

What is the future of the Youth Court? Reflecting on the relationship of informal and formal justice

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In my remarks today, I want to consider two related areas. The first is, what is the future of the Youth Court? I'll look back to when and why the Youth Court was founded in Australia and to changes that have occurred in the past 30 years. The second is the relationship between informal and formal justice. What is the optimal relationship? How might the two articulate in Youth Court practices?

I. What is the future of the Youth Court?

The year 1899 is said to be when the first Juvenile Court was founded, but this is an overly US-centred view of history. We know instead that South Australia pipped Chicago at the wire² with the passage of the State Children Act, 1895, which (among other things) established the idea of a separate room or place for handling offences committed by a child (defined as anyone under 18 years).

Looking at the State Children Act, we find these elements:

- A separate room for a hearing or trial (in Adelaide and Port Adelaide)
- In other towns or areas, hearings or trials could take place in a police station or court house, but if they did, they had to occur at a different time than ordinary (adult) trials.
- A closed court (that is, excluding those "not directly interested in the case").
- Wide police powers to apprehend "without a warrant ... any child appearing or suspected to be a destitute or neglected child."
- For parents who charge their child with being "uncontrollable or incorrigible," wide judicial discretion to send the child to an institution, to have the child whipped, or to release the child on probation.

For simplicity, I'll focus on the court's role in adjudicating and sentencing criminal matters, not on other decision-making areas such as guardianship.

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² Paraphrasing Judge Andrea Simpson (SA Youth Court Senior Judge) when we discussed the history.

What forces shaped the founding of the Youth Court (or Children's Court) in Australia? There are similarities with other countries, but also key differences. I am going to take from John Seymour's (1997; see also 1988) historical account.

Seymour argues that by the end of the 19th century and across all Australian jurisdictions, it had become accepted that young people who appeared before the court should have procedures that were "more simple and speedier" than those in adult courts. During the second part of the 19th century, the idea of speedy and simple court procedures for children and youth had been building, although in different ways, in Australian jurisdictions. In three states (QLD, SA, and WA) children "charged with very serious offences" could be tried summarily; in other jurisdictions, however, summary procedures applied only to minor offences.

Seymour suggests that the history of Australia's Youth Courts is one in which the "courts of summary jurisdiction were modified to create specialist courts" (Seymour 1997: 293). Parliamentary Debates in the early 1900s in QLD, NSW, and VIC revealed these major concerns:

- Juvenile offenders should be tried separately from adults.
- Juvenile cases ought to be handled in summary fashion rather than by jury trial.
- Juvenile offenders ought to be treated differently than adult, that is, less harshly and more in a manner of "fatherly correction."

With respect to the last item, the NSW Attorney General told the Legislative Assembly in 1905:

[The special class of treatment for juveniles] is to be somewhat of a parental, informal character rather than the severity, formality, and possibly terrorism of the ordinary courts of the land (NSW Parliamentary Debates, as quoted in Seymour, 1997: 294)

This "special class of treatment" Seymour terms the "popular child saving philosophy." It is also commonly referred to the "welfare" model of criminal process.

Seymour offers an important observation about Youth Court practices in this early phase. While there was a greater emphasis on "fatherly correction" in the court, these ideas worked alongside normal criminal procedures and penalties. What might now be viewed as a tension between the "welfare" and "justice" models was present in the early years of the

founding of the Youth Court.³ From the start, then, the court was a hybrid.⁴

The next step in Seymour's account of the Youth Court jumps to the 1960s and 1970s. Three developments during this time have been influential in changing the court's character.

