2012 Children's Week

Appointment of Ambassadors for Children and Young People

Youth Justice in Western Australia - How do we rate by reference to the international instruments?

Address by

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Government House, Perth
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Introduction

It is a great pleasure and an honour to have been invited to address this event which commemorates the appointment of 15 inaugural Ambassadors for children and young people. This important initiative, promoted by the Commissioner for Children and Young People, Ms Michelle Scott, recognises eminent and outstanding Western Australians who have played a significant role in our community by their commitment to supporting children and young people and their families. By their appointment, we as a community signify the importance which we attach to the nurture, protection and support of our children and young people, and encourage others to follow in the footsteps of those who are recognised and acknowledged this morning.

This is, of course, not to say that we do not expect any further contribution to be made by the Ambassadors who are appointed this morning. To the contrary, we hope and have every reason to expect that the Ambassadors will assist the Commissioner in increasing community awareness and understanding of the factors which have an impact on the wellbeing of children and young people.

The Traditional Custodians

Before proceeding any further, I would like to thank Kim Collard and the Moorditj boys for their Welcome to Country and acknowledge the traditional owners of the lands on which we meet, the Wadjuk people, who form part of the great Nyungar clan of south-western Australia, and pay my respects to their Elders past and present.

The Most Valuable Resource in a Resource Rich State

Western Australia is often described as a State which is exceptionally rich in resources. Almost invariably the resources to which reference is made are our mineral and petroleum resources. There is no doubt that we enjoy an abundance of such resources, and that they are of great value.

However, focus upon resources that lie in and under the ground tends to distract attention from what I consider to be by far our most valuable resource, which is our human resource. Minerals and gas have no intrinsic value of their own. Their value depends upon the ability of human beings to extract them from the ground in ways which are economically viable and environmentally sustainable and to use them in ways which enhance the lives of not only the residents of this State, but the citizens of many other parts of the world who buy our commodities or enjoy using products manufactured using those commodities.

The abundance of the natural resources with which this State has been blessed provides every reason for optimism for our future. It is trite but nevertheless true to observe that children are our future because they represent the future of our human resources, without which our natural resources and the benefits which they can provide are meaningless. The initiative which we celebrate today, in the form of the appointment of inaugural Ambassadors for Children and Young People, appropriately recognises and reinforces the fact that children and young people remain our most valuable asset, notwithstanding the wealth of our many other assets. The task of the Ambassadors, along with the Commissioner, all branches of government, including the parliamentary, executive and judicial branches, and the community, is to ensure that our most valuable

asset is protected, nurtured and encouraged so as to realise their full human potential, and live rewarding and fulfilling lives.

This Paper

This morning I want to address a particular aspect of the obligations of the various branches of government to nurture and support children and young people. It is the aspect with which I am most familiar, and is related to the work of several of the Ambassadors - it concerns youth justice. I have no doubt that governments of all political persuasions readily accept that any justice system worthy of that description must deal with children humanely and compassionately, having regard to their particular vulnerability, and to the interest which the community has in encouraging our young people to live law-abiding lives as they mature into adulthood. I also have no doubt that those sentiments and aspirations are endorsed by the vast majority of our community, notwithstanding the reactionary comments sometimes made by a very small and uninformed minority.

I also have no doubt that the people involved in all relevant agencies of government, be it the parliamentary branch, the executive branch or the judicial branch, believe that they are doing their best to provide such a system of youth justice. The topic I wish to address this morning is the extent to which those subjective beliefs and ambitions match up to the standards and aspirations provided by a number of international instruments which bear upon the rights of children. I will start by identifying the international instruments particularly relevant in the context of youth justice, and summarising briefly their most significant provisions.

