TRYING TO BETTER SEE

BOTH SIDES OF THE COIN

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by

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"… the presentation of juvenile justice as the site of opposition between the principles of justice and welfare is ill-conceived…"

John Clarke (1985) 'Whose Justice? The Politics of Juvenile Control' 13 *International Journal of the Sociology of Law*, 407 (at 407).

Introduction

Prior to my appointment in February 1988 to the office of Chief Justice of the Family Court of Australia, I was a Justice of the Supreme Court of Victoria. In that capacity, I was also the Chair of the Adult Parole Board and a member of a group who undertook a major review of sentencing in the State of Victoria.[1] My current judicial role has formally taken me some distance from the criminal justice system. However in my voluntary capacity as Chairman of the Australian Community Support Organisation, a direct service NGO working with offenders, I remain connected with and deeply concerned about the importance of meeting the welfare needs of people who have been through the criminal justice system – both youngsters and adults.

It will come as no surprise to you that it was common to find that the offenders we were dealing with at the Parole Board either had been under the care of protective services departments as children and adolescents, or else they should have been.[2] The histories of these adults displayed the hallmarks of unmet needs: physical, developmental and mental health needs; income, education and housing needs; attachment and consistency needs; and the need to escape and overcome family violence and isolation.

[1] *Sentencing – Report of the Victorian Sentencing Committee* (Volumes 1, 2 and 3), Victorian Attorney-General's Department, Melbourne, Australia.

[2] In Australia's federal system, the responsibility for the investigation and adjudication of care proceedings rests, respectively, with State and Territory government departments and children's courts. The responsibility for criminal law and justice legislation is shared between the parliaments of the six States and two Territories which have the main role, and the Commonwealth Parliament in limited fields.

Regrettably, such was and still is the norm.[3] Worse still, the official recognition of a child in need, through care proceedings and a subsequent court-ordered mandate for welfare intervention, did not mean that those needs would be addressed. This complaint also persists.[4]

A major national review of children in the Australian legal process supported the express inclusion of the following suggestion, with which I agree, within a proposed set of national sentencing principles:

> "[that] in sentencing juvenile offenders courts should take account of failure in protective service provision or community based juvenile justice services for young offenders."[5]

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[3] Keogh, T. (2002) 'Juvenile Recidivism: New and surprising possibilities for mental health promotion and prevention' in Rowling, L. *etal* (Eds) *Mental Health Promotion: Concepts and Practice – Young People*, McGraw-Hill, Roseville, Australia writes (at 235):
"More broadly, juvenile offenders have engaged less well in the educational system and tend to have lower verbal IQ than performance IQ, and overall IQs lower than those of age peers. They are more likely to have learning and attention difficulties, be impulsive and have difficulties with regulating emotions, particularly anger. Young offenders have also been shown to be significantly impaired in their problem-solving ability. It is not surprising, therefore, that juvenile offenders are also known to have difficulties with self-esteem and self-concept. Another distinguishing characteristic of this group which is important in terms of prevention, is the significant profile of drug and alcohol misuse, with over 70% of all juvenile offenders using illicit drugs (mainly cannabis).
Related to the common experience of depression, difficulties with problem solving and limited coping skills, offenders also have a higher propensity than mainstream adolescents to attempt suicide or self-harm. They also present with significant levels of comorbility, with conduct problems, depression (most common), attention deficit hyperactivity disorder, and post-traumatic stress disorder.
As a group, offenders are significantly more likely to have experienced neglect and various forms of abuse, usually within their own families…"

[4] See for example: Australian Law Reform Commission & Human Rights and Equal Opportunity (1997) *Seen and Heard: priority for children in the legal process – Report No. 84*, ALRC, Sydney, Australia; Cashmore, J. and Paxman, M. (1996) *Wards Leaving Care: A Longitudinal Study*, NSW Department of Community Services, Sydney, Australia; Cavanagh, J. (1992) `Children and Young People in Out-of-home Care: Treating and Preventing Individual, Programmatic and Systematic Abuse', Vol 17 *Children Australia*, 1; Kiraly, M. (2001) 'What's wrong with child welfare? An examination of current practices that harm children', *Children and Young People* (web magazine) sourced from http://www.childrenuk.co.uk/chnov2001/chnov2001/kiraly.html; New South Wales Community Services Commission (1996) *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals*, Sydney, Australia; Standing Committee on Social Issues (2002) *Care and Support: Final Report on Child Protection Services*, Parliament of New South Wales, Sydney, Australia.

[5] Australian Law Reform Commission & Human Rights and Equal Opportunity (1997) *Seen and Heard: priority for children in the legal process – Report No. 84*, ALRC, Sydney, Australia (at 543-544); see recommendation 239 (at 544).

Unfortunately, there has been no implementation of either the national sentencing principles or the specific suggestion.

Compared with my days at the parole board, I think we now have structural and opportunity factors that aggravate the risk of children and young people offending. These include: an increased range and availability of substances that are available for abuse; fundamental changes to the labour market and what it takes for young people to enter it; reduced access to universal services; and widening margins between the haves and the have-nots.[6]

Service provision also labours under what I consider to be an inadequate emphasis on the children and young people who bear the legacies of significant community fragmentation, especially when they display the impacts through offending behaviours.

Importantly, in Australia, and this may be relevant in your jurisdiction, those who come to the attention of the state through the criminal justice pathway are the poor cousins of those who are noticed through care and protection intervention. Not only do they suffer greater political and media demonisation, they are the subject of lesser government resource investment.[7] This is extremely short sighted in my view.

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[6] Australia has not mirrored the U.S.A. experience of gun-related violent crime by young people due to more restrictive laws regulating availability and the lack of a culture which speaks in terms of a so-called "right" to bear arms.

