



Children's Court of New South Wales

CHILDREN'S LEGAL SERVICE CONFERENCE

**RYDGES WORLD SQUARE, 389 PITT ST, SYDNEY
SATURDAY 24 FEBRUARY 2018**

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

“UPDATES IN THE CHILDREN'S COURT JURISDICTION”

- 1 This paper has been prepared for the 2018 Legal Aid Children's Legal Service Conference on Saturday 24 February 2018.¹
- 2 Firstly I wish to acknowledge the traditional occupiers of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to Elders past, present and future.
- 3 Secondly, I would like to acknowledge and thank the legal practitioners who appear in the Children's Court for their dedication, professionalism and integrity in the work they undertake in this jurisdiction. 2017 was a particularly busy year with many reforms, consultations and changes happening throughout the criminal and care jurisdictions.
- 4 This paper will firstly canvass some general updates in the Children's Court, as well as updates affecting the criminal jurisdiction, including some recent case law. This paper will then consider the “10 easy steps” to turn a child offender into an adult criminal, as articulated by Judge Andrew Becroft, Principal Youth Court Judge for New Zealand, and reflect upon the key messages which can be found in this paper, and my hopes for the future.

¹ I acknowledge the considerable help and valuable assistance in the preparation of this paper by the Children's Court Research Associate, Elizabeth King.

General updates

President of the Children's Court of NSW reappointed

- 5 I was very pleased to be reappointed as the President of the Children's Court of NSW by Attorney General Mark Speakman in June last year. My new term as President began on 1 June 2017 and expires on 7 July 2021.
- 6 I look forward to another exciting and rewarding term as President.

Closure of Bidura Children's Court and opening of the new Surry Hills Children's Court

- 7 The Children's Court on Glebe Point Road known as Bidura Children's Court closed permanently on Friday 7 July 2017 and the new Surry Hills Children's Court opened on 15 January 2018, located on Albion Street, Surry Hills.
- 8 The refurbished four-court complex includes state-of-the-art AVL facilities, two conciliation rooms, witness protection rooms as well as space for support services and agencies.
- 9 The new Surry Hills Children's Court honours the solid foundations, history and heritage of the former Metropolitan Children's Court, and acknowledges the troubled history whilst incorporating new features to reflect the needs of modern court users and the specialist nature of the Children's Court jurisdiction.
- 10 It is inspiring and empowering to reflect upon and to witness the changes which have occurred since the original building opened in 1911, which are a stark reminder of the need to continually advocate for the best outcomes for the most vulnerable members of our community.
- 11 With the opening of the Surry Hill's Children's Court, there have been some changes to catchments and circuits. Sutherland Children's Court will continue to sit as a Children's Court for criminal matters from St George, Sutherland and Miranda Local Area Commands.

- 12 Criminal matters from Ashfield, Burwood, Ku-ring-gai, Marrickville, North Shore and Ryde Local Area Commands have been re-directed to Surry Hills Children's Court.

Magistrate capacity and circuits

- 13 I am pleased to report that this year the Children's Court has the full complement of Children's Magistrates. Children's Magistrate Virgo commenced in January 2018 and will be responsible for the Western and Riverina circuits, and Children's Magistrate Crompton has replaced Children's Magistrate Murphy who retired in 2017. We continue to host rotating Magistrates throughout the year.
- 14 The Mid North Coast circuit has been extended to cover criminal matters at Port Macquarie as well as Kempsey. The Illawarra Children's Court has expanded to include both Moss Vale and Goulburn Children's Courts.
- 15 Children's Court Magistrates hear roughly 90 per cent of care cases in the State, up from 45 per cent in 2011, and the coverage for criminal matters remains around 67 per cent.

National Judicial College of Australia "Family Violence in the Court" training for the Children's Court of NSW

- 16 The specialist Children's Magistrates and Children's Registrars and myself attended an excellent training day hosted by the National Judicial College of Australia on "*Family Violence in the Court Room*" on 6 October 2017.
- 17 The training day involved informative presentations on the nature and impact of domestic and family violence, as well as a unique virtual reality experience, which holds some great potential as an engaging training tool.
- 18 Domestic and family violence is now recognised as a serious and widespread problem in Australia, with significant costs to the individuals who are victimised and to the community.

