

Legal Studies Association of NSW Inc



Supporting and promoting legal education

Legal Studies State Conference 2012

Juvenile Justice : What is effective and what needs reform

Presenter

Judge Mark Marien SC
President
Children's Court of New South Wales

Legal Studies State Conference

29 March 2012

Juvenile Justice : What is effective and what needs reform

Judge Mark Marien SC
President
Children's Court of New South Wales

The jurisdictions of Children's Courts – Juvenile Justice and Care and Protection

The two principal jurisdictions of Children's Courts throughout Australia are first, a criminal jurisdiction relating to juveniles ('juvenile justice') and secondly, a care and protection jurisdiction relating to proceedings brought by the State child protection agency with respect to children and young persons alleged to be at risk of harm. Care and protection proceedings are not criminal proceedings. They are unique proceedings which are aimed at securing outcomes for children in need of care and protection which are in their best interests.

Over the past 25 years there has been a widespread trend (particularly by government and government agencies) to view these two jurisdictions of Children's Courts as quite separate and distinct. However, they are not separate and distinct. There is a considerable overlap between the two jurisdictions because many young offenders who come before the Children's Court in its criminal jurisdiction have a history of being in care. We also see in our criminal jurisdiction young offenders who should have had interventions from the child protection agency but 'have slipped through the cracks' in the child protection system.

In New South Wales, 'the great divide' between juvenile justice and care and protection has its origins in major legislative reforms which occurred in 1987. Before 1987, children charged with criminal offences and children in need of care were essentially dealt with in the Children's Court in the same way, that is, by what were effectively criminal sanctions under the *Child Welfare Act* 1939. Up until 1969, children were actually 'charged' under the Act with being 'neglected' or 'uncontrollable.' Although, after 1969, children in need of care were no longer 'charged' under the Act, they were spoken of as being 'charged' and were dealt with in almost indistinguishable ways from juveniles who were charged with a criminal offence. For example, the least power available to the Children's Court for a proved neglected baby was 'admonishment and discharge' of the child (not the parent) as if the child had done some wrong. The strongest power of the court for neglected and uncontrollable children was deprivation of liberty by committal to an institution (a training school).

Following a number of reviews of child welfare laws in NSW, a package of legislation was passed in 1987 which included separate legislation applicable to children in need of care and protection and juvenile offenders. The *Children (Care and Protection) Act* 1987 related to the protection of children in need of care and was 'welfare based' legislation. The *Children (Criminal Proceedings) Act* 1987, however, related to criminal responsibility and criminal procedure in relation to children charged with a criminal offence. The *Children (Care and Protection) Act* 1987 (as does its

successor, the *Children and Young Persons (Care and Protection) Act 1998*) recognised international expressions of the rights of children including rights to equality and special protection and opportunity for development. The 1998 Act recognises the rights of children as stated in the UN *Convention on the Rights of the Child* (to which Australia became a signatory in 1989) in particular, the paramountcy principle, namely, that the best interest of the child must be the primary concern in making decisions that may effect them (Article 3).

While the legislative response of government in 1987 was a great step forward, it is unfortunate that since then a view has become entrenched that our responses to abuse and neglect of children and juvenile offending should, like the legislation, be kept entirely separate. Such a view fails to recognise that with respect to many young offenders who come before the Children's Court charged with a criminal offence, the clear underlying cause of their offending behaviour is essentially a welfare issue rather a criminogenic one. 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 in order to survive or 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. These questions raise the 'need v deed' debate and I shall return to that later in the paper.

'Cross-over kids' – childhood and adolescent abuse and neglect and juvenile offending

Children and young people who have been in care are grossly over-represented in the juvenile justice system. In 1992, the NSW Parliament's *Inquiry into Juvenile Justice* heard evidence that young women in state care were forty times more likely to be detained in custody than other girls and were frequently unable to meet bail conditions regarding approved place of residence thereby remaining in detention by default¹. The Parliamentary Committee urged the Departments of Community Services and Juvenile Justice:

“to continue to monitor the numbers of state wards in the juvenile justice system with a view to developing strategies as to how best such young people might be diverted from contact with that system”.

In 1997, a joint report of the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission stated as follows:

*“Children who have been extensively involved in the care and protection system are drifting into the juvenile justice system at alarming rates.”*²

A year before, in 1996, a NSW Community Services Report found that:

- a young man in out-of-home care was 13 times as likely to enter a juvenile detention centre than if he was not in out-of-home care, and
- a young woman in out-of-home care was almost 35 times as likely to enter a juvenile justice centre than if she was not in out-of-home care.³

¹ *Standing Committee on Social Issues 1992:141*

² *Seen and heard: priority for children in the legal process*; ALRC 84 at para. 4.43

³ Community Services Commission, *The drift of children in care into the criminal justice system: turning victims into criminals*, Dec 1996 p. 8

Since the release of those reports, the drift of children and young people from care into the juvenile criminal justice system ('the juvenile justice system') has continued unabated. These children who 'drift' from the care and protection system into the juvenile justice system are referred to by US academics in the area of juvenile justice as 'cross-over kids'.

In this paper I will discuss:

- research establishing the gross over-representation of children in care in the juvenile justice system;
- the link between child and adolescent abuse and neglect and juvenile offending;
- some intervention models used around the world to address the problem of child abuse and/or neglect and juvenile offending, and
- the '*Need*' v '*Deed*' debate

As the President of the Children's Court of NSW, in my everyday work I see the juvenile justice system operating in the context of court involvement. However, not all juveniles who become involved in the juvenile justice system come before a court. Many young offenders are properly diverted by police away from the court system without charge through the issuing of warnings and cautions or by referral to a youth justice conference. In NSW, those options are also available to the court with respect to certain offences.

Two types of juvenile offenders

At the outset, it is important to recognise that juvenile offenders generally fall into two categories:

- 'adolescent limited' offenders, and
- 'life course' offenders.

