Submission No 19

INQUIRY INTO THE ADEQUACY OF YOUTH DIVERSIONARY PROGRAMS IN NSW

Organisation: Children's Court of NSW

Name: Judge Peter Johnstone

Position: President

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Children's Court of New South Wales

Mr Geoff Provest MP
Chair
Committee on Law and Safety
Parliament House
Macquarie Street, Sydney NSW 2000

8 February 2018

Dear Mr Provest

Legislative Assembly Law and Safety Committee Inquiry into the adequacy of youth diversionary programs in NSW

The Children's Court welcomes the opportunity to make a submission to the Legislative Assembly Law and Safety Committee Inquiry into the adequacy of youth diversionary programs in NSW to deter young offenders from long-term involvement with the criminal justice system.[1]

In the experience of the Children's Court, diversion from long-term involvement with the justice system is a process, rather than an outcome from a single intervention or engagement with a diversionary program. Therefore, the Children's Court suggests that the success of a diversionary program or mechanism cannot be easily measured or evaluated in isolation, and that successful diversion from long-term involvement with the criminal justice system requires a holistic approach to justice and an understanding of the unique nature of young offenders.

Diversion should be considered in a broad and flexible manner, as opportunities for diversion can be located, created and conceptualised at every stage of a young person's life and at every point of contact with the justice system, including once incarcerated and after release back into the community.

[1] I acknowledge the valuable assistance provided by the Children's Court Executive Officer, Rosemary Davidson and the Children's Court Research Associate, Lizz King, in the preparation of this submission.

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Children and young people should receive the benefit of support, enlightened policy and practice at every possible point in time, as well as the benefit of specialised, targeted treatment from informed practitioners and stakeholders.

The jurisdiction of the Children's Court has developed discrete and specialised practices and procedures over time to reflect the growing body of evidence which demonstrates the neurobiological differences between children and adults, and the need for children and young people to be treated differently and separately in the criminal justice and child welfare systems.

For example, 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.[2] If we liken executive function of the pre-frontal cortex to a type of control centre for 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.

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.[3]

This research has some important implications for diversionary mechanisms and programs, as each child and young person may require different and multiple diversionary interventions before they are successfully diverted away from offending.

Furthermore, the various underlying factors of offending must be considered in order to fully comprehend the pathways which lead to criminal offending and the opportunities for diversion which exist within the community as well as after the initial first contact with the justice system.

Therefore, the success or adequacy of a diversionary program or mechanism may not be revealed or captured accurately if the indicators of success are limited to measuring recidivism.

[2] E.C. McCuish, R. Corrado, P. Lussier, and S.D. Hart, 'Psychopathic traits and offending trajectories from early adolescence' (2014) *Journal of Criminal Justice* 42, pp 66-76.
[3] B Midson, 'Risky Business: Developmental Neuroscience and the Culpability of Young Killers', (2012) *Psychiatry, Psychology and the Law,* 19 (5), pp.692 -710 at 700. See also: Gruber, S.A. Yurgelun Todd, D. A. 'Neurobiology and the Law: A role in Juvenile Justice' (2006) *Ohio State Journal of Criminal Law,* 3, pp 321-340 at 332.

If some or all of the multiple and complex challenges faced by children and young people can be addressed through one or ongoing diversionary interventions, then this may contribute significantly to successful diversion from ongoing involvement with the criminal justice system later down the track.

This submission will canvass pre-court, court and post-court mechanisms which are diversionary in nature and/or which have the potential to facilitate supports and services to contribute to long-term desistance from criminal offending, thus impacting on the process of diversion.

Pre-court diversion

Increased use of the Young Offenders Act 1997

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 *Young Offenders Act 1997* (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.

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.[4]

The Children's Court suggests there would be value in lowering the threshold of this requirement in NSW 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.

The Children's Court also suggests that there may be an opportunity for a broader range of offences to be covered under the YOA, which would increase the availability of warnings, cautions and Youth Justice Conferences to children and young people.

[4] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B, 227 (Recommendation 25.12).

I am particularly supportive of Youth Justice Conferences, 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. In my view, they produce fruitful results for both the offender and the community.

It has become evident that police uptake and use of the YOA varies across geographical locations and Local Area Commands in NSW, and in some areas the Youth Liaison Officer operates as a dedicated full-time role, whereas in other areas this crucial role is combined with other pressing duties. For example, anecdotally it seems that in regions where there is a Police Citizens Youth Club (PCYC), there appears to be a greater utilisation by police of the YOA.

Organisations such as the PCYC have an important role to play in empowering children and young people and fostering positive relationships between the community, police and young people. I am highly supportive of the work of PCYC's, and their ability to work closely with young people to develop their skills, character and leadership, which assists in diversion away from long-term involvement with the justice system.

It is critical that police who are interacting with children and young people understand the diversionary options available under the YOA and the circumstances in which diversion is appropriate.

The Royal Commission into the Protection and Detention of Children in the Northern Territory has recognised the importance of an enlightened understanding of the nature of children and young people and many challenges they face, and has recommended that "*all Northern Territory Police receive training in youth justice which contains components about childhood and adolescent brain development, the impact of cognitive and intellectual disabilities including FASD (Foetal Alcohol Spectrum Disorder) and the effects of trauma, including intergenerational trauma*."[5]

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.

[5] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B (Recommendation 25.1.5).

Youth on Track and the Family Investment Model

Whilst many young offenders will simply "grow out of crime" as they continue to mature and develop, some children and young people present with multiple and complex needs that require a holistic response in order to successfully divert away from long-term involvement with the justice system. Factors such as socio-economic disadvantage and poverty, poor physical and mental health, abuse and neglect, trauma, family violence and disengagement from education can all impact significantly on a child's development, and contribute to their offending behaviour.

In many instances, a warning or a caution may successfully divert a child or young person from contact with the court system, but without the provision of appropriate services and supports for the child and their family to address any underlying issues, the root causes of the offending behaviour remain unchallenged and will continue to impact on a child or young person's behaviour.

Youth on Track is one diversionary model which operates in NSW with the aim of intervening at an early stage to divert young people from the criminal justice system through identifying and responding to the underlying risk factors and the provision of one-on-one case management.[6] 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.[7]

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.

[6] Department of Justice NSW, http://www.youthontrack.justice.nsw.gov.au/Pages/yot/about_us/yot_cjs.aspx accessed 25 January 2018.

[7] Cultural and Indigenous Research Centre Australia (for the Department of Education), *Youth on Track Social Outcomes Evaluation Final Report,* April 2017, http://www.youthontrack.justice.nsw.gov.au/Documents/circa-evaluation-final-report.pdf accessed 2 February 2018.

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.

Earlier identification of risk factors

Alongside programs such as Youth on Track, there is also a role for educators and health professionals to identify and respond to problematic behaviours or issues impacting on a child or young person, well before a child or young person comes into contact with the criminal justice system.

