Responding to young people offending

Remarks of the Hon Marilyn Warren AC
Chief Justice of Victoria
The Hon Austin Asche AC QC Oration in Law and Governance
Charles Darwin University
11 October 2016

I acknowledge that we meet on the traditional lands of the Larrakia people. I pay my respects to their elders, past and present.

- Your Excellency, the Administrator and Mrs Hardy
- Chief Justice Michael Grant
- Your Honours
- The Hon Kevin Lindgren
- The Hon Austin Asche and Dr Asche
- The Hon Margaret White and Commissioner Gooda
- Vice-Chancellor
- Distinguished members of the Academy
- Ladies and Gentleman

Many months ago I was graciously invited by Professor Les McCrimmon of the Law School to give this year's Austin Asche Oration. I am greatly honoured that the University and the Australian Academy would invite me to speak.

Many, many years ago I attended a lecture given by the Hon Austin Asche at the Royal Children's Hospital in Melbourne. The lecture was on the topic of child protection and the role that the medical profession plays. Around that time mandatory reporting was being debated triggered by some very tragic cases where very young children had died from neglect and cruelty. The lecture hall was packed. There was standing room only. I was struck by the extraordinary respect from a non-legal audience that Austin Asche commanded on a very controversial topic.

I reflected on my almost two decades as a judge and I was very struck by the fact that I wanted to talk about something in the criminal justice system that is very obvious but about which little attention seems to be paid and which is related to children and young persons.

Essentially it comes down to this: if the problems of education, social dysfunction and homelessness are addressed many of the problems resulting in the horrific cases we see may be avoided.

During my time as a judge, I have sat on a number of cases involving criminal conduct which were confronting, cruel and overwhelmingly anti-social. So often the perpetrator of these offences has killed an innocent victim. I provide an anecdotal snapshot: the offender is invariably male, somewhere in his 20's or 30's, has been the subject of cruelty and more often than not sexual abuse as a young child, neglected, lacking a good and positive male role model in their youth, lacking support to achieve an education, has entered the juvenile justice system, become schooled in further anti-social and dysfunctional misbehaviour, graduated into adult prisons, served a criminal apprenticeship, left prison unrehabilitated and gradually progressed through further offending until they ultimately destroy the life of another human being.

Judges are intrinsically involved in the sentencing process. Yet, we are not part of the education, social welfare, medical or corrections environment or context for the individual. When judges complete trials or appeals and then turn to the sentencing process a sentence will be imposed or, where appropriate, a resentence or an upholding of an earlier sentence will occur. The prisoner is then taken away and judges have no further involvement in the

process.[1] The sentencing judge will usually never hear of the individual they have sentenced again. There is no judicial monitoring of what happens to the individual, where they are placed in the corrections system, how the individual's rehabilitation is to be effected and so on. If we reflect on it, this of itself might be said to be odd.

I have reflected that when dealing with children and young offenders it would be better to have a holistic approach to protection, sentencing and detention. Such an approach would require a whole-of-government response. There is no doubt that such a system can be said to be costly. However, the long-term savings can be appreciated. The long-term social investment may create a chance to divert and rehabilitate the individual and, very importantly, save victims' lives.

To establish that this social investment is desirable and necessary, we need to consider several matters tonight. First we need to understand the ways in which young minds are different to adult minds, and how this relates to youth offending. We will need to look briefly at the law on sentencing young offenders. Next we should turn back the clock to the 1990s, when an inquiry was held into how children and young people should best be dealt with

[1] Unless the individual is subject to an ongoing supervision order as will occur these days with serious sex offenders and terrorists.

in the legal process. We will see that slow progress has been made in Australia since the findings of that inquiry, especially in respect of young Indigenous offenders. But we will see some shining examples of progress in multidisciplinary youth courts and indigenous youth courts, which bear out the importance of education to rehabilitation. When considering how we should go about investigating what social investment is needed, we will draw upon the model of the Victorian Royal Commission into Family Violence as a novel and effective approach to investigating reform.

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We must bear in mind that children's cognitive capacity develops gradually from the age of around 10 right through young adulthood which is usually regarded as concluding at around 24 years of age.[2] In early adolescence, children are 'mostly interested in [the] present with little thought about the future' and want to 'test rules and limits'.[3] It is not until young people are around 20 years of age that they will usually have the 'ability to think ideas through from beginning to end' or the 'ability to delay gratification'.[4]

[2] Susan M Sawyer et al, 'Adolescence: A Foundation for Future Health' (2012) 379 *The Lancet* 1630, 1632.
[3] Susan M Sawyer et al, 'Adolescence: A Foundation for Future Health' (2012) 379 *The Lancet* 1630, 1632.
[4] Susan M Sawyer et al, 'Adolescence: A Foundation for Future Health' (2012) 379 *The Lancet* 1630, 1632.

Crucially adolescence is also a 'sensitive time for social learning through imitation of behaviours'[5] and a period 'in which both normative and maladaptive patterns shape future trajectories'.[6] These traits make some children and adolescents both more likely to contravene Australia's criminal laws and more susceptible to the negative impacts of detention. Former Australian of the Year Professor Patrick McGorry stated clearly that poor mental health is the biggest health risk for young people across Australia.[7] Professor McGorry cited statistics that suggest 50% of young people will develop a mental health problem.[8] Placing such vulnerable people in detention exacerbates this risk. Professor McGorry has also referred to research indicating that detention 'damages [young people's] cognitive abilities, their emotional abilities and…really has the potential to blight their whole futures'.[9]

A report of the Sentencing Advisory Council of Victoria[10] very recently made some highly relevant observations.

