AIJA Justice for Young People Conference 2019
Friday 8 November 2019
Rendezvous Hotel, Melbourne

Keynote presentation – Innovations in Children's Justice

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Introduction

1. I am honoured by the invitation to present this keynote address with my NSW counterpart, Judge Peter Johnstone, President of the NSW Children's Court.

2. I begin by acknowledging the traditional custodians of the land we meet upon today, the Boon Wurrung and Wurundjeri people of Kulin nations. I pay my respects to their Elders, past, present and emerging.

3. Attending conferences such as these – bringing interstate and international colleagues, academics and other experts together – reminds us that we have much to learn from each other and that we share many of the same problems. Together, our collective experiences and expertise can be brought to the task of fashioning effective, evidence-based responses to the complex problem of youth offending.

4. There is no doubt that when the young offend – particularly when committing violent, confrontational crimes – the impact on victims and the broader community can be profound. For victims traumatised by the

offending, the age of the offender matters little. The public nature of much youth offending can be shocking, contributing to community concern that offending by young people is out of control and that our community is less safe than ever before. This, in turn, frequently elicits calls to "get tough" on young offenders – for the justice system and courts to send a stronger message.

Trends in youth offending

5. So, what does the data tell us? How big is the problem of youth offending in Victoria?

6. Overall, the trends in youth offending reveal two apparently conflicting trends. Notably, these trends are reflected across Australia and elsewhere.

7. One is the significant reduction in the number of individual children who ever come before the Children's Court charged with a criminal offence. The Victorian Sentencing Advisory Council (SAC) recently reported that the annual number of sentenced children decreased by more than two-thirds between 2008 and 2017: from 6,068 in 2008 to 1,915 in 2017.[1] The precise cause of this trend, seen both across Australia and internationally, is largely attributed to increased early intervention, effective cautioning and diversion options.

8. The competing trend is the number of offenders aged between 10-17 years who are responsible for a disproportionate number of incidents of offending. Data from 2014-16 presented by Professor James Ogloff, the co-author of the *Youth Justice Review* report, indicates that a group of 1,393 young people was responsible for 55% of all incidents recorded by

[1] SAC, *Crossover Kids Report 1* (2019), page 85.

police – a total of almost 20,000 incidents.[2] It is this comparatively small, yet significant cohort of repeat youth offenders that is the focus of my discussion here today.

What we do know about youth offenders?

9. There are no simple, straightforward answers to why these young people resort to violence, and why youth violence appears to be increasing, including amongst young women. There is much research in this area, but studies mainly identify 'co-relationships' rather than causes.

10. However, these co-relationships, often seen in the characteristics of these young people, point to the complexity of the problem. Young, violent offenders who are themselves often victims of abuse, trauma and neglect: many from infancy. Most are male. Most are aged between 16-17 years. We know school is a protective factor, yet many young offenders are entirely disengaged from education.

11. A disproportionate number live with or have been exposed to violence throughout their young lives. The link between exposure to violence – notably family violence – on the development and behaviour of the young has been well documented.

12. Family poverty and intergenerational disadvantage are common features.

13. Against this background coalesce other complications – neuro-disability, fetal alcohol spectrum disorder, language disorders, autism spectrum disorder, drug and alcohol abuse and increasingly, poor mental health. You begin to see the co-relationships. Even without these challenges, the

[2] Professor Ogloff, 'Observations and Research on Youth Offending' presentation, South Pacific Council of Youth and Children's Court Conference, Melbourne (November 2016).

adolescent brain is still developing – particularly in the areas that govern consequential thinking and impulse control – critical to manage behaviour.

14. For those who first enter the justice system at a very young age, 10-13 years, the outcomes are the worst,[3] with a disproportionate number of these children also the subject of multiple reports to child protection and with experiences in out-of-home care. Too many of these are Aboriginal and Torres Strait Islander (ATSI) children and youth.[4] A report of the Sentencing Advisory Council, *"Crossover Kids: Vulnerable Children in the Youth Justice System"* published in June 2019 found that while only 1.6% of Victorian youth aged 10-20 as at 30 June 2016 identified as ATSI, 19% of sentenced and diverted children who experienced out-of-home care were ATSI children.[5]

15. Judge Michael Bourke, Chair of the Youth Parole Board (YPB), reported in 2017 that well over 40% of those detained in youth justice centres or on parole come from three groups: Aboriginal, Maori and Pacific Islander and East African, predominantly Sudanese, youth; and recently said this:

"*It must be recognised and confronted that likely well over 50% of the young people detained in our system come from those parts of our community which are disadvantaged, dislocated and often excluded… It is the growth of this [group] that is significant. In my view, there is a risk of an entrenched underclass within our young which feels no connection or aspiration to being part of a functional and hopeful community*."[6]

[3] SAC, *Reoffending by Children and Young People in Victoria* (2016), page 30.
[4] SAC, *Crossover Kids Report 1* (2019).
[5] SAC, *Crossover Kids Report 1* (2019), summary.
[6] YPB, *Annual Report 2016-17* (2017), page xiv; YPB, *Annual Report 2017-18* (2018), page x; YPB, *Annual Report 2018-19* (2019), page 4.

