



Children's Court of New South Wales

**AUSTRALIAN AND NEW ZEALAND ASSOCIATION OF PSYCHIATRY,
PSYCHOLOGY AND LAW**

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KEYNOTE ADDRESS

INTRODUCTION

1. This presentation has been prepared for the Annual General Meeting of the Australian and New Zealand Association of Psychiatry, Psychology and Law (ANZAPPL) on 1 March 2017.¹
2. I am very pleased to have been invited to present the first keynote address of 2017. The relationship between psychiatry, psychology and the law is of significant relevance to the Children's Court, as we rely heavily on developments in these areas to inform our understanding of the children who come before the Court, and assist us in shaping our decision making to better address the issues of care and protection and youth crime.

¹ I acknowledge the considerable help and valuable assistance in the preparation of this paper by the Children's Court Research Associate, Elizabeth King.

3. In the first part of my presentation, I will speak to you all about the specialist nature of the Children's Court jurisdiction. In the second part I will explore the use of expert clinical evidence, particularly in Care cases. Finally, in the third part, I will canvass the emerging importance of advances in the understanding of brain development in dealing with issues in the Children's Court, particularly in the area of youth crime.

4. My hope is that my discussion may provide some relevant insight into the operation and work of the Children's Court, and help promote a better understanding between ANZAPPL and the Children's Court of the expert's role in court proceedings. As professionals working within these areas that are so interconnected, we are charged with the task, and indeed the privilege, of collaboration and consultation, in order to better understand those children and young people that we seek to support.

SPECIALIST NATURE OF THE CHILDREN'S COURT/ ROLE AND STRUCTURE OF THE CHILDREN'S COURT

5. Today, the Children's Court of NSW consists of a President, 15 specialist Children's Magistrates and 10 Children's Registrars. It sits permanently in 7 locations, and conducts circuits on a regular basis at country locations across New South Wales.

6. The Children's Court of NSW deals with both care and protection matters and offences committed by children under 18.

7. Although these are two separate jurisdictions, there is a distinct correlation between a history of care and protection interventions and future criminal offending. This nexus has been explored and articulated particularly well by former President of the Children’s Court, Judge Marien, who describes the reality of ‘Cross-over Kids’² - young people who have been before the Court in its Care jurisdiction, and the frequency with which they come before the Crime jurisdiction later in life. In Judge Marien’s paper he cites the work of the eminent psychologist Dr Judith Cashmore AO, who argues that there is an established link between childhood maltreatment and subsequent offending in adolescence.³

8. The Children’s Court does not charge children with crimes, but it does determine their guilt. If children plead guilty, or are found guilty after a trial, the Children’s Court conducts a sentence hearing and determines the appropriate sentence to be imposed.

9. I believe that the ultimate aim of an enlightened system of juvenile justice should be to have no children in detention. Rather, we should be developing other social mechanisms to deal with problem children.

² Judge Mark Marien SC “Cross-over kids’ – childhood and adolescent abuse and neglect and juvenile offending”, paper presented to the National Juvenile Justice Summit, Melbourne, 26 and 27 March 2012.

³ Judith Cashmore, “The link between child maltreatment and adolescent offending”, (2011) 89 *Family Matters*, available at: <https://aifs.gov.au/publications/family-matters/issue-89/link-between-child-maltreatment-and-adolescent-offending>

A. Origins of the Children's Court of NSW

10. The Children's Court of NSW is one of the oldest children's courts in the world. It has a specially created stand-alone jurisdiction which has origins traced back to 1850.
11. Prior to 1850, the criminal law did not distinguish between children and adults, and children were subjected to the same laws and punishments as adults and were liable to be dealt with in adult courts.
12. There were a number of children under 18 transported as convicts in the First Fleet of 1788. The precise number of convicts transported is unclear, but among the 750-780 convicts, there were 34 children under 14 years of age and some 72 young persons aged 15-19.⁴
13. The first special provision recognising the need to treat children differently was the *Juvenile Offenders Act 1850*.⁵
14. This legislation was enacted to provide speedier trials and to address the "evils of long imprisonment of children".
15. Then, in 1866, further reforms were introduced, including the *Reformatory Schools Act 1866*.⁶

⁴ State Library of NSW Research Guides, 'First Fleet Convicts' at www.sl.nsw.gov.au accessed 29 January 2016.

⁵ 14 Vic No II, 1850.

16. This Act provided for the establishment of reformatory schools as an alternative to prison, and the *Destitute Children Act* 1866,⁷ under which public and private “industrial schools” were established, to which vagrant and destitute children could be sent.⁸

17. Since those early beginnings in 1850, there has been a steady progression of reform that has increasingly recognised and addressed the need for children to be treated differently and separately from adults in the criminal justice and child welfare systems.

B. The need for specialist courts and the structure of the Children’s Court

18. The *Children’s Court Act* 1987 imposes upon the President both judicial and extra-judicial functions: s 16. My extra-judicial obligations include a requirement to confer regularly with community groups and social agencies on matters involving children and the Court. I am also required to chair an Advisory Committee that has a responsibility to provide advice to the Attorney General and the Minister for Family and Community Services on matters involving the Court and its function within the juvenile justice system in NSW: s 15A.