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[5] Susan M Sawyer et al, 'Adolescence: A Foundation for Future Health' (2012) 379 *The Lancet* 1630, 1635.
[6] Susan M Sawyer et al, 'Adolescence: A Foundation for Future Health' (2012) 379 *The Lancet* 1630, 1633.
[7] http://www.theaustralian.com.au/news/health-science/kids-and-teenagers-with-mental-health-issues-deserve-early-intervention/news-story/d3034cb356ae6f0421d0c3a181c908cb
[8] http://www.abc.net.au/7.30/content/2016/s4479239.htm
[9] http://www.couriermail.com.au/news/national/former-australian-of-the-year-patrick-mcgorry-calls-on-politicians-to-free-asylum-seeker-children-from-detention/story-e6freooo-1226051825641; See further Australian Children's Commissioners and Guardians, *Human Rights Standards in Youth Detention Facilities in Australia: The Use of Restraint, Disciplinary Regimes and Other Specified Practices* (April 2016) <https://www.ccyp.wa.gov.au/media/2152/report-accg-human-rights-the-use-of-restraint-disciplinary-regimes-and-other-specified-practices.pdf>.
[10] Sentencing Children in Victoria – Data Update Report, SAC, July 2016.

Being young is itself a risk factor for offending. Young people are over-represented compared with adults in alleged offending statistics – in 2009-2010 there were 3,785 offenders per 100,000 young people nationwide,[11] compared with 1,940 offenders per 100,000 adults.[12]

But much offending by young people is minor in nature and research says that many adolescents are likely to cease offending once they reach neurological and social maturity. It is only the persistent offenders who continue offending beyond that point. Persistent offenders are a minority of youth offenders, but they are responsible for a disproportionate amount of offences.[13]

There is little research into the issue of young people reoffending in adulthood, but one study showed that an earlier age of onset offending is related to a higher risk of recidivism.[14]

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Sentencing laws across Australia impose reasonably consistent obligations on judicial officers. Broadly speaking, the

[11] http://www.abs.gov.au/ausstats/abs@.nsf/Products/9458935BB998B2EBCA257840000F31C9?opendocument
[12] http://www.abs.gov.au/ausstats/abs@.nsf/Products/42EC7840CD683146CA257840000F319D?opendocument; Note also that the ABS data from 2014-15 showed that '[y]outh offenders comprised just over a fifth (21%) of the total offender population in 2014-15, while representing 14% of the total Australian Estimated Resident Population (ERP).' http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4519.0~2014-15~Main%20Features~Youth%20Offenders~4
[13] Sentencing Children and Young People in Victoria, Sentencing Advisory Council Report, April 2012, 18.
[14] Sentencing Children and Young People in Victoria, Sentencing Advisory Council Report, April 2012, 18.

same obligations apply nationally when sentencing children and young offenders.

If I take the Victorian *Children Youth and Families Act* as an example, there are a number of essential things that a judge or magistrate must consider in the sentencing process when dealing with children and young offenders. Broadly speaking they are:

- the need to strengthen and preserve the relationship between the child and the child's family;
- the desirability of allowing the child to live at home and allowing the child's education, training or employment to continue without interruption or disturbance;
- the need to minimise the stigma;
- if appropriate, making the child understand his or her responsibility for the offending; and
- if appropriate, the protection of the community.[15]

In a 2016 judgment of the Victorian Court of Appeal the Court addressed the special circumstances that apply when sentencing young offenders. The majority (President Maxwell and Justice Redlich) stated the position:

> First, the statutory framework for juvenile justice compels the court sentencing a young offender (almost always the Children's Court) to adopt the offender-centred (or 'welfare') approach rather than the 'justice' or 'punishment' approach.

[15] See s 362 of the *Children, Youth and Families Act 2005* (Vic)..

> Secondly, and just as importantly, this strong legislative policy is well supported by the extensive research into adolescent development conducted over the past 30 years.[16]

In the Victorian Court of Appeal case, the Court resolved upon a non-custodial disposition. The individual had been found guilty of seven charges of rape. The individual was 17 years old and the victim 15. A 12 month youth supervision order with conditions was affirmed. The conditions included attendance at programs as directed, abstinence from alcohol and the use of illegal drugs, residential requirements, a curfew, psychological counselling with a specified psychologist and drug and alcohol counselling as directed. We can see that the Court of Appeal was very much directed to a welfare rather than a punishment approach for the individual.

The statutory principles are largely consistent with laws across the nation and largely incorporate the principles set out in the Convention on the Rights of the Child.

For the discussion, we need a starting point so let us wind the clock back 20 years.

[16] *Webster (a pseudonym) v The Queen* [2016] VSCA 66, [28].

In 1995, the Federal Attorney-General commissioned a report from the Australian Law Reform Commission and the Federal Human Rights and Equal Opportunity Commission reviewing how children and young people should best be dealt with in the legal process. The Terms of Reference for the 1997 Joint Report acknowledged Australia's state and federal governments owe a special responsibility to children. [17] Children and young people have a 'particular vulnerability'[18] that requires they be treated not with kid gloves but with an awareness of their unique stage of life. In the terms of reference, the Attorney-General requested that the two Commissions 'have regard to [the special responsibility] arising under the Constitution and Australia's international human rights obligations, particularly under the Convention on the Rights of the Child'.[19]

The Commissions published their report entitled *Seen and Heard:* on 19 November 1997. The Report noted that numerous preceding papers repeated 'concerns about successive generations

[17] In the Preamble to the Convention on the Rights of the Child ('the Convention'), it is reiterated that children because of their 'physical and mental immaturity, nee[d] special safeguards and care…'. *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), preamble.

[18] Australian Children's Commissioners and Guardians, *Human Rights Standards in Youth Detention Facilities in Australia: The Use of Restraint, Disciplinary Regimes and Other Specified Practices* (April 2016) <https://www.ccyp.wa.gov.au/media/2152/report-accg-human-rights-the-use-of-restraint-disciplinary-regimes-and-other-specified-practices.pdf>.

