ANZAPPL Symposium

Young People and State Intervention

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A paper on "Young People and the Criminal Justice System"

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Sadly, it is a common theme of the elderly to complain about the behaviour of the young. This, of course, is not unique to our time.

In "The Winter's Tale", the old shepherd says this – "I would there were no age between ten and three and twenty, or that youth would sleep out the rest; for there is nothing in the between but getting wenches with child, wronging the ancientry, stealing, fighting...." (Act three, scene three)

One of the things that I will do in my talk today is discuss what is actually happening in Victoria with young people and the hard end of misbehaviour, namely, criminal offending.

There are about 550,000 young people in Victoria aged 10 to 17 inclusive.[1]

[1] 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 2008/09

- The police cautioned 9,981 young people. Cautioning is an effective program that recognises the fundamental importance of diverting young people away from the formal court process where appropriate.

Of those who ended up in Court

- 662 young people completed the ROPES program. This diversionary program is available to a young person appearing in court for the first time and involves participation in a daylong course with a number of other offenders and police officers. If the course is successfully completed, the young person is not required to appear at court on the next court date and the charges are struck out. This means there is no finding of guilt and no sentencing order made against the young person; [2]
- 12,241 young people were processed through the court's administrative CAYPINS system and [3]
- 6,633 young people[4] (just over 1% of the population) aged 10 to 17 were found guilty of offences in the Children's Court.

Of those 6,633 young people found guilty by a court, 75% of them received undertakings, good behaviour bonds or fines. This indicates they committed minor offences or, alternatively, were involved in more serious offending but

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[2] One obvious and original feature of the program is the interaction between the participants. The young person and the police work together, learn to trust each other and, from that trust, develop understanding. If the program is successfully completed, the charges will be struck out without a plea being entered. This means there will be no criminal record for the young person.

[3] Nearly half - 6,172 – were processed for no ticket. Also 1,792 for no concession card, 1213 for "feet on seat", 800 for no bike helmet and 374 for unlicensed driving = 10,351).

[4] This represents the number of individuals dealt with by the court. Some young people had more than one set of charges. The actual number of matters dealt with is much higher.

were regarded as good prospects for rehabilitation and did not require ongoing support 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 of our community.

What of that relatively small group of young people who do require formal intervention in their lives?

In 2008/09, 1,431 young people received probation, youth supervision or youth attendance orders. The orders, which are administered by youth justice, offer a graduated response. The aim of these orders is to support young people within the community. Particular problems that lie behind the offending behaviour will be addressed by the use of appropriate supports. If the offender does not comply with the conditions of the order or is involved in further offending, the matter comes back to court for breach proceedings.

Most young people on these orders are on the least intensive form of order – probation (984).

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. The charging police officer, the defendant, the defendant's family and defendant's lawyer also attend. If the conference is successfully completed the court is required to make a lower sentencing order than the order first envisaged. A recent evaluation of Group Conferencing confirmed that Group Conferencing is an effective and cost efficient diversionary program that reduces recidivism. Four important findings -

- Three quarters [75.5%] of Group Conferencing participants were placed on non-supervisory orders and, as a result, were diverted from further progression into the Youth Justice system. (22% received probation orders).

- Those who participated in a group conference were much less likely to have reoffended within 12 or 24 months.[5]

- All of the victims, family members, and the vast majority of young offenders surveyed agreed that they were satisfied with their involvement with the group conference process.

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[5] After 12 months, 18.6% of group conference participants re-offended compared with 27.6% of those who received sentences of Probation or a Youth Supervision Order. Over a 24-month period, the difference was more significant with 19.2% of the group conference participants re-offending compared to 42.9% in the comparison group.

- The report also noted that for every dollar invested in the program more than a dollar was 'saved' in the short term in diverting young people from supervisory orders and in reducing the rate of recidivism.

In Victoria a small number of offenders in 2008/09 (209) received detention orders. Two types of offender receive such an order. Some, with limited criminal history, receive sentences of detention because they commit very serious offences. Other offenders, often described in the youth justice literature as chronic offenders, are young people who, having been given opportunities within the community, continue to offend. These young people often come from disadvantaged backgrounds, are not attending school, are using drugs and alcohol, have difficult peer networks and start offending before the age of 14. They require comprehensive and coordinated responses that address their individual needs. Even though they constitute a small percentage of the young people who appear in court, they are responsible for a significant percentage of offences. [6]

In 2008-09, Youth Justice undertook a survey of the characteristics of those young people who were on supervisory orders or in detention. The results of that survey will not surprise you –

- 88 % were male;
- 50% were not in school or employment;

[6] See Livingstone M, Stewart A, Allard T and Ogilvie J 2008. *Understanding juvenile offending trajectories.* Australian and New Zealand Journal of Criminology 41(3); 345 -363. In that study, chronic offenders comprised just 11% of the cohort but were responsible for 33% of the offending.

