

JUDGEMENT CALL: ON KIDS, RESPONSIBILITY AND WHY COMMUNITY NEEDS TO STEP UP



Children's Court President Judge Peter Johnstone. Photo: Dubbo Weekender

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It's perhaps one of the toughest areas of the law, but being the President of the NSW Children's Court is a role Judge Peter Johnstone is relishing for the opportunity it affords him to "make a difference".

JEN COWLEY spent time with the Judge during his visit to Dubbo this week.

The Presidency of the NSW Children's Court is a relatively newly created position – can you explain how it came to be?

Following the Wood Enquiry into Child Protection in NSW, it was recommended that the Children's Court be given an increased status and that a president should be appointed who should be a district court judge.

That occurred nearly four years ago. I am the second President. Prior to that, the Children's Court was headed up by what's called a senior magistrate.

All the jurisdiction we exercise is under statutory provisions – so in the 'care' jurisdiction, that's under the Care and Protection Act, and in the criminal jurisdiction, it's governed by the Children (Criminal Proceedings) Act and the Young Offenders Act.

All our jurisdiction is statutory, but it's exercised not just by the specialist children's magistrates, but by local court magistrates across the state.

For example, the 'care', which is the civil side of the jurisdiction, 80 per cent is done by the 13 specialist magistrates; in relation to juvenile crime, it's the other way 'round – 60 per cent is done by local court magistrates like here in Dubbo.

Does that line ever blur? I imagine at times it would be a care AND a crime issue – do the two areas often converge?

There is a huge amount of cross over at a "street" level, but the jurisdictionally they don't cross over. That's sometimes what gives rise to some of the tensions – because some of the criticism of the court is that it gives criminal decisions which operate as welfare decisions. But we know there's a very high correlation between the children who come before the criminal jurisdiction and the kids who are in the care and protection.

What is the actual role of the Children's Court?

On the civil side – the care and protection side – our role is to be the final point of reference in relation to children who are considered to be 'at risk' and who are removed from their parents' responsibility by Department of Family and Community Services (DFACS). If a child is assumed into care, then DFACS has to make an application within three days to the court for orders. We are the supervisor of what the Department does. We don't have any power in terms of starting the process – our job is to look at what the department puts before us.

So, in layman's terms, the agencies at the community level identify children at risk, then the department steps in and then that goes before you for final judgement?

Yes. What happens is that when the department takes someone into care, or removes them from their parents, then an application is made to the court and 99 times out of 100, the court will approve the removal. Then a process starts whereby the department has to make what's called permanency planning for that child, which might involve restoration to the parents, or one of the parents, or placement into out of home care, or foster care. If the (FACS) minister's current recommendations are adopted the options will include a lot more closed adoptions. The family court only has the option of the child going to mother or father. At least we have other options.

And that's a good thing – to have more options?

One of the things that amazes me is that I got this job at all – because I was always an advocate of saying that in care and protection cases, I really had doubts about whether the court was the right place for those sort of things to be done. In a judicial environment and in a court atmosphere – is that the right place to be making such huge decisions?

Given you did take the job, do you think "the system" for the care and protection is improving?

Yes I do. What's happened under (current FACS minister) Pru Goward is that there's a lot more early intervention and a shift back towards restoration to the parents being the first option considered. In other words, where the department can – with appropriate

support – restore a child to those parents, that's the best option. So we're seeing a real drop off in the number of cases coming before the court as a result of early intervention and the philosophical change in approach from case workers.

How far does that follow through, though? Are there any figures to indicate whether that restoration works in the longer term, or are these kids then coming back through the system again?

I don't have that data, and that's one of the problems I've had coming into the court. It's one of the things that I've flagged as a priority – the collection of better data to better inform us about those sorts of things. But we do know there's a drop-off in the number of cases coming before the court, and that's the clearest indicator we have. I haven't checked these statistics, but anecdotally you'll probably find that there's a drop off in a thing we call a Section 90 application, which is down the track as a review application. Also, the incidence of children who have been in care going on to getting into the criminal or juvenile justice system has been decreasing.

That's something else that's often raised – the perception that it's often too little too late. Is there anything that can be done to help families before they get to crisis point?