[19] The terms of reference are reproduced at Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 3.

of children'.[20] The Report's own findings were consistent with these concerns.[21] The Report said that:

> 'Australia's legal processes ha[d] consistently failed to recognise the [fact that Australia's children were its future] by ignoring, marginalising and mistreating the children who turn[ed] to them for assistance'.[22]

Amongst the many failures compiled by the joint Commissions in the 1997 Joint Report, were these findings:

1. that a large number of people questioned 'the effectiveness of current detention practices in rehabilitating young offenders' and fervently believed that there was insufficient attention 'given to the circumstances in which detention is applied as a sentencing option and [to] the environment provided for young detainees';[23]
2. that there was an 'increasingly punitive approach to children in a number of juvenile justice systems';[24]
3. that there was a 'large gap between the principles and policies of some [juvenile detention] centres and their operation in practice';[25]

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[20] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 10 [1.18].

[21] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 10 [1.18].

[22] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 5.

[23] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 290 [19.48].

[24] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 12 [1.30], see further 241 [18.3], 291–2 [19.50]–[19.64].

[25] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 305 [20.3].

4. that there were inadequate complaints mechanisms for children who suffered mistreatment in detention;[26] and
5. that there was a 'discriminatory impact of certain legal processes [which resulted] in the over-representation of some groups, particularly indigenous children, in the juvenile justice and care and protection systems'.[27]

All that in 1997, almost 20 years ago.

With respect to international obligations, the Joint Report concluded that there were 'significant breaches of [the Convention on the Rights of the Child] commitments on the part of federal, State and Territory governments'.[28]

Unsurprisingly, one of the major recommendations of the Joint Report was that the mandatory detention regimes, that were introduced in Western Australia and the Northern Territory in 1996, should be repealed.[29] The Northern Territory's system provided that a young person found guilty of more than one property offence had to be imprisoned, no matter the severity of the second

[26] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 315–6 [20.69]–[20.70]; see further 271–2 [18.140]–[18.141],
[27] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 12 [1.30], see also at 254 [18.43], 257 [18.64], 261 [18.89].
[28] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 42 [3.19].
[29] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 292 [19.64].

offence.[30] The statute in Western Australia provided that a juvenile or adult must be imprisoned for at least 12 months if they were convicted of a home burglary for a third time.[31]

In 1999 (two years after the report), an opposition bill was introduced into federal parliament titled the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 (Cth). The bill included a section which read:

> A law of the Commonwealth, or of a State or of a Territory *must not require a court to sentence a person to imprisonment or detention for an offence committed as a child*.[32] (my emphasis)

The bill noted that it was intended to implement Australia's human rights obligations under Articles 37(b) and 40(4) of the Convention on the Rights of the Child. The bill passed through the Senate but evidently the Government did not support the Bill.

The following year, another bill was introduced into federal parliament. This echoed the provision in its predecessor but with a limitation; it read:

> A law of the Commonwealth or of a State or of a Territory must not require a court to sentence a person to

[30] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 291 [19.54]; see *Juvenile Justice Act 1983* (NT) ss 53AE-AG.

[31] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 291 [19.54]; *Criminal Code* (WA) s 401(4).

[32] Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 (Cth), s 5 (emphasis added).

imprisonment or detention for a *property* offence committed as a child.[33]

This too lapsed with no action taken.

The Northern Territory ultimately repealed its mandatory imprisonment regime in 2001.

The Western Australian regime was amended[34] in 2015 when a discretion was introduced through which the judge could choose not to count the current offence as a third relevant conviction (which would lead to a mandatory sentence) if she or he considered there to be exceptional circumstances.[35] This new discretion applies whether the offender is an adult or a juvenile and has not altered the primary mandatory sentencing regime that remains in place.[36]

The Joint Report also strongly recommended that a number of jurisdictions including Victoria and Queensland alter the laws

[33] Human Rights (Mandatory Sentencing for Property Offences) Bill 2000 (Cth) s 5 (emphasis added).

[34] Note s 401 of Schedule 1: The Criminal Code of the *Criminal Code Compilation Act 1913* (WA) was amended by s 66 of *Criminal Code Amendment 2004 (No 4)* but this amendment did not affect the mandatory sentencing; s 401 was also amended by s 35(4) of *Criminal Law Amendment (Simple Offences) Act 2004 (No 70)* (WA) but again this did not affect the mandatory sentencing regime.

[35] *Criminal Code Compilation Act 1913* (WA), Schedule 1, s 401A(4); see also the Second Reading Speech for the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA), <https://lawlex.com.au/tempstore/WA/Hansard/145182.html>.

[36] *Criminal Code Compilation Act 1913* (WA), Schedule 1, s 401(4); see also the Second Reading Speech for the *Criminal Law Amendment (Home Burglary and Other Offences) Act 2015* (WA), <https://lawlex.com.au/tempstore/WA/Hansard/145182.html>.

that allowed 17 year olds to be placed in adult prisons.[37] The Report found there were often inadequate facilities to provide relevant educational programs or to accommodate the young offenders separately.[38] The Joint Report stated that

> placing a young offender in an adult prison does little to advance the rehabilitative aims of juvenile justice, particularly as contact with adult offenders has a tendency to further criminalise young offenders.[39]

When the Joint Report was published in 1997, five years had already passed since the Queensland government had stated that it intended to remedy this regime to include 17 year olds within the juvenile justice system rather than the adult.[40] No action was taken. By 2004, when Victoria amended its legislation, Queensland became the 'only remaining Australian jurisdiction which treated 17 year olds as adults'.[41]

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[37] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 324 [20.111]; 323 [20.106]; see also *Juvenile Justice Act 1992* (Qld) s 211.

