Juvenile justice: responding to Australia's children and young people in trouble with the law

By Jenny Bargen

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Prominent researchers in the field of juvenile justice have summarised the major changes in juvenile justice laws and practices over the last decade.

According to Cuneen and White, to date there has been:

> Heightened public concern and moral panics about ethnic minority youths, imposition of mandatory sentences on juvenile offenders, adoption of zero-tolerance policing, especially in public places, persistent over-representation of Indigenous young people within the juvenile justice system, and intensification of intervention in the lives of young offenders and non-offenders alike...Discussion has centred on how best to control, manage, and contain those youth suffering most from the disadvantages of social, economic, and political exclusion.
>
> On the positive side, greater attention is now being given to the basic rights and well-being of young people...There has been a growth in the human rights perspective as a critical perspective by which to evaluate policing practices, the operation of courts and youth conferences, and the conditions under which young people are detained or sentenced to community work...The increasing popularity of 'restorative justice' with an emphasis on repairing social harm, can serve as an important counterweight to traditional retributive methods that emphasise punishment.[1]

Seen and Heard[2] made over 90 recommendations about children's involvement in the criminal justice process, covering the policing of children, legal advice and representation, diversion from court and custody; court design and proceedings, sentencing and detention. It is impossible in a piece of this length to fully canvas whether and, if so, how the responses by all Australian jurisdictions to children in trouble with the law have changed in each of these areas since 1997. Rather than canvassing the changes outlined by Cunneen and White, above, only a few of the most obvious changes are considered here. The focus is largely on NSW, although reference is made to changes in some other jurisdictions, particularly Victoria, Queensland and Western Australia.

National standards

The major recommendation in *Seen and Heard* is that national standards should be established for all areas of juvenile justice. This recommendation has not been implemented and responses to children and young people in trouble with the law remain firmly entwined with the politics of juvenile crime in each jurisdiction.[3] The election of the new federal Labor government in December 2007 was quickly followed by the appointment of a Minister for Youth, and the creation of a new national Youth Forum, together with a call for submissions from children and young people and those working with them about the areas on which the new Forum should concentrate.[4] Whether the new Minister for Youth or the Youth Forum will include children and the criminal law as one of their priority issues or take up the *Seen and Heard* recommendation to create national standards for juvenile justice remains to be seen.

The Australian Juvenile Justice Administrators (AJJA)[5] could perhaps be said to act as a de-facto monitoring body. AJJA has sponsored the creation of National Minimum Data Sets

for juvenile justice, but has excluded police cautioning and youth conferencing. The bail supervision schemes operated by the NSW Department of Juvenile Justice in certain parts means that official statistics do not provide a complete picture of the extent to which Australia's children and young people are involved in both informal (diversionary) responses and in formal court processes. This is disappointing, given that significant proportions of children and young people who come into contact with police are now dealt with by way of formal or informal police cautions in every Australian jurisdiction, and given the dominance in the literature over the last 10 years of issues in restorative justice for juveniles in youth/family conferences.

The Australian Institute of Health and Welfare (AIHW) now publishes biennial reports on the number and rates per 100,000 children of children on community orders and in detention.[6] The Australian Institute of Criminology (AIC) also publishes annual reports on the number and rates of children in custody (both remand and control)[7] for each jurisdiction.[8]

Official statistics must be read with caution, and can never indicate the full extent of offending. Rather, they provide an indication of the activities of police, courts and the various government departments responsible for implementing court orders. Victim surveys, although confined to people over about 15 years old, provide the other side of the coin, and indicate relatively high levels of unreported crime that vary with the nature of the offence, for both children and adults—but also show that children and young people experience relatively high rates of victimisation, particularly as victims of assault.[9]

Seen and Heard estimated that, in 1997, at most, only about 4% of all children and young people aged between 10 and 17 came into contact with Children's Courts, police cautions and youth conferences.[10] More recent estimates by the AIHW suggest that 'around 15–17% of young Australians have been found to have at least one formal contact with police as juveniles'.[11] This may indicate better recording practices, rather than an increase in the incidence of offending by children and young people, or simply that the take up in the use of diversionary options has resulted in significant net widening. What is clear is that in all jurisdictions Indigenous children and young people come into contact with the police at much higher rates and at much lower ages than any other group of Australian children and young people—that they dominate the data for all responses and, in most jurisdictions—overwhelm the data for children and young people in detention.[12]

Upper and lower ages for criminal responsibility as a child

In 1997, the age of criminal responsibility in Tasmania was seven and in the ACT, eight. *Seen and Heard* recommended that there should be a uniform minimum age of criminal responsibility. The age of ten has now been adopted in law by all Australian jurisdictions as the minimum age.

