a number of investigations, Anthony was found to have both old and new subdural haemorrhages bilaterally, widespread haemorrhages in both his eyes, fractures of multiple ribs and facial bruising.

Anthony's parents professed themselves to be "bewildered." Each denied causing any harm to Anthony, and while acknowledging the logical inconsistency of the position, each doubted that the other could have done so.

Following Anthony's discharge from hospital, he resided, while in the parental responsibility of the Minister, with his maternal grandmother. An application was made by the Director-General to the Children's Court to place Anthony with his maternal grandmother for a period of five years, and continue to have contact with his parents.

A number of expert witnesses were called by the Director-General and the parents during proceedings before the Children's Court to determine whether, on the balance of probabilities, Anthony's parents presented an unacceptable risk of harm. In doing so, it was necessary for the court to ascertain whether on balance, Anthony's injuries were the result of abuse.

The Director-General relied upon two witnesses, Dr Moran and Dr Tait, from the Sydney Children's Hospital Network.

Dr Moran reported that "subdural haemorrhages and retinal haemorrhages most usually occur secondary to trauma ... of the acceleration-deceleration type, typically

caused by shaking with impact”. Further, he suggested that Anthony’s rib fractures were “caused by squeezing of the chest wall ... and require a degree of force which is not associated with normal handling”.<sup>268</sup>

Dr Tait, a Consultant Paediatrician, agreed with Dr Moran that, at 12 months of age, retinal haemorrhages, particularly those involving different layers of the retina as was the case with Anthony, “are rare, and in this age group almost exclusively are the consequence of forceful acceleration/deceleration of the head in association with angular rotation”.<sup>269</sup>

The parents presented an affidavit of Dr Kalokerinos suggesting that some or perhaps all of Anthony’s injuries may have been a consequence of vitamin C deficiency. The court noted that Dr Kalokerinos’ thesis was not new, and had failed to attract support of the medical profession. Similarly, the theory was not supported by consistent rigorous study and research. Senior Children’s Magistrate Mitchell, while praising Kalokerinos as “a distinguished Australian humanitarian”, held that “his honourable motives do not render his science reliable.”<sup>270</sup> The court employed the concept of “general acceptance” and dismissed Dr Kalokerinos’s theory by stating that it had “failed to attract support in the medical profession”.<sup>271</sup>

The Children’s Court also had the privilege of hearing from Dr Lennings, a clinical and forensic psychologist. Dr Lennings opined that the psycho-social factors often pointing to risk in cases of non-accidental injury to children were absent in the case of *Re Anthony*. Further, he did not believe that either parent was prone to impulsivity of behaviour, there was no suggestion of personality disorder in either parent and there was an absence of aggression and violence. While Dr Lennings acknowledged that the absence of psycho-social factors was peculiar, as he explained, “human behaviour is unpredictable”.<sup>272</sup>

Further, the court reflected upon the findings of Kasia Kozłowska and Sue Foley in their paper titled “Attachment and risk of future harm: a case of non-accidental brain injury” published in the *Australian and New Zealand Journal of Family Therapy*. This paper noted that:<sup>273</sup>

shaking may be the result of one of a number of scenarios: a lack of empathy for the child’s needs or distress; parental difficulty in managing the child’s negative emotions; parental difficulty in managing their own emotions; or parental anger at the impact of the child on their ability to meet their own physical or emotional needs.

Kozłowska and Foley argue that an exploration of “perpetrator intentionality” is an important tool for the assessment of future risk but acknowledge that in many cases “understanding the circumstances surrounding the shaking event in order to understand risk is not possible in day-to-day practice”.<sup>274</sup> The court noted that such a practice is not possible where the identity of the perpetrator is unknown or where the perpetrator is unwilling to speak about the matter, and as such, was not possible in *Re Anthony*.

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<sup>268</sup> *Re Anthony* [2008] NSWLC 21 at [6].

<sup>269</sup> *ibid* at [10].

<sup>270</sup> Stephens, above n 12.

<sup>271</sup> *Re Anthony* at [14].

<sup>272</sup> *ibid* at [29].

<sup>273</sup> Kozłowska and Foley, above n 2, at 76.

<sup>274</sup> *ibid*.

In such circumstances, the learned authors acknowledged that the “assumption remains however, that after an alleged incident, there is always ongoing potential for harm, even though the circumstances of the injury may remain unclear” and, for that reason, they argue that the “broader indicators of risk” including parental substance abuse, parental or older sibling mental health examination and history, history of poor impulse control, frustration tolerance, violence between family members, other instances of physical harm or neglect of children, safe physical handling of children, physical discipline practices, parental ability to empathise with children, and parental ability to recognise and meet their children’s needs must be carefully considered.<sup>275</sup>

As Stephan Herridge states in “Non-accidental injury in care proceedings — a digest for practitioners” [2009] CLN 6 at 12:

If the cause of the injuries was known and was acknowledged by the person responsible, one could assess the likelihood of that person acting again so as to cause the injuries. It would be possible to assess the risk involved to the plaintiff and to weigh that against the advantages of returning him to his parents. However, in the absence of any explanation, it is far more difficult to assess and weigh the relative advantages and disadvantages in this matter.

The court in *Re Anthony* then turned to consider and balance the risks associated with restoration against those in alternate or out-of-home care, at [44]:

It follows then that, in assessing whether the risk posed to a child by a parental proposal is acceptable or unacceptable, one of the factors which will be considered is the risk of disadvantage posed by alternate proposals for the care of the child advanced by the Director-General or any other party. There will be cases where the risks posed by parents are so egregious that they quite overwhelm the disadvantages posed by a proposal of long term out-of-home care but, in other cases, such as *Re Nellie* [2004] CLN 4, where there had been serious injury to the child caused by an unexplained shaking incident, the risks posed by a restoration to the parents and the disadvantages involved in the Director-General’s proposals were much more evenly balanced.

The Children’s Court held that to restore Anthony to his parents in the circumstances was an unacceptable risk to his safety, welfare and well-being. Accordingly, the court directed that Anthony should be placed in the parental responsibility of the grandparents.

## **Forensic evidence in child protection proceedings**

Care and protection proceedings involving suspected non-accidental head injury often rest entirely upon forensic evidence.

A review of legal principles, as set out in *Re JS* [2012] EWHC 1370 (Fam), emphasises the centrality of expert evidence in care and protection proceedings involving matters of suspected non-accidental head injury.

Firstly, the burden of proof lies with the Department of Family and Community Services, now known as the Department of Communities and Justice. It is the Department that brings these proceedings and identifies the findings they invite the court to make. Therefore the burden of proving the allegations rests with them.

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<sup>275</sup> *ibid.*

Second, the standard of proof is the balance of probabilities: *Briginshaw v Briginshaw* (1938) 60 CLR 336. If the Department of Family and Community Services proves on the balance of probabilities that a child has sustained non-accidental injuries inflicted by one of his parents, the Children's Court will treat that fact as established and all future decisions concerning his future will be based on that finding.

Third, findings of fact in suspected non-accidental injury must be based on evidence. As Munby LJ observed in *Re A (A Child)* [2011] EWCA Civ 12 at [26]:

[It] is an elementary proposition that findings of fact must be based on evidence (including inferences that can properly be drawn from the evidence) and not on suspicion or speculation.

Fourth, when considering cases of suspected child abuse the court must take into account all the evidence and furthermore consider each piece of evidence in the context of all the other evidence. As Dame Elizabeth Butler-Sloss P observed in *Re T* [2004] EWCA Civ 558 at [33]:

evidence cannot be evaluated and assessed in separate compartments. A judge in these difficult cases must have regard to the relevance of each piece of evidence to other evidence and to exercise an overview of the totality of the evidence in order to come to the conclusion whether the case put forward by the local authority has been made out to the appropriate standard of proof.

Fifth, amongst the evidence received in this case, as is invariably the case in proceedings involving allegations of non-accidental head injury, is expert medical evidence from a variety of specialists.

Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. The roles of the court and the expert are distinct. It is the court that is in the position to weigh up expert evidence against the other evidence. Thus there may be cases, if the medical opinion is that there is nothing diagnostic of non-accidental injury, where a judge, having considered all the evidence, reaches the conclusion that is at variance from that reached by the medical experts.

Sixth, in assessing the expert evidence it is to be borne in mind that cases involving an allegation of shaking involve a multi-disciplinary analysis of the medical information conducted by a group of specialists, each bringing their own expertise to bear on the problem. The court must be careful to ensure that each expert keeps within the bounds of their own expertise and defers, where appropriate, to the expertise of others.

Seventh, the evidence of the parents and any other carers is of the utmost importance. It is essential that the court forms a clear assessment of their credibility and reliability. They must have the fullest opportunity to take part in the hearing and the court is likely to place considerable weight on the evidence and the impression it forms of them.

Eighth, it is common for witnesses in these cases to tell lies in the course of the investigation and the hearing. The court must be careful to bear in mind that a witness may lie for many reasons, such as shame, misplaced loyalty, panic, fear, distress, and the fact that a witness has lied about some matters does not mean that he or she has lied about everything.

Ninth, as observed by Hedley J in *Re R* [2011] EWHC 1715 (Fam) at [10]:

there has to be factored into every case which concerns a disputed aetiology giving rise to significant harm, a consideration as to whether the cause is unknown. That affects neither the burden nor the standard of proof. It is simply a factor to be taken into account in deciding whether the causation advanced by the one shouldering the burden of proof is established on the balance of probabilities.

The court must resist the temptation to believe that it is always possible to identify the cause of injury to the child.

Finally, when seeking to identify the perpetrators of non-accidental injuries the test of whether a particular person is in the pool of possible perpetrators, is whether there is a likelihood or a real possibility that he or she was the perpetrator, as established in *North Yorkshire County Council v SA sub nom A (a Child)* [2003] EWCA Civ 839. In order to make a finding that a particular person was the perpetrator of non-accidental injury the court must be satisfied on a balance of probabilities. It is always desirable, where possible, for the perpetrator of non-accidental injuries to be identified both in the public interest and in the interest of the child, although where it is impossible for a judge to find on the balance of probabilities, for example that Parent A rather than Parent B caused the injury, then neither can be excluded from the pool and the judicial officer should not strain to do so.

Expert witnesses are uniquely placed to assist the court in cases involving suspected child abuse, but are not an advocate for a party. They have a paramount duty, overriding any duty to the party or other person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness. Expert witnesses ultimately assist the court in determining matters to ensure the safety, welfare and well-being of a child or young person.

In the current climate of evidence-based medicine, the question of how medical knowledge is utilised in cases of physical child abuse is of paramount importance for the effectiveness of the legal process and the protection of victims.

## Conclusion

Forensic evidence plays a central role in care and protection proceedings involving suspected non-accidental head injury. It is critical in establishing the required tests under the Care Act, namely, whether a child is in need of care and protection, and whether there is any realistic possibility of restoration.

Judicial officers rely on medical professionals to conduct timely and high-quality clinical investigations in suspected shaken baby cases to facilitate the decision-making process in court.

Decision making in care and protection proceedings is complex, and necessitates that courts engage in the difficult task of considering and evaluating the multiple factors which combine to impact on the child's future safety, welfare and well-being.<sup>276</sup> This process is especially complex in cases involving non-accidental head injury where there are typically no witnesses to the alleged abuse and explanations offered by carers are often inconsistent with the physical findings.

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<sup>276</sup> Kozłowska and Foley, F, above n 2, at 75.

Whilst appropriate attention must be paid to the opinion of medical experts, those opinions need to be considered in the context of all the other evidence. The roles of the court and the expert are distinct. It is the court that is in the position to weigh up expert evidence against all other available evidence. Thus there may be cases, if the medical opinion evidence is that there is nothing diagnostic of non-accidental injury, where a judicial officer, having considered all the evidence, reaches the conclusion that is at variance from that reached by the medical experts.

I hope this paper has been illuminating for all here today, especially for those who may come into contact with the care and protection jurisdiction of the Children's Court of NSW.



# Youth on Track randomised controlled trial: process evaluation

Lily Trimboli, NSW Bureau of Crime Statistics and Research, August 2019.<sup>277</sup>

**Aims:** To determine whether the Youth on Track randomised controlled trial is being implemented as intended and whether there are any unexpected consequences of the trial.

**Methods:** Semi-structured interviews were conducted with 52 stakeholders and available administrative program data were analysed.

**Results:** While both the processes of referral into, and engagement with, the scheme were perceived to be operating well, some problems were identified with each process, for example, difficulties in contacting or locating the young person. It was noted that participants of the “control group” (Fast Track) are primarily given referrals to, or linkages with, other service providers while young people allocated to the more comprehensive and longer-term Youth on Track intervention receive a variety of support. Stakeholders identified challenges in implementing each intervention. While some stakeholders stated that there were no challenges in referring young people in either intervention to external service providers, others noted a lack of services in the local area, as well as the effects of the service providers’ risk assessments and their waiting lists. Two recurring themes in the stakeholder interviews were the perceived negative ramifications of Fast Track’s shorter timeframe on re-offending risk and concern about the random allocation of young people to an intervention with no consideration of their background, circumstances or needs.

**Conclusion:** Stakeholders believed that each intervention was being implemented as intended. However, the delivery of the two different interventions and the evaluation and randomisation processes had produced some unexpected consequences.

**Keywords:** youth, randomised controlled trial, process evaluation, interviews

## [5-0210] Introduction

### Youth on Track scheme

Youth on Track is an early intervention scheme. It targets young people in NSW aged between 10 and 17 years who are not yet entrenched in the criminal justice system but who have been assessed as having a medium to high likelihood of re-offending. Youth on Track is not a diversionary program; instead, it operates after formal contact with the criminal justice system. The scheme is based on the premise that young people can be deterred from long-term involvement in the criminal justice system by addressing their multiple and complex offending-related needs such as pro-criminal thinking, negative peer associations, mental health issues, substance abuse, disrupted or dysfunctional family life, poor employment prospects, disabilities and disengagement from education.

Therefore, Youth on Track provides targeted, individualised interventions to address the underlying causes of the young person’s involvement in crime.

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<sup>277</sup> This paper was originally published as L Trimboli, *Youth on Track randomised controlled trial: process evaluation (Issue Paper No 141)*, NSW Bureau of Crime Statistics and Research, Sydney, 2019.

The three key objectives of Youth on Track are:

1. to identify, in a timely way, young people at high risk of continuing in the criminal justice system
2. to provide one-on-one case management and evidence-informed interventions targeted to address the individual criminogenic risk factors of the young person, and
3. to provide an evidence-informed family intervention to support the family of young offenders to reduce the young person's contact with police.<sup>278</sup>

Youth on Track was endorsed by NSW Cabinet in late 2012 and commenced operation on 1 July 2013 in three NSW Police Local Area Commands (LACs) — Blacktown, the Mid-North Coast and Newcastle City. The scheme has gradually expanded over the last few years. The Newcastle site grew to include Lake Macquarie LAC in April 2014 and Port Stephens LAC on 2 February 2015. In addition, on 2 February 2015, the Mid-North Coast site expanded to include Manning Great Lakes LAC and the Blacktown site incorporated the two LACs of Mount Druitt and Quakers Hill. On 17 October 2016, Mr David Elliott, the then NSW Minister for Corrections, announced that, in December 2016, the scheme would receive an injection of \$14.5 million over three years and be expanded to three new sites — Central West (Orana and Canobolas LACs), Coffs Harbour (Coffs Clarence LAC) and New England (Oxley and New England LACs). These six sites are currently funded until June 2020 with further funding being sought to June 2022, to allow time for completion of the randomised controlled trial and a report back to NSW Cabinet to consider the results of the evaluation and possible state-wide expansion of the scheme.

Following a competitive tender process, the NSW Department of Communities and Justice contracted three non-government organisations<sup>279</sup> to engage eligible young people and their families in the scheme and to co-ordinate casework and intensive evidence-informed interventions tailored to the young person's specific offending-related needs.

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<sup>278</sup> NSW Department of Justice, *Youth on Track Service Performance Framework*, 2018, p 2 at [www.youthontrack.justice.nsw.gov.au/Documents/yot-performance-framework.PDF](http://www.youthontrack.justice.nsw.gov.au/Documents/yot-performance-framework.PDF), accessed 9 October 2019.

<sup>279</sup> The relevant organisations are Mission Australia servicing the Blacktown, Central West, Hunter and Mid-North Coast sites; Social Futures servicing Coffs Clarence; and Centacare NSW servicing New England. See D Elliott, Minister for Corrections, Emergency Services and Veterans Affairs, NSW Government, *Innovative program gets Youth on Track*, media release, 17 October 2016 at [www.justice.nsw.gov.au/Documents/Media%20Releases/2016/Innovative-program-gets-youth-on-track.pdf](http://www.justice.nsw.gov.au/Documents/Media%20Releases/2016/Innovative-program-gets-youth-on-track.pdf), accessed 9 October 2019.

### ***How Youth on Track operates***

Figure 1 broadly illustrates how Youth on Track operates. As Figure 1 shows, the scheme consists of six key elements — referral and screening, engagement, assessment, case management, intervention, review and exit planning. There are two referral pathways into Youth on Track. The first pathway relates to discretionary referrals. These are made principally by NSW Police Youth Liaison Officers (YLOs) and also by local primary and secondary schools in the Youth on Track sites. Discretionary referrals apply to young people who have received at least one formal police contact (ie a caution, a Youth Justice Conference or a charge) and who have several risk factors. Some of the relevant offending-related risk factors include truancy, child-at-risk reports, substance abuse, mental health issues, association with peers involved with police, family history of domestic violence, and lower than normal cognitive and academic ability.

The second referral pathway into the scheme relates to compulsory automatic referrals. These are made by the Youth on Track Screening Officer using the NSW Police Force's Computerised Operational Policing System (COPS) database. On a daily basis, the Screening Officer identifies relevant young people who have had a police contact within the previous 24 hours in one of the scheme's pilot sites. Automatic referrals apply to young people who have had at least two formal police contacts and who have a 60% or greater chance of re-offending within 24 months; the latter is measured using an actuarial screening tool developed by the NSW Bureau of Crime Statistics and Research (BOCSAR).<sup>280</sup> To be deemed suitable for either a discretionary or an automatic referral into Youth on Track, the young person must be aged between 10 and 17 years, offend or attend school within one of the Youth on Track sites and have never previously been supervised by Youth Justice NSW.

If the Screening Officer determines that a young person is eligible for the scheme, the young person is referred to the provider who then assesses suitability. A number of factors make a young person unsuitable, including if he/she lives outside the service area of the Youth on Track site. A young person is also deemed to be unsuitable for the scheme if, after completing a risk assessment of the young person (and/or

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<sup>280</sup> GRAM or Group Risk Assessment Model is an actuarial risk assessment instrument whose scores are indicative of a defendant's risk of re-offending within 24 months of an index offence. (See N Smith and C Jones, "Monitoring trends in re-offending among adult and juvenile offenders given non-custodial sanctions", *Crime and Justice Bulletin* No 110, NSW Bureau of Crime Statistics and Research, 2008 at [www.bocsar.nsw.gov.au/Documents/CJB/cjb110.pdf](http://www.bocsar.nsw.gov.au/Documents/CJB/cjb110.pdf), accessed 9 October 2019; N Smith and C Jones, "Monitoring trends in re-offending among offenders released from prison", *Crime and Justice Bulletin* No 117, NSW Bureau of Crime Statistics and Research, 2008 at [www.bocsar.nsw.gov.au/Documents/CJB/cjb117.pdf](http://www.bocsar.nsw.gov.au/Documents/CJB/cjb117.pdf), accessed 9 October 2019.) Technically, GRAM is a logistic regression model that predicts reconviction on the basis of a number of offender and offence characteristics. The GRAM score is calculated on the basis of various individual-level static risk factors, including the defendant's age, gender, Aboriginal or Torres Strait Islander origin, prior criminal history and current offences. One application of the risk assessment instrument is to screen individuals who come in contact with the criminal justice system for further intervention, identifying which individuals would benefit most from referral to specific programs that are designed to reduce their likelihood of re-offending. For the Youth on Track scheme, a young person's GRAM score is calculated by the NSW Police Force's Screening Officer at the time of the young person's referral to the scheme. A GRAM score of <0.6 indicates that a young person's predicted risk of re-offending within 24 months is moderate to low; a score between 0.6 and 0.7 indicates a moderate to high risk of re-offending and a score of >0.7 indicates a high risk of re-offending.

his/her family), the provider determines that it is unsafe to work with them. The young person's existing case manager could decline the young person's participation in the scheme if the case manager considers it is not in the best interests of the young person. This would occur in cases where the young person already has a number of agencies involved in his/her life.

Within three days of the young person being referred to Youth on Track, the provider begins the process of contact with both the young person and his/her family to offer a service. The provider liaises with NSW Police, local schools, community groups and other stakeholders in order to locate the young person and engage him/her and his/her family in the scheme. The provider must obtain written consent from both the young person and his/her family to participate in the scheme. However, the scheme is ultimately voluntary and a young person may opt out at any time.

To ensure continuity of service, each young person is allocated a dedicated and trained case worker. The key tasks of the Youth on Track case workers are to engage the young person and his/her family; develop an individual case plan based upon the young person's assessed criminogenic needs; deliver, refer or broker appropriate programs or services to address these assessed needs and to increase pro-social behaviour; regularly monitor the young person's progress towards meeting the goals of the case plan; and conduct an exit planning process to facilitate the young person's access to ongoing community supports outside Youth on Track.

When a young person consents to participate in Youth on Track, the case worker must conduct two assessments, using validated tools. Each of these assessments should be conducted within four weeks of the young person consenting to participate in the scheme. The results of each assessment are used to develop the young person's case plan. The first assessment is to screen for a cognitive disability. Providers typically use the Child and Adolescent Intellectual Disability Screening Questionnaire (CAIDS-Q). This tool does not assess whether the young person has a cognitive disability, but rather it is used to indicate whether the young person should be referred to an appropriate clinician for further assessment. The second assessment is conducted using the Youth Level of Service Case Management Inventory — Australian Adaptation (YLS/CMI-AA).<sup>281</sup> The YLS/CMI-AA is a structured risk/needs assessment and case management tool, incorporating items that represent static and dynamic risk factors. It is designed to guide the level and types of interventions so that case planning activities can be focused on the appropriate areas of need. The instrument gives some direction for the three basic principles of effective case management that form the foundation of

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<sup>281</sup> The YLS/CMI-AA is an adaptation of a parent tool (YLS/CMI) that was developed in Canada. It was adapted to improve its validity and reliability in the Australian context and to accommodate an older age range. See A Thompson and Z Pope, "Assessing juvenile offenders: preliminary data for the Australian adaptation of the youth level of service/case management inventory (Hoge & Andrews, 1995)" (2005) 40(3) *Australian Psychologist* 207. Use of the YLS/CMI-AA by Youth on Track case workers began on 1 January 2015. Prior to this date, the tool used was the YLS/CMI.

Youth on Track's casework and interventions, namely, risk, need and responsivity.<sup>282</sup> Completion of the YLS/CMI-AA involves gathering information from various sources and conducting multiple interviews with the young person and his/her family.

The YLS/CMI-AA consists of 47 items organised into eight criminogenic domains — prior and current offending, family and living circumstances, education/employment, peer relations, substance abuse, leisure/recreation, personality/behaviour and attitudes/beliefs. A score is calculated for each domain and an overall score that combines the eight domains can also be calculated. The overall score assists in deciding on the level of service to be delivered, with more frequent and intensive intervention being provided to young people who are at higher risk. For example, a young person assessed at high risk/needs receives a minimum of six hours of support per week and could remain in the scheme for up to 12 months while a young person assessed at low risk/needs receives a minimum of two hours per fortnight and may remain in the scheme for only three months and a young person assessed at medium risk/needs receives a minimum of two hours per week and could remain in the scheme for up to six months. The YLS/CMI-AA also allows the case worker to assess the young person's existing strengths, such as his/her skills, family and community relationships.

The YLS/CMI-AA assessment is reviewed 12 and 24 weeks after the first assessment and again when the young person exits from the scheme. The case worker also collects social outcome information from the young person on both entry to, and exit from, the scheme. This is information about the young person's accommodation (eg living in a home with parents or relatives, in independent living, in a rehabilitation service, in foster or kinship care or is homeless), participation in employment (eg in a traineeship or apprenticeship, employed fulltime/part-time, self-employed, in work experience or not employed), participation in education or training (eg attending school, a back-to-school program, a special education program, TAFE, university or

<sup>282</sup> D Andrews et al, "Does correctional treatment work? A clinically relevant and psychologically informed meta-analysis" (1990) 28(3) *Criminology* 369 at 374–375 describe these principles in the following ways:

The risk principle suggests that higher levels of service are best reserved for higher risk cases and that low-risk cases are best assigned to minimal service ... the effects of treatment typically are found to be greater among higher risk cases than among lower risk cases. This is expected unless the need and/or responsivity principles are violated.