- Almost 33% had child protection involvement (this is an important point. Around .5% of young people in Victoria are on child protection orders and yet close to 33% of the young people on youth justice orders are, or have been, involved with child protection);
- 60% had a history of abuse or trauma;
- 30% had mental health concerns
- 14% were Aboriginal and
- Drugs and alcohol were a factor in 62.5% of the cases.

Victoria has the lowest rate of youth detention of all states and territories. This has occasionally excited some journalists. In January 2008, for example, an article appeared in one of our daily papers that said this – "Lowest jail rates for our kids; our state of leniency". The writer saw low detention rates as a failing of the court. Criticism such as this indicates a failure to understand that the court, when sentencing young offenders, acts according to law.

The principles the Court must apply in determining sentence and the form of orders it can make are set out in *Children, Youth and Families Act* 2005. This legislation reproduced the principles enunciated in the reforming *Children and Young Persons Act* of 1989. Prior to that Act, the Children's Court only had four sentencing options for dealing with a young person – a bond, a fine, probation or detention. Nor was the Court given any specific legislative

guidance on the principles to be applied when sentencing a young person. All that changed in 1989 with legislation that, amongst other things –

- set out the matters to be taken into account when sentencing a young person (including recognizing the principle that detention should be a sentence of last resort) and
- provided the court with a much greater range of sentencing options – moving from dismissal, undertakings, bond, fine, probation, yso, yao and detention.

The impact of this legislation - which became operational in 1991 - is evident when comparing the use of youth detention in Victoria over time and when comparing the Victorian figures with the figures in other states and Territories.

Rate per 100,000 of persons aged 10-17 in Juvenile Corrective Institutions on 30 June each year									
	NSW	VIC	QLD	WA	SA	TAS	NT	ACT	AUS
1981	87.6	59.6	32.9	84.3	41.3	54.3	5.5	77.3	64.9
1986	40.4	46.4	25.8	49.3	23.8	35.7	132.2	47.1	39.9
1987	55.1	36.4	26.1	42.2	23.7	36.6	135.7	33.6	41.4
1988	38.2	36.6	26.9	40.5	26.6	35.6	177.5	35.9	36.5
1989	40.0	31.7	22.0	66.6	18.2	29.4	208.6	15.5	36.6
1990	51.8	29.3	29.7	63.0	22.9	17.5	138.0	23.6	40.4
1991	48.2	13.7	20.7	58.3	28.7	29.9	166.2	18.5	34.2
1992	38.9	10.3	20.1	46.5	33.3	8.8	127.1	26.8	28.5
1993	46.4	10.2	22.7	51.6	38.5	15.8	102.7	16.2	32.2
1994	54.8	12.9	24.9	64.3	36.4	17.6	57.5	24.3	36.9
1995	57.8	14.9	35.1	49.3	24.4	17.5	74.8	37.8	38.3
1996	49.3	14.0	34.4	50.4	51.6	45.4	56.1	18.9	37.7
1997	51.5	14.2	25.1	52.2	47.8	24.1	88.2	43.5	36.6
1998	48.2	13.3	31.3	63.0	31.0	33.8	103.0	30.3	36.7
1999	39.4	11.8	33.7	57.1	20.9	55.5	57.3	44.0	32.8
2000	38.5	10.1	24.7	51.9	36.2	40.5	49.5	41.2	30.7
2001	32.2	12.7	20.3	43.3	34.4	67.0	24.0	68.4	27.9
2002	28.0	10.9	22.7	35.1	28.9	47.3	83.8	41.4	25.0
2003	30.5	14.4	23.2	46.3	43.7	34.6	92.1	64.2	29.1
2004	27.2	11.7	20.6	51.9	31.5	32.7	39.8	45.1	25.5
2005	29.7	11.8	21.7	46.5	36.4	63.5	66.8	28.4	27.2
2006	35.0	7.1	29.9	46.6	25.2	54.6	97.5	48.6	29.1
2007	38.0	9.0	32.3	59.4	36.5	29.1	127.9	37.0	32.8

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 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".[7] The emphasis is on the rehabilitation of the young offender. Section 362 of the current Act 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.