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'*Doli incapax*' is the rebuttable presumption that a child aged between 10 and 13 does not possess the capacity to form criminal intent. All jurisdictions except NSW, Victoria and South Australia had enshrined this presumption in legislation by 1997. *Seen and Heard* sensibly recommended that *doli incapax* should be in legislation everywhere in Australia, but to date this has not happened. In NSW there have been regular, but unsuccessful, calls to abolish the presumption.

Seen and Heard recommended that the age at which a child reaches adulthood for the purposes of the criminal law should be 18 in all jurisdictions. This is now the case everywhere except in Queensland, where, despite advocacy on this point, the upper age remains at 17. The Northern Territory raised the upper age limit to 18 in 2000. Victoria raised the upper age limit from 16 to 17 in 2005.[13]

The age at which an adult can be tried as a child for offences allegedly committed when aged less than 18 and the upper age limit for serving a custodial order for an offence committed as a child continue to vary across the jurisdictions, as was the case in 1997.[14]

Diversion by means of police cautions and youth conferences

All jurisdictions have now introduced legislation governing police cautions and youth/family conferences, usually as a 'front end' response to (generally less serious) offending by children and young people.[15] All jurisdictions permit courts to refer young offenders to a youth conference. Uniquely, Victoria confines family group conferences to a sentencing option for those young people who have a significant history of offending and who would

otherwise be sentenced to a period in a youth detention centre. While police are responsible for the administration of formal and informal cautions in all jurisdictions, the administrative arrangements for conferencing vary between jurisdictions, and the national standards recommended by *Seen and Heard* for both cautions and youth conferences have not yet been developed. Although recommended in *Seen and Heard*, no specific arrangements have been made for Indigenous forms of conferencing for young offenders. NSW has considered introducing circle sentencing for Indigenous young people similar to the circle sentencing schemes for adult Aboriginals. Queensland and Victoria have introduced Murri and Koori [17] youth courts (respectively), in which respected members of local Aboriginal communities sit on the bench with the Children's Court magistrate in deciding on sentences.[18]

Preventive apprehension

The *Children (Protection and Parental Responsibility) Act 1997* (NSW) was the subject of considerable criticism in *Seen and Heard*.[19] While provisions remain in this Act for removing children and young people on the streets who are 'at risk' or about to commit an offence, and for the establishment of safe places to which such children can be removed, the provisions are rarely, if ever, used.[20]

Arrest as an option of last resort

Consistent with the recommendations of *Seen and Heard*, all jurisdictions now have a legislated requirement that children should be dealt with by way of court attendance notice or summons rather than arrest.[21] Most jurisdictions encourage police to consider cautions or referral to conferences before initiating court proceedings. In practice, however, at least in NSW, while police are aware of the need to adopt the least intrusive response when dealing with young offenders, young people are often more likely to be arrested and charged than summonsed or dealt with by way of court attendance notice. Children and young people can also be given a variant of a court attendance notice called a 'bail CAN', which allows compliance with the requirement to proceed by alternatives to arrest while at the same time permitting the imposition of bail. The recent changes to the bail laws in NSW that are canvassed below appear to have encouraged the continuing imposition of conditional bail on many young suspects in NSW.