...

[need principle] The most promising intermediate targets [for correctional rehabilitation programs] include changing antisocial attitudes, feelings, and peer associations; promoting ... [family bonds] ...; promoting identification with anti-criminal role models; increasing self-control and self-management skills; replacing the skills of lying, stealing, and aggression with other, more pro-social skills; reducing chemical dependencies; and generally shifting the density of rewards and costs for criminal and noncriminal activities in familial, academic, vocational, and other behavioural settings ... Less-promising targets include increasing self-esteem without touching antisocial propensity ..., increasing the cohesiveness of antisocial peer groups ..., improving neighbourhood-wide living conditions without reaching high-risk families ..., and attempts to focus on vague personal/emotional problems that have not been linked with recidivism ...

The responsivity principle has to do with the selection of styles and modes of service that are (a) capable of influencing the specific types of intermediate targets that are set with offenders and (b) appropriately matched to the learning styles of offenders ... Specifically, they include modeling, graduated practice, rehearsal, role playing, reinforcement, resource provision, and detailed verbal guidance and explanations (making suggestions, giving reasons, cognitive restructuring).

a parenting program), and participation in community activities (eg playing sport, participating in volunteer work or programs such as the Rural Fire Service, attending a youth or family centre, and involvement in community groups).

Young people who are referred to Youth on Track may have a range of complex needs that require interventions. With the exception of young people who have low risk levels, case workers should deliver behavioural and family intervention programs to young people in the scheme. Behavioural intervention programs focus on addressing anti-social/pro-criminal thinking and behaviour and are typically based on cognitive behavioural techniques. A standard cognitive behavioural tool employed by Youth on Track case workers is Changing Habits and Reaching Targets.<sup>283</sup> CHART is an offence focused intervention designed specifically for young offenders. It challenges offending behaviour by helping young people to understand the values and beliefs that underpin their offending behaviour, to re-examine their motivation, to re-evaluate the potential consequences of their actions, and to develop problem-solving and consequential thinking skills.

Family intervention programs are designed to change dysfunctional family patterns; improve parenting skills; promote improved relationships with teachers and positive peers; and help parents and children to communicate more effectively and safely, solve problems collaboratively and resolve conflict. These programs should include both the young person and the significant people in his/her life, such as parents and siblings. They typically involve a number of steps — role clarification, identification of the issues or problems and strengths, decisions about what to work on first and what the family wants to achieve, exploration of the issues in greater detail and the strategies to achieve the goals. One family intervention model available for case workers to employ with young people in Youth on Track is “Collaborative Family Work”.<sup>284</sup> This model consists of between six and ten sessions, each lasting between 30 minutes and an hour. It deals with general family dynamics and relationship focused tasks and agreed actions. The sessions are conducted either in the family home or in a neutral area where the family feels comfortable; they generally involve two workers who share the facilitation and positive role modelling for problem solving and collaboration.

Education engagement programs are another type of program to which young people could be referred by Youth on Track case workers. These programs are designed to support young people to continue, or to reengage, with the mainstream school environment. Their objective is to address behavioural, emotional or cognitive issues that may affect the young person’s educational participation. Case workers could also refer a young person into education programs conducted by other non-government organisations or training providers (such as TAFE or community colleges) or to alternative schools in the catchment area. In addition, depending on the needs of the young people, case workers could refer or broker interventions, including accommodation (eg referrals to refuges, specialist homelessness service providers, accommodation support or living skills development), training and employment programs (eg assistance in the preparation of resumes or job applications, role

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<sup>283</sup> Juvenile Justice NSW, *CHART: Changing Habits and Reaching Targets*, 2015 at [https://justice.nt.gov.au/\\_\\_data/assets/pdf\\_file/0003/238188/chart-resources.pdf](https://justice.nt.gov.au/__data/assets/pdf_file/0003/238188/chart-resources.pdf), accessed 10 October 2019, adapted for use in NSW.

<sup>284</sup> C Trotter, *Collaborative family work: a practical guide to working with families in the human services*, Allen & Unwin, Sydney, 2013.

modelling a job interview, referrals to job network agencies that could provide links to employers, training or job-ready programs), health (eg appointments with general practitioners, family planning, sexual health and protection, information and advocacy), drug and alcohol services (eg organising appointments for counselling or support, referrals for detoxification or rehabilitation), mental health services (eg arranging mental health plans, referrals to psychologists or community mental health, support and advocacy), anger management programs (eg RAGE),<sup>285</sup> financial services (eg money management, financial advice), legal services (eg referring a young person and supporting him/her to seek legal advice), recreation (eg linking a young person to an activity conducted by the local Police Citizens Youth Club, sports or recreation clubs) and cultural support programs.

During their interactions with the young people and their families, case workers employ motivational interviewing techniques in order to understand the young person's perspective, minimise any resistance, and elicit his/her motivation for change. In addition, case workers use core effective practice skills. These include having open and honest discussions to clarify the respective roles of the case worker and the young person, as well as clarifying timeframes for both parties, problem-solving modelling and encouraging pro-social behaviour and values.

As Figure 1 shows, the final element of the Youth on Track scheme is review and exit planning. The case worker reviews the outcomes against the goals identified in the young person's case plan and develops an exit plan. This occurs with the participation of both the young person and his/her family. The exit plan focuses on strategies for the young person and his/her family to continue to improve outcomes and to reduce the young person's likelihood of re-offending.

The scheme is supported by a two-tiered governance structure. This consists of a multi-agency Implementation Committee that is responsible for high-level decision making and Regional Governance Committees in each site to deal with local implementation issues.

### ***Previous evaluations***

Two external evaluations of the Youth on Track scheme have previously been undertaken.<sup>286</sup> BOCSAR's research findings were based on an analysis of two relevant databases and the telephone interview responses of 22 young people, 24 caregivers and 38 stakeholders. Both the young people and their caregivers gave overwhelmingly positive feedback regarding both the scheme and their case workers. The young people interviewed were highly motivated to participate in the scheme and perceived that their case plans did not miss any issues. However, most were not clear about some of the elements of their case plan. The vast majority of the stakeholders who were

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<sup>285</sup> Re-Navigating Anger and Guilty Emotions (RAGE) is a six-week anger management course targeting young people aged between 11 and 17 years. Each session lasts about two hours. The course incorporates a number of themes, including the different anger styles; identifying the triggers, thoughts, tantrums and troubles ("the four Ts") of the anger cycle; healthy expressions of anger; understanding that guilt is part of the cycle of anger and learning healthy ways of dealing with it; understanding the importance of relaxation, exercise and diet on the state of mind and emotions.

<sup>286</sup> NSW Bureau of Crime Statistics and Research (BOCSAR), July 2014, unpublished; Cultural and Indigenous Research Centre of Australia (CIRCA), *Youth on Track social outcomes evaluation: final report*, 2017 at [www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf](http://www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf), accessed 10 October 2019.

interviewed believed that the scheme is beneficial, innovative and has the potential to enhance the lives of the young people and their families. However, they suggested improvements in the operation of the scheme, most of which should have occurred prior to the scheme's implementation, for example, negotiating for the establishment of relevant local services; and consulting with, engaging and promoting the scheme among local communities and key agencies.

CIRCA's evaluation focused on the impact of Youth on Track on social outcomes for young people and their families. It comprised interviews with 18 young people, 18 family members/carers, 10 Youth on Track staff and 15 stakeholders. CIRCA also analysed both the YLS/ CMI-AA data and the satisfaction surveys (conducted by Youth on Track staff) for 44 scheme participants (that is, 22 young people, 16 family members/carers and 6 involving both young people and their family members/carers). CIRCA found improvements over time in the total YLS/CMI-AA assessment scores and in a number of specific criminogenic domains — education/employment, leisure/recreation and peer relations.<sup>287</sup> However, CIRCA found no improvements in other domains, for example, personality/behaviour, attitudes/beliefs, alcohol and other drug use, and family and living circumstances. As CIRCA noted, their evaluation did not include a comparison group. Consequently, it cannot be determined whether the improvements observed in the various criminogenic domains are due to participation in the Youth on Track scheme or to some other factor(s).

Neither the CIRCA nor the initial BOCSAR evaluation was designed to examine the scheme's central objective of reducing rates of re-offending by young people. To fill this gap, BOCSAR is currently undertaking a randomised controlled trial to determine whether the scheme achieves this central objective. This methodology compares two groups of people who have been randomly assigned to two different treatments; one group receives the treatment being evaluated (in this case, Youth on Track) and the other group receives a "control" treatment. Since random assignment minimises group allocation bias, this methodology is considered to be the most reliable and robust for evaluating the effectiveness of an intervention.

### ***Youth on Track randomised controlled trial***

The key objective of the randomised controlled trial is to determine if young people in the Youth on Track scheme have reduced re-offending rates after participating in the scheme compared to young people in the control group. The control group consists of young people who are eligible for the Youth on Track scheme but who have not been randomly balloted to receive Youth on Track services. In lieu of Youth on Track, the control group receives a shorter, less intensive intervention, referred to as "Fast Track". Fast Track was developed specifically for the purpose of this randomised controlled trial and was designed to provide only minimal support and intervention for the young person. The randomisation of the young people into the two groups began on 9 August 2017 and will continue until approximately 350 young people have been allocated to each group. Participation in the evaluation is voluntary and young

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<sup>287</sup> CIRCA found no statistically significant change in mean YLS/CMI-AA score for peer relations between the first (mean = 3.1) and second (mean = 2.8) assessment at three months; however, there was a significant reduction between the first (mean = 3.2) and third (mean = 2.5) assessment at six months. See CIRCA, *ibid*, pp 39–40.

people can withdraw from it at any time.<sup>288</sup> If a young person does not consent to participate in the evaluation but consents to participate in the Youth on Track scheme, he/she is still randomly assigned to either Youth on Track or Fast Track, but his/her information is not used in the evaluation. This was done to avoid any potential for the randomisation process to be manipulated by either the young person or the case worker. The primary measure of re-offending is time (in days) to the first formal contact with the police (ie a caution, a Youth Justice Conference or a charge) after consenting to participate in the evaluation. The minimum follow-up period for young people in each group is 12 months from their date of consent to participate. Changes over time in a number of social outcomes (accommodation status, engagement in education, employment and community activities) will also be compared across the two groups of study participants.

The case workers who deliver the Youth on Track intervention also deliver the Fast Track intervention. This is done to maintain consistency and ensure that the staff involved in each intervention have had the same training in motivational interactions, core effective practice skills and working with young offenders. For Fast Track participants, the case worker completes a shortened version of the YLS/CMI criminogenic assessment, namely, the Youth Level of Service/Case Management Inventory: Screening Version (YLS/CMI:SV).<sup>289</sup> Following this assessment, the case worker, together with the young person, formulates a plan of action. This includes goals for the young person and the services needed to address the higher risk criminogenic domains. The case worker facilitates referrals to appropriate external services and programs over four face-to-face case management interactions with the young person and/or his/her family and one additional case conference if required; these interactions occur within a period of six weeks. Case management responsibilities for Fast Track participants include making telephone contact with referral agencies, reminder telephone calls to the young person and/or his/her family, and completing referral forms. Youth on Track staff do not provide Fast Track participants with any direct offence-based behavioural or family interventions. Limited brokerage funds are also available for Fast Track participants.

Figure 2 outlines the steps involved in the random ballot process, summarising a young person's progress through either Youth on Track or Fast Track, and highlighting the differences between the two interventions.

This randomised controlled trial has received ethics approval.<sup>290</sup> In addition, prior to the commencement of the study, staff from BOCSAR and Youth Justice NSW

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<sup>288</sup> However, some categories of young people are excluded from the study, namely, a young person referred to the Youth on Track scheme who has had a household member already randomised into an intervention will be allocated to the same intervention as that household member, but only the first-placed young person will be included in the study; if a study participant re-offends during the trial and is re-referred to the scheme, he/she is excluded from the randomisation process and is not counted as a new participant in the evaluation.

<sup>289</sup> The YLS/CMI:SV is an abbreviated form of the YLS/CMI 2.0. It was specifically designed to provide an initial screening of risk and need levels in young people allocated to the Fast Track intervention to determine the level and nature of interventions required by these young people. This inventory has eight categories: history of conduct problems, current school or employment problems, some criminal friends, alcohol/drug problems, leisure/recreation, personality/behaviour, family circumstances/parenting and attitudes/orientation.

<sup>290</sup> Bellberry Application 2017-05-361.

conducted 18 face-to-face consultations with relevant stakeholders in each of the six sites. These consultations, which occurred over a four-week period in April 2017, involved Youth on Track case workers and managers, Aboriginal community members and service providers. During these consultations, stakeholders were informed of the advantages and disadvantages of a randomised controlled trial, the proposed experimental design and the elements of the shorter Fast Track intervention. Perceived risks identified by stakeholders were discussed, and where possible, strategies were developed to mitigate these risks. This included allowing case workers to set up case conferences to ensure continuity of care of Fast Track clients when they exit the intervention, informing the Children's Court of the evaluation and establishing an Evaluation Advisory Committee to discuss and address any issues that arise during the evaluation.

Furthermore, since this is the first randomised controlled trial of a youth justice intervention in NSW, BOCSAR simultaneously undertook a process evaluation to complement the outcome evaluation. The key objectives of the process evaluation were to determine whether the randomised controlled trial is being implemented as intended and whether there are any unanticipated consequences of the trial.

### **Research Aims**

In consultation with the Youth on Track Unit, NSW Department of Communities and Justice, BOCSAR's process evaluation was structured around the following questions:

1. Are the referral and engagement processes into the scheme operating efficiently/effectively?
2. What types/levels of support are Fast Track participants receiving? How does this differ from the support provided to Youth on Track participants?
3. Are there any major challenges in implementing Fast Track and Youth on Track?
4. Are there any challenges in referring Fast Track and/or Youth on Track participants to external services?
5. Is each intervention being delivered as intended?
6. Is the delivery of Fast Track/Youth on Track producing any unexpected consequences (either positive or negative)?
7. Is the evaluation (and the randomisation process) producing any unexpected consequences (either positive or negative)?

### **Method**

To address these issues, semi-structured interviews were conducted with 52 stakeholders across the six sites. The stakeholders comprised the Youth on Track staff (managers and case workers; n=27); staff associated with each of the two discretionary referral sources, namely, Youth Liaison Officers and school-related staff (n=13); and representatives of various service providers to which the young people were referred by the Youth on Track staff (n=12). These interviews were conducted in two phases. The first phase occurred in November 2017. During these interviews (n=21), it became clear that many Youth on Track staff had had limited direct experience with Fast Track participants and were therefore not in a position to outline any associated issues. As a result, interviews were suspended until mid-2018 when the second phase of

interviews occurred (n=31). However, of the 52 stakeholders interviewed over the two phases, 21 (40.4%) had no or limited experience with, or knowledge of, the Fast Track intervention. Youth Liaison Officers, school-related staff and service providers comprised about 86% of these stakeholders.

The stakeholder interviews were supplemented with an analysis of available administrative program data extracted from the Youth on Track database.

## Results

### Characteristics of Youth on Track participants

Of the 708 young people who consented to participate in the Youth on Track scheme between 9 August 2017 and 24 July 2019, 145 (20.5%) were ineligible for the evaluation. The vast majority (525, 93.2%) of the remaining 563 young people consented to participate in the evaluation. Table 1 shows the characteristics of these 525 young people who consented to participate in both the Youth on Track scheme and the evaluation.

As Table 1 shows, between 9 August 2017 and 24 July 2019, the New England site accounted for the lowest proportion of young people who consented to both receive the Youth on Track service and to participate in the evaluation (14.1%) while the Blacktown site accounted for the highest proportion (20.6%). In the first 24 months of the randomised controlled trial, 45.7% of the young people who consented to participate in the scheme were randomly allocated to the shorter Fast Track intervention. However, the rate differed by site, ranging from 33.8% in the Coffs/Clarence site to 56.0% in the Hunter. It is expected that there will be a fairly even distribution of young people randomly assigned to each of the two interventions across the six sites once a sufficient sample size is reached.

Table 1 shows that, across the six sites, the majority of participants were male (75.0%) and aged between 14 and 17 years (71.0%) with an average age of 14.53 years. While 44.8% of the total number of young people who consented to the scheme were recorded as being Aboriginal or Torres Strait Islander, this varied across the sites and, for one in five young people, their indigenous status was not known/recorded. In three sites, at least half of the participants were Aboriginal or Torres Strait Islander — Central West (63.6%), Mid North Coast (53.9%) and New England (62.2%).

About three in five (59.2%) of all young people had been referred to the scheme via the automatic referral pathway of COPS, and a further 32.0% were referred by YLOs. Less than 9% of young people were referred by staff of the Department of Education. Three in ten (30.3%) young people had no police cautions prior to their involvement with the Youth on Track scheme. The remaining 69.7% of participants had either one (29.7%) or at least two prior cautions (40.0%), with the average being 1.39 prior cautions per young person. By contrast, the majority (62.7%) of participants had no prior charges, with the average being 0.98 prior charges.

Table 2 shows, for each intervention type, the number of young people referred to different types of services provided by external agencies.

As Table 2 shows, young people in each intervention were referred to a variety of external services by case workers. Consistent with the operating rules of the two

interventions, compared to young people in the longer Youth on Track intervention, no young person in Fast Track received family interventions (13.1% vs 0%,  $p < .001$ ) and much fewer young people in Fast Track received behavioural interventions (66.0% vs 0.9%,  $p < .001$ ). Although significantly more young people in the longer intervention were referred to drug and alcohol services compared to Fast Track (16.5% vs 9.4%,  $p = .027$ ), similar proportions of young people in each intervention were referred to a number of services, including education (about 30%), financial (about 6%), health (about 7%), employment services (13.6% of Youth on Track participants vs 16.1% of Fast Track participants) and family support (15.5% vs 18.3%, respectively). Table 2 also shows that young people in Youth on Track were referred to a greater number of different services than those in Fast Track.

## Stakeholder interviews

### *Are the referral and engagement processes into the scheme operating efficiently/effectively?*

About 35% of the 37 relevant stakeholders (Youth on Track Managers and case workers, and YLOs) stated that both the referral and engagement processes into the scheme were operating well. Stakeholders also noted that, with discretionary referrals, young people have some understanding of the scheme, the role of the case worker and the purpose of the case workers' call because YLOs and school staff provide them with this information. It is, therefore, easier for case workers to contact these young people. Some stakeholders noted that these young people are more willing to participate in the scheme. Discussions with the YLOs or school teachers also give the case workers an insight into the young person's needs, background, family history and perhaps suggestions for priority areas for the young person. Conversely, for young people referred to the scheme via the automatic referral pathway, case workers have no background information about them or their needs prior to the first phone contact. Some stakeholders noted that it takes more effort from the case workers to explain the scheme and the benefits of participating to young people referred via the automatic referral pathway.

Despite the perception of some stakeholders that the referral and engagement processes were operating well, a number of problems were identified with each process. One in four of the 31 comments made regarding the discretionary police and school referrals related to a lack of appropriate staff, for example, "referrals come to a standstill when the NSW Police Screening Officer is on leave", the lack of a consistent YLO in a specific Police District and the long recruitment process to replace a YLO. A further three in five comments dealt with school-related issues, namely, that referrals from schools often do not meet the scheme's eligibility criteria (29% of comments), only some schools or teachers refer young people to the scheme (12.9%), schools make few referrals (9.7%) and the school term structure affects the flow of referrals (6.4%).

Stakeholders also noted problems with the scheme's engagement process. More than half of the 48 comments related to difficulties in contacting or locating the young person (25%, eg some young people and families are transient, phones are disconnected or are not answered, phones are lost or stolen, a young person living in a remote bush location may have neither a phone nor mobile phone access), information regarding the young person being incorrect (14.6%, eg phone numbers

change, addresses do not correspond to the young person) and issues associated with cold-calling the young person (14.6%). About 8% of comments noted that the engagement of young people is difficult because the program is voluntary.

### ***Suggested improvements to referral and engagement processes***

Five (13.5%) of the 37 stakeholders stated that no improvements were required to either the referral or the engagement processes into the scheme. About 71% of the 28 comments made regarding improvements to either the school or the police referral process suggested increased engagement and communication between Youth on Track staff and the referral sources. Examples of these suggestions included that the Youth on Track Unit conduct workshops with school staff who make referrals to ensure that referrals are successful rather than being screened out, case workers undertake further “road-shows” to speak with school principals and support staff who could potentially make referrals, case workers liaise with schools to find where a young person is living, case workers attend school meetings and provide updates, and case workers improve their relationships with some YLOs and conduct joint visits in order to engage young people. About one in ten comments related to improving the accuracy of the information about the young people referred.

Of the 34 comments made regarding general improvements to the referral and engagement processes into the scheme, one in five was to modify the scheme’s eligibility criteria, for example, allowing referrals for children with “at risk” notifications and for school students displaying violent behaviours even if the police have not been involved. Another comment was to decrease the threshold for automatic referrals from COPS.<sup>291</sup> An associated suggestion, accounting for 15% of the comments, was to increase the referral pathways to allow referrals from other agencies or sources. One in four comments dealt with increasing communication and community awareness of the scheme. The strategies suggested to achieve this included holding round-table conferences to identify other services already involved with the young person in order to avoid duplication and to determine gaps in service, having telephone referrals to allow for discussion of any concerns regarding the young person or to discuss the best fit for that young person, the Youth on Track team becoming better known in the local community and breaking down barriers through community awareness, increasing promotion of the scheme within the community, and the local Youth on Track team educating agencies about the scheme’s eligibility criteria. About 12% of the comments suggested modifications to the referral form to incorporate more information about the young person, for example, his/her cultural identity, drug and alcohol issues, mental health issues, domestic violence background, family environment, trauma, possible weapons, whether there are any dogs at the residence and who else may be in the house. It was suggested that some of this information could help to assess the case workers’ safety when visiting the young person’s house.

### ***What types/levels of support are Fast Track participants receiving? How does this differ from the support provided to Youth on Track participants?***

Stakeholders commonly reported that Fast Track participants were referred to, or linked with, external service providers in the local areas (34% of 195 comments)

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<sup>291</sup> From a GRAM score of 0.6 to 0.4 (the GRAM, or the Group Risk Assessment Model, score is indicative of a defendant’s risk of re-offending within 24 months of an index offence, a score of less than 0.6 indicates that the risk is moderate to low).

and engaged in activities provided by external agencies/programs (10.3%). These included housing, local mental health services, drug and alcohol services, education, youth employment programs, legal services support and family support. Stakeholders also reported that Fast Track participants were engaged in goal-setting activities and developing action plans (8.7%). In addition to providing case work or support (6.1%), case workers working with Fast Track participants provide education-related support (4.6%, eg accompanying a young person to a meeting about returning to school following suspension or assisting a young person to enrol in a TAFE course) and court-related support (4.1%, eg informing a young person about a typical day in court, providing information about navigating the criminal justice system).

The main difference between the types of support or interventions that case workers and agencies provide to Youth on Track and Fast Track participants is that only Youth on Track participants receive CHART and the family collaborative work interventions. By contrast, for the most part, Fast Track participants are referred out to, or linked with, external service providers in the local area. One concern noted by a stakeholder was that “case workers feel as though young people [in Fast Track] are being palmed off”.

### ***Are there any major challenges in implementing Fast Track and Youth on Track?***

#### *Challenges in implementing Youth on Track*

Many of the 141 comments made by 48 of the 52 stakeholders regarding the challenges faced when implementing the longer Youth on Track intervention related to engagement (17%) and the young people’s background and characteristics (12.1%). Examples of the challenges in engaging the young person included not only securing the young person’s initial engagement, but maintaining that engagement and motivation over time. It was also observed that families of some young people are not prepared to engage, or participate on a regular basis, in the structured family collaborative work. While families are prepared for case workers to work with their young person, they balk at the implication that their parenting is being questioned, distancing themselves from any responsibility for their child’s behaviour. Some case workers remarked that they undertake family work informally rather than in the structured manner required by the intervention. Examples of the challenges associated with the young person’s background and characteristics included being entrenched in the criminal justice system; having multiple or complex issues such as long-term drug or alcohol or mental health concerns; having families who are not supportive, provide minimal parental guidance or are negative role models; some young people believing that they had no problems or not believing that their attitudes, beliefs or behaviours contribute to their offending; the difficulties of working with homeless young people or young people when they leave out-of-home care; and some young people not being willing to accept the requirements of the intervention. It was noted that the younger age group of 10–13 years have additional challenges associated with their greater susceptibility to being influenced by their peers and the limited services/activities available for their age group.

