Launch of Sentencing Advisory Council Report

Sentencing Children and Young People in Victoria

11 April 2012

Introduction

Over the last three years or so, there has been significant commentary on the child protection system in Victoria. Some of that commentary has been informed by research and some of it has not. As we all know, good policy is dependent on evidence not on anecdote. However, sometimes when research is lacking, people provide an anecdote and assume it is the evidence. For example, in the recent 'Cummins' inquiry at least one submission asserted that the judicial officers of this court were simply 'rubber-stamping' recommendations made by the Children's Court Clinic. Those of us who work in the court knew this was not true. The court was able to commission research that debunked the assertion[1]. This experience is a potent reminder, if one were needed, on the value of research informing commentary.

In the court's second submission to the 'Cummins' inquiry it listed all the research that has been undertaken within the court over the past ten years. It is predominantly, but not exclusively, research relating to the work of our Family Division. At a time when child protection systems throughout Australia are under great pressure, this is not surprising. However, the court has been very aware of the need to ensure research relate not only to child protection (or family violence) but also criminal offending and the sentencing of young offenders. Again, the court was anxious for any discussion and policy development in this area to be informed by evidence. That is why the Sentencing Advisory Council (SAC) was asked if it would be willing to prepare

[1] "A comparison of Clinicians' Recommendations and Court Orders for Protection matters Referred to the Court Clinic by the Children's Court of Victoria" by Aino Suomi and Jeanette Lawrence, Psychological Sciences, The University of Melbourne, August 2011.

this report. I am very pleased that the Council agreed to take on the challenge – I can assure you that the work was not easy. Before formally launching the report I do want to say a little about young people and the youth justice system. Much of what I will say is discussed in detail in the report.

The data on young people and offending in Victoria

There are about 550,000 young people in Victoria aged 10 to 17 inclusive.[2]

The SAC report confirms that in 2009/10 -

- 14,556 young people were processed by the police;
- 5,957 young people were diverted or not proceeded against;
- 7,064 cases were proved in the court; and
- 70% of the young people found guilty by the court were sentenced to undertakings, good behaviour bonds or fines, indicating they committed minor offences or were regarded as good prospects for rehabilitation and did not require ongoing support and supervision in the community.

These facts allow me to make two important points **-**

- Only a small percentage of young people actually come to the attention of law enforcement authorities and fewer still require formal intervention in their lives;
- The vast majority of young people detected in criminal behaviour do not constitute a risk to the safety and welfare of our community.

[2] To come within the jurisdiction of the Children's Court a young person has to be aged 10 or over and under 18 when the offence is committed (providing the police charge them before their 19th birthday).

In Victoria, a small group of young offenders do require formal intervention in their lives.

In 2009/10, 1,556 young people received supervisory orders such as probation, youth supervision[3] or youth attendance orders. The Youth Justice Division of the Department of Human Services administers these orders. The orders offer graduated responses. Every effort is made to engage appropriate supports and services to address the particular problems that lie behind the offending behaviour.

In Victoria a small number of offenders in 2009/10 (172) received detention orders. The SAC report confirms that Victoria has the lowest rate of youth detention of all states and territories.

The most recent report of the Youth Parole Board provided a snapshot [4] of the characteristics of those young people in youth detention. Here is a list of some of them -

- 35% had previous child protection involvement;
- 16% had current child protection involvement;[5]
- 55% were victims of abuse, trauma or neglect prior to incarceration;
- 66% had been suspended or expelled from school;
- 34% presented with mental health issues;
- 14% were registered with Disability Services;
- 88% of cases had alcohol or drugs related to the offending.
- 12% were parents.

[3] If the Court is considering a probation order or youth supervision order, it can adjourn the case for a **group conference**. This program allows a facilitated conference involving the victim or a victim's representative. It is a very positive way of giving the victim a voice in the criminal justice process. A recent evaluation of Group Conferencing by KPMG confirmed that Group Conferencing is an effective and cost efficient diversionary program that reduces recidivism.

[4] The survey was conducted in September 2010.

[5] In Victoria 5.4 children per 1,000 are on child protection orders. This is a rate of .54%. Alarmingly, 51% of detainees had previous or current child protection involvement.