For example, it is not uncommon for many children in school to be experiencing a physical, mental or learning disability which goes unnoticed or is masked by challenging behaviours. The Young People in Custody Health Survey (YPICHS) conducted by Justice Health and Forensic Mental Health Network and Juvenile Justice in 2015 revealed that 1 in 6 YPICHS participants scored in the extremely low range of the Wechsler Intelligence Scale for Children, indicating a potential intellectual disability.[8]

An undiagnosed disability or difficulty can impact significant on a child's ability to engage in education, and to build important life skills as well as forge important neural networks as part of their development.

Whilst some disabilities and problems may be easy to identify, others such as learning difficulties or language impairments may be masked by certain behaviours, and may have a significant impact on a child's ability to express themselves and regulate their behaviour. The 2015 YPICHS indicates that young people in custody are scoring well below their same-aged peers in a range of areas including verbal comprehension and reasoning, as well as perceptual reasoning, which includes organised thought and cognitive flexibility.[9]

Early identification of disabilities and other difficulties experienced by children as well as access to targeted supports is needed to increase the chances of successful diversion from problematic behaviours and potential criminal offending. Given the early and frequent contact schools have with children, there may be merit in considering a way to implement improved screening by health professionals at an early stage, and to then facilitate the provision of specialised supports.

[8] Justice Health and Forensic Mental Health Network and Juvenile Justice NSW, "2015 Young People in Custody Health Survey" p 80 http://www.justicehealth.nsw.gov.au/publications/2015YPICHSReportwebreadyversion.PDF accessed 30 January 2018.
[9] Ibid 96.

The impact of Suspect Targeting Management Plans

The NSW Police Force Suspect Targeting Management Plan (STMP) is a preventative crime tool which allows police to identify recidivist offenders as well as those suspected to be at risk of committing crimes.
Individuals who are identified for inclusion on the STMP are subject to a targeted program by NSW police officers, which includes police attending the individual's house and using police powers to stop, search and direct an individual to move on whenever police encounter the individual.[10]

A recent study suggests that STMP's are being used by police against young people, which raises some concern about whether this is increasing young people's contact with the criminal justice system, and thus undermining the key objectives of the YOA including diversion.[11]

The Children's Court recommends consideration be given to the operation of Suspect Targeting Management Plans (STMP's) in NSW, specifically the impact this scheme has on young offenders, and whether it operates in a way that increases the risk of a child having long-term involvement in the criminal justice system, rather than acting as a deterrent.

Of particular concern to the Children's Court is the impact of STMP's on young Aboriginal people who are participating in the Youth Koori Court and undertaking holistic diversionary programs, and the manner in which the STMP may be compromising the young person's rehabilitation and their progress down a pathway away from offending and the Court system. The recent study into the use of STMP's against young people suggests that there is no publicly available evidence that the STMP reduces youth crime.

Whilst deterrence strategies may have some place in preventing crime, strategies that work with young people are more likely to deter young offenders in the long-term.

Court diversion

The specialised jurisdiction of the Children's Court

The specialist nature of the Children's Court operates as a safeguard to the detrimental exposure of children to the adult court environment and to adult offenders.

[10] Sentas, V and Pandolfini, C (2017) *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan. A Report of the Youth Justice Coalition NSW.*
[11] Ibid.

The practices and procedures of the Children's Court also reflect an enlightened judicial understanding of the issues and risk impacting on children and young people, as well as a comprehensive understanding of important legislative principles distinguishing children and young people from adult offenders.

Currently Children's Magistrates hear roughly 90% of care cases in the State, up from 45% in 2011, but the coverage for criminal matters remains around 67%. The balance of cases is heard by Magistrates in the Local Court exercising the Children's Court jurisdiction.

In a letter to the then Attorney General The Hon. Gabrielle Upton (annexed), I have previously requested that consideration be given to the legislative and administrative frameworks that currently operate in a way which limits the Children's Court ability to provide a consistent and focused approach to cases within the Children's Court jurisdiction across NSW.

I am an advocate for the expansion of the specialist Children's Court across as much of the State 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.[12]

Mental Health (Forensic Provisions) Act 1990

The *Mental Health (Forensic Provisions) Act 1990* contains provisions which enable Magistrates to divert mentally disordered young people from the criminal justice system.[13] This approach 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, there is some concern in the Children's Court about using this option due to the lack of follow-up and an inability to require a report detailing the young person's compliance with treatment.

The recent case of *Director of Public Prosecutions (NSW) v Saunders* (2017) NSWSC 760 highlighted these concerns in circumstances where an adult defendant was discharged under s 32 of the *Mental Health (Forensic Provisions) Act 1990* without specific identification of a particular person or particular place which the person would be required to attend for assessment and/or treatment.

[12] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B, 305 and 312.
[13] *Mental Health (Forensic Provisions) Act* 1990 (NSW) ss 32 and 33.

It was held simply nominating a type of person (e.g. “a psychiatrist”) or a type of place does not comply with the provisions of the Act, and is so vague as to render compliance uncertain and enforcement virtually impossible.[14]

There is a clear need to legislatively strengthen s 32 to address the issues which were brought to light in this case, and to ensure that the Children’s Court is not inhibited in its regular and appropriate use of this diversionary provision.

A lack of available services can also weigh heavily in the balancing exercise which is undertaken in deciding whether a diversion under s 32 will produce better outcomes for the young person and the community. For example, there is no residential drug and alcohol treatment facility for young people in Western Sydney, where it is greatly needed.

The availability of appropriate therapeutic services within the community impacts significantly on the successful long-term diversion of young offenders with complex needs from the criminal justice system.

Youth Koori Court

It is an incontrovertible fact that Aboriginal young people are over-represented in the justice system. Aboriginal young people are similarly over-represented in detention centres. The distressing situation with respect to this over-representation is articulated by Weatherburn:

“By the time they reached the age of 23, more than three quarters (75.6%) of the NSW Indigenous population had been cautioned by police, referred to a youth justice conference or convicted of an offence in a NSW criminal court. The corresponding figure for the non-Indigenous population had been refused bail or given a custodial sentence (control order or sentence of imprisonment).”[15]

During my time as President over these last five years, I have agitated for this situation to improve, and I have advocated for an emphasis on the development of cultural competence in our responses to this societal failure.

The Children’s Court is of the view that diversionary efforts should be made at every stage of a young person’s interaction with the criminal justice system. 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.

[14] *Director of Public Prosecutions (NSW) v Saunders* (2017) NSWSC 760 per Hulme J at [49] and [50].

[15] Weatherburn, D (2014) Arresting Incarceration: Pathways out of Indigenous Imprisonment, Aboriginal Studies Press, Canberra at p.5

The Youth Koori Court (YKC) was established as a pilot program on 6 February 2015 on the initiative of the Court itself, within existing resources and without the need for legislative change. The Children's Court identified that the Court process itself has 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 Aboriginal and Torres Strait Islander community and must be addressed by the criminal justice system if the legal process is to have any deterrent or diversionary effect.