Other challenges noted by stakeholders in implementing the Youth on Track intervention included the restrictions associated with the intervention’s requirements, parameters or resources (9%, eg referral pathways into the scheme being too narrow, the inability to deliver some anger management programs and living skills programs that some stakeholders believe to be more suitable, not having the scope to run

programs in schools where further connections could be established); the voluntary nature of the scheme (7.1%); locating the young person due to incorrect telephone numbers or addresses or the lack of a fixed address (7.1%); the skills, experience and quality of the Youth on Track staff required for effective service delivery (7.1%); family-related issues (6.4%, eg the lack of involvement or support from some parents/carers and the parents' own problems with, for example, addictions); a lack of services or referral sources (5.7%); community understanding of the scheme's aims and services (5%); and the impact of their past negative service history on young people and their families (4.2%).

### *Challenges in implementing Fast Track*

Some of these same challenges were also reported in relation to the implementation of Fast Track. For example, of the 198 comments made by 41 stakeholders, reference was made to the difficulties associated with engagement (7.1%), building rapport (6.1%), a lack of services or capacity in the area including lengthy waiting lists (7.6%) and challenges linked to the characteristics of the young person (4%, eg some young people have difficulty trusting people). However, about 31% of the comments noted specific challenges when implementing Fast Track. These included the ramifications of the intervention's short timeframe, for example, being unable to include everything in the six-week time period, goals requiring longer than the allocated time to be completed, the case worker not being able to assist the young person through their legal process because their court matter is not finalised within the timeframe, and the difficulties of completing a handover to another organisation within the short timeframe. These concerns accounted for 24.2% of the stakeholders' comments. An additional time-related challenge for the case workers is the need to maximise each contact with the young person. It was observed that the case workers must quickly locate the young person, obtain his/her early consent to participate in the scheme, build rapport and a relationship, engage him/her, immediately identify and prioritise his/her criminogenic needs, transfer those needs into a functional case plan and address them while simultaneously communicating to the young person both the timeframe of the intervention and the need for haste. To utilise the time available in the best way possible, it was noted that case workers need to be organised, structured, highly goal orientated and goal-specific from the outset.

Just over 7% of comments referred to the Fast Track's restricted parameters, for example, case workers not being able to offer the young people any behavioural interventions or family interventions; not being able to help directly with the young persons' issues; not being able to get to know the young person deeply; and the case plan for Fast Track clients being a "to-do" list rather than a working document as it is for clients of the Youth on Track intervention.

### *Challenges in implementing Youth on Track and Fast Track concurrently*

Stakeholders were also asked whether there are major challenges in the implementation of both Youth on Track and Fast Track concurrently. Nine (17.3%) stakeholders stated that there were no challenges in implementing the two interventions simultaneously. Of the 34 stakeholders who indicated that there were challenges, about one in ten (9.6%) of 114 comments dealt with the difficulties for case workers, for example, case workers struggle to explain to young people and their families that they could be allocated to either a six-week or a 12-week intervention, it is stressful for case workers to work

with both interventions and it is difficult for case workers to transition from working with a client in Youth on Track to a client in Fast Track. An associated challenge was time management for case workers, this accounted for 5.3% of the comments made.

About 12% of comments dealt with the issue of confusion, both within the community and amongst the young people and their families. Comments included that people do not understand the difference between Youth on Track and Fast Track, people assume that case workers only deliver one intervention rather than both, people living in the same street whose young people are involved in the scheme may have a different understanding of the scheme because some young people are in the longer intervention and others are in the shorter intervention.

Other challenges of simultaneously implementing both Youth on Track and Fast Track included the difficulties for Youth on Track managers (10.5%, eg ensuring and monitoring intervention fidelity and the fair allocation of caseloads to case workers); case workers giving priority to clients in the Fast Track intervention because of the limited time available whereas they have more time and freedom to interact with clients in Youth on Track over three to 12 months and incorporating more into the shorter timeframe (10.5%); the challenges associated with the randomisation process (6.1%, eg making caseloads unpredictable, neither case workers nor young people knowing to which intervention they will be assigned); disappointment and jealousy that other young people are receiving a different intervention (3.5%); whether the intervention is suitable for the young person (3.5%, eg a young person in Fast Track may have as many needs as a young person in the Youth on Track intervention and could benefit from further contact with the scheme); and the difficulties of explaining the two interventions to the young people, their families, the community and referral sources (2.6%).

***Are there any challenges in referring Fast Track and/or Youth on Track clients to external services?***

Of the 27 Youth on Track staff who were interviewed, 55.5% stated that there were no challenges in referring Youth on Track participants to external service providers, and 40.7% made the same comment regarding Fast Track participants. About 15% of stakeholders noted that the challenges in referring Fast Track participants were the same as those for referring Youth on Track participants. However, a lack of services in the local area was commonly noted, accounting for about one in five of the comments made in relation to referring Fast Track participants (n=48 comments) and Youth on Track participants (n=46 comments). Some of the services that stakeholders reported to be lacking for young people in both interventions include mental health services and programs, drug and alcohol services, alternative education options for young people who are not comfortable in the traditional school setting, transport options and accommodation including emergency and short-term housing. Local services were considered to be particularly critical to the success of Fast Track because, as one stakeholder noted, it is “a small, sharp program over six weeks”. Reference was also made to the large distances to be travelled to reach services and the inflexible hours of operation of some programs. A second common challenge in referring young people to external services that was reported by Youth on Track staff (accounting for about 15% of their comments) was the impact of the service providers’ risk assessments, for example, some providers require a case worker to accompany a young person who the service has assessed as being too high risk, some services do not accept complex young

people or young people who have a high level of criminogenic need, and mental health services triage a referral to determine if it is safe for their clinicians to see the young person. Service providers' lengthy waiting lists comprised about one in seven of the staff's comments regarding each intervention.

The key difference in the challenges reported by Youth on Track staff in referring young people in each intervention focused on Fast Track's timeframe (29.2% of 48 comments). Stakeholders noted that a case worker could spend several weeks attempting to negotiate for a young person to be allowed to return to school without achieving an outcome within the required six-week period, a young person could be exited from the intervention before the school term begins, referrals to psychologists or psychiatrists may not be accepted within the timeframe, and referrals must be left in the hands of the young people or their families to follow-up.

#### *Strategies to overcome challenges in referring young people*

There was overlap in the strategies employed by Youth on Track staff to overcome these challenges. Two of the main strategies used were assisting service providers through education or additional support and utilising existing relationships or establishing positive relationships (by, for example, attending inter-agency meetings and establishing partnerships with other community programs). These two strategies together accounted for 80.9% and 71.0% of the 42 and 38 comments made regarding Youth on Track and Fast Track participants, respectively. Examples of how Youth on Track staff assist service providers were by offering them information about successful strategies that Youth on Track staff have employed to manage young people's difficult behaviour, educating the service providers about the different types of risk and risk management, case workers accompanying young people to appointments to build a bridge with the service provider, Youth on Track case workers providing input about the young person so that the intervention can be tailored to the young person, conducting informal case conferences by telephone with staff of the external service, and making warm referrals rather than simply expecting the young person to attend an appointment. Other strategies used by Youth on Track staff to overcome challenges in referring clients included contacting a different service (9.5% of comments made regarding Youth on Track participants and 5.3% of comments made regarding Fast Track participants) and being knowledgeable about local services (4.8% and 7.9%, respectively).

Most of the 37 relevant stakeholders stated that neither Youth on Track nor Fast Track participants are given priority by external service providers, rather they are treated the same as any other client referred to the provider.

#### **Are Fast Track and Youth on Track being delivered as intended?**

The vast majority of the relevant stakeholders stated that both Fast Track and Youth on Track were being delivered as intended. For Fast Track, some case workers noted "we are doing what we were instructed to do".

Stakeholders perceived that the specific elements of the Youth on Track intervention were crucial for the intervention to be delivered as intended, for example, CHART, YLS and the family collaborative work. Comments regarding these elements comprised 34.5% of the 142 comments made by the relevant stakeholders. About three in ten (30.3%) comments referred to relationships, either relationships between the case worker and the young person (17.6%, eg case workers building rapport, trust and

good relationships with the young people and their families), or relationships between the Youth on Track staff and stakeholders/agencies such as schools, YLOs, local organisations (6.3%) or community engagement, communication and support (6.3%). About 15% of comments noted that the characteristics of the individuals involved are key aspects of the intervention for it to be delivered as intended, namely, the quality of the case workers (9.1% of comments) and the attributes of the young people such as their level of engagement and their motivation to change (6.3%).

The relevant stakeholders noted that, for Fast Track to be delivered as intended, it was necessary for case workers to make each interaction with the young person as thorough as possible, with speed and timeliness being a priority (30.9% of 84 comments). As for the more comprehensive intervention, stakeholders also referred to the elements of Fast Track (19%, eg identifying the highest risk and most intensive needs, the more directed case plan, some brokerage) and case workers' relationships with, and referrals to, other services/stakeholders (19%, eg having referral avenues; case workers knowing the local services to which young people could be referred, establishing relationships with other services and maintaining communication with the referral sources).

### **Is the delivery of Fast Track/Youth on Track producing any unexpected consequences (either positive or negative)?**

Although 35% of the stakeholders interviewed stated that the delivery of Fast Track and Youth on Track did not produce any unexpected consequences, either positive or negative, others disagreed, with Fast Track comprising most (71%) of the 31 comments about unexpected negative consequences of the scheme's delivery. One stakeholder remarked "the negative is Fast Track". Comments included that Fast Track is not sufficient to achieve change in the young person (35.5% of comments) because it is too short, there is insufficient time to get positive outcomes with some clients, complex young people who need more than Fast Track have been allocated to the intervention and young people have re-offended after completing Fast Track. Other unexpected negative consequences of the scheme reported by stakeholders were that families are angry and disappointed when allocated to the Fast Track intervention (16.1%) and that Fast Track is simply a referral service (6.4%). Only a minority of comments (about one in ten) noted that the delivery of the scheme has had a negative impact on other services, for example, other agencies are providing an extended service so that young people can complete the goals that they are not completing with the Youth on Track case workers.

Two in five of the stakeholders' 22 comments about unexpected positive consequences of the delivery of the two interventions related to the positive relationships and collaboration either created or enhanced between Youth on Track staff and local agencies, programs and staff. For example, stakeholders remarked that Youth on Track staff have strengthened their relationships with the police and PCYCs; new networks have been developed with job support agencies, the National Disability Insurance Scheme, local sports clubs; and Youth on Track case workers attend Youth Justice Conferences. Stakeholders noted that Youth on Track is another service in the local community (22.7% of comments). About one in five (18.2%) comments referred to some unexpected positive consequences associated with Fast Track, such as young people beginning TAFE courses and case workers placing young people into programs

or school. Fast Track was observed to be effective for some young people, particularly those who are efficient in their everyday life, who are motivated, who have family support, who have transport, who can continue to engage with services after they exit Fast Track, who are at the lower end of the needs spectrum or who have issues that can be resolved within the intervention's six-week timeframe. It was also noted that Fast Track is structured and focused in terms of how it is delivered and its timeframe. This was perceived to have a number of advantages, including making it possible to predict the duration of a young person's engagement in the intervention, making it easier for the scheme's managers to both allocate caseloads to the case workers and also to monitor those caseloads. Some comments referred to the fact that Fast Track does not create dependence on the case worker, it maintains the young person's motivation and it enables case workers to assist more young people through shorter waitlists.

**Is the evaluation (and the randomisation process) producing any unexpected consequences (either positive or negative)?**

Of the stakeholders in a position to comment, two in five stated that there were no unexpected consequences of either the evaluation or the randomisation processes. In addition, most of the 28 stakeholders who had been involved with the Youth on Track scheme when randomisation commenced stated that the trial had no impact on the referral process. One in three of these stakeholders also noted that the vast majority of young people and their families consented to participate in the evaluation. Several stakeholders stated that consenting to participate in the evaluation went hand-in-hand with consenting to participate in the scheme.

Although all program staff who were interviewed reported that the evaluation requirements were being implemented as intended, three in ten (30.3%) of the 76 comments made identified challenges when gaining consent to participate in the scheme because of the evaluation. Staff referred to not being able to guarantee which of the two interventions the young person would receive prior to giving consent; case workers being required to explain both interventions as well as the evaluation process; difficulties in explaining the randomisation/evaluation processes; the limited capacity of the young people and their families to understand the randomisation process/evaluation; consent sometimes being conditional on the young person being allocated to the longer intervention; and case workers having to manage the disappointment of the young person and their family when allocated to Fast Track.

Several (n=81) comments were made about the consequences of the evaluation and the randomisation processes. Three-quarters of these comments were negative, but stakeholders stressed that the consequences were not unexpected. About one in five of the 61 comments regarding negative consequences related to the perception that young people may be allocated to an intervention which is not suitable for them. For example, it was observed that some young people had been allocated to Fast Track but would have benefited from the longer intervention, and conversely that some young people only need six weeks but had been assigned to the longer Youth on Track intervention. Other comments dealt with the difficulties associated with the randomisation process (11.5%, eg some conversations about randomisation have been unpleasant, and some young people and their families have refused to participate in the scheme because of the randomisation), the ramifications of Fast Track's time limits (11%), the difficulties of gaining young people's consent to participate in the program

if they had previously been allocated to Fast Track and were re-referred to the scheme after having re-offended (9.8%), the frustrations of not knowing to which intervention the young person will be allocated prior to the initial home visit (8.2%), the fact that some young people who complete Fast Track re-offend (8.2%), and the possibility that the integrity of the program or the evaluation could be damaged (4.9%).

Although only 11.1% of the consequences of the evaluation and randomisation processes were perceived to be positive, almost three in five (55.5%) of these comments noted that Fast Track is suitable for some young people.

### **General comments**

The vast majority of the 52 stakeholders who were interviewed believed that there is a need for the Youth on Track scheme. Some stakeholders asserted that the longer Youth on Track intervention was “great”, “fantastic” or “brilliant”. In fact, one in five (19.6%) stakeholders stated that all aspects of this intervention are working well. Conversely, some stakeholders stated “Fast Track has no place” or “I do not like Fast Track”.

Although one in four stakeholders stated that the Youth on Track intervention required no improvements, the remaining stakeholders suggested improvements in its operation. About two in five (39.0%) of the 77 comments referred to modifying various elements of the intervention. This included modifying the specific interventions (14.3%), for example, changing the method of delivering the structured family intervention, delivering some behavioural interventions to young people in group settings rather than individually, and increasing the flexibility in delivering CHART. Modifications were also suggested to the eligibility criteria (10.4%, eg focusing on earlier intervention, before young people have had a formal police contact and accepting young people at risk into the scheme), the parameters (10.4%, eg making the scheme mandatory rather than voluntary and making participation in Youth on Track a bail condition) or the referral pathways (3.9%).

### ***Suggested improvements in operation of Youth on Track***

One in five (20.8%) of the suggested improvements in the operation of the Youth on Track intervention related to improving communication, dissemination of information and collaboration between Youth on Track staff and local agencies. The suggestions included informing relevant stakeholders of the progress being made by the young people, perhaps through case co-ordination meetings; involving schools more directly in the delivery of the scheme, for example, in the development of the young person’s plan so that the school could support the young person and celebrate the successes; or offering some programs in the local schools that directly relate to criminogenic needs (eg “Love Bites”).<sup>292</sup> Although only accounting for 3.9% of the suggestions, a related suggestion to collaboration and communication was to increase community capacity, for example, increasing community awareness of the scheme, and reaching out to the local Aboriginal communities to establish and extend trust.

Other suggested improvements were to increase resources (10.4% of comments, eg increase the number of case workers in order to decrease the waitlist, appoint a family therapist as part of the Youth on Track team), improve administrative aspects

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<sup>292</sup> “Love Bites” is a school-based program targeting students in Years 9 and 10. It is designed to promote respectful relationships for young people and to raise awareness about sexual assault, the concept of consent and domestic and family violence.

of the scheme (7.8%, eg streamlined documentation) and analyse the engagement and disengagement processes to determine what is working and what is not working (3.9%).

### ***Suggested improvements in operation of Fast Track***

Stakeholders also suggested a number of improvements to the operation of Fast Track. Almost two in five (37.9%) of the 66 comments related to changing and clarifying elements of the intervention. The most frequent of these suggestions, accounting for one in five of the comments, was to increase the length of the program, perhaps to eight or 12 weeks instead of the current six weeks. One stakeholder noted that this would enable the case worker to build some rapport with the young person, encouraging the young person to open up. This, in turn, would be beneficial for both the case worker and the young person, facilitating the young person's engagement with more services. The additional time would also allow the case worker greater flexibility to work with the young person rather than being completely task-focused in order to accomplish all that is required within the six-week timeframe. Another suggested change to elements of the intervention was to allow an unlimited number of face-to-face interactions between the case worker and the young person for the duration of the program, rather than restricting the number of interactions to four. One stakeholder asserted that even six weeks would be sufficient if the case worker could meet with the young person every day, noting that working intensively with a young person is different to one meeting a week. Other suggested changes to elements of the shorter intervention were to clarify the expectations of both the case worker and the young person for the duration of the intervention, beginning the six-week period of the intervention three weeks after consent to take into account the difficulties often associated with contacting the young person, and formalising a case conference with the service providers to which the young people have been referred so that case workers know whether the young person has engaged with those providers.

Nine per cent of the suggested improvements to the operation of Fast Track involved modifications to the intervention's eligibility criteria. This included restricting Fast Track to young people with specific characteristics, such as those with fewer needs, those with minimal interactions with the police/court, those with supportive families, or to young people aged between 14 and 17 years who have fewer service referral pathways. About 6% of the suggested improvements to the operation of Fast Track related to increasing access to services and having a broader range of services to which young people could be referred. Stakeholders also stressed the need for case workers to have the discretion to decide which intervention a young person receives; this accounted for 13.6% of comments.

## **Discussion**

The main purpose of this study was to obtain stakeholder perceptions about whether the Youth on Track randomised controlled trial was being implemented as intended and the challenges associated with the scheme's implementation. Interviews were conducted with 52 stakeholders, including Youth on Track staff, Youth Liaison Officers, school-related staff and representatives of various service providers.

The relevant stakeholders were unequivocal in stating that both the Youth on Track and Fast Track interventions were being implemented as intended. In addition, young

people are engaging well in each intervention, with the randomisation process having little impact on engagement rates. Several stakeholders went so far as to state that participation in the evaluation went hand-in-hand with participation in the scheme. This is corroborated by the administrative data that shows that 92.5% of eligible young people consented to participate in the Youth on Track evaluation.

Stakeholders highlighted two very distinct differences between Youth on Track and Fast Track:

1. program length; and,
2. the types of interventions that can be offered.

While these differences were a design feature of the randomised controlled trial, stakeholders stressed that these two elements are problematic for Fast Track participants. Youth on Track staff, in particular, claimed that, Fast Track does not allow sufficient time for the case workers to build rapport with the young person or to deliver services that could produce change in the young person. The second key difference between Youth on Track and Fast Track highlighted by stakeholders was that young people allocated to the former receive a variety of interventions, in particular CHART and the family collaborative intervention. On the other hand, stakeholders noted that, due to its parameters, case workers are not permitted to provide either family or behavioural interventions to young people allocated to Fast Track. This is supported by the data held in the Youth on Track administrative database. The latter confirmed that no young person in Fast Track received family interventions and less than 1% received behavioural interventions. Furthermore, stakeholders reported that Fast Track participants are primarily referred to, or linked with, other service providers, for example, housing, local mental health services, drug and alcohol services, education, legal services support and family support.

While two in five Youth on Track staff reported no challenges in referring Fast Track participants to external services, others noted a lack of services in the local area and lengthy waiting lists, particularly in rural areas. The latter issue is relevant to participants of both Youth on Track and Fast Track, however, its impact is magnified for young people on Fast Track because often appointments that are arranged by the case workers cannot be scheduled within the six-week period of the intervention.

Many stakeholders, particularly the Youth on Track staff, also voiced concerns over the random allocation of young people to an intervention with no consideration of the young person's needs. This issue dominated stakeholder comments. Most of these stakeholders were concerned about the negative impact of randomly allocating young people with multiple and complex needs to the shorter intervention, particularly if the young person has insufficient family support to assist them after the case worker exits them from the intervention.

Although most stakeholders had a negative perception of Fast Track, some stakeholders conceded that it had benefits. They noted that some positive outcomes have been achieved in Fast Track's limited timeframe and acknowledged that the intervention accelerates case workers' progress through the waitlist of young people who have been referred to the scheme. It was also recognised that the shorter intervention enables at least some of the scheme's elements to reach a greater number of young people who otherwise may not have received any services. In addition, a

few stakeholders conceded that a randomised controlled trial is the best evaluation methodology to determine which of the two interventions is the most effective in reducing re-offending amongst this target group of young people. They accepted that, until the research was completed, it was necessary for young people to be randomly allocated to one of the two interventions rather than allocation being based on an assessment of the young person's needs, backgrounds and circumstances.

BOCSAR's outcome evaluation which will be completed in 2021 will compare re-offending rates amongst young people who were randomly allocated to each intervention and determine whether the longer, more comprehensive Youth on Track intervention confers a benefit in terms of reducing a young person's likelihood of re-offending. It will clarify whether some stakeholders are correct in their assertion that young people who are referred to Fast Track are more likely to re-offend because the time available in the intervention is insufficient to make a positive impact on the young person's life and external services are less accessible. Although stakeholders expressed concerns about randomly allocating young people to an intervention, the randomisation process itself appeared to have little impact on engagement rates, and both interventions were largely implemented as intended. This information will be invaluable when interpreting findings from the outcome evaluation. However, more broadly these findings demonstrate that randomised controlled trials can be successfully employed to evaluate criminal justice programs and interventions without compromising the integrity of the programs and interventions being delivered.



# The role of holistic approaches in reducing the rate of recidivism for young offenders\*

Associate Professor Jioji Ravulo†

## [5-0220] Introduction

I first become intrigued by how the legal system works when I came across a newspaper article in 1998 that highlighted research around sentencing disparities between Anglo Australian, Indigenous and Pacific young people.<sup>293</sup> It found the latter two cohorts were receiving harsher penalties, double those of their white counterparts, despite coming from similar criminal histories and backgrounds. Being a teenager myself at the time, with an Anglo-Australian mother and Fijian father, and extended family and friends involved in the youth justice system, it made me feel an array of emotions ranging from disbelief, frustration and anger. This in essence, further underpinned my growing understanding of social justice, and to question why society undertakes such treatment of people, especially its youth.

My growing interest in the youth justice system flourished through my undergraduate degree in social work. Studying at the then University of Western Sydney (now known as Western Sydney University), I came to further understand the role of systems theory, and the importance placed on creating various social systems to cater for individuals, families and communities that make up a society. But I also became more intrigued by the idea that certain systems may create further inequalities and areas of marginalisation as a result of them not catering for its people. As I further heard from lecturers on the ongoing needs across public housing communities in western Sydney, it motivated me to serve and strive to contribute (where appropriate) to promoting a more fair and just systemic response to young people involved in the youth justice system.

After successfully completing my four-year social work degree, I eagerly secured my first full-time job in 2003, working as a Post Release Support Program (PRSP) caseworker. This role was funded by NSW Juvenile Justice and contracted by Mission Australia, a non-government organisation, to work collaboratively across the Campbelltown and Liverpool local government areas. My core role was to help young people aged between 10–17 years reintegrate into their community after spending time in custody. This model was previously set up due to a trend within the Children’s Court where young people were not receiving a mandated parole period after their incarceration, which limited their scope to receive support by Juvenile Justice. Despite young people having a short or extensive criminal history, my support was aimed to help clients and their families reintegrate positively into their community. However, many challenges still occurred as the model at the time only focussed on certain

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\*Judicial Commission of NSW, Children’s Court of NSW s 16 Conference, Friday 3rd November 2017, Sydney.

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<sup>293</sup>P Gallagher and P Poletti, *Sentencing disparity and the ethnicity of juvenile offenders*, Research Monograph No 17, Judicial Commission of NSW, 1998.

outcomes that were perceived to reorient the young person into forms of education, training or employment. Of course, these are important components of helping a young person, but it did not cater for the extensive social and welfare needs such families were still experiencing, and the need to move limited resources to areas that would cater for such deficits in the community.