[7] In this regard Scraton, P. and Haydon, D. (2002) 'Challenging the criminalization of children and young people: Securing a rights-based agenda' in Muncie, J. *etal* (Eds) *Youth Justice – Critical Readings*, Sage, London, comment (at 323):
"Youth justice work within local authorities has not been afforded a high priority and significant cuts in youth service budgets have affected provisions. Schemes such as drink and drug programs have been reduced. Preventative measures intended to strengthen social support, ensure the provision of appropriate housing, employment and leisure opportunities are not sufficiently widely available…"

The recently retired and long-serving Chair of the Victorian Youth Parole Board, His Honour Judge Eugene Cullity, was renowned for always reminding the community that most young offenders have been previously offended against. In similar terms, the former Director of the City of London Children's Rights Commissioner's Office, Australian lawyer Ms Moira Rayner, has passionately chastened the hypocrisy of community sympathy for children who are survivors of abuse and neglect, while the same community calls for harsher punishments when, some years later, those same children commit an offence.[8]

I don't think I need to overdo the point with an audience such as this. We are being shown two sides of the same coin. We need to be able see them at the same time when young people come to notice as offenders.

It is in the context of these introductory remarks that I am pleased to have the opportunity to participate in this conference. In keeping with the organisers' kind invitation, I hope to bring an Australian perspective to our discussions about better ways to meet what I will broadly describe as the "welfare" needs of young offenders, and the role that jurisdictional arrangements can play. To begin with, I would like us to remind ourselves of the place of diversion and welfare needs for young offenders within a human rights framework.

Human Rights Principles

[8] Rayner, M. (1991) 'The Right to Be Heard' in Alston, P. and Brennan, G (Eds) *The UN Children's Convention and Australia*, ANU Centre for Public Law, Canberra, Australia.

Young offenders are first and foremost people who are entitled to have their rights as children recognised and given effect.[9] The United Nations Convention on the Rights of the Child (CROC) is the premier international instrument identifying the various ways in which under 18 year olds have the right to have their needs met by the social institutions of the state and the community.[10] As Phil Scraton and Deena Haydon explain, the implementation of CROC:

> "… should be grounded in a welfare approach, its three core principles having significant implications for youth justice. First, children's status requires discrete recognition and different responses from adult status, while taking account of individual experiences and capacities. Second, children's welfare should be prioritized. This implies treatment support and guidance based on individual needs rather than punishment retribution and deterrence. Third, children should participate fully in decisions affecting their lives, having had opportunities to gain confidence, explore issues of importance to them, learn the skills required to actively participate, and take action on their own behalf."[11]

Significantly for today's purposes, CROC particularly recognises the special position, vulnerabilities and rights of children who have been the victim of abuse and neglect (in Article 39)[12] and children who are accused and/or adjudicated to have committed criminal offences (in Articles 37 and 40).[13]

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[9] Jones, M. and Basser Marks, L.A. (2001) *Children on the Agenda: The rights of Australia's children*, Prospect Press, Chippendale, Australia.

[10] Available on-line at http://www1.umn.edu/humanrts/instree/k2crc.htm. As the law presently stands, the Convention has not been incorporated into Australian domestic law.

[11] Scraton, P. and Haydon, D. (2002) 'Challenging the criminalization of children and young people: Securing a rights-based agenda' in Muncie, J. *etal* (Eds) *Youth Justice – Critical Readings*, Sage, London, (at 323).

[12] **Article 39**
"States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child."

[13] **Article 37**
"States Parties shall ensure that:

a. No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;

b. No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

c. Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

d. Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

Article 40

"1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

i. To be presumed innocent until proven guilty according to law;

ii. To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

iii. To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

iv. Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

v. If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

vi To have the free assistance of an interpreter if the child cannot understand or speak the language used;

vii. To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

In respect of young offenders, two features of Article 40 warrant special note. Article 40.4 places a responsibility upon the state to provide:

> "[a] variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care … to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

Article 40. 3(b) additionally envisages that jurisdictions will have:

> "measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected".

These Articles make clear the specific foundation for the state's obligation to meet the welfare needs of young offenders and to provide structures for diversion from the formal criminal justice system and the well-recognised risk of young people becoming enmeshed within it.[14] Article 2 requires that the right of children and young people to these opportunities is to be respected and ensured:

> (b) whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence."

[14] See the commentary on rule 10.3 in note 25 below. In this regard the Fundamental Principles of UN Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines) remind:

"5. The need for and importance of progressive delinquency prevention policies and the systematic study and elaboration of measures should be recognised. These should avoid criminalizing and penalizing a child for behaviour that does not cause serious damage to the development of the child or harm to others. Such policies and measures should involve:

[…]

> (e) Consideration that youthful behaviours or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood;
> (f) Awareness that, in the predominant opinion of experts, labelling a young person as 'deviant', 'delinquent' or 'pre-delinquent' often contributes to the development of a consistent pattern of undesirable behaviour by young persons."

> "without discrimination of any kind … irrespective of the child's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property disability, birth or other status."

In this regard, I note that racial and gendered discriminatory practice in the administration of youth justice is raised as a concern in your jurisdiction as it is in Australia and elsewhere.[15]

The CROC provisions are augmented by internationally agreed Rules and Guidelines [16] that provide a body of standards and principles to guide domestic implementation and practice.[17] The UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 ('The Beijing Rules') contain some features that I would highlight as being of particular significance for today's proceedings. Explaining the messages contained within these criteria to the community is essential, I think, if the upward spiral of punitive attitudes towards young offenders is to be effectively stemmed.

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[15] Scraton, P. and Haydon, D. (2002) 'Challenging the criminalization of children and young people: Securing a rights-based agenda' in Muncie, J. *etal* (Eds) *Youth Justice – Critical Readings*, Sage, London, comment (at 322); See also: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Parents (1997) *Bringing them Home,* Human Rights and Equal Opportunity Commission, Sydney, Australia; R. White (1996) *Australian Youth Subcultures: On the margins and in the mainstream*, National Clearinghouse for Youth Studies, Hobart, Australia; and note 24 below.

