



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

**CHILDREN'S LEGAL SERVICE CONFERENCE  
Rydges World Square, 389 Pitt Street Sydney  
Saturday 15<sup>th</sup> August 2015**

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

### **“CURRENT ISSUES IN THE CRIMINAL JURISDICTION OF THE CHILDREN'S COURT”**

#### **INTRODUCTION:**

1. This paper has been prepared for the 2015 Legal Aid Children's Legal Service Conference on Saturday 15 August 2015.
2. Firstly, I wish to acknowledge the traditional occupiers of the land on which we meet and pay my respects to their Elders past and present.
3. Second, I wish to acknowledge the help and assistance of my Associates: My Court Associate, Vicki Bethel, and my Children's Court Research Associate, Paloma Mackay-Sim, in particular for her work in the preparation of this paper.
4. Third, I wish to acknowledge the fantastic work that the lawyers who appear in the Children's Court do on a daily basis. We are heavily dependent on the assistance that you provide for the expeditious disposal of our case load, and I am grateful for the high quality of skill and dedication, common sense, integrity and courtesy that the vast majority of practitioners in the Court bring to their work in this jurisdiction.
5. What I propose to do in the half hour allocated for this “President's Address” is to provide an overview in relation to 5 Current Issues in Youth Justice in the Children's Court.

6. This will include an update on the appointments to the Children's Court made by the Chief Magistrate and how I propose to deploy the specialist Children's Court Magistrates in 2016. I will also inform you about our sitting and circuit arrangements going forward.
7. These are my take on the main areas of concern that will command my focus and attention over the next year.
8. I have now been President of the Children's Court for 3 years. In this time, I have undertaken a significant amount of research to supplement my knowledge and understanding of young offenders. My study in this area has strengthened my commitment to youth justice and my resolve to agitate for appropriate socio-legal mechanisms to be put in place to support young people.
9. Further, I have become an unremitting advocate for what I call the 'four pillars of a modern, enlightened juvenile justice system'. These four pillars are: prevention, early intervention, diversion and rehabilitation.
10. The key themes I wish to discuss in today's address are:
  - 1) State-wide coverage of the specialist Children's Court
  - 2) The over-representation of Aboriginal children in the Children's Court
  - 3) The criminalisation of children and young people in Out-Of-Home Care (OOHC)
  - 4) The impact of neurobiology in the criminal justice sphere
  - 5) The four pillars of a responsible Youth Justice System – Prevention, Early Intervention, Diversion and Rehabilitation.

## **1. STATEWIDE COVERAGE OF THE SPECIALIST COURT**

11. I turn now to address my first theme, that of the desirability of expanding the coverage of specialist Children's Court Magistrates across the whole of the state.
12. This is not an exercise in empire building. Rather it is recognition that cases involving children are different from the general run of adversarial disputes in other jurisdictions. It has taken me some time to comprehend that there is a requirement for specialist expertise, experience and understanding in this jurisdiction. This is not the time to go into the detail of the rationale, but a simple example is that of brain development. Our Magistrates are well-versed in the developments in the last 15 years with regards to brain science and how that plays out in the decision making that confronts our Court.
13. Secondly, there is value in having a consistency of approach and of outcomes across the whole state, in the way the evidence is presented, in the practices and procedures applied, and in the decisions made in the cases that come before the Court.
14. I am very pleased, therefore, that we have been provided with two additional Children's Magistrates, both of whom commenced last week in the Children's Court.
15. Within a few weeks we will have a specialist Children's Magistrate permanently based at Lismore, presiding over the Northern Rivers Circuit (NRR), extending from Tweed Heads South to Port Macquarie. Magistrate MacMahon will move to Lismore later this month and commence sitting from early September 2015. This Circuit will encompass all aspects of Children's Court jurisdiction, including Care, Crime and Education matters.