Such work bolstered my understanding around the ongoing limitations across government departments and agencies that appeared to work in silos rather than collaboratively. For example, as I was trying to get support from local schools to enrol a client, I was trying to negotiate resources to help fund the additional means to enable them to engage, eg, uniforms, workbooks, pens etc. At the same time, I was also trying to gain other resources to help with physical health needs to support the young person and their family. Realistically, I knew this was the role I was employed to do as a case worker, however, it felt that at times, if I didn't proactively approach certain services and departments to connect with one another and to gain support and assistance, then they may have never done so. This challenge perpetuated the lack of understanding and insight certain community organisations may have around the true social and welfare needs of young offenders and their families.

My desire to create a greater insight on the need to challenge and change the way in which community-based agencies were not working together become my focal point; including the desire to understand how NSW Police, NSW Children's Court and NSW Juvenile Justice interacted to support the reduction in recidivist offending behaviour. This objective was further extended by the completion of a Master in Education degree in 2005, where I focussed on the role of engaging disengaged learners in education, followed by the start of my professional doctorate in cultural research where I aimed to further understand the development of antisocial behaviour in young offenders. My paper is focussed on exploring the various entities that make up the youth justice system, and the possible role of creating good practice approaches and opportunities for organisational capacity building.

In the first section, I will explore the social and welfare needs of young offenders, and their interactions with NSW Police, NSW Children's Court and NSW Juvenile Justice — with a view to highlight the possible incongruence that may occur due to certain practices that further perpetuate cycles of disadvantage and marginalisation. In the second section, I will explore models of good practice within holistic intervention programs that reduce recidivists' offending behaviour. Finally, I will explore the ongoing need to develop and implement whole-of-community and whole-of-government strategies that better enhance and promote social inclusion, cohesion and cultural capital.

## **Social and welfare needs of young offenders**

There is a growing amount of research that highlights the significant concurrence between youth who offend and their social and welfare needs.<sup>294</sup> An implicit need arises to create systems that effectively respond to such obligations. Rather than view

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<sup>294</sup>D Johns, K Williams and K Haines, "Ecological youth justice: understanding the social ecology of young people's prolific offending" (2017) 17(1) *Youth Justice* 3, at <https://doi.org/10.1177/1473225416665611>, accessed 6 August 2019.

youth justice as solely bringing a young person to account from a criminal lens, there is an emphasis to meet the challenging needs from a welfare perspective. Specifically, it is through an ecological, or holistic lens, that we can start to gain a better insight, understanding and room for better strategies that deter recidivist offending behaviours. Rather than see the young person through the lens of their criminogenic needs and risks, ie factors that lead to offending, systems should be better equipped to promote pro-social attitudes and behaviours that lead to inclusion and engagement.

Through my own empirical research with young offenders,<sup>295</sup> 10 key areas were profiled: seven around the prevalence of social and welfare needs, and the other three associated with their interaction with the youth justice system. In total, 100 young people were profiled through their involvement in case-management services provided by a large non-government agency, Mission Australia, that worked in partnership with NSW Police and NSW Juvenile Justice. The following subsection of the paper will profile the key findings from this research, which is further supported by quotes gained from young people. Such a perspective highlights the realities of working with young people with significant social and welfare needs, and the role the youth justice system should play in helping rehabilitate and deter recidivist offending behaviour, rather than perpetuate and create further tensions and strains across the community.

### **Significant social and welfare needs**

Table 1 outlines the various social and welfare domains evident from the research undertaken across the following seven areas:

- family dynamics
- accommodation arrangements
- education levels and history
- financial circumstances
- health characteristics (including alcohol and other drugs (AOD))
- social participation (including access to identification documentation), and
- criminal history.

Under each domain, an array of different characteristics was further explored, providing insights into the issues, and the need to appreciate the multiple and complex needs of the young person, their family and the wider community.

*Table 1: Social and Welfare needs of young offenders*

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<sup>295</sup>J Ravulo, *The development of anti-social behaviour in Pacific youth*, University of Western Sydney, Sydney, 2009.

<b>Domain</b>	<b>Characteristic</b>	<b>Percentage (n=100)</b>
<i>Family</i>	Regular contact with Mother	81%
	Regular contact with Father	43%
	Lives with both parents	35%
	Three or more siblings	72%
	Mother is working (any type)	37%
	Father is working (any type)	40%**
	Mother has significant AOD usage	48%
	Father has significant AOD usage	65%**
	Mother has been incarcerated	19%
	Father has been incarcerated	42%
	Mother violent in home	34%
	Father violent in home	68%
	Young person violent in home	63%
	Mother demonstrates mental health issues	44%
	Father demonstrates mental health issues	35%**
Young person also undertakes care for siblings	37%	
<i>Accommodation</i>	Lives with non-family member	9%
	Resides in public housing	75%
	Resides with four or more bedrooms	16%
	Resides with six or more people	45%
	Access to privately owned car	6%
	6–15 minute walk to bus station	45%
	30+ minute walk to train station	47%
	Evades train fare	72%
	Received penalty notice for fare evasion	80%
<i>Education</i>	Young person attained Year 10 and above	30%
	Special Education enrolment	20%
	History of school suspensions	55%
	Diagnosed learning difficulty	38%
	Diagnosed behaviour issue	35%
	Mother — below Year 10 completion	88%
	Father — below Year 10 completion	95%**
	Reading level below academic standard for age	36%
	No longer enrolled/active in education	86%
<i>Finances</i>	Not on Centrelink benefits (but eligible)	55%
	History of unpaid fines now under Revenue NSW	59%
	Further issues with Revenue NSW for not paying	58%
<i>Health</i>	History of negative AOD use	97%
	Young person consumes AOD daily	53%
	Previously convicted of offence under influence of AOD	82%
	Offence undertaken to obtain substances	29%
	Poor personal hygiene	38%
	Known mental health issues	29%
<i>Social</i>	Socialising with peers own age	56%

Domain	Characteristic	Percentage (n=100)
	Socialising with negative peer associates	81%
	AOD use among peers	44%
	Negative anger towards peers	61%
	Negative anger in public	63%
	Negative anger in education	72%
	Negative anger in home	75%
	Access to computer at home	14%
	Access to Internet at home	15%
	Consistently attends sport commitment	35%
	Attends Place of Worship	41%
<i>Criminal</i>	First offence by age 14	58%
	Sibling has been incarcerated	57%
	Serious Indictable Offence conviction	43%
	Charged with 5+ offences	37%

\*\* Of known cases.

Many of the distinctive areas that are outlined in Table 1 reflect a lack of support and resourcing for the young person. In the family domain, a large number of parents, especially fathers, have significant issues with AOD usage. Such patterns may impact on the family environment, and can lead to similar patterns being developed with the young person. This is also evident from the large proportion of offences being committed while under the influence, with over half of this cohort consuming on a daily basis. Notions of other negative patterns is evident in the level of violence that may occur, with such behaviour also seen as a norm when overcoming conflict in the home, leading to poor interpersonal and intrapersonal communication skills.

A large proportion of participants have not completed Year 10 or above, with many also having a history of school suspension due to problematic participation or behaviour. Parental completion of high school was also low, which may impact on attitudes to educational engagement whereby lifelong learning and its many benefits are diminished. Such perspectives may have led to nearly 90% of the young people surveyed no longer attending school or participating in any form of education or training.

Limited access to public transport as evident in the accommodation domain, can lead to further issues when young people are expected to move across the community to access other resources including training and work opportunities. With only 6% of households possessing a privately registered vehicle, the need to budget funds to utilise public transport is important. However, a large majority of young people may not have ready access to such funds, and as a result, evade the fare, leading to fines and other sanctions. This is evident with nearly half of the cohort not receiving Centrelink benefits, despite being eligible, and the accumulation of unpaid fines being referred and monitored by Revenue NSW (previously known as NSW State Debt Recovery Office).

As a result of not successfully engaging with positive learning environments found in school or other parts of the community, young people may then create peer group association with other young people who are also in similar positions and possess significant social and welfare needs. This may then exacerbate other unhelpful

behaviours within this cohort of friends, including negative alcohol and other drug consumption, and violence and aggression among each other, in education and their own homes.

A high proportion of young people may also have other family members with a history of offending, including parents and siblings. Over half the participants in this research committed their first offence before the age of 14. Such patterns of offending behaviour, without intervention, can lead to a further trajectory of offending, especially if encouraged among a negative peer group, which in turn may lead to offences becoming more serious in nature over time.

### Interactions with youth justice system

Table 2 outlines the same participant cohort, and their interactions with the three key areas of youth justice in NSW: the NSW Police Force, NSW Children's Court and NSW Juvenile Justice.

*Table 2: Interactions with the NSW Youth Justice system*

Statutory Department	Characteristic	Percentage (n=100)
NSW Police Force	Stopped at least once a week	65%
	Profiling impacts on peer association	63%
	Profiling impacts on self-esteem	64%
	Young person will actively run/hide from police	60%
	Young person will run/hide due to existing warrant	58%
	Young person required to report to police for order	63%
	Problems occur when reporting to police	77%
	Problems occur during interaction with police	83%
	Problems with police then result in further charges	34%
NSW Children's Court	History of more than 5+ court cases	35%
	More than 5+ adjournments during case	24%
	Adjournments are for 6+ weeks long	11%
	Parent present at court to support child	49%
	Young person understood court process	87%
	Attending school during court process	22%
	Re-offending during court process	44%
	Re-offending leads to a new charge	94%
	Missed court appearance during matter	28%
	Missed court due to non-parental support	25%
	Missing court resulted in a further warrant	85%
	Abide by imposed conditions	30%
Abide by condition to report to police	77%	
NSW Juvenile Justice	Mandated to attend weekly supervision	85%
	Trouble accessing transport to attend supervision	85%
	Caught public transport to attend supervision	56%
	Evaded train fare to attend supervision	63%
	Received fine for fare evasion	91%
	Supervision was perceived as helpful	39%
	Good rapport with juvenile justice worker	60%

Statutory Department	Characteristic	Percentage (n=100)
	Conflicting appointments were made	24%
	Supervision ended due to lack of compliance	37%
	Formal breach or order occurred as a result	80%

A large proportion of young offenders felt a strained relationship with NSW Police, creating a sense of us and them that further perpetuated a level of mistrust. A third of offenders who had problems through negative interactions with police received further charges as a result. This negative association only created a perceived barrier with such young people, who may see NSW Police as an unhelpful entity, rather than wanting to promote community safety. Young people also felt negatively impacted by the constraints on their ability to associate with peers, resulting in low self-esteem which impacts on the way in which they position themselves as a positive member of a community. As young people are still in the psychosocial developmental stage of forming their personal identities, negative association with systems, including law enforcement, may create an anti-social perception for the young person, who starts to then internalise and perceive their own self and broader identity within this context. As shared by one 13-year-old male:

One of the police, they were saying rude stuff to me, and when they were hand cuffing me they squeezed my hand and stuff . . . F you and stuff . . . I don't wanna be bad and stuff, I just wanna be a normal person.<sup>296</sup>

Legal processes in the NSW Children's Court are, by their nature, complex. However, young offenders have noted a positive flow of communication in the court, and participate with a good level of comprehension about what is going on. Part of this approach is assisted by the compulsory need to have a parent/caregiver present during court participation. However, there were some concerns when such guardians were not present, which meant matters could not progress, and adjournments would occur. This has more of a negative impact if the young person is not granted bail. In other situations, if a young person is on some form of community-based order, almost half of such young people re-offend, which leads to a new charge before the courts. Such cyclical patterns then create further concerns as a number of young people will not be engaged with formal education, further deterring opportunities for learning and matriculation into vocational support leading to employment and other positive life outcomes.

Of the young people required to see NSW Juvenile Justice as part of their court order, a large percentage found being able to attend mandatory appointments problematic. With over half having to use public transport to access such support people, over two-thirds received a financial fine for not paying the required fare. A good level of rapport was generally built between the young person and their respective worker; however, a lower rate was scored for the perceived usefulness of supervision given. This could be based on the value such young people placed on the actual support given, or the nature of the support still being perceived within a punitive context. Where there is a lack of value on supervision by the young person and there are problems in being able to physically attend appointments due to transport and the inability to pay, this led to non-compliance, which in turn resulted in further breaches. As a result, a warrant for an arrest may ensue, further perpetuating a negative association with legal entities.

<sup>296</sup>ibid.

Therefore, as noted in the above two tables, the social and welfare needs of young people and the way in which they interact with the legal system needs to be considered and dealt with effectively. The lack of ability to report to police, and attend supervision and court hearings may prevent genuine assistance and support from being provided to such vulnerable and marginalised young people. Being able to counteract such problematic social issues and anti-social behaviour is needed, as discussed below.

### **Holistic approaches to deterring recidivist offending**

Models of service delivery and provision should reflect the social and welfare needs. A holistic approach helps meet such needs, and understands and addresses criminogenic factors. Traditionally, case-management approaches have been utilised when working with young offenders especially through statutory entities like NSW Juvenile Justice. However, it is how this case-management model is established and implemented that can make the difference.

Various case-management models exist, ranging from problem solving and task centred, to post-modern, narrative and psychosocial. Under each model, one of the main goals is to re-position the client as an individual within their situation, and provide scope for the case worker to support the young person to explore the possible reasons and solutions to the issues they are experiencing. Ideally, the case worker is situated to empower the client to be self-determined, as someone — when given the opportunity — who has the ability to challenge and change their current pathway towards a more positive set of outcomes.

A good practice approach to case management is both prescriptive and descriptive. Prescriptive in the way in which various stages occur across the life of the working relationship, facilitated by the case worker in conjunction with the young person. The descriptive nature of good case management occurs where the client is able to nuance the direction by providing their own insight and aspirations. Combining a prescriptive and descriptive approach will enable specific goals to be mapped, while assisting tangible outcomes to occur.

For example, as per Table 3 below, Stage One would consist of assessment; where the case worker gains a greater insight and understanding of the client's circumstances. Stage Two includes goal-setting activities that enable the client to explore the possible solutions to the problems they are facing.

*Table 3: Good practice approach to case management*

<b>Prescriptive</b>	<b>Descriptive</b>	<b>Focus</b>
Stage One: Assessment	Information provided directly by young person, their support people, and other relevant sources	Understanding individual context and capabilities
Stage Two: Goal Setting	Young person creates specific case plan with support of worker to achieve positive outcomes	Promotion of possibilities beyond current circumstances and situation
Stage Three: Implementation	Application of case plan, with support of worker in engaging with resources	Engagement and connection with self and community

Prescriptive	Descriptive	Focus
Stage Four: Review	Worker to support active reflection with young person on the progress and process of change	Creating an insight into pro-social thought, feelings and behaviours
Stage Five: Exit	Outlining possible options and access to resources beyond case-management period	Exploration of ongoing development and importance of self-determination

Descriptively, young people are the central component of the case-management process — where they are seen as collaborators and contributors. Their own perspective and narratives shape the way in which each stage is undertaken, providing a practical application and understanding to the process.

At the same time, an overarching focus is also part of the case-management process, knowing that each stage also yields a more in-depth ability to provide the young person with the opportunity to both deconstruct, and reconstruct their understanding of self and others. This is achieved by making them the focal point, enabling the case worker to facilitate the helpful relationship towards a change process that deals effectively with the social and welfare needs that perpetuate offending behaviour.

I have been involved in creating a case-management model that supports the development of young people involved in crime. Under the auspices of South West Youth Services and Mission Australia, the Youth Offender Support Programs (YOSP) were formed to develop three programs to work with NSW Police and NSW Juvenile Justice. A psychosocial case-management model was developed to address criminogenic factors, and the accompanying social and welfare needs by accessing and setting goals against 13 life domains (Table 4). Each domain represents a key area of the individual's life, while also listing key tasks or activities that could support the young person to set goals, and to implement them as part of the case-management process. The top five domains that were most utilised were:

- personal and social skills
- alcohol and others drugs
- financial
- family, and
- health.<sup>297</sup>

*Table 4: Youth Offender Support Programs*

Life Domain	No of times domain chosen as a goal	Included
Accommodation	16	Family placement and personal support
Family	16	Mediation, sibling and parental support
Education	12	School and TAFE placements
Employment and training	26	Job search, resume and accessing courses

<sup>297</sup>Ravulo, *ibid*, p 260.

Life Domain	No of times domain chosen as a goal	Included
Recreation	31	Sporting commitments and programs
Financial	16	Centrelink payments and budgeting
Health	44	Sexual, physical and mental health
Alcohol and other drugs	15	Education, harm minimisation and strategies
Identification	15	Birth certificate, bank accounts and TFN
Legal and offending behaviour	37	Court appearances and supervision
Daily living	16	Hygiene workshops and resources
Personal and social skills	19	Anger and conflict management and peers
Ethnic culture	15	Connection with community and events

Other promising models include the newly formed and implemented Youth on Track, a program funded by NSW Juvenile Justice with Mission Australia, and referrals sourced by NSW Police and NSW Education. The majority of referrals are activated from NSW Police after the young person has received their second caution, or youth justice conference or charge. Over half identify as being Aboriginal or Torres Strait Islander. On entry, near to 60% of participants had a medium-high risk of offending, but on completion, scored low-medium.<sup>298</sup> Additional benefits include 88% of young people improving their relationship with police, including positive and no contact; and 50% have reduced their offending risk after three months of involvement.<sup>299</sup> The key feature of the case-management model is to address eight central criminogenic domains: antisocial behaviour and thinking, peer relations, alcohol and other drug use, education and employment, family functioning and connection to community.<sup>300</sup> An ongoing evaluation framework underpins the model, with a view to highlight strengths and areas of improvement.<sup>301</sup>

### Individual, community and organisational capacity building

Overall, there is a need to enable a young person to understand their own role in the community through their participation in pro-social activities and behaviours. This also includes promoting community-based resources and capacity to deal with needs. That is, how can we expect to have resilient individuals if we do not adequately fund resources within communities and regions that support psychosocial development and achievement? This includes providing support for families to thrive, and access educational opportunities that are on par with existing educational levels.

<sup>298</sup>NSW Justice, *Youth on Track snapshot*, Sydney, 2016 at [www.youthontrack.justice.nsw.gov.au/Documents/Snapshot%20YOT%20Dec%202016.pdf](http://www.youthontrack.justice.nsw.gov.au/Documents/Snapshot%20YOT%20Dec%202016.pdf), accessed 8 August 2019.

<sup>299</sup>NSW Justice, *Youth on Track snapshot*, Sydney, 2018 at [www.youthontrack.justice.nsw.gov.au](http://www.youthontrack.justice.nsw.gov.au), accessed 8 August 2019.

<sup>300</sup>Cultural & Indigenous Research Centre, *Youth on Track social outcomes evaluation*, 2017 at [www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf](http://www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf), accessed 8 August 2019.

<sup>301</sup>NSW Bureau of Crime Statistic and Research, *Outcome evaluation of Youth on Track*, 2017 at [www.youthontrack.justice.nsw.gov.au/Documents/2017\\_HT\\_Youth%20on%20track%20evaluation%20proposal.pdf](http://www.youthontrack.justice.nsw.gov.au/Documents/2017_HT_Youth%20on%20track%20evaluation%20proposal.pdf), accessed 8 August 2019. See also, L Trimboli and NSW Bureau of Crime Statistic and Research, *Youth on Track randomised controlled trial: process evaluation*, Issue paper no 141, August 2019 at [www.bocsar.nsw.gov.au/Documents/BB/2019-Report-Youth-on-track-randomised-controlled-trial-BB141.pdf](http://www.bocsar.nsw.gov.au/Documents/BB/2019-Report-Youth-on-track-randomised-controlled-trial-BB141.pdf), accessed 17 September 2019.

We also need to ensure organisations are adequately resourced and understand the work being achieved with vulnerable young people and their families. This may be achieved through the following three areas underpinned by the notion of capital as expounded by sociology theorist Pierre Bourdieu:<sup>302</sup>

1. developing the skills of the individuals (economic capital — talents and attributes),
2. developing the community to promote cohesion (social capital — role of community to support networking and opportunities for growth and participation), and
3. developing organisations and institutions to be responsive (cultural capital — valuing contribution and shaping the way in which capital is understood and determined).

### **Developing the skills of the individuals (economic capital)**

The opportunity to assist an individual develop skills and other key attributes that will help them engage in education, will also foster and enhance the notion of lifelong learning. That is, we learn how to learn. If we are not providing scope to participate and attain a positive association within local primary and high schools, then it can be difficult to move into other key areas and outcomes in life. By promoting positive attitudes towards learning, employment is seen as being a productive part of wellbeing, which in turn supports economic and financial viability. However, people are not able to gain and sustain employment if they do not have the requisite skills that lead to job readiness and employment. Therefore, by promoting young offenders to meaningfully engage in education requires the additional care and support with adequate access to resources to enable such outcomes to occur. Underlying this concept of formal learning comes the opportunity for young people to potentially exercise their talents and attributes, also known as strengths, that provide a platform for skills to develop, mature and become part of the toolkit used as a productive member of society.

The need to engage young offenders in a process of effective change through holistic case-management models further supports economic capital, and the ability to use such capital in a proactive and productive manner. Other people within the young person's environment, including siblings and parents, will also contribute to the way in which attitudes are fostered. If support programs include other family members in the process of change, then a shifting in attitudes towards education, and subsequent employment can also follow.

Also, the notion of lifelong learning is not restricted to formal learning environs. It also incorporates the way in which individuals understand and learn who they are, and how they relate to self and others. Having a positive understanding of self helps an individual to further foster a positive attitude on how their thoughts, emotions and behaviours may have an impact on self and others. For example, the ability to learn from mistakes is part of having a positive attitude towards lifelong learning. You are able to further undertake decisions that are informed by the learning from previous experiences. Creating such emotional intelligence can then support the ability to be more critical in the way in which someone navigates certain life choices, and

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<sup>302</sup>R Moore, "Capital", In M Grenfell (ed), *Pierre Bourdieu — Key Concepts*, 2nd edn, Routledge, 2014, p 98.

once again impacts on the creation of skills to exercise and obtain economic capital. This includes interpersonal and intrapersonal communication skills, and the way in which someone learns how to effectively communicate across various situations and circumstances.

### **Developing the community to promote cohesion (social capital)**

Individuals make up families, and families make up communities. Within these communities certain attitudes and perspectives are formed in accordance with the allocation of resources such as adequate housing, transport and other community-based facilities like sport and recreation, shops, schools and law enforcement. The ability to access and utilise these resources also depends on the way in which local communities value these resources.

In the context of youth offenders and their families, being able to promote scope for such individuals to be part of their local community can greatly impact on the way in which they participate and use the respective resources. The inclusion of young people in spaces that provide them with a voice to be heard, and activities that are relatable and engaging, can assist them engage with their local community. For example, the Police Citizens Youth Clubs NSW (PCYC) helps foster positive relationships between the community and police, and can be part of this approach. Various activities are offered, ranging from physical to educational; all in the context of youth participation and inclusion. New and emerging peer groups are formed and support the development of a community where young people feel valued. Helping young offenders, who may be vulnerable and marginalised due to their social and welfare needs, to actively join their local PCYCs can spur on a level of growth and participation. Such young people are also provided with the opportunity to learn new positive skills and perspectives that are reinforced by other participants. Having this sense of value can greatly assist an individual feel they are able to positively contribute to their own community, in turn creating a sense of social capital.

Community cohesion is part of this bigger process and encourages individuals and families to become more connected with the larger notion of being part of a community. At the same time, communities are empowered to be proactively involved in supporting one another to thrive, ensuring adequate resources are funded and included across a particular geographic location. Conversely, if individuals and families are not valued in their own community, then a lack of cohesion may occur, creating marginalisation and disadvantages the way in which a community operates and functions. Therefore, it is important for young offenders to feel like they do positively belong to their community, which can be impacted by the way in which they interact with schools and police.

### **Developing organisations and institutions to be responsive (cultural capital)**

In lieu of community cohesion, the need to create organisations that interact with young offenders and their families to be responsive to their social and welfare needs is important. Various institutions, and the way in which they do things can greatly determine the outcome achieved. It is within these organisations and institutions that certain practices are undertaken, forming a culture of how employees operate. For example, the ability of police to develop appropriate skills to communicate with young people who have limited interpersonal communication skills can determine the outcome of such an interaction. If a young offender, who has had a negative experience

with police previously, does not respond appropriately to police during their respective interaction, this can create further problems for both the young person and the police. Likewise, if a staff member in NSW Juvenile Justice is not aware and appreciative of the limited interpersonal communication skills of a young offender, they may perceive such youth as being non-compliant and not wanting to change.

Therefore, the need to re-shift the way in which institutions and organisations value and determine what is appropriate can have a positive impact. I believe we need to promote scope for young offenders to be better understood in the context of their significant social and welfare needs, and the way in which they may navigate and negotiate their involvement in the youth justice system. Paired with the ongoing psychosocial development of young people, I also believe organisations and institutions have a responsibility to set a tone to create a culture where service provision and delivery meets these needs. Rather than creating a punitive space, we need to balance the approach between a welfare and justice model<sup>303</sup> where we strive to understand the significant social needs of the young person, while also promoting scope for them to be held accountable where and when appropriate.