[38] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 324 [20.112].

[39] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 324 [20.112].

[40] Ms Anne Warner (Minister for Family Services and Minister for Aboriginal and Islander Affairs) 5 August 1992, Queensland Legislative Assembly, https://www.parliament.qld.gov.au/documents/hansard/1992/920805ha.pdf, p 6130.

[41] See generally Australian Institute of Criminology, *Trends in juvenile detention in* Australia (May 2011), http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi416.html; the quotation is from Youth Affairs Network Queensland, *Children Don't Belong in Adult Prisons* (Campaign Kit, July 2012) <http://www.childprotectioninquiry.qld.gov.au/__data/assets/pdf_file/0010/171865/YANQ-2.pdf>, slide 7.

In September 2016, the Queensland Premier announced that the government intended within a year to alter the legislation so as to remove 17 year olds from adult jails.[42]

Nationally, there has been gradual progress, important progress. Most of the states and territories are collectively agreed that detaining children and young people is an extreme measure and one to be avoided. Each state and territory has operative legislation that, in the ordinary course of dealing with a juvenile offender, requires numerous steps to be taken before resorting to detention.[43] Most juvenile justice regimes operate under the general principle that 'detaining a youth in custody should only be used as a last resort and should only be for as short a time as is necessary'.[44] There are also strict provisions in all state and territory legislation prohibiting physical punishment as a disciplinary measure, though reasonable force is usually allowed where required to protect a detainee's health or the security of a centre.[45] The use of isolation or solitary confinement of detainees is largely limited except where a superintendent of a youth

[42] Jamie McKinnell, 'Queensland to remove 17-year olds from adult jail', *The Australian* (online) (7 September 2016) <http://www.theaustralian.com.au/national-affairs/state-politics/queensland-to-remove-17yearold-from-adult-prisons/news-story/f71a58cc5d52a44241f7ada12a9f6653>.

[43] See, eg, *Children, Youth and Families Act 2005* (Vic) ss 360–2 and Part 5.3 generally; *Young Offenders Act 1997 (No 54)* s 7(a); *Youth Justice Act 1992* (Qld) Schedule 1(5); *Young Offenders Act 1994* (WA) s 7(h); *Youth Justice Act 1997* (Tas) s 5(1)(g); *Children and Young People Act 2008* (ACT) s 94(1)(f); *Youth Justice Act 2005 (No 32)* (NT) s 4(c).

[44] *Youth Justice Act 1997* (Tas) s 5(1)(g).

[45] See, eg, *Children (Detention Centres) Act 1987* (NSW), s 22; *Youth Justice Act 2005* (NT), s 153; *Children, Youth and Families Act 2005* (Vic), s 487.

detention centre believes it is necessary to protect the detainee's health or where he or she poses a threat.[46] Some jurisdictions require the detainee in isolation be checked on at regular intervals — in Victoria it is every 15 minutes[47] and some states and territories impose maximum times that a young person can be kept in isolation[48] but others leave this at the discretion of the corrections authority. There does not appear to be any mandatory reporting across the country of detention punishment measures, for example, annual reporting to the state or territory parliament.[49]

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So, what is the reason for Australia's slow progress after the Joint Report was released in 1997 with its excoriating observations of our treatment of juvenile detainees and its many clear recommendations?

There has been a tendency for state governments and enforcement agencies to emphasize the topics of law and order and community safety. If I take Victoria in the period 2010 to 2015, sentenced offending patterns are declining, both in the number of children sentenced and the number of charges laid.

[46] See, eg, *Youth Justice Act 2005* (NT), s 153(5); *Children, Youth and Families Act 2005* (Vic), s 488(2).
[47] *Children, Youth and Families Act 2005* (Vic), s 488(5).
[48] *Youth Justice Act 2005* (NT), s 153(5); Corrective Services Act 2006 (Qld) s 121(2).
[49] See, eg, *Children, Youth and Families Act 2005* (Vic), s 488; see also http://hrlc.org.au/the-legality-of-solitary-confinement-and-the-direction-australian-policy-should-take/.

There is increased information available to the public about controversial even high profile criminal conduct through social media and the general media. Academics have identified the readiness of governments to highlight threats to safety and the need for a strong, 'full force of the law' response.[50] It is not clear as to what the foundation of the perceptions of threats to safety are. It may be research drawn from focus groups, surveys or other sources.

Inevitably there will be frustration by enforcement agencies when children and young offenders repeatedly offend, breach bail, abscond from the protected environment and engage in other activities creating difficulties with the managing of their detention. Then there is the matter of offending while on bail.

There is dramatic community concern when there is large-scale wanton disobedience and lawlessness.

At these times resort to detention is a quick and tempting response to satisfy those demanding that something be done. However, is it inconsistent with the obligations required to protect, not punish, children and youth? The potential to break the offending cycle is highest for young people, but they are under-

[50] See the commentary by Professor Russell Hogg on the law and order rhetoric that continues unabated despite reductions or stability in crime rates: Russell Hogg, 'Mandatory Sentencing Laws and the Symbolic Politics of Law and Order' (1999) 22(1) *University of New South Wales Law Journal* 262, 265.

represented in accessing opportunities for rehabilitation. Children in detention are frequently the victims of offences committed by other children in detention, and victimisation is a pathway into offending or re-offending for some children.

The indigenous challenge is one I mention with much hesitation.

Throughout the Joint Report are references to how the deficiencies with Australia's juvenile justice system in 1997 were disproportionately impacting on indigenous children.[51] It noted that it seemed almost every diversionary program aimed at preventing children from being placed in detention was less successful for indigenous children.[52]

Little has changed for indigenous youth. A 2014 Australian Institution of Health and Welfare study indicated that although indigenous children constituted approximately 5.5% of Australia's population of 10 to 17 year olds, they make up over 50% of the

[51] Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997) 283 [19.6].