- 19 As judicial officers we have responsibilities such as enabling the best evidence to be given by witnesses and managing safety within the Court room. This is an important area of learning for all stakeholders, and the training day was valuable in continuing to develop and enhance the specialist nature of the Children’s Court in dealing with complex children and families.

The continuing relevance of brain science

- 20 It is my belief that effective strategies, programs and policy implementing the principles of early intervention, diversion and rehabilitation require an acute, comprehensive and insightful understanding of the reasons why children and young people commit crimes.
- 21 I have undertaken research over the years into this precise question, and through forums such as this which provide for collaboration and the sharing of knowledge between important stakeholders, some important insights have been discovered.
- 22 I touched on some of this brain science when I presented at the Children’s Legal Service Conference in 2015, however since then I have discovered, through collaboration and discussion with various stakeholders, an emerging wealth of knowledge in this area, which I believe should inform the policy of youth justice and detention moving forwards. I am pleased to see that it has already begun to do so, and there have been some positive developments over the past five years. I will explore these developments in a later section of the paper.
- 23 In particular, I credit Judge Becroft, the Principal Youth Court Judge of New Zealand, for being one of the first Judicial Officers to highlight the importance of understanding brain science, and how it may assist us in meeting the need to match policy and legislation to the factual realities presented within the science.²

² ‘From Little Things, Big Things Grow - Emerging Youth Justice Themes in the South Pacific’, Judge Andrew Becroft, Principal Youth Court Judge of New Zealand, 2014.

- 24 A great deal of research has been undertaken in recent years to show that the pre-frontal cortex of the brain (the frontal lobes) is the last part of the human brain to develop. The frontal lobes are those parts of the brain associated with identifying and assessing risk, managing emotion, controlling impulses and understanding consequences.³
- 25 We know that rational choice theory argues that young people are able to undertake a logical risk assessment in their decision-making process. Neurobiological research, on the other hand, argues that adolescent decision-making is not linear, sophisticated and predictable.
- 26 A further complication is that brain development differs depending upon a number of variables and that 'neuro-scientific data are continuous and highly variable from person to person. The bounds of 'normal' development have not been well delineated.'⁴
- 27 Neurobiological research to date shows that whilst adolescents may appear to function in much the same way as adults, they are not capable of the executive function that mature adults possess.
- 28 Neurobiological development will continue beyond adolescence and into a person's twenties (possibly even into some people's thirties), and different people will reach neurobiological maturity at different ages.⁵
- 29 Advances in neurobiology allow us to better understand the range of factors (biological, psychological and social) that make juvenile offenders different from adult offenders, and justify and improve the unique responses to juvenile crime.

³ E.C. McCuish, R. Corrado, P. Lussier, and S.D. Hart, 'Psychopathic traits and offending trajectories from early adolescence' (2014) *Journal of Criminal Justice* 42, pp 66-76.

⁴ S.B Johnson, R.W Blum, J.N Giedd, 'Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy' (2009) *Journal of Adolescent Health* 45(3) pp 216-221 at 220.

⁵ B Midson, 'Risky Business: Developmental Neuroscience and the Culpability of Young Killers', (2012) *Psychiatry, Psychology and the Law*, 19 (5), pp.692 -710 at 700. See also: Gruber, S.A. Yurgelun Todd, D. A. 'Neurobiology and the Law: A role in Juvenile Justice' (2006) *Ohio State Journal of Criminal Law*, 3, pp 321-340 at 332.

- 30 Over the past year I have become aware of some important research which has enormous implications for the way in which the criminal justice system treats young people, and also on our understanding of the importance of early development, as the manner of this development can impact on care and protection matters as well as criminal matters.
- 31 I attended a wonderfully informative seminar series hosted by the Advocate for Children and Young People on 30 March 2017, and some fascinating insights into science and child development were shared by leaders in the field.
- 32 For example, Associate Professor Elisabeth Murphy described how babies are born with 25 per cent of their brains developed, and that by age 3 they will have developed 80 per cent of the brain for life.⁶ The development of brain connections is dependent on stimulation and experiences and these experiences in the early years are crucial as they will shape the wellbeing and cognitive development of a person as they grow through to adulthood.
- 33 This research has enormous implications for the principle of early intervention. If experiences such as trauma, abuse and neglect, even within the womb, occur within the first 1000 days of life, this may lead to difficulty later in life, especially during adolescence but even during adulthood.
- 34 Dr Michael Brydon discussed a fascinating study by Aaron Antonovsky, whereby it was discovered that 29 per cent of women who had survived concentration camps as children were able to carry on and maintain good health after their traumatic experience.
- 35 Antonovsky questioned why it is that some women were not affected in the same way most others were, and it was discovered that the reason was because they had an adult or older carer with them throughout the traumatic experience.