Special arrangements for Aboriginal children and young people

Most jurisdictions now make provision for special arrangements with respect to Aboriginal children and young people. For example, in Queensland, provisions are made for the presence in the Children's Court of Queensland of members of organisations providing welfare services to Aboriginal and Torres Strait Islander children, or representatives of an Aboriginal Community Justice Group in the child's community, to assist the court in making sentencing decisions about the child.[22] The 2004 amendments to the *Young Offenders Act 1994* (WA) allow the head of the juvenile justice department to make arrangements with Aboriginal Community Councils to supervise Aboriginal children and young people on community based orders.[23] In NSW, respected members of Aboriginal communities can be invited to deliver cautions to Aboriginal children.[24] In late 2007, the NSW government incorporated into the *Young Offenders Act* a specific object of addressing 'the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings'.[25]

Legal advice

Seen and Heard expressed strong views about children's right to legal advice and representation at every point at which they are in contact with criminal justice proceedings. The report recommended that children should have a statutory right to legal advice prior to any police interview, and that police should be required by law to inform children of this right before interview. It recommended that duty solicitor schemes should be adequately funded so that the child could meet with a solicitor prior to his or her court appearance to allow time for the solicitor to take adequate instructions. It also considered that duty solicitor schemes should be supplemented by 24 hour free telephone legal advice services, staffed by skilled children's lawyers.[26] Not all states and territories have adopted these recommendations, partly because of the cost. However, since 1999 the NSW Legal Aid Children's Legal Service has operated a very busy free Youth Hotline, which provides legal advice to all children in police custody between 9 am and midnight Monday to Friday, and for 24 hours on weekends and public

holidays. Police are required to advise any child in custody that he or she has a right to legal advice, and where this advice can be obtained.[27] Until very recently, the Aboriginal Legal Service (ALS) in NSW and the ACT offered a 24/7 custody line to both Aboriginal adults and children in police custody. While recent cuts in Commonwealth government funding and the continued unwillingness of the NSW government to provide funding for the service—even though police are required by law to use it—have constituted significant threats to its continuation, the ALS has found ways to continue to provide this essential protection to the legal rights of Aboriginal children and adults in police custody. Victoria and Queensland both have limited free telephone advice schemes for children in police custody.

Most states now have some form of children's court duty solicitor scheme run by the various Legal Aid bodies, with a mix of in-house and private solicitors. However, while most duty solicitors will meet with the child prior to a court appearance, the time available for this meeting continues to be very limited, and, unless the child is facing relatively serious charges, the meeting will be in a room at the court house.

Bail and remand

The *Seen and Heard* recommendations on bail included that national standards for juvenile justice should provide that:

- there should be a presumption in favour of bail for all young suspects. The absence of a traditional family network should not negate this presumption;
- children should be legally represented at bail application proceedings;
- monetary and other unrealistic bail criteria should not be imposed on young people; and
- children should not be subject to inappropriate bail conditions, such as 24 hour curfews, that disrupt their education and have the effect of forcing constant contact with their families or impose policing roles on carers.

This section focuses exclusively on recent changes to the bail laws and the introduction of hearings by way of Audio Visual Links (AVL) in NSW, which have arguably ignored both the spirit and intent of these recommendations.

Over the last 10 years there has been a clear change in ways in which bail has been conceptualised and used in practice.[29] There has been a steady erosion of the understanding that the original and strictly legal purpose of bail was to ensure that an accused person appeared in court to face the charges against him or her.[30]

For children and young people, one result of this tendency has been much closer policing of compliance with bail conditions. The bail supervision schemes operated by juvenile justice in certain parts of the state[31] are helping children to comply with their bail conditions. They are not and cannot be designed to address the appropriateness of the initial imposition of these conditions by police or courts.

While children in NSW are granted bail more frequently than adults, the grant of bail is often conditional.[32] The most common reason for appearances in Children's Courts across NSW in 2006–2007 was 'breach bail conditions'. Unpublished data from the NSW Bureau of Crime Statistics and Research indicates that Aboriginal children and young people were more often subject to onerous bail conditions and arrested for breach of those conditions than were other children and young people.[33]

When a child or young person is refused bail or arrested for breaching bail conditions, they must be brought before a court at the earliest possible opportunity.[34] Recent changes to the law in NSW mean that this appearance is not in person, but via an AVL between the Children's Court in metropolitan Sydney and the detention centre in which the child is held on remand.