This may include the development of responsive organisational policy and procedures when accessing young offenders in accordance with their social and welfare needs to encourage engagement and participation. For example, meeting young offenders in their own local community may provide a better incentive to get involved in supervision by NSW Juvenile Justice, rather than expecting them to take public transport to a location they can not financially afford to get to. Utilising other community-based resources to assist in promoting community inclusion, including local schools, can also assist in this big-picture approach. In turn, this builds a level of cultural capital, where expectations are mapped and can be met by all parties involved; without the risk of creating another level of marginalisation for young people already isolated.

## Conclusion

There is a real need to promote partnership between individuals, families and communities with the organisations and institutions that work with them. Rather than working and competing against each other, including departmental silos that may exist across State government and their contracted services, we need to promote whole-of-family, whole-of-community and whole-of-government approaches that are equally underpinned by social resilience, social mobility and social inclusion.

A whole-of-family approach provides scope for individuals to be understood in the context of the family, and the various social and welfare needs that may exist within. At the same time, the ability to highlight possible capabilities and strengths that can be utilised in the change process is part of the solution. We need to understand that young offenders are part of a family/care-giving system that may require additional assistance, while at the same time providing supportive engagement with this service. Such young people and their families should also be acknowledged for their resilience, and this needs to be recognised as part of their ability to move beyond difficult situations and create further opportunities to thrive.

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<sup>303</sup>C Cunneen, R White and K Richards, *Juvenile justice: youth and crime in Australia*, 5th edn, Oxford University Press, 2016.

A whole-of-community approach provides scope for communities to see themselves as that — sharing a common unity that enables their members to operate and function in a purposeful manner. Being aware of what resources are available to help connect people to one another, while also acknowledging certain gaps and areas of improvement is part of this process. Providing young offenders with a space to be included and feel like they belong and can contribute is part of this approach. This will also promote a sense of social mobility where people can move in and across a physical space while also seeing the potential to move beyond perceived limitations whether they be physical or economic. The ability to traverse beyond their local community and across other areas of the region can also support young people to see beyond their marginality, in turn, providing new opportunities and experiences that can help enforce positive engagement and inclusion with others.

A whole-of-government approach provides scope for departments to move beyond the limitations of red tape and rhetoric. All government departments are created to undertake a certain role and responsibility across civil society, but within each department, a governance structure is created, and a certain way of doing things occurs. The need to uphold legislative frameworks and operations that fall under a certain remit is required, but at the possible sacrifice of working collegially with other cognate departments. In turn, a barrier is created, and resources are expended with a common good in mind, but may fall short of meeting the need of the community in which they are created to service. Therefore, the need to institute connections to working with each other can be part of breaking down these barriers. This includes enhancing working relationships between all departments that have a vested interest in counteracting youth offending and crime, including Police, Education, Health, Juvenile Justice and the Children's Court. Ensuring strategic departmental plans are more inclusive of each other results in a level of social inclusion not just within the statutory agencies, but also across the wider community. Overall, a better scale of economy is enabled and an efficiency to truly meet the social and welfare needs of young offenders and their families.

Through this approach, I believe we can achieve a more holistic response to the way in which we work collaboratively in and across the community. It is my ongoing hope and professional commitment to promote the scope for society to be more aware of the realities associated with the needs of young people who commit crime, and to create a systemic response that benefits all stakeholders including government departments and its services in the desire to deter recidivist offending behaviour while promoting happy, healthy communities.

## Criminal matters — practice and procedure

The following practice and procedure material that deal with care and protection matters have been included in this section at the following paragraph numbers:

- Sentencing for common offences in the NSW Children’s Court: 2010 at [6-0100]
- Sentence options — Murphy/Still sheet at [6-0150]
- Sentencing considerations for serious criminal matters at [6-0155]
- Parole in matters commencing on or after 26 February 2018 at [6-0180]
- Apprehended violence orders at [9-0100]ff
- Compulsory schooling orders at [10-0100]ff
- Youth Koori Court at [11-0000]ff

See also the *Local Court Bench Book* for:

- The committal process in the Children’s Court at [45-280] and the criminal jurisdiction generally at [45-000]ff
- The **Bail Act 2013** at [20-000]ff

The *Bail Act 2013* commenced operation on 20 May 2014. Section 28 provides for a form of pre-release requirement that suitable accommodation arrangements be made for the accused person before their release on bail. This requirement is only available where the person is a child and once imposed, a court must re-list the matter every two days, until the requirement is met. Section 74(3)(d) provides that an application for release may be made in relation to a child as an exception to the prohibition against multiple or detention applications to the same court.

### [6-0100] Sentencing for common offences in the NSW Children’s Court: 2010

*Sentencing for common offences in the NSW Children’s Court: 2010* was issued by the Judicial Commission of NSW as Monograph 36 in March 2012.

For further information about criminal proceedings in the Children’s Court, please see *Sentencing Bench Book* at [15-090], [15-100] and *Local Court Bench Book* at [45-100] for sentencing orders and principles.

### [6-0150] Sentencing options — Murphy/Still sheet

#### **Young Offenders Act 1997**

s 31	Dismissal with caution (results in the police being notified that the young person was dealt with by way of a caution)
s 40	Direct a YOA conference
s 57	Dismissal after a YOA conference

#### **Children (Criminal Proceedings) Act 1987**

s 33(1)(a)(i)	Dismissal with/out caution
s 33(1)(a)(ii)	Discharge on condition that the person enter into a good behaviour bond (maximum 2 years)
s 33(1)(b)	Good behaviour bond (maximum 2 years)

s 33(1)(c)	Fine (maximum is lesser of maximum fine for offence or 10 penalty units)
s 33(1)(c1)	Release on condition that the person complies with an outcome plan determined at a YOA conference [ONLY 3 REFERRALS ARE ALLOWED BY THE COURT]
s 33(1)(c2)	Adjournment for maximum 12 months, and grant of bail under the <i>Bail Act 1978</i>
s 33(1)(d)	Good behaviour bond and fine
s 33(1)(e)	Probation (maximum 2 years)
s 33(1)(e1)	Probation and fine
s 33(1)(f)	Community service s 13(2), (3) <i>Children (Community Service Orders) Act 1987</i> (a) if under 16, maximum of 100 hours in total (b) if 16 or over: (i) maximum 100 hours in total if maximum control order on the most serious offence does not exceed 6 months (ii) maximum 200 hours in total if maximum control order on the most serious offence is between 6 and 12 months (iii) maximum 250 hours in total if maximum control order on the most serious offence exceeds 12 months  s 3 [Definition of “relevant maximum period”] Relevant maximum period for performance is 12 months s 20A Application to extend period of community service orders
s 33(1)(f1)	Probation and community service
s 33(1B)	Suspended control order Good behaviour bond under s 33(1B)(b) for the period of the sentence
s 33(1)(g)	Control order (maximum 2 years) s 33A(4) Continuous periods of detention must not exceed 3 years s 33AA Cumulative or concurrent control orders — assault on juvenile justice officers s 33B Reduction for guilty plea s 33(2) Control order only if satisfied other options are wholly inappropriate
s 36	Compensation Maximum 10 penalty units if the person is less than 16 years at time of offence, 20 penalty units otherwise.

### ***Children (Detention Centres) Act 1987***

s 24	Persons subject to control may be granted leave, discharged, etc
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Although it may be expedient in a particular case for a court to make a recommendation or suggestion, as a general rule it is undesirable that the court should do so: *R v Sherbon* (unrep, 5/12/91, NSWCCA).

For further information on referrals for conferences by DPP and the courts under *Young Offenders Act 1997*, please see *Sentencing Bench Book* at [15-120] and *Local Court Bench Book* at [45-340].

For further information about dismissal, good behaviour bonds, variation of good behaviour bonds or probation and enforcement of conditions, fines, probation, community service orders, control orders, other orders and compensation, please see *Sentencing Bench Book* at [15-110]. See *Local Court Bench Book* for sentencing draft orders at [45-140]ff, and information on suspended sentences at [45-200] and control orders at [45-220].

**[6-0155] Sentencing considerations for serious criminal matters**

No matter what the serious offence is the sentencing exercise follows a regular pattern that we all may tamper with slightly, but generally it requires a consideration of the following, not necessarily in this order:

- the charge
- the maximum penalty
- the facts
- an assessment of the seriousness of the conduct
- aggravating factors
- when the plea was entered
- criminal history, if any, of the offender
- subjective features of the offender
- application of general sentencing factors in light of or modified by the rehabilitative emphasis provided for by the common law in relation to children and as reflected in the legislation: *KT v R* (2008) 182 A Crim R 571
- what is the appropriate penalty
- Is any alternative to imprisonment “wholly inappropriate”
- If not, consider CSO
- If CSO not appropriate consider the appropriate term of imprisonment and then apply any discounts of which there are only two or possibly three ...
  1. the discount for the plea of guilty,
  2. the discount for any assistance including a quantification of future assistance ... if future assistance includes the intention to give evidence for the crown in future proceedings and
  3. finally compliance with any court orders eg house arrest or court ordered attendance at a rehabilitation programme. Also see *R v Perry* [2000] NSWCCA 375 and *R v Campbell* [1999] NSWCCA 76
- **Only after determining the appropriate length of the term should you then consider if a suspended sentence is appropriate**
- Are there any special circumstances to cause an adjustment to the non-parole period
- The commencement date, should it be backdated; should it be accumulated
- When you pronounce your sentence, comply with s 44 *Crimes (Sentencing Procedure) Act* 1999 and express the sentence as a non-parole period with a balance of parole.

For further information on children’s indictable offences heard in higher courts, please see *Sentencing Bench Book* at [15-050], [15-060] and [15-070]. For maximum community service orders for juveniles under the *Children (Community Service Orders) Act* 1987, see *Local Court Bench Book* at [45-180].

**[6-0170] Child sexual assault offences**

A “child sexual assault offence” is defined under s 83 *Criminal Procedure Act* where the complainant is under the age of 16 years on the date of the alleged offence, or under 18 years of age where the offence is under ss 73, 73A *Crimes Act*. If a person is charged before the Children’s Court with a child sexual assault offence, the prosecution may request the proceedings be dealt with on indictment under Div 3AA: s 31(3A) *Children (Criminal Proceedings) Act*. If the Children’s Court is of the opinion the evidence is capable of satisfying a jury beyond reasonable doubt that the accused has committed a child sexual assault offence, then the proceedings are to be dealt with as committal proceedings in accordance with Div 3A: s 31(3B) *Children (Criminal Proceedings) Act*.

**[6-0175] Committal proceedings**

The following information is taken from the *Local Court Bench Book* at [45-280].

**Committal for trial/sentence**

The court has no jurisdiction to deal with a “serious children’s indictable offence” to finality: ss 3, 17, 28(1) *Children (Criminal Proceedings) Act* 1987. Other indictable offences may be dealt with according to law or under the CCPA: s 18.

The *Justice Legislation Amendment (Committals and Guilty Pleas) Act* 2017 commenced on 30 April 2018. That Act made significant amendments to committal proceedings generally, including the addition of Pt 3, Div 3A to the CCPA which creates separate committal procedures for children charged with certain indictable offences. For proceedings commencing from 30 April 2018, the committal procedures in Div 3A, discussed further below, apply.

For proceedings commenced before 30 April 2018 the committal procedures in Divs 2–4 (other than ss 60 and 61), and Div 5 (committal for sentence on a plea of guilty) of Pt 2 of Ch 3 *Criminal Procedure Act* 1986 (CPA), as in force immediately before the commencement of the amendments, apply. See [30-040]ff.

**Committal for trial or sentence for other than a “serious children’s indictable offence”**

Generally, if a child is charged with an offence (other than a serious children’s indictable offence) the proceedings are dealt with summarily: s 31(1).

**Committal for trial at the election of the child — s 31(2)(b)**

A child charged with an indictable offence (other than one punishable summarily without the consent of the accused) may inform the court at any time during, or at the close of, the prosecution case, that he or she wishes to take his or her trial according to law, the proceedings are to be dealt with as committal proceedings in accordance with Div 3A: s 31(2).

- If the child makes a request under s 31(2) before the prosecution closes its case, the proceedings continue as summary proceedings until the prosecution evidence is complete: s 31(2A)
- If the child makes a request under s 31(2) in relation to an offence and the court is of the opinion, after all the prosecution evidence has been taken, and having

regard to all the evidence before the court, that the evidence is not capable of satisfying a reasonable jury beyond reasonable doubt that the person has committed an indictable offence, the child must be discharged: s 31(2B).

If the relevant proceedings commenced on or after 30 April 2018, then Pt 3, Div 3A (Committal proceedings) of the CCPA applies.

### **Committal for trial at court's determination**

Where a child is charged with an indictable offence and the court, after hearing all the prosecution evidence, is of the opinion that having regard to all the evidence before the court, the evidence is capable of satisfying a jury beyond reasonable doubt that the child has committed an indictable offence, and that it would not be proper for the matter to be dealt with summarily, the proceedings are to be dealt with as committal proceedings in accordance with Pt 3, Div 3A: s 31(3).

If a decision is made under s 31(3) to commit the child for trial, the court must provide a statement of reasons for its decision forthwith: s 31(4).

### **Committal for sentence**

Where a child is charged with an indictable offence and pleads guilty to it, and the court is of the opinion that, having regard to all the evidence before it (including any background report of a kind referred to in s 25), that it would not be proper for the matter to be dealt with summarily, the proceedings must be dealt with as committal proceedings in accordance with s 31H: s 31(5).

For a sentence matter, facts, criminal record and a background report may all be considered in determining whether or not to commit a child for sentence.

Circumstances where it may be considered that a case may not properly be disposed of summarily include:

- where it may be more appropriate for a child to be dealt with according to law (including the matters listed in s 18(1A))
- the seriousness of the offence and where a sentence is likely to exceed the maximum available to the Children's Court
- an offence where the child is already the subject of a cumulative sentence such that no further effective sentence can be imposed
- a case involving an issue of mental illness or fitness to plead, or
- the seriousness and nature of the offence rendering a joint trial of a number of co-accused (being both juvenile and adults) desirable in the interests of justice.

See also the *Sentencing Bench Book* at [15-100].

### **Conducting committal proceedings commencing on or after 30 April 2018 — Div 3A**

For proceedings commenced on or after 30 April 2018, the procedures for committal proceedings under Div 3A apply where:

- a child made a request under s 31(2) and the court did not discharge the child under s 31(2B), or
- the court forms the opinion required by s 31(3)(b) that the evidence is capable of satisfying a jury beyond reasonable doubt that the child committed an indictable offence and it is not appropriate that the matter be disposed of summarily.

In conducting the committal proceeding, the court:

- must give the child an opportunity to give evidence or call any witness on their behalf: s 31B(1)
- must give the child a warning before giving them an opportunity to answer the charge: s 31B(2)
- may end further examination or cross-examination of a witness if satisfied further examination or cross-examination will not help the court make a determination under s 31B(6)
- must consider all the prosecution evidence given under ss 31 or 31C and any defence evidence and determine whether or not there is a reasonable prospect a reasonable jury, properly instructed, would convict the child of an indictable offence: s 31B(6)
- may not exclude evidence on any of the grounds set out in s 90 (Discretion to exclude admissions) or Pt 3.11 (Discretionary and mandatory exclusions) of the *Evidence Act 1995*.

If the court is of the opinion:

- that there is a reasonable prospect that a reasonable jury, properly instructed, would convict the child of an indictable offence — the court must commit the child for trial: s 31F(1)
- that there is not a reasonable prospect that a reasonable jury, properly instructed, would convict the child — the court must immediately discharge the child in relation to the offence: s 31F(2)
- despite any requirement of s 31B, the court may, at any time, on the application of the accused person, and with the consent of the prosecutor, commit the accused person for trial.

Sections 31C–31E deal with the admissibility of statements in Div 3A proceedings. The provisions under Ch 6 Pt 3A *Criminal Procedure Act 1986* apply: s 31D(2).

### **Committal for sentence**

At any time during committal proceedings under Div 3A, the child may plead guilty to the offence and the court may accept or reject the guilty plea: s 31G(1)–(2). Committal proceedings continue if the plea is rejected: s 31G(4).

If a plea during committal proceedings is accepted, or if the child pleaded guilty at an earlier stage and the court has made a determination under s 31(5), the court must commit the child to the District or Supreme Court for sentence: s 31H.

### **Transfer of back up and related offences — applies irrespective of when proceedings commenced**

Under s 31(6), when a child charged with an indictable offence or a serious children's indictable offence (the "principal indictable offence") is committed to another court for trial or sentence:

- (a) the prosecutor must, if the child has been charged with back up or related offences to the principal indictable offence, produce to the court a certificate specifying the back up or related offence/s, and
- (b) the court may transfer the back up or related offence/s to the other court.

Where a back up or related offence is transferred under s 31(6), those proceedings must be dealt with in accordance with ss 167–169 of the CPA: s 31(7).

### **Hearing juvenile and adult cases together**

The Children’s Court may hear and determine committal proceedings involving an adult and juvenile together if:

- the indictable offence is one which cannot be dealt with summarily with the consent of the child, and
- the court is of the opinion that it is in the interests of justice to do so: s 29(2).

**Note:** There is no provision which otherwise enables adult and juvenile offences or offenders to be dealt with together either as a committal or a summary hearing.

### **[6-0178] Presidential Children’s Court appeals**

An appeal under Pt 3 *Crimes (Appeal and Review) Act* 2001, s 84(2) *Crimes (Domestic and Personal Violence) Act* 2007 and cl 17 Sch 2 *Bail Act* 2013, if the appeal relates to a decision of the Presidential Children’s Court, is taken to be an appeal to the Supreme Court, and is subject to any relevant rules of court applying to appeals to the Supreme Court: cll 6, 7 and 8 *Children’s Court Regulation* 2019.

### **[6-0180] Parole in matters commencing on or after 26 February 2018**

Part 4C of the *Children (Detention Centres) Act* 1987 applies to parole matters commencing on or after 26 February 2018. The Children’s Court has jurisdiction to determine matters relating to parole, and conditions of parole, for juvenile offenders: s 41. When the detention order is for a period of 3 years or less, a juvenile offender is taken to be subject to a statutory parole order: s 44. If the detention order is for a period of more than 3 years, the Children’s Court must consider whether the offender should be released on parole: s 45(1).

#### **Age-based system**

The juvenile parole system applies to offenders under 18 years when the offender first becomes eligible for parole (s 40(1)). Part 4C ceases to apply to juvenile offenders when they reach the age of 18 years (s 40(2)), whereupon the provisions of the *Crimes (Administration of Sentences) Act* 1999 relating to parole of adult offenders apply. The exceptions at s 40(3) are if:

- (a) the offender reaches the age of 18 years while on parole and the birthday occurs during the last 12 weeks of the parole period, or
- (b) the Secretary of the Department of Justice considers that it is appropriate that the offender, or a class of offenders of which the offender is a member, continue to be dealt with under Pt 4C.

Where offenders are over 18 but are particularly vulnerable, the Secretary can consider if it is appropriate for the offender to be dealt with under the Juvenile Justice system.

#### **Principle of community safety**

Section 38 introduces the principle that the purpose of parole for children is to promote community safety, recognising that the rehabilitation and reintegration of children into

the community may be highly relevant to that purpose. The Children's Court must not make a parole order directing the release of a juvenile offender unless it is satisfied that it is in the interests of the safety of the community: s 46(1). The Children's Court must have regard to the following principal matters relating to the promotion of community safety, while recognising that the rehabilitation and re-integration of the offender into the community may be highly relevant to the promotion of community safety (s 46(2)):

- (a) the risk to the safety of members of the community of releasing the offender on parole,
- (b) whether the release of the offender on parole is likely to address the risk of the offender re-offending,
- (c) the risk to community safety of releasing the offender at the end of the sentence without a period of supervised parole or at a later date with a shorter period of supervised parole.

Under s 46(3), the Children's Court must also have regard to the following matters:

- (a) the nature and circumstances of the offence to which the offender's sentence relates,
- (b) any relevant comments made by the sentencing court,
- (c) the offender's criminal history,
- (d) the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole,
- (e) if applicable, whether the offender has failed to disclose the location of the remains of a victim,
- (f) any report in relation to the granting of parole that has been prepared by or on behalf of the Department,
- (g) any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of any authority of the State,
- (h) any other matters that the Children's Court considers to be relevant.

A parole order is subject to the standard conditions imposed by Pt 4C and cl 94 *Children (Detention Centres) Regulation 2015*. See s 54 for conditions of parole as to non-association and place restriction.

### **Supervision**

It is a condition of a parole order that the juvenile offender is to be subject to supervision: s 55. This is consistent with the evidence that supervision reduces reoffending. Exemptions from supervision will be given in exceptional circumstances: s 56. See cl 95 *Children (Detention Centres) Regulation 2015* for conditions of supervision.

### **Terrorism related offences**

Part 4C, Division 5 re-enacts adult parole provisions that restrict release on parole for terrorism-related offenders. There is a presumption against parole for terrorism related offences.

The State may make submissions to the Children's Court in parole proceedings concerning a juvenile offender who is a terrorism related offender: s 86 *Children (Detention Centres) Act 1987*.

### **Revocation**

The Children's Court may make an order revoking parole at any time before the offender to whom the order relates is released under the order, if the court is satisfied under s 63 that:

- (a) the offender, if released, would pose a serious identifiable risk to the safety of the community and the risk cannot be sufficiently mitigated by directions from a juvenile justice officer or by changing the conditions of parole, or
- (b) the offender, if released, would pose a serious and immediate risk to the offender's safety and the risk cannot be sufficiently mitigated by directions from a juvenile justice officer or by changing the conditions of parole, or
- (c) the offender has requested the revocation, or
- (d) in the case of a parole order made by the court, there has been a substantial change to a matter considered by the court in making the order, or
- (e) any other circumstances prescribed by the regulations.

Section 64 provides for actions that can be taken by the Secretary in the event of failure by the offender to comply with a parole order. The Children's Court may take any of the following actions under s 65(2), if satisfied that a juvenile offender has failed to comply with the offender's obligations under a parole order:

- (a) record the non-compliance and take no further action
- (b) give the juvenile offender a formal warning
- (c) impose additional conditions on the parole order
- (d) vary or revoke conditions of the parole order (other than conditions imposed by this Act or the regulations),
- (e) make an order revoking the parole order.

The Children's Court may make an order under s 66(1) revoking a parole order aside from non-compliance at any time after the release of a juvenile offender:

- (a) if it is satisfied that the offender poses a serious and immediate risk to the safety of the community and that the risk cannot be sufficiently mitigated by directions from a juvenile justice officer or by changing the conditions of parole, or
- (b) if it is satisfied that there is a serious and immediate risk that the offender will leave NSW in contravention of the conditions of the parole order and that the risk cannot be sufficiently mitigated by directions from a juvenile justice officer or by changing the conditions of parole, or
- (c) in the case of an offender who has been granted parole under s 47 on the grounds that the offender is dying or because of exceptional extenuating circumstances, if it is satisfied that those grounds or circumstances no longer exist, or
- (d) if the offender fails to appear before the Children's Court when required to do so, or
- (e) if the offender has applied for the order to be revoked.

A revocation order takes effect on the day on which it is made or on any earlier day specified in the order: s 68(1).

The Attorney General, Minister or Director of Public Prosecutions may request the Children's Court to revoke a parole order where the offender was sentenced for a serious children's indictable offence and the order was made on the basis of false, misleading or irrelevant information: s 69.

### **Victims Register**

A Victims Register is to be kept by the relevant government agency to record the names of victims of juvenile offenders who have requested they be given notice of the possible release of the juvenile offender: s 100A *Children (Detention Centres) Act* 1987. The government agency that keeps the Victims Register must give notice to any victim if a serious offender is being considered for release on parole or has applied for parole: s 100B. The victim can make a submission to the Review Panel which must be considered: s 100C. Information which is to be provided to the victim concerning the juvenile offender is set out at s 100D.

## **[6-0200] Parole: transitional provisions**

A parole order for a juvenile offender that was in force immediately before the commencement of Pt 4C of the *Children (Detention Centres) Act* 1987 on 26 February 2018 continues to be subject to the same conditions to which it was subject immediately before that commencement: cl 155 *Children (Detention Centres) Regulation* 2015.