The very different backgrounds and characteristics of these two groups of juvenile offenders mean that in most cases different responses to a juvenile's offending behaviour will be appropriate and effective.

The 'adolescent limited' offender

These young offenders make up about 75-80% of juvenile offenders. Their offending is often the result of factors such as 'boundary pushing', peer pressure, impulsive and reckless or poor decision-making and alcohol and drug abuse. Neurological research has conclusively established that the part of our brain responsible for impulse control, planning and decision-making (the prefrontal cortex), is not fully developed until we are about 25 years of age. What may be said then of the adolescent brain is that it is 'a work in progress'. We should not be surprised, therefore, that most young people will at some time during their adolescence become involved in what is strictly 'offending behaviour'.

Although the offences these young offenders commit may sometimes be serious, these young people usually do not have significant care and protection needs. The adolescent-limited offender offends only for a short period of time mainly during adolescence. In other words, these juvenile offenders grow out of their offending behaviour as they both physically and emotionally mature.

Dealing with ‘adolescent limited’ offenders

We are able to work with this group of young offenders very successfully in the community and preferably without court intervention. In relation to less serious offences this can be done through police interventions such as the use of warnings and cautions and other police diversions including police-run community programs and police-referred youth justice conferencing under the *Young Offenders Act 1997* (YOA). For more serious offences, court referral may be required. But even when a case is referred to the Children’s Court by the police, the court is still able to divert young offenders by referral to youth justice conferencing under the YOA.

Youth Justice Conferencing in NSW

Youth justice conferencing is a juvenile offender diversion model built on the principles of restorative justice. Restorative justice is a broad concept used to define a range of practices aimed at repairing the harm caused by a crime. Once an offender has admitted responsibility for the crime, restorative justice practices can occur at any stage in the criminal justice process.

International support for restorative justice among crime and legal experts gained momentum in the 1990’s. Since then, Australia and New Zealand have become world leaders in the use of conferencing (particularly for juveniles) as one approach to restorative justice.

Over the past 20 years, conferencing has been legislated in all Australian states and territories in an effort to address youth crime. While there is variation in the models adopted in the states and territories, conferencing is typically used as a diversionary measure from court proceedings and aims to bring the offender face-to-face with the victim/s of the offence as well as any family and/or support persons (for either party). The purpose of a conference is to encourage the young person to accept responsibility for the offence and to attempt to repair the harm caused by the young person agreeing to some form of restitution to the victim, for example, an apology, monetary compensation, community work or participation in a behavioural program. In addition, the conference process is designed to give the victim a voice in the criminal justice process.

In NSW, youth justice conferences are conducted under the YOA, juvenile offenders can be sanctioned by a ‘warning’ or a ‘caution’ or referred to a youth justice conference or formally charged and dealt with by the Children’s Court. The Children’s Court can also deal with young offenders by way of the same diversion processes under the YOA including referring the matter to a youth justice conference.

To be eligible for referral to a youth justice conference the young offender must admit the offence and agree to participate in a conference. Certain offences cannot be the subject of a youth justice conference, for example, sexual offences and other serious offences. At the conference, the participants (including the young offender and the victim) agree on an ‘outcome plan’ which is to be completed by the young offender.

A recent study conducted by the NSW Bureau of Crime Statistics and Research (BOCSAR) has found that youth justice conferencing is no more effective than sanctions imposed by the Children’s Court in reducing the risk of juvenile re-offending: *Youth Justice Conferences versus Children’s Court: A comparison of re-offending* (Contemporary Issues in Crime and Justice, No. 160, February 2012). However, this finding appears to be inconsistent with an evaluation of youth justice group conferences in Victoria conducted by KPMG in 2010: *Review of the Youth Justice Group Conferencing Program*, Final Report, September 2010). The Victorian report found that young people who participated in Youth Justice Group Conferencing “were much less likely to have re-offended within 12 to 24 months than young people who received initial sentences of Probation or Youth Supervision Orders.”

A possible explanation for the different findings is that the conferencing models in Victoria in NSW are quite different. In Victoria more serious offences are dealt with at conferences than are dealt with in conferences in NSW. There is some research which has found that with young offenders, conferencing is more effective in reducing the risk of re-offending when dealing with more serious offences. Also, in Victoria follow up support is provided to the young offender at the conclusion of the conference. This follow up support is not provided in NSW. Further, in Victoria a conference can only be ordered by the court (not the police) and the matter returns to court for final sentencing after the conference and completion of the outcome plan by the young offender. In NSW, following successful completion of the outcome plan, the charge or charges are dismissed without the need for the young offender to return to court.

However, reducing the risk of re-offending is not the only purpose of youth justice conferencing. Another important purpose is to give the victim a voice in the proceedings. The BOCSAR report noted that there is strong evidence that victims and offenders find the conference process satisfying and rewarding. There is also considerable public support for measures that allow the victim a say in how offenders are dealt with and that provide the offender with an opportunity to apologise and offer restitution. The BOCSAR report states:

“If conferencing gives victims of crime some measure of closure and relief while at the same time restraining the public appetite for expensive but ineffective punishments, then it serves a valuable purpose.”

In this regard, see also the recent BOCSAR report, *Restorative Justice Initiatives: Public opinion and support in NSW* (Issues paper no. 77, February 2012).

Further, even if the same results are being obtained in youth justice conferencing and with court interventions in reducing the risk of recidivism, conferencing is a far more cost effective alternative to the formal court system.

What is clear is that for the vast majority of ‘adolescent limited’ offenders (but not all), the most appropriate and effective intervention should involve diversion by the police away from the formal court system. This requires, as is the situation in New Zealand, a police force committed to and trained in the principles of juvenile justice.

Regrettably, in NSW police diversion under the YOA is far less widely utilised than court diversion under the YOA. This is to be contrasted with the situation in New Zealand where there is a heavy statutory emphasis on police diversion without charge. Later in this paper I shall consider the New Zealand youth justice system in some detail.