1. *Critique of the Welfare Model.* During the 1970s, there was a critique of the strong welfare orientation ("fatherly correction") of the court. This came from the political right (e.g., claims that the Youth Court "too lenient") and from the left (claims that children's rights were denied in Youth Court). Emerging from the critique what is referred to today as the justice model, which places greater emphasis on responding to (punishing) a crime in a uniform way, rather than reforming the individual using criteria specifically tailored to that individual (O'Connor 1997).⁵

2. *Reconceptualisation of the Child.* Also during this time, there has been a reconceptualisation of the child, now invested with "rights" and having a more adult-like capacity to know right from wrong. The United Nations Convention on the Rights of the Child, ratified by Australia in 1990, will likely play a role in the court's work, although it's uncertain how this will evolve. The consequences of children's rights are double-edged, of course. Children and youth may now have a greater voice in deciding things (with greater independence from parental and state control), but they may be held as accountable as adults for offences they commit and sentenced accordingly.

In the US, Barry Feld (1997) has been arguing for some time that there is no reason to have a special Youth Court. He suggests that age should not be used to distinguish people's legal rights and entitlements, although he proposes that age (youth) could be used as mitigation in sentencing.

3. *Informalism.* Finally, there is the enormous impact of informalism, in particular, diversion from Youth Court. These developments began in Australia in the late 50s and early 60s

³ As Seymour (1997: 295) puts it: "The children were not to be treated as criminals, but they were still charged with offences and liable to criminal penalties." The new goal of correction and helping the young offender "was pursued within the framework of a traditional police court."

⁴ This is where the character of youth courts in Australia and the US can be seen to differ, at least during their formative periods in the early 20th century. The US courts gave greater attention to new procedures by which children's problems were to be diagnosed; there was a stronger emphasis on rehabilitation and reform via accessing educational and psychological services. In Chicago where the Juvenile Court was founded in 1899, the court was to be a hub for a range of educational and welfare activities, including child protection.

⁵ What appears to be a major shift from welfare to justice may be, in reality, more a matter of ideological emphasis than actual practices (Hudson 1996: 3-5). Much depends on the character of legislative changes and the degree to which the discretion of judges is curtailed.

with the development of police formal cautions in VIC and QLD, and in the 60s and early 70s with the development of Children's Aid Panels in WA and SA. Today, almost all states have legislated a combination of police caution and family (or community) conferences as diversions from court. State comparisons utilising data from the 1980s (Wundersitz 1997: 276) show great variation in the proportion of cases diverted from court during this period. In some states (QLD, VIC, SA), there appears to be more diversion than in others (NSW and WA).

Seymour observes with some irony that "the same reasons which led to the creation of Children's Courts have now been accepted as reasons for relying on alternatives." And he wonders, "What tasks will be left for the Children's Courts to perform" as "more and more cases are handled informally" (p. 299)?

You will be pleased to know that there are some tasks left! They include

- Fact-finding when a not guilty plea has been entered.
- Providing community assurance that "justice will be done" especially in more serious cases (what is viewed as the legitimating function of the "judicial robe").
- Imposing coercive sanctions such as detention.
- Enforcing failed agreements from diversion sites (e.g., conference agreements).

Seymour sees the court (and formal legality) not as standing apart from diversion (or forms of informal legality) or from the courts above them (such as District Court). Rather, he has in mind an articulation of formal and informal legality. He does not develop that idea further, and I'd like to do so in the second part of my remarks on the relationship of informal and formal justice

II. Informal and Formal Justice

It's difficult to define and to distinguish formal and informal justice. Richard Abel (1982: 2) suggests that while we might need some "working concept of informal justice, its boundaries must remain quite fluid." More often than not, proponents of informalism are united only in what they may oppose: formalism. Abel defines informal legal institutions this way; they are

non-bureaucratic in structure, minimise the use of professionals, eschew official law in favour of substantive and procedural norms that are vague, unwritten, commonsensical, flexible, ad hoc, and particularistic (p. 2).

Many commentators suggest that over the past two to three decades, there's been a blurring of boundaries between informal and formal justice. Such blurring does not

necessarily imply an easy articulation or fit. Roger Matthews (1988: 24), for example, says we should not expect to find that formal and informal "spheres of regulation will create a harmonious and mutually reinforcing system." Rather, they will produce an "uneven and unstable mixture of procedures and norms" (p. 24). And he says that researchers need to "trac[e] connections between [the informal and formal] spheres and evaluat[e] their diverse operations," and that this research will "raise crucial political and strategic questions ..." (p. 24).