The process that has been developed for the YKC 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.

An example of the impact and outcomes for a participant in the YKC is illustrated in the following case study:

> *C was removed from the care of his parents and placed in the care of the Minister from the age of two. From the age of 11 he experienced chronic homelessness when he left his care placements and stayed with relatives or friends. He became disengaged from school, dependent on drugs and alcohol, experienced low levels of personal safety and security and developed mental health issues. Intensive contact with police for offences such as shoplifting and failing to buy a rail ticket followed. Over time and with a lack of appropriate cultural and clinical support, C's dependence on drugs and alcohol was exacerbated and his mental health needs increased.*
>
> *C was accepted into the Youth Koori Court program in early 2015 and an Action and Support Plan was developed. With the assistance of agencies working with the Youth Koori Court and the encouragement of members of the Aboriginal community and the Court C was able to obtain a permanent NSW Housing tenancy after being connected to a NSW Housing Aboriginal Specialist. After re-engaging with caseworkers a leaving care plan was developed which included entitlements to help him set up his home and obtain driving lessons. C subsequently obtained his Learners licence. With the aid of appropriate legal advice he dealt with over $7000 worth of debt. Since graduating from the Youth Koori Court 2.5 years ago it is understood that C has continued to maintain his tenancy and has enjoyed the benefits of employment in several jobs.*

The YKC has been sitting for almost three years now, and an analysis has shown positive social outcomes including improved cultural connection, education and employment, accommodation, health and management of drug and alcohol use.

All of these factors impact significantly on a young person's health and wellbeing, as well as their offending behaviour, and it is hoped that this process will provide the first step for many young people to find an alternative path for themselves away from the criminal justice system.

The Children's Court was very pleased to hear the Attorney General announce in June 2017 $220,000 in funding for Marist180 to provide a casework position dedicated to assisting clients in the YKC. I will continue to advocate for the expansion of the YKC, particularly to areas such as Dubbo and central Sydney.

However, as I have reiterated in relation to other processes and programs, a YKC cannot alone address the social, economic and cultural disadvantages that Aboriginal and Torres Strait Islander people experience. Culturally appropriate support services, policies and practices are needed to address these complex issues, and to empower Aboriginal children and young people to successfully take up opportunities that will improve their life chances and divert them away from the justice system.

It is important to recognise that diversionary processes can also work as part of the Court process, and the Youth Koori Court is an excellent example of this.

Youth Diversion Process at Parramatta Children's Court

The Youth Diversion Process was established as a collaborative trial process between Legal Aid NSW and the Children's Court of NSW in 2014.

A report released by Legal Aid titled "*High Service Users at Legal Aid NSW: Profiling the 50 highest users or legal aid services*" found that 80% of high users of Legal Aid services were children and young people who were 19 years and under, and 82% of high service users had their first contact with Legal Aid NSW by the time they were 14 years old. The study found evidence of multiple and complex needs amongst high service users, with almost all having spent time in juvenile detention and nearly half having been in out-of-home care.

The Youth Diversion Process involves a case management system at Parramatta Children's Court, which draws on the skills and expertise of trained lawyers to identify children with complex needs and liaise with service providers to improve the supports available to the child to address the social, health and economic causes of offending.

Whilst the Court may allow a short adjournment to allow relevant enquiries to be made, the Court process operates in the usual way but with the benefit of any additional information.

Currently the Youth Diversion Process only operates at Parramatta Children's Court, and the Children's Court recommends that this type of process be rolled out and made available across the State, to ensure that all children and young people receive access to the benefit of specialised skills, expertise and services, as well as consistency of opportunity and outcomes.

Children's Court Assistance Scheme

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The Children's Court Assistance Scheme (CCAS) provides information about court processes and outcomes, informal counselling and conflict resolution, referral to welfare services such as drug and alcohol programs, counselling and accommodation, as well as support for the young people and their families at court.

The CCAS is well placed to identify particular issues which may be impacting on a child or young person's life, including their offending behaviour, and to facilitate positive intervention through a referral, and to help the child or young person understand the Court process and outcomes through appropriate child-centred language. This is a crucial point where diversionary interventions can be identified and a pathway created for the child or young person to obtain support and critical services.

Currently, the CCAS operates at Parramatta, Surry Hills, Campbelltown, Port Kembla, Woy Woy, Wyong and Broadmeadow Children's Courts in NSW.

The Children's Court has identified some areas where a CCAS is greatly needed, including the Hunter Region and the South Coast. The Children's Court suggests consideration be given to expanding the scope of the CCAS across NSW to provide access to a greater range of services to as many children, young people and their families as possible across the State.

Changing the age of criminal responsibility and young people in detention

The findings of the Royal Commission into the Protection and Detention of Children in the Northern Territory present an opportunity for a timely discussion regarding the age of criminal responsibility in Australia.

The Children's Court supports consideration of the Royal Commission's recommendation to amend legislation to provide that the age of criminal responsibility be raised to 12 years, rather than 10, and suggests a higher age should be adopted uniformly across all jurisdictions.[16]

[16] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B (Recommendation 27.1).

Increasing the age of criminal responsibility to 12 would align NSW with contemporary scientific research, as well as with the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* which stipulates that the minimum age set should recognise emotional, mental and intellectual maturity.

The Children's Court recommends close consideration of this recommendation, as it would 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[17]), reducing the effectiveness of the court process as a deterrent.

However, the Children's Court submits that 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.

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.[18] This would reflect practices in other 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.

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.[19]

No experience is more predictive of future adult difficulty than confinement in a juvenile facility.[20]

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[17] Judge Peter Johnstone, 'Emerging Developments in Juvenile Justice' (2016) 12(4) *The Judicial Review* 456, p 464.
[18] Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B (Recommendation 27.1).
[19] K. Richards, 'What makes juvenile offenders different from adult offenders' (February 2011) 49 *Trends and Issues in Crime and Criminal Justice,* Australian Institute of Criminology.
[20] M. Wald and T. Martinez, 'Connected by 25 – Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds' (2003) Stanford University: http://www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf (accessed 18 April 2017).

Children who have been incarcerated are more prone to further imprisonment. Statistics from the NSW Bureau of Crime Statistics and Research (BOCSAR) show that 66.2% of young offenders exiting detention were reconvicted of another offence within the next 12 months in 2015.[21] 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.[22]

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.[23]

Confinement all but precludes health psychological and social development.[24] Detention, therefore, is not the best answer to the multiple, complex and traumatic problems experienced by and caused by young offenders. Rather, early intervention and diversion 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.[25]

Diversion from the criminal jurisdiction to the welfare jurisdiction

The Children's Court suggests that some insight could be drawn from the experiences of other international jurisdictions which operate under a combined care and justice system, which present some alternative opportunities for diversion.

For example, the Children's Hearing System in Scotland is a care and justice system for children and young people.[26] This system is supported by a therapeutic framework involving the collaboration of different agencies which work together to deliver care, protection and support services to children and young people who have been referred to a Children's Panel. The Children's Panel makes decisions at a hearing about the help and guidance necessary to support the child or young person.