⁶ G. Allen, Early Intervention: The Next Steps. An Independent Report to Her Majesty's Government. HM Government, UK, January 2011 <https://www.gov.uk/government/publications/early-intervention-the-next-steps--2>.

- 36 What is clear from this is that the benefits of a positive, enduring and nurturing relationship, even in situations of extreme adversity, cannot be underestimated.
- 37 Furthermore, I am deeply troubled by the important findings of a recent study conducted in Western Australia, where it was found that 89 per cent of the young people in detention who were assessed as part of the study had at least one domain of severe neurodevelopmental impairment, and 36 per cent were diagnosed with Fetal Alcohol Spectrum Disorder (FASD).⁷
- 38 This study shows that the majority of young people with FASD had severe impairment in the academic, attention, executive functioning and/or language domains. Severe impairment in memory, motor skills and cognition were also commonly found in the young people with FASD.⁸
- 39 For the majority of these young people, FASD and severe neurodevelopmental impairment had not previously been identified.
- 40 The report clearly identifies that impairment in these domains may contribute to offending behaviours and/or difficulties in negotiating all aspects of the justice system.⁹
- 41 Whilst this particular report is limited to Western Australia, FASD has been identified as an “issue that is not confined to a particular community or demographic; it is a disorder that crosses socio-economic, racial and education boundaries.”¹⁰

⁷ Bower C, Watkins RE, Mutch RC et al, ‘Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in Western Australia’ (2018) *BJM Open* 1.

⁸ Ibid 6.

⁹ Ibid.

¹⁰ Australian Medical Association, *Fetal Alcohol Spectrum Disorder (FASD) – 2016*, (24 August 2016), Australian Medical Association <https://ama.com.au/position-statement/fetal-alcohol-spectrum-disorder-fasd-2016>

42 Emerging insights from research such as this continue to highlight the vulnerability of young people and the need for there to be appropriate services available within the community to identify issues experienced by children and a clear pathway to support and wrap-around services for the child or young person and their family.

Schooling issues

43 Education plays a significant role in a child or young person's life, and presents a valuable opportunity for early identification of risk factors as well as interventions and diversion from problematic and offending behaviour.

44 It has come to my attention that roughly 40 per cent of the children coming before the Children's Court in its criminal jurisdiction are not attending and are totally disengaged from school. Recent, informal observations at one of the Children's Courts located in Sydney indicate that the number of children in the criminal jurisdiction of the Court who are not attending school is, in fact, much higher than 40 per cent, and that the rates of non-attendance reflect a chronic and complex pattern, which is deeply troubling.

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

46 I have been advocating for a solution to this problem, and was pleased to jointly host a roundtable discussion with the Department of Education and key stakeholders in August last year. I believe there are opportunities for justice agencies and education agencies to work together to divert children from long-term involvement with the justice system.

47 For example, I am hopeful that in NSW we can adopt the Victorian Education Justice Initiative whereby officers of the Department of Education are placed in the Children's Court to assist in identifying those children who are not attending school and to help support them to re-engage in school.

48 This promising initiative is an innovative demonstration of diversionary processes working in parallel with court processes, and would be of significant benefit to children and young people in NSW.

Updates in the criminal jurisdiction

Declining number of children in detention

49 The NSW Bureau of Crime Statistics and Research reported on 30 October 2017 that the juvenile detention population has decreased by roughly 29 per cent since the peak of 405 detainees in June 2011. The number of children and young people in detention has decreased significantly over the past 6 years, which is in stark contrast to the adult prison population which continues to rise.

