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## Chapter 6

### Responding to Repeat and Serious Offences

Practitioners working in these Australian children's courts recognized two distinct types of offenders. Most young people who appeared before the court once or twice were never seen again. This may be because the experience of being in court brought home the seriousness of their behavior, or it may be that many young people simply grew out of offending. Then there were a smaller number of offenders who were in regular contact with the courts, and received supervision from juvenile case workers. Some of these received one or more sentences of

detention, and in some cases spent a large proportion of their teenage years in a detention centre.<sup>1</sup> They usually committed more serious offences than fighting amongst themselves, shop-stealing or making trouble for the police. These included robbery, burglary, stealing cars and acts of violence.

Through looking at actual cases, one can see that practitioners recognized further differences within these repeat offenders. The next chapter will consider young people who were considered especially “vulnerable” in some way, whether from being in care, having an Indigenous background, belonging to an ethnic group or suffering from a psychological problem such as a learning disability. This chapter will focus on cases in which these factors were not mentioned during the hearing,<sup>2</sup> or if they were mentioned were not viewed as excusing the offence. These defendants were mainly ordinary working class youths, who have attracted attention from criminologists and social control agencies for anti-social behavior for many years.

My warrant as a sociologist for using the term “working class” is partly because some practitioners, matter of factly, characterized the area in which a court was situated as a “working class” district. It also arises from my own observation of hearings. Although it is often hard to identify class distinctions from clothing, or from the way people speak, in an affluent society such as Australia, it is still possible to see or hear these differences. There were some defendants who were smartly dressed. They were accompanied by their parents and had what I recognized as educated, middle-class accents. There were other youths who jauntily displayed their lack of interest in middle class conventions. Some male defendants wore a jacket and tie (with the top button of the shirt unbuttoned) over jeans. One youth was chastised by the magistrate for dressing inappropriately, although the hearing did proceed. He was wearing a t-shirt that presented him as a gift-wrapped parcel, with the slogan, “God’s gift to women – from God”.

Sentencing decisions lend themselves to different forms of variable analysis, whether these are concerned with identifying the causes of offending, or factors that influence sentencing decisions. They also invite an evaluative response since there were sometimes striking variations in the way different magistrates sentenced what appeared to be similar offences. However, this often means that sentencing researchers do not describe what happens in hearings, the reasons given for the sentence or specific features of particular offences. By contrast, this chapter seeks to describe hearings in more detail, as these were available to me as an observer. This preserves how practitioners understood the seriousness of the offence, which would not be available from the bare details of the charges. The summaries also provide some insight into how offenders understood the hearing. They do not, however, supply a full interactional record of hearings, or the full ethnographic context. In cases where I had an

opportunity to interview a case worker about a particular client, or see the pre-sentence report, I had a better understanding of this context, or rather one perspective within it.<sup>3</sup>

The chapter starts by giving a taste of the administrative work involved before sentencing can take place: the young person has to attend a meeting with a case worker so there will be a pre-sentence report. It then provides some examples of decisions that resulted in defendants receiving a probation order, a combination of probation and community service, and a detention order. The hearings also illustrate some of the communicative work involved in seeking to persuade young people to stop offending. The chapter concludes by considering how practitioners responded to repeat offending with what might be called professional realism. They know that legal sanctions often have no effect, but also that most young people grow out of offending.

Although this chapter will not seek to differentiate between the approaches adopted in the three states, one procedural difference should be explained. In Victoria, there was a power in the legislation to defer sentencing a defendant. This made it possible to dismiss offences, or impose a light penalty such as a good behaviour bond, even after a period of supervision by Youth Justice. If more serious offences were committed during the deferral, it was also possible to make a probation order. Deferred sentences were widely used for what were perceived as middle-range offences. This meant that, in Victoria, some young people received the equivalent supervision of a probation order in other states but without being found guilty of a criminal offence.

### **Obtaining A Pre-Sentence Report**

Before a magistrate can impose a more serious penalty than an undertaking or good behaviour bond, the court normally requires a pre-sentence report. The following hearing illustrates how one magistrate in Tasmania explained the importance of this report to a defendant, who in this study will be called David Riley.<sup>4</sup> This transcript breaks up long stretches of talk, which were delivered briskly and without pauses by the defense lawyer and magistrate, for ease of reading. The transcript includes some details of the defendant's dress and body-language, which seems important since some previous studies give the impression that most youths are terrified by, or do not understand, court proceedings. Everyone in the court could see at a glance that this 17 year old youth belonged to a different social world to the magistrate and other practitioners, who were conventionally dressed. He did not appear at all cowed or frightened by court proceedings:<sup>5</sup>

Case 6A

DL: David Riley. It's 30 and 35 on Your Worship's list this morning.

CC: Call David Riley.

U: [outside the court] DAVID RILEY.

[The defendant came into court. He was wearing a red and black Holden tracksuit with trainers, and had a partly shaved head. He stood facing the magistrate with a relaxed posture.]

CC: You are David Riley.

D: Yes.

