Children's Court of New South Wales

ABORIGINAL LEGAL SERVICE SYMPOSIUM
Noah's on the Beach, Newcastle: Friday 5 August 2016

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"CROSS-OVER KIDS - THE DRIFT OF CHILDREN FROM THE CHILD PROTECTION SYSTEM INTO THE CRIMINAL JUSTICE SYSTEM"

INTRODUCTION:

1. This paper has been prepared for the 2016 Aboriginal Legal Service Symposium on Aboriginal Children, Culture and the Law - Changing Practice, and is to be presented to attendees on Friday 5 August 2016. The topic I will be addressing today is "Cross-Over Kids - The Drift of Children From the Child Protection System Into the Criminal Justice System".[1]

2. First, I wish to acknowledge the traditional custodians of the land upon which we meet today, the Pambalong Clan of the Awabakal People, and pay my respects to their Elders past and present.

3. Throughout my time as President of the Children's Court, I have observed that there is an unequivocal correlation between a history of care and protection interventions and future criminal offending. This nexus between care and crime has been persuasively articulated by a number of respected commentators, including Dr Judith Cashmore[2], and former President of the Children's Court, Judge Mark Marien, whose seminal paper on 'Cross-Over Kids' examined the drift from children and young people in care into criminal offending.[3]

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[1] I acknowledge the considerable help and valuable assistance in the preparation of this paper provided by the Children's Court Research Associate, Paloma Mackay-Sim
[2] Cashmore, J. (2011) 'The link between child maltreatment and adolescent offending: systems of abuse and neglect of adolescents', *Family Matters*, 89, 31-41
[3] His Honour Judge Mark Marien (2012) 'Cross-Over Kids' Childhood and adolescent abuse and neglect and childhood offending' Paper delivered at the National Juvenile Justice Summit, Melbourne.

4. Notwithstanding that I have been President for 4 years, I continue to be astounded by the complexity of the issues that arise in this Court.

5. The social disadvantage facing the children and young people appearing before this jurisdiction is a profound reminder of the need to work together to critically analyse the issues, build capacity and develop realistic and achievable options for improvement. We must never allow ourselves to sit idly by while children and young people are denied the human rights and opportunities they are entitled to as citizens of the world.

6. We were acutely reminded of the need to take action in the face of human rights abuses perpetrated against children and young people after the Four Corner's Investigation into the systemic abuse and mistreatment of children and young people at the Don Dale Youth Detention Centre in Darwin.[4] Of relevance to these reports, and to the broader discussion today, is that over 90% of children and young people held in juvenile detention centers in the Northern Territory are Aboriginal or Torres Strait Islander.

7. Without detailing the specific abuses, it is sufficient to state that they are abhorrent breaches of human rights that raise important questions, such as (to name a few): How could such egregious mistreatment occur in Australia today? Given that the events occurred in 2014, and despite two previous inquiries into the incident, why did it take 2 years for the Government to establish a Royal Commission? How far have we really come in the 25 years since the Royal Commission into Aboriginal Deaths in Custody? What can we do in future to challenge the complex constellation of factors that continue to affect the treatment of Aboriginal and Torres Strait Islander peoples.

[4] Caro Meldrum-Hanna, Mary Fallon, Elise Worthington 'Australia's Shame', aired on ABC Four Corner's on Monday 25 July 2016. Transcript accessible on www.abc.net.au

8. As a response to these events, on Thursday 28 July 2016, the Australian Government announced its establishment of a Royal Commission to examine the child protection and juvenile detention systems of the Northern Territory.[5] Specifically, the Terms of Reference state that the Royal Commission will examine:

   - Failings in the child protection and youth detention systems of the Government of the Northern Territory since 2006
   - The effectiveness of any oversight mechanisms and safeguards to ensure the treatment of detainees was appropriate
   - Cultural and management issues that may exist within the Northern Territory youth detention system
   - Whether the treatment of detainees breached laws or the detainee's human rights, and
   - Whether more should have been done by the Government of the Northern Territory to take appropriate measures to prevent the reoccurrence of inappropriate treatment.[6]

9. Despite the delay in conducting a Royal Commission into the child protection and juvenile justice systems in the Northern Territory, the establishment of a Royal Commission represents an important step in tackling the silence and shame surrounding the treatment of Aboriginal and Torres Strait Islander peoples in Australia.

10. The baleful effects of silence, and the oppression so commonly associated with it, have remained recurring themes throughout history, influencing some of the most significant events affecting the lives of Aboriginal people. Silence can result in constructive agreement to individual misconduct, it can normalise abuse of process and departure from the precepts of natural justice and, it can entrench the systemic disintegration of the social contract.

[5] Joint Media Release of Prime Minister the Hon. Malcolm Turnbull MP and Attorney-General, Senator the Honourable George Brandis QC, 'Royal Commission into the Child Protection and Youth Detention Systems of the Northern Territory', Thursday 28 July 2016, accessible at: www.attorneygeneral.gov.au
[6] Ibid

11. One of the most concerning implications of the oppression of silence is its ability to manipulate facts and frustrate or prevent progress.