The ‘life course’ offender

These young offenders make up only about 5-10% of young offenders, but commit more than half of all youth crime. In other words, ‘life course’ offenders individually commit far more crime than the individual ‘adolescent limited’ offender.

‘Life course’ offenders usually exhibit severe behaviour 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.⁴

⁴ Moffitt, T. *Life-course – Persistent versus Adolescence-Limited Antisocial behaviour*. In *Developmental Psychopathology* (2nd Ed) Vol 3, Ed Cicchetti & Cohen. Page 571

Life-course offenders are sometimes described as having ‘conduct disorder’. Conduct disorder refers to behaviours which are severe, persistent across contexts over time, and which involve repeated violations of societal and age-appropriate norms.⁵

In relation to ‘life course’ offenders, it is difficult to identify a ‘cause’ of their offending behaviour. However, a number of factors have been identified by researchers as often being associated with young offenders in this group. The question arises as to which of these factors are causative of the juvenile’s offending behaviour and which are co-related. It is often very difficult to answer those questions. It is better to talk in terms of what factors create a ‘risk’ of offending and what factors are ‘protective’ and make a young person ‘resilient’ to offending.

Recognised risk factors for children under 13:

- a history of antisocial behaviour, behaviour problems, conduct disorder during childhood (lying, stealing, bullying, non-compliance etc) including contact with the law and arrest before age 12
- a history of childhood abuse and/or neglect
- disengagement from education
- use of tobacco, alcohol and/or other drugs, either weekly or more frequently, before age 12
- male gender
- low self-control, impulsive, poor ability to stop and think before acting during childhood
- hyperactive, poor ability to pay attention during childhood
- involved in fighting, aggression, acts of violence before age 12
- low family income during childhood
- neither parent had skilled work (that is, one or both are unemployed or in unskilled or semi-skilled jobs)
- neither parent left school with any qualifications
- one or both parents has a history of antisocial criminal behaviour

Recognised risk factors for young people over 13:

- contact with antisocial peers (those involved in law-breaking, drugs, violence, gangs etc - the more peers or contact, the higher the risk) from age 13 onwards
- general offences, number of prior offences (the more prior offences, the higher the risk before the current age)
- abuse and/or neglect which commences or continues in adolescence
- poor supervision by parents/caregivers (knowing where the young person is, who they are with, rules and consequences)
- low levels of warmth, affection and closeness between parent(s) and young person
- disengagement from education or employment
- aggression, fighting, violent offences
- low self-control, impulsive, poor ability to stop and think before acting
- hyperactive, poor ability to pay attention
- tendency towards anxiety, stress
- few friends and social/recreational activities
- length of first incarceration (the longer the period, the greater the risk).

⁵ *Inter-Agency Plan for Conduct Disorder/Severe Antisocial Behaviour 2007-2012* Pub Sept 2007; the Ministry of Social Development, New Zealand, page 2

Protective factors:

- usually the inverse or opposite of the risk factors
- establishing ‘community connectedness’ in the life of the young person
- treatment of any conduct disorder

As we know, not all abused and neglected children go on to become juvenile offenders. It is therefore important to look at other factors that may be associated with maltreatment that may have an influence on the young person’s offending. A very significant risk factor is lack of ‘community connectedness’ by the young person who has disengaged from education or employment and lacks family and community supports.

The principal focus of this paper is upon the ‘life course’ offender who comes before the Children’s Court. In particular, I will discuss a number of models being used around the world to address the problem of life-course juvenile offenders with a history of maltreatment.

It is useful to first identify the kinds of cases which are dealt with by Children’s Courts and the kinds of jurisdictions which they exercise.

The gross over-representation of children with a history in care in the juvenile justice system

Research consistently finds that with the small group of ‘life course’ offenders, the majority have care and protection histories. The Australian Institute of Criminology Trends and Issues Paper No. 241, *Pathways from Child Maltreatment to Juvenile Offending*: Stewart, Dennison and Waterson states as follows:

“There is no single cause of juvenile offending. What we look at is exposure to risk and protective or 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”.

Research in NSW has found that children and young people with a history of being in care are over-represented in the juvenile justice system. In 2011, NSW Justice Health in collaboration with NSW Juvenile Justice released the *2009 NSW Young People in Custody Health Survey Report*. The survey was conducted between August and October 2009 across all Juvenile Detention and Correctional Centres in NSW. A total of 361 young people participated in the survey, which represented 80% of all young people in custody and 95% of young people approached to participate in the study. The sample comprised 88% male with 48% of Aboriginal origin. The average age of young people surveyed was 17 years.

The Health Survey Report clearly demonstrated that the majority of young people in juvenile detention are highly disadvantaged both in terms of their socio-economic background and their physical and mental health status. The Report notes research findings that a history of being raised outside of the family unit is more prevalent among prison inmate populations than among the general population (*Borzycki, 2005*). The Report also notes that children placed in out-of-home care (OOHC) experience significantly poorer long-term physical and psycho-social outcomes than those not placed in care, particularly where the child does not experience stable care placements (*COAG, 2009; Cashmore and Paxman, 2006*).

Importantly, the Health Survey Report confirmed that children with a history of being placed in OOHC are grossly over-represented in the juvenile justice system in NSW 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 (*Mendes, 2009*). 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 (*Osborn and Bromfield, 2007; Richardson, 2005*). Consequently, the long-term social and economic costs to the young person and the wider community are high (*Bromfeld et al; 2009; Taylor et al, 2008*).

The Health Survey Report found that with respect to the young people **in detention** in NSW who were surveyed:

- over a quarter (27%) had a history of being placed in care (38% Aboriginal, 17% non-Aboriginal)
- young women were more likely than young men (40% v 25%) to have been placed in care
- nearly half (45%) had a parent who had been in prison (61% Aboriginal; 30% non-Aboriginal)
- over half (60%) had a history of child abuse or trauma (81% young women, 57% young men). For 49% of the young women and 18.8% of the young men, that abuse or neglect was 'severe'
- a high proportion of young women had been physically (61%) or sexually (39%) abused
- most (79%) had previously been in juvenile detention
- most (78%) drank alcohol at risky levels prior to entering custody (83% Aboriginal, 73% non-Aboriginal)
- two-thirds (65%) used drugs weekly prior to entering custody (72% Aboriginal, 58% non-Aboriginal)
- nearly all (87%) had a diagnosed psychological disorder and nearly three-quarters (73%) were found to have two or more psychological disorders.
- one in seven (14%) had an extremely low IQ (less than 70) and 32% had a borderline IQ (70-79).