DL: Thank you Your Worship. I appear on behalf of David.

M: You can sit next to your counsel [The defendant sat to the right of his lawyer.]

DL: [speaking very fast] I am appearing for David today effectively for the duty solicitor. He approached me outside court. He's given me instructions in relation to these charges and he is in a position to enter pleas of guilty to all of them and I note that in relation to index 34 it's a simple charge of stealing, that's a plea of guilty, and in relation to the matter at 35 there are 3 charges of motor-vehicle stealing which are pleas of guilty to all, and attempted motor-vehicle stealing which is also a plea of guilty, and a contravening of the conditions of the notice relating to a curfew condition which is a plea of guilty as well [draws in breath].

Your Worship, my application in relation to this matter is that it adjourn for Facts and Sentence at a later date and in the meantime I will apply for aid on David's behalf at the Legal Aid office and he will be represented appropriately next time.

M: Thank you for that. Have we got a date there Marian?

CC: [mid-May] at 10am.

M: Right the position is this David. These matters will be adjourned till [mid-May] at 10am. Now your bail will be changed. It will still have the condition that you must live at...in...during the period of the bail and not change it without the approval of the court. But added to that you also have to report to Youth Justice in...and they will give you some details of that in the bail room...Now the questions they put to you will help me understand you as a person. This is all very useful to you because I just see you as another youth at this point in time and I don't know you as a person. Youth Justice get to know you – they bring out the details.

So while they may ask you some very personal questions the position is that you should be very frank with them about what you think, and that sort of thing. And that will all be to your advantage in determining what I should do with these offences at the end of the day. And, of course, the whole process is to benefit you

and rehabilitate you in relation to not doing these sort of things or anything else so you can get on with your life.

So it is a very important process from your point of view. And if they ask you to wait around because they haven't got time to see you immediately, make sure you do and be patient, because if we come back and we haven't got the report because of your fault, I will not be very happy about it OK? So if you'd like to go with the officer to the bail room, he'll look after your bail. Then you can be on your way.

D: Thank you [Looked for confirmation that he could leave from his lawyer, then left the court with the security officer.]<sup>6</sup>

This transcript demonstrates the organizational and administrative work around sentencing, and the sequence of actions required before this can take place. Although the prosecutor played no part in this hearing (she was sitting immediately to the right of the defendant), the prosecution case had been disclosed to the defendant. This defendant had also seen the duty solicitor, and chose to plead guilty to all charges. It appears that this lawyer had instructed a colleague to indicate this in court. At the next hearing, when the defendant formally pleaded to the charges, the agreed facts would be presented. However, the magistrate could only sentence once a pre-sentence report had been obtained. This meant that Youth Justice had to meet the defendant, prepare a short report about his or her background, and recommend how he or she should be sentenced.

From this short hearing, one can obtain a sense of the values that informed sentencing in this court, which were explicitly communicated to the defendant. While a central objective of youth justice legislation in each state was to punish as well as rehabilitate, this magistrate told the young offender that "of course, the whole process is to benefit you and rehabilitate you in relation to not doing these sort of things or anything else so you can get on with your life". There was some effort to explain the purpose of the Youth Justice interview rather than simply requiring him to attend, which is similar to how young people are disciplined in other social settings.<sup>7</sup>

In this hearing, the moral failing of not attending an interview, and the possible consequences that might flow, seemed rather to overshadow the moral and legal consequences of stealing or motor-vehicle stealing. Before sentencing could take place, the defendant had to be persuaded to attend an interview with Youth Justice, although with an implied threat if he failed to comply ("I won't be very happy"). The magistrate asked rather than ordered the defendant to go with the officer at the end of the hearing ("So if you'd like to go with the officer") and even showed some consideration for taking up this young person's time ("Then you can be on your way"). It seems significant that the defendant thanked him for giving his

own time at the end of the hearing. Even though he was being told to comply with a court procedure, the exchange had a polite character, and it was made clear that the procedures were for the defendant's benefit rather than punishment for breaking the law.

### **Some Probation Orders**

Probation is a more serious order than a good behaviour bond. It does not, necessarily, involve more supervision, although it makes it possible for a magistrate to attach an order requiring completion of a program, rather than leaving this to the judgment of the case worker. Nor is it necessarily the case that having a probation order automatically means that the magistrate must consider more serious penalties on the next offence. However, it does make this more likely, if supervision and some degree of support has not resulted in a change of behavior or what case workers describe as cognitive development.