⁶ 30 Vic No IV, 1866.

⁷ 30 Vic No II, 1866 (otherwise known as the *Industrial Schools Act* 1866).

⁸ R Blackmore, “History of Children’s Legislation in New South Wales – the Children’s Court”, at www.childrenscourt.justice.nsw.gov.au, accessed 27 January 2016, extracted from R Blackmore, *The Children’s Court and Community Welfare in NSW*, Longman Cheshire, Melbourne, 1989.

19. Therefore, as President of the Children’s Court, I have had the opportunity to preside over a wide range of cases, to observe many children involved in the youth justice system and the care and protection system, to visit the juvenile detention centres, to read widely, to attend conferences and seminars, and to speak to a lot of experts and others involved, or interested, in matters concerning children and young people.

20. I continue to be astounded by the complexity of the issues that arise in this area. The social disadvantage facing the children and young people and their families who have their lives characterised by decisions made by this Court, is a profound reminder of the need for continuing education and resolute and meaningful collaboration. The evidence arising from the public hearings of the Royal Commission into Institutional Responses to Child Sexual Abuse, and more recently the Royal Commission to examine the child protection and juvenile detention systems of the Northern Territory, exemplify the systemic failures that can arise when siloes are maintained and networks are broken.

21. In particular, the need for ongoing collaboration between the scientific and legal community is absolutely crucial, as the ability of Judicial Officers to understand and make decisions in the best interests of children relies heavily on our ability to understand the social, emotional and psychological development of children, and to be able to identify areas for prevention, early intervention, diversion and rehabilitation.

- 22.** Examining and challenging the social disadvantage and disempowerment that have defined the lives of generations of families who come before the Children's Court is critical to my role as President of the Children's Court, and the roles of my colleagues, the specialist Children's Magistrates.
- 23.** It is implicit in the role of Judicial Officers that we comply with our responsibility to perform our roles consistent with the administration of justice. However, this is a particularly special jurisdiction that is imbued with the practice of therapeutic jurisprudence and restorative justice.
- 24.** Additionally, there is value in having a consistency of approach and of outcomes across the whole state, in the way evidence is presented, in the practices and procedures applied, and in the decisions made in cases that come before the Court.
- 25.** I am an advocate, therefore, for the expansion of the specialist nature of the jurisdiction across as much of the state as might be achieved over time.
- 26.** Children's Court Magistrates now hear something like 90% of care cases in the State.
- 27.** The coverage for criminal matters remains, however, at about 60%. The balance of cases is heard by Local Court Magistrates exercising Children's Court jurisdiction, predominantly in remote parts of NSW.

C. The legislative environment of the Children's Court

- 28.** The Children's Court has jurisdiction over care and protection matters and matters involving juvenile crime. The Court also has jurisdiction to hear children's parole matters, apprehended violence orders and compulsory schooling matters under s 22D of the *Education Act 1990* (NSW).
- 29.** Proceedings in relation to the care and protection of children and young persons in NSW are public law proceedings, governed, both substantially and procedurally, by the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the *Care Act*).
- 30.** Care proceedings involve discrete, distinct and specialised principles, practices and procedures which have regard to their fundamental purpose, namely the safety, welfare and well-being of children in need of care and protection.⁹
- 31.** In the criminal jurisdiction of the Court, the applicable legislation includes the *Crimes Act 1900*, the *Bail Act 2013*, the *Children (Criminal Proceedings) Act 1987* (CCPA) and the *Young Offenders Act 1997* (YOA). Section 6 of the CCPA provides that children and young people are unique, reflecting an understanding of the cognitive and neurobiological differences between young people and adults.

⁹ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 60.

32. Specifically, it states that the following principles are to be applied with regard to the administration of the Act:

“(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparations for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.”¹⁰

¹⁰ Children and Young Persons (Criminal Proceedings) Act 1987, s 6.

- 33.** The YOA is a statutory embodiment of early intervention and diversion, providing the option of warnings, cautions and Youth Justice Conferences (YJC's). A YJC brings young offenders, their families and supporters face-to-face with victims, their supporters and Police to discuss the crime and how people have been affected. Together, they agree on a suitable outcome that can include an apology, reasonable reparation to victims, and steps to reconnect the young person with their community to help them desist from further offending.
- 34.** YJC's are beneficial for the young person's experience of the criminal justice system, as all involved in the conference are not placed in an adversarial situation. Further, YJC's facilitate co-operation between the young person and Police and foster collaboration and input from the individual offender, victims, families and communities. I am particularly supportive of the use of YJC's. In my view, they produce fruitful results for both the individual offender and the community.
- 35.** There are also safeguards within the *Care Act* and corresponding provisions in the CCPA and YOA that prevent the publication of any material that identifies or is likely to identify the young person.¹¹

¹¹ *Children and Young Persons (Care and Protection) Act* 1998, ss 104 and 105; *Children (Criminal Proceedings) Act* 1987, s 15A and *Young Offenders Act* 1997, s 65.