12. As John Stuart Mill famously pronounced:

"Bad men need nothing more to compass their ends than that good men should look on and do nothing."[7]

13. Silence has been an important factor in perpetuating Aboriginal disadvantage. In fact, silence was used to attempt to remove Aboriginal people from recorded history. Reynolds describes this phenomenon, stating:

"The Great Australian Silence was a 20th century phenomenon. Most books written about the colonies in the 19th century devoted a chapter or two to the Aborigines and to their relations with Europeans, while the few major historical works produced before 1900 gave considerable attention to the great tragedy of destruction and dispossession. But during the first half of the 20th century the Aborigines were dispersed from the pages of Australian history as effectively as the frontier squatters had dispersed them from the inland plains a century before."[8]

14. In addition to historical disempowerment through the denial of a legitimate voice, Aboriginal peoples' experiences of gratuitous concurrence in the face of authority have acted as a fetter on their ability to access justice and achieve equality before the law. This repudiation of meaningful participation is even more striking for children and young people, who face additional barriers by virtue of their age and lack of autonomy.

[7] Presented in an address at the Unioversity of St Andrews in 1867
[8] Reynolds, H. (1984) 'The breaking of the Great Australian Silence: Aborigines in Australian historiography 1955-1983', University of London, Institute of Commonwealth Studies, Australian Studies Centre, London at p.1

15. The importance of giving a child or young person the opportunity to have their voice heard and to participate in the decisions that affect them is recognised both nationally and internationally.[9] However, it cannot be ignored that complex social disadvantage and vulnerability impedes the ability of a significant majority of the young people accessing the Children's Court to meaningfully participate and engage in decisions that will have a long lasting impact on their life course.

16. Aboriginal and Torres Strait Islander children and young people are among the most vulnerable children that appear before both jurisdictions of the Children's Court. Cultural competence, and the failure to embed it across all levels of decision making, can function to deny these young people strong connections to their identity, connections that have been described as 'intrinsic' to any assessment of what is in a child or young person's best interests.[10]

17. With all of this in mind, it is critical that we can get together at symposiums such as these to engage in productive discussions. These forums encourage advocacy and information sharing by professionals committed to constant improvement. In my view, any discourse that facilitates collaboration, capacity building and information exchange is worth preserving and promoting.

18. Further, the outcomes we reach from these discussions can drive paradigm shifts regarding the preservation of the best interests of Aboriginal children and young people and, as a corollary, assure that the interests of Aboriginal children are placed at the forefront of community consciousness.

19. A group that does a fantastic job in countering the deleterious effects of silence are the Grandmothers Against Removal. I commend all grandparents who take responsibility for raising their grandchildren.

[9] Article 12 of the United Nations Convention on the Rights of the Child; *Children and Young Persons (Care and Protection) Act* 1998, ss 9 and 10.
[10] *Department of Human Services and K Siblings* [2013] VChC 1 per Magistrate B Wallington at p.4

20. I also acknowledge that informal kinship carers play a significant role in taking such responsibility and that this is not always recognised with the appropriate financial and social supports. I thank you for your passionate presentation this morning and applaud you for the work you do in engaging with communities and ensuring that important voices are no longer silenced, abandoned or ignored.

21. I also wish to praise the hard work of the practitioners and other professionals working within this jurisdiction and acknowledge their commitment toward safeguarding the best interests of Aboriginal children and young people.

22. Turning now to the specific challenges confronting Aboriginal children and young people in their experience of the drift from care to crime. After much consideration as to how I might do this topic justice, I have decided to distil the core elements of this subject, as I see them, into the following structure:

- Part One: Identification of the extent of cross-over
- Part Two: Discussion of the causes of cross-over
- Part Three: Examination of options to address cross-over

23. Whilst some of the material that I will discuss in this paper has been widely documented by respected academics and seasoned practitioners, I hope that my insights will add to this body of work and that this paper can be used as a valuable reference resource, with a focus on practical and positive directions for the future.

PART 1: IDENTIFICATION OF THE EXTENT OF THE CROSS-OVER

24. In order to embark upon an exploration of the extent of cross-over, the first step is to develop a familiarity with the jurisdiction of the Children's Court of NSW. After developing this familiarity, it is necessary to define what the term 'Cross-Over Kids' denotes. It is only after this, that we can look at the scope of the problem and develop a true appreciation of the seriousness of this issue, its causes and what steps can be taken to ameliorate its effects.

25. The Children's Court of NSW is empowered with the jurisdiction to make decisions in care and protection matters as well as criminal matters relating to all children and young people under the age of 18.[11] While most people are aware of criminal proceedings and juvenile justice, the care and protection jurisdiction is often misperceived, and therefore confounds many members of the community.

26. In care and protection matters, the NSW child protection agency, the Department of Family and Community Services (DFaCS), brings proceedings with respect to children and young people alleged to be at risk of significant harm. These are distinct from criminal proceedings. Proceedings involve an inquisitorial process whereby a Judicial Officer, after hearing all of the evidence, makes a determination as to whether entrusting parental responsibility to the child or young person's current parents/care givers represents an unacceptable risk of harm. If this is the case, the Judicial Officer will make an order for Parental Responsibility to the Minister until the young person attains the age of 18. The overarching, or paramount consideration, in all care and protection decision making is the safety, welfare and well-being of the child or young person.[12]

27. The bifurcated nature of the care and protection and criminal jurisdictions has its origins in a number of reviews to child welfare laws in the 1980s. These reforms culminated in a package of legislation that clearly demarcated the child protection jurisdiction from the juvenile crime jurisdiction. Whilst this was a positive step at the time (given the need to reform the punitive criminalisation of child protection issues under the *Child Welfare Act* 1939) it has created structural and legal barriers that fail to acknowledge and address the practicality of these young people's lives. This practicality is that criminal offending and care and protection are not mutually exclusive.

[11] Note also: the operation of the doctrine of *doli incapax* for children and young people between the ages of 10-14
[12] *Children and Young Persons (Care and Protection) Act* 1998; The United Nations Convention on the Rights of the Child (to which Australia became a signatory in 1989).

