

**JUVENILE JUSTICE IN WESTERN AUSTRALIA:
THE TYRANNY OF CIRCUMSTANCE**

**A paper prepared for the 19th Annual Conference and Annual General Meeting
of the International Association of Prosecutors**

November 2014

Dubai

Genevieve Cleary

**State Prosecutor, Office of the Director of Public Prosecutions for Western
Australia**

WARNING AND APOLOGY

Aboriginal and Torres Straight Islanders are warned that this paper and the accompanying presentation may contain images of people who are now deceased. In addition, I do not, by showing the images contained in the paper or presentation, intend to shame or embarrass aboriginal or Torres Straight Islanders – either those in the images or the population in general. The purpose of showing the images is to illustrate the juxtapositions the state of Western Australia and its distances and demographics produce.

ACKNOWLEDGEMENT

I am grateful for the time his Honour Judge Reynolds, President of the Children's Court of Western Australia, took to discuss the state of juvenile justice in Western Australia with me. I am also grateful for the help of the staff at the Department of the Attorney General's (WA) library.

INTRODUCTION

Children are not small versions of adults. The objectives of current Western Australian legislation – the *Children's Court Act* and the *Young Offenders Act* are consistent with the United Nations Convention on the Rights of the Child, to which Australia is a signatory. The Convention, the legislation and a separate Children's Court of Western Australia demonstrates that there is a clear recognition both internationally and in Western Australia that children should be treated differently to adults, and that special objectives should be applied when dealing with children.¹

I present this paper not to suggest that Western Australian youth justice is a model of best practice. In fact, the statistics and examples suggest that it is not so. The purpose of this paper is to present to you the unique position Western Australia finds itself in in terms of geography, demographic and history. Western Australia is an extremely large area of land, inhabited by a relatively small amount of people, creating isolation and a lack of services. This is embedded in a general Australian history of the enforced taking of young native children from their parents and isolating them from any parental, familial and cultural influence, and a Western Australian history of a welfare focused youth justice system, which has developed into a justice focused youth justice system. This paper and the presentation aim to provoke thinking and discussion on what is best practice when young people are charged with committing criminal offences, particularly when they are either native, live in remote regional areas, or both.

¹ Reynolds 11.

BACKGROUND – SOME STATISTICS

What does Western Australia look like?



Western Australia is the largest state in Australia, covering 2,529,875 square kilometres. That means that 10.4 United Kingdoms can fit into Western Australia, or about a quarter of the European continent.

In Western Australia we have a lot of this:



And this



vineyards, cowaramup
photo courtesy tourism.wa

And this



The population of Western Australia in December 2013 was 2,550,900 (ABS 2013). Approximately 89,000 of that population were aboriginal, the original inhabitants of the land comprising Australia. That is, approximately 3.5% of the Western Australian population are Aboriginal. 40% of the aboriginal population are aged 15 or less (which speaks to the morbidity rate of aboriginals in Australia).

78% of Western Australia's population lives in Perth, its capital city, and its outer regions. We therefore have a lot of this – these are the distances of these towns from the capital of the state, Perth:

1 95 GREAT NORTHERN HWY	
Dalwallinu	231
Mount Magnet	549
Meekatharra	743
(Newman)	1164
(Port Headland)	1613
(Broome)	2154
(Derby)	2308
Fitzroy Crossing	2482
Halls Creek	2771
Wyndham	3139

And this:



Regional towns are therefore small, and few and far between. It is not unusual to travel 1000km to get to the closest town. Many aboriginals live in remote communities.

Western Australia's remote aboriginal communities can sometimes look like this:





This is where our remote aboriginal, or native, children are being raised. For many reasons, the aboriginal children who appear in the Children's Court in Western Australia have profiles characterised by extreme disadvantage and vulnerability.²

Who is a child in Western Australia?

Section 4 of the *State Children Act 1907* defined a child as a girl or boy under the age of 18 years. That definition remains in Western Australia today.

Do all children in Western Australia have criminal responsibility?

In addition to the definition of a child, s29 of the *Criminal Code (WA) 1902* provided that a person under 7 years old could not be held criminally responsible for his actions. If a child was between 8 and 14 the State had to prove, prior to proceeding with a prosecution, that the child had the capacity of understanding, at the time of committing the alleged offence, that he knew he ought not to have so acted. The age of responsibility was elevated in 1988 to, and remains, 10.

In 1902, it was also deemed that boys under 14 could not commit carnal knowledge (perform sexual intercourse). By virtue of the drafting of the provisions relating to sex offences, neither could a female of any age commit carnal knowledge, and neither could a male be sexually assaulted. The barrier of 14 was abolished in 1985, and subsequent redrafting of the relevant chapter in the Code made both the offender and victims in such offences gender neutral.

The current condition of juvenile justice in Western Australia

In June 2013, on an average night, 150 youths (10-17) spent the night in custody. 117 were aboriginal. That is, 78% of youths in custody were aboriginal. A remarkable figure given that the entire aboriginal population makes up only 3.5% of the actual Western Australian population. Although the percentage is not as high in other Australian states, it is still significant, particularly in the Northern Territory and Queensland. "It is clear from these statistics that aboriginal children are seriously struggling in our community."³ That is not to say that non-indigenous youths do not commit offences – I am merely quote the statistics to illustrate the demographics the court deals with daily. The following is a table from the Department of Corrective Services Annual Report for 2013/2014:

² Reynolds 11.

³ Reynolds 17.

Youth in detention

On an average day in 2013–2014 the Department managed 155 young persons in detention. This was a decrease of 14.3% compared to 2012–2013.

Table providing breakdown by legal status, gender, Aboriginality and security rating.

Daily Average Population	2012–2013	2013–2014	% Change
Overall	181.4	155.5	-14.3%
Legal Status			
Sentenced	103.1	83.7	-18.8%
Unsentenced	78.3	71.8	-8.3%
Gender			
Male	166.0	144.3	-13.1%
Female	15.4	11.2	-27.3%
Aboriginality			
Aboriginal	127.2	120.9	-4.9%
Non-Aboriginal	54.2	34.6	-36.2%
Personal Security Rating			
Maximum	143.6	127.1	-11.5%
Medium	35.5	28.1	-20.9%
Minimum	2.2	0.2	-89.2%

Of note is the statistic showing that incarceration rates are decreasing, but the non-aboriginal rate is decreasing by more than the aboriginal rate. The cost to the state of a youth in detention, per night, is shown in the following table in the Department of Corrective Services Annual Report for 2013/2014:

Indicator	2013-2014	2012-2013	Target	Performance	Score
Service 2: Youth Justice Services					
Outcomes: Community Safety Improved and Reoffending Reduced					
Number of escapes (youth)	Escapes	0	0	●	144
Rate of return to detention (youth)	Percent (%)	49.03	50.00	●	145
Successful completion of community-based orders (youth)	Percent (%)	66.96	68.00	●	146
Cost per day of keeping a juvenile in detention	\$ per detainee per day	814	567	●	148
Cost per day of managing a juvenile through community supervision	\$ per offender per day	90	81	●	149

Achieved Target Indicator Key

● More than 10% behind target ● Up to 10% behind target ● Achieved or exceeded target

And it cannot be said that we simply lock more aboriginal children up – they are also over represented in community based options, although the ratio of aboriginal to non-aboriginal young offenders is less than the same comparison in detention:

Youth in community

On an average day in 2013–2014 the Department managed 1123 young persons in the community. This was a decrease of 12.4% compared to 2012–2013.

Table providing breakdown of gender, Aboriginality and service category.

Daily Average Population	2012–2013	2013–2014	% Change
Distinct Offenders	1282.3	1123.3	-12.4%
Gender¹			
Male	1008.1	891.9	-11.5%
Female	271.6	229.7	-15.4%
Aboriginality²			
Aboriginal	773.6	682.0	-11.8%
Non-Aboriginal	496.8	436.1	-12.2%
Order/Service Category³			
Court Orders (incl. Bail)	738.0	665.7	-9.8%
Supervised Release Orders	82.9	67.7	-18.4%
Juvenile Justice Teams	493.9	410.8	-16.8%

¹ May not sum to overall *Daily Average Distinct Young Persons* due to a small number of people where gender is not recorded.

² May not sum to *Daily Average Distinct Young Persons* due to a small number of people where Aboriginality is not recorded.

³ May not sum to *Daily Average Distinct Young Persons* as an individual could be counted in multiple categories.

A brief history of time (by Australian standards)

Both Western Australian, and Australian, criminal justice operates with a background of the “stolen generations.” This is not a paper where I will discuss, let alone provide answers to solving the effects of the stolen generation, or even determining what those effects truly are. However, no consideration of the issues facing juvenile justice in Western Australia can be done without a brief knowledge of Australia’s history, and what occurred to 3 generations of Aboriginals from the early 1800’s to the 1970’s.⁴ Australia was settled by the English as a penal colony in 1788. At that time, the traditional owners of the land lived on the coast, by rivers and in the deserts in separate tribes with complex rules and rituals managing family relationships and for accessing food in sustainable ways. There were hundreds of tribes with their own language and culture.⁵ However, Australia was colonised on the basis of *terra nullius* (empty land). It took the decision of *Mabo*⁶ in 1992 to recognise that Aboriginals had native title rights to their land.