The International Instruments

The international community has given particular attention to the special care and assistance to which children are entitled for almost as long as there has been a recognisable international community. In 1924, a conference in Geneva resulted in the *Declaration of the Rights of the Child* (otherwise known as the *World Child Welfare Charter*),[1] and a further declaration of such rights was adopted by the General Assembly of the United Nations in 1959.[2] In those instruments it is declared that:

> [T]he child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.[3]

The special care and assistance to which children are entitled is also specifically recognised in the *Universal Declaration of Human Rights*,[4] in the *International Covenant on Civil and Political Rights*,[5] see in particular articles 23 and 24, and in the International Covenant on Economic, Social and Cultural Rights,[6] see in particular article 10.

In 1985, the General Assembly of the United Nations resolved to adopt the *Standard Minimum Rules for the Administration of Juvenile Justice* (the *Beijing Rules*),[7] to which I will return. A few years later, on 20 November 1989, the General Assembly resolved to adopt and open for

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[1] *Geneva Declaration of the Rights of the Child,* League of Nations, 5th sess (26 September 1924) ('*World Child Welfare Charter*').
[2] *Declaration of the Rights of the Child,* GA Res 1386 (XIV), UNGAOR, 14th sess, Supp No 16, UN Doc A/4354 (20 November 1959).
[3] See *World Child Welfare Charter* and *Declaration of the Rights of the Child,* GA Res 1386 (XIV), preamble.
[4] *Universal Declaration of Human Rights,* GA Res 217A(III), UNGAOR, 3rd sess, UN Doc A/810 (1948).
[5] *International Covenant on Civil and Political Rights,* opened for signature 19 December 1966, 999 UNTS 171 (entry into force 23 March 1976).
[6] *International Covenant on Economic, Cultural and Social Rights,* opened for signature 19 December 1966, 993 UNTS 3 (entry into force 3 January 1976).
[7] *United Nations Standard Minimum Rules for the Administration of Juvenile Justice,* GA Res 40/33, UNGAOR, 40th sess, 96th mtg, UN Doc A/RES/40/33 (29 November 1985) ('*Beijing Rules*').

signature, ratification and accession the most important international instrument in this area, the *Convention on the Rights of the Child* (the Convention).[8] That was followed in 1990 with resolutions of the General Assembly adopting Guidelines for the *Prevention of Juvenile Delinquency* (the *Riyadh Guidelines*),[9] and *Rules for the Protection of Juveniles Deprived of their Liberty* (the *Havana Rules*).[10] In 1997, the *Guidelines for Action on Children in the Criminal Justice System* (the *Vienna Guidelines*)[11] were recommended to States by the United Nations Economic and Social Council. In 2000, optional protocols to the Convention, namely the *Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*,[12] and the *Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict*,[13] were adopted and opened for signature. More recently, in 2011, another optional protocol to the Convention dealing with a communications procedure was adopted,[14] although it has not yet come into force.

The number and range of international instruments dealing with the rights of the child reflects the importance which the international community appropriately places upon these rights. The topics covered by those

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[8] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entry into force 2 September 1990).
[9] *United Nations Guidelines for the Prevention of Juvenile Delinquency*, GA Res 45/112, UNGAOR, 45th sess, 68th mtg, UN Doc A/RES/45/112 (14 December 1990) ('*The Riyadh Guidelines*').
[10] *Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, UNGAOR, 45th sess, 68th mtg, UN Doc A/RES/45/113 (14 December 1990) ('*The Havana Rules*').
[11] *Guidelines for Action on Children in the Criminal Justice System*, ESC Res 1997/30, ESCOR, 36th mtg, UN Doc E/RES/1997/30 (21 July 1997) ('The Vienna Guidelines').
[12] *Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, opened for signature 25 May 2000, 2171 UNTS 227 (entry into force 18 January 2002).
[13] *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in armed conflict*, opened for signature 25 May 2000, 2173 UNTS 222 (entry into force 12 February 2002).
[14] *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, GA Res 66/138, UNGAOR, 66th sess, UN Doc A/RES/66/138 (opened for signature 19 December 2011).

instruments, and the interaction between their various provisions is a subject worthy of a doctoral thesis and is well beyond the scope of this short address. All that I can hope to do in the time allotted is to provide a brief overview of the dominant instruments and the provisions in those instruments bearing upon youth justice.