To be fair, there are some important practical advantages in appearing via AVL for children and young people in rural and regional areas of NSW. Representation is provided by a specialist children's solicitor. Children do not have to be transported long distances for short court appearances.

On the other hand, taking instructions from a child over the telephone or via an AVL limits the ability of a lawyer to assess the child's capacity to give instructions or understand the proceedings. When *Seen and Heard* recommended that children should be represented in bail applications, legal representation without the child's physical presence in the court room could not have been foreseen. Recent health surveys of children in custody and on community orders in NSW indicate that many of these children are

likely to have mental illnesses or disabilities. Some will have hearing problems. Many have left school before completing year 10, and have low reading ages.[35] Identifying that the child is in one of these high needs categories (and getting appropriate support for the child) is challenging enough for solicitors when children are seen in person on busy list days. Doing so becomes much more difficult when communication is via telephone or by AVL.

Further recent changes to the law in NSW extend the use of appearances by way of AVL well beyond bail hearings. Earlier separate provisions for children have been removed and replaced by provisions that are applicable equally to both children and adults.[36] These changes are inconsistent with both the spirit and recommendations of *Seen and Heard*.

The new laws reverse the presumptions that an accused child will appear in person for committal proceedings, sentencing hearings and appeals.[37] We have yet to see the real impact of these changes on the operation of juvenile justice in NSW. Nonetheless, it is clear that the recommendations of *Seen and Heard* were unremarked when these changes were made.

Further amendments to the *Bail Act* were introduced in NSW in late 2007. These changes mean that arguably NSW now has the toughest bail laws in Australia—laws which make no special provisions for children, and which severely limit the number of applications that can be made for bail by children on remand unless the child was not initially represented by a lawyer, or a court decides that new facts or circumstances have arisen since the previous application.[38]

The protection of children's legal rights, including their right to the least intrusive, most appropriate response to their alleged offending behaviour, is as important as it was in 1997. Where the distinctions between anti-social but non-criminal behaviour and minor public order offences, and between bail and sentence are blurred, then the protections of the law are essential for children in trouble.

Endnotes

1. Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia*, Oxford University Press, 2007, p vi.
2. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, ALRC 84,1997.
3. See Chris Cunneen and Rob White, *Juvenile Justice: Youth and Crime in Australia*, Oxford University Press, Melbourne, 2007, particularly Chapter 9.
4. See http://www.thesource.gov.au/involve/NYR/default.asp.
5. The heads of relevant departments in each jurisdiction are members of the AJJA.
6. See, eg, Australian Institute of Health and Welfare, *Young Australians: Their Health and Wellbeing*, AGPS, 2007, *Australia's Welfare* 2007, AIHW, 2008 at pp 58–63.
7. 'Control' is the NSW term for a court order equivalent to a prison sentence for adults. The terminology varies across jurisdictions.
8. See Natalie Taylor, *Juveniles in Detention in Australia*, 1981–2006, Australian Institute of Criminology, Canberra, 2007.
9. See Cunneen and White, above, Chapter 3, for a full discussion of the extent and nature of contemporary juvenile crime and the difficulties involved in attempting to estimate how many children offend and the most common offences for which children and young people come to police notice. See also Australian Institute of Health and Welfare, *Young Australians: Their Health and Wellbeing*, AGPS, Canberra, 2007, Australia's Welfare 2007, AIHW, Canberra, 2008, pp 56–57 for estimates of the number of people aged 0–24 who were victims of selected offences in 2006. The AIHW found that children and young people are more likely to be victims of violent crimes (assault and robbery) than adults. They report that in 2006, young people aged between 15 and 24 were 2–3 times more likely to be victims of assault and robbery than people in the general population.
10. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, 1997, p 466.
11. Australian Institute of Health and Welfare, *Young Australians: Their Health and Wellbeing*, AGPS, Canberra, 2007, Australia's Welfare 2007, AIHW, Canberra, 2008, p 58.
12. See Cunneen and White, Chapter 6; see also Shuling Chen, Tania Matruglio, Don Weatherburn and Jiuzhao Hua, 'The Transition from Juvenile to Adult Criminal Careers', *Crime and Justice Bulletin*, *Contemporary Issues in Crime and Justice* Number 86, Bureau of Crime Statistics and Research, May 2005.
13. Taylor, above, p 4.
14. Ibid, p 4.
15. See, eg, *Young Offenders Act* 1994 (WA) Part 5; Parts 2 and 3, *Juvenile Justice Act 1992* (Qld), *Young Offenders Act* 1997 (NSW).
16. See s 415 and related sections, *Children Youth and Families Act 2005* (Vic).
17. See Part 7.2, *Children Youth and Families Act 2005* (Vic).
18. See *Children's Court Act 1992* (Qld) and *Children Youth and Families Act 2005* (Vic).
19. See Seen and Heard, at pp 489–491.
20. See, eg, Aboriginal Justice Advisory Council, *A Fraction More Power: Evaluation of the impact of the Children (Protection and Parental Responsibility) Act on Aboriginal people in Moree and Ballina*, Research and Evaluation Series No 1, October 1999.
21. See, eg, ss 12 and 42, *Juvenile Justice Act 1992* (Qld); s 8, *Children (Criminal Proceedings) Act* 1987 (NSW); s 345, *Children Youth and Families Act 2005* (Vic). NSW adds a further requirement that the least intrusive most appropriate response in the circumstances of an alleged offence should be chosen by police.