[16] The obligations in CROC are elaborated upon by several United Nations rules and guidelines, namely:

- UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules) available on-line at http://www1.umn.edu/humanrts/instree/k2crc.htm;
- UN Standard Minimum Rules for Non-Custodial Measures 1990 (Tokyo Rules) – available on-line at http://www1.umn.edu/humanrts/instree/k2crc.htm
- UN Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines) – available on-line at http://http://www1.umn.edu/humanrts/instree/j2ungpjd.htm and
- UN Rules for the Protection of Juveniles Deprived of Their Liberty 1990 – available on-line at http://http://www1.umn.edu/humanrts/instree/j2ungpjd.htm

[17] The Australian Human Rights and Equal Opportunity has prepared a commendable briefing paper on the combined effect of the international instruments with respect to diversion *Human Rights Brief No. 5 Best practice principles for the diversion of juvenile offenders* http://www.hreoc.gov.au/human_rights/briefs/brief_5.html together with a checklist for implementation http://www.hreoc.gov.au/human_rights/briefs/practitioners_brief5.html.

- The Beijing Rules locate juvenile justice as a public policy and a service that is to benefit both the alleged law-breaker and the broader community. It is intended to operate:

> "within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society."[18]

Best practice responses to offenders thus need to be understood as also serving a crime prevention function.

- Responses are not conceived solely at the individual level. The Beijing Rules call upon societies to simultaneously address needs at the structural, systemic and environmental levels. The individual is to receive the benefit of "the full mobilization of all possible resources",[19] and "necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical".[20] Importantly however, states are also called upon to tackle environmental conditions and response systems so as to enhance what is now often described as 'resilience' to the risk of

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[18] Rule 1.4 Beijing Rules states:
"Juvenile justice shall be conceived as an integral part of the national development process of each country, within a comprehensive framework of social justice for all juveniles, thus, at the same time, contributing to the protection of the young and the maintenance of a peaceful order in society."
This underpins the UN Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines)

[19] Rule 1.3 Beijing Rules states:
"Sufficient attention shall be given to positive measures that involve the full mobilization of all possible resources, including the family, volunteers and other community groups, as well as schools and other community institutions, for the purpose of promoting the well-being of the juvenile, with a view to reducing the need for intervention under the law, and of effectively, fairly and humanely dealing with the juvenile in conflict with the law."
See also rule 30.4 which stipulates:
"The delivery of services in juvenile justice administration shall be systematically planned and implemented as an integral part of national development efforts."

[20] Rule 24 Beijing Rules states:
"Efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance such as lodging, education or vocational training, employment or any other assistance, helpful and practical, in order to facilitate the rehabilitative process."

offending.[21] To do so requires a resource investment strategy that has long term as well as short term timeframes, one which appreciates the connection between unmet protective needs and the predictable graduation of young people into criminal justice processing where such needs are unaddressed.

- Rule 3 extends the protection afforded by the Beijing Rules to cover so-called "status offences" and "juvenile welfare and care proceedings".

- The requirement for systems to respond in a manner that emphasises the "well-being" of the young person and that is proportionate to both the circumstances of the individual and the offence is contained in rule 5. This is a critical guiding principle. It reflects a universal view that the bulk of young offending and other conduct of community concern is a transitory, indeed predictably normal, developmental event. Only a small proportion of young people offend in a serious way or persist in offending,[22] and over-reaction is as dangerous as under-reaction. The accompanying commentary to the rule pointedly warns against the risk of net-

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[21] Rule 1.2 Beijing Rules.
"Member States shall endeavour to develop conditions that will ensure for the juvenile a meaningful life in the community, which, during that period in life when she or he is most susceptible to deviant behaviour, will foster a process of personal development and education that is as free from crime and delinquency as possible."
As to resilience literature in Australia, see for example: Fuller, A. *et al* (1998) *The Mind of Youth*, Department of Education (Victoria), Melbourne, Australia; Simmonds, K. (1999) *Pathways to Prevention*, National Crime Prevention, Canberra, Australia.

[22] Gelsthorpe, L. and Morris, A. (2002) 'Restorative youth justice – The last vestiges of welfare' in Muncie, J. *etal* (Eds) *Youth Justice – Critical Readings*, Sage, London, comment (at 242):
"For some time it has been recognised that minor offences are characteristic of a certain stage of adolescence, in both boys and girls. However it is also recognised that a significant proportion of offences are committed by a very small group of offenders, whose offending is unrelated to age. These persistent offenders are seemingly characterized by an early onset of offending and chaotic lives in which poverty, violence, neglect and school failure play a large part."

widening,[23] a concern that has particularly arisen in respect of coercive welfare intervention and social control with adolescent girls.[24] The commentary states:

> "…reactions aiming to ensure the welfare of the young offender may go beyond necessity and therefore infringe upon the fundamental rights of the young individual, as has been observed in some juvenile justice systems. Here, too, the proportionality of the reaction to the circumstances of both the offender and the offence, including the victim, should be safeguarded.
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> In essence, rule 5 calls for no less and no more than a fair reaction in any given cases of juvenile delinquency and crime. The issues combined in the rule may help to stimulate development in both regards: new and innovative types of reactions are as desirable as precautions against any undue widening of the net of formal social control over juveniles."[25]

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[23] Sarre, R. (1999), 'Destructuring and Criminal Justice Reforms: Rescuing Diversionary Ideas from the Waste-paper basket', Vol 10 No. 3 *Current Issues in Criminal Justice,* 259 warns (at 260):
"Evidence is mounting that diversion carries with it hidden dangers. There is a constant danger with diversionary programs that people who come into contact with formal agencies of social control are more often diverted into a less formal destructured aparatus than away from the system entirely."