The Convention on the Rights of the Child

The Convention is by far the most important of the various international instruments in this area. The Convention has been adopted almost universally (193 countries at the last count). Australia signed the Convention on 22 August 1990, and ratified the Convention on 17 December 1990. As a result of ratification, Australia has undertaken a commitment, binding under international law, to implement the obligations imposed by the Convention through domestic legislation and policies.

The preamble to the Convention records the conviction that:

> [T]he family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community.[15]

Further, the preamble recognises that:

> [T]he child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding.[16]

The Convention contains 54 articles intended to achieve the objective of defining minimum standards and rights to be enjoyed by all children. It

[15] *Convention on the Rights of the Child*, 1577 UNTS 3, preamble.
[16] Ibid.

defines a child to be a person below the age of 18 years unless the law of a State party provides otherwise. It covers a broad range of topics, including the role of the family, the right to a name and identity, the right of children to be brought up by their parents wherever practicable, freedom of expression, thought, conscience and religion, and to association and peaceful assembly, freedom from physical or mental violence, injury or abuse, rights with respect to adoption, refugee status, health and medical treatment, social security, education, recreational activities, freedom from economic exploitation, protection from illicit drugs and sexual exploitation, protection from cruel, inhuman or degrading treatment or deprivation of liberty unlawfully or arbitrarily and so on.

Provisions of the Convention also create the Committee on the Rights of the Child (the Committee),[17] responsible for the oversight of the realisation of the objectives of the Convention. State parties to the Convention are required to submit a report to the Committee every five years, indicating the measures which they have adopted to give effect to the rights recognised in the Convention. The Committee is in turn accountable to the General Assembly, by way of reporting the progress of State parties in achieving the objectives of the Convention.

Australia has also ratified the two optional protocols to the Convention currently in force.[18]

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[17] *Convention on the Rights of the Child*, 1577 UNTS 3, art 43.

[18] The *Optional Protocol on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography*, 2171 UNTS 227, ratified on 8 January 2007 and the *Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict*, 2173 UNTS 2222, ratified on 26 September 2006.

The particular provisions of the Convention that are relevant to the intersection of children with the justice system include article 3, which requires that in all actions concerning children undertaken by courts of law, administrative authorities or legislative bodies, 'the best interests of the child shall be a primary consideration'. The primacy of the best interests of the child is a concept familiar to Australians working in the area of child welfare, and to lawyers working in that field. It is enshrined in the *Family Law Act 1975* (Cth), the *Children and Community Services Act 2004* (WA), and in various other State and Commonwealth Acts.

Judges and magistrates administering the *Family Law Act* are obliged to act in the best interests of the child when making decisions with respect to the arrangements to be made for what used to be called the custody of and access to children under that Act (now referred to as 'parenting orders').[19] Section 7 of the *Children and Community Services Act* provides that when exercising functions or powers under the Act, the court or the State Administrative Tribunal 'must regard the best interests of the child as the paramount consideration'. Other provisions of that Act set out in detail the matters to be taken into account in determining what is in the child's best interests, and the principles which are to be observed in the administration of the Act, including the principle that the child should be given the opportunity to participate in the decision-making process to the extent possible having regard to the child's age and capacities.[20] The Act also contains specific principles relating to Aboriginal and Torres Strait Islander children which include the objective of maintaining a connection with the family and culture of those children by providing a system of priorities with respect to the placement of

[19] *Family Law Act 1975* (Cth) s 60CA.
[20] *Children and Community Services Act 2004* (WA) div 2.