Let's move from this abstract language and consider the problems raised by informal and formal justice in a more concrete way. What does it mean to "blur the boundaries" between formal and informal justice? When might we expect to find lack of harmony between the two? What is happening today in the Youth Court that reflects blurred boundaries and incompatibility? For convenience, I'll focus on the family conferencing process and how it may relate to the Youth Court in the handling of youth justice cases.⁶

As an informal process, the benefits of family conferencing are considerable. Foremost is that the parties to an offence have a frank and direct exchange. Victims ask offenders (and their supporters) questions directly, unmediated by legal representation. Everyone gets to have "their say" about the things that matter to them, unconstrained by matters of legal relevance. Everyone gets to participate in deciding on a negotiated sanction. There are openings for apology. There is a chance for protagonists to move from positions of anger, fear, and embarrassment, to understanding and acceptance. The process permits emotions of sadness, anger, and love to be expressed.

Rarely do these things occur or would they be permitted to occur in the Youth Court. In the court, the operative elements are deliberative justice, with an emphasis on decorum and attention to procedure. There is a decided lack of emotion; legal relevance comes to the fore as does legal representation of position. Victims are rarely present. To be sure, judges or magistrates may be somewhat more informal in Youth Court than in an adult court by speaking directly to a child/youth or by using non-legal terms; but the tenor of the proceedings is decidedly formal.

I've just assembled elements that are present in conference and court processes as if they were separate entities, but we know that there can be a good deal of interplay between them. For example, in New Zealand, for the roughly 10 percent of youth justice cases that are disposed in Youth Court, the judge receives a sentence recommendation, devised by family group conference participants. One judge I spoke to said that she looks for three things: some kind of punishment, a way to

⁶ Conferences are also used in care and protection matters in Australia and other countries. We know comparatively less about their use in these settings (but see Pennell and Burford 1996).

help the victim, and a plan to help or reform the offender.⁷ Thus, in this jurisdiction, while a judge makes the final sentencing decision, it has been informed by an informal legal process.

Another example comes from South Australia. In the Port Adelaide Magistrates Court, there is a day set aside on a regular basis for handling Aboriginal cases. The magistrate may step down from the bench and sit at a table with the offender and kin, drawing on the idea of "sentencing circles," which comes from Canadian indigenous groups' practices. Thus, in the formal physical space of the courtroom, informalism occurs.⁸

Going the other direction, there are many ways in which the conference process is subject to formalism. An offender (young person) is asked at the start of the conference whether s/he admits to the offence; an offender can have a lawyer present; a police officer is present as a legal representative; the sanctions agreed to should not exceed a court's sanction for the same offence; and the agreement signed at the end of the conference is a legal document enforceable in court. There is, then, a good deal of formalism in an apparently informal group setting with people sitting in a circle. Indeed, my sense is that since Abel's (1982) definition of close to 20 years ago, today there may be a good deal more formalism in informal justice practices.

What then are some problems that may emerge in the articulation of the informal and formal spheres? Several come to mind. When a young person admits to an offence as the first step in attending a conference, might that young person also be subject to a civil suit? What if a young person (or others at the conference) admits to other offences during the conference?

And I'm sure that you can imagine other grey areas.

I'd like to ratchet up our discussion of problems, however. To date, when we look at Australian legislation and administrative guidelines, we see that conferencing has been *contained* in that it is

⁷ Again we see multiple principles (a hybrid justice form) operating in Youth Court decisions; this judge (Carolyn Henwood) explicitly combines retribution, restitution, and rehabilitation in sentencing. Henwood discusses this in a published paper (citation pending).