[52] For example, police cautions or warnings (which could be issued instead of pursuing charges against a child) were given at a far lower proportion for Indigenous children than for non-Indigenous children.[52] When formally processed by police, the chance that an Indigenous child would be arrested rather than summonsed was higher than it was for a non-Indigenous child.
Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process,* Report 84 (1997) 28 [2.82] and [2.85]; see also Chris Cunneen, 'Changing The Neo-Colonial Impacts of Juvenile Justice' (2008) 20(1) *Current Issues in Criminal Justice* page no.

population of 10 to 17 year olds in detention.[53] In the Northern Territory, I understand indigenous youths account for over 90% of the juvenile detainees.[54] Australia wide, Indigenous young people are about 15 times more likely than non-Indigenous young people to be under supervision on an average day.

Senator Pat Dodson spoke in May of this year of the difficulty in reducing the rate of indigenous youths in juvenile detention when disciplinary laws intended to discourage law-breaking are introduced 'without any real consideration of the factors that underlie why people commit crime'.[55] He went on to say '[t]hat is because [indigenous youths] live in poverty, because of the lack of proper education, the lack of opportunity for jobs, the lack of real engagement with the society'.[56]

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[53] Marie Sansom, 'Detaining Aboriginal Youth: Child Protection to Prison' *GovernmentNews* (online), 10 December 2014, <http://www.governmentnews.com.au/2014/12/detainingaboriginalyouthchildprotectionprison/>. AIHW gives the figure as 54% at Australian Institute of Health and Welfare, *Youth Detention Population in Australia 2015* (23 November 2015) 9, accessed at <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129553698>.

[54] Table 26 of the Northern Territory Department of Correctional Services Annual Statistics 2014-5 gives figures showing about 93% of detainees being Indigenous. Note, widely reported as 97% in the following: Helen Davidson, 'Pat Dodson: Indigenous Incarceration Rate 'Shameful' Due To Failure To Address Poverty', *The Guardian* (online) 26 May 2016, < http://www.theguardian.com/australia-news/2016/may/26/patdodsonindigenousincarcerationrateshamefulduetofailuretoaddresspoverty>. See also, https://www.nt.gov.au/__data/assets/pdf_file/0004/238198/Review-of-the-Northern-Territory-Youth-Detention-System-January-2015.pdf (page 8); https://theconversation.com/why-are-so-many-indigenous-kids-in-detention-in-the-nt-in-the-first-place-63257

[55] Helen Davidson, 'Pat Dodson: Indigenous Incarceration Rate 'Shameful' Due To Failure To Address Poverty', *The Guardian* (online) 26 May 2016, < http://www.theguardian.com/australia-news/2016/may/26/patdodsonindigenousincarcerationrateshamefulduetofailuretoaddresspoverty>.

[56] Helen Davidson, 'Pat Dodson: Indigenous Incarceration Rate 'Shameful' Due To Failure To Address Poverty', *The Guardian* (online) 26 May 2016, < http://www.theguardian.com/australia-news/2016/may/26/patdodsonindigenousincarcerationrateshamefulduetofailuretoaddresspoverty>.

The Minister for Indigenous Affairs not long ago said 'The welfare of youths who come into contact with the youth justice system should be the highest priority'.[57]

The current sentencing of children and young offenders is usually done in private, done according to the law but without direct explanation to or input from an offender themselves, their family or their friends. Cases progress according to the peculiarities of the justice system that we as lawyers have become accustomed to but which others often find wholly foreign and inexplicable. Indigenous Australians in particular have been reported to have a general distrust of the legal system, exacerbated by the significant language barriers they face and the perception courts have a lack of cultural awareness.[58]

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I reflected on the prospect of on-going judicial oversight. Options could include multi-disciplinary oversight of the problem child or offender. For example, sentencing in consultation with police, corrections, health and welfare authorities. We must use

[57] Nigel Scullion (Minister for Indigenous Affairs), 'NT youth justice system' (media release) 26 July 2016, <https://ministers.dpmc.gov.au/scullion/2016/nt-youth-justice-system>.
[58] Scott Ludlum and Chiara Lawry 'Closing the Justice Gap for Indigenous Australians' [2010] *Indigenous Law Bulletin* 11 <http://www.austlii.edu.au/au/journals/IndigLawB/2010/11.html>; Chris Cunneen, Fiona Allison and Melanie Schwartz, 'Access to justice for Aboriginal People in the Northern Territory' (2014) 49(2) *Australian Journal of Social Issues* 219 <https://www.jcu.edu.au/__data/assets/pdf_file/0008/119942/jcu_141209.pdf>.

the valuable knowledge and experience of those who have spent time with children or young offenders and their peers and who know the individuals and their circumstances better than we can as judges. There are many different ways of looking after this group.

One approach I have observed to achieve much success are the 'circle justice' courts. In Victoria these are called Koori Courts. They exist for adults in the County and Magistrates' Courts and for children in the Children's Court.

As the President of the Victorian Children's Court has noted,[59] indigenous participation in sentencing was an important focus of the Royal Commission into Deaths in Custody.[60]

The Victorian Koori Court model involves the judge or magistrate sitting in a less formal, non-adversarial setting with usually two indigenous Elders. The individual may be legally represented but the discussion is between the individual and the court, including the elders. The 'sentencing conversation' is conducted around an oval table, and the magistrate sits at the same level as other participants. The Children's Koori Court has

[59] Unpublished paper, Chambers, A., "Children's Rights in Australia", Victoria University 2015 Chancellor's Lecture p 23.
[60] Royal Commission into Aboriginal Deaths in Custody (1987–91)

been very successful. Initially the Children's Koori Court sat in two locations, but now it sits in nine court locations.