28. It is to this reality that we refer when we talk about the ‘cross-over between care and crime' or 'cross-over kids'. As I mentioned above, the black letter law recognises care and protection and juvenile crime as two separate jurisdictions. However, when viewed through a criminological and socio-legal lens, the practicality and reality of these young people's lives highlights that there is a distinct correlation between a history of care and protection interventions and criminal offending.

29. Judge Mark Marien enunciated the complexity of this cross-over, wrestling with the issue of how to respond when social issues manifest in interactions with the legal system:

"A 13 year old who has left the family home and is living on the streets because of ongoing domestic violence and/or drug and alcohol abuse by their parents is very likely to become involved in offending behaviour because they are associating with a peer group which engages in offending behaviour. But does this 'offending behaviour' by the 13 year old require a response within the criminal justice system (with the consequent stigmatising of the young person and the possible prejudicing of their future employment prospects) or should the child be dealt with within the child welfare system? Is there a risk in 'criminalising' the behaviour of a young person with serious welfare needs? Alternatively, is there a risk that we may be 'welfarising' our response to the criminal behaviour of young people..."[13]

30. Sadly, this 'cross-over’ conundrum is something that I witness numerous times a day when conducting my judicial functions. I see it when I preside over the criminal list, defended hearings, parole list, education list, care and protection list and care and protection hearings. Many defeatists have stated that the effects of such troubling work would make anyone resistant, dispirited and resigned to maintaining the status quo.

[13] Above n 3

31. I am no defeatist and every day that I bear witness to these issues, I am emboldened with the drive and determination to realise my goal of a generation of children and young people whose lives have not been characterised by cross-over.

32. As President, I engage in continuous research in order to supplement my experiential data with statistical and critical commentary. Numbers have a way of slapping you across the face in a way that words cannot, and when accompanied by explanation and peer-reviewed research, the reader is afforded with a detailed and unequivocal picture of the issues.

33. Therefore, in describing the extent of the cross-over between young Aboriginal people drifting from the care and protection system into the criminal justice system, I propose to look at the following groups of statistics: data outlining the representation of *non-Aboriginal* children in care; the representation of *Aboriginal* children and young people in care; the representation of *non-Aboriginal* young people in detention; the representation of *Aboriginal* young people in detention and finally a comparison of the over-representation of Aboriginal young people who have been removed and later appear before the criminal jurisdiction of the Court.

34. As at June 30 2014, across Australia, the rate of children in out-of-home care per 1000 children in the population aged 10-17 years was highest in the Northern Territory (14.3%) and New South Wales (10.8%) and lowest in Victoria (6.1%) and Western Australia (6.4%).[14]

35. Between 2004-05 and 2013-14, the rate of Aboriginal and Torres Strait Islander children in out-of-home care per 1000 children in the Aboriginal and Torres Strait Islander population aged 0-17 years has more than doubled from 21.5% to 51.4% compared to 4.9% to 8.1% for non-Indigenous children.[15]

[14] Productivity Commission, *Report on Government Services* 2015, Table 15A.18
[15] Ibid

36. Troublingly, across jurisdictions, the *rate* of Aboriginal and Torres Strait Islander children in out-of-home care per 1000 children is highest in NSW (71.3%), the ACT (67.3%) and Victoria (62.7%).[16] Whereas, the *proportion* of children and young people in out-of-home care by Indigenous status and jurisdiction is highest in the Northern Territory (85%), Western Australia (51%) and Queensland (40%).[17]

37. In relation to young people in detention, the rate of young people aged 10-17 in detention on any average night in the June quarter of 2015 was 3.2 per 10,000 (or about 1 in every 3,150 young people). This represented a decrease from the rate in the June quarter 4 years earlier (3.6 per 10,000).[18] Over the most recent year, the rate of young people aged 10-17 in detention was between 2.9 and 3.3 per 10, 000 each quarter.[19]

38. In the June quarter of 2015, just over 50% (480 young people or 54%) of all those in detention on an average night were Aboriginal. Aboriginal young people outnumbered non-Aboriginal young people in detention in every quarter from March 2013.[20]

39. The Australian Institute of Health and Welfare states that Indigenous over-representation can be explained by comparing the rate of Indigenous young people to that of the non-Indigenous young people in detention:

"The rate ratio shows that Indigenous young people aged 10-17 were 26 times as likely as non-Indigenous young people to be in detention on an average night in the June quarter of 2015. This was an increase from 19 times as likely in the June quarter of 2011."[21]

[16] Ibid
[17] Ibid
[18] Australian Institute of Health and Welfare 2015, 'Youth Detention Population in Australia 2015', *AIHW Bulletin* no 131. Cat no. Aus 196, Canberra AIHW at p. 6
[19] Ibid
[20] Ibid at p.9
[21] Ibid at p.11

40. Director of the NSW Bureau of Crime Statistics and Research, Dr Don Weatherburn powerfully distils these statistics, stating:

"By the time they reached the age of 23, more than three quarters (75.6%) of the NSW Indigenous population had been cautioned by police, referred to a youth justice conference or convicted of an offence in a NSW Criminal Court. The corresponding figure for the non-Indigenous population of NSW was just 16.9%. By the same age, 24.5% of the Indigenous population, but just 1.3% of the non-Indigenous population had been refused bail or given a custodial sentence (control order or sentence of imprisonment)."[22]

41. These statistics present a concerning picture, bolstered further by a considerable amount of research that has been conducted to show that children that have been in care are over-represented in the juvenile justice system. In 2011, the results of the *2009 NSW Young People in Custody Health Survey Report* were released. This report was prepared by NSW Justice Health in conjunction with NSW Juvenile Justice and surveyed the views of 361 young people from all Juvenile Detention Centres in NSW.[23]