D. Specialised principles and procedures of the Children's Court

- 36.** The Children's Court safeguards the needs of the vulnerable people who appear before it and has developed discrete, distinct and specialised procedures over time.
- 37.** In criminal matters, courts are designed to be smaller, less intimidating environments and legal practitioners stay seated when addressing the Court. Participants are encouraged to tailor their language to the age and stage of the young person's development. Additionally, Police do not wear their uniforms or carry their appointments in court.
- 38.** In care proceedings, the rules of evidence do not apply, the proceedings are non-adversarial, and are required to be conducted with as little formality and legal technicality and form as the circumstances permit.
- 39.** The need to tailor the environment and communication to the child, young person or vulnerable witness is highlighted in the English case of *R v Lubemba*:
- "It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness. If there is a right to 'put one's case' (about which we have our doubts) it must be modified for young or vulnerable witnesses.*

*It is perfectly possible to ensure the jury are made aware of the defence case and all the significant inconsistencies without intimidating or distressing a witness.*¹²

- 40.** In addition, the Children's Court has the benefit of assistance from the Children's Court Clinic.
- 41.** The Children's Court Clinic (which I will refer to in short form as the Clinic) is established under the *Children's Court Act 1987* and is given various functions designed to provide the Court with independent, expert, objective and specialised advice and guidance.
- 42.** Upon the making of an assessment order by the Court, the Clinic may provide a psychological or psychiatric assessment of a child¹³, or an assessment of a person's capacity to carry out parental responsibility.¹⁴
- 43.** I will canvas the use of expert evidence, including the giving of expert evidence by Clinicians shortly.
- 44.** As an advocate for the specialist nature of the Children's Court, I view forums such as these as an important means by which the Children's Court can further inform itself.

¹² *R v Lubemba* [2014] EWCA 2064 at [38] – [45].

¹³ *Children and Young Persons (Care and Protection) Act 1998*, s 53

¹⁴ *Ibid*, s 54.

45. Organisations such as yours have the benefit of many decades of wisdom and knowledge in the areas of psychology and psychiatry. Any discourse that facilitates collaboration, capacity building and information exchange is a discourse that is worth supporting. Accordingly, I see this as an opportunity to share our respective wisdom and expertise.

THE USE OF EXPERT CLINICAL EVIDENCE

46. The Court may receive the benefit of expert evidence from different classes of experts, including a Clinician from the Children's Court Clinic. Clinicians are effectively single witness experts in the sense that they are appointed by the Court, and are not qualified or retained by a party. However, it is also possible for a party to retain an external expert, such as a psychologist or a psychiatrist, a surgeon or speech therapist.

47. The Children's Court expects all experts, including Clinicians, to be aware of, to apply and to adhere to the provisions of the Expert Witness Code of Conduct (the Code) set out at Schedule 7 of the *Uniform Civil Procedure Rules* 2005 (UCPR). Experts must not advocate for a party. It is the expert's paramount duty, overriding any other duty, or loyalty to the person retaining the expert witness, to assist the Court impartially on matters relevant to the area of expertise of the witness.

48. External experts retained by a party such as the mother or father of a child, are bound by this duty of impartiality in the same way a Clinician is, however the independence of an external expert is impacted by the terms of reference given to the expert by the contracting party.

49. Therefore, although the Code applies equally to Clinicians and external experts, I will discuss the role of the Clinician first, and then canvass some more general requirements of all expert witnesses.

The role of the Clinician

50. It is important to distinguish the role of the Clinician from the role of the Court.

51. As I have set out above, the Court only intervenes where there is a need for care and protection. This is a 'critical first step' that reflects the UN Convention on the Rights of the Child (CROC) in acting as a safeguard, protecting families from unnecessary state intervention into their lives.¹⁵

“Once having intervened, the role of the Court then differs from other Courts. One would normally expect a court to have powers of compulsion, to require parties before it to do certain things so as to resolve the issue in dispute. In fact, the Children’s Court has very few powers of compulsion. It can compel people to attend before it or produce documents to it.

¹⁵ Jennifer Mason, then Director-General of DoCS, from a paper by entitled “Courts, DoCS and Child Protection in NSW” delivered to District Court Judges in May 2009 at p 7.

It can reallocate parental responsibility - notwithstanding the disagreement of everyone before the Court to the orders that the Court proposes to make.

The Court can also compel attendance as part of a therapeutic program. But beyond those very limited powers all of the other powers of the Children's Court require the consent and co-operation of at least one of the child, the family, DoCS (now DFACS) or other agencies.

*This can prove extraordinarily frustrating for judicial officers. It is however a natural element which reflects the peculiarities of making an order in one point of time which will potentially bind a child and family for years to come.*¹⁶

52. Thus, for example, the Court cannot order restoration. It can only decide to accept or reject the assessment of the Secretary. The Court cannot direct the permanent placement. It can only approve or not approve the Secretary's permanency plan.

53. The Court is, however, required to make findings. The role of the Clinician, in simple terms, is to assist the Court in making those findings. It is absolutely critical, therefore, that the Clinician be, and be seen to be, completely impartial and independent of the parties, whether it be the Department, or family members, or any of the lawyers and caseworkers involved.

¹⁶ Jennifer Mason, then Director-General of DoCS, from a paper by entitled "Courts, DoCS and Child Protection in NSW" delivered to District Court Judges in May 2009 at p 7.