The former parole regime applying to juvenile offenders in the *Crimes (Administration of Sentences) Act* 1999, as applied by s 29 (rep), continues to apply generally to any act, matter or thing done or omitted to be done under any of the former parole provisions in force immediately before 26 February 2018. Section 29, before its repeal by the *Parole Legislation Amendment Act* 2017, is set out below:

### **29 Application of Crimes (Administration of Sentences) Act 1999 to detainees [R]**

- (1) The provisions of Parts 6 and 7 of the *Crimes (Administration of Sentences) Act* 1999 apply to a detainee within the meaning of this Act in the same way as they apply to an offender referred to in those provisions, and so apply as if in those provisions:
  - (a) a reference to a correctional centre were a reference to a detention centre, and
  - (b) a reference to the Parole Authority or a member of the Parole Authority were a reference to the Children's Court or a Children's Magistrate, respectively, and
  - (c) a reference to the Secretary of the Parole Authority were a reference to a Registrar of the Children's Court, and
  - (d) a reference to the Commissioner were a reference to the Director-General.
- (2) If a detainee who is being detained as a result of the revocation or suspension of a parole order by the Children's Court is transferred to a correctional centre, this section (subsection (1)(a) excluded) continues to apply in relation to the parole order as if the transferred detainee were still a detainee. Accordingly, the Children's Court is to continue to exercise the functions of the Parole Authority under Pt 7 Div 4 *Crimes (Administration of Sentences) Act* 1999 with respect to the detainee's parole order.

## **Criminal matters — practice notes**

A link to the following Children’s Court Practice Note that deals with criminal matters can be found below:

- Practice Note 8: Apprehended domestic and personal violence proceedings in the Children’s Court (see [9-0310])
- Practice Note 11: Youth Koori Court (see [11-0025])
- Practice Note 12: Criminal proceedings in the Children’s Court (see [6-0425]).

For Children’s Court Practice Notes that concern care and protection matters see [2-0310]ff.

### **[6-0425] Practice Note 12: Criminal proceedings in the Children’s Court**

Practice Note commenced 18 May 2018 and applies to criminal proceedings commenced on or after 30 April 2018.



## Criminal matters — legislation

The following pieces of legislation are useful in the consideration of criminal matters:

- *Bail Act* 2013 at [7-0050]
- *Children (Criminal Proceedings) Act* 1987 at [7-0100]
- *Children (Criminal Proceedings) Regulation* 2016 at [7-0110]
- *Children (Community Service Orders) Act* 1987 at [7-0150]
- *Children (Detention Centres) Act* 1987 at [7-0200]
- *Children (Detention Centres) Regulation* 2015 at [7-0210]
- *Children (Interstate Transfer of Offenders) Act* 1988 at [7-0250]
- *Children's Court Act* 1987 at [7-0300]
- *Children's Court Regulation* 2019 at [7-0305]
- *Children's Court Rule* 2000 at [7-0310]
- *Crimes Act* 1900 at [7-0350]
- *Crimes (Administration of Sentences) Act* 1999 at [7-0400]
- *Crimes (Sentencing Procedure) Act* 1999 at [7-0450]
- *Young Offenders Act* 1997 at [7-0500]
- *Young Offenders Regulation* 2016 at [7-0550]

See also legislation for care and protection matters at [3-0100]ff.

### [7-0050] **Bail Act 2013**

Children — bail conditions in relation to accommodation: s 28 — prohibition against multiple or detention applications to the same court unless there are grounds for a further release application: s 74 — an application for release may be made in relation to a child: s 74(3)(d).

### [7-0100] **Children (Criminal Proceedings) Act 1987**

Children — criminal proceedings — age of criminal responsibility — Children's Court jurisdiction — commencement of proceedings — hearings — publication and broadcasting of names — penalties — compensation — background reports — criminal proceedings — adjournments — charges hearings — cumulative or concurrent orders — guilty plea — non-association and place restriction orders — reasons for decisions — compensation — term of control order — variation of good behaviour bond or probation — enforcement — suspension of control order —

mistake in exercise of jurisdiction — youth conduct orders — proceedings for offences — procedures for remitting cases from one court to another — drug rehabilitation programs.

### **[7-0110] Children (Criminal Proceedings) Regulation 2016**

Children — criminal proceedings — serious children's indictable offence — lists of adults willing to attend interviews — background reports — conditions that may be imposed by certain orders — explanatory material for orders — authorised officers — consultation required before conditions as to residence or treatment imposed on parole — parole orders — warrants of commitment — savings — any act, matter or thing that, immediately before the repeal of the *Children (Criminal Proceedings) Regulation 2011*, had effect under the 2011 Regulation continues to have effect under the 2016 Regulation.

### **[7-0150] Children (Community Service Orders) Act 1987**

Children — criminal proceedings — applicable to children under 21 years and guilty or convicted of an offence — making children's community service orders by courts — administration of children's community service orders — extension and revocation of children's community service orders — liability in respect of community service work — notice of revocation of orders — orders to be taken into account in subsequent dealings — disclosure of information.

### **[7-0200] Children (Detention Centres) Act 1987**

Children — criminal — detention centres — establishment, control, management and inspection — Official Visitors — admission to detention centres — persons on remand and persons subject to control — exceptions — transfers — detention orders — treatment of detainees — maintenance of physical, psychological and emotional well-being of detainees — promotion of social, cultural and educational development — maintenance of discipline and good order — facilitation of the proper control and management of detention centres — leave — escorted absences — restrictions on and conditions of leave — medical attention — riots and disturbances — transfers — detention centre offence — discharge — termination of detention orders — offences — administration — appointment of medical officers — testing of juvenile justice officers for alcohol and prohibited drugs — Serious Young Offenders Review Panel — Victims Register.

### **[7-0210] Children (Detention Centres) Regulation 2015**

Children — criminal — detention centres — administration — admission — information — classification — health and medical attention — health, medical attention and maintenance of physical well-being — segregation — uniform — property, possession and disposal — education and training — access to programs — case management — preparation and development of case plans — visits — letters and parcels — telephone communications — communications with staff members — complaints — leave — maintenance of order — use of dogs to assist in drug detection — use of force — testing for alcohol or drugs — list of punishments for misbehaviour

— inquiry into misbehaviour — misbehaviour dealt with by the Children’s Court — parole — conduct of juvenile justice officers regarding alcohol and prohibited drugs — health, mental illness and death of detainees — diet, exercise and treatment — spiritual welfare — list of general misbehaviour — serious misbehaviour — forms — notice of revocation of parole order — arrest warrant — warrant of commitment to detention centre.

**[7-0250] Children (Interstate Transfer of Offenders) Act 1988**

Children — criminal — interstate transfer of offenders — general agreement — arrangements — transfer orders — transfer to NSW in custody of escort — escape from custody — transfer of sentence or order — transit through NSW — revocation of transfer orders — reports — proceedings for offences.

**[7-0300] Children’s Court Act 1987**

Children — Children’s Court of NSW — constitution — jurisdiction — Children’s Court Advisory Committee — Children’s Court Clinic — functions of the President — reports — venue — contempt — judicial notice of signatures — appeals — rules — practice notes — directions may be given in circumstances not covered by the rules or the practice notes — provisions relating to Children’s Magistrates.

**[7-0305] Children’s Court Regulation 2019**

Children — Children’s Court of NSW — appeals in relation to decisions of Presidential Children’s Court — appeals etc under *Children and Young Persons (Care and Protection) Act 1998* — appeals under *Crimes (Appeal and Review) Act 2001* — appeals relating to apprehended violence orders — appeals relating to forfeiture orders under Sch 2 to the *Bail Act 2013* — appeals relating to youth conduct orders — definitions — savings.

**[7-0310] Children’s Court Rule 2000**

Children — Children’s Court of NSW — general practice and procedure — application of the Rule — administration of the court, including seal, venue, sittings and delegation of functions — filing, lodgment and service of documents — care proceedings — functions of Children’s Registrars — applications — children and young persons as witnesses — evidence of school attendance — application for appointment of a person to act as guardian ad litem — record of proceedings — subpoenas — criminal proceedings — Children’s Court Clinic — Children’s Court Advisory Committee — forms.

**[7-0350] Crimes Act 1900**

Crimes — child murder — injuries to child at time of birth — abandoning or exposing a child under 7 years — failure of persons with parental responsibility to care for child — sexual intercourse with a child under 10 — attempting or assaulting with intent to have sexual intercourse with child under 10 — sexual intercourse with child between 10 and 16 — attempting or assaulting with intent to have sexual intercourse with child

between 10 and 16 — persistent sexual abuse of a child — procuring or grooming a child under 16 for unlawful sexual activity — child abduction — child prostitution — child abuse material — measures to protect children in AVO proceedings.

**[7-0400] Crimes (Administration of Sentences) Act 1999**

Crimes — children — custody of persons during proceedings — subject to *Children (Detention Centres) Act 1987* — see [7-0210].

**[7-0450] Crimes (Sentencing Procedure) Act 1999**

Crimes — children — provisional sentencing for child offenders — power to impose provisional sentence — case plan to be provided — effect of provisional sentence — progress reviews — progress reports to be provided by person responsible for detention of an offender — final sentence — time limit for imposition of final sentence — appeals.

**[7-0500] Young Offenders Act 1997**

Children — scheme to provide alternative processes to the court system — youth justice conferences — cautions — warnings — proceedings for offences — publication and broadcasting of names — disclosure of records — certain statements inadmissible — interventions not to be disclosed as criminal history — range of investigating officials — notices — liability of officers — conference convenors.

By operation of s 8 *Young Offenders Act 1997*, certain matters and offences, including serious indictable matters, drug matters, sexual offences, domestic violence offences and traffic offences, cannot be sent to youth conferencing.

**Act**

*Young Offenders Act 1997*

**Second Reading Speech**

Young Offenders Bill 1997, NSW, Legislative Council, Hansard, 21 May 1997, p 8958.

**[7-0550] Young Offenders Regulation 2016**

Children — Youth justice conferences — notification of referrals — notice of referrals to be given to conference administrators — times for outcome plans — maximum period of community service work — outcome plans in respect of bush fire or arson offences — outcome plans in respect of graffiti offences — records of conferences — Disclosure of records — disclosure relating to cautions and conferences to Department of Justice — disclosure relating to warnings, cautions and conferences to the Bureau of Crime Statistics and Research — disclosure relating to warnings, cautions and conferences to the Australian Bureau of Statistics and the Australian Institute of Criminology — Miscellaneous — penalty notice offences subject to young offenders scheme — records of warnings and cautions — form and content of written victim

statements — delegation of Secretary's functions — authorised officers — savings — any act, matter or thing that, immediately before the repeal of the *Young Offenders Regulation* 2010, had effect under the 2010 Regulation continues to have effect under the 2016 Regulation.



## Criminal matters — important cases

### [8-0000] Children’s Law News

Also check the latest issues of Children’s Law News.

### [8-0090] Decisions concerning young offenders

The following cases have been included in this Resource Handbook:

- Doli incapax (sexual intercourse without consent) — *BP and SW v R* [2006] NSWCCA 172 (see [8-0110])
- Police interviews — *R v Phung and Huynh* (2001) NSWSC 115 (see [8-0120])
- Provision of legal advice prior to interview — *R v Cortez* (unrep, 3/10/2002, NSWSC) (see [8-0130])
- Arrest and alternatives — *Director of Public Prosecutions (NSW) v CAD* [2003] NSWSC 196 (see [8-0140])
- Offences in company — *R v KT* [2007] NSWSC 83 (see [8-0150])
- Double punishment in AVO breach — *Police v BS* [2011] CLN 4 (see [8-0160])
- Committal of matters which may be dealt with in the Children’s Court — *JIW v Director of Public Prosecutions (NSW)* [2005] NSWSC 760 (see [8-0170])
- Power to seize property to prevent breach of the peace — *Poidevin v Semaan* [2013] NSWCA 334 (see [8-0180])
- Doli incapax (aggravated break and enter) — *RH v Director of Public Prosecutions (NSW)* [2013] NSWSC 520 (see [8-0190]) and *RH v Director of Public Prosecutions (NSW)* [2014] NSWCA 305 (see [8-0210])
- Improperly obtained evidence from a vulnerable person — *R v FE* [2013] NSWSC 1692 (see [8-0200])
- Laws of evidence as they apply to applications for forensic procedures — *TS v Constable Courtney James* [2014] NSWSC 984 (see [8-0220])
- Order for the production of FACS reports concerning a deceased child made in criminal proceedings where the accused was indicted for the murder of the child — *The Application of the Attorney General for New South Wales dated 4 April 2014* [2014] NSWCCA 251 (see [8-0230])
- Doli incapax (defacing a wooden bench with a graffiti item) — *R v GW* [2015] NSWDC 52 (see [8-0235])
- Doli incapax (sexual intercourse with a child under 10) — *RP v R* [2015] NSWCCA 215 (see [8-0240]); *RP v The Queen* (2016) 259 CLR 641 (see [8-0241])
- No requirement under common law to direct the jury to take into account the differences between sworn and unsworn evidence in assessing the reliability of a child witness’ unsworn evidence — *The Queen v GW* (2016) 258 CLR 108 (see [8-0245])

- Procedural deficiencies attending committal — *JW v District Court of NSW* [2016] NSWCA 22 (see [8-0250])
- Bail application for school student charged with a terrorism offence — *R v NK* [2016] NSWSC 498 (see [8-0255])
- Verdict of acquittal in murder trial — *JB v R (No 2)* [2016] NSWCCA 67 (see [8-0260])
- Doli incapax (aggravated indecent assault on a person under 16) — *Director of Public Prosecutions (NSW) v NW* [2015] NSWChC 3 (see [8-0265])
- Fingerprint left at scene of aggravated breaking and entering — *JP v Director of Public Prosecutions (NSW)* [2015] NSWSC 1669 (see [8-0270])
- Application for authorisation to carry out forensic procedure — *Police v JC* [2016] NSWChC 1 (see [8-0275])
- Bail refused for youth charged with terrorist crime — *AB v R (Cth)* [2016] NSWCCA 191 (see [8-0280])
- Doli incapax (context evidence in incest charge) — *Director of Public Prosecutions v Martin (a pseudonym)* [2016] VSCA 219 (see [8-0285])
- Effect of new evidence that young offender suffered from foetal alcohol spectrum disorders — *LCM v State of WA* [2016] WASCA 164 (see [8-0290])
- Whether failure to warn jury as to unreliability of a young complainant's evidence — *AL v R* (2017) 266 A Crim R 1 (see [8-0295])
- Material error in expert's evidence in murder trial — *DL v R* [2017] NSWCCA 57 (see [8-0300])
- No requirement to warn jury of reliability of unsworn evidence — *Tikomaimaleya v R* (2017) 95 NSWLR 315 (see [8-0305])
- Relevance of corroborating evidence by 10-year-old — *R v SG* [2017] NSWCCA 202 (see [8-0310])
- A particular psychiatrist must be named pursuant to s 32(3)(b) *Mental Health (Forensic Provisions) Act 1990* — *Director of Public Prosecutions (NSW) v Saunders* [2017] NSWSC 760 (see [8-0315])
- Appeal against refusal to grant injunction restraining publication that child was in care — *Secretary, Department of Family and Community Services v Smith* [2017] NSWCA 206 (see [8-0320])
- Custody or access to child where allegation of sexual abuse — *NU v NSW Secretary of Family and Community Services* [2017] NSWCA 221 (see [8-0325])
- Consideration of alternatives to arrest — *Director of Public Prosecutions (NSW) v GW* [2018] NSWSC 50 (see [8-0330])
- Suppression and non-publication orders — *AB (A Pseudonym) v R (No 3)* [2019] NSWCCA 46 (see [8-0335])
- Admissibility of tendency evidence — *DS v R* [2018] NSWCCA 195 (see [8-0340])
- Propensity evidence in sexual assault trial — *Johnson v The Queen* (2018) 92 ALJR 1018 (see [8-0345])

- Part 3 Div 4 *Children (Criminal Proceedings) Act 1987* applies where offender two days from his 18th birthday when offences committed — *R v RI* [2019] NSWDC 129 (see [8-0350])
- Record of police interview inadmissible pursuant to s 13 *Children (Criminal Proceedings) Act 1987* — *R v Mercury* [2019] NSWSC 81 (see [8-0355])

**[8-0110] BP and SW v R [2006] NSWCCA 172**

Children — criminal — young offenders — directions — doli incapax — sexual intercourse without consent — in circumstances of aggravation, namely being in the company of another person — appeal — the Crown must prove beyond reasonable doubt that the child (aged between 10–14 years) knew the act was seriously wrong as distinct from an act of mere naughtiness or mischief — the directions given in the case were sufficient — court not satisfied that the jury’s verdict was unreasonable.

**[8-0120] R v Phung and Huynh (2001) NSWSC 115**

Children — criminal — young offender aged 17 years — armed robbery and murder — admissibility of certain statements — objection to two electronic records of interview — compliance with s 13 *Children (Criminal Proceedings) Act 1987* and Pt 10A (rep) *Crimes Act 1900* as to the provision of a support person — whether the accused was properly advised as to his entitlements — whether offered the opportunity of obtaining legal assistance — whether the accused was adversely affected by drugs or the effects of withdrawal at the time of the first interview — whether the accused was adversely affected by tiredness to the point where the reliability of any admission made was in question — overall irregularity in compliance with the statutory regime although various irregularities were not contumelious or deliberate — serious concern as to whether the rights of the accused were properly protected — in combination, there were sufficient circumstances involving non compliance with the statutory regime, so as to give rise to serious concern as to whether the accused, a 17-year-old with a somewhat disturbed background, had been sufficiently advised as to his rights, and as to whether those rights were adequately protected, to require exclusion of the evidence under ss 90 and 138 *Evidence Act 1995*.

**[8-0130] R v Cortez (unrep, 3/10/2002, NSWSC)**

Children — criminal — young offenders aged 17 years at the time of arrest and interview — murder — admissibility of certain statements — application for evidence to be excluded under s 90 *Evidence Act 1995* — police gave no indication that the young offenders were under arrest or suspected of murder — whether each offender could be deemed to have been arrested — whether the accepted support person attending the interview with each offender was appropriate — whether each offender was made aware of his entitlements or properly advised as to the seriousness of his position — failure to be told of the right to obtain free legal advice — the offenders were not afforded the protection the legislature intended — evidence tendered was inadmissible by virtue of s 90 and in breach of s 138 *Evidence Act* as evidence improperly obtained.

**[8-0140] Director of Public Prosecutions (NSW) v CAD [2003] NSWSC 196**

Children — criminal — young offenders — allegations of assaulting a police officer — informations against defendants in the Children’s Court dismissed — appeal — whether magistrate wrong in refusing to receive certain evidence of the events giving rise to the charges — whether matter should be restored to the Children’s Court — whether complainant had acted unlawfully or improperly in arresting a young person for a minor offence in circumstances that did not call for an arrest — whether it was possible for the magistrate to apply the test mandated by s 138 *Evidence Act* 1995 — whether matter to be remitted to the magistrate to be dealt with according to law.

**[8-0150] R v KT [2007] NSWSC 83**

Children — criminal — offender aged 16 although 17 years — manslaughter by unlawful and dangerous act — offender pleaded guilty to a serious children’s indictable offence — sentencing — offender was in a group of youths engaged in throwing eggs at members of the public from a moving vehicle — the offender had assaulted a man who threw a can back at the car in retaliation — the assault caused the man to fall and strike his head heavily to the ground thereby sustaining fatal injuries — examination of the offender’s background and subjective circumstances — no prior criminal history — whether offender should serve any sentence in juvenile detention, given his age and limitation, rather than in the adult prison system — objective seriousness of the offence assessed — whether offence committed in company — whether offence part of a planned or organised criminal activity — whether offender not fully aware of the consequences of his actions because of his age or any disability — whether discount allowed by reference to the offender’s plea of guilty — existence of special circumstances — continued detention at the juvenile detention centre — sentenced to a term of 6 years imprisonment with a non-parole period of 4 years — see also *KT v R* (2008) 182 A Crim R 571 for application for leave to appeal against sentence at [8-0510].

**[8-0160] Police v BS [2011] CLN4**

Children — criminal — young offenders — double jeopardy — charges establishing contravention of AVO — same facts for each offence — prosecution to elect which charge to proceed.

**[8-0170] JIW v Director of Public Prosecutions (NSW) [2005] NSWSC 760**

Children — criminal — young offenders — ss 6, 18, 31 *Children (Criminal Proceedings) Act* 1987 — applicant committed for trial rather than dealt with summarily in the Children’s Court — requirement to “... forthwith furnish to the person a statement of reasons for decision” in s 31(4) — magistrate neither erred by failing to give sufficient reasons nor in deciding the applicant should be dealt with according to law.

**[8-0180] Poidevin v Semaan [2013] NSWCA 334**

Criminal — police powers and duties — resisting arrest — power to seize property to prevent breach of the peace — police officer attempted to seize respondent’s mobile

phone — police officer obliged to inform respondent, as soon as reasonably practicable after exercising the power, of his name, place of duty and the reason for exercising the power — elements of offence made out even though no evidence that information was given — no obligation to prove that officer formed view that it was impracticable to give information before exercising power — consideration of nature of power at common law and as preserved by statute — s 201 *Law Enforcement (Powers and Responsibilities) Act 2002*.

**[8-0190] RH v Director of Public Prosecutions (NSW) [2013] NSWSC 520**

Children — criminal — offender aged 12 — aggravated break and enter — break and enter at an emergency services building (a country fire station) in the company of another — issue on appeal whether prosecution rebutted presumption of *doli incapax* — whether the magistrate erred in law in finding that there was evidence capable of rebutting beyond a reasonable doubt the presumption of *doli incapax* — whether the magistrate erred in law in applying an objective test to the question of whether the presumption of *doli incapax* was rebutted beyond reasonable doubt — whether the magistrate erred in law in relying on factual matters that constituted no more than the commission of the offence itself to rebut the presumption of *doli incapax* — a *doli incapax* cannot be rebutted merely by virtue of the commission of the offence itself — sufficient evidence to rebut presumption — see also [8-0210].

**[8-0200] R v FE [2013] NSWSC 1692**

Children — criminal — 15-year-old girl — improperly obtained evidence — whether grave improprieties — failure to caution the accused prior to or during questioning — interview conducted notwithstanding initial refusal to answer questions — whether unfair deprivation of right to silence — failure to take the accused to the custody manager who was obliged, since she was a vulnerable person, to assist her to exercise her legal rights — the accused's rights under Pt 9 *Law Enforcement (Powers and Responsibilities) Act 2002* were neither read out nor explained to her — interview with the accused excluded — improperly obtained evidence from a juvenile excluded under ss 90, 138 and 139 *Evidence Act 1995*.

**[8-0210] RH v Director of Public Prosecutions (NSW) [2014] NSWCA 305**

Children — criminal — young offenders — appeal — *doli incapax* — age of criminal responsibility — break-in at a country fire station — child aged 12 when offence occurred — presumption that child between 10 and 14 years not criminally responsible — whether presumption of no criminal responsibility of child rebutted — use of subjective test to determine whether presumption rebutted — see also *RH v Director of Public Prosecutions (NSW)* [2013] NSWSC 520 at [8-0190].

**[8-0220] TS v Constable Courtney James [2014] NSWSC 984**

Children — criminal — young offenders — suspected offence of aggravated break and enter — appeal against order authorising the taking of a buccal swab — evidence — common ground that the magistrate decided incorrectly that the *Evidence Act 1995*

(NSW) did not apply to the the application for a buccal swab — *Evidence Act* must be read together with *Crimes (Forensic Procedures) Act 2000* (NSW) along with any other applicable Act — meaning of reasonable grounds for forming a suspicion or belief.

**[8-0230] The Application of the Attorney General for New South Wales dated 4 April 2014 [2014] NSWCCA 251**

Children — criminal — procedure — submission by Attorney General to court of Criminal Appeal of questions of law after the accused is acquitted of the murder of a child — trial judge sitting alone in the Supreme Court made order for the production by Department of Family and Community Services of reports concerning the deceased child — whether court precluded from making such an order by s 29 *Children and Young Persons (Care and Protection) Act 1998* (NSW) — s 29 should not be construed so as to preclude the accused in a criminal trial from compelling, by subpoena, production of s 29 reports that are relevant to the issues at the trial — principle of legality requires that the general words of s 29 should be read down so as not to interfere with the accused's fundamental right to a fair trial.

**[8-0235] R v GW [2015] NSWDC 52**

Children — criminal — young offender — appeal — doli incapax — age of criminal responsibility — defacing a wooden bench with a graffiti item — presumption that child between 10 and 14 years not criminally responsible — whether presumption of no criminal responsibility of child rebutted — previous findings of guilt — whether issue of doli incapax requires urgent attention by the legislature — s 4(1) *Graffiti Control Act 2008*.