50 Furthermore, 3 juvenile detention centres have closed over the past 6 years due to the falling number of young people in detention. Now only 6 juvenile detention centres remain in NSW.

51 I believe it is no coincidence that this number has fallen so significantly, and that this development has not occurred in isolation. Rather, the insights we have gained from brain science have allowed us to gain a better understanding of the adolescent brain, and paved the way for better policies, practices and procedures which highlight and emphasise the fact that children are fundamentally different to adults and must be treated as such.

52 I am a strong advocate for the approach of Justice Reinvestment, which is an idea for rethinking the criminal justice system. Under this philosophy, the savings from the closure of three juvenile detention centres should be reinvested back into the community to provide services and supports to children and young people.

53 In 2016 I participated in the discourse on Justice Reinvestment in relation to the pilot project to be implemented in Cowra, and I look forward to seeing some more Justice Reinvestment programs established in regional areas.

Youth Koori Court

- 54 The Youth Koori Court (YKC) was established as a pilot in 2015 at Parramatta Children's Court and has now been operating for almost three years.
- 55 The YKC was established in response to the devastating over-representation of Aboriginal young people in the justice system.
- 56 The YKC seeks to contribute to a solution to the over-representation of Aboriginal young people through the inclusion of Elders and professionals who are Aboriginal, providing low volume case management mechanisms that will facilitate greater understanding of and participation in the Court process by the young person, identifying relevant risk factors that may impact on the young person's continued involvement with the criminal justice system, and monitoring appropriate therapeutic interventions to address these risk factors.
- 57 The process that has been developed for the YKC involves an application of the deferred sentencing model (s 33(1)(c2) *Children (Criminal Proceedings) Act 1987*) as well as an understanding of and respect for Aboriginal culture.
- 58 A formal process evaluation has been conducted by Western Sydney University, and the final report is currently before the Attorney General.
- 59 Whilst the evaluation has not yet been formally released, several positive outcomes including improved cultural connection, education and employment, accommodation, health and management of drug and alcohol use have been identified in the report.
- 60 The Children's Court was very pleased to hear the Attorney General announce in June 2017 a sum of \$220,000 in funding for Marist180 to provide a casework position dedicated to assisting clients in the YKC.
- 61 I will continue to advocate for the expansion of the YKC, particularly to communities in Dubbo and Redfern.

Criminal case law

62 This section will provide a brief summary of some recent criminal case law.

RP v The Queen [2016] HCA 53

63 The appellant was convicted on two counts of sexual intercourse with a child under 10 years. At the time of offending the appellant was aged approximately 11 years and 6 months, and the complainant, who was the appellant's half-brother, was approximately 6 years and 9 months. By grant of special leave, the appellant appealed to the High Court.

64 The High Court held that the Court of Criminal Appeal erred in finding that the appellant's convictions were not unreasonable in circumstances where there was insufficient evidence to rebut the presumption that he, as a child of 11, did not know his behaviour was seriously wrong in a moral sense. The Court ordered that the convictions be quashed and entered verdicts of acquittal.

Department of Public Prosecutions (NSW) v GW [2018] NSWSC 50

65 This decision concerns an appeal from the DPP in relation to an order of the Local Court made at Dubbo Children's Court dismissing proceedings against the defendant for various offences following a *voir dire*.

66 On appeal it was held that there was an error of law due to the brevity of the reasons and the failure to explain that which rendered the conduct an impropriety or to undertake the balancing exercise required by s 138 of the *Evidence Act 1995*, which rendered the judgement inadequate.

67 The Court ordered that the appeal be allowed in part, and that the matter be remitted to the Children's Court at Dubbo for determination.

68 In this case, the respondent was charged with assault after he spat in the face of a three month old child. When the matter came before the Local Court, a Magistrate dismissed the charge and made an order under s 32(3)(b) of the *Mental Health (Forensic Provisions) Act 1990* with conditions requiring the respondent to attend a “psychiatrist” but did not name any specific person or place. The DPP appealed to the Supreme Court and contended that the Magistrate erred in the formulation of the conditions.