- 54.** Perhaps one way of looking at it is to say, in accordance with the paramountcy principle; their role is to assist the Court to make decisions that best promote the safety, welfare and well-being of the child.
- 55.** The Clinician's role, to impartially assist the Court, has several practical consequences.
- 56.** Assist means not attempting to guide or shape the outcome, or to pre-empt a finding, or to attempt to inappropriately influence the Judicial Officer. Clinicians must not try to be the lawyer and purport to interpret the Act or the Convention in forming their opinion. Their assessment should focus on clinical matters, consistent with their expertise, not the legal principles.
- 57.** Clinicians must not say what they think the parties want to hear. They must be aware of the audience, but where necessary, be firm, and frank, about deficiencies in the parents or others. It is for the Court to apply the law to the facts as it finds them, with the Clinician's assistance as to what those facts are.
- 58.** The first way in which Clinicians assist the Court is by the provision of an expert opinion.
- 59.** That opinion must derive first from a body of specialised knowledge, obtained by Clinician's by reason of their training, experience and study. Thus, Clinicians should clearly identify and be able to demonstrate what that specialised knowledge is, and how they obtained it. Clinicians must not, therefore, stray outside their area of expertise.

- 60.** For example, a general practitioner should not express a view on a matter of psychiatry, or at least should make clear that the view is based on a limited level of general medical knowledge derived from study or general practice.
- 61.** Secondly, the opinion must derive from facts, that is, it must be based on matters that the Clinician has observed, or assumed to be accepted facts, or which are assumed to be subsequently proved or disproved. The facts or assumed facts upon which a Clinician or expert relies should be set out and differentiated, in the sense that they are matters which have been personally observed, read or been informed about, or which have been assumed or hypothesized (usually in cross-examination).
- 62.** Thirdly, Clinicians should articulate the reasoning process they have used to come to any opinion or conclusion, and be in a position to defend it.
- 63.** In addition to providing the Court the benefit of their expertise, Clinicians in the Children's Court have another very important facet to the way they assist the Court. They provide information, not necessarily in the form of an opinion, but a hybrid factual form of evidence, which can greatly assist the judicial officer. Because they observe the protagonists over a period of time, interview parents, children and others in detail and on different occasions, in neutral or non-threatening environments, away from courts and lawyers, untrammelled by court formalities and processes, they can provide the Court with insights and nuances that might not otherwise come to its attention.

They can provide impartial, independent, objective information not contained in other documents, give context and detail to issues that others may not have picked up on, and which the Court, trammelled by the adversarial process and the 'snapshot' nature of a court hearing, the benefit of which it would not otherwise have.

64. Importantly, Clinicians must not approach issues in the same way as a treating medical practitioner, who will accept and rely on a history of given symptoms described or signs recorded, generally at face value, to diagnose and treat a patient. In contrast, Clinicians should question histories, particularly if at odds with other material they have read or heard, or observed. They should objectively assess and test the facts they rely on, consistent with their duty of impartiality and independence. Clinicians cannot take things at face value, as they otherwise risk misleading or confusing the court.

65. Clinicians should also be prepared to change their view, or have their view rejected by the Court, where the facts upon which their opinion was based are found not to have been established, or where a different set of facts about which the expert was not aware emerges, or the significance of which was not fully appreciated by the expert. As Mark Allerton has said on a previous occasion¹⁷:

¹⁷ A paper by Mark Allerton entitled "How to be a Real Expert, and Not Just an Old Drip Under Pressure", August 2008.

“...it is important to show that you have canvassed a range of views and information, but have made your own assessment of their validity and accuracy, and assessed the extent to which they support or weaken your own findings...”

66. I set out now something I wrote about a Clinician, as it seems to encapsulate some of the points I have been making:

“I am persuasively guided by the opinion of the Clinician. He is, after all the court’s witness (as counsel was at pains to remind me), and may therefore be presumed to be unbiased and objective. There was no suggestion that he wasn’t. It is one thing for a judge to listen to the mother as she gave her evidence for a short period of time, and to observe her demeanour in the cloistered environment of the courtroom. She was undoubtedly on her best behaviour, which was at odds with some of the evidence emerging from the documentary material, and with the way she appears to have conducted herself at the hearing in the Children’s Court...On the other hand, the Clinician has had extensive contact not only with the mother, but also with the children and the carers, including observation of them all during contact sessions, and at the homes of the carers. He has also carried out and interpreted the results of an extensive array of psychological tests and assessments. This and his experience as a clinician over many years of practice in this area make him far more equipped than me, and with respect, the Department’s personnel, to evaluate the mother. I found the Clinician to be a most impressive witness.

I've had occasion to hear evidence from a number of psychologists over the past eighteen months, and he was a stand out for lucidity, objectivity, thoroughness, careful reasoning and thoughtfulness.”

67. There is no substitute for common sense.

Giving expert evidence

68. Given the audience before me today, it would be beneficial for me to reinforce some of the requirements for expert evidence in the Children’s Court, which applies to Clinicians as well as all other appointed experts, as outlined in the Code and the relevant Practice Notes.¹⁸

69. An expert’s assessment report should clearly set out the name and address of the expert, an acknowledgement by the expert that they have read the Code and agree to be bound by it, as well as their qualifications in preparing the report.¹⁹ Additionally, the expert must clearly set out any written material which has been considered or relied upon, any examinations, tests or investigations relied upon.