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22 *Children's Court Act 1992* (Qld) s 20(g).

23 *Young Offenders Act 1994* (WA) ss 17A. 17B.

24 *Young Offenders Act 1997* (NSW) s 27(2).

25 *Young Offenders Act 1997* (NSW) s 3(g).

26 *Seen and Heard*. pp 518–521.

27 *Young Offenders Act 1997* (NSW) ss 7(b), 22(1)(b), 39(1)(b).

28 *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW) cl 33.

29 Arie Freiberg and Neil Morgan. 'Between bail and sentence: the conflation of dispositional options' (2004) *Current Issues in Criminal Justice* 220.

30 See. eg. the discussion in NSW Law Reform Commission, *Young Offenders*. Report 104 (2005) at p 257. See also Georgia Brignell. *Bail: An Examination of Contemporary Issues—Sentencing Trends & Issues* No 24 (2002) Judicial Commission of New South Wales.

31 NSW Department of Juvenile Justice, *Annual Report 2005–06*.

32 See NSW Bureau of Crime Statistics and Research. *NSW Criminal Court Statistics 2006* (2007) summary tables at pp 9 and 4 respectively.

33 The proportion of children and young people appearing in court for breach bail conditions rose from 14% in 2003–04 to 20% in 2006–07. In 2006–07 almost one quarter of all Aboriginal children appearing in court in NSW were there for breach of bail conditions.

34 *Children (Criminal Proceedings) Act 1987* (NSW) s 9.

35 Mark Allerton et al. *NSW Young People in Custody Health Survey: Key Findings Report* (2003). NSW Department of Juvenile Justice: and Dianna T Kenny et al. *NSW Young People on Community Orders Health Survey 2003–06*, (2006). Both reports are available at www.djj.nsw.gov.au/publications.htm.

36 The amendments were to the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW).

37 See the Second Reading Speech by the Attorney General. the Hon. John Hatzistergos, Legislative Council, NSW Parliament. Full Day Hansard Transcript. 15 November 2007. p 54. Designated government agencies now have standing to apply to the court for a direction about the appearance in person of the child. The court can require the child's presence at court. providing this is in the interests of the administration of justice. The child's legal representative will also be able to make submissions to the court in support of the child's presence at the court during the proceedings.

38 Hansard. Legislative Council. 17 October 2007.

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26. Report. p 428.

27. http://www.facsia.gov.au/internet/facsinternet.nsf/family/parenting-child_protection_discussion_page.htm.

28. Report. chapters 18.19 and 20.

29. Sentencing Young Offenders in Australia. *Reform*. Winter 2005 Issue 86.

30. Report. p 483.

31. '*A Last Resort? The Report of the Inquiry into Children in Immigration Detention*' Human Rights & Equal Opportunity Commission. 2004.

32. Report. pp 578–581.

33. For further information. contact the authors of this article.