69 It was held on appeal that s 32(3)(b) of the *Mental Health (Forensic Provisions) Act 1990* requires a Magistrate to nominate a particular person upon whom, or a particular place at which, the defendant is to attend for assessment of the defendant’s mental health condition and/or treatment.

“How to Turn a Child Offender Into an Adult Criminal – in 10 Easy Steps”

70 The Principal Youth Court Judge for New Zealand, Judge Andrew Becroft, delivered a compelling and engaging paper at the Children and the Law International Conference in 2009, titled “How to Turn a Child Offender Into an Adult Criminal – In 10 Easy Steps”.¹¹

71 The paper is approached from a perspective that is “deliberately contrary to all but the most committed devil’s advocate”¹², and the blatant inversion of decades of youth justice wisdom is particularly meaningful at this point in time, with the conclusion of the Royal Commission into the Protection and Detention of Children in the Northern Territory and a clear appetite for change.

72 It will be useful to examine these “10 easy steps” and reflect upon the current practice in NSW, with a mind to acknowledging the best practice which has been set, but also the areas in which we must continue to improve.

¹¹ Judge Andrew Becroft, ‘How to Turn a Child Offender Into an Adult Criminal – In 10 Easy Steps’ (paper presented at the Children and the Law International Conference, Tuscany, Italy, 7 September 2009).

¹² Ibid 3.

Step 1: Leave families alone to sort themselves out: “Ignore risk and erode resiliency”.

- 73 *“Since we know that parents and parenting contribute significantly as a risk factor (or a filter for other risk factors) for adolescent anti-social behaviour, it makes sense for the state and other agencies to let at-risk families get on with fostering those risks without intervention.”¹³*
- 74 The influence of family on a child’s wellbeing and development is crucial. As I mentioned earlier, research shows that the development of brain connections is dependent on stimulation and experiences in early childhood, and will shape the wellbeing and cognitive development of a person as they continue to grow into adulthood.
- 75 Children are particularly vulnerable to experiences such as abuse and neglect, family violence, drug and alcohol abuse (including FASD), socio-economic disadvantage, disengagement from education, criminal behaviour of parents/family members and health issues. These are all recognised risk factors for criminal offending.
- 76 Families need support to overcome these issues, to break the cycle of intergenerational trauma and disadvantage, and to engage in pro-social, positive parenting.
- 77 I have become aware of a significant shift within DFACS in the last 2 years, with a renewed focus on early intervention and family preservation services, including the use of some evidence-based international models known as Functional Family Therapy – Child Welfare (FFT-CW) and Multi-systemic Therapy – Child Abuse and Neglect (MST-CAN).

¹³ Judge Andrew Becroft, ‘How to Turn a Child Offender Into an Adult Criminal – In 10 Easy Steps’ (paper presented at the Children and the Law International Conference, Tuscany, Italy, 7 September 2009) 6.

- 78 The introduction of these new models is part of a broad suite of reforms under “Their Futures Matter”, known as the Permanency Support Program.¹⁴ It is hoped that these intensive, wrap-around family preservation services will help stem the number of children entering out-of-home care in NSW, and lead to better outcomes for vulnerable children and young people.
- 79 Interestingly, the number of children entering in out-of-home care decreased in the 2016/2017 financial year by 24 per cent compared to the previous year.¹⁵
- 80 Addressing risk factors within the family may have an enormous effect on the welfare and wellbeing of a child, and may create or reinforce some protective factors against offending behaviour.
- 81 I look forward to following the outcomes of these reforms and the impact of improved supports for families in NSW.

Step 2: Make the age of criminal responsibility as young as possible and get children into Court as soon as possible

- 82 “Child offenders need to face the reality of their criminal futures and learn to deal with, and be sorted out by ‘the system’ at an early age.”¹⁶
- 83 The features of the justice system underlying this second ‘step’ include the principles of early intervention and diversion, which are critical pillars in an enlightened youth justice system.
- 84 In NSW the age of criminal responsibility is 10, and the rebuttable presumption of *doli incapax* applies between the ages of 10 and 14.

¹⁴ NSW Department of Family and Community Services, *2016-2017 Annual Report* (2017) FACS website https://www.facs.nsw.gov.au/_data/assets/pdf_file/0008/535256/FACS-Annual-Report-Volume-1-Performance-and-activities-report.pdf.