From the early 1800’s governments and missionaries in Australia targeted Aboriginal children for removal from their families to inculcate European values and work habits in them, so that they could be employed in service to the European settlers in Australia. Enforced resettlement to enable colonisation lead to malnutrition and disease, and it was assumed that the Aboriginal population would die out, and each state government developed a ‘protectorate’ system to “smooth the dying pillow,”⁷ with some states legislating for the guardianship of all Aboriginal children by the chief

⁴ Other than where referenced, the following brief history is a summary of sections of the Australian Human Rights Commission Report ‘Bringing Them Home.’

⁵ Clare et al, 52.

⁶ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, HCA

⁷ Australian Human Rights Commission Report, Chapter 2.

protector. However, although the full descent aboriginals were dying, there was an increasing number of those with 'mixed descent.' To ensure this 'mixed descent' group assimilated into the European society, and were therefore not a drain on the public purse or a threat to colonisation, children of mixed descent were taken from their parents, and forcibly segregated from family and cultural bonds in missions and settlements, or adopted by non-aboriginals, often being given new names. Once taken, many of them never saw their parents again. Children were usually removed between birth and the age of 2. By this, it was thought, the full descent aboriginals would die out and those of mixed descent would assimilate and merge with 'white' Australia, both socially and biologically. It has been accepted that neither was achieved, and that neither is a valid reason for taking children from their parents and culture.

At the same time, aboriginals were not permitted to be citizens of Australia, and were therefore denied access to government support, and although they were drafted to fight in World Wars on behalf of Australia, they were not entitled to claim benefits afforded to other returning servicemen. Aboriginals could apply to be 'Australian' if they renounced their aboriginal heritage. The process of removing and 'assimilating' aboriginals into 'white' society continued in various guises until the 1970's.

The effects of the stolen generations have been extensively documented, but, on the whole, the policy created communities who are still today experiencing grief, mental health challenges, a lack of parenting and cultural awareness, a lack of identity and frustration leading to violence, substance and sexual abuse. It is in that context that the Children's Court deals with aboriginal offenders, victims and families of both.

HISTORY OF YOUTH JUSTICE AND INTERVENTION IN WA

With those images, figures and history in mind, the Children's Court of Western Australia attempts to deal daily with the inevitable institutionalisation, poverty, lack of regional support and distance that comes from such conditions. It also attempts to find a balance between the need for a welfare approach to children who commit crimes because of their dysfunctional lives, and lack of parental support, and the expectations of a modern community that those who commit offences should pay for their crimes, and that the community is entitled to be protected from them.

Setting up the Children's Court of Western Australia

1907 – 1927

Legal parameters

In 1907 the *State Children Act* came into force in Western Australia to "make better provision for the Protection, Control, Maintenance, and Reformation of Neglected

and Destitute Children...⁸ The Act established the Children's Court of Western Australia as a separate and specialist court, taking matters in relation to offences committed by children and against children, and matters under various public education enactments away from the regular courts. The government department administering the court was the State Children Department rather than any justice department. Matters were to be dealt with by a legally trained magistrate, or 2 Justices of the Peace.⁹

Its focus was one of a strong welfare based approach, where treatment and intervention were the main methods for addressing problematic behaviours in children. This was driven by the belief that a large portion of young offenders presented with various social welfare and mental health issues, which played a causal role in their offending.¹⁰ The powers of the court, enunciated in the one section headed "Powers of the Court," were:¹¹

1. To exercise all the powers and administer the punishments that were open to magistrates dealing with and sentencing adults under the *Justices Act 1902*,¹² in relation to children who have committed offences, and of those who had committed offences against children, and
2. To hear and determine all applications and complainants under the Act, such as applications regarding the welfare of the child, and under various public education enactments.

When determining punishment for criminal offences which were punishable by imprisonment, the court could make the following options in lieu of imprisonment:¹³

- (a) Send the child to be detained at industrial school until 18 years of age;¹⁴
- (b) Order the parent to enter into a bond of good behaviour on behalf of the child, and dismiss the charge;
- (c) Allow a near relative to punish the child, and dismiss the charge.

Therefore, there was no separate regime for the punishment of a child; the child was either treated as, and punished as, an adult, not punished by the court, and released to a parent, or effectively made a State child.

⁸ Preamble, Act No 31 of 1907.

⁹ Members of the Public appointed to hear minor criminal matters, not legally trained, but of good standing in the community.

¹⁰ Wells 2.

¹¹ S 19.

¹² Which provided rules and procedures for operating a court, and hearing and determining summary criminal offences. Western Australia has 2 types of offences – summary and indictable (labelled so by relevant legislation according to the objective seriousness of the offence). Indictable offences where life imprisonment is the maximum available penalty must be dealt with in the Supreme Court. Some indictable offences, even though not with a maximum of life, must be dealt with in the District Court. Other indictable offences, if considered factually less serious, may be dealt with by a magistrate, who never sits with a jury. All summary offences can only be determined by a magistrate.

¹³ S 28.

¹⁴ A Royal Commission is currently being conducted in Australia into the lack of response to what appears to be endemic and systematic, and under-reported, child sex abuse that went on in these and other church and State run institutions: Royal Commission into Institutional Responses to Child Sex Abuse, established 2013, ongoing.

Children who were found to be uncontrollable or incorrigible, a charge brought by their parents, the Department or police, could be sent to an institution which was not an industrial school, whipped (if male and over 16) or released on probation until they were 18.¹⁵

By s 108 of the Act, an appointed officer of the Department was entitled to be present at any hearing of any charge, criminal or otherwise, against a child, examine and cross examine witnesses and be heard on the acquittal or punishment of the child. Therefore, the government department overseeing the running of the Court, with powers under the Act to generally care for and supervise children in the care of the State, could also bring charges against them, and then prosecute them.

Further, it is interesting to note that although the court was set up as a “Children’s Court,” to oversee the prosecution of children, the Act did not provide for the prosecution of children for strictly indictable offences (which could only be dealt with in the District or Supreme Courts), unless, of course, a relevant party had brought an application to have the child made a State child, by virtue of their offending behaviour, rather than as a prosecution for their offending behaviour as such. Otherwise, if the child was accused of committing, and charged with, say, murder, they would be tried as an adult.

Physical parameters

The court was to be convened in a special building, not in a regular court house unless approval was granted by the Governor, and, if granted, the business of the Children’s Court was not to take place while the ordinary court was conducting its business. In other words, the Children’s Court was to be both physically and in principle entirely separate from adult courts. This physical distinction prevails today. The Children’s Court in Perth is housed in a separate building to any other court, and in it is housed the magistrates and a Judge, and court rooms, relevant Departments of Community Protection and Corrective Services staff, the Children’s Court prosecutors (who are State Prosecutors employed by the Director of Public Prosecutions for Western Australia) and court staff. The suburban courts of greater Perth, and regional courts do not house a physically separate Children’s Court. Where those courts sit, the magistrate presiding conducts the business of the Children’s Court, usually first, before adult court is opened.

Pursuant to s 22, the proceedings of the court could be held in closed court, if the magistrate so ordered; it was not automatic that uninterested parties were not permitted in the court room, or that publication of identifying features of the child or their offence could not be published.

¹⁵ S 26.

1927

Despite the already welfare-biased direction of the Court, in 1927 the *State Children Act* was renamed the *Child Welfare Act 1927*. Significantly, the Court was no longer to be presided over by a legally trained magistrate. Along with a special magistrate, who could be a magistrate or Justice of the peace, other members of the community, whether legally trained or not, could be appointed to the court. The Court could be constituted by the magistrate, or 2 of the other members. Therefore, it was not necessary for a legally trained person to preside over the criminal prosecution of a child. In fact, a minister of religion was appointed, to “humanise” the Court,¹⁶ and ensure that the Court did not become too legalistic.¹⁷

A specific provision was inserted enabling the Court to determine that no punishment was necessary and dismiss the complaint of an offence, despite conviction, depending on the antecedents, age, health or mental condition of the child.¹⁸ Whipping remained for uncontrollable males over 16.¹⁹ In addition, the court was given jurisdiction over orders dealing with maintenance of children by their relatives, for example, after the death of both parents, where, previously, that was solely within the jurisdiction of the Secretary of the State Children Department.²⁰

1947 – 1980’s

In 1947, a new *Child Welfare Act* was enacted, but the significant change to the constitution of the Court made in 1927 remained the same – the court could be presided over by those not necessarily legally trained. The purpose of the Act was as it was in 1907, as was the structure of dealing with “destitute or neglected or incorrigible or uncontrollable children.” Penalty provisions remained the same, other than whipping being removed. However, the Act made a further change to the manner in which the court was used in relation to children. Pursuant to s 20, the powers of the court were now:

- (a) To exercise jurisdiction over all children who commit criminal offences;
- (b) To hear and determine all complaints and applications under the Act;
- (c) To hear and determine all applications and complainants under the Act, and under various public education enactments.
- (d) To exercise powers under the *Guardianship of Infants Act 1926*;
- (e) To make recommendations on children who were found to be delinquent, incorrigible, neglected or destitute, and “the recommendations shall not be departed from without the consent of the Minister.”