The principles contained in the legislation reflect well-established legal principle. For example, in a 2007 case in the Supreme Court[8], youth was described as a mitigating consideration of the first importance. The Judge

[7] See the comments of the relevant minister during the Second Reading Speech for the *Children and Young Persons Act* 1989.

[8] See DPP –v- Ty (NO3) (2007) VSC 489

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 recognizes 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 Justice Vincent, "entirely inappropriate in the case of older and presumably more mature individuals."[9]

I make a number of brief points about youth detention -

- some young people have complex and difficult problems. There is no simple connection between "locking them up" and stopping offending behaviour. We need to address in a coordinated and comprehensive way the problems in that person's life;
- whilst detention may protect the community during the time a young person is in custody, there is evidence that shows detention does not act as a deterrent to further offending. Indeed, according to a recent paper published by the Australian Institute of Criminology, "it is widely recognized that some criminal justice responses to offending, such as incarceration, are criminogenic, that is, they foster further crime". [10]

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[9] See the comments of Vincent J. in R-V-Evans (2003) VSCA at page 10.
[10] See the discussion at pages 6 and 7 of "*What makes juvenile offenders different form adult offenders*" by Kelly Richards. Trends and issues in crime and criminal justice, No.409, February 2011. AIC

- detaining young offenders does not appear to impact on the crime rate. NSW, for example, detains many more young people than Victoria. The crime rate in the two states is virtually the same. There does not seem to be any connection between higher rates of custodial orders and lower rates of offending;
- finally, and to avoid misunderstanding, there are young people who will be sentenced to detention. They are the relatively small group who either commit serious criminal offences or persist in criminal behaviour and do not respond to community support.

The Children's Koori Court

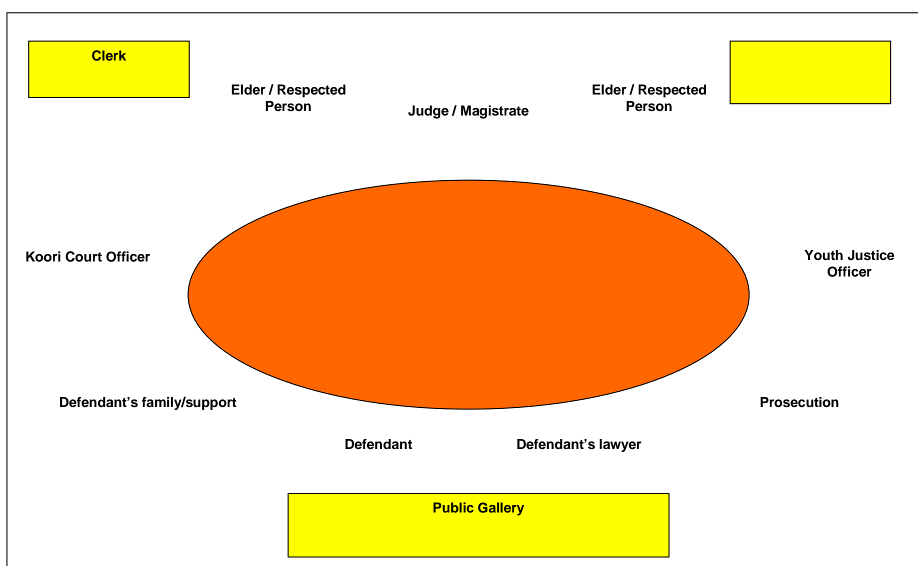
One important challenge in the Victorian system – and throughout Australia – is the over representation figures for our Indigenous population. The Koori Court is one part of a comprehensive response developed by government and koori community to tackle this issue. [11]

The legislation establishing the Children's Koori Court has the objective of "ensuring greater participation of the Aboriginal community in the sentencing process of the Children's Court through the role to be played in that process by the Aboriginal Elder or Respected Persons..." However, it does not create a

[11] In his speech in support of the legislation for Victoria's adult Koori Court, the Attorney-General, Rob Hulls, stated that the government did not "pretend that the Koori Court is the only answer to address the alarming number of Aboriginal people represented within our justice system". Rather, it was one part of a comprehensive package of services to support Aboriginal offenders.

separate court with separate sentencing orders. As in any criminal case, the judicial officer is responsible for making the sentencing order. What the Court offers is a different and more meaningful process for Koori offenders - a process that draws on the authority Elders have in their community. The Koori court endeavors to counteract the alienation many Koori offenders have from the traditional court process. In the Koori Court, offenders are able to engage with Elders whose authority they acknowledge. It is hoped that this engagement will encourage offenders to change their behaviour and, where necessary, to work with those agencies that can assist them to change their behaviour.