42. The report arrived at a number of significant conclusions, one of which was a confirmation that children with a history in care are over-represented in the juvenile justice system in NSW. It also made a number of revealing findings with respect to the cross-over of young Aboriginal people from the care and protection system into the criminal justice system. Amongst other things, the report found (with respect to young people in detention):

- 27% had a history of being placed in care - 38% of those young people were Aboriginal and 17% were non-Aboriginal
- 45% had a parent who had been incarcerated - 61% Aboriginal and 30% non-Aboriginal

[22] Weatherburn, D. 'Arresting Incarceration: Pathways out of Indigenous Imprisonment' Aboriginal Studies Press, Canberra 2014, p.5
[23] Indig, D. Vecchiato, C. Haysom, L. Beilby, R. Carter, J. Champion, U. Gaskin, C. Heller, E. Kumar, S. Mamone, N. Muir, P. van den Dolder, P & Whitton, G (2011) Young People in Custody Health Survey: Full Report, Justice Health and Juvenile Justice, Sydney.

43. In addition to providing a statistical outline of the extent of cross-over between a history of care and protection and entry into juvenile detention, the findings of the survey above elucidate the number of contributory risk factors specific to Aboriginal and Torres Strait Islander children and young people. I will discuss these risk factors in greater detail in the following section.

DISCUSSION OF THE CAUSES OF CROSS-OVER

44. My discussion of these causes will not focus upon the impacts of the colonisation of Aboriginal people. Nor will it examine the dispossession and disempowerment that resulted from the numerous abuses perpetrated on Aboriginal people over time. This paper accepts that the reticulated and entrenched social, economic and cultural disadvantages experienced by Aboriginal people are root causes of Aboriginal young people 'drifting' from the care and protection system to the criminal justice system.[24]

45. For the purposes of today's discussion, I will settle on five well-recognised areas of disadvantage, specific to the complex manifestation of cross-over: child neglect and abuse, poor school performance/early disengagement from education, unemployment, drug and alcohol abuse and disconnection from cultural identity.[25] These areas of disadvantage should be posited within the root causes of disadvantage and the broader, underlying impacts of Aboriginal cultural history.

46. All of these areas and their correlation with the drift from care to crime are also present in the non-Indigenous population, as identified in the 2010 Strategic Review of the NSW Juvenile Justice System.[26]

[24] Johnson, E. (1991) 'Royal Commission into Aboriginal Deaths in Custody', vol 1-4, Canberra Australia at vol 1
[25] Above n 21 at p.77; The Senate Select Committee on Regional and Remote Indigenous Communities (2010) 'Indigenous Australians, Incarceration and the Criminal Justice System, Discussion Paper p. 24-25.
[26] Noetic Solutions Pty Ltd (2010) 'A Strategic Review of the New South Wales Juvenile Justice System: Report for the Minister of Juvenile Justice'

47. This review highlighted the following risk factors for juvenile offending:

- disengagement from education
- criminal lifestyles and associations
- alcohol and other drug misuse
- accommodation problems, relationship problems including family dysfunction, mental health
- intellectual disabilities, and
- lack of structured leisure and recreational pursuits.[27]

48. Further, as the 2009 Young People in Custody Health Survey confirmed, children with a history of being placed in out-of-home care are grossly over-represented in the juvenile justice system and have been found to experience poorer mental and physical health, particularly difficulties in accessing education, employment and housing and have higher rates of early parenthood.[28]

49. This disadvantage is augmented by a lack of availability of emotional, financial and social supports to young people as they transition to adulthood. Consequently, long-term social and economic costs to the young person and the wider community are high. These risk factors are intensified for Aboriginal young people and are often perpetuating and mutually dependent, creating an impenetrable cycle of disadvantage.

50. A wealth of research exists to establish the adverse effects of child abuse and maltreatment on life-course outcomes for young people.

[27] Ibid
[28] Above n 21

51. Stewart, Dennison and Waterson summarise this research most eloquently when they state:

"There is no single cause of juvenile offending. What we look at is exposure to risk and protective or resilience factors at different points in a child's development. While a number of risk factors have been identified as increasing the likelihood of juvenile offending, none are as consistent as the detrimental effect of child abuse and neglect."[29]

52. As I have discussed above, Aboriginal children and young people are significantly over-represented in out-of-home care and, from this over-representation, we can infer that these children are much more likely to experience abuse and neglect than non-Aboriginal children.

53. The propensity for increased abuse and neglect can also be related to the crime rates in Indigenous communities and the likelihood of a child being exposed to family violence and other forms of antisocial behaviour from a young age.

54. This is reflected in the substantiated notification rates (rate by 1,000 of population) of child neglect and abuse by Indigenous status. In New South Wales, between 2009-2010, this rate was 55.3 in the Aboriginal community, compared to 6.3 of the non-Indigenous community, representing and Indigenous to non-Indigenous ratio of 8.8.[30]

55. With respect to poor school performance and disengagement from education, it is well established that Indigenous children are less likely to attend school regularly. It is also well established that a young person's attendance at school is closely correlated to their performance.

[29] Stewart, A. Dennison, S. Waterson, E. (2002) 'Pathways from child maltreatment to juvenile offending', *Trends and Issues in Crime and Criminal Justice*, Australian Institute of Criminology, Canberra
[30] Steering Committee for the Review of Government Service Provision (2011) *Report on Government Services*, Commonwealth Government, Victoria at Table 4A10.2

56. Non-attendance can arise due to a number of pressures in the young person's home life and may be connected to early parentifying behaviours and the need for older siblings to look after their younger siblings due to child abuse, neglect and/or parental abuse or misuse of alcohol and other drugs.