The Children's Court President has explained the purpose of the special court this way: "At its heart the Koori Court aims to interrupt the cycle of intergenerational offending and incarceration".[61]

Relevantly, the President has also said:

> Young people who elect to appear before a Koori Court are making a commitment to show respect to the court, including the judicial officer, and the Elders and Respected Persons and to take responsibility for their behaviour. For anyone who might view the Koori Children's Court as an "easy" option for the Koori offender, you should know that, in reality, for offenders, for families and Elders, involvement in the Koori Court process is a very intense, challenging and reflective experience.[62]

A special approach to indigenous children and youth has been adopted in Queensland with the Murri Courts[63], in New South Wales with its 'circle sentencing' program,[64] and in New Zealand with the Youth Courts.

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[61] Unpublished paper, Chambers, A., "Children's Rights in Australia", Victoria University 2015 Chancellor's Lecture p 24.
[62] Ibid.
[63] Queensland Parliamentary Library 'Murri Courts' (Research Brief No 2006/14) <http://www.parliament.qld.gov.au/documents/explore/ResearchPublications/ResearchBriefs/2006/RBR200614.pdf>.
[64] Indigenous Justice ClearingHouse 'Programs & Projects — Circle Sentencing' <http://www.indigenousjustice.gov.au/db/projects/272400.html>.

One other Victorian approach is the effective application of diversion in the Children's Court. In essence diversion plans are developed for suitable candidates. The plans are multi-disciplinary and across agencies.[65] A similar co-ordinated inter-agency approach is applied in the New Zealand Youth Courts. They are largely solution focused courts with representatives of Justice, Police, Social Development, Health and Education departments all present in the courtroom. Also in New Zealand are the Rangatahi Courts for young Maoris held on traditional grounds and partly in the Maori language.

When discussing children and young offenders, there is one topic that lies at the heart of the discussion: education. It is self-evident. Nelson Mandela has said '[e]ducation is the most powerful weapon which you can use to change the world'.[66]

In 2014-2015, more than half the children subject to youth detention in Victoria had been suspended or expelled from school. An incomplete education and social disadvantage are consistent companions. The Sentencing Advisory Council has noted that minimal educational attainment or lack of engagement with other

[65] Unpublished paper, Chambers, A., "Children's Rights in Australia", Victoria University 2015 Chancellor's Lecture p 27.
[66] UN Resources for Speakers on Global Issues,
Education for All' <http://www.un.org/en/globalissues/briefingpapers/efa/quotes.shtml>.

learning opportunities is a social risk factor for youth offending. A Tasmanian inquiry into alternatives to youth detention noted that detention can exacerbate factors that contribute to youth offending, and impact adversely on education and employment outcomes.[67]

The Victorian Government reported in 2015 that "Each year, approximately 10,000 young people in Years 9-11 leave their school and do not go on to any other Victorian education or training provider".[68] Some of those children are at greater risk of entering the youth justice system, and will tend to be significantly more disadvantaged in life.

The Victorian Children's Court has implemented the Education Justice Initiative. It was funded by the State Department of Education. The program is directed at young people appearing in the Criminal Division who are either "totally or partly disengaged from education".[69] It is implemented with the Department of Education who are at the court, daily. Young offenders appearing at the court are connected to an education pathway through liaison

[67] Commissioner for Children Tasmania, 'Alternatives to Secure Youth Detention in Tasmania' (26 July 2013) <http://www.childcomm.tas.gov.au/wp-content/uploads/2015/07/Alternatives-to-Secure-Youth-Detention-FINAL-2013.pdf>.

[68] The Victoria Institute, 'Education at the Heart of the Children's Court' (Final Report) <https://www.vu.edu.au/sites/default/files/victoria-institute/pdfs/Education-at-the-Heart-of-the-Children's-Court-Final-Report-web.pdf>

[69] Unpublished paper, Chambers, A., "Children's Rights in Australia", Victoria University 2015 Chancellor's Lecture p 29.

with schools.[70] In addition the youth justice (detention) centres provide classes from Years 2 to 12 levels. Further, there is a transitional learning centre for young offenders on parole.[71]

The President of the Children's Court reported that early indications of the education program are extremely positive.[72] In its first year the program engaged intensively with 45 young people:

> This cohort was identified as being between 14 – 17, 82% male, 57% from a culturally and linguistically diverse background and 8% explicitly identify as Aboriginal or Torres Strait Islander. In terms of their educational history, 45% were not currently enrolled in an educational setting, 40% had five or more previous school enrolments and many had been disengaged from education for periods ranging from two months – two years.[73]

Last year I visited the Djidbidjidbi Residential College in Jabiru in the Kakadu National Park (it is not a justice or detention centre, rather a community facility). This provides another model which prioritises education as a crucial tool to help people. The college houses about 21 indigenous students and has created an environment in which children are able to easily attend school and

[70] Ibid pp 29-30.
[71] Ibid p 30.
[72] Ibid p 30.
[73] Ibid pp 30-31.

complete homework.[74] It is a simple model that is designed to reduce barriers to learning. Further, although the residents are mostly between 11 and 18 years old, the College aims to provide an 'intergenerational learning space'.[75] It hosts workshops for families including what it terms 'Master Apprentice' language workshops which facilitate the passing down of indigenous languages from elders within the community to beginners.[76]

Then there are other local, national and international models.

For example, in the small town of Bourke in northwest New South Wales, one of Australia's first major justice reinvestment programs is being embarked upon. The first element of this project has involved three years of community engagement and data gathering, identifying some of the catalysts for young people to offend. A simple discovery has been that providing free driving lessons will prevent numerous youths from being stopped for driving without a licence. From June 2016 to 2019, the town is entering the implementation phase of the scheme, during which it

[74] Gundjeihmi Aboriginal Corporation, 'Djidbidjidbi Residential College' <http://www.mirarr.net/djidbidjidbi-residential-college>.