Aboriginal children intended to enhance the achievement of that objective.[21]

A similar objective can be seen, at least by implication, in the provisions of the *Young Offenders Act 1994* (WA), which have been construed as requiring courts to exercise their powers in such a way as to maximise the prospects of rehabilitating young offenders.[22] This construction of the *Young Offenders Act* is entirely consistent with the express provision in s 7(d) of that Act that 'the community must be protected from illegal behaviour'. By far the best way of protecting the community from illegal behaviour is by rehabilitating young offenders so as to break the cycle, which we see far too often, of young offenders graduating into adult offenders.

A central theme of the *Young Offenders Act* is the encouragement of what is known as diversionary programmes - that is, taking measures other than court proceedings where young persons are found to have engaged in illegal behaviour - consistent with article 40(3)(b) of the Convention, which emphasises the employment of diversionary measures 'whenever appropriate and desirable'. There are many good reasons for encouraging these diversionary programmes. Experience has shown that there are many risks and disadvantages involved in placing young people within the formal court system. These include labelling the young person as a criminal, thereby encouraging behaviour consistent with the label, the adverse effect of association with other young offenders, and the stigma and anti-rehabilitative effect of having a criminal record, to mention but some of the factors. Nevertheless, there are occasions upon which the

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[21] Ibid s 12.

[22] See *Young Offenders Act 1994* (WA) ss 6(d)(iii), 7, 46 & 120; see also *WO (a child) v Western Australia* (2005) 153 A Crim R 352, 362; *Western Australia v A Child* [2007] WASCA 115 [16].

offending behaviour is either so protracted or so serious that diversion is inappropriate.[23] Happily, the vast proportion of juvenile offences and juvenile offenders are not of this character. I have therefore been very pleased to note the response of the Western Australia Police Department to the Auditor-General's finding that diversion of children away from court had reduced since the *Young Offenders Act* commenced operation in the mid-90s. Western Australian police have embraced a policy of reinvigorating policies and procedures aimed at diverting appropriate juvenile cases away from the Children's Court, and these policies have borne fruit. These policies are to be commended.

Earlier this year the Commissioner of Police published an article[24] and made a number of public statements concerning the desirability of early intervention when a child was manifesting a propensity to significant criminal behaviour, with a view to reducing the prospect of a pattern of offending behaviour increasing in seriousness being established - a pattern which we see too often. I agree with those observations. In particular, I entirely agree that as soon as a child manifests a tendency towards significant offending behaviour, steps should be taken to reduce, or if possible, eliminate the child's exposure to the adverse influences which are generating the offending behaviour.

In some quarters the Commissioner's remarks were seen as a plea for more extensive use to be made of juvenile detention, and in particular, for children to be placed in detention earlier in a sequence of offending

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[23] See for eg. *JSA v The State of Western Australia* [2012] WASCA 25 [35] – [36] (Buss JA, Murphy JA & Hall J agreeing); *JTP v Western Australia* [2010] WASCA 191 [13]–[14] (McLure P, Buss JA & Mazza J agreeing); *F (a child) v Western Australia* [2004] WASCA 193 [14] (Wheeler J, Templeman & Miller JJ agreeing).

[24] See Commissioner Karl O'Callaghan, 'Loopholes let young offenders off the hook', *The West Australian* (online), 23 April 2012 <http://au.news.yahoo.com/thewest/a/-/latest/13498898/loopholes-let-young-offemandatorysentencignadnrightsofchildnders-off-the-hook/>.

behaviour. The Commissioner can, of course, speak for himself, very eloquently, and it would be presumptuous of me to place words in his mouth, although I must say that I did not construe what he wrote and said this way. Rather, I took his remarks to emphasise the need for significant steps to be taken to break a cycle of behaviour which could lead to offences escalating in seriousness. Sometimes the seriousness of the offences will be such that detention is the only realistic means of breaking that cycle.