57. The statistics regarding school attendance and performance clearly show that Aboriginal students perform more poorly than non-Indigenous students on all measures of educational achievement, including the achievement of minimum literacy and numeracy requirements.[31] In NSW, 17.3% of Aboriginal students completed year 12, compared to 52.3% of non-Aboriginal students.[32] Aboriginal students meet 77.7% of the minimum reading standards, as compared to 93.7% of non-Aboriginal students[33] and 83.5% of Aboriginal students meet minimum writing standards, as compared to 95.2% of non-Aboriginal students.[34] Finally, 80.9% of Aboriginal students meet minimum numeracy requirements as compared to 94.7% of non-Aboriginal students.[35]

58. Lack of educational attainment is closely correlated with poor future prospects of employment, exacerbating disadvantage and heightening the likelihood of engagement in antisocial behaviour.

59. The gap in unemployment rates between Aboriginal and non-Aboriginal people aged between 15-64 years is striking. In NSW in 2010, 48.1% of Aboriginal people aged 15-64 were employed, compared to 71.8% of non-Indigenous people.[36]

60. Interestingly, and highly material to the issue of cross-over Aboriginal young people, unemployment rates are much higher among young Aboriginal people in their 'crime prone' years (15-24) than among non-Aboriginal people during the same years.

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[31] Ibid
[32] Ibid at Table 4A.5.4
[33] Ibid at Table 4A.4.16
[34] Ibid at Table 4A.4.17
[35] Ibid at Table 4A.4.18
[36] Australian Bureau of Statistics (2010) 'The health and welfare of Australia's Aboriginal and Torres Strait Islander peoples' cat. no 4704.0, ABS, Canberra at Table 1

61. The data shows that 25% of Aboriginal Australians aged 15-17 are unemployed, as compared with 13.5% of non-Aboriginal Australians.[37] In a 2001 Australian Bureau of Statistics Study, Hunter found, that the effect of being unemployed was substantially worse for those who were not in the labour force.[38]

62. Referring once more to the Young People in Custody Health Survey, the report revealed that a large proportion of Aboriginal young people were misusing or abusing alcohol or other drugs prior to their placement in custody. These drug or alcohol issues are often compounded by the fact that a large proportion of these young people are negotiating fraught, chaotic and dysfunctional home lives, including parental drug misuse or abuse.

63. Drug or alcohol abuse is particularly problematic for young people, and can have a significant effect on their mental health. Mental illness and developmental disabilities are widespread among the young people attending the Children's Court. This anecdotal evidence has been further confirmed by the research, including the results of the Young People in Custody Health Survey:

- 46% had a possible disability or borderline intellectual disability
- 18% had mild to moderate hearing loss
- 66% reported being drunk at least weekly in the year prior to custody
- 65% had used an illicit drug at least weekly in the year prior to custody.[39]

[37] Above n 21 at p.84
[38] Hunter, B (2001) 'Factors underlying Indigenous arrest rates' NSW Bureau of Crime Statistics and Research, Sydney
[39] Above n 22

64. Professor McGorry et al. validate this research, stating:

"Up to one in 4 young people are likely to be suffering from a mental health problem, most commonly substance misuse or dependency, depression or anxiety disorders or combinations of these...there is also some evidence that the prevalence may have risen in decades."[40]

65. Statistics regarding alcohol-induced deaths for Aboriginal people suggest that alcohol abuse among Aboriginal people is widespread. Between 2005-2009, 27.7% of Aboriginal people, as compared with 4.8% of non-Aboriginal people in NSW had alcohol-induced deaths. In Western Australia 48.8% of Aboriginal people versus 4.4 % died from alcohol related causes and in the Northern Territory, 55.5% of Aboriginal people, as compared with 4.6% of non-Aboriginal people died from alcohol-induced deaths.[41]

66. In addition, data suggests that drug-related poisonings and drug-related mental/behavioural disorders are much more common among Aboriginal Australians than non-Aboriginal Australians - particularly with respect to the use of opioid and opioid derivatives.[42]

67. The final category is not as statistically marked as those identified above. However, in my view, it is one of the most significant causal factors for Aboriginal disadvantage generally, and the drift from care to crime more specifically. I will describe this factor as disconnection from cultural identity.

68. An abundance of research exists regarding the pivotal role of cultural identity in the socialisation of all children and young people. This is further supplemented by legislative recognition in the *Children and Young Persons (Care and Protection) Act* 1998.

[40] McGorry, P.D, Purcell, R. Hickie, L.B. and Lorry, A.F (2007) 'Investing in Youth Mental Health is a Best Buy' *Medical Journal of Australia* 187
[41] Above n 28 at Table 10.3.17
[42] Ibid at 10A.4.6

69. Aronson-Fontes has conducted extensive research into culture and child protection and synthesises the role of culture as follows:

"…culture defines what is natural and expected in a given group. We all participate in multiple cultures: ethnic, national and professional, among others. We carry our cultures with us at all times and they have an impact on how we view and relate to people from our own and other cultures."[43]

70. In relation to Aboriginal children and young people, a range of Aboriginal and Torres Strait Islander organisations have highlighted that connection to family, culture and community are central to the safety, welfare and well-being of Aboriginal young people.[44] As Libesman states:

"Cultural care is about being part of a family, community, extended network, knowing where you belong, and knowing what the difference is between two nations."[45]

71. The *Children and Young Persons (Care and Protection) Act* 1998 also places culture as a critical consideration in decision-making for both non-Aboriginal and Aboriginal children and young people.[46] For Aboriginal children and young people, the Aboriginal and Torres Strait Islander child placement principles make clear that the identity and socialisation needs of Aboriginal and Torres Strait Islander children and young people will be met most successfully in placements that foster Aboriginal culture and identity.[47]

72. A positive characterisation of Aboriginality can act as a protective factor in ensuring that culture is used constructively, rather than destructively. Cultural competence in this context is about challenging labels that associate Aboriginality with antisocial behaviour.