As you can see, many of the young people in detention come from backgrounds of abuse and disadvantage. A significant number of detainees are "the product of, and still suffer from, a damaged and unprotected childhood."[6] These young people need our most innovative and intensive interventions to help them rebuild their fractured lives.[7]

The law on sentencing of young offenders in Victoria

The sentencing principles that apply in the Children's Court are different to those that apply in adult courts. When dealing with an adult, a judge or magistrate is required to balance principles of specific and general deterrence, punishment, denunciation, protection of the community and rehabilitation. Sentencing in the Children's Court, however, focuses on supporting the young person within the community "wherever practicable and appropriate".[8] The emphasis is on the rehabilitation of the young offender.

Section 362 of the *Children, Youth and Families Act* 2005 states that in determining which sentence to impose on a child, the Court must, as far as practicable, have regard to -

- The need to strengthen and preserve family ties;
- The desirability of allowing the child to live at home;
- The desirability of allowing the young person's education, training or employment to continue without interruption or disturbance;
- The need to minimise stigma;
- The suitability of the sentence to the young person;
- If appropriate, making a young person understand his/her responsibility for the offending behaviour; and
- If appropriate, protection of the community.

[6] See the comments of Judge Burke, Chair of the Youth Parole Board, 2010-11 Annual Report at p.5.
[7] When we consider this issue, we need also to understand that in real terms, the numbers of children on protection orders has increased significantly over the last few years. In Victoria in 1998, 3.7 children per 1,000 were on child protection orders. By 2011, it had risen to 5.4 per 1,000. The growth Australia wide is even more significant – 3.5 to 7.6.
[8] See the comments of the relevant minister during the second reading speech for the *Children and Young Persons Act* 1989.

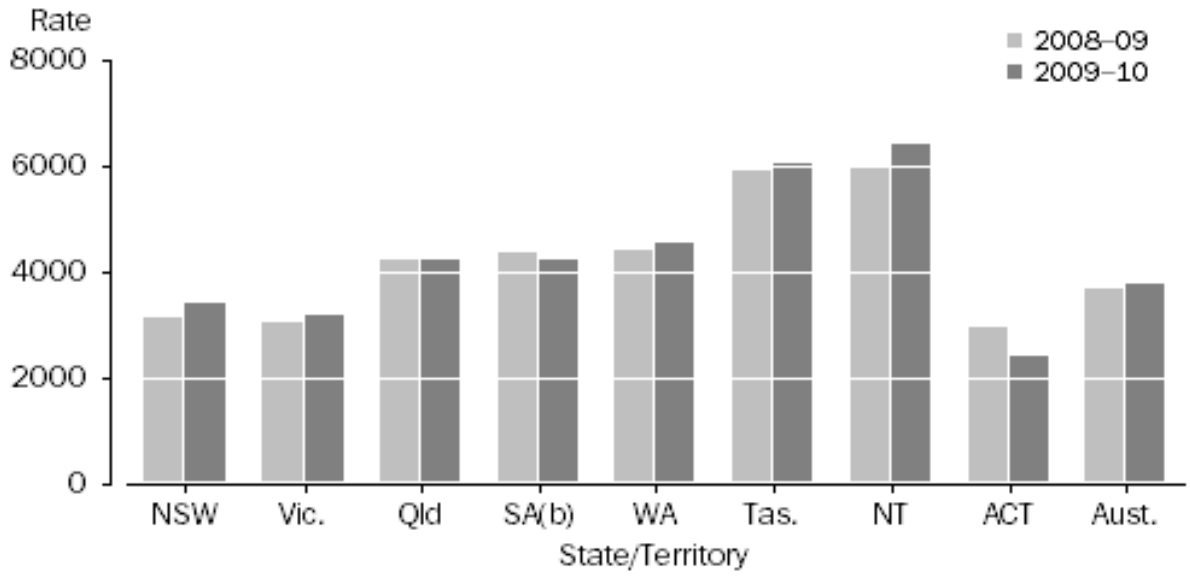
The focus on rehabilitation is consistent with well-established legal principle. For example, in a 2007 case in the Supreme Court[9], the judge described youth as a mitigating consideration of the first importance. The Judge identified two reasons for this approach. The first acknowledged that young people, while being criminally responsible, lack the degree of insight, judgement and self-control possessed by an adult. The second recognised that the "community has a very strong interest in the rehabilitation of all offenders, but especially young offenders, which, in the case of the latter, is one of the great objectives of the criminal law."