[24] See for example Hudson, A. "'Troublesome girls': towards alternative definitions and policies" in Cair, M. (Ed.) *Growing Up Good*, Sage, London, 197; Alder, C. and Baines, M (Eds) (1996) *…and when she was bad? Working with young women in juvenile justice & related areas*, National Clearinghouse for Youth Studies, Hobart, Australia.

[25] In a similar vein, rule 10.3 of the Beijing rules states:
"Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or him, with due regard to the circumstances of the case."
The accompanying commentary includes the following explanation:
"Involvement in juvenile justice processes in itself can be 'harmful' to juveniles; the term 'avoid harm' should be broadly interpreted, therefore, as doing the least harm possible to the juvenile in the first instance, as well as any additional or undue harm. This is especially important in the initial contact with law enforcement agencies, which might profoundly influence the juvenile's attitude towards the State and society."
The commentary to rule 11 Beijing rules is also apposite. It states in part:
"Diversion, involving removal from criminal justice processing and, frequently, redirection to community support services, is commonly practised on a formal and informal basis in many legal systems. This practice serves to hinder the negative effects of subsequent proceedings in juvenile justice administration (for example the stigma of conviction and sentence). In many cases, non-intervention would be the best response. Thus, diversion at the outset and without referral to alternative (social) services may be the optimal response. This is especially the case where the offence is of a non-serious nature and where the family, the school or other informal social control institutions have already reacted, or are likely to react, in an appropriate and constructive manner."

- Rules 6 and 11 concern, respectively, the scope for discretion and diversion.[26] They prescribe a role for discretion by specially qualified or trained personnel "at all stages of proceedings and at the different levels of juvenile justice administration"[27] with diversion not restricted to cases involving petty or first offences. The availability of legal advice is expected throughout proceedings,[28] and Rule 11.3 adds the important requirement that any diversion be with the consent of the young person or his/her parents or guardian. The accompanying commentary explains:

  > "However, this consent should not be left unchallengeable, since it might sometimes be given out of sheer desperation on the part of the juvenile. The rule underlines that care should be taken to minimize the potential for coercion and intimidation at all levels in the diversion process. Juveniles should not feel pressured (for example in order to avoid court appearance) or be pressured into consenting to diversion programmes. Thus, it is advocated that provision should be made for an objective appraisal of the appropriateness of dispositions involving young offenders by a "competent authority upon application"."

- Discretion and diversion must operate within a framework that contains the essential elements for a fair and just trial that are internationally recognised in existing human rights instruments such as the International Covenant on Civil and Political Rights. Rule 7 specifies that:

  > "the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and

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[26] Rule 3.1 of the Tokyo Rules states that the "introduction, definition and application of non-custodial measures shall be prescribed by law".

[27] Rule 6.1 Beijing Rules states:
"In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions."

[28] Rule 15,1 Beijing Rules states:
"Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free leal aid where there is provision for such aid in the country."

cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings."

- The final provision I would list is rule 17.4, which requires that there be a power to discontinue proceedings at any time, the rationale being:

  "circumstances may become known to the competent authority which would make a complete cessation of the intervention appear to be the best disposition of the case."[29]

SOME IMPLICATIONS

Over and above their specific guidance, I think that CROC and the various Rules are an encouragement to continue developing creative options for diversion from formal criminal justice processing.

There is a spectrum of case circumstances to be targeted. The development of diversion options is an evolutionary process in which jurisdictions look and learn from each other what additional string to the bow may assist and be improved upon in the local context. Even where new initiatives conscientiously attempt to meet the human rights and criminological best practice standards of the day, careful and credible evaluations must be built in to their design and trial. The interventions have to be demonstrably effective not only attractive in theory. They must certainly not be counterproductive, no matter how well-intended – and I am thinking here of the so-called "scared straight" programs.[30]

[29] Commentary to rule 17 Beijing Rules.

[30] McCord, J. (2002) 'Counterproductive Juvenile Justice' Vol 35 No 2 *Australian and New Zealand Journal of Criminology* 238 illustrates how outcome evaluations can identify the unexpected negative effects of interventions.

In a federal system such as Australia where the juvenile justice and the care systems are the bailiwick of the States and Territories, we have a good deal of variety in the operation of diversion schemes and the extent to which welfare needs are given prominence. Generally though, diversionary programs in Australia involve either police cautioning or conferencing schemes with the meaning of these terms and their place within the system, varying across jurisdictions.[31] Victim-offender or family group conferences are also used increasingly either as a pre-trial diversion option or as a sentencing option.[32] Referrals are made either

[31] In this regard see Daly, K. and Hayes, H. (2001) 'Restorative Justice and Conferencing in Australia' *Trends and Issues in Crime and Criminal Justice No. 186*, Australian Institute of Criminology, Canberra, Australia.

[32] *Human Rights Brief No. 5 Best practice principles for the diversion of juvenile offenders* comments as follows:
"At present, diversionary programs in Australia tend to be limited to either police cautioning or conferencing. The specific nature of these schemes and the legal framework within which they operate vary among jurisdictions.
Police have traditionally exercised discretion to divert young people from court proceedings by warning or cautioning them. In some jurisdictions cautions are governed to a limited extent by police instructions. In Queensland, Western Australia, South Australia, Tasmania, Northern Territory and NSW cautioning is covered by legislation. The caution must be expressed in language readily capable of being understood by the juvenile. The fact of a caution should not be referred to in subsequent legal proceedings, since this would amount to a conviction being recorded against a juvenile without the due process of a judicial hearing or the need to establish guilt beyond a reasonable doubt.
Victim-offender or family conferences are also used increasingly in states and territories either to divert young offenders prior to trial or as a sentencing option. All existing models of victim-offender conferencing used in Australia have been the subject of criticism. In their joint 1997 report, *Seen and Heard*, HREOC and the Australian Law Reform Commission recommended that national standards for juvenile justice should incorporate best practice guidelines for conferencing. Matters for consideration should include