[43] Aronson-Fontes, L (2005) 'Child abuse and Culture: Working with diverse families', Guildford Press, New York at p.4
[44] Libesman, T. (2011) 'Cultural Care for Aboriginal and Torres Strait Islander Children in Out-Of-Home Care' Secretariat National Aboriginal and Islander Child Care at p. 11- 14.
[45] Ibid at p.10
[46] *Children and Young Persons (Care and Protection) Act* 1998: Parts 1 and 2.
[47] Ibid at s 13

73. Ms Eileen Cummings, Chair of the Northern Territory Stolen Generation Aboriginal Corporation succinctly captures this challenge:

"Children have always been loved and respected and nurtured and taught in the Aboriginal way. It is important that these values and systems are encouraged and that Aboriginal people are empowered to ensure the systems are once again taught to their children to bring back pride and dignity to the Aboriginal people and communities. Too often the focus is wholly on the negative, not the positive, of Aboriginal child rearing and the Aboriginal practices which give young people their identity, their values, their role and their purposes in life."[48]

74. We know from the well-established criminological theory of labeling, that when social institutions and processes ascribe certain, negative labels to young people during the crucial years in which self-identity is formed, the young person may begin to form their identity around this label. Cuneen and White state that:

"The process of labeling is tied up with the idea of the self-fulfilling prophecy. That is, if you tell someone sufficiently often that they are 'bad' or 'stupid' or 'crazy' that person may start to believe the label and to act out the stereotypical behaviour associated with it."[49]

75. The concept of labeling is often perpetuated by 'moral panic', whereby public labeling and denouncement of certain groups as 'bad', 'criminal' or 'deviant' is amplified by the media.[50]

76. Young Aboriginal people in their formative years are saturated by portrayals in media, social media and within the community that define Aboriginal people as a homogenous criminogenic group of inherently antisocial people.

[48] Ms Eileen Cummings, Chair, Northern Territory Stolen Generations Aboriginal Corporation, *Committee Hansard*, Darwin, 2 April 2015, p.28
[49] 'Theories of Juvenile Offending' in Cuneen, C. White, R. *Juvenile Justice: Youth and Crime in Australia*, 2002, Oxford University Press Australia, pp. 32-61 at 46
[50] Cohen, S. (1972) 'Folk Devils and Moral Panics', London, MacGibbon and Kee.

77. In addition, young people often respond as a collective – for example, they may form a gang in order to develop a sense of identity and community. This is likely to exacerbate the effects of peer pressure and in conjunction with the lack of a stable or secure home life, disengagement from education, unemployment and drug or alcohol misuse or abuse, it is easy to see how a young Aboriginal person might see that their only option is a life of crime and disadvantage.

78. The resulting stereotypical behaviour associated with the label of 'antisocial Aboriginal youth' can also limit a young Aboriginal person's prospects of rehabilitation, further feeding and embedding the causative effects of cultural disconnection.

79. I appreciate that I have discussed a number of issues that present a rather bleak picture for Aboriginal children and young people drifting from the care and protection, to the juvenile justice jurisdiction. However, in the next section, I propose to look at some ways of countering these risk factors through the application and development of promising initiatives that use protective factors to address the multifactorial reasons underpinning cross-over.

PART 3: EXAMINATION OF OPTIONS TO ADDRESS CROSS-OVER

80. This paper has illustrated that the needs of Aboriginal and Torres Strait Islander children and young people are irrefutable and complex. Justice Muirhead eloquently enunciated the need for erudite application of the law for Aboriginal and Torres Strait Islander children and young people in *Jabaltjari v Hammersley*, stating:

"The young Aboriginal child is a child who requires tremendous care and attention, much thought, much consideration."[51]

[51] *Jabaltjari v Hammersley* (1977) 15 ALR 94 at 98

81. Whilst all children and young people in care require a range of supports to address trauma and abuse, there is an additional need for Aboriginal and Torres Strait Islander children to be provided with cultural support through tailored counseling and collaboration, to assist in maintaining links to their family and culture.

82. Megan Mitchell, National Children's Commissioner stated that it is necessary to collaborate and engage with Aboriginal communities in order to improve outcomes for children and young people:

"That includes things like improving the number of Aboriginal people that are in the child-protection and home-care workforce so that you can have effective engagement with families so that they become part of the solution and so that they are driving and owning the problem and solution. If we keep disempowering these communities and families, we will just create more of the same intergenerational disadvantage."[52]

83. One way of doing this is by encouraging the use of therapeutic jurisprudence and problem solving courts. Therapeutic jurisprudence is directed toward looking at the law as a therapeutic agent and, as a consequence, improving the operation of the law in order to address the impact of legal practice and procedure on well-being.[53]

84. Amongst other things, application of the precepts of therapeutic jurisprudence can improve policy and drafting, embed practice aimed at harm minimisation and the promotion of rehabilitation and encourage community trust and confidence in the administration of justice.[54]

[52] Ms Megan Mitchell, National Children's Commissioner, *Committee Hansard*, Sydney, 18 February 2015, pp 5-6
[53] Wexler, D.B (1991) 'An introduction to Therapeutic Jurisprudence' in DB Wexler and BJ Winick, *Essays in Therapeutic Jurisprudence*, Durham, Carolina Academic Press at p.8
[54] King, M.S (2008) 'Restorative Justice, Therapeutic Jurisprudence and the Rise of Emotionally Intelligent Justice' *Melbourne University Law Review*. Vol 32 pp. 1096 – 1126 at p.1114

85. Accordingly, using therapeutic approaches to address the drift of Aboriginal children and young people from the care and protection jurisdiction to the criminal justice system may provide a more holistic, and therefore more curative, approach to reducing cross-over.

