

Children and the Courts Conference
National Judicial College of Australia
5 November 2005

DOCS' Place in the Criminal Jurisdiction.

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Traditionally, the involvement of children and young people in the court system often arose as a combination - an overlap - of criminal justice issues and welfare issues. The criminal justice and the care jurisdictions of the court were intertwined and the distinction between them was often blurred and indistinct.

In New South Wales, some of the earliest legislation to deal specifically with children - the *Children's Protection Act of 1892*, provided that a stipendiary magistrate, in lieu of committing to prison any child under the age of 14 years convicted of an offence, might "hand over" such child to a home for destitute or neglected children. Presumably both classes of children - the "sinners" and the "sinned against"- those in trouble with the law and those in danger of abuse or neglect, would be accommodated and cared for together. The ideal, without distinction, with children who were neglected and uncontrollable and with those who had committed summary or even indictable offences. Children in respect of whom there were issues which, nowadays, we would recognise as welfare issues were charged with the offence of being neglected and dealt with as such in the context of an essentially criminal proceeding.

Beginning in the late 1970s, the distinction between criminal and welfare proceedings began to be appreciated and, in New South Wales and across Australia, the business of Children's Courts was divided into two distinct and arms-length jurisdictions - the criminal jurisdiction and the care jurisdiction. Perhaps it was not always inevitable that this should be so. As a matter of practical reality, it is not difficult to perceive the causal effect of neglect or abuse in much juvenile offending and in some jurisdictions - notably in New Zealand, juvenile offending by children under the age of fourteen years of age is regarded, not as a criminal matter, but as a welfare matter and is dealt with as such in the "care courts."

But in Australia, the distinction between the two jurisdictions exercised by the Children's Courts is now well established and well recognised and, as a result, new concepts and procedures have been introduced and principles relative to one or the other jurisdiction, but not to both of them, have been created or adopted.

One unwelcome consequence of this division is that the department of community services - the chief welfare agency of New South Wales, only comparatively rarely makes an appearance in the criminal jurisdiction of the court. The absence of the Department of Community Services is particularly distressing when a juvenile offender seeking bail or facing sentence is already what we used to call "a state ward" - that is, has been placed by a care order made in the Children's Court in the parental responsibility of the minister.

In ordinary circumstances, a court could reasonably expect a parent to appear when his/her son or daughter is seeking bail or is about to be sentenced. Apart from comforting and

supporting the young person in what might well be an unpleasant and troubling event, that parent might be able to throw some valuable light on the young person's background or provide the court with assurances of parental support for the young offender and might be able to reassure the court that the young person will be supported in his compliance with the conditions of his bail or his bond. Sometimes a departmental officer will be able to provide vital information to ensure that proposed bail conditions - for instance, not to go within five miles of a particular place or person, are not incompatible with the placement arrangements which have already been made for the young person.

But it is not in every case or even in a majority of such cases where the minister has parental responsibility that a representative of DOCS comes to court - let alone somebody with first hand knowledge of the matter and some practical knowledge of the young offender.

Section 7 of the children [protection and parental responsibility] act 1997 provides that "*a court exercising criminal jurisdiction with respect to a child may require the attendance, at the place where the proceedings are being or are to be conducted, of one or more parents of the child. The court may specify which parents are to attend*". "parent" is defined as including "*a guardian of the child*" and "*a person who has custody of the child*" but the section specifies that it does not include the minister or the director-general of the department of community services. No doubt the exclusion of the minister and the director-general from those who can be regarded as "parents" is attractive to government because, elsewhere in the I, liability is cast on parents to pay compensation for some of the actions of their children but there should be an arrangement (either a legislative amendment or an agreement) requiring the minister to ensure that juvenile offenders, already in her parental responsibility, are properly supported at court.

The absence of "DOCS" from juvenile justice proceedings in the children's court is even more troubling when, sometimes almost as an aside, a children's magistrate "gets wind" of significant care and protection concerns which are not being addressed and which, if ignored, will almost certainly involve the young person in further offending and bring him back before the court. When that happens - when there is information that a child or young person may be in danger and in need of assistance, a children's magistrate is entitled (like anybody else) to phone the departmental *Helpline* and make a report. As something of a concession, children's magistrates are welcome to make after hours reports by telephone via the direct line of the department's director of legal services.