[21] NSW Bureau of Crime Statistics and Research, "Re-offending Statistics for NSW" http://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx, accessed 23 January 2018.
[22] E. P. Mulvey, 'Highlights from Pathways to Desistance – A Longitudinal Study of Serious Adolescent offenders', Office of Juvenile Justice and Delinquency Prevention.
[23] Ibid, Road Map.
[24] M. Wald and T. Martinez, 'Connected by 25 – Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds' (2003) Stanford University: http://www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf (accessed 18 April 2017).
[25] Judge Peter Johnstone, 'Emerging Developments in Juvenile Justice' (2016) 12(4) *The Judicial Review* 456; Judge Peter 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, Sydney, 5 May 2017).
[26] Children's Hearings Scotland, http://www.chscotland.gov.uk/the-childrens-hearings-system/

The Children's Hearing System recognises that children and young people in need of care and protection are often the same children and young people who commit offences, and presents a potential model to address the "cross-over"[27] of children from care to crime in NSW.

Working within the current parameters of the NSW Children's Court jurisdiction, I have been advocating strongly for a power similar to the 'secure welfare' power, or a power to refer a child in the criminal justice system to the care and protection system. Victorian and Western Australian 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.[28]

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.[29] 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.

The impact of disengagement with education on the likelihood of offending

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.

If a child or young person becomes disengaged from education, they lose one of the biggest protective factors against the risk of offending. The use of tools such as suspension and expulsion from school can also contribute to the risk of a young person engaging in offending behaviour. Studies have shown that within 12 months of being suspended from school students are 50% more likely to engage in anti-social behaviour and 70% more likely to engage in violent behaviour.[30]

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[27] Dr Judith Cashmore, "The link between child maltreatment and adolescent offending", (2011) 89 *Family Matters,* https://aifs.gov.au/publications/family-matters/issue-89/link-between-child-maltreatment-and-adolescent-offending; McFarlane, K, 2015, Care-criminalisation: The involvement of children in of home care in the NSW Criminal Justice System, Doctoral dissertation, University of New South Wales; Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 3B, chapter 25 "The Cross-over Between Care and Detention".

[28] *Children and Community Services Act 2004* (WA) s 88C, *Children, Youth and Families Act 2005* (Vic).

[29] *Court Procedures Act 2004* (ACT) s 74K.

[30] Hemphill S.A. & Hargreaves J. School suspensions - a resource for teachers and school administrators, Centre for Adolescent Health, Murdoch Childrens Research Institute, Melbourne 2010, http://www.rch.org.au/uploadedFiles/Main/Content/cah/School_suspension_booklet.pdf

Anecdotally we believe 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.

Furthermore, the Children's Court has been informed that roughly 40% of children in residential out-of-home care are not attending school.

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.

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. 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.

Post-court diversion

Use of sentencing as an opportunity to divert from future offending

My colleagues, the specialist Children's Magistrates, and myself have long advocated for the need for the Children's Court to be empowered with greater flexibility in the sentencing options available for dealing with young offenders and additional alternatives to detention.

A comprehensive submission made by the Children's Court to the Attorney General in 2016 (annexed) canvasses the underlying reasons why flexible sentencing options are needed, and remains relevant to the legislative framework which remains today.

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 offending, as well as promote rehabilitation and deliver community-focused outcomes. In particular, sentencing options that provide opportunities for intensive supervision and casework by Juvenile Justice would be extremely beneficial.

For example, if a young person is released from detention without being subject to a parole order, then Juvenile Justice are not empowered to be involved with or supervise a child or young person as they reintegrate into the community.

The Children's Court also suggests that there may be great value in linking up young people with NGO's in the community who are able to provide ongoing supports beyond the sentencing mandate.

Similarly, a referral to the National Disability Insurance Scheme would ensure that children and young people with disabilities are actively engaged with support services tailored to their needs which will continue as needed throughout their lives. However, the Court understands that this is a complex process and young people need support to help them apply for the Scheme and then to manage any approved benefits.

Conclusion

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. 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 this submission is of value in exploring a wider concept of diversion, and identifying opportunities for increased supports, services and mechanisms for children and young people to address the underlying risk factors relevant to offending behaviour.

The Children's Court looks forward to the outcomes of this inquiry and is keen to work closely with stakeholders to continue to improve the outcomes for children and young people in NSW.

Yours faithfully,

Judge Peter Johnstone
President of the Children's Court of New South Wales

Children's Court of New South Wales

28 October 2015

The Honourable Gabrielle Upton MP
Attorney General
PO Box 5341
SYDNEY NSW 2001

Dear Attorney

Since my appointment as President of the Children's Court in June 2012 I have become increasingly conscious of the value of the work undertaken in the Children's Court jurisdiction and the work carried out by the many government and non-government agencies that support the children and young persons who are the subject of Children's Court proceedings. However, I have also become increasingly frustrated by a legislative and administrative framework that limits the Court's capacity to provide the specialist work needed in the Children's Law arena.

The legislative framework for the Children's Court is similar to other NSW courts in many respects. The Children's Court is constituted under Part 2 of the *Children's Court Act* 1987 (the Act) and is composed of the President and such Children's Magistrates as are appointed under the Act. The President's functions under s16 of the Act are very similar to other heads of jurisdiction and include, among other things, the responsibility to administer the Court, to arrange the sittings of the Court, to provide judicial leadership to the Court, to develop recommendations for rules, issue Practice Notes and to oversee the training of Children's Magistrates.

However, under section 7 of the Act the appointment of Children's Magistrates to the Children's Court are made from the Local Court bench by the Chief Magistrate in consultation with the President. This dependency on the Chief Magistrate inextricably ties the Children's Court to the Local Court and to the policies pertaining to judicial officers of that court. The reliance on the Local Court impacts directly on the operations of the Children's Court yet the Children's Court has no input into the development of policies in the Local Court, particularly as it relates to the country service of magistrates.

Problems associated with this framework have re-surfaced over the past year and have hindered attempts to ensure that specialist Children's Magistrates are available to deal with Children's Court cases in rural and regional areas.

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The particular issue that currently confronts the Children's Court is that from January 2016 we will have vacancies for the Riverina care and protection circuit and the Western region care and protection circuit. Each circuit operates one week per month. The Chief Magistrate has informed me that he is not in a position to fill these vacancies, notwithstanding that these circuits were established as a result of funding that was specifically provided to enable specialist Children's Magistrate to deal with more care and protection cases in rural and regional areas following recommendations of the *Special Commission of Inquiry into Child Protection Services,* 2008 (the Wood Inquiry).

To more fully inform you on these issues I think it useful to provide some background information. The Wood Inquiry made a number of recommendations pertaining to the operation of the Children's Court which were introduced by the previous government.

The two most significant recommendations related to

a. the appointment of a District Court Judge as the senior judicial officer of the Court and
b. the appointment of additional specialist Children's Magistrates to hear more care and protection cases in rural and regional areas.