86. With respect to the effects of therapeutic jurisprudence in the criminal sphere, a report prepared for the National Judicial Institute in Canada recognised that:

"Members of Aboriginal communities – overrepresented in our courts and in our jails – have advocated for a judicial system that both considers the complex social, economic and cultural factors that cause Aboriginal people to be in conflict with the law and that takes a healing approach to sentencing." [55]

87. As President of the Children's Court, I have adopted a therapeutic jurisprudential approach to the over-representation of Aboriginal children and young people in the care and criminal jurisdictions of the Court. Additionally, I have agitated for the application of innovative responses to address the distrust and disconnection from the justice system experienced by many Aboriginal young people.

88. One way the Children's Court is actively implementing the precepts of therapeutic jurisprudence in the Court's criminal jurisdiction is through its establishment of a pilot Youth Koori Court (YKC), which commenced operation on 6 February 2015. I acknowledge that the YKC is not a panacea, however it does seek to provide the Aboriginal young people who appear before the Court with an inclusive, empowering and culturally relevant legal process.

55 Goldberg, S (2005) 'Judging for the 21st century: A problem solving Approach' Ottawa. National Judicial Institute, accessed at: www.nji.ca

89. I strongly support the YKC and note that the pilot has been established within existing resources and without the need for legislative change. The establishment and development of the YKC has been undertaken in consultation with an extensive group of stakeholders.[56] These include, the Aboriginal Legal Service, Children's Legal Services, Police Prosecutions, Daramu, Aboriginal Services Division of the Department of Justice, Juvenile Justice, Justice Health, the Children's Court Assistance Scheme, Marist Youth Care, DFaCS and the Children's Court Executive.

90. The legislative scheme applicable to the YKC is consistent with the general principles informing the work of the Children's Court. Specifically, the provisions in s 6 of the *Children (Criminal Proceedings) Act* 1987. Specifically (a), (b) and (f) included below:

(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 that children who commit offences be *assisted with their reintegration into the community so as to sustain family and community ties*."(My emphasis).

56 Note: A significant amount of information relied upon in this section on the YKC is taken from a paper presented to the Aotearoa Conference on Therapeutic Jurisprudence on 3rd and 4th September 2015 by the Presiding Magistrate of the Youth Koori Court, Magistrate Susan Duncombe

91. In the Children's Court, the *Children (Criminal Proceedings) Act* 1987 provides the penalties applicable at s 33. Specifically, s 33(1)(c2) provides:

"(c2) it may not make an order adjourning proceedings against the person to a specified date (not later than 12 months from the date of the finding of guilt) for any of the following purposes (but only if bail for the offence is or has been granted or dispensed with under the *Bail Act* 2013):

(i) for the purpose of assessing the person's capacity and prospects for rehabilitation,
(ii) for the purpose of allowing the person to demonstrate that rehabilitation has taken place,
(iii) for any other purpose the Children's Court considers appropriate in the circumstances."

92. Simply put, the YKC uses a deferred sentencing model: s 33 (1)(c2). In addition, it applies a culturally competent process through the participation of Elders.

93. The principles of mediation are used through a conference process, presided over by Specialist Magistrate Sue Duncombe. The young person is consulted and participates, as do the relevant stakeholders, and issues of concern are identified for the young person. Methods of addressing these issues are then incorporated in an Action and Support Plan for the young person. The young person must focus upon this plan over the 3-6 months prior to sentence.

94. The young person then has his/her actions taken into account on sentence and after hearing submissions from the Prosecution and Defence. Elders/Respected persons are also provided with an opportunity to provide input. Juvenile Justice or the agency with the case coordination role will prepare a Progress Report. The Judicial Officer will consider this information and impose a sentence. Notably, the full suite of sentencing options are available to the Judicial Officer.

95. Referrals to the YKC can only be made on the application of the young person. It is a voluntary process and relies upon genuine commitment by the young person.

96. The culturally competent component of the YKC is demonstrated through the set-up of the court room itself. The YKC sits in a court room with artworks prepared by young people in custody at each of the juvenile justice centres in NSW.

97. The Judicial Officer sits with the Elders/Respected persons around a table with the young person, his or her family or supporters, the prosecutor, the legal representative for the young person and representatives from agencies, including Juvenile Justice. The Judicial Officer is not robed until sentencing.

98. The YKC has been sitting for over a year and a half now, 49 young people have been referred and 26 have been sentenced in the YKC. A profile of the young people involved demonstrates the enormity of the issues these young people face.

99. A formal process evaluation has been conducted by the University of Western Sydney. Anecdotally, however, many young people have become genuinely engaged in the process and given the participatory nature of the process, many young people have developed a strong sense of accountability for their actions.

100. This development is indicative of an enlightened criminal justice system for young Aboriginal offenders. It is an exciting process to be involved in and has the real potential to significantly change outcomes for young Aboriginal people involved in the criminal justice system.