- the desirability of diversionary options being administered by someone independent of law enforcement bodies, such as a judicial officer, youth worker or community based lawyer
- the need to monitor penalties agreed to in conferences to ensure that they are not significantly more punitive than those a court would impose as appropriate to the offence
- the need to ensure that young people do not acquire a criminal record as a result of participating in conferencing
- the need to monitor conferencing proceedings to ensure that they do not operate in a manner oppressive or intimidating to the young person
- the child's access to legal advice prior to agreeing to participate in a conference
- whether it is preferable for schemes to have a legislative basis so that the process is more accountable and less ad hoc
- the need to monitor the overall effect of conferencing schemes to ensure they do not draw greater numbers of young people into the criminal justice system or escalate children's degree of involvement with the system.

Despite the shortcomings of existing diversionary options in Australia, they offer a number of advantages. They are more likely to recognise the particular vulnerabilities of juvenile offenders. They avoid the stigma associated with prosecution and conviction and the

by police or by the courts. The young person must admit the offence. The following table prepared by the Australian Institute of Criminology is a helpful summary of current pre-court diversionary options.[33]

contamination of a first/minor offender by more serious or recidivist offenders. Diversionary options may create better opportunities to identify any family, behavioural and health problems contributing to the offending behaviour, and they may enable the child to participate meaningfully in the proceedings. They may also save resources for law enforcement and criminal justice agencies."

[33] Sourced from: http://www.aic.gov.au/research/jjustice/diversion/options.html

Pre-court diversionary options

Jurisdiction	Options	Governing Legislation
Australian Capital Territory	• Warnings • Conferencing	• Children and Young People Act, s 81(3)(k) • Australian Federal Police Conferencing Program
New South Wales	• Warnings • Cautions • Youth justice conferences • Warning – verbal or written	• Young Offenders Act, Part 3 • Young Offenders Act, Part 4 • Young Offenders Act, Part 5
Northern Territory	• Formal Caution • Formal diversion program • Conferencing • Drug abuse program • Community program	• Police Administration Act, s 120H • Northern Territory Police Juvenile Diversion Division
Queensland	• Cautions • Community conferences	• Juvenile Justice Act, Part 1C
South Australia	• Informal cautions • Formal caution • Family conferences	• Young Offenders Act, s 6-12
Tasmania	• Information caution • Formal caution * • Community conference	• Youth Justice Act, s 8 • Youth Justice Act, s 10-12 • Youth Justice Act, Part 2 Division 3
Victoria	• Warnings • Cautions • Juvenile Justice Group Conferencing Program	• No legislative framework for diversionary procedures
Western Australia	• Cautions – verbal or written • Referral to Juvenile Justice Team	• Young Offenders Act, Part 5

* may be given by Aboriginal elder or community representative where appropriate.

Interestingly, a different type of diversion provision exists under the Victorian legislation which is similar to that under discussion today but it is not contained in this summary. I will return to discuss the Victorian *Children and Young Persons Act* 1989 in a few moments.

Beforehand, I would first like to underline the point that the human rights standards I have canvassed lay down the clear expectation that the right of young offenders to discretion and diversion is not to be at the expense of due process protections, and that genuine consent is to be obtained as a pre-requisite to participation in the alternatives to formal processing. The applicability of the Beijing Rules to care proceedings that I mentioned earlier suggests that if equivalent safeguards operate in both the care and criminal justice jurisdictions, there is compliance with the international standards where diversion involves the transfer of a matter between jurisdictions. As to the procedural justice considerations that are involved, I am sure you are all much more familiar and conscious than me of the bearing of the European Convention on Human Rights on program design and practice in your jurisdiction.

I would also like to stress that the Rules expect that **all** juvenile justice interventions will attend to the welfare needs of the youngster, and that a variety of diversion options will be available depending upon the case-type and the point of criminal justice processing. Good program design means that some schemes will be more suitable for or limited to certain circumstances.[34] Thus, providing there is a broad menu of diversion

[34] Note in this regard the following comment in *Human Rights Brief No. 5 Best practice principles for the diversion of juvenile offenders*:
"Agencies with the discretionary power to divert young people from formal proceedings must exercise that power on the basis of established criteria. Access to diversionary programs must not be arbitrary. Tokyo Rule 3.1 requires that the "introduction, definition and application of non-custodial measures shall be prescribed by law'."

schemes that are not limited to first or petty offence circumstances, and within which there is proper attention to welfare needs, there would seem no reason why eligibility for a particular option could not be tightly defined. Indeed, to avoid net widening and to focus resources, clear definitions are highly desirable.

The expectation that welfare needs will be addressed across the entire continuum of juvenile justice processing by all actors within the process leads to fundamental questions about the proposal for a capacity to transfer certain cases out of the criminal justice jurisdiction and into the care jurisdiction:

- What would be the welfare benefits of such a transfer?
- How would the welfare benefits differ from those currently provided within the existing juvenile justice framework (both diversion options and mainstream processing)?

It would seem to me that the answers to these questions have a critical bearing upon the criteria to be applied to eligibility for what I will term "care referral" diversion.[35] This is a convenient point to describe such an option in the Victorian legislation.[36]

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[35] In this regard, I note the following comment in respect of your jurisdiction by Gelsthorpe, L. and Morris, A. (2002) 'Restorative youth justice – The last vestiges of welfare' in Muncie, J. *etal* (Eds) *Youth Justice – Critical Readings*, Sage, London, (at 240):
"The first significant events of the 1990s were the implementation of the 1989 Children Act and the introduction of the 1991 Criminal Justice Act, which had the combined effect of separating the systems for dealing with children perceived to be in need of care (to be dealt with in the family courts) and those charged with offences (to be dealt with in the newly named Youth Court). The most important change in this context was the cessation of the use of the care order (an established symbol of welfare) as a disposal available to the courts in criminal proceedings, and the removal of the offence condition in proceedings justifying state intervention in the life of a family. This change at once recognized the enormous decline in the use made of the care order, the seeming inappropriateness of a care order in criminal proceedings, the principle of determinacy in sentencing, and the importance that the government attached to parental responsibility."