A Health Survey for young people in NSW **on community orders** was conducted by the University of Sydney between October 2003 and December 2005. The sample surveyed comprised 802 young people, 683 (85%) male, 119 (15%) female and 19% were Aboriginal. The mean age of young people surveyed was 17 years (22% were younger than 16 years). Of all young people surveyed:

- 27% had a history of parental/step-parental imprisonment,
- 34% were not living in the family home,
- 21% had a history of being in care,
- 31% reported low, moderate or severe levels of physical abuse,
- 46% reported emotional abuse,
- 50% reported emotional neglect,
- 37% reported physical neglect,
- 20% were living with a person with a physical or mental health problem affecting their daily life,
- 14% males and 32% females had considered attempting suicide,
- 8% males and 18% females had attempted suicide.

In 2008, 28 % of males and 39 % of females in detention in NSW had a history of OOHC. At less than half a percent of the NSW child population, children in care are 68 times more likely to appear in the Children's Court than other children.⁶

⁶ Australian Law Reform Commission and The Human Rights and Equal Opportunity Commission 1997; Department of Community Services 2007

Aboriginal juvenile offenders

Aboriginal prisoners removed from their families as children experience significantly worse outcomes with regards to mental health than their non-removed Aboriginal peers (Egger and Butler, 2000) and they were significantly more likely to have been gaoled more than five times, to have experienced child sexual assault and to have attempted suicide.

Aboriginal children in NSW currently make up 4% of the population but in 2011, 33% of children and young persons in OOHC in NSW were Aboriginal. This is a rate 11 times higher than for non-Aboriginal children. In 2011, 47% of young people in juvenile detention in NSW were Aboriginal.

The Wood Report

The *Report of the Special Commission of Inquiry into Child Protection Services in NSW, 2008* (the Wood Report) noted that research shows that there is a 'significant correlation' between juvenile offending and rates of reported neglect or abuse, as well as a "strong connection" between juvenile offending and homelessness.

The Wood Report stated at [15.18]:

“Access to bail is of particular significance for young people charged with criminal offences in diverting them from potentially unnecessary contact with a delinquent group, and in limiting the interruption of their education and family connection. The desirability of maintaining members of this group in the community and of involving them in programs and support services while on bail, so as to encourage their successful completion of the bail period, has been recognised by the Youth Justice Board in the UK whose model includes the following standards:

- 1. Programs should be developed at the initial bail assessment point, and be individually tailored to the needs of the young person.*
- 2. Young persons should have immediate access to programs and support services once they are released on bail. If there is to be an intensive support program, a timely start will improve the young person's retention in the program.*
- 3. Programs should take a more holistic view of the young person and their needs, and interventions should be focused on promoting a more stable lifestyle.*
- 4. Family should be involved when possible.*
- 5. Programs should include court support to help the person to comply with their bail conditions. For example, court reminder calls, accompanying the young person to court, organising transport when necessary and providing information and advice about the court and bail process: G Denning-Cotter, “Bail Support in Australia”, Indigenous Justice Clearinghouse, April 2008.*

At [15.9] the Wood Report stated:

“A positive commitment on the part of Juvenile Justice to secure accommodation for young people within the juvenile justice or criminal justice systems who would be allowed their liberty, either pending trial or pursuant to a non-custodial disposition such as a bond or suspended sentence, had they a stable place in which to live, would accord with the requirements of the international instruments to which Australia is signatory.”

The Wood Report, while recognising that there is a clear distinction between the child protection and criminal justice systems which needs to be maintained, concluded,

“[o]n the other hand, coming within the juvenile justice or criminal justice system should not exclude a young offender from long term services from DoCS and other human service agencies. Nor should a shortage of refuges or other forms of accommodation result in young people, who cannot live safely with their families, being remanded in custody unnecessarily, pending trial.”

The Wood Report stated that while current initiatives designed to prevent young people from becoming engaged with the criminal justice system need to be encouraged,

“The long term consequences of acquiring a record as a juvenile, or of being detained in a detention centre, in terms of future employability and rehabilitation, are such that every possible alternative should be made available. This has a particular significance for those young people who, through no fault of their own, have suffered that degree of abuse, neglect and poor parenting that might call for care and protection intervention or that might otherwise heighten their risk of drifting into criminal behaviour.

For those who do become the subject of interest by both DoCS and Juvenile Justice, the case for extensive joint intervention including Health is compelling.”

The Wood Report recommended that given the over-representation in the adult criminal justice system of offenders with a history of being in state care, every alternative should be explored so as to prevent children in care entering the juvenile justice system in the first place. Children in care are at much greater risk of entering the juvenile justice system and research around the world consistently demonstrates that by entering the criminal justice system as a child the risk is much greater that the child will enter the adult criminal justice system.

The 2010 Independent Strategic Review of the NSW Juvenile Justice System

In 2010 an independent review of the NSW juvenile justice system was released: *A Strategic Review of the New South Wales Juvenile justice System – Report for the Minister for Juvenile Justice*.

The Review notes the high correlation between juvenile offending and a history of being placed in care and identified the following additional well-recognised risk factors for juvenile offending:

- disengagement from education
- criminal lifestyles and associates
- alcohol and other drug misuse
- accommodation problems, relationship problems including family dysfunction, mental health
- intellectual disabilities, and
- lack of structured leisure and recreational pursuits.