The inadequacy of this system is obvious. In the first place, it is not unusual for a caller to the helpline to wait for a couple of hours before his or her report is received. Neither a children's magistrate nor a registrar nor any other staff member can reasonably hang at the end of a telephone line in the hope that, sooner or later, his or her call will be answered and report will be taken. Nor is it appropriate (although sometimes it has to be done) to have phone calls between a judicial officer and the principal legal adviser to one of the court's principal clients.

Furthermore, there is no guarantee that the report will be acted upon. It is common knowledge that, not so long ago, a high proportion of reports were simply not actioned. Even now, reports are prioritised. The top priority, which requires a response within 24 hours, relates to infants under 12 months of age and to allegations of abuse in care. Reports in other categories will be actioned at the discretion of the manager of the *Helpline* and, later, of the local DOCS' office known as the "csc." Depending on resources and perhaps the area, a report of a fourteen year old being homeless and without parental support is unlikely to prompt a very vigorous response.

Moreover, the experience of children's magistrates who have made such reports is that it is often not clear what action, if any, DOCS was able and prepared to undertake. This is not a

criticism of DOCS. They are bound by their resources and to prioritise infants under one year of age or abuse in care cases or cases where the very life of a child may be at risk is surely not unreasonable. But the fact remains that, as an aid to keeping a young person out of trouble and reassuring a judicial officer that a young person will be safe if released on bail or on probation, the present arrangement provided by the department of community services is inadequate.

Another method by which a children's magistrate might bring care and protection concerns to the attention of the department of community services and might seek the department's assistance for a young person is to recite those concerns onto the record, order a transcript and direct the registrar of the court to forward a copy of that transcript to the director-general. The plus of that method and where it beats the *Helpline* is that it saves time on the telephone! It also places the children's magistrate's concerns "on the record" and might ultimately deflect public criticism from the court if things go wrong. But, like recourse to the *Helpline*, there is no guarantee that the "report" will be actioned and even less guarantee of receiving an informative response from the department.

What is needed is a formal method of invoking the assistance of the department of community services where, in the course of proceedings in the children's court (particularly in its criminal jurisdiction), it becomes clear that a child or young person is in need of assistance.

The assistance needed may be help in dealing with parents or extended family. It could involve counseling or mediation between parent and child. It might be a medical or paramedical intervention or some financial help. Perhaps it may extend to finding housing or, at least, some temporary shelter so that the child is not simply turned out on to the streets. The assistance called for may involve care proceedings - it may involve DOCS seeking a care order, or it may be as simple as a train fare home.

Simon is a fourteen year old lad who appeared at a children's court in Sydney a month or so ago pleading guilty to a charge of "*possess prohibited article*." He had been arrested at manly beach where he was found in possession of a pair of handcuffs. He had been in trouble before and had matters of "*break, enter and steal*" "*malicious damage*" and "*enter prescribed premises*" recorded against him. The background report prepared by the department of juvenile justice suggests that Simon is "*slightly autistic*." A year or so ago, Simon was the subject of a penetrative sexual assault for which he has received little if any counseling and therapy. He is homeless and is alienated from his mother and step-father.

In early 2005, the department of community services commenced care proceedings for Simon and there was an interim order placing him in the parental responsibility of the minister, pending further order. He was placed in a refuge in country New South Wales but the DOCS' file records that he "*was in compliant and would not follow the instructions of the house management*" and, on 15/5/05, before his arrest, the department withdrew its care application so that the interim orders - like his entitlement to remain in the refuge, lapsed. According to the JJ background report "*DOCS are no longer working with him and his files are now inactive*."

According to the sentencing children's magistrate, Simon's offence was not one which should have lead to his detention. He was granted bail while awaiting JJ's preparation of a background report and, ultimately, he was placed on probation for six months. The conditions of his bond were that he :

1. Be of good-behaviour,
2. Appear to be further dealt with if called upon,
3. Accept the supervision of the department of juvenile justice,
4. Follow the instructions of the department of community services and
5. Follow the directions of the department of education and training.