16. The extension of the NRR has enabled us to extend the Mid-North Coast Circuit south. This Circuit is a Care Circuit only, but it will now cover Kempsey, Port Macquarie and Taree. I will continue to sit on that Circuit one week each month.
17. That means we now have specialist Children's Court Magistrates dealing with Care cases from the Queensland border south to Nowra. Our next objective will be to look at extending the Illawarra Circuit further west and south, depending on demand.
18. Magistrate Sheedy has also been appointed to the Children's Court and she will preside over the new Hunter Circuit, incorporating Cessnock, Muswellbrook, Maitland and Raymond Terrace. The Circuit will operate 2 weeks per month for Care, Crime and Education matters.
19. We have also made some changes to the Riverina Circuit and the Western Circuit.
20. More information on these Circuits can be found on the Children's Court website at: [www.childrenscourt.justice.nsw.gov.au](http://www.childrenscourt.justice.nsw.gov.au)
21. Another new Children's Magistrate, Magistrate Haskett, will be joining Parramatta Children's Court from 28 August 2015. This will enable us to look at restoring Bidura to a full complement of 2 permanent Magistrates. Whilst on the topic of Bidura, you are no doubt aware that the building has been sold by the Government, which is planning to build a new Children's Court complex at Surry Hills.
22. Turning then, to the deployment of Children's Court Magistrates from 2016, the following will occur:

**Bidura:** Children's Magistrates Hogg and Duncombe

**Campbelltown:** Children's Magistrate Blewitt

**Broadmeadow:** Children's Magistrate Robinson

**Illawarra:** Children's Magistrate D Williams

**Northern Rivers:** Children's Magistrate MacMahon

**Hunter:** Children's Magistrate Sheedy

**Woy Woy:** Children's Magistrates McManus and Stubbs

**Parramatta:** Children's Magistrates Murphy, Carney, Ellis, Sbrizzi, E Ryan and Haskett.

23. Returning to the Local Court in 2016 are Magistrates Russell, Feather and Hawdon.

24. The allocation to the Children's Court of additional Magistrate capacity to service the Riverina and Western Circuits is a work in progress. Similarly, at this point, we are not guaranteed any rotating Magistrates in 2016, unless new Local Court appointments eventuate in the next 6 months. The Chief Magistrate has advised that he will raise these resourcing issues with the Attorney at his next meeting with her.

## **2. THE OVER-REPRESENTATION OF ABORIGINAL CHILDREN AND YOUNG PEOPLE IN THE CHILDREN'S COURT**

25. It is an undisputed fact that Aboriginal people are over-represented in the justice system. In the Children's Court, this over-representation is manifested in both the juvenile crime and care and protection jurisdictions. Aboriginal children are similarly over-represented in detention centres.

26. Over my time as President of the Children's Court I have agitated for an amelioration of this tragic reality. I have advocated for the proper attention to be paid with respect to cultural planning in the Care jurisdiction and have emphasised the importance of culture and identity formation with respect to the Criminal jurisdiction.

27. It is vital to unpack the role culture plays in the identity formation and socialisation of a child. In order to do this properly, one must appreciate the causes of over-representation. It is widely accepted that social, economic and cultural disadvantage are primary causes of Aboriginal over-representation.<sup>1</sup> Distrust and disconnection from the criminal justice system are further factors impacting on Aboriginal over-representation.<sup>2</sup>

28. I see it as my duty to challenge this over-representation and to ensure that my role as President of the Children's Court is used to achieve concrete results for Aboriginal children and young people. Accordingly, the Children's Court has committed to the development of a Reconciliation Action Plan (RAP) with Reconciliation Australia.

29. The purpose of a Reconciliation Action Plan is to document what the Children's Court will do to contribute to reconciliation in Australia.

30. One way the Children's Court has sought to contribute to reconciliation in Australia is through the establishment of the Youth Koori Court (YKC). While the YKC is not intended to be a panacea, it does seek to provide the Aboriginal young people who appear before it with an inclusive and culturally relevant legal process.

31. The Children's Court began trialling the YKC in January 2015 at Parramatta Children's Court. Significantly, the Children's Court and all of the agencies involved in the process are undertaking the pilot within existing resources, without additional funding, and without legislative change. I knew that if we tried to get government funding or legislative support for the YKC, we would never get it off the ground. Once it is established and has a track record of success, we can look to expand its operation to other regions, and lobby for some funding.

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<sup>1</sup> The Commonwealth of Australia (1991) *Royal Commission into Aboriginal Deaths in Custody*, vols 1-4, Canberra Australia at vol 1.