The importance of the principle of rehabilitation often results in Children's Courts making orders that would be, in the words of a former Supreme Court Judge, "entirely inappropriate in the case of older and presumably more mature individuals."[10]

The Victorian approach, with its focus on the rehabilitation of the young offender, the emphasis on graduated and proportional responses and the use of detention as the sentence of last resort, is consistent with the principles enunciated in the Convention on the Rights of the Child and other associated human rights covenants.

[9] See DPP –v- Ty (NO3) (2007) VSC 489.
[10] See the comments of Vincent J. in R-V-Evans (2003) VSCA at page 10.

Importantly, according to the Australian Bureau of Statistics, Victoria has the second lowest youth offender rate of all states and territories.



(a) Rate per 100,000 population aged 10 to 19 years (see Explanatory Notes paragraphs 22–24).
(b) Data are overstated (see Explanatory Notes paragraph 46).

Source: Australian Bureau of Statistics, Recorded Crime – Offenders, 2009-10 (4519.0)

Some final comments

Victoria has a reputation for "leading the way" in youth justice in Australia. There is much more that I could say about the strengths of the Victorian approach. For example –

- The important work of the Children's Court Clinic in providing, when necessary, psychiatric or psychological assessments of young offenders.
- The role of the Children's Koori Court in providing a process that is beneficial to the young Koori offender.
- The effectiveness of Victoria's Group Conferencing Program
- The advantages of Victoria's "dual track" system - a system that enables young adult offenders aged 18-20, appearing in the adult courts, to be assessed to determine their suitability to undergo a custodial sentence at the youth justice facility at Malmsbury.

Clearly, there is much to be proud of.

On the other hand, there is still much to be done. I conclude by identifying five challenges for the youth justice system:

- We do not have a statewide diversion program that is available after charging but before a finding of guilt. The SAC report comments on this at page 28 –

  > *"The absence of a comprehensive state-wide diversion program for young people can lead to inequitable outcomes and possibly also to net widening in certain areas. It may also be a missed opportunity in terms of keeping potentially large numbers of low-level young offenders out of the Children's Court. As one participant in the Council's stakeholder roundtable meeting commented; 'nearly 50% of children are being dealt with by undertakings or bonds and so, if you had a good state-wide diversion program that was available to young people in Ballarat just as it would be in Melbourne, then you would be diverting some of those young people away from Court.' Ironically, given the lesser emphasis placed on diversion for adult offenders, the situation is far better in the adult system, which has the (legislated and well co-ordinated) Criminal Justice Diversion Program available to offenders aged 18 years and above.*"

- The number of young people held in custody on remand has been rising over the past four years. We need a statewide intensive bail support program to address this problem.[11]
- We need appropriate and responsive support services for young people with mental health problems or complex needs.[12] This

[11] The Victorian Law Reform Commission recommended such a program in its 2007 review of the Bail Act. Intensive bail support is now available for 15 to 18 year olds from metropolitan Melbourne. This is a good start but such a program should be available to all young people throughout Victoria.

[12] For example, Professor McGorry has been quoted as saying that only a third of young people with serious mental illness are getting access to proper care. "We are turning away 1,500 people a year (from Orygen Health), and hundreds more aren't even getting to us. Some of these young people end up in the criminal justice system."

includes comprehensive therapeutic support for troubled young people on Family Division orders to stop them “graduating” to our Criminal Division.

- Young Koori offenders would benefit from an expansion of Children’s Koori Courts to those regions where there are adult Koori Courts.
- We need to be alert to the increase in violence offences over the past decade whilst also acknowledging that only a very small proportion of these offences involve serious injury to victims. (The SAC report shows that offences in which serious injury was inflicted accounted for 1.3% of all principal proven offences dealt with by the Children’s Court).

In tackling these challenges we need to understand our current system and that is exactly what this report helps us do.

The report of the SAC is a clear and comprehensive review of the system that applies to those young people who are in breach of the law. I thank the Council for preparing and publishing this report. Authors Hilary Little and Tal Karp deserve the highest commendation for their work – as does Dennis Byles who provided the statistical analysis. It is my great pleasure to officially launch the publication “Sentencing Children and Young People in Victoria”. I am sure it will be read with interest and inform policy development.

Judge Paul Grant

President

Children’s Court of Victoria