The rationale for the appointment of a District Court Judge as President of the Children's Court was that it would reflect the importance of the care and protection of children and young persons and the complexity of many of the cases heard in the jurisdiction.

The Wood Inquiry was not the first time that this issue had been raised. In 1997 the review of the former *Children (Care and Protection) Act* 1987 conducted by Professor Parkinson (the Parkinson Review), similarly concluded that the Children's Court should be headed by a Judge to allow for more serious and complex cases to be heard by a senior judicial officer. The Parkinson Review also argued that the appointment of a Judge as the head of jurisdiction would, among other things, lead to a more consistent application of law and practice and provide a stronger basis for liaison and negotiation with the legal profession and other agencies. Raising the status of the Court would allow for greater independence of the Court and, in turn, ultimately enhance the public perception and credibility of the Court.

The issue was again raised in 2005 by the NSW Law Reform Commission. In the Commission's report on *Young Offenders* (no. 104) it also recommended that a District Court Judge should be appointed to head the Children's Court. However, the Commission went one step further by recommending that the method of appointment of Children's Magistrates be changed so that the head of the Children's Court should appoint magistrates to be Children's Magistrates, after consulting with the Chief Magistrate of the Local Court. This would have reversed the current position whereby Children's Magistrates are appointed by the Chief Magistrate in consultation with the President (s 7 *Children's Court Act* 1987).

The Commission noted at 9.20 that

> *'while training and education can achieve a great deal in developing a highly responsive and skilled Children's Court judiciary, ... selection of magistrates suited to this jurisdiction is equally important. It is a jurisdiction that calls for particular communication skills, pragmatism and personality traits.'*

The Commission perceived advantages in allowing an expert in juvenile matters to have significant input into the choice of Children's Magistrates and it noted that the approach had worked well in Victoria. The Commission appeared to view the change to the appointment process as a necessary consequence of the change in head of jurisdiction.

The rationale for the appointment of two additional Children's Magistrates in 2010 to deal with more care and protection cases in rural and regional NSW was also first raised in the Parkinson Review. At 2.1.7 the Review noted

> *'The consultations indicated that participants in rural areas felt that the magistrates operating in the Local Court where most of their time was spent on criminal and non-care matters had considerable difficulty dealing with care matters. This was reflected in the manner in which the magistrates addressed the children, young people and their families, and in the way they dealt with care matters. Generally, the magistrates were thought to lack the specialist knowledge and experience to deal with care and protection matters, particularly contested matters.'*

The Wood Inquiry noted that DoCS (now FaCS) strongly recommended the introduction of country care and protection circuits and the provision of additional specialist magistrates to enable this to occur.

In the context of the Children's Court criminal jurisdiction the Law Reform Commission's report on *Young Offenders* in 2005 referred to submissions by the Shopfront Youth Legal Centre and Legal Aid NSW that raised concern about the ability of Local Court magistrates to adapt to the Children's Court jurisdiction when most of their time was spent in the adult jurisdiction. The Commission also supported the introduction of rural circuits conducted by specialist Children's Magistrates.

Following the appointment of two additional specialist Children's Magistrates in 2010, as a result of the Wood Inquiry, the Children's Court introduced permanent country care and protection circuits in 2011 in the Riverina region covering Wagga Wagga, Griffith and Albury, the Western Region currently covering Lithgow, Bathurst, Orange, Parkes and Dubbo and the Northern Rivers region covering Lismore, Tweed Heads, Ballina and Grafton. Since then the Children's Court has established a circuit on the Mid-North Coast. In 2011, 44.3 per cent of finalised care and protection cases were heard by specialist Children's Magistrates. By 2013 this figure had rose to 76.8% and as at the end of 2014 the figure had reached 90%.

As a result of the additional funding provided under the Government's *Safe Home for Life* package I have recently expanded the Northern Rivers circuit to include Coffs Harbour, allowing the mid-North Coast circuit to extend to Taree. The Northern Rivers circuit now operates on a full time basis and includes all Children's Court criminal, care and protection cases and applications for compulsory schooling orders under the *Education Act* 1990. I also agreed to cover the Local Court sittings at Murwillumbah and Mullumbimby as part of this circuit. I have established a new circuit in the Hunter region covering Cessnock, Maitland and Muswellbrook that also includes care and protection, criminal and education matters.

Stakeholders have consistently provided positive feedback in relation to the establishment of the specialist Children's Court circuits. In 2014 KMPG conducted an *Evaluation of Keep them Safe Children's Court initiatives* involving an evaluation of the two initiatives stemming from the Wood Inquiry referred to earlier, the appointment of a District Court Judge as President of the Children's Court and the appointment of additional specialist Children's Magistrates to deal with more care and protection cases in rural and regional areas. That evaluation was also positive and noted very similar benefits to that which had been identified in the earlier reports. I have attached a copy of that report for your information.

I remain firmly of the belief that the interests of children and young people in this state are best served by a judiciary that has developed and maintains the specialised skills to conduct cases involving children and whose primary attention is on this work.

I request that consideration be given to reviewing the current legislative and administrative frameworks that currently operate in a way that limits the Children's Court's ability to provide a consistent and focused approach to cases within the Court's jurisdiction across NSW.

Yours sincerely

Judge Peter Johnstone
President

cc: Judge Graeme Henson, Chief Magistrate

Michael Talbot, Deputy Secretary, Department of Justice

Children's Court of New South Wales

15 July 2016

The Hon. Gabrielle Upton MP
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney,

Submission regarding sentencing options in the Children's Court

Thank you for providing the opportunity to make a submission regarding the availability of sentencing options in the Children's Court of NSW.

On your visit to the Children's Court on Friday 6 November 2015, you spoke with a number of specialist Children's Magistrates during the morning tea adjournment. The discussion included, among other things, the availability of flexible sentencing options for children and young people appearing before the criminal jurisdiction of the Children's Court.

You will recall that my colleagues advocated that the Children's Court should be empowered with greater flexibility in the sentencing options available for dealing with young offenders and additional alternatives to detention (imprisonment). While the Court acknowledges that more comprehensive submissions will be required in time to explore the practical application of these options, it is intended that this letter will provide a brief discussion of suggestions for change, and some context and background to inform an intended direction for the future.[1]

There is no single, simple explanation for the problem of young offending, however the causes are often inextricably linked to disadvantage and are often intergenerational and embedded, and are invariably complex. It is this Court's submission that rehabilitation is critical if we intend on breaking the cycle of disadvantage. I believe that there should therefore be available to Children's Magistrates a full range of sentencing options to assist them in creatively rehabilitating young offenders and reducing recidivism.[2]

The Children's Court seeks to be empowered with a suite of sentencing options to allow for tailored solutions when sentencing young offenders that can address the underlying causes of the offending. Flexibility is critical when sentencing young

[1] Given the complexity of this cohort of offenders, a cost/benefit analysis may assist to further scope these options

[2] This is consistent with the Department of Justice strategy regarding sentencing in the adult jurisdiction

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offenders as it provides Children's Magistrates with the ability to make the most appropriate decision for a young person that promotes their rehabilitation and deliver community focused outcomes.