<sup>2</sup> Blagg (2008) *Crime Aboriginality and the Decolonisation of Justice* at p.11.

32. The YKC is, essentially, a deferred sentencing process that focusses on providing greater Aboriginal involvement in the court process. This empowerment is particularly critical, as highlighted by the Royal Commission into Aboriginal Deaths in Custody, which found:

“...running through all the proposals that are made for the elimination of these disadvantages is the proposition that Aboriginal people have for 200 years been dominated to an extraordinary degree by the non-Aboriginal society and that the disadvantage requires an end of domination and an empowerment of Aboriginal people: that control of their lives, of their communities must be returned to Aboriginal hands.”<sup>3</sup>

33. In addition to involving the Aboriginal community to ensure the process is culturally relevant, one of the aims of the YKC is to reduce the risk factors that impact on re-offending behaviour and ultimately, to reduce the number of Aboriginal young people being sentenced to a period of detention.

34. Unlike a mainstream court, the YKC is more informal and all participants sit around a table and use ‘plain English’ rather than using complicated legal terminology and jargon. Elders are involved to provide cultural advice to the Magistrate and they may also speak with the young person about their circumstances and why they are in court.

35. An informal conference with the young person is conducted prior to sentencing. The participants at the conference include a Magistrate (who assumes the role of facilitator), the young person, their family, Elders and staff from both government and non-government agencies.

36. At the conference, an Action and Support Plan is devised.

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<sup>3</sup> Commonwealth of Australia (1991), *Royal Commission into Aboriginal Deaths in Custody*, vols 1-4, Canberra Australia at vols 1.7.5-1.7.6

37. The Aboriginal young person will have 6 months to comply with the program and to achieve the goals/tasks set out in the Plan, prior to being sentenced. At the end of this period, the Judicial Officer will make a determination as to sentence.
38. To date, the feedback received from the ALS and the Magistrate presiding over the YKC has been largely positive. Young people have been engaging with the Court process and are reportedly beginning to take responsibility and express accountability for their actions.
39. A formal evaluation of the YKC will be undertaken by researchers at the University of Western Sydney after 12 months of the pilot.
40. Regardless of the results of the evaluation, the establishment of a pilot YKC is an important step in tackling the over-representation of Aboriginal people in the justice system.

### **3. THE CRIMINALISATION OF CHILDREN IN OOHC**

41. The problem of criminalising children and young people living in OOHC is well known by all who practice within the juvenile justice sphere.
42. In the 1999 Community Services Commission publication, 'The drift of children in care into the criminal justice system: turning victims into criminals', the following circumstances were identified as leading to police intervention for children in OOHC:
- Problematic behaviour that would be a disciplinary matter in a family home could lead to criminal charges in group homes. Staff would call police after incidents such as malicious damage and assault and an altercation would take place which then resulted in additional charges of resisting arrest, assaulting police and offensive language.



- When a child's placement broke down, the Department of Community Services sometimes put out a warrant for a child, resulting in their apprehension and detention.
- Incidents were reported where children in care would be returned to a residential facility under bail conditions after a court hearing. These bail conditions could involve keeping to a curfew or staying within a particular facility. If a child breached these conditions, it was possible staff would report the breaches to the police which could then result in detention.
- Carers were sometimes required to make a statement to the police in order to lodge a claim for victim's compensation, which operated as an incentive for them to contact police in matters of physical aggression or assault.
- Many services had explicit policies about using the police as a 'natural consequence' and as a substitute for imposing their own disciplinary action.
- The staff of some funded services were reportedly simply 'not up to it' and as a result sought assistance from the police to deal with the behaviour of the young person.<sup>4</sup>

43. Further, 46% of all legal aid high service users had spent time in OOHC.<sup>5</sup> The imposition of criminal charges on children and young people who would have been, but for their placement in OOHC, dealt with in the family home is unreasonable and unfair. It victimises children and young people who have already suffered sufficiently to warrant their removal from their parents/carers.

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<sup>4</sup> Community Services Commission, *The drift of children in care into the criminal justice system: turning victims into criminals* (1996) Community Services Commission, *Wards and Juvenile Justice* (1999) at pp.16-20.