¹⁸ Practice Note No. 6, ‘Children’s Court Clinic Assessment Applications and Attendance of Authorised Clinicians at Hearings, Dispute Resolution Conferences and External Mediation Conferences’, 2011, Children’s Court of NSW; Practice Note No. 9, ‘Joint Conference of Expert Witnesses in Care Proceedings’, 2012, Children’s Court of NSW.

¹⁹ *Uniform Civil Procedure Rules 2005* (UCPR), Schedule 7, s 3(a), (b) and (c).

- 70.** To the extent to which any opinion expressed by the expert involves the acceptance of another person's opinion, the identification of that person and the opinion expressed by that person, including any literature.²⁰
- 71.** By way of example, I recently presided over a matter where two psychologists broke almost every rule in relation to the giving of expert evidence.
- 72.** They failed to describe their expertise, qualifications and experience in the report, and there was no formal scope for their retainer, or letter of instructions. They were unaware of the Experts Code of Conduct and the Children's Court Practice Note, and were therefore unable to comply with either. Most importantly, they also failed to list the documents they considered as part of their investigation. I was asked to reject their report in its entirety, and if I had been in any other jurisdiction than the Children's Court, I would have done so.
- 73.** Expert evidence plays a crucial role in Care proceedings at the Children's Court, whether it be provided by a Clinician or an external expert retained by a party. It is absolutely crucial, therefore, that experts be aware of the Code and the Practice Note, and comply accordingly so as to present valuable evidence which will assist the Court in determining the best interests of the child with regard to safety, welfare and wellbeing. To do so otherwise is to risk wasting the Court's time and resources.

²⁰ Ibid s 3(e), (g) and (h).

- 74.** It is important to distinguish between criminal trials and civil trials, where the burden of proof is significantly lower. In criminal matters the Crown is generally required to prove a fact beyond reasonable doubt, hence it is common to see a defence run along the lines of causing confusion, or “muddying the waters”, to create a reasonable doubt.
- 75.** In Care cases, however, the facts need only be established on the balance of probabilities: s 93(4) of the *Care Act*. In applying that standard, the Court will have regard to the gravity and importance of the matters to be determined in accordance with the principles in *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Director General of Department of Community Services; Re “Sophie”* [2008] NSWCA 250. Thus, the Court will not lightly make any findings in respect of the serious allegations: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170.
- 76.** The point might be demonstrated by a case study, in a case involving the so-called shaken baby syndrome, decided in the District Court on appeal in 2010: *SS v Department of Human Services* [2010] NSWDC 279.
- 77.** The Secretary's case was that the baby in question had suffered a non-accidental abusive head injury causing severe brain damage, and that the perpetrator(s), although not identified, were, on the balance of probabilities the mother and/or the father.

- 78.** Reliance was placed principally on the hospital records and the evidence of the Staff Specialist Paediatrician of the Child Protection Unit at the Children's Hospital at Westmead, a specialist paediatric ophthalmologist who had worked in the area for 21 years, and Professor David Isaacs, a senior staff specialist in General Paediatrics and Paediatric Infectious Diseases at Westmead Children's Hospital.
- 79.** The parents contended that, upon analysis, the medical conclusion of a 'shaken baby' was based on less than unassailable foundations.
- 80.** They submitted that the existence of alternative hypotheses, together with the "circular reasoning" of the 'science' of shaken baby syndrome, lead to the position where the Court could not be comfortably satisfied that the Secretary had proved the case against the parents.
- 81.** The so-called alternative hypotheses as to the possible cause of the baby's brain damage, including for example meningitis, or a congenital condition, were advanced by two doctors from the United States, qualified on behalf of the parents and brought to Australia to give evidence. The reality was that these two American doctors were professional expert witnesses who were nothing more than "hired guns", whose evidence was not directed at discovering the true cause, rather it was designed to create doubt as to the Secretary's hypothesis of shaken baby.

82. The Court said of the American doctors:

“Dr Gabaeff and Dr Gardner approached the task from a prejudiced and pre-judged perspective. Their evidence, which was wholly concerned to debunk the notion of shaken baby syndrome, is to be approached with considerable caution. The medical evidence led by the Secretary, on the other hand, involved a logical evaluation of all available material, was concerned to consider other possibilities, and was carefully and logically reasoned. That evidence is consistent with mainstream paediatric medical opinion. By their own admission, Dr Gabaeff and Dr Gardner are outside that conventional paradigm... They were unashamedly partisan, and the totality of their evidence must be viewed with suspicion.”

83. The point was that creating a doubt may have been enough for a criminal jury to have a reasonable doubt as to the guilt of the parents, but in a Care case, where the paramount concern is the safety, welfare and well-being of the children, the Court looks at the probabilities. Hence, the Judge concluded:

“I am comfortably satisfied, on the balance of probabilities, that the proximate cause of the brain damage observed following the baby’s hospitalisation on that day was non-accidental shaking in the previous 24 hours. The only persons who, on the balance of probabilities, were in the available pool of perpetrators, were the parents.”

