



## Précis Paper

### The Jurisdiction and Practice of the Children's Court in NSW

This presentation provides a thorough overview of the work of the Children's Court in NSW and includes fascinating insight from the President of the Court into current issues in the children's jurisdiction.

#### **Discussion Includes**

- The origins and jurisdiction of the Children's Court
- The over-representation of Indigenous youth in juvenile justice
- The Young Offenders Act 1997 (NSW)
- The role of police and other government agencies in the Children's Court jurisdiction
- Sentencing options
- Communication difficulties with children
- The role of registrars

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### The Jurisdiction and Practice of the Children's Court in NSW

1. In this edition of BenchTV, Judge Peter Johnstone (Judge, Children's Court of NSW, Sydney) and Debra Maher (Solicitor in Charge, Children's Legal Service, Legal Aid NSW, Sydney) discuss the jurisdiction and practice of the Children's Court in NSW.

#### The Origins and Jurisdiction of the Children's Court

2. The Children's Court sits at the bottom of the hierarchy of the courts administering justice in NSW, however has a highly important role for children who come into contact with the justice system. The Court is a specialist court and believes strongly that children are different from adults and should be treated differently in the justice system. The idea of a separate and discrete jurisdiction to deal with children has evolved over time. Today, there are 15 Specialist Children's Magistrates, plus 10 Children's Registrars. However, the Children's Court still does not cover the totality of issues concerning children in NSW.
3. The jurisdiction of the Court includes two areas: youth crime, and care and protection. Children between the ages of 10 and 18 who commit a crime are dealt with by the Children's Court, however only 60 percent of those cases are dealt with by Specialist Children's Magistrates due to the lack of Specialist Magistrates in rural and regional areas in Western NSW. In those areas, the jurisdiction is exercised by magistrates of the Local Court. In the care jurisdiction, the Specialist Children's Magistrates now cover 90 percent of the care cases in NSW.
4. The Children's Court is able to deal with serious offences which, if the offender was an adult, would need to be dealt with by the District Court. The Court's philosophy is to keep matters within the Children's Court as much as possible, although the legislation allows for the prosecution to make an application to remove a matter to a higher court where necessary.
5. The specialist children's jurisdiction is in line with emerging details about the development of the brain and of adolescents. Both presenters noted that recent research indicates that the brain does not develop until much later than previously thought. It is important for the Children's Court to recognise what is driving children's behaviour, as the frontal lobes, which involve reasoning and impulse control, do not fully develop until around the age of 23 for young women and 28 for young men. President Johnstone noted the importance of addressing criminal behavior by young people in a more scientific way, and of keeping young people out of the criminal justice system while they develop and mature.

6. In the care jurisdiction, the Court involves discrete, distinct and specialised principles, practices and procedures which have regard to their fundamental purpose, namely the safety, welfare and well-being of children in need of care and protection. The science around the development of the brain is also relevant here. Emerging science indicates the importance of the development of the brain in the first 1000 days of a child's life, being the period from utero until about 2 and a half years of age. This is the period in which the brain develops the most rapidly, and there is a correlation between events and trauma that happen to children in their first 1000 days and how they will behave in the future. This research has an impact in the care jurisdiction when considering how to deal with children who have been the subject of abuse or neglect.
7. The Children's Court has very strict time requirements in the care jurisdiction, and if a child is removed by Community Services, they must bring the matter before the Court within 5 working days. The Court disposes of 80 percent of cases within 9 months and 100 percent within 1 year. However, President Johnstone did note that there can be some negative impacts of this expedition, including not having sufficient time to devote to an individual child. In addition, in the care jurisdiction, sometimes the requirements to deal with matters expeditiously can have a negative impact on families where there is a prospect of reunification, and the Court is currently examining this issue.
8. In the criminal jurisdiction, given the volume of cases in the Children's Court, there is not necessarily the time there to examine in great detail why children are offending. The Youth Koori Court and the Youth Diversion List have been set up to consider more fully why the child is committing crimes, including socio-economic and health factors. The Court then tries to address these issues with a more holistic plan and with appropriate services being provided.
9. As in the wider criminal justice system, Indigenous youths are over-represented in the juvenile justice system. Aboriginal detainees make up more than 50 percent of detainees in juvenile justice. To address this issue, the Children's Court has set up the Youth Koori Court, which has been underway for around two years and is operated as a pilot out of Parramatta. The key features of the Youth Koori Court include:
  - Aboriginal Elders are included in the process: This gives the Court cultural sensitivity and legitimacy, and also allows the Elders to help the young people in the Court system by explaining cultural origins and teaching them about identity.
  - The therapeutic nature of the jurisdiction: The Court does not just respond to the crime, but looks at why the child is committing the crime, including health and socio-economic factors.

- Sentencing: Sentencing is a holistic process which includes discussions with various agencies and the development of a child-specific plan to assist the child to rehabilitate themselves.

### Breaking the Cycle of Crime and Detention

10. The majority of clients in the criminal jurisdiction come from backgrounds of need and have significant history of trauma and neglect. Of the children who appear before the Children's Court, 40 percent do not attend school; 40 percent of children who commit crimes and come before the Children's Court come from a background of care and protection; and 40 percent of children in residential care are not going to school.
11. In order to attempt to remedy this cycle, President Johnstone set out the four pillars of the modern youth justice system: prevention, early intervention, diversion and rehabilitation. One of the main areas of prevention is making sure that every child goes to school. To achieve this goal, every child who goes into detention has an assessment that covers their dental and general health and their literacy and numeracy. Nearly 98 percent of children who go into detention need dental work, and there is a close correlation between poor teeth and hearing.
12. On the early intervention and diversion side, the Court is encouraging the government to intervene with families early, and programs like Youth on Track try to address issues early when youth come into contact with the justice system. The Court is keen to divert children out of the justice system if they have a health issue that is causing them to misbehave, and the *Young Offenders Act 1997* (NSW) sets out a regime whereby the police have the opportunity to caution or reprimand children, or refer them to Youth Justice Conferences. Finally, when sentencing young people, the primary consideration for the Children's Court is rehabilitation, and the youth detention population has decreased by 35 percent over the past 5 years in NSW.