¹⁵ Ibid 22.

¹⁶ Judge Andrew Becroft, ‘How to Turn a Child Offender Into an Adult Criminal – In 10 Easy Steps’ (paper presented at the Children and the Law International Conference, Tuscany, Italy, 7 September 2009) 10.

- 85 The Children’s Court has recently expressed its support for the recommendation made by the Royal Commission into the Protection and Detention of Children in the Northern Territory, to amend legislation to provide that the age of criminal responsibility be raised to 12 years.
- 86 In a submission to the Legislative Assembly Committee on Law and Safety Inquiry into the adequacy of youth diversion programs in NSW, the Children’s Court recommended that close consideration be given to raising the age of criminal responsibility, as this would align NSW with contemporary scientific research, as well as with the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* which stipulates that the minimum age set should recognise emotional, mental and intellectual maturity.
- 87 Raising the age would also likely reduce the number of children coming before the Courts at an early age which increases the risk that they will become desensitised to the Court process (the “inoculation” effect¹⁷), reducing the effectiveness of the Court process as a deterrent.
- 88 However, in order to successfully divert children from the justice system where the minimum age of criminal responsibility is 12, there must be processes, supports and services in place to identify and respond to the needs of children who are engaging in offending behaviour at a younger age. Without access to appropriate diversionary services, there is a risk that contact with the Court system will simply be delayed until the child reaches the age of 12, with no positive interventions in the interim period, and no successful diversion from further offending.
- 89 There are several diversionary programs and mechanisms in NSW, which are informed by enlightened policy and practice, such as the *Young Offenders Act 1997* (YOA), which provides police with the options of a warning, caution or Youth Justice Conference (YJC).

¹⁷ Judge Peter Johnstone, ‘Emerging Developments in Juvenile Justice’ (2016) 12(4) *The Judicial Review* 456, p 464.

- 90 The Children’s Court has recently suggested there may be value in lowering the threshold of the requirement for an admission of guilt, to something along the lines of a “concession of wrongdoing” or to “not deny” the offence rather than an admission to the specifics of the offence.
- 91 In New Zealand the young person is required to “not deny” the offence in order to have access to a diversionary mechanism called a family group conference. The Royal Commission into the Protection and Detention of Children in the Northern Territory recently recommended that the Police General Order be amended to remove the requirement that a child or young person admit to committing an offence, and instead require that the young person “does not deny” the offence.¹⁸
- 92 The effectiveness of the YOA in diverting young offenders relies, to a great extent, on the awareness of police officers of this diversionary mechanism.
- 93 I have been in ongoing discussions with NSW Police with a view to ensuring that all police officers receive specialised training tailored to the unique nature of children and young people and the diversionary mechanisms available to police to divert children and young people away from long-term involvement with the criminal justice system and into support services.
- 94 The Children’s Court is also supportive of the Royal Commission’s recommendation that children under the age of 14 should not be ordered to serve a time of detention except in certain circumstances.¹⁹ This would reflect practices in other international jurisdictions such as Belgium, Switzerland, Finland, Scotland and England which require children under a certain age to be dealt with through a therapeutic, protective response.

¹⁸ Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B, 227 (Recommendation 25.12).

¹⁹ Commonwealth, Royal Commission into the Protection and Detention of Children in the Northern Territory, *Final Report* (2017) vol 2B (Recommendation 27.1).

- 95 This recommendation is supported by a growing body of evidence which shows that the incarceration of children and young people is both less effective and more expensive than community-based programs, without any decrease in risk to the community. Studies have shown that incarceration is no more effective than probation or community-based sanctions in reducing criminality.²⁰
- 96 No experience is more predictive of future adult difficulty than confinement in a juvenile facility.²¹
- 97 Children who have been incarcerated are more prone to further imprisonment. Statistics from the NSW Bureau of Crime Statistics and Research (BOCSAR) show that 66.2 per cent of young offenders exiting detention were reconvicted of another offence within the next 12 months in 2015.²² Recidivism studies in the United States show consistently that 50 per cent to 70 per cent of young people released from juvenile correctional facilities are re-arrested within 2 to 3 years.²³
- 98 Furthermore, children who have been incarcerated achieve less educationally, work less and for lower wages, fail more frequently to form enduring families and experience more chronic health problems (including addiction) than those who have not been confined.²⁴ Confinement all but precludes health psychological and social development.²⁵
- 99 Detention, therefore, is not the best answer to the multiple, complex and traumatic problems experienced by and caused by young offenders.