Why treat children and young people differently?

The need to ensure the rehabilitation of children and young people is recognised in the United Nations Convention on the Rights of the Child. Article 40.4 provides 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."*[3]

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."*[4]

In NSW, the paramountcy of rehabilitation is provided for in s 6 of the *Children (Criminal Proceedings) Act* 1987 (the CCPA), which states:

> *(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,*

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[3] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations.
[4] 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.

(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.

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* (Supreme Court of NSW, 15 August 1979, unreported):

> *"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 cited Wood J in *R v Hoai Vinh Tran* [1999] NSWCCA 109 at [3]:

> *"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 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."***

In addition to international legal principle, legislation and case law relating to children, the Children's Court is increasingly looking at science, in particular the emerging understanding of brain development, including the adolescent brain, to fully appreciate the causes of young offending. Neurobiological research undertaken over the last 16 years in particular, reveals 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.[5]

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."*[6]

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[5] McGuish, E.C. Corrado, R., Lussier, P. and Hart, S.D 'Pyshcopathic traits and offending trajectories from early adolescence.' (2014) *Journal of Criminal Justice* 42 pp.66-76

[6] Johnson, S.B. Blum, R.W. Giedd, J.N '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 218

In simple terms, according to neurobiology, a young person rarely makes any rational choice, let alone a rational choice to commit a criminal act.

The developmental neurobiology of young people is compounded by intergenerational disadvantage. My predecessor as President of the Children's Court distinguished two types of young offender:

Firstly, 'adolescent-limited' offenders, comprising 75-80% of offenders, who usually "grow out of their offending behaviour as they both physically and emotionally mature." Secondly, the 'life course' offender, about 5-10% of young offenders, that commit more than half of all youth crime. In other words, 'life course' offenders individually commit far more crime than the individual 'adolescent limited' offenders.[7]

'Life course' offenders usually exhibit severe behavioural problems from a very early age. Their lives are marked by multiple adverse influences including family dysfunction. As children, they may have exhibited subtle cognitive deficiencies, difficult temperaments or hyperactivity. When compounded by adverse environmental factors such as inadequate parenting, exposure to violence or other trauma, disrupted family bonds or poverty, the developmental processes of their brains responsible for social behaviour are adversely impacted.[8]

Research consistently finds that with the small group of 'life course' offenders, the majority have care and protection histories. Stewart, Dennison and Waterson confirm that:

> *"There is no single cause of juvenile offending. What we look at is exposure to risk and protective resilience factors at different points in a child's development. While a number of risk factors have been identified as increasing the likelihood of juvenile offending, none are as consistent as the detrimental effect of child abuse and neglect."*[9]

In 2011, NSW Justice Health in collaboration with NSW Juvenile Justice released the 2009 Young People in Custody Health Survey Report.[10] This survey confirmed that children with a history of being placed in out of home care are grossly overrepresented 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.

The report notes research findings that these young people suffer multiple disadvantages and are less likely to have the level of emotional, financial and social support available to most young people in their transition to adulthood. Consequently,

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[7] Judge Mark Marien SC, "'Cross-over kids' – childhood and adolescent abuse and neglect and childhood offending", paper presented originally at the South Pacific Council of Youth and Children's Courts Annual Meeting, 25–27 July 2011, Vanuatu (and was updated for the Third National Juvenile Justice Summit 2012, 27 March 2012, Melbourne).

[8] Ibid

[9] Australian Institute of Criminology, 'Pathways from child maltreatment to juvenile offending' *Trends and Issues in crime and criminal justice* Paper No. 241

[10] Indig, D. Vecchiato, C et al. (2011) 'Young People in Custody Health Survey: Full Report', Justice Health and Juvenile Justice, Sydney.

the long term social and economic costs to the young person and the wider community are high.

Turning to the sentencing options currently available to Children's Court, we see that the theory outlined above does not always fit comfortably with the available options.

Current limitations on sentencing options and recommendations for change

Currently, the Children's Court is empowered with the following sentencing options, in accordance with s 33 of the CCPA:

1. Dismissing the charge with or without caution
2. A good behaviour bond of 2 years or less
3. A fine of no more than 10 penalty units, or the maximum fine for the offence, whatever is the lesser
4. A fine and a bond
5. Release on condition of complying with the outcome plan of a conference under the *Young Offenders Act* 1997
6. A Griffiths-type remand[11]
7. A release on probation for a period not exceeding 2 years
8. A community service order of up to 100 hours if the child is under 16 or up to 250 hours (depending on the maximum penalty for the offence) if the child is 16 or over[12]
9. A suspended sentence of up to 2 years
10. A detention order of up to 2 years

Additionally, a child or young person may be diverted out of the criminal justice system in accordance with s 32 of the *Mental Health (Forensic Provisions) Act* 1990 (the MH(FP) Act).

The Children's Court therefore submits that the following changes might validly be considered.

1. Increased jurisdictional limit:

In matters where a young person's sentence is to be accumulated, the Children's Court's jurisdictional limit could be increased to 5 years, to align with the Local Court. An increased jurisdictional limit would ensure that this incongruity is overcome, resulting in a broader variety of options for accumulated sentences.

An additional argument in favour of an increased jurisdictional limit, is that it may permit a greater number of matters to remain in the Children's Court's jurisdiction, in situations where s 31(3) or s 31(5) of the *Children (Criminal Proceedings) Act* 1987 applies.

2. Traffic Matters

[11] See *Griffiths* (1977) 137 CLR 293
[12] S 13 *Children (Community Service Orders) Act* 1987

The Children's Court next submits that, for consistency, it should be the decision maker with respect to all breaches of the criminal law, excluding serious children's indictable offences. Currently, traffic matters are only heard in the Children's Court where the young person is not old enough to hold a licence, or where there is a related criminal offence.

This jurisdictional anomaly has the potential to delay the administration of justice and fails to properly consider the young person's age as a significant factor underpinning their offending behaviour. Additionally, it exposes young people to the adult Court environment, a factor which the Children's Court safeguards against.

The Children's Court is a discrete, specialist jurisdiction. Children's Magistrates undertake judicial education specifically tailored to children and young people and keep abreast of current academic and legal studies. They are in a good position to appreciate the issues impacting upon a young person's ability to foresee and mitigate against risks and ensure that the precepts in s 6 of the CCPA are adhered to.

Providing the Court with jurisdiction to deal with the commission of traffic matters by young people (between the ages of 10-18) will enable Children's Magistrates to make the best decisions for the young person – for example a Children's Magistrate is unlikely to issue an onerous fine on a young person who has committed a traffic offence, as many young people only work casual or part-time hours (if they are employed). This means that they do not have the resources to pay a fine, and instead of acting as a deterrent, it may result in further criminal behaviour. Further, there is a statutory limit on the fine amount in s 33 of the CCPA.