The Review found that time spent in a remand facility is the “*most significant factor in increasing the odds of recidivism*”.⁷ It also found that remanded detainees often feel isolated or as if they have already been found guilty, adding stress on family relationships and disruption to education for young people. The Review states,

⁷ Justice Policy Institute, *The Dangers of Detention. The Impact of Incarcerating Youth in Detention and Other Secure Facilities*

“Excessive use of remand can result in overcrowding of detention centres and unsatisfactory conditions for detainees. International research shows that custodial remand should be used as a last resort and bail should be granted to youth wherever possible.”

The review recommended a “reinvestment” by government in the juvenile justice system to divert funding away from building juvenile justice detention centres to evidence-based prevention and early intervention programs and services for local communities. This is obviously a very sensible proposal because research around the world has consistently found that detention exerts no specific deterrent effect on juveniles.⁸ Further, as stated in the Review, time spent in detention is “*the most significant factor in increasing the odds of recidivism.*”

The link between child maltreatment and adolescent offending

In a recent paper, “*The link between child maltreatment and adolescent offending: systems neglect of adolescents*”⁹, 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. She notes that while the majority of abused and neglected children do not offend, a large number of children who do offend have experienced abusive or neglectful or inadequate parenting.

Dr Cashmore states that,

“The consistent finding has been that young people whose maltreatment persists from childhood into adolescence or that starts in adolescence are much more likely to be involved in crime and the juvenile justice system than those whose maltreatment was limited to their childhood (Jonson-Reid & Barth, 2000; Smith, Ireland & Thornberry, 2005; Stewart, Livingston & Dennison 2008; Thornberry, Ireland & Smith, 2001).

Dr Cashmore notes various studies which have highlighted the significance of “transitions” in children’s exposure to maltreatment and their subsequent likelihood of offending. These transitions include the period at or just before a child’s transition into primary school and later from primary school to secondary school. These are periods which cause stress and uncertainty for children and their families and if maltreatment occurs at these times, this may hinder the child’s ability to negotiate such transitions successfully. Children who struggle with these transitions (particularly the transition from primary to secondary school) are more likely to have difficulty in their academic performance and in their peer relationships, increasing the likelihood that they will experience bullying and school failure. Dr Cashmore states,

“These experiences will, in turn, exacerbate the long term negative consequences associated with child maltreatment (Stewart et al, 2008) and increase the likelihood of anti-social behaviour problems and offending. On the other hand, if abused children are able to perform well at school and are positive about being there, they are less likely to engage in offending behaviours (Zingraff, Leiter, Johnsen & Myers, 1994).”

Dr Cashmore states that there are other non-normative transitions for some children who have been maltreated that also increase the risk of offending. Several studies have shown that placement in out-of-home care doubles the risk of subsequent offending (Ryan & Testa, 2005; Stewart et al; 2002), particularly if this occurs during adolescence and involves placement in a group home (Ryan et al, 2008). It has been found that it was not being placed outside their home that made children in care more likely to be involved in crime, but the stability and number of their placements.

⁸ *The specific deterrent effect of custodial penalties on juvenile offending*; BOCSAR; July 2009

⁹ Published in *Family Matters*, Australian Institute of Family Studies, 2011 Issue No. 89 at p. 31

Other studies have also reported a link between placement instability and offending (*Jonson-Reid & Barth, 2000; Runyan & Gould, 1985*) but *Ryan and Testa (2005)* found that this was significant only for males. Research has found that three or more placements double the risk of offending but only for males; for females, any placement, not instability, increased their risk of offending (*Widom, 1991*).

Dr Cashmore also found that once children in care are involved in the juvenile justice system, there is evidence from various jurisdictions that they are also likely to receive more punitive treatment because of their in-care status. She states that children in care “are more likely to be refused bail because of the lack of appropriate supervised accommodation, because of their lack of community ties and support from their families and because it seems that magistrates assume, perhaps with some justification, that they are safer in custody than on the streets” (*Developmental Consortium, 1999*).

Dr Cashmore states that the final transition that young people make in care – in leaving care – may also make them vulnerable to involvement in the criminal justice system, and if it occurs after the age of 18, they are then subject to the adult rather than the juvenile justice system. A recent Australian report indicates that a large proportion of young people leaving care (60%) are doing so without a leaving care plan and with inadequate support in terms of accommodation, employment prospects and sources of social and emotional support (*Create, 2011*).

How do we address the problem of ‘cross-over kids’?

It is essential that young people at risk of becoming ‘life course’ offenders are identified early in their life course by the use of sound assessment tools and that there is a co-ordinated agency intervention. A “silo” approach with limited information sharing between agencies such as education, health, social welfare care and protection and police will **prevent** early identification.

Dr Cashmore states in her paper that children in need of care who move into the juvenile justice system are arguably neglected by both the child protection and juvenile justice systems. She notes that Australia, along with other English-speaking common law jurisdictions (England, Wales, Canada and the US), has adopted a ‘justice model’ for dealing with juvenile offenders whereas in the Scandinavian countries (Sweden, Denmark, Norway and Finland) and Scotland young offenders are dealt with in a system of justice that is geared mostly towards social services with incarceration as a last resort. The aim in these ‘welfare’ processes is to understand why children are offending and what their needs are in order to try to divert them from the offending pathway. The focus is much more on their ‘needs’ rather than their ‘deeds’.

In Sweden the age of criminal responsibility is 15 years, and the standard procedure for prosecutors or criminal courts that come into contact with delinquent youth is to refer them to social services without any legal sanctions being imposed. Approximately half of young people between 15 and 20 years of age arrested for a criminal offence are sentenced to care through the local social services agency. In 2009, of the young people referred to social services for intervention, only a minority (14%) were placed outside of the home; the remainder were provided with in-home services. In addition to young offenders, the social child welfare system in Sweden is also charged with intervening when young people display other problem behaviours such as aggression, substance abuse and school problems.