[36] Scuderi, C. (2003) 'Diversion Program for Young Drug Users in Victoria' Vol 77 No 5 *Law Institute Journal* 36 describes a recent initiative whereby the Children's Court of Victoria may defer sentencing pursuant to s 190 of the *Children and Young Persons Act* 1989 (Vic.) to enable participation in a program operated by the clinical service attached to the Children's court. A report is prepared which may be taken into account when, after the deferral period, the child presents for sentencing. The program is to be evaluated later in 2003.

Care Referral under Victorian Legislation

Throughout Australia, both child protection and juvenile justice matters are the jurisdiction of a State or Territory children's court (unconnected with the federal Family Court of Australia).[37] Cases are presided over by a judge or legally qualified magistrate.[38] The minimum age of criminal responsibility is 10 years old,[39] and generally, the definition of a child for both child protection and criminal justice purposes extends to the age of 18 years.[40]

Unfortunately, the child protection laws of our eight internal jurisdictions contain fundamental, indeed I would say, irrational differences in critical matters as the following:

- how abuse or maltreatment is defined;
- the systems through which abuse notifications are investigated;
- the level and availability of primary, secondary and tertiary services; and
- the relative emphasis placed on forensic investigation as contrasted with measures of service and assistance to children, young people and their families.[41]

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[37] The establishment of separate Family and Criminal Divisions of the Children's Court of Victoria was effected by the *Children's Court (Amendment) Act* 1986 (Vic.) was "to ensure that their procedures, standards of proof and dispositions reflect the fundamental difference in the nature of child protection and juvenile justice proceedings": Parliament of Victoria, *Hansard*, Legislative Assembly, 8 December 1988 (at 1150). Care proceedings and criminal proceedings are distinct and separate cases in Victoria.

[38] Serious offences may be transferred to higher courts.

[39] See the table at http://www.aic.gov.au/publications/tandi/tandi181.html

[40] *Ibid*.

[41] Rayner, M. (1994) *The Commonwealth's Role in Preventing Child Abuse : A Report to the Minister for Family Services*, Australian Institute of Family Studies, Melbourne.

An important point to be noted is that the Family Court of Australia has no jurisdiction to make orders under State and Territory child protection laws other than in the context of and as between the parties before them.[42] This jurisdictional situation flies in the face of research that has

[42] There are however statutory requirements in the *Family Law Act* 1975 (Cth) for notifying child protection concerns. Investigations are carried out by the relevant State or Territory department.

Section 67Z

Where party to proceedings makes allegation of child abuse

(1) This section applies if a party to proceedings under this Act alleges that a child to whom the proceedings relate has been abused or is at risk of being abused.

(2) The party must file a notice in the prescribed form in the court hearing the proceedings, and serve a true copy of the notice upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.

(3) If a notice under subsection (2) is filed in a court, the Registrar must, as soon as practicable, notify a prescribed child welfare authority.

(4) In this section:

prescribed form means the form prescribed by the applicable Rules of Court.

Registrar means:

(a) in relation to the Family Court, or the Family Court of Western Australia—the Registrar, or a Deputy Registrar, of that Court; and

(b) in relation to any other court—the principal officer of that court.

Section 67ZA

Where member of the Court personnel, counsellor, mediator or arbitrator suspects child abuse etc.

(1) This section applies to a person in the course of carrying out duties, performing functions or exercising powers as:

(a) a member of the Court personnel; or

(b) a family and child counsellor; or

(c) a family and child mediator; or

(d) an arbitrator.

(2) If the person has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

(3) If the person has reasonable grounds for suspecting that a child:

(a) has been ill treated, or is at risk of being ill treated; or

(b) has been exposed or subjected, or is at risk of being exposed or subjected, to behaviour which psychologically harms the child;

the person may notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.

(4) The person need not notify a prescribed child welfare authority of his or her suspicion that a child has been abused, or is at risk of being abused, if the person knows that the authority has previously been notified about the abuse or risk under subsection (2) or subsection 67Z(3), but the person may notify the authority of his or her suspicion.

(5) If notice under this section is given orally, written notice confirming the oral notice is to be given to the prescribed child welfare authority as soon as practicable after the oral notice.

(6) If the person notifies a prescribed child welfare authority under this section or subsection 67Z(3), the person may make such disclosures of other information as the person reasonably believes are necessary to enable the authority to properly manage the matter the subject of the notification.

Section 67ZB

No liability for notification under section 67Z or 67ZA

(1) A person:

highlighted that dealing with child abuse allegations is part of the core business of the Family Court.[43] Indeed, orders that are made in private family law proceedings under the *Family Law Act* (Cth) 1975 are displaced when a Children's Court makes a child protection order.[44] On occasions we have the spectacle of both federal and State/Territory courts dealing with the same people and the same issues.

(a) must give notice under subsection 67Z(3) or 67ZA(2); or
(b) may give notice under subsection 67ZA(3) or (4); or
(c) may disclose other information under subsection 67ZA(6);
in spite of any obligation of confidentiality imposed on the person by this Act, another Act, another law or anything else (including a contract or professional ethics).
(2) A person is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics, in respect of a notification under subsection 67Z(3) or 67ZA(2).
(3) A person is not liable in civil or criminal proceedings, and is not to be considered to have breached any professional ethics, in respect of a notification under subsection 67ZA(3) or (4), or a disclosure under subsection 67ZA(6), if the notification or disclosure is made in good faith.
(4) Evidence of a notification under subsection 67Z(3) or subsection 67ZA(2), (3) or (4), or a disclosure under subsection 67ZA(6), is not admissible in any court except where that evidence is given by the person who made the notification or disclosure.
(5) In this section:
court means a court (whether or not exercising jurisdiction under this Act) and includes a tribunal or other body concerned with professional ethics."