¹⁶ The Hon. P.G. Pendall MLC, Children’s Court of Western Australia Bill, second reading debate, Legislative Council, Hansard 23.8.88, p1854.

¹⁷ *Ibid.*, 1855.

¹⁸ S 26.

¹⁹ S 32.

²⁰ S 20(c).

The court therefore had jurisdiction to sentence child offenders, now for any offence committed by them, no matter how serious, even though it was still deemed to be a court of summary jurisdiction.²¹ Pursuant to s 34, similar to the 1927 Act, in lieu of imprisonment, the court could order the child go to an industrial school until the age of 18, or earlier, order a parent to give security for the child's good behaviour, allow parental punishment or release the child on probation, to be administered by the Child Welfare Department.²²

However, it could now only make recommendations as to a neglected, destitute, delinquent, incorrigible or uncontrollable child; no longer could it make orders in relation to those children. Although s 20(e) provided that the recommendation would be applied by the Department unless the Minister disagreed, it was still only a recommendation, with no legal power. A government department, therefore, had the final say on the future of such children, rather than a court, even if the child had committed a criminal offence. Given the belief that children were committing offences because of dysfunctional backgrounds, or that they were destitute, incorrigible, uncontrollable or neglected, that meant that, largely, what ultimately happened to those children convicted of criminal offences was in the hands of a government department, rather than a court. Similar to the 1907 and 1927 Acts, any police officer, parent or department official could bring an action against a child alleging they were uncontrollable or incorrigible, or destitute or neglected. Again, therefore, it could be the agency who brought the action before the court, who had the final say on how the child would be dealt with.

The court could either order the child be placed in an institution or on probation, however exactly which institution, or how the probation was to be conducted, was for the department to consider.

Further, no matter how trivial the offence committed, the court could order that the child be the subject of supervision under the Child Welfare Department until they were 18, or for a shorter period.²³

By s 23, although proceedings in relation to children were not automatically in closed court, the publication of the proceedings, a report of the proceedings or their result, was prohibited unless expressly authorised by the court or necessary in the performance of official duties. This prohibition remains today.

A philosophical debate in the 1980's

The structure and principles described above meant that youths who were committing offences were dealt with in the same way and by the same tribunal and government department as truants, those likely to commit self-harm, 'promiscuous'

²¹ S 19(6).

²² The 'penalty' of probation was expanded by amendments over the years to the Act, creating several levels of community based options for the court.

²³ S 26.

girls and girls 'lying in,'²⁴ and runaways. By the 1970's that department, which had both the control and administration of the court and the authority over children in State care, was the Department of Family and Children's Services (later changed to the Department for Community Services), whose name speaks to the overarching principles applied to young offenders – they needed treatment or intervention; their offending was a sign of dysfunction or abuse.²⁵

Although there was little emphasis on punishment, resulting in the appearance of permissiveness,²⁶ in effect, the legislation allowed indeterminate detention until the age of 18 and a lack of due process.²⁷ Often open-ended orders allowed for more extensive loss of liberty and State control in the lives of young offenders than would be possible for adults convicted of the same offences.²⁸ Conversely, others saw a regime of penalties which did not reflect the seriousness of the crimes being committed by juveniles.²⁹

In 1988 the *Children's Court of Western Australia Bill* was introduced. An amended *Child Welfare Act* was to remain, with the intention of separating the control of State children from the administration of juvenile criminal justice, although not from the court itself. The aim of implementing the new legislation was to:³⁰

- Establish a new Children's Court;
- Provide adequate safeguards for the rights of individuals who appear before the Court;
- Reduce the administrative input of the officers of the Department of Community Services, as it was then known, and to provide greater accountability in the court system, by shifting the administration of the Court to the Crown Law Department (as it was then known);
- Provide an adequate range of options to the Court in dealing with the "very significant problem of juvenile crime, but at the same time reduce the very high rate of juvenile incarceration in Western Australia;"
- Ensure that young offenders are held accountable before the law, and the community are afforded proper protection; but
- Provide support which assists young people in developing into responsible adulthood.

In other words, the court was now less of a filter to determine whether a child, committing offences or not, should be made a State child, and more of a court. For

²⁴ Pregnant, unwed teenage girls, who were taken to hostels during their pregnancies. The children were often taken from them at birth, without their consent.

²⁵ Wells 2.

²⁶ The Hon. Kay Hallahan MLC, Children's Court of Western Australia Bill, second reading debate, Legislative Council, Hansard 15.6.88, The Hon. Kay Hallahan MLC, Children's Court of Western Australia Bill, second reading debate, Legislative Council, Hansard 15.6.88, 1091.

²⁷ Wells 2, citing Edwards Report, "The Treatment of Juvenile Offenders – a study of juvenile offenders in Western Australia as part of an overall review of the *Child Welfare Act* 1982.

²⁸ The Hon. Kay Hallahan MLC, Children's Court of Western Australia Bill, second reading debate, Legislative Council, Hansard 15.6.88, 1091.

²⁹ The Hon. C Edwardes MLA, *Young Offenders Bill*, second reading speech, Hansard 12.5.1994, p362.

³⁰ The Hon. Kay Hallahan MLC, Children's Court of Western Australia Bill, second reading debate, Legislative Council, Hansard 15.6.88, 1091.

the first time, the Children’s Court of Western Australia was to operate under a judicial seal, and was to be constituted by:³¹

- A judge (to have commensurate standing to a District Court judge, and to act as President of the court); or
- A magistrate (who was to be appointed in exactly the same way as an ordinary magistrate sitting in the adult criminal court of petty sessions); or
- Not less than 2 members (maintaining the previous regime’s apparent desire to be seen as not too ‘legalistic.’ S 11 of the Act provides, widely, that the governor can simply appoint any person they see fit, whether they were legally or otherwise trained, or not).

In relation to jurisdiction, the new Act removed any doubt as to the offences over which the court had power – the court had “exclusive jurisdiction to hear and determine a complaint of an offence alleged to have been committed by a child.”³² Furthermore, the court was to hear such complaint if the accused was a child at the time of the alleged offence, but an adult at the time of the hearing, or they were a child at the time of being sentenced to a community order, but an adult when it was breached.³³ It was clear, therefore, that the court was to hear every offence alleged against a child, whether a minor traffic matter, or a homicide offence. Nevertheless, the child had a right of election for judge and jury in an adult court.³⁴

Further, as a separate and distinct jurisdiction to the criminal jurisdiction, the court was also to hear applications under the *Child Welfare Act 1947*.³⁵ However, no longer was there cross reference to that Act in determining the disposition in relation to criminal offending. The court was 2 separate and distinct courts – one with jurisdiction over criminal behaviour, committed by children, whether their behaviour was a result of dysfunction or not, and one with the sole purpose of dealing with children in need of care, whether they coincidentally committed offences or not. Imprisonment, or detention, was a punishment, rather than a welfare option, and was one of last resort.³⁶

Despite the apparent advances in the separation of the criminal jurisdiction from the welfare jurisdiction, the Act, in separating the two, made no provision for the involvement of parents in the sentencing or rehabilitation process. Further, penalty and community based dispositions for children who criminally offended were still contained in the *Child Welfare Act 1947*.

The administrative effect of the changes was to place the running of the court with the Crown Law Department (which also oversaw lawyers representing the State, the running of other courts and the operation of prisons), and the penalty regime and

³¹ S 6.

³² S 19(1).

³³ S 19(2).

³⁴ S 19(5)(a).

³⁵ S 20 – significantly headed “Non-criminal jurisdiction as regards children.”

³⁶ S 26.

administration of those penalties with the Department for Child Welfare, or Children and Family Services, or Community Services, as it has variously been known from time to time.

Despite the clear separation of the criminal justice purpose of the court from the welfare purpose, and a judge of District Court standing now in charge of the court, there was considerable community unrest, with a view that the court was still 'soft' on juvenile offenders, when Western Australia became known as the 'burglary capital of Australia'³⁷ and a spate of high-speed car chases involving juveniles driving away from police capture resulted in several deaths. In the early 1990's intense media coverage of youth crime and the court resulted in a public Rally for Justice, targeting tougher penalties on juveniles who commit crimes.