Empowering the Children's Court with this jurisdiction would also enable Children's Magistrates to impose a bond for up to 5 years (where a penalty of imprisonment is otherwise available).

3. Departure from statutory ratio for parole

The Children's Court submits that the statutory ratio in s 44(2) of the *Crimes (Sentencing Procedure) Act* 1999 operates as a fetter on Children's Magistrates' sentencing discretion and should not apply to matters for sentence in the Children's Court. It is appropriate to empower Magistrates with the automatic discretion to decide upon their own flexible ratio for the non-parole period to properly address the offending circumstances of the young person.

The Court makes this submission based on the fact that sentencing matters in the Children's Court almost always meet the special circumstances test to enable alteration of the statutory ratio, due to the youth of the offender and the focus on the offender's rehabilitation.

The s 6 principles in the CCPA and case law emphasise the importance of rehabilitation to an offender's criminogenic needs.[13] The Court of Criminal Appeal

[13] *R v El Hayek* (2004) 144 A Crim R 90 at [105]; *Arnold v R* [2011] NSWCCA 150 at [37]; *Kalache v R* (2011) 226 A Crim R 154 at [2] per Allsop P

has held that an offender's youth is a common ground for a finding of special circumstances:

> *"The applicant was twenty three years old at the time of the offences and is now twenty-five. He has a minor criminal history, comprising driving offences only, which his Honour disregarded for the purpose of sentence. His Honour considered his prospects of rehabilitation to be reasonable and in the light of his youth and the fact that he faced his first custodial sentence.* [14]

In *MB v Regina* the NSW Court of Criminal Appeal emphasised that an extended period of parole eligibility is advantageous for young offenders, stating:

> *"For the purpose of re sentence, we received an affidavit from the applicant's solicitor which attests that he is visited regularly by his mother and sister and has responded positively to the rehabilitative opportunities open to him in prison. As foreshadowed, I would depart from the standard non-parole period in respect of the carjacking offence because of his youth, his disturbed background and his prospects of rehabilitation. For the same reasons I would find special circumstances in sentencing for both offences and would structure them in such a way as to achieve an aggregate sentence which provides for an extended period of parole eligibility."* [15]

Specialist Children's Court Magistrates have the requisite knowledge and experience to make decisions about what will best meet a young person's rehabilitative needs. Indeed, it may be appropriate for a combination of custodial and non-custodial penalties to be imposed. For example, it is generally desirable for young offenders to be subjected to an extended period of supervision on parole.

In practice, this may mean that the most effective sentencing option is a short sharp custodial sentence which may or may not be suspended, followed by an extended period on a bond.[16] This ratio provides the young person with an incentive to be of good behaviour and allows for appropriate supervision and intervention to be co-ordinated.

The Court submits that empowering Magistrates with discretion to formulate their own ratio will provide them with greater flexibility. Such flexibility can be used to safeguard a young person's best interests and assist them through targeted supervision on parole.

4. Alternatives to Detention:

The Children's Court currently has jurisdiction to order the following, where the Court finds that no penalty other than imprisonment is appropriate, in descending order:

1. A Control Order, ie a period of Detention (imprisonment)

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[14] *Hudson v R* [2007] NSWCCA 302 at [6]; *MB v R* [2007] NSWCCA 245 at [23]
[15] *MB v Regina* [2007] NSWCCA 245 at [23]
[16] Anecdotal evidence obtained from Specialist Children's Magistrates, further statistics to be provided at a later stage

2. A Suspended Sentence
3. A Community Service Order

The Court submits that greater alternatives would provide it with more flexibility to make the appropriate order tailored to the young person's criminogenic needs. The Court would like to be empowered with jurisdiction to make Intensive Correction Orders (ICOs), Home Detention Orders and greater flexibility with respect to Community Service Orders.

a) Intensive Correction Orders

Intensive Correction Orders (ICOs) were introduced in October 2010, replacing periodic detention.[17] ICOs sought to overcome the limitations of periodic detention and were "designed to reduce an offender's risk of re-offending through the provision of intensive rehabilitation and supervision in the community."[18]

An ICO is an order of imprisonment of not more than 2 years made by a court, which directs that the sentence is to be served by way of intensive correction in the community. Significantly, ICOs aim to provide focussed supervision and support to the offender in order to facilitate an offender's rehabilitation and reduce recidivism.

The Children's Court submits that it should be empowered with jurisdiction to make ICOs, under the supervision of Juvenile Justice. The programs available to offenders under an ICO include: drug and alcohol services, anger management and programs to improve employment/address literacy.[19] These programs could greatly assist young offenders as it is common for their offending to be associated with poor socio-economic status. Additionally, there is currently no residential drug and alcohol rehabilitation facility in Western Sydney. Therefore, strict supervision, including the requirement to submit to drug testing and attend drug and alcohol rehabilitation programs may provide some support.

Juvenile Justice currently runs the Intensive Supervision Program (ISP). ISP is a rehabilitation option aimed at young offenders who commit serious and/or repeat offences or whose severe anti-social behaviour increases their likelihood of offending. The program aims to promote behavioural change by working with a young person's family, school and local community to address various criminogenic risk factors. The Sydney Institute of Criminology undertook an evaluation of the ISP, however the results did not find a clear correlation between the program and recidivism.[20]

While the evaluation did not clearly indicate that ISP is more effective than conventional case management in reducing recidivism, it may be worthwhile to make use of the practice and skills of Juvenile Justice in establishing an ICO program that uses multi-systemic therapy, within Juvenile Justice.

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[17] *Crimes (Sentencing Procedure) Act* 1999 at Part 5; *Crimes (Administration of Sentences) Act* 1999 Part 3; *Crimes (Administration of Sentences) Regulation* Part 10

[18] Attorney General's Second Reading Speech, Hansard, 28 June 2010

[19] *Ringland, C. Weatherburn, D.* (2013) 'The impact of intensive correction orders on re-offending' *Contemporary Issues in Crime and Justice*, no 176 at p.2

[20] *Poynton, S. Menendez, P.* (2015) 'The impact of the NSW Intensive Supervision Program on recidivism' *Contemporary Issues in Crime and Justice*, no 186

The 2013 evaluation of ICOs showed that while strict supervision and treatment can reduce recidivism "...the effectiveness of any rehabilitation program is likely to vary according to the level of supervision under which offenders are placed, the quality and duration and appropriateness of any treatment/support provided."[21] Therefore, if such a program is properly and consistently resourced by Juvenile Justice, Health and Education and other relevant agencies, ICOs could prove a useful tool in the armoury of custodial alternatives available in the Children's Court.

b) Home Detention Orders

The Children's Court submits that home detention should be made available for children and young people who are dealt with under the *Children (Criminal Proceedings) Act* 1987. The home lives of most of the young people that come before the criminal jurisdiction are characterised by instability.