The juvenile justice system in New Zealand

In New Zealand, approximately 80% of youth offenders are diverted away from the court system without charge and most do not re-offend. Section 208 (a) of the *Children, Young Persons and*

Their Families Act 1989 (NZ) provides that everyone exercising powers under the Act shall be guided by the principle:

“that, unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter.”

Minor and first offenders are diverted from prosecution by means of an immediate (street) warning. Where further action is thought necessary, the police can refer juveniles to the Police Youth Aid (a specialist unit dealing only with juveniles) for follow-up – for example, a warning in the presence of the parents. Youth Aid may also require an apology to the victim and give the young offender an additional sanction (for example, some work in the community). Many diversion programs are run by the police themselves. In New Zealand:

- 44% of young offenders are dealt with by warnings
- 32% by Police Youth Aid diversion,
- 8% by direct referral to a Family Group Conference (FGC), and
- 17% by charges in the Youth Court followed by a FGC.

With the exception of very serious offences, young offenders in New Zealand under 14 years of age are dealt with on the basis that care and protection issues are the primary cause of the offending. They are dealt with in the Family Court and cannot be charged in any criminal court. In other words, by *definition*, the vast majority of offending by an under 14 year old is seen as being of a care and protection origin.

In New Zealand, after 14 years of age, a youth offender can be charged in a criminal court. But, even then, all offenders are referred to a FGC. FGCs are described as “the lynch pin” of the New Zealand youth justice system. FGCs take a restorative justice approach to juvenile offending and involve participation by the young offender and their family together with the victim and their family in the decision-making process to reach a consensus on a ‘just’ outcome. Where a particular case has care and protection issues, it may be referred to a Care and Protection FGC. After referral to a FGC, the criminal charges are adjourned and the young offender may ultimately be discharged absolutely. Further, following a Care and Protection FGC the care and protection issues relating to the young offender may be referred to the Family Court and the criminal charges will be adjourned by the Youth Court pending finalisation of the proceedings in the Family Court.

Like Australia, indigenous young people in New Zealand are grossly over-represented in the youth justice system. Maoris comprise approximately 50% of the children and young people apprehended by police. (Maoris comprise 15% of the New Zealand population). In Maori custom and law, *tikanga o nga hara* (the law of wrongdoing), is based on notions that responsibility is collective rather than individual and that redress is due not just to any victim but also to the victim’s family. Understanding why an individual had offended was also linked to this notion of collective responsibility. Accordingly, when dealing with cases involving a Maori young offender, the FGC includes the participation of the families of both the young offender and of the victim as well as community members.

In dealing with youth offenders at a FGC, it is an important statutory requirement in New Zealand that the young offender is held accountable for their offending behaviour while appropriate consideration is given to their needs. The FGC may recommend that the young offender write an apology letter to the victim, carry out community work and/or be required to make a payment of reparation or that there be restitution of property. In relation to a court referred FGC, upon receiving the recommendations of the FGC the court will determine the appropriate disposition of the case.

Koori Courts and Youth Drug Courts

In her paper, Dr Cashmore notes new initiatives in Australia and other countries including therapeutic or problem-solving courts that provide alternative approaches especially for Indigenous young people (Koori Courts in Queensland and Victoria) and youth drug courts such as the Youth Drug and Alcohol program within the NSW Children's Court. However, Dr Cashmore states,

“While the window may not be closed to intervention, it is considerably more difficult and more expensive to intervene when there have been established offending behaviours among adolescents. As yet, there has been no coordinated program to deal with young people who offend while in care (or soon after leaving care) nor those who have been maltreated and offend.”

The Florida Juvenile Justice Model – Miami-Dade County

It has been found that interventions tailored to the particular background and needs of the individual juvenile offender rather than the use of 'generic' intervention programs, have far greater successes. The Florida Juvenile Justice Model in Miami-Dade County, Florida, has had remarkable successes with the use of individualised intervention programs. In the model's first ten years of operation (since the late 1990's) there has been:

- a decrease in juvenile arrests by 41%;
- a drop in the juvenile detention population of 66%, and
- a 78% reduction in re-arrest.

These impressive results have been achieved through collaboration of various State and County agencies and the development of six innovative, targeted and customised diversion programs. The agencies involved include Juvenile Justice, the State child protection agency, the State Attorney's Office, Public Schools, Corrections and courts administration.

Juveniles participate in an individualised collection of community-based programs. Participants may be referred to a diversion program upon arrest or by the courts. All the programs are monitored and supervised by a trained clinical team. Diversion services cost only \$1,749 per juvenile while detention costs \$3,491 per juvenile.

A diversion program may include:

- victim/offender mediation;
- social skills enhancement;
- restitution coordination;
- community service work, and
- referrals to family and individual counselling, psycho educational groups and substance abuse counselling and treatment.

The **Post Arrest Diversion Program (PAD)** has been particularly successful. This program is an alternative arrest processing program where juveniles do not enter the traditional juvenile justice system. The program provides intervention at the earliest point of entry, identifying risk factors and applying a personalised diversion program that addresses the issues of the child – including the family – and not only the offence.

From 2000 to 2007, 10,548 arrested juveniles were diverted from entering the formal juvenile justice system under the PAD program. As a result, Miami-Dade County made a saving of \$47 million by keeping those arrested juveniles out of the court system.

United States NCJFCJ guidelines for juvenile courts

In her paper, Dr Cashmore refers to a model which has been widely adopted in the US which provides a coordinated program in relation to cross-over kids in particular. The aim is to deal with both 'needs' and 'deeds'. In 2005 the US National Council of Juvenile and Family Court Judges (NCJFCJ) produced guidelines for juvenile delinquency courts of excellence, emphasising the role of judicial leadership and case management of these matters. This is similar to the role of the judicial officer in youth drug courts in Australia, but more extensive.