The *Children's Court of Western Australia Act* was followed by the *Young Offenders Act* in 1994. The latter Act compliments the first by providing a structure of processes in dealing with young offenders, from alternatives to court for minor offending, to the implementation and administration of detention for serious offences. It assists in promoting the justice approach outlined by the *Children's Court Act* – that young offenders must accept responsibility for their actions.³⁸ The Act was based on the policy "tough but fair," and sought to embody a straight forward premise that juvenile justice should share the same three goals as the broader criminal justice system:

- to protect the public;
- to ensure the fair treatment of those involved in the criminal justice process; and
- to minimise the incidence of crime.³⁹

The separation from welfare to justice, according to some critics, was now complete.⁴⁰ However, the legislation recognises that there must be some modification to the criminal justice system to facilitate factors specific to children:

- age, maturity;
- a recognition that much juvenile offending is transitory and minor, and
- that young offenders should not be given a greater punishment than an adult for a similar offence.⁴¹

This is done by:

- recognising parents and families in the juvenile justice process, particularly by providing that all juveniles attending court should be accompanied by a responsible adult;

³⁷ In 2003 Western Australia recorded the highest burglary statistics of all states in Australia.

³⁸ The Hon. C Edwardes MLA, *Young Offenders Bill*, second reading speech, Hansard 12.5.1994, p362.

³⁹ The Hon. C Edwardes MLA, *Young Offenders Bill*, second reading speech, Hansard 12.5.1994, p361.

⁴⁰ Wells3.

⁴¹ The Hon. C Edwardes MLA, *Young Offenders Bill*, second reading speech, Hansard 12.5.1994, p362.

- recognising the place of victims in justice;
- creating strong diversion programs;
- creating strong community based supervision which achieves positive behavioural change;
- providing a post release sanction based supervision program;
- providing alternatives to mandatory minimum sentences;
- promoting re-establishment of responsible citizenship, attitudes and behaviour in young people; and
- ensuring child welfare legislation is entirely separate from juvenile justice legislation,⁴² albeit that the Children’s Court hear and determine child welfare matters.

The implementation of this Act occurred at the same time as a significant change in the make up and responsibilities of government departments. Crown Law was divested of its lawyers, and the Office of the Director of Public Prosecutions for Western Australia commenced, along with the State Solicitors Office. Courts were now overseen by the Department, or Ministry, of Justice, as it has been variously called, and, eventually, prisons and corrections by the Department of Corrective Services. This means that youth detention centres and community based programs are now run and implemented by a ‘correctional’ department.

The *Young Offenders Act* ensured that offending juveniles no longer had any correlation with child welfare legislation or procedures, and was administered by the justice and corrective services agencies. Any application by the relevant government agency in respect of a child in need of care and protection was and still is an entirely separate procedure, both philosophically and practically, although care and protection applications are still dealt with by the Children’s Court of Western Australia.

WHAT DOES YOUTH JUSTICE LOOK LIKE NOW?

The Young Offenders Act

Section 6 of the Act clearly states the objectives of the Act, and s 7, the principles of juvenile justice.⁴³ They are based on the United Nations Convention on the Rights of the Child.

In summary, rehabilitation is the overriding principle of the practice of the court.

The Act:

- provides for the administration of juvenile justice by the department of Corrective Services;
- establishes detention centres although there is only 1 in Western Australia;

⁴² The Hon. C Edwardes MLA, *Young Offenders Bill*, second reading speech, Hansard 12.5.1994, p362.

⁴³ Reproduced at Appendix 1.

- provides diversion from the court by cautioning for minor offences, with the principle that unless the young person has a number of previous convictions or court appearance, or the facts of the alleged offence are too serious, cautioning is to be preferred over a charge;
- provides diversion from the court to the Juvenile Justice Team, where the offending is not an entrenched pattern of behaviour. Referral to the team can either be before charge, or by the court, after an admission of responsibility. The child and responsible adult will be required to attend a conference with youth justice counsellors, may be required to meet with a victim, and may be required to undergo counselling, substance use treatment, go to school or take other relevant steps to address the offending. If the child successfully completes the referral, the charge, if it existed, is dismissed, otherwise the child is not charged, and does not attend court. However if the child does not successfully complete the referral, the matter is referred to the court, or back to the court, for the child to be sentenced accordingly.
- Sets out procedures and options upon the finding or plea of guilty:
 - No punishment, with or without conditions;
 - Good behaviour bond;
 - Fines;
 - Youth community based orders – including counselling, victim mediation, regular supervision, school attendance requirements, community work, accommodation requirements;
 - Intensive youth supervision orders, without detention – as above, however more intensive, with greater consequences when breached;
 - Intensive youth supervision orders, with detention - similar to the above, however breach of the order usually means the offender will serve the remainder of the order in detention;
 - Detention.

The purpose of the Children’s Court of Western Australia

A recent study of the Children’s Court of Western Australia concluded that the formal role of the court is now that of impartial decision-maker, administering the law and upholding the guiding principles of the *Young Offenders’ Act*.⁴⁴ The Court does not deliver a service.⁴⁵ While still adversarial, there is a greater flexibility in the Children’s Court, because of the principles of the Act, to apply some inquisitorial processes; magistrates take the time to listen to the child, parents and carers and relevant government agencies in determining outcomes such as bail and sentencing.

There are clearly tensions when attempting to apply the usual principles of criminal justice such as deterrence and community protection, with specific principles of rehabilitation of a child into responsible adulthood. This is made more complex when the child often comes from highly impoverished and stigmatized communities,⁴⁶ where the child is in need of protective intervention, and where

⁴⁴ Clare 2011, 21.

⁴⁵ Clare 2011, 22.

⁴⁶ Clare 2011, 21.

'rehabilitation' is not possible because of a lack of elder and parental guidance, no incentives to go to school and the availability of harmful substances.

However, as explained above the legislature moved away from the welfare model, to 'get tough on crime,' and the court's welfare and criminal justice powers are now completely separate and, in practice and philosophy, unrelated.

The Court's powers

The court's exclusive jurisdiction⁴⁷ over children who are alleged to have committed offences, no matter what offences, is maintained, with the following exceptions:

- the right of election of a child to have a matter that would, if an adult, be dealt with in the District or Supreme Court;⁴⁸
- where there is a co-accused who was an adult at the time of allegedly committing the offence, with the child, and the adult is to stand trial, the court, on application of the prosecutor or child accused, may order that the child be dealt with at the same time as the adult in the adult court (given there is no provision to have the adult dealt with by the Children's Court);⁴⁹ and
- although the Children's Court has jurisdiction over an accused who has turned 18 where the alleged offence was committed prior to them turning 18, the court may nevertheless order that the matter be dealt with by an adult court, on application of the accused, the prosecution or by its own volition.⁵⁰

At no time when applications of this nature are being made, does a parent or responsible adult have a right to have any input into the court process. A further tension therefore arises, particularly when the child is young, for the lawyer acting, especially when he is being paid by the parent.

Drug court

It was recognised many years ago that just like adult offenders, some youths commit offences due to significant drug related problems. Drug Courts aim to break the cycle of drug related problems and offending by facilitating treatment programs as part of the court process.

To be referred to the Children's Court Drug Court, an accused person must be facing criminal charges, be experiencing drug related problems, plead guilty at an early stage and be willing and available to participate in treatment under the supervision of the Drug Court. Generally they must also be facing a term of imprisonment or detention.

⁴⁷ A chart showing the hierarchy of courts in Western Australia is at Appendix 2 to assist the reader to understand where the court sits within that hierarchy, and the types of cases the adult courts have jurisdiction to hear in comparison.

⁴⁸ *Children's Court Act 1988* s 19B.

⁴⁹ S 19C.

⁵⁰ S 19D.

Following referral to the Drug Court, an initial assessment is conducted and considered by the Drug Court magistrate to determine suitability for a Drug Court program. If accepted, the participant may be either remanded in a treatment facility, or on bail. The first few months require intensive intervention, with almost daily counseling and urinalysis and weekly court attendance. The offender is also subject to breach points, with a certain number amounting to expulsion from the regime, and a return to the mainstream court to be sentenced. The Drug Court itself is non-adversarial, with all involved agencies, including the prosecution, working as a team to assist the offender in addressing their drug addiction and any other comorbidity issues. Final sentencing is deferred while the participant undertakes the agreed program under the judicial case management and review of the Drug Court magistrate.

The State is represented at the Perth Children's Court Drug Court by a dedicated ODPP prosecutor, and Legal Aid provides a dedicated Drug Court Duty Lawyer.

Who presides over the Children's Court?

The Court's President is a Judge, who has the standing of a Judge of the District Court, with magistrates appointed as adult court magistrates would be appointed – legal practitioners of at least 10 years' standing specifically employed as magistrates of the Magistrates Court (which was called the Court of Petty Sessions). Currently there are 3 permanent magistrates and a part time magistrate who each preside in Perth and its suburban courts, and one Judge, who sits in Perth and travels as required to conduct matters across the state. Otherwise, magistrates who sit in adult Magistrates Courts around the state also convene children's courts when and where appropriate.