84. Where the Court is asked to accept an opinion of an expert, it will look to the substance of the opinion expressed.

- 85.** Accordingly, the cogency of the reasoning process plays an important role:
Dasreef Pty Limited v Hawchar [2011] HCA 21 at [92]. A reasoned explanation or conclusion must be presented.
- 86.** This requires the expert to explain the methodology employed to reach the conclusion expressed, that is, to identify the chain of reasoning leading to the conclusion.
- 87.** It is also important to be aware that the Judicial Officer is required to express a view about an expert's evidence, especially where it conflicts with someone else giving evidence about the same issue. This means experts should be measured in any criticism they make of other witnesses, objective but not pejorative. Conversely, experts should not take criticism of their views personally. It is in the nature of litigation that criticism will be made. If everything was straightforward and clear cut, there would be no need for court cases.
- 88.** Finally, I want to make a few observations about future directions in expert evidence.
- 89.** The Clinic has already made some forays into joint opinion writing. There are difficulties with that, as it gives rise to practical issues such as who expressed what opinion, who has what expertise, and who should be cross-examined about what.

90. On the other hand, there is great value in having the experts get together in advance of a hearing, or even during the hearing, to confer and identify what they agree about, and what they differ on and why. I, for my part, will be utilising these techniques in the Children’s Court in the future.

91. In the recent case I have referred to above involving the joint report, I put the two authors into the witness box together to be cross-examined together. I doubt a judge would get away with this “technique” in any other court.

THE EMERGING IMPORTANCE OF ADVANCES IN THE UNDERSTANDING OF BRAIN DEVELOPMENT, PARTICULARLY IN THE AREA OF YOUTH CRIME

92. Throughout my time at the Children’s court, I have undertaken some research into the issues and circumstances surrounding the reasons young people commit offences.

93. Given the expertise of the audience before me today, I will only briefly outline the research relating to adolescent brain development, and will discuss why it is so important why we must continue to grow our knowledge in this area, in order to better respond to youth offending.

- 94.** A great deal of research has been undertaken in recent years to show that the pre-frontal cortex of the brain (the frontal lobes) is the last part of the human brain to develop. The frontal lobes are those parts of the brain associated with identifying and assessing risk, managing emotion, controlling impulses and understanding consequences.²¹
- 95.** We know that rational choice theory argues that young people are able to undertake a logical risk assessment in their decision-making process. Neurobiological research, on the other hand, argues that adolescent decision-making is not linear, sophisticated and predictable.
- 96.** A further complication is that brain development differs depending upon a number of variables and that 'neuro-scientific data are continuous and highly variable from person to person: the bounds of 'normal' development have not been well delineated.'²²
- 97.** Despite this, the neurobiological research to date shows that whilst adolescents may appear to function in much the same way as adults, they are not capable of the executive function that mature adults possess.
- 98.** Executive function of the prefrontal cortex is explained by Johnson, Blum and Giedd as:

²¹ E.C. McCuish, R. Corrado, P. Lussier, and S.D. Hart, 'Psychopathic traits and offending trajectories from early adolescence' (2014) *Journal of Criminal Justice* 42, pp 66-76.

²² S.B Johnson, R.W Blum, J.N Giedd, 'Adolescent maturity and the brain: the promise and pitfalls of neuroscience research in adolescent health policy' (2009) *Journal of Adolescent Health* 45(3) pp 216-221 at 220.

“...a set of supervisory cognitive skills needed for goal-directed behaviour, including planning, response inhibition working memory and attention. Poor executive functioning leads to difficulty with planning, attention, using feedback and mental inflexibility, all of which could undermine judgment and decision making.”²³

99. If we liken executive function of the pre-frontal cortex to a type of control centre of the brain, we can recognise that during adolescence, this control centre is under construction. As such, a young person’s ability to undertake clear, logical and planned decision making prior to acting is also under construction.

100. Neurobiological development will continue beyond adolescence and into a person’s twenties, and different people will reach neurobiological maturity at different ages.²⁴

101. In simple terms, according to neurobiology, a young person is unable to make any rational choice, let alone a rational choice to commit a criminal act.

102. This is not to say that the findings from neurobiology research exculpate all young offenders from criminal responsibility.

²³ Ibid at 218.

²⁴ B Midson, ‘Risky Business: Developmental Neuroscience and the Culpability of Young Killers’, (2012) *Psychiatry, Psychology and the Law*, 19 (5), pp.692 -710 at 700. See also: Gruber, S.A. Yurgelun Todd, D. A. ‘Neurobiology and the Law: A role in Juvenile Justice’ (2006) *Ohio State Journal of Criminal Law*, 3, pp 321-340 at 332.

- 103.** Rather, these findings indicate that there is a grey area between right and wrong when considering the culpability of a young offender.
- 104.** Advances in neurobiology allow us to better understand the range of factors (biological, psychological and social) that make juvenile offenders different from adult offenders, and justify and improve the unique responses to juvenile crime.
- 105.** The importance of understanding trauma, and the effect of trauma on brain development, is another critical issue. As a Judicial Officer, I see children and young people on a daily basis, and recognise the impact that trauma can have on a young person's ability to articulate themselves and their ability to regulate their behaviours.
- 106.** Dr Cashmore's research shows links between brain development, trauma and criminal offending, and therefore it comes as no surprise that communication with children and young people is a discrete area of study in and of itself.
- 107.** Judge Sexton, of the Victorian County Court, presented a paper titled 'Communicating with Children and Young People' at the 'Speaking their Language' conference in 2015, which highlighted the impact of brain development on the ability for children to give evidence.