[43]See Brown, T. with Sheehan, R., Frederico M., and Hewitt, L. (2002) *Resolving family violence to children,* the evaluation of Project Magellan, a pilot project for managing Family Court residence and contact disputes when allegations of child abuse have been made, and the references therein, available at http://www.familycourt.gov.au/papers/html/magellan.html

[44] Section 69ZK *Family Law Act* 1975 (Cth) provides:
"**Child welfare laws not affected**
(1) A court having jurisdiction under this Act must not make an order under this Act (other than an order under Division 7) in relation to a child who is under the care (however described) of a person under a child welfare law unless:
(a) the order is expressed to come into effect when the child ceases to be under that care; or
(b) the order is made in proceedings relating to the child in respect of the institution or continuation of which the written consent of a child welfare officer of the relevant State or Territory has been obtained.
(2) Nothing in this Act, and no decree under this Act, affects:
(a) the jurisdiction of a court, or the power of an authority, under a child welfare law to make an order, or to take any other action, by which a child is placed under the care (however described) of a person under a child welfare law; or
(b) any such order made or action taken; or
(c) the operation of a child welfare law in relation to a child.
(3) If it appears to a court having jurisdiction under this Act that another court or an authority proposes to make an order, or to take any other action, of the kind referred to in paragraph (2)(a) in relation to a child, the first-mentioned court may adjourn any proceedings before it that relate to the child."

The well-spring of our jurisdictional difficulties in Australia is to be found in federal Constitutional limitations, a matter I will not delve into today.[45] Our difficulties have to be ameliorated through the use of protocols and other working arrangements. They are constructive innovations but not a substitute for having a coherent child centred legal framework.

The Australian experience is to be contrasted with that seen in the United States, where there has been active interest for some years in the context of what is there described as a "Unified Family Court".[46] The concept is that one Court will deal with all of the problems of families and children and young people, which are so often interlocked. These would include traditional family law disputes, domestic violence, child protection and young offenders.[47] Some more radical suggestions involve such Courts dealing with criminal offences **against** children. My colleague Justice Linda Dessau has had this to say:

> "Having sat in the Children's Court, Magistrates' Court, Coroner's Court and for the past four years in the Family Court of Australia (the FCA), I have contemplated how children fare across the spectrum of court experiences. My assimilated view leads me to the view that until Australia has one Unified Family Court, children and families will irreparably suffer from disjointed and/or overlapping court services."[48]

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[45] See the discussion in Nicholson, A. and Harrison, M. (2000) 'Family Law and the Family Court of Australia: Experiences of the First 25 Years' Vol. 24 No. 3, *Melbourne University Law Review,* 756.

[46] See Nicholson, A. "Future directions in family law", A paper presented to Family Law : Processes, practices and pressures, International Society of Family Law, 10th World Conference, 10 July 2000, Brisbane, Australia available at http://www.familycourt.gov.au/papers/html/nicholson10.html

[47] "Children and Family Violence Laws in Australia "Paper presented to the conference In the Mainstream: Contemporary Perspectives on Family Violence, September 1999, Belfast.

[48] "Children and the Court System", A paper delivered to The Australian Institute of Criminology conference, Brisbane, 17 June 1999, available at http://www.familycourt.gov.au/papers/html/dessau.html

As to the inclusion of jurisdiction concerning young offenders, her Honour has advocated, and I agree that:

> "… a unified family court must also include juvenile crime. Otherwise, those children charged with offences would be dealt with as the junior part of an adult criminal justice system. To follow that course would be to marginalise those children, who in reality are mostly indistinguishable from the children who are in need of care and protection or suffering family breakdown, family violence or other family problems."[49]

So far as service delivery is concerned, we do not have a "local authority" system *per se* of allocating responsibility for juvenile justice orders and the investigation and post-court management of child protection cases. They are the responsibility of State and Territory government departments, often the same one, with regional structures, as is the case in Victoria.

This was the administrative structure in place at the time of the enactment of the *Children and Young Persons Act* 1989 (Vic.). Importantly for today's topic, as a result of the Act and consistent with contemporary thinking at the time, the making of a care order ceased to be available as a criminal justice disposition. Sections 132 and 133 of that Act do, however, enable a court to refer a young defendant in criminal proceedings to the Secretary of the Victorian Department of Human Services for protective assessment, with a report provided to the referring court.[50]

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[49] *Ibid.*

[50] The Second Reading Speech by the Minister introducing the bill which became the *Children and Young Person's Act* 1989 (Vic.) relevantly states:
"The government recognises that, in some situations, there may be both protective and criminal matters in respect of the one child. Where this occurs, the court must, as a general rule, deal with the protective concerns first in the Family Division [of the Children's Court]. In addition, where the Criminal Division [of them Children's Court] believes there are protective issues, the court may defer sentencing and refer the matter to the Director-General of Community Services for investigation and report. This endures that protective issues are dealt with in the Family division and do not obscure issues of criminal responsibility, which are the proper concern of the Family Division.

Sections 132 and 133 are in the following terms:

"**132. Referral to Secretary**

(1) If--

(a) a child appears as a defendant in a criminal proceeding in the Court; and

(b) the Court considers that there is prima facie evidence that grounds exist for the making of a protection application in respect of the child--

the Court may refer the protective matter to the Secretary for investigation.