The President is the administrative head of the court, and presides over sentencing matters and trials where the offender, upon conviction, is likely to be liable to detention of over 12 months,⁵¹ where the maximum penalty is life imprisonment, or where there is some matter of policy or public interest in the case. Otherwise, the magistrates hear and determine all other criminal matters. That is not to say that therefore all matters where the available penalty is over 12 months imprisonment are heard by the President; the assessment as to likely penalty is based on the actual child's age, antecedents and the facts of the alleged offence itself. Therefore, the magistrates hear offences such as aggravated armed robberies (maximum available penalty - dealt with in the Supreme Court if the offender is an adult) and sex offences where the victim is a child (maximum penalty 20 years imprisonment – dealt with in the District Court if the offender is an adult). This is an unusual situation – generally, Supreme Court judges determine, with or without a jury, criminal matters where the maximum penalty is life imprisonment (homicides, aggravated armed robbery and criminal damage by fire); District Court judges determine, with or without a jury, all other indictable offences which either must be dealt with by a judge, or the accused or prosecution have elected for them to be dealt with by a judge and/or jury.

⁵¹ S 21.

Magistrates hear all other matters (therefore the least serious matters). In the Children's Court, magistrates hear some matters that normally must be dealt with by a District or Supreme Court judge, and the President hears matters that would normally be dealt with by a Supreme Court judge.

The Act provides for 2 Justices of the Peace to sit as the Children's Court. This would only occur in regional courts, and now, rarely.⁵² Justices of the peace are subject to strict restraints in their powers. The Act no longer provides for other, non-legally trained members to be appointed to the court.

Who prosecutes?

Until December 2006 prosecutors employed by the Western Australian Police appeared in the Children's Court in Perth and in all regional areas. Police prosecutors are sworn officers, who generally do not have degrees in law, who have elected to become prosecutors, but can also be returned to active duty at any time.

In December 2006 the office of the Director of Public Prosecutors for Western Australia took over prosecutions in the Children's Court in Perth. Police still prosecute in Perth adult Magistrates Courts and all suburban courts of Perth, and in all regional Children's Courts before a magistrate. We have 7 prosecutors over various levels of seniority in the ODPP Children's Court team. All ODPP prosecutors must have a degree in law. Children's Court prosecutors, similar to prosecutors who work in the adult courts, in fulfilling their duties of representing the State of Western Australia:

- are not involved in the investigation of an offence, or in the original decision to charge or divert a juvenile, although do provide formal advice, from time to time, to investigating police on specific areas of investigation or the discretion to charge;
- assess a brief of evidence, once it is compiled by police and the accused has been charged to determine whether the prosecution should continue, and whether there should be amendments to the charge, or further matters investigated, and negotiate with defence accordingly;
- represent the State and appear before the magistrates and judge at all remand, sentencing and trial hearings in the Perth Children's Court,⁵³ and at sittings of the court outside Perth when the President is presiding.

Considerations of the prosecution and charge are governed by a Statement of Prosecution Policy and Guidelines (2005), published under the *Director of Public*

⁵² The use of Justices of the peace in any court hearing and as court officers has been recently criticized, noting that they often see their job as endorsing the decisions of police (Blagg 25). In 2007 Mr Ward, an aboriginal man charged with minor traffic offences, died while being transported hundreds of kilometres from one regional town to another, in 45 degree heat, in a prison van whose air-conditioning had broken. Police refused bail and the JP simply ratified their decision, rather than making his own enquiries, as the relevant Act required him to do before agreeing to the transfer.

⁵³ ODPP prosecutors do not appear in the adult magistrates courts – prosecutors there are police officers.

Prosecutions Act 1991, which make special provisions for juvenile prosecutions. The prosecutor must consider, along with any other special circumstance:⁵⁴

- that long term damage can occur through a child's encounter with the criminal justice system;
- the welfare of the child, and whether a prosecution would be harmful;
- the seriousness of the offence;
- the age and apparent maturity of the child;
- available alternatives to prosecution;
- family circumstances, particularly where the parents are able and prepared to exercise control of the child;
- the interests of the victim and their family;
- the capacity of the child, if under 14, to know that he or she ought not to have done the act;
- the sentencing options;
- the capacity of the child to have matured at the time of the prosecution; and
- the child's antecedents.

The guidelines note that at no time is a child to be prosecuted solely to secure access to the welfare powers of the court.⁵⁵ These special conditions are in addition to the usual considerations in a prosecution: the public interest,⁵⁶ whether there is a prima facie case,⁵⁷ prosecution of mentally impaired accused⁵⁸ and issues which arise in domestic violence matters.⁵⁹ Juvenile justice is also subject to the normal rules of disclosure, trial procedure and the rules of evidence.

The Children's Court prosecutor:

- Only prosecutes in the Children's Court, although does not have any special training to do so;
- Becomes familiar with the repeat offenders, understanding the progress they may be making, despite the set-backs of re-offending, and can make submissions which both represent the needs of the community for protection, but also recognising the particular needs of children attempting to rehabilitate;
- Becomes familiar with the systematic and endemic dysfunction facing young offenders in Western Australia, both in Perth and in regional Western Australia, and can make submissions on bail and in sentencing, and examine witnesses in trials accordingly;
- Can assess a brief of evidence in terms of its legal prospects of success, but also with an understanding of both community expectations in relation to those who commit offences, and the particular mental and physical maturity of young offenders and how those factors effect offending behaviour;
- Is involved with the court's diversionary drug court and substance abuse program;

⁵⁴ Guidelines 34, 35.

⁵⁵ Guideline 36.

⁵⁶ Guidelines 23 – 33.

⁵⁷ Guidelines 20 – 22.

⁵⁸ Guidelines 37 – 40.

⁵⁹ Guidelines 41 – 44.

- Can make high level legal decisions in regard to serious indictable offences, unlike police who need to delay matters to seek legal advice from the ODPP;
- Is situated in the Children’s Court building, unlike other prosecutors, who are situated in a building separate to any courts. This creates a collegiate atmosphere with court staff and youth justice staff, and enables the prosecutors to be seen around the court precinct by offenders, rather than being seen as an aloof and separate power;
- Is not on ‘rotation’ and liable to being redeployed or called for active service, as police prosecutors are. They are permanent, as are the support staff at the ODPP Children’s Court office.

Who else is in the court during hearings?

In addition to the judicial officer, the following are in the court at any hearing:

The accused

Matters will never be dealt with, in any way, without an accused being present, however ‘present’ can mean that the accused is appearing via video or audio link. Although there is only one detention centre for juveniles in Western Australia, and that centre is in an outer suburb of Perth, juveniles who are in custody can elect to be dealt with via a video link to the centre, rather than be transported to the court. Juveniles on bail may not live in Perth, and may live thousands of kilometres from the Perth court. If their matter is to be dealt with by the President, or by a magistrate who sits in Perth, then the accused will not be required to make their way to Perth. They will often appear in another regional court, with a video link to the Perth Court from that court. If video link in the regional court is not available, or they are in a community (an aboriginal camp or small village) without transport, or the community is cut off from other towns because of flooded roads in the wet season, then a telephone link will be allowed – whatever it takes to have the young accused acknowledge that there are court proceedings on foot, and understand the importance of the contact with the court.

This would not occur, however, if the matter is listed for a trial. The accused will always be physically present in the court. Matters will be transferred to suburban or regional courts, or the President will travel to a regional centre for a trial, if the accused lives there. That can mean that witnesses can often give evidence via video link if they are in another part of Western Australia, or the world. By the time a trial occurs, police and other agency workers have often been transferred to other posts, and give evidence, via video link, from there.

The accused’s lawyer

Often specialist lawyers are provided free of charge to the accused by the Legal Aid Commission or Aboriginal Legal Service. The court will also allow proceedings to occur with the lawyer appearing next to their client at the detention centre or regional court or community, or in the court room when their client is elsewhere on video or

audio link, or if they are appearing by video or audio link, but from a different place to where the accused is appearing via audio or video link. The court will rarely deal with a matter in any way if the child is not represented in court, other to adjourn so that a lawyer can be present.

Youth Justice

An employee from the youth justice section of the Department of Corrective Services attends every court matter, other than the hearing of trials. They provide the magistrate or judge with copies of the accused's criminal record, and report on previous supervision opportunities the accused has had. They also provide detailed reports on the child's schooling (or, often, lack of), parental guidance, accommodation, substance use and other cultural and social factors relevant to decisions being made by the judicial officer. They present relevant options for community based sanctions on sentencing, and information on the accused's time in custody and his behaviour in custody, where relevant.

Parents or responsible adult

S 23 of the *Children's Court Act* provides that if no parent or responsible adult is present when a matter is being dealt with in the court, the magistrate or judge may enquire of the whereabouts of that person, and if there is no good excuse for them not attending, can order a parent or responsible adult to be present, even if the use of video or audio link is required to have them present. It is an offence punishable by a fine to disobey such an order. If the child is in State care, their Department of Community Protection carer will be present. Although uncommon, it is not rare for a child, even as young as 11, to appear in court without a responsible adult having been found from their relatives.