<sup>5</sup> Pia van de Zandt and Tristan Webb, *High Service Users at Legal Aid NSW: Profiling the 50 highest users of legal aid services*, June 2013, Legal Aid NSW.

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

“...if you tell someone sufficiently often that they are ‘bad’ or ‘stupid’ or ‘crazy’ that person may start to believe the label and to act out the stereotypical behaviour associated with it.”<sup>6</sup>

45. As professionals within the youth justice sphere, we must challenge circumstances that give rise to negative labelling. One such response is over zealous policing of young people in OOHC.

46. Legal Aid NSW has been active in a project being administered by the Deputy Ombudsman of NSW to engage the NGO sector and the NSW Police Service in the development of a protocol designed to reduce the contact of young people in residential out-of-home care (OOHC) with the Police and with the Criminal Justice System.

47. Development of the protocol is well advanced. It has two key objectives. First, to reduce the incidence of police being called as a result of incidents in residential OOHC, to ensure that police will only be called in appropriate circumstances, and not in cases of trivial offending or breach of house rules. And second, to encourage police, when they are called, to view arrest as a last resort, and to consider other options such as cautions and warnings, or if it is necessary to take a more serious step, to proceed by way of future CAN, rather than placing the young person in detention.

48. There will be more on this exciting initiative in coming months.

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<sup>6</sup> ‘Theories of Juvenile Offending’ in Cunneen, C. White, R. *Juvenile Justice: Youth and Crime in Australia*, 2002, Oxford University Press Australia pp.32-61 at 46.

#### **4. THE IMPACT OF NEUROBIOLOGY IN THE CRIMINAL JUSTICE SPHERE**

49. You may recall that in my address last year, I spoke about the neurobiological factors driving adolescent behaviour. I would like to persevere again this year with this theme, as in my view it is fundamentally important that we understand the impact of brain science on the administration of youth justice. In my view, the neurobiological differences of adolescents are not fully understood by practitioners, Judicial Officers and other relevant agencies.

50. The following quote from the New Zealand Court of Appeal decision of *Slade v The Queen* is a powerful articulation of the developing nature of adolescent cognition:

“It is widely accepted that adolescents do not possess either the same developmental level of cognitive or psychological maturity as adults (Steinberg & Scott, 2003). Adolescents have difficulty regulating their moods, impulses and behaviours (Spears 2001). Immediate and concrete awards, along with the reward of peer approval, weigh more heavily in their decisions and hence they are less likely to think through the consequences of their actions. Adolescents’ decision making capacities are immature and their autonomy constrained. Their ability to make good decisions is mitigated by stressful, unstructured settings and the influence of others. They are more vulnerable than adults to the influence of coercive circumstances such as provocation, duress and threat and are more likely to make riskier decisions when in groups. Adolescents’ desire for peer approval, and fear of rejection, affect their choices even without clear coercion (Moffit, 1993). Also, because adolescents are more impulsive than adults, it may take less of a threat to provoke an aggressive response from an adolescent.”<sup>7</sup>

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<sup>7</sup> *Slade v The Queen* [2005] NZCA 19 at [43]

51. A lack of understanding of adolescent brain development can have many negative implications. One is a failure to properly communicate with young people. An understanding of the discrete cognitive processes that differentiate young people from adults is critical to effective communication. Additionally, ensuring young people understand the legal implications of their offending behaviour may also combat against a distrust with and disconnection from the criminal justice system.

52. In order to appreciate these developmental differences, it is important to unpack the various issues impacting upon adolescence. Firstly, it is crucial to understand that adolescence is a physiologically transitory period of time. It is a developmental stage fraught with conflict. As Muncie states:

“Unlike the nouns ‘child’ and ‘adult’ which refer to definite periods of life, the period identified as ‘youth’ is more nebulous and is normative because it conjures up troubling and emotive images.”<sup>8</sup>

53. This amorphous period of life for all young people is further problematised by the disadvantage suffered by most of the children and young people appearing before the Children’s Court. The 2009 Young People in Custody Health Survey found that:

- 46% had a possible intellectual disability or borderline intellectual disability
- 18% had mild to moderate hearing loss
- 66% reported being drunk at least weekly in the year prior to custody
- 65% had used an illicit drug at least weekly in the year prior to custody.<sup>9</sup>

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<sup>8</sup> Muncie, G. (2009) *Youth and Crime*, 3<sup>rd</sup> edition, Sage, London at p.4

<sup>9</sup> Indig, D. Vecchiato, C. et al (2011), ‘2009 Young People in Custody Health Survey: Full Report’, Justice Health and Juvenile Justice, Sydney.