**[8-0240] RP v R (2015) 90 NSWLR 234**

Children — criminal — young offender — sexual intercourse with a child under 10 years — accused aged between 11 and 12 years, 3 months — accused was older half-brother of victim — doli incapax — whether presumption rebutted — what acts may be considered — whether surrounding circumstances of first offence could be used in assessing if presumption rebutted for later offences — ground of appeal asserting unreasonable verdict — how Court of Criminal Appeal considers unreasonable verdict ground in a judge-alone trial — accused occupied a position of trust — see also [8-0595] and [8-0241].

**[8-0241] RP v The Queen (2016) 259 CLR 641**

Children — criminal — young offender — appeal — criminal liability and capacity — doli incapax — where appellant convicted to two counts of sexual intercourse with a child under 10 — the appellant's brother is the complainant — where appellant was 11 years and six months at time of the offending — appellant found to be of very low intelligence — whether presumption of doli incapax rebutted — knowledge of the moral wrongness of the act present — use of condom during offence significant.

**[8-0245] The Queen v GW (2016) 258 CLR 108**

Children — criminal — young offender — 6-year-old witness — directions — Uniform Evidence Law — competence — s 13 *Evidence Act* 2011 (ACT) (in virtually identical terms to s 13 *Evidence Act* 1995 (NSW)) — pre-trial ruling that young child witness' evidence be received unsworn — ruling open — Court of Appeal (ACT) erred in holding the trial judge should have directed the jury as to the differences between sworn and unsworn evidence in assessing the reliability of the witness' evidence — neither the common law nor the Evidence Act required such a direction.

**[8-0250] JW v District Court of NSW [2016] NSWCA 22**

Children — criminal — young offender — dangerous driving causing death — committed for trial in the District Court by a magistrate in the Children's Court — notice of motion filed in District Court seeking a temporary stay of proceedings — stay of proceedings refused — summons filed in the Court of Appeal — s 69 *Supreme Court Act* 1970 (NSW) — order sought to set aside magistrate's order in the Children's Court committing applicant for trial — order sought to set aside judgment or order of the District Court refusing stay of proceedings — Court of Appeal has jurisdiction to set aside orders of District Court refusing stay of proceedings — Court of Appeal does not have jurisdiction to set aside orders of Children's Court magistrate — s 48 *Supreme Court Act* — proceedings under s 69 concerning orders of a specified tribunal — District Court a specified tribunal under s 48(1) — Children's Court not a specified tribunal under s 48(1) — s 46(2)(b) *Supreme Court Act*.

**[8-0255] R v NK [2016] NSWSC 498**

Children — criminal — young offender — a school student 16 years old living with her mother and siblings — charged with an offence of collecting funds for, or on behalf of, a terrorist organisation — application for bail refused in the Children's Court — rebuttable presumption against bail being granted to a person charged with a terrorism offence — exceptional circumstances to justify the granting of bail — youth of the applicant — vulnerability of youth to adult persuasion or influence — bail conditions can be imposed to appropriately address bail concerns.

**[8-0260] JB v R (No 2) [2016] NSWCCA 67**

Children — criminal — young offender — murder committed on 21 April 2008 — material discovered subsequent to the exhaustion of the avenues of appeal — application for inquiry into conviction made to Supreme Court pursuant to s 78 *Crimes (Appeal and Review) Act* 2001 — referral to Court of Criminal Appeal under s 79(1)(b) *Crimes (Appeal and Review) Act* 2001 — concession by Crown that appeal must succeed and conviction be quashed — new trial should only be ordered where it would more adequately remedy the miscarriage of justice than any other order the Court could make — undertaking by Crown not to call a compromised witness on retrial — evidence of that witness very important in original trial — remaining evidence not capable of proving applicant guilty of murder — detailed analysis of evidence likely to be called at retrial — evidence unlikely to establish guilt of applicant — interests of justice did not require that a new trial be had — verdict of acquittal entered.

**[8-0265] Director of Public Prosecutions (NSW) v NW [2015] NSWChC 3**

Children — criminal — young offender — intellectual disability — aggravated indecent assault upon a person under 16 — offender approximately 13 years and 1 month at time of the alleged offence — sexual harm counselling prior to alleged offending conduct — development of a safety plan — offender of low intelligence but on the evidence the offender possessed an appreciation of the seriousness of his conduct — presumption of *doli incapax* rebutted — offender had knowledge of conduct as being gravely or seriously wrong in a moral sense.

**[8-0270] JP v Director of Public Prosecutions (NSW) [2015] NSWSC 1669**

Children — criminal — young offender — aggravated breaking and entering — fingerprint left at the scene — challenge to admissibility of fingerprint expert's conclusion that plaintiff's fingerprint found at the crime scene — whether admission of expert certificate involved a question of law alone — whether ground involved mixed question of fact and law — whether magistrate's reasons for admitting certificate inadequate — whether magistrate's reasons for convicting plaintiff inadequate — complaint not made out — whether magistrate wrongly purported to apply different standard to admission of expert evidence in Children's Court compared to other courts — complaint not made out that magistrate devolved decision-making task to expert — leave to challenge conviction refused.

**[8-0275] Police v JC [2016] NSWChC 1**

Children — criminal — young offender — *Crimes (Forensic Procedures) Act 2000* — application for authorisation to carry out forensic procedures on the young person — the applicant must prove the young person was a “suspect” — grounds upon which the person is suspected and the reasonableness of those grounds — on the balance of probabilities the young person was not a “suspect” within the meaning of the *Crimes (Forensic Procedures) Act*.

**[8-0280] AB v R (Cth) [2016] NSWCCA 191**

Children — criminal — young offender — bail application — youth aged 17 years with psychiatric issues and a history of making threats and self-harm — charged with intentionally doing an act in preparation for or planning a terrorist act — threatening posts on Facebook placed over a significant period of time — whether exceptional circumstances established — youth held to pose an unacceptable risk of committing a serious offence and endangering the safety of the community if released — bail refused.

**[8-0285] Director of Public Prosecutions v Martin (a pseudonym) [2016] VSCA 219**

Children — criminal — young offender — incest involving biological sister attributed to the respondent when he was aged 16 — prosecution sought to lead other acts of misconduct when he was aged between 11 and 13 as “context evidence” — whether exclusion of “context evidence” would substantially weaken the prosecution case

— trial judge ruled against admissibility — whether error in treating presumption of *doli incapax* as relevant when assessing admissibility of the “uncharged” acts — presumption not relevant in way in which invoked — appeal allowed — matter remitted to trial judge for reconsideration.

**[8-0290] LCM v State of WA [2016] WASCA 164**

Children — criminal — young offender — manslaughter of the offender’s newborn son — offender aged under 16 years — highly dysfunctional childhood — sentence of 10 years’ detention — appeal — new evidence that offender suffered from foetal alcohol spectrum disorders (FASD) — relevance of FASD to sentencing — whether a material mitigating factor — offender re-sentenced to a term of 7 years’ detention.

**[8-0295] AL v R (2017) 266 A Crim R 1**

Children — criminal — young offender — appeal — sexual intercourse with a child under the age of 10 — offender aged 12 to 13 and complainant aged 4 to 5 — whether trial judge failed to appropriately warn the jury as to the unreliability of the complainant’s evidence — s 165 of the *Evidence Act* 1995 direction — *Murray* direction — capacity of jury to assess evidence — whether trial judge failed to adequately direct jury as to the burden and standard of proof — whether trial judge failed to adequately direct jury as to the accused’s evidence — whether judge failed to adequately direct jury on question of *doli incapax* — *RP v The Queen* (2016) 91 ALJR 248 considered (see [8-0241]) — whether verdict unreasonable or cannot be supported by evidence — open to jury to find guilt beyond reasonable doubt — appeal dismissed.

**[8-0300] DL v R [2017] NSWCCA 57**

Children — criminal — young offender — appeal — murder — offender just turned 16 and murder victim aged 15 at time of offence — Crown case included expert blood spatter analysis evidence — expert performed further experiments based on defence case during trial — Crown advised of experiments and how expert would respond if cross-examined on defence case — no report provided — alleged denial of procedural fairness — fresh evidence adduced on appeal — established material error in expert’s evidence at trial — whether there was substantial miscarriage of justice — aside from blood spatter evidence Crown case at trial pointed to guilt beyond reasonable doubt — further evidence available on appeal strengthened Crown case — operation of proviso — appeal dismissed.

**[8-0305] Tikomaimaleya v R (2017) 95 NSWLR 315**

Children — criminal — children’s evidence — examination-in-chief given by a complainant in recorded interview with police — witness to be competent at time of interview — trial judge not obliged to direct jury of distinction between sworn and unsworn evidence — no requirement to warn jury of reliability of unsworn evidence s 165(2) *Evidence Act* 1995 — judge did not err by admitting complainant’s pre-recorded interview — significant advantage in jury seeing and hearing witness — evidence did not give rise to reasonable doubt — appeal allowed and dismissed.

**[8-0310] R v SG [2017] NSWCCA 202**

Children — criminal — appeal — exclusion of corroborating evidence by child — respondent charged with multiple offences of assaulting wife — 10-year-old daughter of respondent/victim gave evidence to police — trial judge ruled evidence not relevant — further determination evidence be excluded as probative value substantially outweighed by danger of unfair prejudice — relevance under *Evidence Act 1995* to be given wide interpretation — evidence could rationally affect assessment of probability facts in issue under s 55 — judge erred in not assessing probative value of evidence under s 137 — evidence could be tested in court to remove risk of unfair prejudice — held evidence relevant and admissible — appeal allowed.

**[8-0315] Director of Public Prosecutions (NSW) v Saunders [2017] NSWSC 760**

Children — criminal — appeal — magistrate dismissed charges s 32(3)(b) *Mental Health (Forensic Provisions) Act 1990* — order that person attend psychiatrist/psychologist — magistrate must name a particular place or person s 32(3)(b) — enforcement provisions and object and purpose of the Act to be considered — appeal allowed.

**[8-0320] Secretary, Department of Family and Community Services v Smith [2017] NSWCA 206**

Children — care and protection — appeal — *parens patriae* jurisdiction — child under parental responsibility of the Minister and in foster care — court engaged a “balancing exercise” of child’s interest — paramount interest of child cannot be raised on appeal — construction of strict liability offence for publication of child’s name contrary to s 105 *Children and Young Persons (Care and Protection) Act* — primary judge’s construction not arguably wrong — exercise of discretion in refusing to grant injunction arguably miscarried — leave to appeal refused.

**[8-0325] NU v NSW Secretary of Family and Community Services [2017] NSWCA 221**

Children — care and protection — *Children and Young Persons (Care and Protection) Act 1998* — allegation that father sexually abused daughter — appropriate test to be applied in cases of custody/ access to child — inability to make positive finding of abuse not ultimate determinative of unacceptable risk of harm — *Browne v Dunn* rule did not apply — no error of law demonstrated — summons dismissed.

**[8-0330] Director of Public Prosecutions (NSW) v GW [2018] NSWSC 50**

Children — criminal — appeal — breach of bail — evidence obtained improperly and excluded under s 138 *Evidence Act 1995* — the failure by arresting officer to consider arrest alternatives — arrest for breach of bail without consideration of alternatives is not necessarily improper — court did not adequately disclose reasoning nor conclusions of facts — Supreme Court unable to determine finding of fact in regards to magistrate’s finding of impropriety — magistrate failed to conduct a balancing exercise under s 138 — appeal allowed in part.

**[8-0335] AB (A Pseudonym) v R (No 3) [2019] NSWCCA 46**

Children — criminal — appeal — suppression and non-publication orders — respondent pleaded guilty to historic sex offences committed when he was a child — primary judge ordered non-publication and suppression of respondent's name under s 8 *Court Suppression and Non-publication Orders Act 2010* — suppression and non-publication orders revoked on appeal — appeal against decision not to make non-publication order — court materially misconstrued s 8(1)(c) *Court Suppression and Non-Publication Orders Act* by adopting probable harm test — calculus of risk approach adopted — evidence of risk of physical harm to applicant — evidence of significant psychological harm to applicant and applicant's family — circumstances of misreporting by media and threats to applicant — appeal allowed, non-publication order made under s 8(1)(c).

**[8-0340] DS v R [2018] NSWCCA 195**

Children — criminal — appeal — admissibility of tendency evidence — ss 97 and 101(2) *Evidence Act 1995* — presumption of doli incapax as appellant under 14 years of age — tendency incidents subject of acquittals based on failure to prove offender capable of criminal intent — principle that prosecutor cannot rely upon conduct, which has been the subject of a previous charge and acquittal, in a way which would controvert the acquittal — evidence has little or no probative value, but involves a significant risk of prejudicial effect — evidence of appellant's alleged prior sexual conduct should not have been admitted — appeal upheld, conviction quashed.

**[8-0345] Johnson v The Queen (2018) 92 ALJR 1018**

Children — criminal — appeal — “discreditable conduct evidence” admitted under s 34P(2) *Evidence Act 1929* (SA) to show propensity — appellant convicted of five counts of sexual offending against the complainant, his sister — Crown relied on uncharged acts as relationship or context evidence to rebut presumption of doli incapax and to show relationship between appellant and complainant — evidence of other sexual misconduct admissible — probative value substantially outweighed any prejudicial effect to the appellant — appeal dismissed.

**[8-0350] R v RI [2019] NSWDC 129**

Sexual assault offences — Juvenile offender dealt with on indictment — offender was 17 years, 11 months and 28 days of age at the time of the offences contrary to s 61J *Crimes Act 1900* — offender offered to plead guilty to charges in the Children's Court — offender to be dealt with according to Pt 3 Div 4 *Children (Criminal Proceedings) Act 1987* rather than by law — offender found guilty — offender is not to be treated as a registrable person — offender released on probation.

**[8-0355] R v Mercury [2019] NSWSC 81**

Evidence — proceedings — s 13 *Children (Criminal Proceedings) Act 1987* — Objection to admissibility of alleged confession to murder — accused aged 17 years at time of interview — no parent, guardian, adult or lawyer present at interview — no rules mandating presence of support person in 1971 — low intellect, immaturity,

disturbed upbringing, disturbed mental state and personal vulnerability of accused considered — record of interview inadmissible in the “particular circumstances of the case”.

### [8-0490] Decisions concerning sentencing

The following cases have been included in this Handbook:

- General principles — *KT v R* (2008) 182 A Crim R 571 (see [8-0510]); *BP v R* (2010) 201 A Crim R 379 (see [8-0520])
- Application of guideline judgment — *R v SDM* (1997) 127 A Crim R 318 (see [8-0530])
- Committal for sentence — *Director of Public Prosecutions (NSW) v JJM & ALW* [2010] CLN 1 (see [8-0540])
- Mental illness — *YS v R* [2010] NSWCCA 98 (see [8-0550])
- Aggregate sentence for multiple offences including a serious home invasion — *PD v R* [2012] NSWCCA 242 (see [8-0560])
- Young mother — *HJ v R* [2014] NSWCCA 21 (see [8-0570])
- Whether single good behaviour bond imposed for five child sex offences inadequate — *R v RM* [2015] NSWCCA 4 (see [8-0575])
- Whether there was failure to give appropriate weight to age and background when assessing moral culpability — *Johan v R* [2015] NSWCCA 58 (see [8-0580])
- Whether sufficient allowance made for applicant’s youth at time of offending — *RL v R* [2015] NSWCCA 106 (see [8-0585])
- Error in having regard to non-conviction criminal record — *Siddiqi v R (Commonwealth)* [2015] NSWCCA 169 (see [8-0590])
- Dismissal of conviction and sentence appeal — *RP v R* (2015) 90 NSWLR 234 (see [8-0595])
- 55-year-old offender charged for an offence committed when he was still a child at law — *TC v R* [2016] NSWCCA 3 (see [8-0600])
- Offence within the midrange of objective seriousness — *Kiernan v R* [2016] NSWCCA 12 (see [8-0605])
- Social disadvantage of Aboriginal offender not taken into account — *Ingrey v R* [2016] NSWCCA 31 (see [8-0610])
- Reduction of community service order and imposition of a good behaviour bond — *RC v Director of Public Prosecution* [2016] NSWSC 665 (see [8-0615])
- Failure of sentencing judge to apply *Children (Criminal Proceedings) Act 1987* — *LD v R* [2016] NSWCCA 217 (see [8-0620])
- Sentence for a serious children’s indictable offence of manslaughter not manifestly excessive — *BH v R* [2016] NSWCCA 290 (see [8-0625])
- Failure to apply principle for sentencing youthful offenders — *OK v R* [2016] NSWCCA 318 (see [8-0630])
- No miscarriage of justice for extremely violent conduct — *DS v R* [2017] NSWCCA 37 (see [8-0635])

- Muldrock error conceded — *DL v R (No 2)* [2017] NSWCCA 58 (see [8-0640])
- Effects of childhood deprivation in sentencing — *Ohanian v R* [2017] NSWCCA 268 (see [8-0645])
- Dismissal of appeal against sentence on grounds that s 166 certificate procedure available — *DJ v R* [2017] NSWCCA 319 (see [8-0650])
- Remittance of matter to Children’s Court — *R v ST* [2018] NSWDC 22 (see [8-0655])
- Appeal against full-time custodial sentence for sexual offence — *Campbell v R* [2018] NSWCCA 87 (see [8-0660])
- Sentencing juvenile offender for terrorism offences — *R v AH* [2018] NSWSC 973 (see [8-0665])
- Appeal against non-custodial sentence for committing indecent act with child under 16, producing and possessing child pornography — *Director of Public Prosecutions v Hutchison* [2018] VSCA 153 (see [8-0670])
- Principles to be applied when determining weight given to participation in Koori Court — *Honeysett v R* [2018] VSCA 214 (see [8-0675])
- Weight given to mitigating factors in sentencing juvenile co-offenders — *R v BJ* [2018] NSWDC 122 (see [8-0680])
- Sentencing juvenile offender for aiding and abetting commission of a terrorist act — *R v Alou (No 4)* [2018] NSWSC 221 (see [8-0685])
- Leave to appeal severity of sentence — *DM v R* [2018] NSWCCA 305 (see [8-0690])
- Appeal of sentence for using a carriage service to solicit child pornography material — *Clarke-Jeffries v R* [2019] NSWCCA 56 (see [8-0695])
- Applicant re-sentenced due to age and deprived background not being given proper allowance — *CA v R* [2019] NSWCCA 93 (see [8-0700])

**[8-0510] *KT v R (2008) 182 A Crim R 571***

Children — criminal — sentencing — manslaughter — single punch constituting an unlawful and dangerous act — principles relevant to sentencing young offenders — considerations of punishment, general deterrence and rehabilitation when sentencing young offenders — whether sentencing judge had sufficient regard to offender’s youth and immaturity — whether sentence manifestly excessive — open to sentencing judge to find applicant conducted himself in an adult manner and had committed a crime of violence of considerable gravity (see *R v KT* [2007] NSWSC 83 at [8-0150]).

**[8-0520] *BP v R (2010) 201 A Crim R 379***

Children — criminal — sentencing — severity appeal — s 61I *Crimes Act* 1900 — sexual intercourse without consent — applicant a week short of his 17th birthday at the time of the offence — judge erred by using standard non-parole period as a guide — relevance of the applicant’s youth — emotional maturity and impulse control may

not be fully developed until the early to mid-twenties — application of *R v Fernando* (1992) 76 A Crim R 58 — whether appropriate to give effect to the applicant’s deprived background.

**[8-0530] R v SDM (1997) 127 A Crim R 318**

Children — criminal — sentencing — appeal — number of offences including stealing a motor vehicle, aggravated armed robbery and maliciously shooting with intent to prevent lawful apprehension — two offenders, including applicant who was a young offender — applicant evidence of an unfortunate family history — two of the crimes committed were of considerable gravity — Judge at first instance was well within the confines of the sentencing discretion he had — appeal dismissed.

**[8-0540] Director of Public Prosecutions (NSW) v JJM & ALW [2010] CLN 1**

Children — criminal — sentencing — matters to be taken into consideration when determining whether to exercise the discretion under s 31 *Children (Criminal Proceedings) Act* 1987 and commit the young persons to the District Court to be dealt with according to law.

**[8-0550] YS v R [2010] NSWCCA 98**

Children — criminal — sentencing — appeal — aggravated break and enter commit serious indictable offence — sexual assault — circumstances of aggravation in the deprivation of liberty of the victim — young person aged 16 years at the time of the offence — sentence of a term of imprisonment of 8 years — appeal — whether sentence imposed was manifestly excessive because of a failure to properly reflect the applicant’s youth, mental illness and totality in the sentence imposed — principles relating to mental illness and to youth canvassed — no identifiable or manifest error — appeal dismissed.

**[8-0560] PD v R [2012] NSWCCA 242**

Children — criminal — sentencing — aggregate sentence for multiple offences including a serious home invasion — applicant aged 16 years at the time of the offence in the company of his brother who was then aged 21 — appeal — whether sentencing judge failed to consider statutory principles relevant to sentencing juveniles — Pt 3 Div 4 *Children (Criminal Proceedings) Act* 1987 — whether sentence manifestly excessive — aggravated break and enter — motor vehicle stolen — reckless wounding of a police officer — commission of one serious children’s indictable offence and three other offences — whether erroneous for all four offences to be dealt with “according to law” — no prior convictions — intellectual impairment — s 53A *Crimes (Sentencing Procedure) Act* 1999.

**[8-0570] HJ v R [2014] NSWCCA 21**

Children — criminal — applicant aged 17 years and 8 months at the time of the offence — two offences contrary to s 112(2) *Crimes Act* 1900 — breaking and entering into a house and committing a serious indictable offence — aggravated offence committed in the company of another — application for leave to appeal against sentence — whether

the sentencing judge failed to give proper attention to the fact that the applicant was the mother of a very young baby — whether juvenile detention appropriate if offender has a very young baby — error found — applicant re-sentenced.

**[8-0575] R v RM [2015] NSWCCA 4**

Children — criminal — sentencing — appeal — child sex offences — respondent was juvenile when offences were committed — pleaded guilty to seven charges — sentenced to a five year good behaviour bond and a suspended aggregate sentence of 2 years imprisonment — whether error in identifying qualified discount for remorse — whether error in imposing a suspended aggregate sentence — whether error in imposing a single bond for five offences — whether indicated sentences reveal error in aggregate sentence — whether aggregate sentence manifestly inadequate — whether indicating non-parole periods for indicated sentences was in error — whether individual bonds were manifestly inadequate — whether overall sentence was manifestly inadequate — the court, exercising its residual discretion, declined to intervene to do other than correct the technical errors made by the sentencing judge.

**[8-0580] Johan v R [2015] NSWCCA 58**

Children — criminal — sentencing — appeal — offences involved the use of dangerous weapons, four armed robbery offences as well as an aggravated break and enter offence, most offences were committed in the company with another person — whether there was failure to give appropriate weight to age and background when assessing moral culpability — compelling evidence of the applicant's personal circumstances — applicant's intelligence assessed in the mild intellectual disability range and the applicant had a serious drug habit — whether sentence imposed was manifestly excessive — although leave to appeal was granted, the appeal against sentence was dismissed.

**[8-0585] RL v R [2015] NSWCCA 106**

Children — criminal — sentencing — appeal — sentencing adult for sexual offences committed as juvenile — effect of delay between the commission of the offences and when the charges were laid — whether sufficient allowance made for applicant's youth at time of offending — whether sentence accorded with sentencing principles applied at time of offending — no need for further rehabilitation — use of victim impact statement — statement not limited to harm directly resulting from offence whether to consider ground of manifest excess if specific error established — whether need for appeal court to determine appropriate sentence — finding that it is not sufficient to ask if impugned sentence within range — *Kentwell v The Queen* (2014) 88 ALJR 947 applied — s 6(3) *Criminal Appeal Act* 1912.

**[8-0590] Siddiqi v R (Commonwealth) [2015] NSWCCA 169**

Children — criminal — sentencing — appeal — error in having regard to non-conviction criminal record — Parity principle — whether erroneous sentences imposed upon co-offenders give rise to a justified sense of grievance — whether intervention of appellate court is justified — question of proper reflection of objective.

**[8-0595] RP v R (2015) 90 NSWLR 234**

Children — criminal — conviction and sentencing appeal — sexual intercourse with a younger half-brother under 10 years of age — aggravated indecent assault — accused aged between 11 and 12 years at the time of offending — judge-alone trial — sole issue at trial was *doli incapax* — not open to his Honour to conclude that the Applicant was in a position of trust with respect to the complainant — trial judge did not err in failing to take into account s 22A *Crimes (Sentencing Procedure) Act 1999* — power to reduce penalties for facilitating the administration of justice — not necessary to consider whether sentence imposed was manifestly excessive — necessary to consider whether lesser sentence warranted after an independent exercise of sentencing discretion — see also [8-0240].