### The Young Offenders Act 1997 (NSW)

13. The police can deal with young people of their own accord under the *Young Offenders Act* by giving them a caution or sending them to a Youth Justice Conference. If the police decide not to take this step, the Court has a second opportunity to either caution the child or refer them to a Youth Justice Conference. The statistics show that these options are used a great deal by the specialist Children's Court.
14. The Act allows children to be diverted from the justice system altogether, however there are a number of obstacles to full implementation of the diversionary processes under the

Act. On the police side, there can be an uneven takeup of the diversionary programs depending on the Local Area Command. The Court is working with police to try to encourage them to have a more comprehensive and consistent approach to the application of the *Young Offenders Act*. There is also some inconsistency in takeup amongst magistrates.

15. Another issue is that the *Young Offenders Act* cannot be used in respect of certain types of crime. President Johnstone considered that this should be a matter for the Court's discretion, rather than legislative prescriptions. In addition, the *Young Offenders Act* cannot be used in Youth Justice Conferences unless there is first an admission by the child of the offence. The Protected Admissions Scheme allows the child to concede a wrongdoing in a way that prevents the admission from being used in Court against them at a later time, however this still creates some impediment to the implementation of the system.

#### The Role of Police and Other Government Agencies in the Children's Court Jurisdiction

16. Police have considerable discretion when interacting with young people, and a more enlightened approach has developed recently. The incidences of police arresting children for very minor offences, like breaches of curfew and disputes in residential care, have dropped off considerably, and arrest is increasingly used as a last resort for disputes that take place in residential care facilities. This progress has been a factor in the decrease in the numbers of youth in juvenile detention. The Police Aboriginal Strategic Advisory Committee (PASAC) has also been developed to look at ways in which the police can assist in reducing the incarceration of Aboriginal people. Finally, President Johnstone has worked closely with police prosecutors to better educate them about issues specific to prosecuting young people, and a more general police training program for cadets in Goulbourn is being developed.
17. Another key agency that works closely with the Children's Court is Juvenile Justice. Juvenile Justice runs the youth detention centres, and the ratio of Juvenile Justice officers to detainees is around 2:1. Juvenile Justice is also responsible for preparing background reports for sentencing.
18. On the care and protection side, the Court works closely with Protective Services and Justice Health. More generally, other important partners for the Court include Legal Aid, the Aboriginal Legal Service, and the Department of Education.

#### Sentencing in the Children's Court

19. To maintain the focus of sentencing on rehabilitation, the Court would like to have greater flexibility in sentencing options. President Johnstone considered that the sentencing options available for the Court come from adult legislation transposed upon the children's jurisdiction, which imposes limitations on the Court. 80 percent of children will grow out of crime, and given the deleterious effect of detention, it is very important to try to use detention as an absolute last resort.
20. President Johnstone also noted that there is a misunderstanding in the community about how children react to punishment. A child may not realise the implications of a bond or probation order, but may have a stronger reaction to a Youth Justice Conference. President Johnstone suggested that requiring the child to do something, such as in a Youth Justice Conference, has the positive impact of requiring the child to address the criminal behavior, and studies of the Youth Justice Conference scheme show that all participants consider the process to be more positive than if the child just goes through the normal process.

#### Communication Issues in the Children's Court

21. Children may find the Court a daunting place, and find it difficult to understand what is happening or participate in the process. President Johnstone indicated that, unfortunately, time limitations prevent the Court from addressing each individual child who comes before the Court in an in-depth manner, however the Specialist Children's Magistrates generally try to talk directly to the child.
22. The Children's Court tries to be more informal than a regular court, such as by having all parties remain seated and having police attend in plain clothes. However, the President noted that there is still room for improvement, and the Court is starting to look at using child-friendly language and engaging children in new ways.

#### The Role of Registrars

23. There are 10 full-time Specialist Children's Registrars in the Children's Court. The Registrars are all trained in mediation, and their role is to conduct Dispute Resolution Conferences in the care jurisdiction. They are available to travel anywhere in the State. The Dispute Resolution Conferences have a good success rate, and even if the matter is not resolved at the Dispute Resolution Conference, often it sets the scene for resolution on the day of trial.

## **BIOGRAPHY**

### Judge Peter Johnstone

Judge, Children's Court of NSW, Sydney

Judge Peter Johnstone is the President of the Children's Court of NSW. In addition to sitting regularly in both care and youth crime cases across the state, the President has overall responsibility for the administration of the Court, the Children's Magistrates and the Registrars, arranging sittings and circuits, training, developing court rules, practice notes, policies and guidelines. The President also has additional statutory functions that include advisory, educational and community liaison roles.

### Debra Maher

Solicitor in Charge, Children's Legal Service, Legal Aid NSW, Sydney

Debra Maher was admitted as a solicitor in 1995. She is an accredited specialist in criminal law and children's law and is a member of the Law Society's Children's Legal Issues Committee. She is currently the Solicitor in Charge of the Children's Legal Service in the criminal law division of Legal Aid NSW. She has previously worked as a DPP solicitor and also has a 20 year history of voluntary board memberships in NGOs dealing with violence against women.

## **BIBLIOGRAPHY**

### Legislation

*Young Offenders Act 1997* (NSW)