108. Judge Sexton has identified problems associated with gratuitous concurrence – agreeing or disagreeing with a proposition because the person being questioned thinks that is what the questioner wants to hear – when asking questions of children and young people, particularly those who have been exposed to trauma. In addition, she acknowledges:

“Often adolescents are considered capable of communicating in an adult way, but if they have been subjected to trauma in their lives, there may be an underlying disability which means they are really functioning at the level of an under 12 year old, but will be too embarrassed to admit to not understanding.”²⁵

109. The growing recognition of the relevance of “brain science” has driven the need for policy and legislation to “match” the research.

110. This issue was addressed in detail by the Principal Youth Court Judge of New Zealand, Judge Andrew Becroft, in a comprehensive paper delivered in 2014 at the Australasian Youth Justice Conference in Canberra.²⁶ He pointed out that the first decade of this century has been called the “decade of the teenage brain”, an expression coined by the Brainwave Trust Aotearoa, a not-for-profit organisation working in the field of adolescent brain development (www.brainwave.org.nz).

²⁵ Judge Meryl Sexton, *Communicating with children and young people*, paper presented at the Judicial College of Victoria ‘Speaking their Language’ Conference Monday 19 October 2015.

²⁶ A Becroft, ‘From Little Things, Big Things Grow - Emerging Youth Justice Themes in the South Pacific’, a keynote address presented at the Australasian Youth Justice Conference, Canberra, 20 May 2013.

111. In his paper, Judge Becroft said some important things:

“In recent years, a wealth of neurobiological data from studies of Western adolescents has emerged that suggests biological maturation of the brain begins, and continues much later in life than was generally believed. Many neuroimaging studies mapping changes in specific regions of the brain have shown that the frontal lobes (which are responsible for “higher” functions such as planning, reasoning, judgement and impulse control) only fully mature well into the 20s (some even suggest that they are not fully developed until halfway through the third decade of life). Brain science research also shows that when a young person’s emotions are aroused, or peers are present, the ability to impose regulatory control over risky behaviour is diminished.”²⁷

112. Judge Becroft argues that these findings have implications for youth justice policy and will affect our perceptions of young people’s culpability for their actions and the establishment of an appropriate age of criminal responsibility. Judge Becroft states:

“They also affect our understanding of ‘what works’ with young offenders and what our expectations should be with respect to various responses and interventions.

²⁷ A Becroft, ‘From Little Things, Big Things Grow - Emerging Youth Justice Themes in the South Pacific’, a keynote address presented at the Australasian Youth Justice Conference, Canberra, 20 May 2013., p 5.

Finally, they change any presumption that young people are simply “mini-adults” and that the same responses to offending should be used for both adults and young people...A key challenge for Australasian Courts is how to make use of this growing body of irrefutable research...It is a constant challenge for those involved in youth justice to keep learning more about adolescent brain development, and to take this into account...”²⁸

113. In addition to Judge Becroft’s paper, I was particularly attracted to the research undertaken by Richards in “What makes juvenile offenders different from adult offenders” published by the Australian Institute of Criminology.²⁹

114. The central theme of Richard’s paper is that “most juveniles will ‘grow’ out of offending and adopt law-abiding lifestyles as they mature”.³⁰

115. The paper goes on to argue that a range of factors, including lack of maturity, the propensity to take risks and a susceptibility to peer influence, combined often with intellectual disability, mental illness and victimisation, operate to increase the risk of contact of juveniles with the criminal justice system.

²⁸ Ibid, p 6.

²⁹ K Richards, ‘What makes juvenile offenders different from adult offenders’, *Trends & issues in crime and criminal justice*, No 409, Australian Institute of Criminology, 2011 at <http://aic.gov.au/publications/current%20series/tandi/401-420/tandi409.html>, accessed 27 January 2016.

³⁰ Ibid, p 29.

- 116.** These factors, combined with the unique capacity of juveniles to be rehabilitated can require intensive and often expensive interventions.
- 117.** The paper postulates that crime is committed disproportionately by young people. Persons aged 15 to 19 years are more likely to be processed by Police for the commission of a crime than are members of any population group. This does not mean, however, that juveniles are responsible for the majority of recorded crime.
- 118.** On the contrary, Police data indicates that 10 to 17 year olds comprise a minority of all offenders who come into contact with police. This is primarily because offending peaks in late adolescence, when you people are aged 18 to 19 years.
- 119.** Thus, rates of offending peak in late adolescence and decline in early adulthood.
- 120.** Although most juveniles grow out of crime, they do so at different rates. A small proportion of juveniles continue offending will into adulthood. This small 'core' has repeated contact with the criminal justice system and is responsible for a disproportionate amount of crime.
- 121.** The paper goes on to demonstrate that juveniles disproportionately commit certain types of offence (graffiti, vandalism, shoplifting and fare evasion).