On the other hand, if the pattern of offending behaviour is to be broken, the environment in which the offender is living must be improved. Placement in detention for a short period followed by a return to an adverse home environment is unlikely to achieve enduring behavioural change. The President of the Children's Court, Judge Denis Reynolds, one of our Ambassadors, has repeatedly emphasised the need to address child offenders in their environment, most particularly their family environment, and for that environment to be addressed holistically, not just by justice system agencies. Housing, health, education and social welfare agencies need to be engaged collaboratively in devising a strategy which will effectively address and improve the family environment of a child offender.

Anyone who has spent even a brief time in the Children's Court will know that repeat offenders in that court are very often the product of their environment and the adverse influences to which they have been exposed. By dealing with the child in his or her family environment, addressing all the issues confronting the family, the best interests of the child are aligned to the interests of the community in protection from repetition and escalation of the offending behaviour.

It is to be remembered that the *Young Offenders Act* specifically provides that detaining a young person in custody for an offence should only be a last resort and, if required, is only to be used for as short a time as is necessary.[25] This language mirrors the provisions of article 37(b) of the Convention and other similar provisions in every other international instrument I will mention this morning. The provisions recognise the adverse consequences of juvenile detention, to some of which I have already referred.

This is, of course, not to say that juvenile detention can never be justified - plainly there will be cases in which it is the only means by which the protection of the community can be assured. However, it is to emphasise that the legislative requirement, consistent with all the international instruments, to the effect that detention is a last resort must be taken seriously by the courts and by the various agencies of government which are responsible for providing the courts with other alternatives for dealing with young offenders.

Another provision of the Convention which is directly relevant to the youth justice system is article 37, to which I have already referred in part. The article also includes the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, and the right of every child deprived of liberty to be treated with humanity and respect. Article 37(c) of the Convention specifically provides that, 'every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so'.

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[25] *Young Offenders Act 1994* (WA) ss 7(h), 120.

When Australia ratified the Convention, it entered an express reservation with respect to the obligation imposed by article 37(c).[26] While accepting the general principles of the article, the reservation points to the geography and demography of Australia and to the desirability of ensuring that children be able to maintain contact with their families. The terminology of the reservation is an oblique reference to the circumstances which prevail in regional and remote Australia. In those parts of our country, there are seldom detention facilities available for juveniles. In Western Australia there are no facilities for juvenile detention outside metropolitan Perth. Practical necessity requires that on some hopefully rare occasions children must be kept in the same lockup as adults until such time as arrangements can be made for their bail, or for their transport to Perth.

There have been occasions, even in recent years, in which children have been kept for too long in police lockups in regional towns in Western Australia - sometimes for up to three days. Inquiry into these incidents has invariably revealed a breakdown in systems and procedures which are designed to prevent these things from occurring. The UN Committee has noted Australia's reservation to the Convention with concern and has repeatedly urged Australia to take steps to remove the reservation to article 37(c). However, it must be acknowledged that there is a tension here, which is reflected in the terms of Australia's reservation. The tension arises from the desirability of retaining the juvenile within the town or region within which he or she was apprehended for as long as possible, in the hope that appropriate bail arrangements can be devised

[26] United Nations Treaty Series, *Declarations and Reservations to the Convention on the Rights of the Child* (Status as at 17 October 2012) < http://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-11&chapter=4&lang=en#EndDec> (accessed 18 October 2012).

and contact with family and country maintained in a circumstance in which, until recently, the only viable alternative has been to transfer the child to detention in Perth, sometimes over a distance of several thousand kilometres away from country and family.

Recent years have seen some very positive steps taken to address this tension. The Children's Court has introduced a practice aimed at ensuring that the question of bail is reviewed by a magistrate before any child is moved from the place in which they were apprehended.[27] Through this procedure, a magistrate can ensure that all feasible steps have been taken to explore all avenues for the grant of bail to enable the child to remain in their region and with the prospect of regular contact with the family. This has necessitated the introduction of systems for dealing with cases outside normal working hours, which obviously has had resource implications for the court. However, the system seems to be working well.