Specialist responses in the Children's Court of Victoria

16. Despite the obvious challenges, the situation is not irreversible for young people. Speaking to the World Health Organisation in 2002, Nelson Mandela said this:

> *"Violence can be prevented. Violent cultures can be turned around. In my own country and around the world, we have shining examples of how violence has been countered. Governments, communities and individuals can make a difference."*[7]

17. The law in Victoria rightly recognises that the rehabilitation of young offenders is a paramount sentencing consideration for two reasons.

18. Firstly, the very youth of the offender – particularly first-time offenders – means they are best placed to benefit from effective intervention and support. Their behaviours have not become entrenched over a lifetime.

19. Secondly, because the rehabilitation of young offenders is not only in their interests – but self-evidently – in the interests of the entire community.

20. For these reasons, the law in Victoria under the *Children, Youth and Families Act 2005* (the Act) provides a distinctive, child-focused set of sentencing considerations and sentencing options. Consistent with international conventions and Victoria's *Charter of Human Rights and Responsibilities Act 2006,* these considerations differ significantly to those that apply to adults. Sentencing considerations under the Act balance welfare and justice approaches to ensure the sentence is fashioned

[7] WHO, *World report on violence and health* (2002), foreword.

to the needs of the child and, where appropriate, ensure accountability and the protection of the public. It is truly individualised sentencing.

21. Significantly, notions of just punishment, denunciation and general deterrence – that is, deterring the community more broadly by the sentence imposed on the individual – highly relevant sentencing considerations when sentencing adults have no role to play in the sentencing law that applies to children.

22. The difficult task that confronts courts when sentencing for serious offending by youth was highlighted in the Victorian Court of Appeal decision in *Webster (a pseudonym) v the Queen* [2016] VSCA 66 where, resentencing a 17-year-old (at the time of the offending) to a Youth Attendance Order to be served in the community for multiple offences of rape, Maxwell P and Redlich JA observed at [6]:

> *"On the one hand, conventional considerations of just punishment and denunciation point towards a custodial penalty, because serious offences are seen to require the uniquely punitive sanction of loss of liberty.* ***On the other hand, the public interest in the rehabilitation of an offender is never greater than in the case of a young offender… What is so distinctive, and so important about juvenile justice is that it requires a radically different balancing of the purposes of punishment. The punitive and retributive considerations which are appropriately applied to adults must be largely set to one side."***

Effective responses in the Children's Court

23. The Children's Court of Victoria is a unique, specialist Court that deals with child protection matters in its Family Division and youth crime in its

Criminal Division. Broadly speaking, it deals with offending by children aged between 10-17 years.

24. Over the years, the Children's Court has sought to respond to the complexity of youth offending through a series of innovative programs and targeted services.

25. With a strong focus on early intervention, the Children's Court has been at the forefront of initiatives to improve pathways back into education for the youth appearing before the Court. Self-evidently, educational participation and engagement lies at the heart of intervening effectively with young offenders. However, the stark reality is reflected in the data released annually by the Youth Parole Board. In its 2018/19 Annual Report, the YPB reported that of the 166 males and 8 females detained on sentence and under remand in Victoria, 68% had previously been suspended or expelled from school.

Education Justice Initiative

26. The Education Justice Initiative (EJI) was first established in the Children's Court in 2014, basing education officers at Melbourne Children's Court to support their participation or re-engagement in school. The success of this initiative resulted in Government funding to enable its expansion Statewide in 2018. There are now four Koori education officers and seven regional education officers attached to every Court, including Children's Koori Courts, across the State.

27. Last year, the EJI provided educational support to 829 young people, including 169 Koori youth, appearing in the Children's Court.

Statewide Youth Diversion Program

28. The effective diversion of young, often first-time offenders, from the criminal justice system can provide a life-changing opportunity. Working closely with our education officers, the Statewide Youth Diversion (CCYD) program has operated since January 2017, with CCYD coordinators based at every Children's Court location. This remarkably successful program has resulted in charges being discharged for approximately 3,000 young people since its inception, with successful completion rates of around 95% maintained over that period.