Accordingly, the Court must be satisfied that the young person meets tailored and prescribed suitability requirements and that the young person has received informed legal advice about the nature and requirements of a Home Detention Order.

c) Community Service Orders

Greater flexibility regarding the imposition of Community Service Orders (CSOs) would be advantageous to Children's Magistrates. Under s 5 of the *Children (Community Service Orders) Act* 1987, the Court's jurisdiction is fettered insofar as a Children's Magistrate must be satisfied that no penalty other than imprisonment is appropriate before making a CSO.

CSOs have particular utility in the Children's Court. As a restorative justice option, they accord with the principles of rehabilitation and reintegration enunciated in s 6 of the CCPA. In addition, CSOs have the potential to significantly reduce reoffending rates by providing young people with tangible consequences for their actions.

Therefore, the Court submits that it should be empowered with jurisdiction to make CSOs in cases where a Magistrate is not considering a term of imprisonment. For example, a Magistrate could depart from the limits imposed under s 13 of the *Children (Community Service Orders) Act* 1987 and make an order for 30-40 hours community service to be performed.

Further, if the Court is given jurisdiction to make ICOs, a minimum of 32 hours community service work per month is a mandatory condition of such an order. This would bolster the suite of sentencing options available to a Magistrate where no penalty other than imprisonment is appropriate.[22]

5. Follow-up power for s 32 *Mental Health (Forensic Provisions) Act 1990*

[21] Ibid at p.3
[22] *Crimes (Administration of Sentences) Regulation* 2014 at s 186(o)

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 4 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."*[23]

The Parliamentary debates from 22 March 1990 clearly indicate that the intent of the legislature in enacting s 32 of the 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. They state:

> *"It is estimated that close to one in 5 people in Australia will be affected by mental illness at some stage of their lives. The trend over the past 5 years indicates a substantial increase in the numbers of people with mental illnesses in the NSW correctional system is substantial and indicative of the high incidence of defendants in Court who have mental illnesses...the purpose if s 32 of the Act is to allow defendants with mental illnesses or a developmental disability to be dealt with in an appropriate treatment and rehabilitative context enforced by the Court."*[24]

The high incidence of mental illness and developmental disabilities is further emphasised by the results of the 2009 Young People in Custody Health Survey:

- 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.[25]

The difficulty encountered by the Children's Court when considering the option of ordering a s 32 MH(FP) Act is two pronged. Firstly, 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 mental disorders."*[26]

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[23] P.D McGorry, R. Purcell, I.B Hickie and A.F Lorry 'Investing in Youth Mental Health is a Best Buy'(2007) *Medical Journal of Australia* 187

[24] Parliamentary Debates, Legislative Assembly, 22 March 1990 at 885

[25] Above n 8

[26] Gotsis, T. Donnelly, H. 'Diverting mentally disordered offenders in the NSW Local Court' *Judicial Commission of NSW Monograph 31*, March 2008 at p. 22

The second, but related issue, that Judicial Officers in the Children's Court face with respect to s 32 MH(FP) Act orders is that many Magistrates consider 6 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.

However, a possible option available to Magistrates is to adjourn the proceedings before orders are made under s 32(3). Adams J in *Mantell v Molyneux* [2006] NSWSC 955 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 132(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."*

While this option may be available, it may be more appropriate to amend s 32 MH(FP) Act to create a 'follow-up' process where a young person has failed to comply with their treatment plan. If such an amendment is made, the Children's Court submits that period in s 32(3A) should be greater than 6 months to allow the young person adequate time to properly address their needs.

6. A MERIT program for the Children's Court

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.

The New South Wales Department of Justice provides the following description of the MERIT program:

"MERIT is a program available in most local courts in New South Wales that provides the opportunity for adult defendants with substance abuse problems to work, on a voluntary basis, towards rehabilitation as part of the bail process."[27]
Therefore, the program operates either pre-plea or as a condition of a defendant's bail. In order for a defendant to be eligible for MERIT, they must:

- Be an adult
- Be eligible for bail or not require bail consideration

[27] NSW Department of Justice 'Magistrates Early Referral into Treatment' on http://www.merit.justice.nsw.gov.au/magistrates-early-referral-into-treatment/the-merit-program accessed 9 May 2016

- Voluntarily agree to participate in MERIT
- Be suspected of using drugs or be known to have a history of drug use or alcohol misuse.[28]

A defendant will be ineligible if they have been charged with a sexual or strictly indictable offence or have like offences pending before the court.[29]

In order to be suitable for the MERIT program, a defendant must:

- Have a treatable drug/alcohol problem for which there is appropriate treatment available
- Usually reside within the defined catchment area
- Voluntarily consent to undertake the MERIT program

The Children's Court submits 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.

Many of the young people appearing before the Children's Court do not have the insight or motivation to see that their drug or alcohol use is a problem and, accordingly, lack the drive and commitment to change that behaviour.

In addition, many young people with substance abuse or alcohol misuse issues will be negotiating fraught, chaotic and dysfunctional family environments, including parental drug/alcohol abuse.

Further, young people require concentrated and consistent support and encouragement and the three month duration would not be a sufficient amount of time to embed that support and encouragement.

However, as there is currently no process available in the Children's Court that specifically addresses drug and alcohol abuse, it is appropriate that a tailored youth-MERIT program be made available in the Children's Court.

Chalmers confirms the need for such a process stating:

> *"One way to address this gap is to introduce a modified version for child defendants of a program currently available in the local court for adult defendants, the Magistrates Early Referral Into Treatment program, in the same way as the YDAC* is a modification of an adult program, the NSW Drug Court.*
>
> *The MERIT program is a less intensive rehabilitation program that assists clients to address their addictions at an early stage. It is an interagency initiative of Justice and Attorney General, Chief Magistrate's Office, NSW*

[28] Ibid
[29] Ibid

Health and NSW Police Force arising out of the NSW Drug Court summit of 1999. "*The YDAC is no longer in existence.[30]

The Court submits that it is desirable to tailor the program to young people with continual supervision and reinforcement and to conduct a pilot at Parramatta Children's Court, following the design of an appropriate program.

In addition, the Children's Court submits that a residential rehabilitation facility located in Western Sydney is crucial. In many cases, the best way forward for many young people with alcohol/substance abuse issues is to be separated from the environment facilitating that abuse. Accordingly, a residential facility is likely to provide young people with greater prospects of success through support, reinforcement and residential stability.

Conclusion

Thank you for this opportunity to outline what are seen as desirable reforms that would enable the Children's Court to more effectively discharge its responsibilities, in particular the promotion of rehabilitation as a primary objective when sentencing children and young people.

We would be happy to discuss our proposals in more detail, if thought appropriate, at any time.

Yours faithfully,

Judge Peter Johnstone
President of the Children's Court of NSW

[30] Chalmers, R. 'Insufficient Drug Rehabilitation Programs for Children: A plea for youth MERIT' 2010, Aboriginal Legal Service NSW/ACT at p 3.