Other staff

Also in court is a court officer assisting the magistrate or judge, and security staff, neither usually specially trained to deal with children.

What charges does the court hear, and how often?

The following table is from the Department of the Attorney General for Western Australia, showing the types of charges dealt with by the Children's Court of Western Australia. The only type of charge on the rise is those of a sexual nature. All others are decreasing. This does not mean that sexual offences are increasing – it may be that aboriginal communities, in particular, are now more readily reporting them when the victim is a relative.

ANZSOC Offence	2008/09	2009/10	2010/11	2011/12	2012/13	% Change 1 Year	% Change 5 Years
01: Homicide and Related Offences	3	6	1	5	8	n/a	n/a
02: Acts Intended to Cause Injury	1,547	1,570	1,234	1,068	917	-14.1%	-40.7%
03: Sexual Assault and Related Offences	299	312	394	341	334	-2.1%	11.7%
04: Dangerous or Negligent Acts Endangering Persons	937	701	547	445	405	-9.0%	-56.8%
05: Abduction, Harassment and Other Offences Against the Person	162	207	166	147	122	-17.0%	-24.7%
06: Robbery, Extortion and Related Offences	389	482	527	380	329	-13.4%	-15.4%
07: Unlawful Entry With Intent/Burglary, Break and Enter	2,978	3,373	2,803	2,114	2,255	6.7%	-24.3%
08: Theft and Related Offences	5,400	5,857	5,197	4,504	4,616	2.5%	-14.5%
09: Fraud, Deception and Related Offences	250	162	146	125	129	3.2%	-48.4%
10: Illicit Drug Offences	720	819	571	455	522	14.7%	-27.5%
11: Prohibited and Regulated Weapons And Explosives Offences	118	109	106	65	66	1.5%	-44.1%
12: Property Damage and Environmental Pollution	2,222	3,584	2,525	2,205	1,703	-22.8%	-23.4%
13: Public Order Offences	2,213	2,245	1,655	1,446	1,479	2.3%	-33.2%
14: Traffic and Vehicle Regulatory Offences	4,894	3,613	2,917	2,728	2,352	-13.8%	-51.9%
15: Offences Against Justice Procedures, Government Security and Government Operations	1,963	1,687	1,435	1,506	1,093	-27.4%	-44.3%
16: Miscellaneous Offences	70	75	56	15	17	13.3%	-75.7%
Total	24,165	24,802	20,280	17,549	16,347	-6.8%	-32.4%

IS THIS PROCESS BEST PRACTICE?

The *Children's Court* and *Young Offenders Acts* may have been implemented as an antidote to the permissive welfare system, however, the statistics suggest that the system is still failing its youth, particularly those of aboriginal descent from remote regions. There are two reasons – we currently have:

1. Justice by geography,⁶⁰ and
2. Justice by adult standards.

Justice by Geography

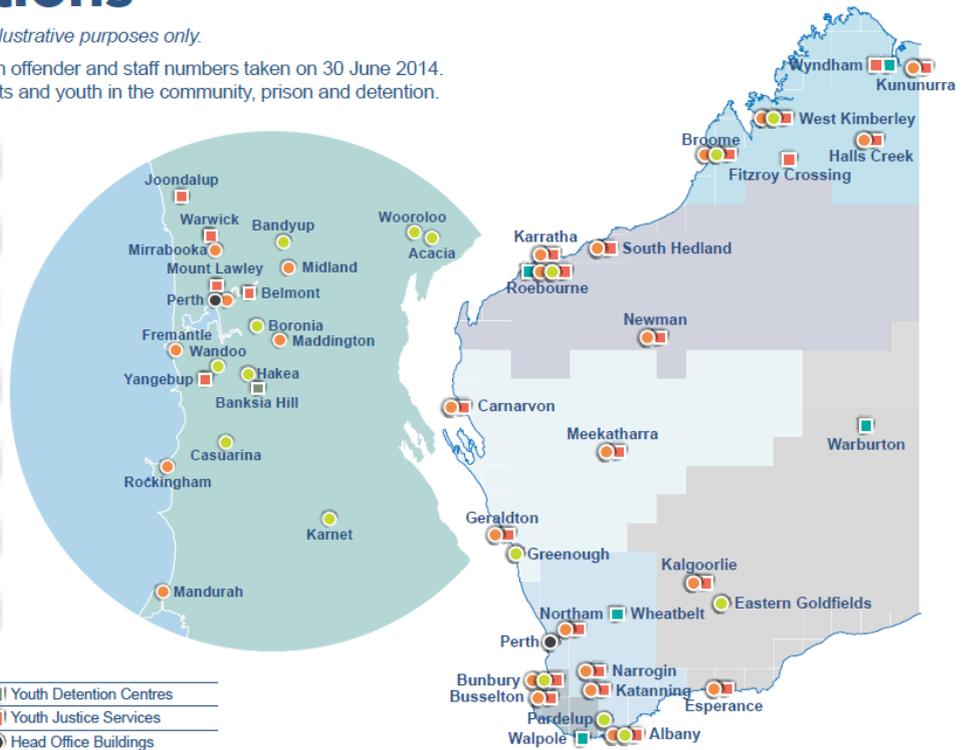
The following table illustrates the services available to those (adults and children) on community orders in Western Australia, and then the following maps illustrate the aboriginal communities and main towns in Western Australia.

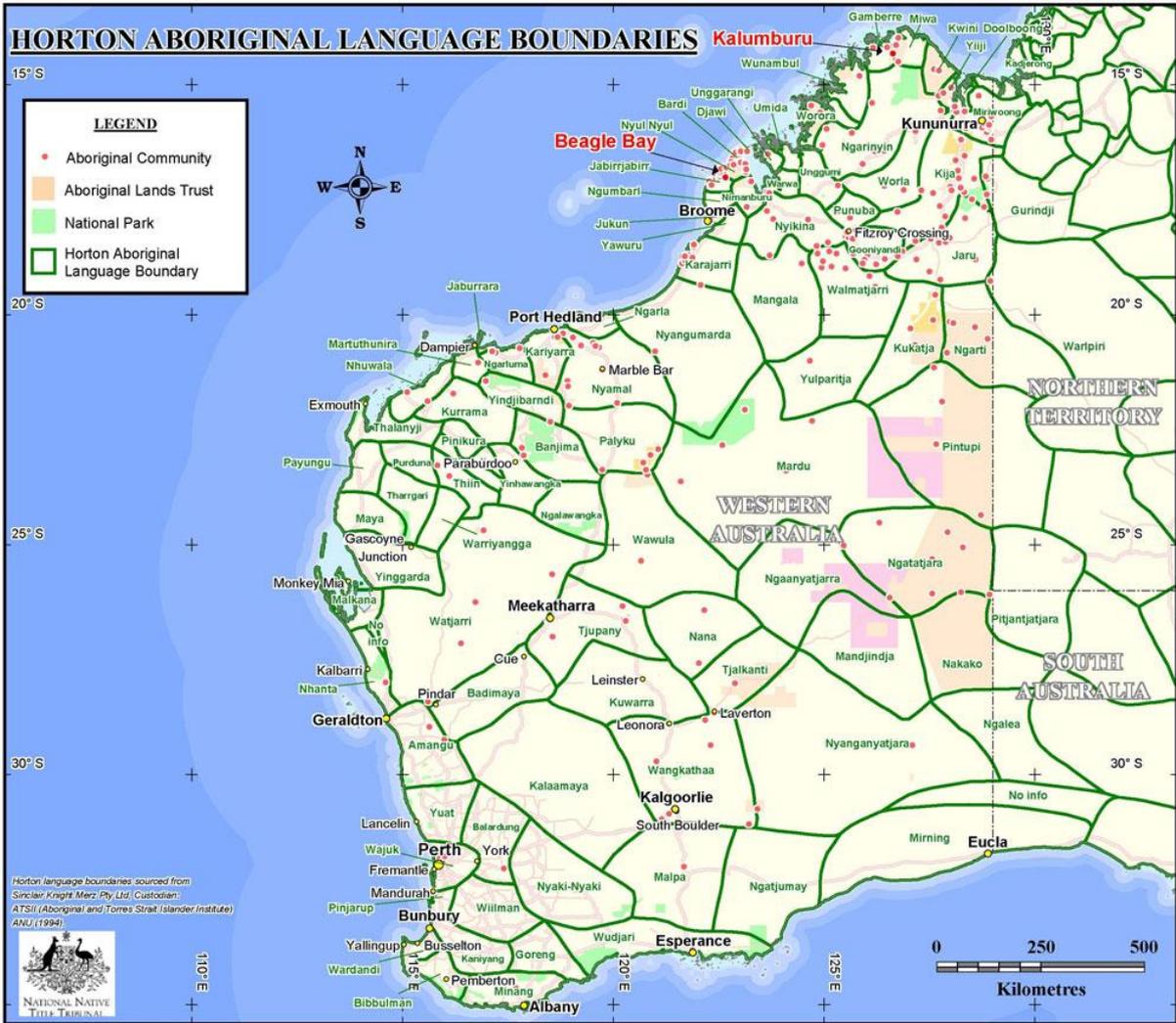
⁶⁰ Blagg 24.