**[8-0600] TC v R [2016] NSWCCA 3**

Children — criminal — sentencing — sentence appeal — offender 17-and-a-half at the time of the offence — offender aged 55 years at the time of sentence — indecent assault committed 38 years earlier by the then young person on 9-year-old boy contrary to s 81 (rep) *Crimes Act 1900* (NSW) — further historical indecent assault on 12-year-old girl contrary to s 76 (rep) *Crimes Act* on a Form 1 — sentencing judge convicted applicant and imposed 2-year good behaviour bond — essential objective of application was to have the formal conviction expunged — sentencing judge failed to take into account sentencing options under the *Child Welfare Act 1939* (NSW) (rep) — sentencing judge failed to sentence in accordance with standards at time of the offence — sentence imposed on applicant clearly within the range of sentences which could be imposed — sentence not unreasonable or plainly unjust but leave to appeal granted as one ground of appeal made out — appeal against conviction dismissed — offence warranted withholding, to some degree, leniency to the applicant in light of his youth — no lesser sentence warranted in law.

**[8-0605] Kiernan v R [2016] NSWCCA 12**

Children — criminal — sentencing — sentence appeal — wounding with intent to cause grievous bodily harm — s 33(1)(a) *Crimes Act 1900* (NSW) — no error in finding that offence was within the midrange of objective seriousness — applicant's subjective case including abusive upbringing properly taken into account — sentence not manifestly excessive — adult applicant with poor criminal record including a conviction as a juvenile and a history of drug use from the age of 10-years-old — psychologist's report that applicant was subjected to ritual and constant physical, sexual and psychological abuse — leave to appeal granted but appeal dismissed.

**[8-0610] Ingrey v R [2016] NSWCCA 31**

Children — criminal — Aboriginal offender — sentencing — sentence appeal — applicant aged 19 at time of offence — found guilty after trial of one count of attempted robbery armed with a dangerous weapon — ss 97(2) and 344A(1) of the *Crimes Act 1900* (NSW) — sentencing judge had no regard to applicant's social disadvantage when exercising sentencing discretion — applicant's disadvantaged background was a factor the judge ought to have considered: [35]; *Bugmy v The Queen* (2013) 249 CLR 571 — error in failing to take into account a material consideration; *House v The King*

(1936) 55 CLR 499 — supportive family background taken into account — applicant's exposure to crime at an early age among members of his wider family and peers — interplay of conflicting sentencing considerations — independent re-exercise of the sentencing discretion — mitigating factors — age of applicant — exposure to criminal activity during his formative years — potentially crushing nature of a sentence which the applicant is already serving — other factors taken into account: lack of remorse, lengthy criminal history and poor compliance with supervision — sentence reduced.

**[8-0615] RC v Director of Public Prosecutions [2016] NSWSC 665**

Children — criminal — sentencing — appeal — youth identifies as Aboriginal — intellectual and emotional deficits — Attention Deficit Hyperactivity Disorder — multiple property offences — break, enter and steal — break and enter with intent — aggravated break, enter and steal — some offences committed while on parole and another while on conditional liberty — disconnection from Juvenile Justice — need for supervision identified — two-year control order reduced to 1 year and 10 months — non-parole period of 14 months reduced to 12 months — two-year good behaviour bond ordered — condition of bond that the youth accept the supervision of Juvenile Justice and the supervision of any other organisation or person directed by Juvenile Justice.

**[8-0620] LD v R [2016] NSWCCA 217**

Children — criminal — sentencing — appeal — youth under 18 years of age at the time of the offence — aggravated break, enter and commit serious indictable offence — reckless wounding, in circumstances of aggravation — being in company — sentence of imprisonment for 3 years with a non-parole period of 1 year and 6 months imposed by sentencing judge — conceded failure of sentencing judge to apply provisions of the *Children (Criminal Proceedings) Act 1987* — matter remitted.

**[8-0625] BH v R [2016] NSWCCA 290**

Children — criminal — sentencing — appeal — youth aged 17 years and 3 months at time of offence — Attention Deficit Hyperactivity Disorder — borderline intellectual disability — manslaughter — single punch — early guilty plea — sentence of imprisonment of 5 years and 3 months with a non-parole period of 3 years and 11 months — whether sentencing judge sentenced applicant on basis of factual findings not open — matter of motivations a point of serious dispute — sentencing judge made no order under s 19(3) *Children (Criminal Proceedings) Act 1987* with regard to the sentence for the serious children's indictable offence of manslaughter — sentence not manifestly excessive — appeal dismissed.

**[8-0630] OK v R [2016] NSWCCA 318**

Children — criminal — sentencing — appeal — youth aged under 18 — cognitive impairment — emotional immaturity — multiple offences — aggravated armed robbery in adult company and armed with a dangerous weapon — aggregate sentence of 11 years imprisonment with a non-parole period of 7 years — whether failure to properly apply principle for sentencing youthful offenders — failure to take into account the youth's no prior criminal history, emotional immaturity and cognitive

impairment — no evidence of “profound deprivation” — sentence not manifestly excessive even given the significance of the subjective features affecting the youth — appeal against sentence dismissed.

**[8-0635] DS v R [2017] NSWCCA 37**

Children — criminal — sentencing — appeal — leave to appeal granted — youth aged 16 years — affected by alcohol and ecstasy — six offences committed at an 18th birthday party — causing grievous bodily harm with intent — reckless wounding in company causing actual bodily harm — affray — common assault — assault occasioning actual bodily harm — causing catastrophic brain injuries to one victim with consequential cognitive impairments and permanent physical injuries (count 1) — objective seriousness of a high order — whether failure to pay proper regard to the fact that offences other than count 1 could have been dealt with in the Children’s Court — due to the extremely violent conduct, other relevant counts (numbers 3 to 7) could not be dealt with under s 18 *Children (Criminal Proceedings) Act 1987* — no miscarriage of justice or serious injustice demonstrated — whether failure to take into account youth’s immaturity other than in relation to the issue of rehabilitation — no failure demonstrated — youth sentenced to an aggregate sentence of 12 years and 6 months’ imprisonment, with a non-parole period of 8 years — aggregate sentence not manifestly excessive — appeal dismissed.

**[8-0640] DL v R (No 2) [2017] NSWCCA 58**

Children — criminal — sentencing — appeal — murder — offender aged 16 and murder victim aged 15 — sentencing judge remarked that “against the statutory provision of a non-parole period of 25 years, I do not feel able to reduce the non-parole period below 17 years and see no point in a further term exceeding 5 years” — *Muldrock* error — *Muldrock v The Queen* (2011) 244 CLR 120 — the High Court in *Muldrock* clarified that the standard non-parole period is but one guidepost and is not to be used as a starting point in the sentencing process — appeal dismissed (by majority).

**[8-0645] Ohanian v R [2017] NSWCCA 268**

Children — criminal — sentencing — supplying a prohibited drug — early exposure to illegal drug use — dysfunctional childhood relevant — sentencing judge found ample opportunity to reform as “mature” man — approach contrary to *Bugmy v The Queen* (2013) 249 CLR 571 — effects of childhood deprivation do not diminish — sentencing not manifestly excessive — re-exercise of sentencing discretion warranted due to error — appeal allowed and upheld and original sentence quashed — applicant re-sentenced.

**[8-0650] DJ v R [2017] NSWCCA 319**

Children — criminal — sentencing — appeal — 16-year-old pleaded guilty to discharging a firearm with intent to cause grievous bodily harm — applicant/Crown requested sentence for two related offences under s 166 certificate *Criminal Procedure Act 1986* — sentences of imprisonment imposed — appeal on grounds that s 166 certificate procedure not available — applicant must establish sentence unreasonable or unjust — sentences not manifestly excessive — appeal allowed and dismissed.

**[8-0655] R v ST [2018] NSWDC 22**

Children — criminal — sentencing — appropriate forum for sentencing — Children’s Court best placed to administer the requirements of the *Children (Criminal Proceedings) Act 1987* and rehabilitation outcomes, and can refer to the Youth Koori Court — remittance to Children’s Court under s 20 *Children (Criminal Proceedings) Act* for purpose of imposing penalties — recommend referring defendant to Youth Koori Court.

**[8-0660] Campbell v R [2018] NSWCCA 87**

Children — criminal — sentencing — appeal — 13-year-old pleaded guilty to serious sexual offences on younger relatives — sentence of imprisonment imposed — strong evidence of rehabilitation — interference with education of applicant — primary judge erred in deciding no alternatives to full-time custodial sentence were appropriate — applicant’s rehabilitation should be primary focus of proceedings — matter remitted to District Court for re-sentencing.

**[8-0665] R v AH [2018] NSWSC 973**

Children — criminal — sentencing — guilty plea to doing an act in preparation for, or planning, a terrorist act, pursuant to s 101.6(1) Criminal Code (Cth) — offence is objectively serious and a substantial term of full-time imprisonment is appropriate — offence above the low end of the range of objective gravity — 12 years imprisonment with non-parole period of 9 years — detention as a juvenile offender up to the age of 21.

**[8-0670] Director of Public Prosecutions v Hutchison [2018] VSCA 153**

Children — criminal — sentencing — committing indecent act with child under 16 (3 charges), producing child pornography for use through carriage service and knowingly possessing child pornography — sentenced to community correction orders for 3 and a half years, with conditions, and 3 year good behaviour bond — mitigating circumstances of age, death of mother, groomed online to commit offence — excellent prospects for rehabilitation — sentence imposed by the judge was not manifestly inadequate — appeals dismissed.

**[8-0675] Honeysett v R [2018] VSCA 214**

Children — criminal — sentencing — appeal — pleaded guilty to one charge of armed robbery and one charge of theft — sentenced to 5 years imprisonment with non-parole period of 3 years — insufficient weight given to appellant’s youth, deprived background and Aboriginality — insufficient weight given to the appellant’s engagement with the Koori Court process — history of re-offending and previously used Koori Court to mitigate sentence — Koori Court has power to inform itself, but no obligation to request “Gladue” reports — appeal dismissed.

**[8-0680] R v BJ [2018] NSWDC 122**

Children — criminal — sentencing — aggravated sexual intercourse child between 14–16 — co-offenders pleaded guilty — offenders were children at the time of the

offence — BJ was 14 years old at time of offence — mitigating factors of youth, immaturity of decision-making, influence of older co-offenders, deprived background taken into account — sentenced to 4 years with non-parole period of 2 years — co-offenders, HA and DM, 17 years old at time of offending — HA sentenced to 4 years 8 months with non-parole period of 2 years 4 months — DM sentenced to 5 years with non-parole period of 2 years and 9 months.

**[8-0685] R v Alou (No 4) [2018] NSWSC 221**

Children — criminal — sentencing — aiding, abetting, counselling or procuring the commission of a terrorist act — 18-year old offender supplied firearm to 15-year old killer — supporter of Islamic State — remains radicalised — lack of contrition — weak prospect of rehabilitation — sentenced to a term of imprisonment of 44 years with non-parole period of 33 years.

**[8-0690] DM v R [2018] NSWCCA 305**

Sentencing — sexual offences — at first instance applicant sentenced to 5 years with non-parole period of 2 years 9 months, co-offender received a lesser sentence due to age and positive background report — sentencing judge erred in finding the applicant was a leader in relation to the offending conduct — applicant had a justifiable sense of grievance when comparing his sentence to that of his co-accused — Leave to appeal granted — sentence imposed at first instance quashed — offender resentenced to imprisonment for 4 years 6 months with non-parole period of 2 years 5 months.

**[8-0695] Clarke-Jeffries v R [2019] NSWCCA 56**

Criminal law— sentencing appeal — Criminal Code (Cth) s 474.26 — 18-year-old applicant sent messages to 15-year-old victim to procure sexual activity — applicant sought money from the victim in exchange for destroying photographs she had sent to him — at first instance applicant sentenced to 4 years 4 months imprisonment with non-parole of 2 years for using a carriage service to solicit child pornography material and procure a person under 16 years to engage in sexual activity contrary to s 474.26 — serious mental health issues prevailing at the time of the offending — sentence manifestly excessive — applicant re-sentenced to an effective sentence of 2 years to be released after 9 months.

**[8-0700] CA v R [2019] NSWCCA 93**

Children — criminal — sentencing appeal — at first instance applicant sentenced to imprisonment for 3 years 9 months with non-parole period of 2 years for specially aggravated break and enter and commit a serious indictable offence — 78-year-old woman severely beaten with bricks and a piece of wood — applicant aged 12 years 10 months — sentence manifestly excessive — judge gave insufficient weight to applicant's youth, immaturity, impulsivity and deprived background — appeal granted and applicant re-sentenced to a term of imprisonment for a non-parole period of 1 year 4 months.

# Apprehended violence orders

## [9-0100] Apprehended violence orders — practice and procedure

For information on apprehended violence orders involving children, see *Local Court Bench Book* at [26-000]ff.

## [9-0310] Apprehended violence orders — practice notes

Practice Note 8: Apprehended domestic and personal violence proceedings in the Children's Court

Practice Note commenced 7 May 2012.

## [9-0510] Apprehended violence orders — legislation

The following legislation is useful in the consideration of apprehended violence orders:

- *Crimes (Domestic and Personal Violence) Act 2007*

### **Crimes (Domestic and Personal Violence) Act 2007**

Children — apprehended domestic violence orders (Part 4) — application for making of apprehended domestic violence order by the court (s 15) — court may make apprehended domestic violence order (s 16) — matters to be considered by the court (s 17) — apprehended personal violence orders (Part 5) — application for making of apprehended personal violence order by the court (s 18) — court may make apprehended personal violence order (s 19) — matters to be considered by the court (s 20) — referral of matters to mediation (s 21) — content and effect of apprehended violence orders (Part 8) — additional measures for support and protection of children and others in proceedings (Part 9) — apprehended violence — proceedings to be held in the absence of the public if defendant is under the age of 18 years (s 58)



# Compulsory schooling orders

## [10-0100] Compulsory schooling orders — practice and procedure

### Compulsory schooling orders

Rachel Dart, SIC — Care & Protection, 13 October 2010, revised August 2012.

On 1 January 2010 amendments to the *Education Act 1990*<sup>1</sup> commenced, enabling the Department of Education and Communities to apply to the Children’s Court for compulsory schooling orders in circumstances where a child of compulsory school-age is not receiving compulsory schooling.

### *Relevant legislative provisions*

#### *Compulsory school-age (s 21B)*

- Of or above the age of 6 and below the minimum school-age.
- “Minimum school-age” is the completion of year 10 or 17 years (whichever occurs first). However, a child who has completed year 10 but is not yet 17 years old is of compulsory school-age unless the child participates, on a full-time basis in:
  - Approved education or training;<sup>2</sup>
  - If the child is of or above the age of 15 years — paid work or a combination of approved education or training and paid work.

#### *Duty of parents (s 22)*

It is the duty of a parent<sup>3</sup> to cause a child of compulsory school-age to be:

- enrolled at, and to attend, school; or
- be registered for home schooling and receive instruction in accordance with the conditions to which the registration is subject.

#### *Conferences to deal with unsatisfactory school attendance (s 22C)*

The Children’s Court may order a conference of all relevant parties if a child is not receiving compulsory schooling.<sup>4</sup>

The primary purpose of the conference is to ensure that a child is provided with compulsory schooling and the conference may:

- (a) identify and resolve any issues in dispute, and
- (b) identify any services directed to the child or family which will assist the child to attend school, and
- (c) formulate undertakings and orders for consideration by the Children’s Court.

<sup>1</sup> As amended by the *Education Amendment (School Attendance) Act 2009*.

<sup>2</sup> Defined by s 21B(6) as participation in a higher education course, a vocational education training (VET) course, and apprenticeship or traineeship or any other education and training approved of by the Minister.

<sup>3</sup> Defined as including a guardian or other person having the custody or care of a child: s 3.

<sup>4</sup> The Secretary of the Department of Education and Communities may also direct that such a conference occur at any time before or after such proceedings: s 22C(1)(b).

Parties are entitled to be legally represented at the conference.

Anything said or done or any document prepared in relation to the conference (other than the undertakings arising from the conference) are not admissible in any proceedings before any court or other body other than in care proceedings.<sup>5</sup>

#### *Compulsory schooling orders (s 22D)*

A compulsory schooling order may be made by the Children's Court on the application of the Secretary of the Department of Education and Communities.

That order may require a parent to cause a child to receive compulsory schooling in accordance with the terms of that order.

Such order may be directed against a child who is aged 12 years and above in circumstances where the Children's Court is satisfied that:

- the child is living independently from his or her parents or
- the parents are unable, because of the child's disobedience, to cause the child to receive compulsory schooling.

A compulsory schooling order may be made as both an interim and final order and may be revoked on the application of the Secretary of the Department of Education and Communities or any other party.

When making a compulsory schooling order (or when dismissing an application or revoking such an order), the court may:

- (a) accept written undertakings from a parent, and from any other participant to the conference; and
- (b) may recommend that a relevant institution<sup>6</sup> provide services to the child or their family in order to assist the child to receive compulsory schooling.

Such orders cease to have effect at the end of the period specified in the order or when the child ceased to be of compulsory school-age, whichever occurs first.

#### *Penalties*

It is a criminal offence for a parent of a child of compulsory school-age to fail to cause a child to be enrolled and to attend school (s 23). Such prosecutions are commended by the Department of Education and Communities in the Local Court.

If a parent has been found guilty of an offence under s 23 in circumstances where there is a compulsory education order in place, the maximum penalty is increased to 100 penalty units (currently \$11,000).

In the case of a child above the age of 15 fails to comply with the order without reasonable excuse, the child is guilty of an offence and the maximum penalty which may be imposed is 1 penalty unit (\$110) with no conviction recorded.

The Act does not prescribe any penalty in the case of a child aged between 12 and 15 who fails to comply with a compulsory schooling order.

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<sup>5</sup> Under Ch 5 *Children and Young Persons (Care and Protection) Act 1998*.

<sup>6</sup> Defined meaning a government department or other public authority (whether Commonwealth, State or Territory), including a government school or registered non-government school, any registered vocational training organisation and any non-government organisation that is in receipt of government funding: s 3.

***Procedure***

When a child's school attendance falls below 80% (equivalent to non-attendance exceeding two days missed per fortnight), departmental practice is that a school may refer the child to a field officer who will then work with the child and family over a period of 10 weeks with the aim of improving school attendance.

If the child's school attendance does not reach an acceptable level after that 10 week period, the matter must be referred for legal action.

Proceedings for a compulsory education order are commenced in the Children's Court by way of an application accompanied by a written report, which is personally served on the respondent by either the sheriff or a process server.

On the first return date of the application, the Department of Education and Communities will generally seek that the matter be referred to a confidential conference.<sup>7</sup>An interim compulsory schooling order will often also be sought on the first return date.

The conference is convened by internal departmental personnel (usually a former school counsellor or equivalent).

The matter will return to court following the conference, with a view to a final compulsory schooling order being made. When making the final compulsory schooling order the court may accept written undertakings from a parent, and from any other participant in a compulsory conference.<sup>8</sup>

In making a final compulsory schooling order, the court may specify the period that the order is to remain in force. If no period is specified, the order remains in force until the child ceases to be of compulsory school-age.<sup>9</sup>

**[10-0310] Compulsory schooling orders — practice notes**

Practice Note 7: Legal representation for children and young persons in proceedings for compulsory schooling orders

Practice Note 7 commenced 27 February 2012.

**[10-0510] Compulsory schooling orders — legislation**

*Education Act 1990*

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<sup>7</sup> Section 22C(1)(a).

<sup>8</sup> Section 22D(7)(a).

<sup>9</sup> Section 22D(8) states that a compulsory schooling order (unless revoked by the Children's Court) ceases to have effect at the end of the period specified during the order or when the child ceases to be of compulsory school-age.



# Youth Koori Court

## [11-0000] Background material

The following background material deals with the Youth Koori Court and has been included in this section:

- Judge Peter Johnstone, extract from “Early intervention, diversion and rehabilitation from the perspective of the Children’s Court of NSW” at [11-0005]
- Magistrate Sue Duncombe, “NSW Youth Koori Court Pilot Program commences” at [11-0010]
- Magistrate Sue Duncombe, “Expansion of the NSW Youth Koori Court program” at [11-0015]
- M Williams et al, “Youth Koori Court: review of Parramatta Pilot Project” at [11-0020]
- Practice Note 11: Youth Koori Court at [11-0025]

## [11-0005] The Youth Koori Court<sup>1</sup>

The Children’s Court began trialling the Youth Koori Court (YKC) in February 2015 at Parramatta Children’s Court.

We created this pilot in response to the devastating over-representation of Aboriginal young people in the justice system.

The YKC was established within existing resources and without the need for legislative change.

The YKC uses a deferred sentencing model: s 33(1)(c2) of the *Children (Criminal Proceedings) Act 1987* (CCPA). 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.

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 six to twelve months prior to sentence.

The legislative scheme applicable to the YKC is consistent with the general principles informing the work of the Children’s Court.

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<sup>1</sup> This extract is from “Early intervention, diversion and rehabilitation from the perspective of the Children’s Court of NSW” by Judge Peter Johnstone, President of the Children’s Court of NSW, at [110]–[126]. The paper, which was originally presented for the 6th Annual Juvenile Justice Summit, Friday, 5 May 2017, Sydney, is reproduced in full at [5-0150]. This extract has been updated to include recent changes. The pilot program is also discussed in an article by S Duncombe, “NSW Youth Koori Court Pilot Program commences” (2015) 27 *JOB* 11.

Specifically, the provisions in s 6 of the CCPA 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*,
- ...
- (c) 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*,
- ...

[Emphasis added.]

The direct participation of the young person 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.

The culturally competent component of the YKC is demonstrated in many ways, including 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.

Notably, the full suite of sentencing options is available to the judicial officer.

The YKC has been sitting since 6 February 2015 and we celebrated the two-year milestone in February [2017], 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 YKC, and shared some words of encouragement and wisdom with one of our young participants.

From February 2015 to December 2016, the YKC had 52 referrals and 48 of those young people were sentenced. In [May] 2017, we have 11 young people continuing or referred, and two have been sentenced so far this year. [As at June 2018, 92 young people have been referred to the YKC program.]

A formal process evaluation has been conducted by Western Sydney University with positive results, see [11-0020].

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.

With the assistance of the Children's Court Assistance Scheme, five of the YKC participants have been able to obtain permanent housing, which is a significant achievement.

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. Funding was recently announced by the Attorney General, Mark Speakman SC, and the Treasurer, Dominic Perrottet, to enable the expansion of the YKC to Surry Hills. The funding will commence on 1 July 2018 and will allow the courts to operate for a further three years.

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.

**[11-0010] NSW Youth Koori Court pilot program commences**

The practise, procedures, aims and objectives of the Youth Koori Court are summarised in this article at S Duncombe, “NSW Youth Koori Court Pilot Program commences” (2015) 27 *JOB* 11.

See also a Fact Sheet by the Department of Justice at [www.childrenscourt.justice.nsw.gov.au/Documents/Youth%20Koori%20Court%20A4\\_Accessible.pdf](http://www.childrenscourt.justice.nsw.gov.au/Documents/Youth%20Koori%20Court%20A4_Accessible.pdf), accessed 22 June 2018.

**[11-0015] Expansion of the NSW Youth Koori Court program**

In May 2018, the NSW Government funded the expansion of the Youth Koori Court to Surry Hills. The sittings of the Youth Koori Court at Surry Hills commenced on 6 February 2019. This article, at S Duncombe, “Expansion of the NSW Youth Koori Court program” (2018) 30 *JOB* 48, gives a brief summary.

**Note:** see [www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/youth-koori-court-surry-hills.aspx](http://www.justice.nsw.gov.au/Pages/media-news/media-releases/2018/youth-koori-court-surry-hills.aspx), accessed 8 February 2018.

**[11-0020] Youth Koori Court review of Parramatta Pilot Project**

A report prepared by M Williams, D Tait, L Crabtree and M Meher, of Western Sydney University can be found at [www.westernsydney.edu.au/\\_\\_data/assets/pdf\\_file/0008/1394918/YKC\\_review\\_Oct\\_24\\_v2.pdf](http://www.westernsydney.edu.au/__data/assets/pdf_file/0008/1394918/YKC_review_Oct_24_v2.pdf), accessed 12 June 2018.

**[11-0025] Youth Koori Court — practice notes**

Practice Note 11: Youth Koori Court issued 16 January 2015, amended 5 March 2015 and further amended 1 February 2019.