⁸ Some may be concerned that family (or diversionary) conferences are held in courtrooms or rooms in courthouses, rather than in more community-like venues away from the court. (NSW legislation specifically proscribes conferences taking place in courthouses, police station, or Department of Juvenile Justice office, for example.) How physical space is used is a good way to examine the interplay of formal and informal justice. An example of going the other way, that is, a formal process taking place in an informal setting, would be a judicial (or magisterial) ratification of a sanctioning decision made in remote Aboriginal areas, away from the courthouse.

- mainly used only as a *diversion from court*,
- for *admitted young* offenders, and
- for a restricted set of "less serious" or "minor" offence categories.⁹

There was, no doubt, sound political reasoning behind containment when conferencing was established legislatively in five Australian states during 1993 to 1998. It may be time to rethink this, especially as jurisdictions gain more experience with conferencing and as more research is done on it. These ideas come to mind.

- Perhaps conferencing ought *not* to be limited to "less serious" offences at all, especially, when we find that it may be most effective when offences are serious.
- Perhaps conferencing ought *not* to be used in "victimless" offences such as drug use (although we have learned from the RISE project that conferencing adult drink driving cases can be effective; see Sherman *et al.* 1998)
- Perhaps referrals to conference or to court ought *not* to be strongly tied to a lawbreaker's previous criminal history as is currently practiced in all Australian jurisdictions.

Once we begin to think about "de-containing" conferencing,¹⁰ new questions arise. For what kinds of cases and people? What criteria should be used? What are the implications for access to justice, if we find that conferencing is more effective for some kinds of cases, but not others?

What people find most unsettling about de-containing conferencing is that, at present, the conference process is primarily (although not exclusively) associated with a *diversion* from court -- and most importantly for the young person, a way to avoid getting a criminal record.

⁹ For each of these elements, there are exceptions. Conferencing is used as a pre-sentencing option in some jurisdictions (QLD and VIC). It was (and is) used in the ACT for adult offenders (during 1995-97 as part of the RISE project for drink driving offences), and it can be used for adults in QLD. It has been used in indictable and more serious matters in SA; in VIC, it is currently used only as a pre-sentencing option in a very small proportion of cases (no more than 40 a year), which are serious. A caveat is in order. For any generalisation one tries to make about conferencing, one finds exceptions, and even more so, when it comes to what is occurring experimentally on the ground in actual practices, as compared to what is set forth in legislation or administrative guidelines.

¹⁰ This idea of "de-containing" conferences emerged in a conversation I had with Grant Thomas (SA Family Conference Team) about the restricted use of the conferencing idea as a court diversion only, and I should like to credit him for the development of these ideas. The ideas developed here were also presented in paper given at the Caxton Legal Centre in July 1999 (Daly 1999)

What if, instead, it was not just a diversion from court, but a process that was used as part of a court disposition? That is not a radical idea. It is occurring already in a limited way in South Australian juvenile sentencing practices. It has been occurring on a substantially larger scale in the sentencing of adult offenders in New Zealand¹¹

By way of conclusion, I'd like to invite discussion about the potential for conferencing (and informal processes, more generally) to become a larger part of formal justice. When contemplating this next phase, we might also consider parallel developments in establishing links between "indigenous justice practices" and those of "white justice" (for review and critique of recent developments, see Chantrill 1997; LaPrairie 1999; Murphy 1999; Tauri 1999).

It will be crucial in this next phase that the "guardians of formal legal order," that is, lawyers, judges, and magistrates, do not view conferencing (or other informal legal processes) as a threat to the legal profession or to their own or their client's interests. Better to find ways to exploit the best that informal and formal justice can offer. Precisely how that will be organised and practiced is not clear, but it should be embraced as a challenge for all of us to work on.

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¹¹ Helen Bowen and Jim Boychuk, both New Zealand barristers, have been running conferences in connection with the sentencing of adult offenders in Auckland. They do so on a pro-bono basis. In 1998 while I was attending the Youth Justice in Focus Conference in New Zealand, Bowen told me that they've run well over 500 such conferences to date. As of 1998, there had been no research conducted on their practices.

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