It is a cardinal principal of juvenile justice, and has been ever since the criminal and the care jurisdictions emerged as separate and distinct jurisdictions that the court may not deprive a young offender of his liberty merely to satisfy his welfare needs. As we have seen, it might have been done in the past - it cannot be done now. It is improper and unlawful and a breach of the United Nations convention on the rights of the child to imprison a young person or detain him simply because he/she is homeless.

And so, Simon was not imprisoned. Rather he was placed on probation and sent on his way out into the world - to fend for himself; to sleep rough if that's what he needed to do; to flog drugs or flog himself if that's what he had to do in order to support himself and to await his next, probably more serious, brush with the police and the criminal justice system.

How long he might have to wait is impossible to say but the JJ background report records that *"this young man is a thigh risk of reoffending if his accommodation needs are not settled."* and, apart from being homeless, nothing has been done to Address his needs arising from his sexual assault. The author of the JJ report saw Simon's offending behaviour as *"directly linked to welfare issues"* and concluded that *"it is considered that the Department of Community Services needs to be actively involved in this case."*

Simon's case is a not very extreme example of a quite common event - where its comes to the attention of a children's magistrate that there are significant care and protection concerns surrounding a particular child or young person and/or where a child or young persons is in dire need of assistance but no care order is in place, no application for a care order is contemplated and no assistance is rendered by the department of community services.

Sometimes, the response of DOCS to a problem or a set of problems like Simon's is to argue that a particular child or young person is not *"in need of care and protection"* and therefore not eligible for assistance by the department. The expression *"need of care and protection"* is a term of art employed in Section 71 of the "care act" –*the Children and Young Persons (Care and Protection) Act*. A finding that a child or young person is *"in need of care and protection"* is a *sine qua non* and the basis upon which the children's court can proceed to make care orders whether they be to allocate parental responsibility to the minister or to some other person, to provide contact, to put in place a regime of supervision, with or without support services, or merely to accept undertakings by parents and/or children. Pursuant to Section 71, the need of care and protection is to be established by reference to one or more of a number of grounds enumerated in subsections (1) (a) to (h). But the only person who can institute proceedings seeking a care order is the Director-General of the Department of Community Services so it would be a bit disingenuous of him to hide behind the lack of a finding. In Simon's case, one might argue that the only reason there has been no finding of *"need of care and protection"* is that the director-general, who has a monopoly, has not sought one.

To say that, at the time he was sentenced, Simon was not in need of care and protection is to look at his legal status rather than at the practical reality of the dangers he was facing.

Another available response of the Department of Community Services may be that the child or young person is not prepared to be assisted so that no effective assistance is possible. Three cases illustrate the difficulty and they are worth discussing because, in this regard, the response of the department of community services may demonstrate a genuine problem.

Carly is a fourteen year old girl with a history of violence. Her mother refuses to allow her into her home for fear of being assaulted. Her father's whereabouts are unknown. Nineteen reports have been made to DOCS, all relating to parent/adolescent conflict or a lack of available accommodation. There is no medical evidence that Carly has a disability or is mentally ill and she has refused any further voluntary participation in a medical assessment.

There have been four voluntary arrangements where Carly has been placed in foster care and each has broken down due to Carly's violence and truculence and DOCS knows of no youth refuge where she will be welcome. Carly has been before the children's court in its criminal jurisdiction on three occasions on charges of violence against a carer or theft while she was homeless. According to the information supplied by the Department of Community Services "*there are no known causes of Carly being in danger of being abused*" but one would have thought that, whatever her legal status in terms of Section 71 of the care act, Carly is a child in dire need. She is 14 and homeless and out of control. When she offends again, whether she will be granted bail and, more importantly, whether she is released back into the community or is made the subject of a control order and detained will depend on Juvenile justice principles but, if she is released, her need of help will be extreme.