Among the 16 key principles of the Model Delinquency Court, for example, are the following:

- Juvenile delinquency court judges should engage in judicial leadership and encourage system collaboration
- Juvenile delinquency courts and juvenile abuse and neglect courts should have integrated "one family-one judge" case assignments
- Juvenile delinquency system staff should engage parents and families at all stages of the juvenile delinquency court process to encourage family members to participate fully in the development and implementation of the youth's intervention plan
- The juvenile delinquency court should engage the school and other community support systems as stakeholders in each individual youth's case
- To be most effective in achieving its missions, the juvenile court must both understand the role of traumatic exposure in the lives of children and engage resources and interventions that address child traumatic stress.

Under these model juvenile court processes, the underlying philosophy in dealing with 'cross-over kids' in particular is to deal with the child's needs and deeds as one, holding young people responsible for their behaviour but taking into account and responding to their needs and trauma by ensuring that they have the necessary support and services around them and their family.

Since the publication of the Juvenile Delinquency Guidelines by the NCJFCJ, they have been adopted by a number of juvenile courts throughout the United States.

Multi-systemic therapy – the Intensive Supervision Program in NSW

Research of the Washington Institute of Public Policy shows that family based interventions are proven to have the greatest effect on reducing juvenile delinquency and re-offending. In May 2008, the Intensive Supervision Program (ISP) was launched in NSW by Juvenile Justice. The program is a family-treatment model based on the multi-systemic therapy model (MST). MST is an intensive family and community based treatment program that focuses on the entire world of chronic and violent juvenile offenders with serious behavioural problems – their homes and families, schools and teachers, neighbourhoods and friends. In the home and community, MST provides service delivery based on the family's needs and therapists are available 24 hours a day, seven days a week. The ultimate aim is to develop the parent/caregiver's skills to help the young person reduce their problematic behaviour and to strengthen the family's natural support network. Length of treatment usually ranges from four to six months. By working with parents, teachers and others, MST is said to aim "to restructure a young person's ecology to support pro-social development and decrease delinquent behaviour."

Evaluations over 10 years in other jurisdictions have shown consistent reductions in re-offending. MST is currently being used in over 30 States in the United States and in eight other countries including Canada, Denmark, Ireland, England, Sweden, Netherlands, New Zealand and Norway.

The ISP in NSW targets serious and/or repeat young offenders aged between 10 and 16 years of age who are assessed as being at medium to high risk of re-offending or incarceration. This target group represents 60% of young persons who come under the supervision of Juvenile Justice in NSW. Under the ISP the court must make a final order directing that Juvenile Justice supervise the young person. Juvenile Justice in carrying out that supervision will then consider whether the young person is eligible to enter the ISP. Entry into the ISP is conditional upon the young person's parents consenting to entering the program.

The ISP program in NSW has been established in two locations: Newcastle and Western Sydney. The ISP team consists of trained clinicians, a clinical supervisor and an Aboriginal team advisor who work systematically with each young person on an individual, family and community level. The Aboriginal team advisers work with clinicians, families and community agencies to ensure interventions are best matched to the needs and strengths of Aboriginal young offenders, families and communities.

The ISP team meets with young offenders and their families in their home to provide caregivers with the skills and resources to independently address antisocial behaviour as well as support their child to successfully adjust to family, peer, school and neighbourhood demands. The ISP team also works with school teachers, principals, and police to develop positive inter-agency links that help families and young offenders access appropriate services.

The intended results of the ISP include a reduction in re-offending and incarceration, a reduction in substance misuse, improved family functioning, decreased behavioural problems at home, increased school attendance or uptake of training and employment opportunities, improved caregiver discipline practices and increased association with pro-social peers.

In ISP the worker contracts with the young person's carer to agree to a number of strategies to deal with their current situation. The focus on the family and the community, rather than solely upon the young person, is a change from traditional approaches.

In 2010/11, 37 (85%) of the 44 families enrolled successfully completed the ISP. During the year, 12 (80%) of the 15 Aboriginal families enrolled completed the program. In May 2010, the Minister for Juvenile Justice said that,

“preliminary research has shown a 60 per cent drop in offending by young people during the program and 74 per cent during the six months after completing the program. Further, preliminary data by the Multisystemic Therapy Institute as of December 2009 shows that 87 per cent of caregivers had acquired the appropriate parenting skills necessary to handle future problems; 78 per cent had improved family relations and 70 per cent had improved support networks.”¹⁰

BOCSAR is currently conducting an evaluation of the ISP in NSW. The Evaluation Report is due to be released in late 2012.

The NSW Youth Drug and Alcohol Court program

The NSW Youth Drug and Alcohol Court (YDAC) program commenced in July 2000 in response to recommendations from the NSW Drug Summit held in 1999. The Court was established to address the needs of young offenders between 14 and 18 years of age who have alcohol and other drug problems. The YDAC is not a separate court but a program conducted by specialist Children's Magistrates within the NSW Children's Court.

¹⁰ NSW Legislative Assembly Hansard; 19 May 2010; p. 23077

The aim of the YDAC is to divert young offenders from further drug use and re-offending by providing specialist assistance in a number of areas. The YDAC is an innovative pilot program within the criminal justice system. Like the NSW Drug Court (for adults), the YDAC program is a problem solving court reflecting the principles of therapeutic jurisprudence.

Under the YDAC program, offenders are offered the opportunity to participate in an intensive program of rehabilitation before being sentenced. In a six-month program participants undergo detoxification and rehabilitation, attend educational and vocational courses, and appear regularly throughout that period before the YDAC for what are called “report backs”. Various health needs of the participants (for example, dental) are met whilst they are on the program.

Evaluations to date indicate that the program is having success with the very “hard end” of juvenile offending and offenders. The YDAC program seeks to address criminal offending by providing holistic and systemic health and welfare interventions for the young person. It is well recognised that disengagement from education and employment are high risk factors for reoffending. The YDAC program is an integrated and collaborative initiative, which brings together the elements of the juvenile criminal justice system with various government and non-government adolescent service providers.

‘Need’ v ‘Deed’

In addressing the problem of ‘cross-over kids’ (and indeed of all children and young people with welfare concerns) in the juvenile justice system, a tension exists between an appropriate criminal justice response to the offending behaviour of the young person (and its effects on victims and the community) and an appropriate welfare response to that offending behaviour.