101. The power of this change is articulated by a young person who stated (in an answer to a question from an Elder about how the person saw this court):

"It is good. There is more support, heaps more. That support is more intensive. You can talk to the judge and the judge knows what's going on, not just reading the papers."[57]

102. In its care and protection jurisdiction, I have used my influence to advocate for tailored cultural care planning for Aboriginal children and young people. As I stated above, culture is central to the identity formation and socialisation of children and young people.

103. It carries a young person through their formative years and provides a sense of belonging in the world. If a child is removed from its parents, culture remains important - whether the child is at an age in which they are cognisant of this process or not. It follows then, that when making decisions about a child or young person's care, we must pay particular attention to providing options that will enhance a child or young person's socialisation and sense of belonging.

104. I appreciate that I have raised this issue at a variety of different forums, but it is important that I continue to do so until comprehensive cultural planning is embedded at all levels of the care and protection process. While I have witnessed some improvements during my tenure at the Children's Court, I am not yet satisfied that there has been a widespread application and appreciation of this need.

105. In order to achieve this aim, I have committed myself to safeguarding, monitoring and insisting upon the implementation of the Aboriginal and Torres Strait Islander Placement Principles, and as a corollary, the development of focussed cultural planning for Aboriginal children and young people.

[57] De-identified quote from young person cited in Children's Magistrate Sue Duncombe's paper "NSW Youth Koori Court Pilot Program: Opportunities and Challenges", presented to the Aotearoa Conference on Therapeutic Jurisprudence, Auckland, New Zealand, 3 and 4 September 2015 at p.13

106. As you are aware, the *Care Act* is to be administered under the 'paramountcy principle', that is, that the safety welfare and well-being of the child is paramount: s 9(1). In addition to this paramountcy principle, the *Care Act* sets out other particular principles to be applied in the administration of the *Care Act*: s 9 (2).

107. One of these principles is that account must be taken of concepts such as culture, language, identity and community.

108. It is a principle to be applied in the administration of the *Care Act* that Aboriginal and Torres Strait Islander people are to participate in the care and protection of their children and young people with as much self-determination as is possible: s 11.

109. Further, Aboriginal and Torres Strait Islander families, kinship groups, representative organisations and communities are to be given the opportunity, by means approved by the Secretary, to participate in decisions made concerning the placement of their children and young persons and in other significant decisions made under this Act that concern their children and young persons: s 12.

110. Finally, a general order for placement of an Aboriginal or Torres Strait Islander child who needs to be placed in statutory out-of-home care is prescribed: s 13(1). In summary, the order for placement is, with:

(a) a member of the child's or young person's extended family or kinship group, as recognised by the community to which the child or young person belongs,

(b) a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs,

(c) a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child's or young person's usual place of

residence,

(d) a suitable person approved by the Secretary after consultation with:

(i) members of the child's extended family or kinship group, as recognised by the Aboriginal or Torres Strait Islander community to which the child or young person belongs, and
(ii) such Aboriginal or Torres Strait Islander organisations as are appropriate to the child or young person.

111. Before it can make a final Care order, the Children's Court must be expressly satisfied that the permanency planning for the child has been appropriately and adequately addressed: s 83(7).

112. Permanency planning means the making of a plan that aims to provide a child or young person with a stable placement that offers long-term security: s 78A. The plan must:

(a) have regard, in particular, to the principle that if a child is placed in out-of-home care, arrangements should be made, in a timely manner, to ensure the provision of a safe, nurturing, stable and secure environment, recognising the child's circumstances and that, the younger the age of the child, the greater the need for early decisions to be made in relation to permanent placement: s 9(2)(e),

(b) meet the needs of the child: s 78A(1)(b), and

(c) avoid the instability and uncertainty arising through a succession of different placements or temporary care arrangements: s 78A(1)(c).

113. The legislative requirement to address the Aboriginal and Torres Strait Islander Placement Principles and to adequately and appropriately address cultural planning are reminders of the significance of Aboriginal cultural identity in the socialisation of a child.

114. The need for appropriate cultural planning is linked to the need to ensure that early intervention and pre-removal options are explored to their fullest extent.

115. I have made numerous comments in past cases in relation to the inadequacy of cultural planning, particularly with respect to Aboriginal children. As I stated in *DFaCS v Gail and Grace* [2013] NSWChC 4:

> *"The Aboriginal and Torres Strait Islander Principles are in the Care Act 1998 for good and well-documented reasons that do not need to be traversed anew in these reasons. They are to be properly and adequately addressed in all permanency planning and other decisions to be made under the Act and in matters coming before the Children's Court."*

116. I am happy to report that in the past year, the Children's Court, in conjunction with FaCS, AbSec, ALS and Legal Aid have developed a template for a cultural action planning section in the Care Plan. The idea behind this template is to ensure that adequate casework is undertaken to appropriately identify a child's cultural origins, and to put in place fully developed plans for the child to be educated, and to fully immerse the child in their culture; including family, wider kinship connections, totems, language and the like.

117. I am optimistic that this will not be a superficial solution to a complex issue. I am committed to a future where Aboriginal children and young people understand their lineage and heritage. I strongly believe that if Aboriginal children and young people are culturally supported at a young age, they have a better chance of successfully progressing through their lives.

CONCLUSION:

118.I hope that I have presented a comprehensive paper to address the complex factors associated with the drift of Aboriginal children from the care and protection system to the criminal justice system and I hope that this conversation will continue until we see a future where cross-over is no longer a problem to be addressed, but a chapter in past history that is not to be repeated.

119.Until that happens, I will continue to ensure that I use my role as President of this significant jurisdiction to achieve concrete, long-lasting and empowering results for Aboriginal children and young people.