²⁰ K. Richards, 'What makes juvenile offenders different from adult offenders' (February 2011) 49 *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology.

²¹ M. Wald and T. Martinez, 'Connected by 25 – Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds' (2003) Stanford University: <http://www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf> (accessed 18 April 2017).

²² NSW Bureau of Crime Statistics and Research, "Re-offending Statistics for NSW" http://www.bocsar.nsw.gov.au/Pages/bocsar_pages/Re-offending.aspx, accessed 23 January 2018.

²³ E. P. Mulvey, 'Highlights from Pathways to Desistance – A Longitudinal Study of Serious Adolescent offenders', Office of Juvenile Justice and Delinquency Prevention.

²⁴ *Ibid*, Road Map.

²⁵ M. Wald and T. Martinez, 'Connected by 25 – Improving the Life Chances of the Country's Most Vulnerable 14-24 Year Olds' (2003) Stanford University: <http://www.hewlett.org/wp-content/uploads/2016/08/ConnectedBy25.pdf> (accessed 18 April 2017).

100 Rather, early intervention and diversion mechanisms and services should be invested in and utilised to their greatest potential to ensure that children and young people receive the care and support they need to become positive and engaged members of society.²⁶

Step 3: Criminalise welfare issues

101 *“It does not matter what lies behind child offending, and it is not relevant if inadequate parental and family care and protection issues are the root cause. The starting point is that a child has offended, and has then created a victim. There must be criminal accountability for law breaking, and consequential punishment.”²⁷*

102 There is a well-established link between childhood maltreatment and subsequent offending in adolescence.²⁸

103 Children and young people who have been in care are grossly over-represented in the criminal justice system. This phenomenon is known as the “cross-over” of children from care to crime, and characterises the lives of many children and young people I, and my colleagues the specialist Children’s Magistrates, see on a daily basis.

104 One important measure which has been taken in NSW is the Joint Protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system.²⁹

²⁶ Judge Peter Johnstone, ‘Emerging Developments in Juvenile Justice’ (2016) 12(4) *The Judicial Review* 456; Judge Peter Johnstone, “Early Intervention, Diversion and Rehabilitation from the Perspective of the Children’s Court of NSW” (Paper presented at the 6th annual Juvenile Justice Summit, Sydney, 5 May 2017).

²⁷ Judge Andrew Becroft, ‘How to Turn a Child Offender Into an Adult Criminal – In 10 Easy Steps’ (paper presented at the Children and the Law International Conference, Tuscany, Italy, 7 September 2009) 13.

²⁸ Judith Cashmore, “The link between child maltreatment and adolescent offending”, (2011) 89 *Family Matters*, available at: <https://aifs.gov.au/publications/family-matters/issue-89/link-between-child-maltreatment-and-adolescent-offending>.

²⁹ NSW Ombudsman, Joint Protocol to reduce the contact of young people in residential out-of-home care with the criminal justice system: <http://www.acwa.asn.au/Pages/Conf2016/Mon/HeritageRoom3/1330/MonHeritageRoom31350Demetrius/CareandCrimeJuliannaDemetriusNSWOmbudsman15August2016.pdf>.

- 105 The Protocol recognises that children and young people exhibit challenging behaviours, particularly when they have experienced trauma, abuse or neglect, and that this behaviour should be managed within the service itself.
- 106 Responding to behaviour with criminal charges is not an appropriate response in these circumstances, and essentially ensures a child or young person crosses over from the care jurisdiction to the crime jurisdiction.
- 107 I have also been strongly advocating for a 'secure welfare' power, or a power to refer a child in the criminal justice system to the care and protection system. Victorian and Western Australian legislation provides for a power to make arrangements for the placement of a child in a secure care facility, which is sometimes necessary in extreme cases where a child or young person is putting themselves or others at risk, and requires intensive care.³⁰
- 108 Similarly, the ACT has enacted legislative provisions which enable the Court to refer a child in the criminal list who is in need of care and protection to the care system.³¹
- 109 Such a power could contribute to the successful diversion of a child or young person with complex needs away from the criminal justice system in NSW.