Absolutely. Again, you need to differentiate between the care side and the crime side – and I think the intervention that's happening in the department (on the care side) is lot more about early intervention, and what the Minister has put on the table goes to even more capacity to intervene sooner and deal with parenting issues before they even get anywhere near the court.

On the crime side, there's a new program that's just been launched by the Attorney General called Youth on Track – and it's designed so that if a juvenile comes to the attention of police more than twice they get intensive supervision and care with the intention of diverting them from a life of crime. The support is intense – so that if there's a medical or psychological problem, or an issue with drugs or alcohol or a family problem or whatever, it's addressed early rather than late to try to keep them out of the system.

Everyone is looking for a silver bullet, I suppose, but these things seem to take so much time.

That program will take a lot of time, yes. It's very expensive and at the moment it's only going to be piloted in three regions – Blacktown, mid-north coast and around the Newcastle area.

So nothing in outer regional areas?

Nothing in places like Dubbo, no. I would have liked to see Dubbo as one of the trial areas but the data actually shows that for all the problems Dubbo seems to have, they're not as bad as in other regions. Don't get me wrong, I'm not trying to minimise the problems that exist here – but this isn't the worst area.

On the point about where the program will run, there are some areas of great disadvantage here in the western region. The NSW Ombudsman's report into Child Sexual Assault in Aboriginal Communities was released late last year and

was scathing about the resources available in some communities for the identification, reporting and care of children at risk. Do you share that concern over the allocation of resources, particularly in remote and disadvantaged communities?

Obviously it's a concern. I've read that paper. But the money just simply isn't there. One of the messages I want to convey on this trip is that communities themselves have to start doing more – because the system isn't going to solve all the problems. As you said, it's not the silver bullet. The community has to step in. The government isn't there to provide an endless bucket of finance. And at the moment, that bucket is really empty. The discretionary dollars to do these kinds of programs just isn't there.

Is the incidence of abuse and neglect on the rise?

No, no, no. Statistics actually show the exact opposite. In all of these areas, these sorts of problems are actually diminishing. It's just that for various reasons, they've never been reported before. Take the inquiry into sexual abuse in institutions – it's been going on in institutions since time immemorial, it's just that for a range of sociological factors it's become more evident. It's more out in the open.

The only thing I think that does increase the incidence of these sorts of things is the greater access to the internet – for example, child pornography has increased considerably because of the capacity of the perpetrators to network and share it.

The Department of Family and Community Services cops a lot of flak. Is it warranted?

On the whole, I think they do a fantastic job. I've been critical in a number of judgements of what I think is unwarranted criticism of case workers – even by lawyers who should know better – I think what they do is try to do the best job they can with limited resources. And I haven't yet met a case worker whose heart isn't in the right place and isn't trying to do the best thing by the children. It's in the nature of the work they do that they'll come into conflict with the parents and families of children who are removed.

From time to time you'll read a sensational story about how they missed one and something happened and the child is abused or murdered because the department has responded – with hindsight – too late. But they're rare.

Given that it is such an emotive atmosphere, and that you're a parent yourself, do you find it hard to remove that emotion, and your own values and beliefs, from your judgments? Or does it in fact help to have a strong value and belief structure?

When the Attorney asked me to do this job, I said, "Why me? I can't even discipline my own children!" Being a parent is very hard.

But with this role, you have to approach everything objectively. You can't get emotionally involved, otherwise you'd get very depressed. One of the things I have learned is that I'm not going to leave children's magistrates in the job for long stretches – we have to rotate them out into the general court system. Because you do see a lot of horrible things and I think you can either become depressed by it or injured by it.

People ask me if you sleep at night. Yes, I do. The case workers are the ones who see it every day – we just get a snap shot.

Is it the role of a judge to reflect the will of the people?

No. It's not. We reflect the will of the people to the extent that it's encapsulated in the statutes, which are made by the parliament, which reflects the will of the people.

Our job is to apply the law.

So when you hear criticisms like "they're just given a slap on the wrist", and that the sentences handed down to young offenders aren't harsh enough, the accusations of lenience and so on – what are your thoughts? Do you take that into account?