(2) If a matter is referred to the Secretary under this section, the Secretary must enquire into the matter and provide, within 21 days of the referral, a report on the matter to the Court.

(3) A report provided under sub-section (2) must--

(a) confirm that the Secretary has enquired into the matter referred; and

(b) advise that--

(i) a protection application has been made by the Secretary; or

(ii) the Secretary is satisfied that no protection application is required.

133. Report to Court

(1) If a matter is referred to the Secretary under section 132, the Court may order the Secretary to prepare a pre-sentence report in respect of the child and may, subject to section 18(2), defer sentencing the child until the Secretary provides the pre-sentence report (if any) and a report under section 132(3)(b)(ii) or sub-section (2)(a) of this section.

(2) If a protection application is made by the Secretary, the Secretary, as soon as possible after the determination of the application, must--

(a) report to the Criminal Division--

(i) that the protection application was dismissed; or

(ii) that a protection order was made and state the terms of the order; and

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However, the offence must still be dealt with in the Criminal Division once the court is satisfied that the protective issues have been appropriately dealt with. This ensures that children and young people recognise that there are consequences for breaking the law.": Parliament of Victoria, *Hansard*, Legislative Assembly, 8 December 1988 (at 1151).

(b) at the same time, forward a pre-sentence report on the child to the Criminal Division if one has been ordered by the Court."

Section 18(2) requires that unless there is an order to the contrary, proceedings in the Family Division of the Children's Court must be heard and determined before proceedings in the Criminal Division of the Court.[51] Thus, the disposition of the criminal proceedings is able to take account of any protective order which has been made.

It was interesting to speak with Children's Court magistrates about the referral provisions when preparing for this paper. Although the Act has contained these sections since its original passage in 1989, there has been no systematic research of their operation. Anecdotally however, it seems:

- only a handful of referrals are made;
- referrals are nearly always upon the application of the child's lawyer;
- the report nearly always finds that there are no protection concerns; and
- although it is open for the Magistrate to question the report writer or for the report writer to be cross-examined, this does not in fact occur.

It is puzzling that the referrals rarely result in the Department of Human Services finding there are protective concerns that warrant the making of a protection application. The magistrates who sit in the Children's Court hear both protection and criminal justice children's matters, are highly experienced in both jurisdictions, and I would have thought, likely to make careful referrals.[52]

[51] Section 18(3) provides that "[I]f the Court makes an order under sub-section (2), it must state orally the reasons for the order."

[52] The President of the Children's Court of Victoria has the status of a County Court Judge. Magistrates are assigned to sit in the Children's Court jurisdiction. We do not, however, have a "ticketing" system as I understand is in place in your jurisdiction.

This makes for an interesting parallel with what occurs when serious child protection issues arise in the course of private family law proceedings in my court. Section 91B of the *Family Law Act* 1975 empowers the Court to request the intervention of a child protection department as a party to the private proceedings.[53] The Court cannot, however, compel such intervention. Again, speaking anecdotally, court requests pursuant to s91B are infrequent and it is rare to find that such invitations are taken up by the departments.

One could speculate that the infrequency of requests by courts under both s91B *Family Law Act* 1975 (Cth) and s132 *Children and Young Persons Act* 1989 (Vic.) is a consequence of the responses which have been received over the years from the child protection departments. Speaking for myself, I can think of numerous occasions where the evidence indicated *prima facie* that neither parent was a suitable carer and that the best interests of the child would have been most adequately met by an order in favour of the department.

Having been disappointed in the past with s91B requests, I tend to see the making of such invitations a futile exercise, causing unnecessary delay. It will therefore come as no surprise to you that I would prefer to see referral provisions between the criminal justice and care jurisdictions which impose a stronger and more accountable legal duty

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[53] Section 91B states:
"**Intervention by child welfare officer**
(1) In any proceedings under this Act that affect, or may affect, the welfare of a child, the court may request the intervention in the proceedings of an officer of a State, of a Territory or of the Commonwealth, being the officer who is responsible for the administration of the laws of the State or Territory in which the proceedings are being heard that relate to child welfare.
(2) Where the court has, under subsection (1), requested an officer to intervene in proceedings:
(a) the officer may intervene in those proceedings; and
(b) where the officer so intervenes, the officer shall be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party."

upon the agencies that are requested by a court to assess welfare and protective needs. Of course, if the child is to actually benefit from such assessment, it is vital that such duty and accountability then extends to the provision of relevant services. This concern permeates the subject-matter of today's seminar.

The further comment I would make about the Victorian statute is that I think it would be helpful if it were to expressly contain a presumption to the effect that where a protective order is made following referral, the criminal charges would ordinarily be disposed of by striking them out. I say "ordinarily" because the justice of the case as between the child, the victim of crime and community expectations may indicate otherwise and, as I have said earlier, I would not like to see the referral provision limited to the softest of first time offenders. Anything more directive than a presumption could have the effect of limiting the use of care referral.

Conclusion

I would conclude with what you might call a hearsay comment that I hope you will forgive under the circumstances. It is your Lord Chief Justice, Lord Woolf of Barnes quoting the person he describes as the father of criminology, Sir Leon Radzinovicz. Sir Leon said:

> "no meaningful advance in penal matters can be achieved in contemporary democratic society so long as it remains a topic of political controversy instead of a matter of national concern."[54]

Lord Woolf made this comment while addressing an Anglo-Australasian Lawyers' Society Breakfast in Sydney less than two months ago, on the general topic of a need for a new approach to sentencing. Today's

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[54] (2003) 'A New Approach to Sentencing' Vol. 15 No. 3 *Judicial Officers' Bulletin*,1 (at 1).

conference focus on children and young people adds momentum to that call. They are and should be a priority national concern.

I hope that the material I have canvassed with you today is of assistance in enhancing the effectiveness and humanity of your justice system for children and young people.

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