The RESTORE program – better responses to adolescent violence in the home

29. Working with the Court's new Family Violence workers, the RESTORE program commenced in August 2018 as a Court-based initiative operated by Jesuit Social Services, providing a non-adversarial, restorative process to better meet the needs of adolescents using violence in the home, and their families.

30. The RESTORE program gives the young person the opportunity to accept responsibility for their violent behaviour, whilst putting practical strategies in place to keep family members safe. It is intended to be a more nuanced intervention for families and adolescents than the often blunt, legal response afforded under the *Family Violence Protection Act 2008*: a legal framework developed to respond to intimate family violence but not articulated to the unique complexity of the situation confronting families dealing with adolescent violence in the home.

Mental Health Advice and Response Service

31. In May 2019, the Children's Court introduced a specialist Mental Health Advice and Response Service (MHARS) delivered by Orygen Youth Health (OYH) to better identify and respond to the prevalence of mental health problems in the youth attending Court. This is the first time that on-site specialist mental health assessments have been available for children presenting with acute mental health episodes at Court. The service, being linked to OYH, is then able to facilitate access to youth-specific treatment and mental health support.

32. The need for this service is great. Of those young people assessed as suitable for diversion programs under the CCYD program – most commonly charged with less serious offending and often first-time offenders – more than half were assessed with a diagnosed mental illness, such as anxiety, depression, post-traumatic stress disorder, bipolar or schizoaffective disorders. Many were undiagnosed at the time of assessment.[8] For those detained or sentenced to detention in Victoria, the truly telling statistic revealed by the YPB data is that 67% are themselves victims of trauma, abuse and neglect and 48% present with mental health problems.[9]

Expansion of the Therapeutic Treatment Order – an effective response to sexually abusive behaviours in youth

33. In Victoria, the early identification of sexually abusive behaviours in adolescents, often in a family context, can be dealt with under a distinctive legislative framework that focuses on the provision of

[8] Children's Court Youth Diversion Service, *Annual Report, 1 January 2018 to December 2018*, page 14 – Diagnosed Mental Illness.
[9] YPB, *Annual Report 2018-19* (2019), page 29.

evidence-based, therapeutic intervention rather than a criminal justice response.

34. The Therapeutic Treatment Order (TTO) offers early intervention and aims to prevent further, more serious sexual behaviour by requiring the young person to attend a therapeutic treatment program. A TTO can remain in force for twelve months and be extended for another year. Once a TTO is made in the Family Division of the Court, any criminal charges are adjourned and must be dismissed on the successful completion of the therapeutic treatment program.

35. From the commencement of the TTO regime until 28 March 2019 applications for TTOs were restricted to children aged 10-14 at the date the order was made. In March 2019, legislative amendments extended this highly successful program to include children aged 15-17 years, as recommended by the Royal Commission into Family Violence.[10]

Fast Track Remand Court

36. In response to the growing numbers of young people held on remand, the Court introduced a Fast Track Remand Court (FTRC) to intensively case manage criminal cases in a timely manner. During 2017/18, the average period on remand where criminal charges were managed in the FTRC reduced from 116 days to 47 days. Given the fundamental tenet of youth sentencing law that detention is a sentence of last resort, addressing time spent by young people on remand is critically important.

37. However, the efficacy of the FTRC has undoubtedly been impacted by recent legislative amendments to the *Bail Act 1977*, and by changes to the

[10] RCFV, *Report and Recommendations - Volume II* (2016), page 228.

Children, Youth and Families Act 2005 associated with the presumptive uplift of Category A serious youth offences to adult courts – including an increase in jurisdictional arguments and committal procedures – introduced by the *Children and Justice Legislation Amendment (Youth Justice Reforms) Act 2017* in mid-2018.

Children's Koori Court

38. It has now been more than 25 years since the 1991 Royal Commission into Aboriginal Deaths in Custody highlighted the disproportionate number of Aboriginal people in custody and the systemic disadvantage suffered by Aboriginal people in Australian society. The Royal Commission made it clear that any effective response to over-representation must address the legacy of colonialism, intergenerational trauma and institutionalisation and critically, involve engaging with, listening to, and working with, Aboriginal communities.

39. In 2000, the Victorian Government and representatives of Aboriginal communities entered into the first Aboriginal Justice Agreement (AJA). A core principle of the AJA, now AJA4, is Aboriginal participation – leading to self-determination – in the development and implementation of justice policies and programs. Victoria's Koori Courts have been described as the "Jewel in the Crown" of the AJA by former Commissioner for Aboriginal Children and Young People, Andrew Jackomos.