Step 4: Treat all young offenders as if they were the same.

Step 5: Always arrest the child if they offend, especially the first time no matter what the circumstances. Be firm and disrespectful, and always bring them to court.

- 110 The importance of tailored and targeted supports within the community which identify and respond to the individual needs of each child cannot be overstated.

³⁰ *Children and Community Services Act 2004 (WA) s 88C, Children, Youth and Families Act 2005 (Vic).*

³¹ *Court Procedures Act 2004 (ACT) s 74K.*

- 111 Programs such as Youth on Track and the Family Investment Model allow for a holistic approach to a young person's criminal behaviour, with the aim of addressing criminogenic risk factors in order to successfully divert a young person away from continuing interactions with the justice system.
- 112 Furthermore, given the invariably complex causes of offending in children and young people, flexibility is critical when sentencing young offenders, as it provides Children's Magistrates with the ability to enforce tailored solutions which can address the underlying causes of a young person's offending, as well as promote rehabilitation and deliver community-focused outcomes.
- 113 I am continuing to advocate for a broader range of flexible sentencing options which could provide opportunities for intensive supervision and casework by Juvenile Justice.

Step 6: Sideline the child offender in the justice response. Ensure the child is marginalised and does not participate. Prevent any contact between the offender and the victim.

- 114 I am particularly supportive of Youth Justice Conferences as a diversionary option in NSW, as they facilitate cooperation between the young person and police, and foster collaboration and input from the individual offender, the victim/s, families and communities.
- 115 A Youth Justice Conference has the capacity to improve trust in the criminal justice system and there is scope within the process to reinforce cultural connections for Aboriginal and Torres Strait Islander young people.
- 116 In my view, they produce fruitful results for both the offender and the community.

Step 7: Always enter a conviction on the child's record. And make no allowance for youth at sentencing: 'adult time for adult crime'.

Step 8: Convicted young people need a sharp shock; in praise of corrective training, boot camps, and scared straight programmes.

- 117 The specialised practices and procedures of the Children’s Court reflect an enlightened judicial understanding of the issues and risks impacting on children and young people, as well as a comprehensive understanding of important legislative principles distinguishing children and young people from adult offenders.
- 118 The specialist nature of the Children’s Court also operates as a safeguard to the detrimental exposure of children to the adult court environment and to adult offenders.
- 119 I am an advocate for the expansion of the specialist Children’s Court across as much of the State as might realistically be achieved, to ensure that all children and young people receive the benefit of the specialised treatment from trained professionals and diversionary programs within the Children’s Court jurisdiction, and consistency of opportunity and outcomes.

Step 9: Segregate young offenders from their families, communities and victims. Wherever possible, aggregate them together in treatment facilities and in prison.

Step 10: If all else fails, use ‘what works’ for child offenders, but deliver it badly.

- 120 The evidence arising from the Royal Commission into the Protection and Detention of Children has highlighted the systemic failures that can arise in the care and protection and the criminal justice system when siloes are maintained and networks are broken.
- 121 Many of the findings and recommendations explore and challenge the pathway to detention, and have highlighted the need for specialist training, knowledge and experience for all practitioners and stakeholders dealing with children and young people.
- 122 It is very encouraging to see an appetite for change to a more therapeutic approach to children who need care, are not attending school or who are committing crimes. It is also pleasing to see that many of the recommendations made by the Royal Commission are already implemented and practiced in NSW.

- 123 Examining and challenging the social disadvantage and disempowerment that have defined the lives of generations of families who come before the Children's Court seems, at times, overwhelming.
- 124 However, I continue to be inspired and motivated by the resilience and courage shown by children and young people, and their capacity to change, adapt and thrive, despite the enormous challenges and difficulties they face. I hope you all find a similar sense of encouragement in the important work you undertake.
- 125 I thank you all for your continuing dedication and commitment to this jurisdiction.

Judge Peter Johnstone

President of the Children's Court of NSW