54. Further, many of the young people appearing before the Children's Court in its Care jurisdiction frequently come before the Court in its Crime jurisdiction later in life. Dr Judy Cashmore, an eminent psychologist and researcher, has found an established link between childhood maltreatment, brain development and subsequent offending in adolescence.<sup>10</sup>

55. Dr Cashmore showed that a number of factors may constitute childhood maltreatment and, consequently, brain development. These factors included: parenting issues, nutrition, health, social interactions and conflict. Dr Cashmore found that the impact of these factors on brain development may be compounded by instability in the creation of developmental attachments through numerous out-of-home care placements.<sup>11</sup>

56. Bennett and Broe argue that a 'stress response' is activated by childhood maltreatment and that the effects of childhood maltreatment extend beyond this response:

"Child neglect and abuse is considered to have neurobiological effects well beyond this 'stress response'. These findings provide neuro-scientific evidence for the notion that parenting and childcare are not 'soft' factors...but factors that have a direct impact upon the neurobiological development of the individual."<sup>12</sup>

57. Section 6 of the *Children (Criminal Proceedings) Act 1987* (CCPA) represents a codified understanding of the unique factors impacting upon the commission of offences by young people.

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<sup>10</sup> Cashmore, J. 'The link between child maltreatment and adolescent offending: systems of neglect of adolescents' (2011) *Family Matters*, Australian Institute of Family Studies, Issue no. 89.

<sup>11</sup> Ibid

<sup>12</sup> Bennett, H. Broe, G.A. 'Brains, biology and socio-economic disadvantage in sentencing: Implications for the politics of moral culpability' (2008) 32 *Criminal Law Journal* 167-179 at 173.

58. Section 6(b) reflects an understanding of the cognitive and neurobiological processes at play when young people commit offences.

59. I cannot over-emphasise the importance of using the research on brain science to inform your application of the CCPA and your ability to communicate with the young person.

60. The Children’s Court has recently prepared a submission to the NSW Government strongly supporting the introduction and use of witness intermediaries in the Children’s Court. The Court’s submission advocated that additional support was required in order to communicate effectively and ensure an inclusive court process for children and young people.

61. Witness intermediaries bridge the communication gap between counsel and child witnesses. Intermediaries are independent and owe their duty to the Court, acting in a similar capacity to interpreters by facilitating communication between the witness and counsel. Intermediaries can also play a part in providing advice or aids to assist counsel and the Court to ensure tailored, appropriate communication.

62. Intermediaries are a valuable resource that have the potential to revolutionise the adversarial system of criminal justice. As Plotnikoff and Woolfson state:

“Intermediaries are the great untold ‘good news’ story of the criminal justice system.”<sup>13</sup>

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<sup>13</sup> 'Intermediaries in the criminal justice system: Improving Communication for Vulnerable Witnesses and Defendants', Plotnikoff, Joyce and Woolfson, Richard (with a foreword by Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales), 2015, University of Bristol, Policy Press, United Kingdom at p.304

## **5. THE FOUR PILLARS OF JUVENILE JUSTICE – PREVENTION, EARLY INTERVENTION, DIVERSION AND REHABILITATION**

63. The conclusion I have reached after my experiences in the Children's Court, is that the ultimate aim of an enlightened system of juvenile justice is to have as few children in detention centres as we possibly can.

64. Instead, we should be developing and strengthening other supports and social mechanisms to address offending and to minimise the incidence of recidivism.

65. I have already canvassed some of the initiatives the Children's Court has implemented to address some identified problems. I have also discussed the research that may assist you to approach your clients in a different way.

66. I will conclude today by discussing the glue that binds these themes together – the principles of prevention, early intervention, diversion and rehabilitation.

67. The research that has attracted my attention indicates that progressive juvenile justice systems benefit from a combination of primary, secondary and tertiary strategies to address the discrete risk factors contributing to juvenile crime.