40. Over 14 years ago, in October 2005, the Children's Koori Court commenced as a specialist division of the Children's Court at Melbourne. At its heart, the Koori Court aims to provide a court environment that is culturally safe, gives Aboriginal children and community a voice and

significantly, seeks to interrupt the cycle of intergenerational offending and incarceration. Central to its success is the role of Aboriginal Elders and Respected Persons in the sentencing conversation.

41. An independent evaluation of the Children's Koori Court in 2009 found, amongst other things, that it resulted in improved appearance rates before the Court, in higher levels of compliance with court orders and fostered positive participation by Koori youth, their families and community in the Court. Put simply, the Koori Court is a better way of doing things for our Koori youth who found traditional courts and court processes alienating and disheartening.

42. The Children's Koori Court now sits at Melbourne, Heidelberg, Dandenong and in regional courts – Mildura, Latrobe Valley (Morwell), Bairnsdale, Warrnambool, Portland, Hamilton, Geelong, Swan Hill and Shepparton.

43. However, the sad truth is that often by the time we get to pay attention to the issues confronting our Koori youth it is too late in the piece.[11] With this in mind, the Children's Court established Australia's first Koori Family Hearing Day at Broadmeadows in 2016, known as *Marram Ngala-Ganbu* (MNG),[12] aimed at improving connection to family, community and culture for ATSI children and families involved in child protection proceedings and to promote adherence to the Aboriginal Child Placement Principles. MNG, soon to be expanded to Shepparton in the north east of Victoria, aims to do more for our Koori youth earlier.

[11] AIHW, *Youth Justice in Australia 2017-18* (2018), page 9 with detention rates for Indigenous youth between 10-17 at 21.9 per 10,000 compared to 1.9 for non-Indigenous youth.
[12] Meaning '*We are One'* in Woiwurrung language.

A changing legal landscape

44. With effect from mid-2018, the *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* made significant changes to the *Children, Youth and Families Act 2005.* Perhaps the most significant and potentially wide-ranging has been the introduction of certain serious youth offences that must now – unless "substantial and compelling" reasons exist[13] – be dealt with in an adult court when an accused was aged 16 years or older at the time of the offence.

45. When charged with an offence/s of aggravated home invasion, aggravated carjacking, intentionally causing serious injury in circumstances of gross violence or certain terrorism-related offences there is now a presumption of uplift to an adult court, opening up the full range of sentencing options available to adult offenders and the adult sentencing considerations of punishment, denunciation, and both general and specific deterrence.

46. Although the youth of an offender is always relevant when sentencing, the paramouncy of rehabilitation must – in adult courts – be moderated against the seriousness of the offending. General deterrence becomes a significant sentencing consideration – imposing a sentence that will operate to deter others from like offending.

47. Prior to the youth justice reforms, only death related charges against children were heard in an adult court, and these were rare. All other indictable offences, including serious indictable offences, were heard and determined in the Children's Court unless exceptional circumstances existed that made the matter unsuitable to be determined summarily. The

[13] Or when another statutory exception applies, including if it is in the interests of the victim/s that the charge be heard and determined summarily, or where the accused is particularly vulnerable because of a cognitive impairment or mental illness.

law required the Court to "relinquish its embracive jursidiction" only with "great reluctance".[14] But the uplift provisions for serious youth offences in 2018 have changed that paradigm.

48. In the first half of 2019, more charges against children have been uplifted to the adult courts than in any of the preceding four years – most on the charge of aggravated home invasion.

49. Additionally, for young offenders sentenced for committing these serious youth offences, amendments to the *Sentencing Act 1991* require the Court to impose a sentence of adult imprisonment unless "exceptional circumstances" exist. This provision now limits the availability of youth detention for "dual track" youth between 18-21 years, but also for any child aged 16 years or above at the date of offending who is sentenced for a relevant serious youth offence.

A solution to the problem of violent offending in youth?

50. Only time will tell if Victoria's youth justice reforms – particularly the availability of the full suite of adult sentencing options and adult imprisonment – will be effective in addressing the patterns of violent offending we see in this small cohort of – mainly – young males.

51. However, from my experience, there is no single or simple answer to the complex problem that is violent youth offending.

52. What the evidence does show us is that a good understanding of the risk and protective factors associated with youth offending and differentiating between the two main types of youth offenders –the life-course persistent

[14] *K v Children's Court of Victoria and Anor* [2015] VSC 645.

offender (those whose offending commences as young as 10 years) and the adolescent onset offender – is perhaps the closest we can get to an understanding of the causes of violent offending by young people.

53. Comprehensive risk/needs assessments and screening tools are increasingly vital to the work of the Children's Court to provide essential information about the youth appearing before us. Targeting early intervention with at-risk families, multi-agency interventions and addressing peer influences are shown by research to be the best way of tackling violent youth offending, to turn young lives around and in doing so, protect the community.