Our Locations

Please note: these maps are for illustrative purposes only.

The following figures are based on offender and staff numbers taken on 30 June 2014. Total offenders is inclusive of adults and youth in the community, prison and detention.







There are a number of significant things about these maps:

1. there is only one square on the first map signifying a youth detention centre, which is not viewable on the main map. That is because it is in Perth, sometimes 4000 kilometres away from the child's family. That means that a child remanded in custody in Kununurra must travel 3214km to Perth to be detained. His family are not brought with him.
2. the pink dots on the second map below show the aboriginal communities throughout Western Australia. You can see that many exist where Youth Justice Services do not.

However, just because an offender does not live in Perth, that does not mean that he or she will not commit very serious offences. In the past 6 months, I have had the following files:

- An aggravated sexual penetration without consent, committed by a 16 year old boy on a 14 year old girl. The victim did not know the offender; the attack was violent, and random. The victim was struck with a pole, and then followed home when she tried to escape. This occurred in a large regional town 2000 km away from Perth. The child was flown to Perth to await sentencing in custody, and then served his time of detention in Perth.
- A burglary on the house of a teacher involving a sexual assault and the use of a knife as a threat. This occurred in a community near the South Australian border. A similar offence, involving a very serious sexual assault occurred in a nearby community, both approximately 3000 kilometres from Perth. One boy, largely due to his age, was released on bail, but was then transported to Perth to serve his term of detention, the other awaited sentence in Perth in custody, and then served his time in detention in Perth.
- Dangerous driving causing death and grievous bodily harm in the south of the state.

Similar matters have been dealt with, in the same frequency, by colleagues. Each of the offenders was ordered to serve a term of detention, and therefore had to leave their families behind for a number of years. In one matter the boy's family listened to the sentencing on a phone because they could not afford to be present in Perth.

Issues also arise in relation to the supervision of young people on bail. Many aboriginal children, whether in regional areas or in Perth, grow up in communities or households effected by substance and sexual abuse, domestic violence and a lack of ability to supervise the young.⁶¹ Children arrested often cannot be interviewed by police, as a responsible adult cannot be found, as is required by s 20 of the *Young Offenders Act*. Those released to bail find a similar problem – there is no responsible adult to ensure compliance.⁶²

Not only do offenders have to be brought to Perth, without their families or other support, to serve their time in remand awaiting trial or sentence, and to serve their sentence, but difficulties also arise upon release. A juvenile, having served half his

⁶¹ Clare 18 - as evidenced by the decision of the Australian Government in 2007 to intervene in aboriginal communities in the Northern Territory. There can be no suggestion that aboriginals living in Western Australia are any different to those in the Northern Territory.

⁶² Blagg 25.

term of detention, is entitled to be considered for *supervised* release. Going back to their community means a lack of adequate supervision, where the closest youth justice officer can be some 3-400 kilometres away.

Similar issues arise when the court intends to impose community based orders on the offender. The current youth justice model requires '1 on 1' supervision, that is, the offender must visit the office of the counsellor, assuming the child has transportation, and it is not the wet season, or the counsellor visits the community of the offender. Given the distances, the visits either way are infrequent. Recently, I prosecuted a young man where the offending was of a sexual nature, but appeared to have been caused by drug and alcohol use. The court believed that the principles of justice were best served by mandatory, intensive substance use and sex offender counselling, in the community. However, when questioned whether youth justice services would be in a position to provide that counselling to the boy if he returned to his community, the court was told by youth justice that the child would receive a phone call, which could last as long as the child needed. The child could then follow up with another call later, if required.

Justice by Adult Standards

As described above, the legislature tried hard, in the late 1980's and early 1990's to ensure that criminal justice for juveniles in Western Australia was not seen as a permissive, welfare based service, but as a justice system delivering what the community expected of a justice system. There were some modifications to account for the age and special requirements of juveniles, in accordance with the United Nations Convention of the Rights of the Child, but in essence the community were given a *justice* system. The welfare system was to be kept completely separate.

At the same time youth detention and justice services were absorbed into the Department of Corrective Services, which at that time only concerned itself with adult offenders. However, before that time, the detention and probation services for juveniles were run by the relevant child welfare authority, under the *State Children or Child Welfare Acts*. Therefore, the Department of Corrective Services, designed to cater for adult corrections, then took on children.

There appear to be a number of recognised problems with the current situation:

1. In 2013/2014 the Department of Corrective Services looked after 9373 offender adults, and 1278 offender children. That is, only 12% of the overall business of the Department is children. It is not surprising therefore that only a small amount of an overall budget would go towards juvenile corrections. Only a small amount of staff, programs and detention centres cater for juveniles. With the limitations of distance in the state, however, that leads to a number of children unable to be supervised at various stages, and a lack of available

programs to all children.⁶³ Despite there being a large number of Elder, senior and young aboriginal people wanting to assist youth justice with the rehabilitation and reintegration of their young, there is almost a complete absence of rehabilitation programs for aboriginal children.⁶⁴ Neither does the current corrections philosophy allow youth justice workers to address the real reason for offending – family and community dysfunction, or prepare families for the return of their young from detention or remand.

2. The detention centre is run by adult corrections and its officers, bringing with them a sense of adult corrections, and the dominance of the philosophy of compliance rather than the special care needed to fulfil the principle of rehabilitating a child to become a responsible adult in the community. The reported culture at the detention centre has been one of locking up, to punish children, rather than locking up as punishment, and to foster rehabilitation.⁶⁵ No greater example of the stress that this places a youth detention centre under is a riot which occurred at the detention centre in Perth on 20 January 2013. The Inspector of Custodial Services for Western Australia found in his report of the incident that the detainees had been subjected to a regime not sufficiently active, or positive. In addition to this, there were significant staffing changes, significant absentees leading to lengthy lock down periods and a lax attitude to security and safety by officers, and little rectification of risks from the building redevelopment of the site.⁶⁶ The report concludes that a fresh approach is required to manage young people in custody. Responsibility for youth justice services should lie with an agency whose primary responsibility is youth justice, not adult imprisonment. Currently, youth justice services accounts for \$100 million of the Department's total budget (out of \$750 million) but reliable estimates suggest that another \$200 million or more is spent across government on services for youth at risk. There are strong arguments in favour of establishing either a new government department or a Youth Justice Commission (along the lines of the Mental Health Commission) to oversee this expenditure and to drive youth justice into the future. Key outcomes should be a sharper focus on regional youth, aboriginal youth and mental health.⁶⁷
3. There is no obvious conduit between the criminal justice system for youths and the welfare agencies directed towards youths and their families in need of assistance. Although some officers of the Department of Child Protection and Family Support house several of its officers in the Children's Court complex in Perth, they attend the criminal hearings only when a child in State care has been charged with a criminal offence, or they are requested to attend by a judicial officer for a particular child. Those who commit criminal offences are seen as the 'problem' of the criminal justice system rather than the welfare system, regardless of reason the offending is taking place. Often magistrates at the court will have to call for State intervention, which will then be a matter assessed by the relevant department. The judicial officer cannot make recommendations or orders with respect to the welfare of the child. The complete separation of the 2 fields therefore makes recognition of, and action against, the relentless consistency with which reports written by youth justice to inform the court of the background of the child at sentencing note significant dysfunctional family

⁶³ Blagg 24-25; Clare 26.

⁶⁴ Reynolds 17.

⁶⁵ Reynolds 2.

⁶⁶ Morgan, Key Findings.

⁶⁷ Morgan, Key Findings.

behaviour difficult. Generally, at least a number of the following will be present, and I have frequently seen all present:

- One or both parents in prison or having been recently incarcerated;
- The child having been witness to, suffered or been the perpetrator of domestic violence;
- The child having been witness or subjected to sexual violence;
- Significant alcohol or substance use by one or both parents, other family members or the offender;
- A lack of stable accommodation and overcrowding (aboriginal families see it as a duty to family to open their homes to other family members, no matter how many, and how small the house is, and for how long they intend to stay – Australian homes and suburban neighbourhoods are not designed or built for these visits);
- Detachment from the family home due to a funeral or ill health (many aboriginals see it as their duty to travel even long distances to attend the funeral and ‘sorry camp’ after the death of a person linked with their family, often at the expense of the child’s schooling, sporting or court obligations);
- The undue influence of adult cousins and other family members already in the corrections system.

ARE WE CLOSE TO BEST PRACTICE?