Christy is eleven years of age and, at the age of six, was sexually abused by an older half-brother who no longer lives at home. Although there is no known abuse by the mother and Christy makes no such allegation, she refuses to live with her mother and continually runs away from home. She has been in six different foster placements, Each of which has been terminated because of her behaviour and, in her two most recent foster placements, she has attempted to burn the places down. She refuses to engage in any treatment programme.

At the time of which we are speaking, Christy was staying at "Yasmar" (a juvenile detention facility for girls) and wanted to stay there because she felt secure there. But people can't stay in juvenile detention centres merely because they want to or because they like it there or feel secure there and, on proper principles, her period of detention can't last for long. She will remain an extremely needy child and a threat to herself and to society as long as her needs remain unanswered. She may not be "in need of care and protection" in the sense that there has been no judicial finding to that effect but there can be little doubt that Christy is in danger and is potentially dangerous.

Joshua is a fourteen years old lad who was physically and emotionally abused by his father. According to the departmental notes, "*he shows signs of a mental health concern but no doctor will diagnose him as having a mental health issue.*" According to DOCS, "*Joshua is not necessarily violent but has behavioural issues which mean that his carers are not prepared to look after him*" he has a history of petty crime but, when he appears before a children's court, he may well be admitted to bail and, ultimately, released on probation. If he is able to return home to live with his mother, that may be an appropriate outcome but, if he cannot, he will be homeless, without parental care and probably unable to take care of himself.

It seems to me that each of these children is "in need of care and protection" in all but the legal sense of that term and each will pose a huge problem for the children's magistrate sitting in the criminal jurisdiction and bound by juvenile justice principles but who is worried

about the child's future offending to say nothing of his/her survival. It is asking too much of children's magistrates simply to turn a blind eye to such pressing needs of so many children and young people.

I should have thought that, no matter how difficult these cases may be, these children and young people and many, many like them cannot be left to fend for themselves with their needs unmet and their problems unanswered. Clearly, a policy of "*no action*" and of DOCS simply closing the file will result in ruined lives and sometimes loss of life and is unacceptable in a civilised community. Unless it has a care case before it - and that requires an application by DOCS, it is not open to the children's court to make provision for every child or young person who may come before it. But from the point of view of the children's magistrates, we believe that we should be able to look to the chief welfare authority in this state to address the care and protection concerns of those who pass through our hands.

A third response on behalf of the Department of Community Services may be that, since these are matters coming to the attention of children's magistrates sitting in the criminal jurisdiction of the Children's Court, any assistance should be provided by the Department of Juvenile Justice rather than the Department of Community Services. But that response ignores the distinction between the juvenile justice concerns and the welfare concerns surrounding many of these children and young persons. In Simon's case, for instance, his supervision while on probation might be a juvenile justice matter but his need for housing and shelter, for reconciliation with his family or placement with a responsible adult and for counselling or therapy to address his needs arising from his sexual abuse are welfare matters and should be answered by the state's primary welfare agency, the Department of Community Services. Furthermore, these needs and the background to them are much more likely to be known to DOCS, which has been keeping files on him for a long time, than to juvenile justice.

Even where care proceedings are in place and a finding of need of care has been made, the "care act" provides power to the court to order the provision of services only where the person ordered to provide them - usually the department of community services, consents to the order. Very understandably, *DOCS* is not about to surrender its purse strings to the children's court and the department has vigorously and successfully defended them in the Supreme Court. My proposal in this regard - a minimal proposal it seems to me - is that a children's magistrate, sitting in the criminal jurisdiction, should be entitled to enumerate his or her concerns and call upon the Department of Community Services to provide a prompt report as to the care and protection issues surrounding any young person before the court, together with an indication of what steps DOCS has taken or proposes to take to address those issues and, if no steps are to be taken, the reasons for that decision. The implementation of this policy would ensure that a sentencing children's magistrate would be provided with a detailed and thorough assessment of the welfare needs of a child or young person together with an indication and description of 'DOCS' intentions as to meeting those needs. Perhaps this procedure would enhance the chances of positive steps being taken to address the welfare concerns of needy children and young persons who find themselves at court and, at any event, would ensure that somebody takes a decision and remains accountable for it.