We take it on board. But our duty is to decide the cases according to law. We're governed by the statutes and also by some fairly strict criteria that applies – and I'm talking about the crime side of things – and says things like incarceration has to be the absolute last resort.

Now, if you look at the literature, there's some very strong data that says most children grow out of crime. So that if 75-80 per cent of children will grow out of criminal offending by the time they're 18 or 19 – the worst thing you can do is put them into a juvenile detention centre where they learn how to become a career criminal. The other thing is that it removes the disincentive; once they've been in there, what's the big stick? Part of our job is to identify that really hard core of people who just have to be incarcerated, and then do our absolute best to target the other 70- 80 per cent who can be rehabilitated and who won't be recidivists unless we turn them into career criminals. That means finding ways to keep them out. And that's the eternal dilemma – when a child is offending, what can be done to keep them out of the system. That requires a lot of resources sometimes.

One of the things I want to look at while I'm here in Dubbo. What sort of community things are available to the magistrate or judge to divert young people, and whether, if they do need to give them some kind of community service sentence, there are programs available for them to do that. Because I believe that children kept busy keep out of trouble. We have to find ways to keep them busy. One of the things I'll be looking at is what facilities are there in Dubbo for keeping children active – how many swimming pools, how many gyms, how many police youth clubs...what kind of programs there are. Do you have comprehensive sporting programs, theatre? What are the things kids can do to keep out of trouble?

So are these the sorts of things you'll take back as recommendations to the government?

Yes. One of requirements of this new role of President (of the Children's Court) is to consult with community groups and to give advice to government through an advisory committee, set up as a statutory body with a whole lot of representatives from all of the stakeholders.

Part of it must be to identify programs that actually work – and that requires accountability and the collection of data on outcomes?

Yes – and spending money that then produces a broader outcome.

As you flagged earlier, there's also a responsibility for communities themselves to get involved and be part of the solution, because it's everyone's problem?

Exactly. Take Redfern as a classic example. Ten years ago it was a horror spot. Once the community engaged with the police and vice versa, there was a total turnaround.

Has the Stolen Generation issue made people on the ground in Family and Community Services skittish?

Yes. And it's going to come up again when we have this adoption debate because everyone is going to say it's just creating another 'stolen generation' by taking children away from parents and adopting them out. That's the fear. I think it has made us much more wary about interfering. That's not a bad thing because we'd never want to see that kind of thing again.

The other thing is to consider all those mothers we're now finding out about who at the age of 18 or 19 had their babies taken away from them – that's horrendous. And that was here in NSW.

So I think to the extent that it makes us sit back and think first, that's a good thing.

On the issue of responsibility, any debate about young people raises the question of parental responsibility, or the lack thereof. What's your comment?

I think parental responsibility exists – I just don't think people are exercising it. Or are not able to exercise it. Parental responsibility is very important, of course. It's all tied in with the debate about whether we identify the children by naming and shaming the parents?

There are counter arguments both ways.

What's your opinion of that naming and shaming notion?

I waver. Some days I'd like to name and shame these parents. Other days I think, no, because then you hear the story about a child going to school and being teased by other children about the fact that their father has been sexually abusing him or her.

The primary responsibility is to the child – that's enshrined in the act, which makes it very clear that the safety, wellbeing and welfare of the child is paramount.

Has the nature of abuse and neglect of children changed over the years?

I can't answer that.

What I can tell you is that anecdotally, we are learning that kids are committing crimes at a much younger age.

Fifteen years ago a 10 or 11 year old to commit a crime was rare.

Now, not only are they committing crimes, they're committing more atrocious crimes.

And an increase in the incidence of young female offenders.

What do you think are the contributing factors?

In my view, a lot of it has to do with what they see on television and the video games they play.

How did you get into this area of the law?

The Attorney General actually just tapped me on the shoulder. I'd been in practice in the law for 30 years, and he said to me, you've done well out of law – it's time to put something back in. And it is a great way of doing that.

I love it. The challenge of trying to make a difference. I'm a change agent – I like to improve things; I like to see things done better; I like to see things happen. Also, I'm in charge – that's one of the best things about it (laughs).