The courtroom has an oval bar table at which all persons involved in the case (including the judicial officer) are seated. The judicial officer sits with two Elders/Respected Persons. In addition, present at the oval table during the hearing will be the Koori Court Officer, the prosecutor, a Youth Justice worker, the defence lawyer, the defendant and family members.



In my experience, proceedings in the Koori Court are often dynamic and confronting. The voice of the defendant, family and community are always present and central. There is no escape from acceptance of responsibility and particular problems that should be addressed are discussed openly and honestly. The open exchange of information that occurs within the Koori Court gives the judicial officer a better understanding of the defendant's circumstances, the context of the offending and the prospects for rehabilitation. The sentencing decision is a fully informed one.

Sometimes the issues before the court, extending as they do beyond the individual and into the social and economic life of our community, are hard for the law to address. This means the work is challenging. The Koori Court is not a magic solution to the problem of over-representation. Some offenders come from backgrounds of significant disadvantage with well-established offending histories and often require support services that are not always available.

Crucially, what the Royal Commission into Aboriginal Deaths in Custody described as the "underlying causes" of over-representation need to be addressed. With more than 33% of Kooris under the age of 15 years, we will sustain high levels of over representation in our court unless, as a community, we address the factors driving Aboriginal disadvantage.

Concluding comments

I just want to make a few quick points in conclusion. There is much more to be said about the Victorian system. For example, I have not spoken of the important role of the Children's Court Clinic in providing, when necessary, psychiatric or psychological assessments of young offenders.[12] Nor have I have spoken of the Victoria's "dual track" system that enables young offenders aged 18-20 dealt with by adult courts, to be assessed to determine their suitability to undergo a custodial sentence at the youth justice facility at Malmsbury. Therefore, I do not want you to think that I have covered everything that is strong about the Victorian system. Clearly, I have not.

On the other hand, there is still much to be done. Some of the challenges, for example, the over representation figures for Koori youth, have provoked original responses. However, other problems are still to be addressed -

- We do not have a statewide diversion program that is available after charging but before a finding of guilt. ROPES is a good start but it is an unfunded program and, for this reason, only available in some areas of Victoria. In addition, it is a "one size fits all" program when it should be one part of flexible diversionary response.

[12] The Court can seek reports from the Children's Court Clinic for any case in which it considers such a report is necessary to enable it to decide the case. The Clinic is an independent body within the Department of Justice. Its primary role is to make clinical assessments of children and families for Children's Courts across Victoria in both the Family Division and the Criminal Division. The clinicians engaged to conduct assessments are highly skilled psychologists and psychiatrists with specialist knowledge in child protection and youth justice. In 2007-08, there were 1,074 referrals of children, young persons and their families to the Clinic. 346 referrals related to criminal cases, 697 child protection cases and 29 were family violence matters.

- The number of young people held in custody on remand has been rising over the past four years. A statewide intensive bail support program would address this problem.[13]
- We need appropriate and responsive services for young people with mental health problems or complex needs.[14] This includes stronger therapeutic support for troubled young people on Family Division orders to stop them "graduating" to our Criminal Division.
- We need to understand how best to respond to the apparent increase in violent offences committed by young people.[15]

These are significant challenges but I am convinced that all of us, who work in the area of youth justice, are strong enough and brave enough to take them on.

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[13] The Victorian Law Reform Commission recommended such a program in its 2007 review of the Bail Act. Youth Justice is currently funding a pilot intensive bail support program for offenders from the northern and western regions of metropolitan Melbourne (15 -18 year olds).

[14] 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 1500 people a year (from Orygen Youth Health), and hundreds more aren't even getting to us. Some of these young people end up in the criminal justice system".

[15] In 2005-06, 12.5% of the defendants dealt with in the Children's Court had an offence against the person as the principal proven offence. In 2008 -09 it had risen to 17.2%.