The success of this system has been enhanced by steps that have been taken to provide facilities to which young offenders can be bailed in some areas of regional Western Australia. These facilities were provided initially in Geraldton and Kalgoorlie, and have now been expanded to the Kimberley and the Pilbara, thanks to funding from the Royalties for Regions programme. In the absence of these facilities, opportunities for bail have been limited because of the difficulty of finding a responsible adult to whom the child can be bailed. These facilities provide a safe place where a child can be kept, within the region with which he or she is familiar, and with the prospect of continued interaction with family, thereby avoiding the adverse consequences of transferring the child to

[27] See Children's Court of Western Australia, *Practice Direction No. 1 of 2011*, 7 June 2011.

detention in Perth, and without resulting in children being detained in the same detention facilities as adults.

In addition, the Royalties for Regions programme has enabled a dramatic improvement in the resources available for the supervision and support of young offenders in the Pilbara and the Kimberley. The advent of those resources has significantly improved the non-custodial options for young offenders in those regions consistently with the requirement of the Convention and the Act that detention be regarded as a last resort. It is no overstatement to say that the additional resources provided through the Royalties for Regions programme is achieving dramatic improvements in the way in which we deal with kids in trouble in regional and remote Western Australia. I am confident that we will see increasing dividends from these programmes.

Improvements have not been limited to regional Western Australia. The Metropolitan Youth Bail Service has significantly enhanced the prospect of making suitable bail arrangements for young offenders apprehended in Perth. During 2010-11, the service facilitated placements for 741 young people who were on bail for an average of 29 days each.[28] This equates to a potential saving of up to 19,416 days in custody,[29] although in reality there simply would not have been enough places in detention for all these young offenders.

This is not to say that there is no room for further improvement in this area. As Commissioner Scott has pointed out previously, the proportion

[28] Department of Corrective Services (WA), *Annual Report 2010-2011* (2012) 49.
[29] Ibid.

of children in detention prior to conviction as a result of failure to obtain bail continues to be higher than we would like.

Another provision of article 37 of the Convention requires that every child deprived of his or her liberty has the right to prompt access to legal and other appropriate assistance.[30] From the information which I have, the arrangements for the provision of legal assistance to young offenders in Western Australia are working well, notwithstanding the challenges posed by the geography and demography of our vast State.

Article 40 contains specific provisions relating to children accused of crime. The article requires the presumption of innocence, the provision of legal or other appropriate assistance, provides the right to have the matter determined without delay by a competent, independent and impartial authority, and ensures the right to silence and procedural fairness.

As I have already mentioned, article 40(3)(b) of the Convention specifies the importance of diversion of children away from judicial proceedings 'whenever appropriate and desirable'.

Generally speaking, there is no reason to think that the youth justice system of Western Australia does not comply with these provisions.

However, another provision of article 40 requires that a child is entitled 'to have his or her privacy fully respected at all stages of the proceedings'. This article is reflected in the provisions of the *Children's Court of Western Australia Act 1988* (WA) which prohibit the identification of a

[30] *Convention on the Rights of the Child*, 1577 UNTS 3, art 37(d).

child charged with a criminal offence, or who is the subject of care and protection proceedings before the court.[31] Concern has been expressed in the most recent report of the Committee to the effect that the *Prohibited Behaviour Orders Act 2010* (WA) infringes the right to privacy embodied in articles 16 and 40 of the Convention.[32] On one view, the provisions of that Act, which authorise and indeed require the 'naming and shaming' of those made the subject of Prohibited Behaviour Orders issued under the Act, could be seen as inconsistent with articles 16 and 40 of the Convention, given that the Act required the provisions of the *Children's Court Act* which prohibited identification of young offenders to be modified in certain respects, in the case of offenders above the age of 16 years.[33] On the other hand, it is significant to note that the Act does not authorise the publication of information which is capable of identifying an offence or offences with which an offender was convicted in the Children's Court.[34] Further, the court has an overriding discretion to order that any or all of the offender's details not be published if, in the opinion of the court, there are circumstances justifying the making of such an order.[35] At least arguably, to the extent of the protections provided in these provisions, the Act conforms to articles 16 and 40 of the Convention.