[75] Office of the Registrar of Indigenous Corporations 'Driving Community Initiatives' <http://www.oric.gov.au/publications/spotlight/driving-community-initiatives>.

[76] Gundjeihmi Aboriginal Corporation, 'Master Apprentice Language Workshop' <http://www.mirarr.net/master-apprentice-language-workshop-18-21-november-2013/>.

will track the success of these measures at diverting youths from offending and at reducing the cost of detaining young offenders.

In the United States, training programs have been implemented to both reduce racial bias in school administrators reporting students' truancy and to implement a new system under which such minor offences can be referred to social services rather than police or the courts.[77]

The US has also trialled a Peer Youth Court which trains young people to act as the advocates and the jury who determine the appropriate response to an offence committed by a juvenile. The underpinning principle of the model is to use the peer pressure that is ever-present in teenage interactions to create a positive motivating force. The trial of this Peer Youth Court model in New York was very effective with 94% of the 'dispositions' of the jury, ranging from reflective essays to community service, satisfactorily complied with.[78] The Youth Justice Advisory Committee, a body that reports to the Northern Territory's Department of Correctional Services is advocating for its trial in the Territory.[79]

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[77] Sarah Childress, 'Why States Are Changing Course on Juvenile Crime' *PBS* (*Online)* 17 December 2014 <http://www.pbs.org/wgbh/frontline/article/why-states-are-changing-course-on-juvenile-crime/>.

[78] Youth Justice Advisory Committee, *YJAC Annual Report 2014/15* (30 September 2014) <https://cmsexternal.nt.gov.au/__data/assets/pdf_file/0008/238715/YJAC-Annual-Report-2014-15-web.pdf> 19.

[79] Youth Justice Advisory Committee, *YJAC Annual Report 2014/15* (30 September 2014) <https://cmsexternal.nt.gov.au/__data/assets/pdf_file/0008/238715/YJAC-Annual-Report-2014-15-web.pdf> 19.

Finally, electronic monitoring is supported by a number of institutions, including the Northern Territory Youth Justice Advisory Committee as an alternative to imprisonment.[80] Advocates for young offenders have noted it is significantly cheaper than detaining juveniles in custody and argued that it reduces the risk of recidivism as it prevents juveniles being exposed to other offenders in detention. It also allows young offenders to remain in their communities, including remote ones, rather than requiring them to be moved to a detention facility often far from family and friends.[81]

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Reflecting on the constrained success of the Joint Report and observing what has happened since I venture to suggest that we need to reconsider the way children and young offenders are treated in the criminal justice system. If I might draw on the Victorian experience. The State reached a crisis with family violence. Rather than embark on the usual responsive model of an

[80] Youth Justice Advisory Committee, *YJAC Annual Report 2014/15* (30 September 2014) <https://cmsexternal.nt.gov.au/__data/assets/pdf_file/0008/238715/YJAC-Annual-Report-2014-15-web.pdf> 17–8; Kathy Laster and Ryan Kornhauser, 'Electronic Innovation Can Help Fix An Archaic, Crowded Prison System' *The Conversation* (18 June 2015) <https://theconversation.com/electronicinnovationcanhelpfixanarchaiccrowdedprisonsystem39044>.

[81] Youth Justice Advisory Committee, *YJAC Annual Report 2014/15* (30 September 2014) <https://cmsexternal.nt.gov.au/__data/assets/pdf_file/0008/238715/YJAC-Annual-Report-2014-15-web.pdf> 17–8; Sarah Childress, 'Why States Are Changing Course on Juvenile Crime' *PBS* (*Online)* 17 December 2014 <http://www.pbs.org/wgbh/frontline/article/why-states-are-changing-course-on-juvenile-crime/>.

inquiry and inter-governmental implementation of recommendations, the Victorian government established a royal commission into family violence with unusual terms of reference that contemplated a systemic analysis and therapeutic jurisprudential approach.

The Commission was established 22 February 2015. Its terms of reference were expansive, directing the Commission to:

- Examine and evaluate strategies, frameworks, policies, programs and services across government and local government, media business and community organisations and establish best practice in the prevention of family violence, early intervention, support for victims and perpetrator accountability;

- Investigate the means of having systemic responses to family violence, particularly in the legal system and by police, corrections, child protection, legal and family violence support services, including reducing re-offending and changing violence and controlling behaviours;

- Investigate how government agencies and community organisations can better integrate and co-ordinate their efforts; and

- Provide recommendations on how best to evaluate and measure the success of strategies, frameworks, policies, programs and services put in place to stop family violence.

In addition to being broad, the terms of reference were of a distinctive nature.[82] Rather than investigating factual findings about past events, they sought recommendations on matters of policy.[83] As such, the Hon Marcia Neave AO perceived the Commission's primary focus as 'identifying and solving system-wide issues rather than on hearing from a large number of individuals about their particular circumstances'.[84] Instead of 'carrying out a forensic investigation into the cause or occurrence of a particular event with a view of determining fault or liability', the task was to 'set directions for future family violence policy'.[85]

A further aim of the Commission was to raise awareness of family violence and the activities of organisations seeking to address it. Consequently, public hearings were broadcast live over the internet, submissions, witness statements and transcripts were

[82] RCFV Report, 2.
[83] Ibid.
[84] Royal Commission into Family Violence, <http://www.rcfv.com.au/Media/Royal-Commission-into-Family-Violence-begins>.
[85] RCFV Report 2

published on the Commission's website,[86] and relationships established with the media.