While we have a set of very good legal rules which make allowances for the fact that the accused or offender is a child, we do not appear to have underpinned that legislation with a recognition of what leads most children to offend. Generally, it is felt that we have moved from an extreme welfare position, to an extreme penalty driven, adult based philosophy. The many complexities and layers of crises which render children and youth vulnerable to offend are not being recognised, appreciated or connected to their offending behaviour. In addition, adult solutions are being applied to young people with dysfunctional backgrounds.⁶⁸ The juvenile justice system may need to find some middle ground.

However, as noted previously in this paper, the number of young individuals offending is declining. Therefore, we must be doing something right. In an apparent recognition by law and policy makers of the need for change, this decline may be due to changes such as:

1. In a recognition that the Western Australian Police Service is the only 24/7 agency in the state, the Police Commissioner, Mr O’Callaghan recently announced a change in focus in policing juveniles. 20 Youth Crime Intervention Officers have been appointed across the metropolitan and regional areas of the state. They work in the community with chronic offenders and their families, and within geographical areas where there are known tensions amongst groups of youths and families, or within families. Many would know this strategy as Justice Reinvestment.

⁶⁸ Reynolds 12.

2. A new Commissioner of Corrective Services, James McMahon, has been appointed, on a platform of courage and change. He too is convinced that Justice Reinvestment and juvenile justice are worthwhile processes, and has made a number of changes in response to the Inspector of Custodial Services' report on the riot at Banksia Hill Detention Centre, and plans more changes with respect to programs.

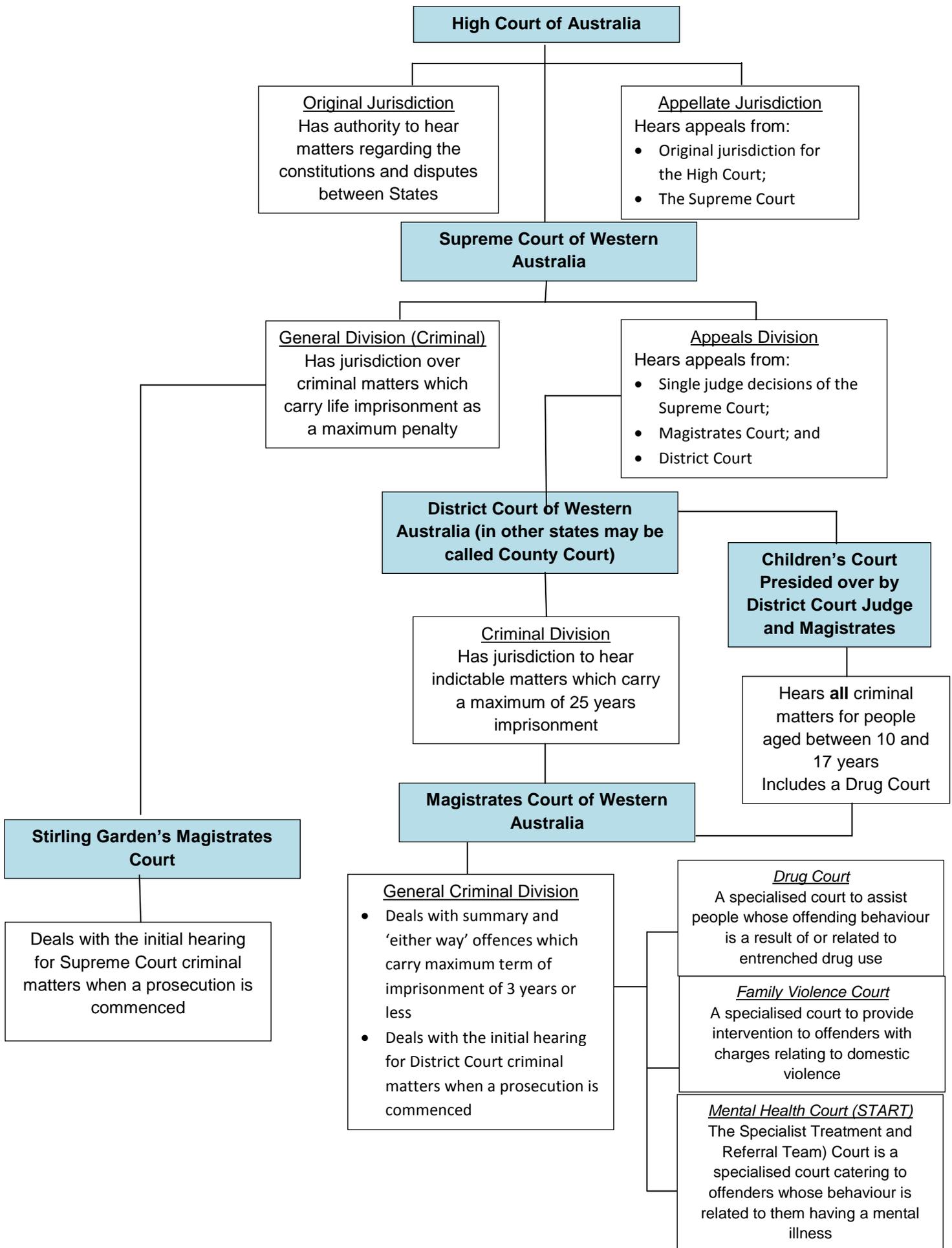
In addition, there are many agencies, both government and non-government, who work very hard with dysfunctional families, and offenders. None of these will solve the chronic issues faced by youths, particularly aboriginal youths, which cause them to offend, or the tyranny of distance encountered by many offenders in Western Australia, however they are in the best positions to deal with both the offender, and the family together. Whether it is policy driven or legislatively based, the suggestion is that there must be a deeper recognition that the criminal behaviour of youth does have welfare considerations. Other suggestions are that consideration should also be given to 'half-way' measures such as supervised bail houses for children in regional towns;⁶⁹ measures that bring together the rigours of the court with the protection and support of the child, and the child's ability to meet those rigours, leading to their rehabilitation, not their constant failure to comply.

It has been recommended that programs delivered both in and out of detention need to focus more on building resilience, life skills⁷⁰ and relationships – abilities offenders are not being taught at home, and need to be adapted to the difficulties of distance and isolation. The Children's Court of Western Australia as it is currently constituted and staffed, including its dedicated ODPP prosecutors and support staff, is well placed to support a more expansive attitude to the rehabilitation of offending youths and their supporting families and agencies, while still upholding the basic expectations of the community of the criminal justice system – still a court of justice, not a welfare tribunal.

⁶⁹ Blagg 25.

⁷⁰ Reynolds 3.

APPENDIX 1



APPENDIX 2

Young Offenders Act 1994

6. Objectives

The main objectives of this Act are —

- (a) to provide for the administration of juvenile justice; and
 - (b) to set out provisions, embodying the general principles of juvenile justice, for dealing with young persons who have, or are alleged to have, committed offences; and
 - (c) to ensure that the legal rights of young persons involved with the criminal justice system are observed; and
 - (d) to enhance and reinforce the roles of responsible adults, families, and communities in —
 - (i) minimising the incidence of juvenile crime; and
 - (ii) punishing and managing young persons who have committed offences; and
 - (iii) rehabilitating young persons who have committed offences towards the goal of their becoming responsible citizens;
- and
- (e) to integrate young persons who have committed offences into the community; and
 - (f) to ensure that young persons are dealt with in a manner that is culturally appropriate and which recognises and enhances their cultural identity.

7. General principles of juvenile justice

The general principles that are to be observed in performing functions under this Act are that —

- (a) there should be special provision to ensure the fair treatment of young persons who have, or are alleged to have, committed offences; and
- (b) a young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct; and
- (c) a young person who commits an offence is not to be treated more severely because of the offence than the person would have been treated if an adult; and
- (d) the community must be protected from illegal behaviour; and
- (e) victims of offences committed by young persons should be given the opportunity to participate in the process of dealing with the offenders to the extent that the law provides for them to do so; and
- (f) responsible adults should be encouraged to fulfil their responsibility for the care and supervision of young persons, and supported in their efforts to do so; and

- (g) consideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardise the protection of the community to do so; and
- (h) detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary; and
- (i) detention of a young person in custody, if required, is to be in a facility that is suitable for a young person and at which the young person is not exposed to contact with any adult detained in the facility, although a young person who has reached the age of 16 years may be held in a prison for adults but is not to share living quarters with an adult prisoner; and
- (j) punishment of a young person for an offence should be designed so as to give the offender an opportunity to develop a sense of social responsibility and otherwise to develop in beneficial and socially acceptable ways; and
- (k) a young person who is dealt with for an offence should be dealt with in a time frame that is appropriate to the young person's sense of time; and
- (l) in dealing with a young person for an offence, the age, maturity, and cultural background of the offender are to be considered; and
- (m) a young person who commits an offence is to be dealt with in a way that —
 - (i) strengthens the family and family group of the young person; and
 - (ii) fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons; and
 - (iii) recognises the right of the young person to belong to a family.

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