122. Conversely, very serious offences (such as homicide and sexual offences) are less frequently committed by juveniles, as they are incompatible with developmental characteristics and life circumstances. On the whole, juveniles are more frequently apprehended in relation to offences against property than offences against the person. Juveniles are more likely than adults to come to the attention of police, for a variety of reasons, including:

- They are usually less experienced at committing offences;
- They tend to commit offences in groups, and to commit their offences close to where they live;
- They often commit offences in public areas, such as shopping centres, or on public transport.

123. Further, by comparison with adults, juveniles tend to commit offences that are attention seeking, public and gregarious, and episodic, unplanned and opportunistic.

124. In my view, it is our job to do our best to help juveniles through these problems years until they mature. In light of these advances in brain science and the implications these findings have for young offenders and their treatment in the criminal justice system, it is important to also consider a final reason why children must be treated differently.

125. There is a growing body of evidence that supports the proposition that incarceration of children and young persons is both less effective and more expensive, and doing away with juvenile incarceration will not increase the risk to the community.

126. Most young persons in the juvenile justice system can be adequately supervised in community-based programs or with individualised services without compromising public safety. Studies have shown that incarceration is no more effective than probation or community-based sanctions in reducing criminality. For example, Wald and Martinez assert that no experience is more predictive of future adult difficulty than confinement in a juvenile facility.³¹

127. Young people who go into custody mix with some other young people who are already deeply involved in criminal offending. Some will form friendships with more experienced offenders and be influenced to commit further offences as a result. This is often referred to as the ‘contamination’ effect.

128. A further important consideration is the ‘inoculation’ effect. If the young person goes into custody for a day and is then released one of the outcomes is that some will conclude that being in custody wasn’t all that bad, especially in comparison to their circumstances in the community.

³¹ M Wald and T Martinez, “Connected by 25: improving the life chances of the country’s most vulnerable 14-24 year olds”, William and Flora Hewlett Foundation Working Paper, 2003.

129. If this happens on a few occasions, even for slightly longer periods of time, the deterrent effect of going into custody diminishes greatly.³²

130. Children who have been incarcerated are more prone to further imprisonment. Recidivism studies in the United States show consistently that 50 to 70% of youths released from juvenile correctional facilities are re-arrested within 2 to 3 years.³³ Further, children who have been incarcerated achieve less educationally, work less and for lower wages, fail more frequently to form enduring families, and experience more chronic health problems (including addiction), than those who have not been confined.³⁴

131. Baldwin asserts that confinement in a secure facility all but precludes healthy psychological and social development.³⁵ This view is further bolstered by the research findings that incarceration actually interrupts and delays the normal pattern of “aging out” .³⁶

³² P Mulrone, “Illustrating the impact of bail refusal”, a paper presented at the Reducing Indigenous youth incarceration conference on 27 September 2012, Sydney.

³³ Justice Policy Institute, *The costs of confinement: why good juvenile justice policies make good fiscal sense*, 2009, Washington DC, at www.justicepolicy.org/images/upload/09_05_rep_costsofconfinement_jj_ps.pdf, accessed 23 February 2016.

³⁴ See B Holman and J Ziedenberg, *The dangers of detention: the impact of incarcerating youth in detention and other secure facilities*, Justice Policy Institute Report, 2006, Washington DC; EP Mulvey, *Highlights from pathways to desistance: a longitudinal study of serious adolescent offenders*, Juvenile Justice Fact Sheet, Office of Juvenile Justice and Delinquency Prevention, US Department of Justice, 2011, Washington DC.

³⁵ J Baldwin, *Juvenile justice reform: a blueprint*, Youth Transition Funders Group, 2012, Washington DC, p 4 at www.ytfg.org/wp-content/uploads/2015/02/Blueprint_JJReform.pdf accessed 27 January 2016.

³⁶ Holman and Ziedenberg, above n 34, p 6.

132. Enlightened with these advances in the science of adolescent brain development, we are able to better understand, empower, protect, divert and rehabilitate children and young people falling into the youth justice system.

CONCLUSION

133. The Children’s Court jurisdiction is a sensitive, specialised and complex jurisdiction. In NSW, the juvenile justice system is moving in the right direction, notwithstanding the oversimplification of juvenile offending through popular media reporting of young offending.

134. The NSW Bureau of Crime Statistics and Research (BOCSAR) reported on 30 January 2017 that the number of juveniles in custody in NSW has now fallen by 38 per cent, from a peak of 405 detainees in June 2011 to 250 in December 2016.³⁷

135. This rapid fall in the number of juveniles in custody reflects, I believe, the growing understanding of the impact of brain development on juvenile offending, and a shift in legal policy towards more effective methods of dealing with children and young people.

³⁷ Bureau of Crime Statistics and Research, “New South Wales Custody Statistics, Quarterly Update”, December 2016, http://www.bocsar.nsw.gov.au/Documents/custody/NSW_Custody_Statistics_Dec2016.pdf, accessed 21 February 2017.

136. This is a positive step towards what I believe should be the ultimate aim of an enlightened juvenile justice system: to have no children in detention.

137. We can continue to strengthen and bolster the intersections of important areas, such as law, psychology and psychiatry, through meaningful collaboration and dialogue, such as that represented here today. In doing so, we move closer to the aim of no children in detention, and towards a more positive and empowering future for our children.

Judge Peter Johnstone

1 March 2017