At the time of writing, it does not seem that the naming and shaming of juveniles subject to orders under the Act has come to pass, or at least not yet. There appear to be only three prohibited behaviour orders in force at the moment in Western Australia, none of which relate to people under

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[31] *Children's Court of Western Australia Act 1988* (WA), s 35.
[32] United Nations Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding Observations - Australia,* UN Doc CRC/C/AUS/CO/4 (28 August 2012) 10.
[33] See *Children's Court of Western Australia Act 1988* (WA), s 34 & pt 5.
[34] *Prohibited Behaviour Orders Act 2010* (WA) s 34(3)(c).
[35] Ibid s 34(4).

the age of 18 years. As far as I am aware, no Prohibited Behaviour Order has yet been issued against a person under 18, and an application brought against such a person last year was dismissed by the Children's Court.

Less directly relevant to youth justice, at least arguably, there are general provisions of the Convention which prohibit discrimination on the basis of the race, ethnic or social origin of a child. I have spoken many times on the subject of the over-representation of Aboriginal people in the criminal justice system of this State, including the over-representation of Aboriginal children.[36] Time does not permit me the opportunity to revisit the complicated issues associated with that over-representation. For the reasons I have given elsewhere, the disadvantages which Aboriginal people, including children, face in our justice system can give rise to what I have termed as a form of systemic discrimination. However, it is also clear that the criminal laws and procedures of this State do not overtly or expressly discriminate against Aboriginal people on the basis of race - if they did, they would almost certainly be invalid.

It is, however, clear that the Committee takes a broad view of the notion of discrimination under the Convention. In its most recent report, the Committee expresses concern with respect to the disadvantages suffered by Aboriginal people in Australia including the disadvantages evident in their over-representation in the criminal justice system.[37] I am pleased that several of the Ambassadors, soon to be announced, are today being

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[36] See Martin CJ, 'Resolving the Intractable - the over-representation of Aboriginal people in the criminal justice system' (Speech delivered to the 7th Annual National Indigenous Legal Conference, Fremantle, 5 October 2012); Martin CJ, 'Bridging the Gap - Some Ethical Dilemmas' (Speech delivered to the Curtin University Annual Ethics Lecture, Bentley, 30 August 2012).

[37] UN Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention, Concluding Observations - Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) 7.

acknowledged for their commendable work in this difficult area, and it is significant that a number of these Ambassadors are Aboriginal people.

The *Beijing Rules*

As I have already noted, the *Beijing Rules* were adopted by the UN General Assembly in 1985. They are concerned with the administration of juvenile justice. Because the rules preceded the Convention, in a number of respects the provisions overlap - for example, in relation to the rights of juveniles within the court process, the right to privacy, the desirability of diversion and detention being ordered only as a last resort. However, in a number of aspects the rules are more detailed providing, for example, that police officers who frequently or exclusively deal with juveniles should be specially instructed and trained.[38] Another rule requires that a variety of disposition measures be made available to a court or other authority dealing with a young offender.[39] The variety of orders available to courts and other authorities in Western Australia complies with that rule, although until recently, in parts of regional Western Australia the practical resources were often lacking. As I have noted, significant improvements have been made in that regard in recent years.