As the research shows, most serious young offenders have a background of childhood and/or adolescent abuse and neglect, dysfunction and, in many cases, severe deprivation. On the one hand, we see these young offenders as vulnerable victims themselves in need of help. On the other hand, their offending (often serious offending) creates damaged victims (including harm to the community) and demands accountability. Judge Andrew Becroft, the Principal Youth Court Judge of New Zealand, states that these conflicts raise two important questions which should dominate debate on youth justice:

1. When and on what basis should offences committed by young people be seen primarily as a result of care and protection issues requiring resolution through care and protection interventions and in some cases through family and care courts. Further, when and on what basis should offences be dealt with as intentional breaches of the criminal law by autonomous, responsible individuals requiring resolution in the criminal courts? If the matter is dealt with in a criminal court does it raise a serious risk of criminalising what is essentially a welfare issue?
2. At the stage the juvenile comes before the criminal court, to what extent should any underlying care and protection issues that may have contributed to their offending be addressed by sentencing orders made in the criminal court rather than by orders made in the care and family courts? Addressing such issues by sentencing orders in the criminal courts (especially to the extent necessary to resolve them) runs the risk of “welfarising” and prolonging the justice response and compromising the important sentencing principle of proportionality of response.

In relation to the danger of inappropriately “welfarising” the response to juvenile offending, Dr Cashmore in her paper raises a note of caution about the welfare approach in Finland where it has

resulted in a much higher number of young people being accommodated within mental health institutions or ‘reformatories’ (Pitts & Kuula, 2005).

The risk of ‘criminalising’ children and young people in care

A recent study was conducted by Katherine McFarlane: *From Care to Custody: Young Women in Out-of-Home Care in the Criminal Justice System*¹¹. In the study 111 NSW Children’s Court criminal files were examined. The study found that:

- over one-third (34%) of the young people appearing before the Children’s Court were, or had recently been in OOHC, and
- a further 22.5% were identified as being “extremely likely” to be in care in the near future (this identification was carried out by a Children’s Magistrate, Juvenile Justice records, lawyers’ submissions and other documentation).

The study focussed particularly upon young women coming before the Children’s Court and found that:

- young women in care were aged from 11 years through 17 years of age at the time of their offence.
- many had been refused bail, or had bail conditions imposed which proved to be too onerous to meet, resulting in them spending periods in juvenile detention on remand.
- they shared a common background of homelessness and abandonment, with periods in refuges and on the streets, group homes and detention centres.
- most offended in the company of others, generally siblings, cousins or other residents of welfare group homes.

The study also found that the most common charge brought against a young person in care is **malicious damage to property**, usually inflicted on property belonging to the care home where the young person was residing. In the study’s sample, approximately half of the males and females in care were facing the court for property damage offences and similar offences - all committed in foster care or against the group home or other ‘specialist’ facility in which they lived. In contrast, none of the female non-care cohort and very few of the male non-care cohort had been charged with such an offence.

The study notes with concern the widespread use in group homes of the criminal justice system to modify the behaviour of young people in care. It is the experience of the NSW Children’s Court that the police are too often called in to deal with behavioural problems of children in group homes rather than attempts being made within the group home to deal with the problem through appropriate behavioural management techniques. One court file in the study noted that the police had been called in order to teach the young person that certain behaviour – putting several small holes in the wall of her room after an argument with a carer – was unacceptable.

In her paper, Dr Cashmore also refers to the inappropriate use of the juvenile justice system to address what are essentially behavioural problems of some young people in care. She states that children in care (especially group homes) are also more likely to come into contact with the police as a result of their behaviour. While children in their family home may cause damage or threaten

¹¹ 22 *Current Issues Crim Just* 345 2010

harm in anger and whilst being upset, their difficult behaviour is generally dealt with in the family. When a child is in care, however, staff or carers, instead of implementing behavioural techniques, may resort to calling the police to manage their behaviour, leading in many cases to charges being laid and the child going into detention because of lack of suitable bail accommodation.

A further problem for young people in care residing in group homes is the high turnover of staff/carers. This makes it very difficult for the young people to develop secure and stable relationships with a caregiver which is essential for rehabilitation interventions to be effective.

Some conclusions

In conclusion, I would suggest that a fair and just juvenile justice system requires at least the following:

1. A police force trained in the principles of juvenile justice and committed to diversion of young offenders from formal court processes wherever possible. Leadership must come from the top of the police force.
2. That in responding to youth offending we recognise that while addressing welfare issues which have contributed to offending we still hold the young offender accountable for their offending behaviour.
3. That our response must be a balanced response and that we should ensure that we avoid the criminalisation of young people where the real issue of concern is a welfare issue and not a criminogenic one.
4. In that balanced approach we should also avoid the ‘welfarising’ of the response to the extent that the welfare response is a disproportionate response to the criminal offending.
5. That child protection agencies must play a role in the juvenile justice system and not abandon young offenders with serious welfare concerns who have entered that system.

In relation to the last point, Dr Cashmore refers in her paper to the need for child protection agencies to become or remain engaged with juvenile offenders with significant welfare needs. She concludes her paper:

“Maltreated adolescents across Australia need early intervention and support, in part at least to try to reduce the risk of their later offending. We need to understand how many children in care are involved in offending and what interventions and services are successful in preventing later offending (Jonson-Reid, 2002, 2004), especially for maltreated children and adolescents. It seems very likely that some prevention measures are working, but we have little information about who these work for and under what circumstances. It is important to build this knowledge and to increase the focus on adolescent and child protection, on the understanding that intervening early means intervening early in the pathway as well as early in life. The window for effective intervention, especially in relation to offending behaviours, is not closed after early childhood, though it is likely to be more expensive to intervene at later ages. Crucially, state parental responsibility for children and young people in care must not stop once they have offended and become troublesome as well as troubled.”

oOOo