68. One of the most effective ways of reducing juvenile offending is to begin prevention efforts as early as possible and to intervene aggressively with those who are already offending. Loeber, Farrington and Petechuk describe early intervention strategies as follows:

“Of all known interventions to reduce juvenile delinquency, preventative interventions that focus on child delinquency will probably take the largest ‘bite’ out of crime.

‘The earlier the better’ is a key theme in establishing interventions to prevent child delinquency, whether these interventions focus on the individual child, the home and family, or the school and community.”<sup>14</sup>

69. The early intervention options enunciated in the *Young Offenders Act* 1997 are useful ways of dealing with young offenders. Youth on Track is another early intervention scheme that uses a multiagency, case management approach to address criminogenic factors in the young person’s life and provide specialist services that will provide ongoing support.

70. Rehabilitation is of equal importance for those young people who have already entered into the criminal justice system. As Professor Kenneth Nunn so aptly put it:

“Containment without treatment is custodial futility without any progress except maturation and chance encounters.

Treatment without containment is powerless without any capacity to prevent flight away from help.

Treatment and containment without education is recovery without skills to live in the real world.”<sup>15</sup>

71. Unfortunately, while substance abuse rehabilitation programs exist in NSW, reported access to treatment is often low. The two residential drug and alcohol rehabilitation programs in NSW specific to juveniles are in country regions. There is nothing available in the western area of metropolitan Sydney.

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<sup>14</sup> Loeber, R. Farrington, D.P, Petechuk, D. ‘Child Delinquency: Early Intervention and Prevention’ *Child Delinquency*, U.S Department of Justice, Office of Juvenile Justice and Delinquency Prevention, May 2003, p.9.

<sup>15</sup> Nunn, K. ‘Decision-making of out-of-home care who offend’, presentation to the Children’s Court s 16 Conference on 1 November 2013.



72. Further, the Triple Care Farm run by Mission Australia is the only residential rehabilitation program in NSW that addresses both mental health and substance abuse. Given that these two issues often go hand in hand, it is my view that an enlightened juvenile justice system should provide for a variety of programs addressing both substance abuse and mental disorder for children and young people.
73. Today, I want to emphasise one particular aspect of the early intervention, diversion and rehabilitation paradigm: Justice Reinvestment.
74. Throughout my time as President, I have come to understand the importance of family and community in the fostering of unity and cohesion in society. The proverb “It takes a whole village to raise a child” was never truer.
75. Justice Reinvestment reflects this notion. It is a powerful articulation of the need to mobilise families, volunteers, community groups and government and non-government agencies to protect and promote positive futures for children and young people.
76. Justice Reinvestment is an innovative mechanism that aims to facilitate successful and meaningful interagency collaboration and capacity building. By aiming to address the underlying causes of crime and improve outcomes for both individuals and communities, it recognises that investment in people is the key to successful communities. In fact, one of the refrains of Just Reinvest is “Give Them a Life, Not a Life in Prison.”
77. By empowering communities with the resources and support required to address the circumstances that result in a young person’s offending behaviour, Justice Reinvestment diverts funds into early intervention, crime prevention and diversionary programs. This creates savings in the criminal justice system which can be tracked and reinvested.

78. There are three justice reinvestment initiatives in NSW of which I am aware. The first is the government sponsored Just Reinvest Program in Bourke, which you may be aware is co-chaired by Sarah Hopkins, a solicitor from the Aboriginal Legal Service. It has strong support from the Office of the NSW Ombudsman. The second is a research project being undertaken at Cowra under the leadership of Dr Jill Guthrie of ANU. Thirdly, there is a project underway at Dubbo funded by Vincent Fairfax Family Foundation (VFFF) and Dusseldorp Forum (DF) aimed at identifying ways to increase the number of young persons on positive pathways and reduce the numbers in and out of custody, particularly amongst Aboriginal children in that region.

79. I am following these three initiatives closely and providing support where I can.

#### **CONCLUSION:**

80. It is an exciting time for the Children's Court, with the expanded coverage of specialist Children's Magistrates, the YKC and Youth Diversion Project, and the increased commitment to diversion and early intervention. However, there are other areas that could be improved. I will continue to advocate for children and young people and ensure that they are listened to, empowered and supported.