The *Riyadh Guidelines*

The *Riyadh Guidelines* were adopted by the UN General Assembly in 1990. They deal with the prevention of juvenile delinquency. They emphasise the desirability of avoiding criminalising and penalising a child for behaviour that does not cause serious damage to the

[38] *Beijing Rules*, r 12.
[39] Ibid r 18.

development of the child or harm to others.[40] Consistently with the concepts which I have already addressed above, the guidelines emphasise the desirability of prevention,[41] and in that context, emphasise the need to address the wellbeing of the family and all its members.[42] The guidelines also emphasise the importance of education and the availability of community-based services and programmes.[43] Consistently with all the other instruments to which I have referred, the guidelines specify that the institutionalisation of young persons should be a measure of last resort and for the minimum necessary period.[44]

The *Havana Rules*

The *Havana Rules* were also adopted by resolution of the UN General Assembly in 1990. They are concerned with the protection of juveniles deprived of their liberty. Consistently with other international instruments, and with practice in Western Australia, they specify that detention before a trial is to be avoided to the extent possible and limited to exceptional circumstances.[45] The rules also contain provisions with respect to the physical environment and accommodation provided to juveniles in detention, including access to education, library facilities, medical care, etc.[46] The rules also specify a right to receive regular and frequent visits, and the regular communication with family.[47] Although juveniles in detention have these rights in Western Australia, because all the juvenile detention facilities are in Perth, the practical exercise of visitation rights by family members in regional and remote Western

[40] *Riyadh Guidelines,* r 5.
[41] Ibid r 1.
[42] Ibid pt IV.
[43] Ibid.
[44] Ibid r 46.
[45] *Havana Rules,* r 17.
[46] Ibid pt IV.
[47] Ibid rr 60-61.

Australia is problematic. Increasingly, audio visual means are being used to address these difficulties, and the increased use of these facilities is to be encouraged.

The *Vienna Guidelines*

The *Vienna Guidelines* were issued in 1997 and are addressed to States which are parties to the Convention and to United Nations agencies and programmes. They are intended to provide a framework for achieving the objectives of the Convention and include provisions relating to the desirability of comprehensive child centred juvenile justice processes and specialist juvenile courts.[48] Consistently with the other international instruments to which I have referred, they reinforce the use of detention as a matter of last resort and for the shortest period of time. The guidelines also specifically provide for child victims and witnesses, who are to be treated with compassion and respect for their dignity.[49] At the risk of being accused of parochialism, my assessment of practices with respect to child victims and witnesses in other jurisdictions leads me to the conclusion that in Western Australia we have enjoyed world's best practice for some years now, by which the adverse impact of the justice system upon a child victim or witness is minimised.

Summary and Conclusion

This brief and necessarily somewhat superficial analysis supports the conclusion that, generally speaking, the youth justice system of this State conforms in large measure to the principles and standards enunciated in international instruments. Continued conformity depends upon detention of young offenders continuing to be regarded as a last resort, for the best

[48] *Vienna Guidelines*, r 14.
[49] Ibid pt III.

interests of the child to remain a paramount consideration, and upon the provision of alternatives to detention in all parts of our large State. Difficulties with respect to the separate accommodation of young offenders in detention in regional and remote parts of our State are being addressed, although demography will likely preclude complete elimination of temporary accommodation of juveniles in adult lockups for the foreseeable future. Although an issue has been noted in respect of a possible tension between the rights to privacy contained in a number of the international instruments and the provisions of the *Prohibited Behaviours Orders Act*, that tension has not yet emerged in practice.

Although the youth justice system is undoubtedly an important aspect of administering the rights of children and young people, it is perhaps unfortunate that my remarks this morning have been focused on this topic. Public discussion of the youth justice system tends to reinforce a community stereotype to the effect that a significant proportion of young Australians are rotten apples who are in constant trouble with the law. Nothing could be further from the truth. The vast majority of young Australians have no contact whatsoever with police or courts during their formative years and grow into responsible law-abiding citizens. Although, as I have noted elsewhere, Aboriginal children are undoubtedly over-represented in the criminal justice system, it remains the fact that the vast majority of Aboriginal children, like their non-Aboriginal peers, have no contact whatever with police or courts and become responsible law-abiding citizens who make an enormous contribution to our society in a wide variety of fields.

I hope that the focus of today's address has not distracted from the celebration of the achievements of the inaugural Ambassadors for

children and young people, who have made and will continue to make such a positive contribution to the rich and valuable resource which is our children and youth.