The Commission recognised significant limitations to the current response. Issues raised include services which are ill-equipped to meet high-demands; insufficient recognition of the different manifestations of family violence; lack of coordination and information sharing between systems; inadequate effort and investment in prevention; and a lack of a dedicated governance mechanism within the Victorian Government to coordinate the system's prevention and response efforts.[87]

The 227 recommendations in the Neave Report are directed at addressing these limitations and improving Victoria's current foundations.

Underpinning the recommendations is a transformative agenda. The Commission has called for a broadening of responsibility in addressing family violence; each sector or component part of the system needs to reinforce the work of others, there needs to be greater collaboration and trust with one another, and an outward focus adopted, which is open to new ideas and new solutions.[88]

[86] RCFV Report, 2
[87] Ibid, 6
[88] Ibid, 7.

Novel recommendations include:

- Support and Safety Hubs in local communities through-out Victoria to enhance access to help and services;
- an immediate increase in funding to support services, Aboriginal community initiatives and dedicated funding towards family violence prevention;
- more specialist family violence courts;
- stronger perpetrator programs;
- family violence training for key workforces such as schools and hospitals;
- an independent Family Violence Agency; and
- expanded respectful relationships education in schools.[89]

The Commission recognised that the way forward necessitates a long-term approach.[90] Such an approach involves the whole community, is bipartisan and requires all sections of the government to work together.[91] Unprecedented levels of community commitment to stop family violence need to be harnessed, and all members of the community have a role to play in creating a culture capable of influencing the behaviour and practices of individuals.[92]

[89] Ibid, 15.
[90] Ibid, 7.
[91] Ibid, 16.
[92] Ibid, 13.

So far the Neave Report has had a dramatic impact in Victoria. The Victorian Premier announced before the Royal Commission started that every recommendation would be implemented[93] - that commitment was given without knowing what would be recommended or the cost.

The Neave Report has received bipartisan support. Since the report was delivered on 30 March 2016 a great deal of activity has occurred in both government departments and the courts, particularly the Magistrates' Court. Special committees and task forces have been established. One particularly relevant group is a court established Judicial Advisory Group on Family Violence. It is chaired by Marcia Neave. It consists of a judicial representative of each Victorian state and federal jurisdiction. The purpose of the Group is to provide a judicial perspective on the Neave Report's reforms.

I reflected that a different approach to children and young offenders taking the example of the Neave Report may lead to change in a way the 1997 Joint Report was unable to achieve.

[93] http://www.premier.vic.gov.au/its-time-to-fix-our-broken-family-violence-system/ - 30 March 2016.

If we reflect as to what is on the 'front page' of the children and young people tabloid, there are constant, varied and dominant topics:

- child neglect and homicide (including by parents and partners);
- truancy;
- youth radicalisation for terrorism;
- wild, lawless and unacceptable behaviour by young offenders;
- youth sentencing (including mandatory sentencing);
- custody management of children in fractured relationships;
- poverty;
- homelessness / sleeping rough;
- drugs (especially ice (meth amphetamine));
- indigenous over-representation and recidivism in the child protection and criminal justice systems;
- children and young people in detention (both at state and federal level and including all detainees – whether held for reasons of protection, criminal offending or asylum);
- youth self-harm and suicide;
- sexual abuse (both current and historic).

They are the very same features that appear all too frequently under the heading 'Personal circumstances' in adult sentencing decisions. Let us look at what appeared under that heading for a recent high profile offender in Victoria. The offender was left with

developmental consequences from complications at birth and had a very difficult childhood. His parents separated when he was five years old. He then lived with his mother, who had relationships with several violent men. He was physically and sexually abused. He finished school at 15 after having moved from school to school and suffered learning difficulties. He started to use marijuana at 15 and then other drugs at 17. He began his criminal career at 18. By the age of 19 he was in the need of mental health services as he was exhibiting signs of psychotic illness. He abused alcohol. An expert reported that he was bequeathed with almost every conceivable developmental contribution to adult mental disorder. Ultimately at the age of 31 he murdered an innocent young woman who happened to pass him by and was a complete stranger. When sentencing the man, the trial judge lamented that 'Executive government, through whichever instrumentality was appropriate, has both failed to treat you and, as these terrible crimes demonstrate, failed to protect the community from the danger you clearly posed with tragic results'. Had there been an intervention in his childhood, perhaps this offender's life would have turned out very differently and his vile offending avoided.

Children and young people are the 'tomorrow'. So far, there has been some, but limited, success at addressing their needs and rights. Let me venture into the order of things: the future of children and young people is in the top order of priorities. The

challenge is how to confront it. The priority is very, very high for judges and magistrates. The judiciary is removed from the maelstrom of current public affairs. The judiciary does not shape policy, rather it encounters the consequences. If governments and policy-makers embrace the future of children and young people, the courts, I fully expect, will help. It seems the approaches to children and young offenders are inconsistently and differently applied across the nation.

Unless much, more occurs then courts will continue to see the tragedies of harm, violence and death across the full human spectrum.

There will be much learning to be taken from the Victorian Royal Commission on Family Violence, the Federal and State Royal Commission into Child Sex Abuse and the Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory. Each of these Royal Commissions has received bipartisan support. Then there are the reports of the past and the manifold successful reforms on the ground. A holistic approach based on a model of therapeutic jurisprudence will be well worth considering. The question might be, who will lead it and who will participate?

Thirty-five years ago this week Austin Asche delivered a lecture on the rights of the child.[94] It was a significant and important commentary. And that is the point, an enduring point, as a society we are bound to recognise the rights of the child for the ongoing benefit of our society.

[94] Asche, the Hon A, 'The Rights of the Child', an unpublished paper delivered as the Vernon Collins Memorial Lecture, Melbourne, 14 October 1981.