Very few of the relatively small number of hearings observed received a probation order without conditions to attend programs, or without also being required to do community service. Perhaps coincidentally, the two young people sentenced below were from middle class families. In the first case, the offence was relatively minor. A 17 year old youth breached a deferred sentence imposed in Victoria for taking money from another youth. In the second case in New South Wales, a young woman had joined the "wrong crowd" and was causing a disturbance at house parties, committing driving offences and repeatedly disobeying the police. In each case, the circumstances and response were slightly more complex:

#### *"Rolling" at a party*

This 16 year old youth (case 6B) was charged with being drunk, while on a three month deferred order imposed after a previous offence, committed when he was 15. In the first offence, he had taken money by going through the pockets of another youth who was sleeping off a bout of drinking at a party. In this case, I was able to attend an interview with his lawyer before the hearing, and read the pre-sentence report. This suggested nothing in his family background, medical history or educational experiences that might explain the offending. Although he was attending drugs and alcohol counseling, and received a positive assessment, at no point in the report was it suggested that he saw moderate drug use as a great problem. Moreover, he did not view "rolling" in order to obtain money to purchase drugs as a serious offence. This had happened to him on a number of occasions, and he had not involved the police. The pre-sentence report also suggested that he was following other people when he committed the first offence, but without giving details. When asked by the Legal Aid lawyer to explain this, he said that this view was mistaken, and that he acted on his own.

His father then joined the interview. He did not believe that his son had stopped drinking, and complained that he was missing school. The lawyer noted that he had not been suspended, and this was not suggested in the pre-sentence report. He went to a good school, but had done badly. His parents had put him on the "Fresh Start" program, a summer camp used in Victoria to encourage re-engagement with school after difficulties. In this camp, he had received a prize for leadership abilities. In the lawyer's view, the fact that he was going to drugs and alcohol counseling once a week was promising: "It doesn't matter if he is still using. It confirms that he's engaging – that's huge".

Even from this short summary, one can see that the young person, case worker, lawyer and parent all viewed this offence, and subsequent progress differently. From the lawyer's perspective, the defendant had already passed a significant threshold in obtaining a criminal record. If he had responded to supervision during the deferral order, the outcome would have been a good behaviour bond. However, his comments to Youth Justice about the original offence, and the new offence, made it more likely that he would be sentenced to a long period of probation. This was an accurate prediction. Moreover, the magistrate expressed doubts about the judgment of the drugs and alcohol counsellor given that there was a glowing report a few days before the most recent offence. He warned him that an adult would normally receive a sentence of imprisonment for robbery, and that he was lucky not to receive a conviction. The sentence was a period of probation for six months, on the condition that he should continue to see the drugs and alcohol counselor weekly.

### *Joining the "wrong crowd"*

There is no criminal offence for mixing with people from a different social background who are regularly in trouble with the police. Nevertheless, when sentencing young people it was often the situation rather than the specific offences that concerned the magistrate. In this case (6C), a 17 year old girl from a good family was sentenced to probation after being in trouble with the police, and committing a number of minor offences over two years, firstly under a deferral order, then a good behaviour bond and most recently a probation order.

According to the case worker, the concern was not the seriousness of the offences, but the fact she was still offending, and continuing to mix with young people who were targeted by police:

The offences are not particularly serious comparatively. She was on orders for shouting at police at a party and making loud noises and things like that. She was engaged with some pretty heavy neighborhood activities with peers. The magistrate has no idea about this since it is not in the report. If it was his kids, he would be very worried. There was a

lot of drinking and drugs and parties and yahooping, and a bit of rebellion, that sort of stuff. What happened [most recently] is she was at a party and got drunk. The police were eventually called. There were complaints about the amount of noise she was making from four blocks away, and she gave the police a hard time. She had also had her license suspended. She was on bail, and then was pulled up and told not to drive. The next day police observed her driving for a second time. They told her to pull over and she sped up. She cut and run. It suggests she's a bit compulsive and will do what she thinks she wants to regardless of the consequences.

The magistrate spent some time deliberating whether or not to give a further probation order, as recommended by the case worker, or to impose a detention order. It was, nevertheless, unsurprising to anyone at the hearing, including the defendant, that he decided to make a further probation order, and did not ask her to undertake community work. The sentencing remarks were also designed for someone who would find detention far more significant in terms of her future life than other defendants:

It upsets me to see you before the court on all these matters [long pause while reads papers]. If you come back, you're going to jail and your life will be absolutely ruined. You are now in the children's court. The court is taking more time with you because you're not 18. If you were 18, you would go to jail. You're then dealing with big overweight unattractive women. There's a lot of problems with young girls going into custody, the same as with young boys [long pause]. We all care for you – Mr. H [the case worker], Mr S [the defense lawyer], the prosecutor. At the end of the day what are you going to do? It's about taking responsibility and not seeing people you don't need to be with. You can turn your back on it.

This short extract from an hearing indicates more vividly than statistics the fact that most defendants come from a different world to ordinary, law-abiding middle class citizens. It is also unusual in that there was no suggestion in the report or during the hearing that any social or psychological factor was blamed for the offending behavior. There was a characteristic mix of objectives. Everyone in the court had her welfare at heart ("We all care for you"). However, if she continued to mix with the wrong crowd, she would be sent to prison. For this offender, this was not presented as having any rehabilitative purpose, but as an environment in which young people are physically and sexually abused by older prisoners.

**Paying Back Society: Community Service**

When faced with repeat offences, the magistrate could continue giving probation orders. However, a common next step was to combine this with an order of community service. These orders were not always punitive in nature, in the sense of involving hard or unpleasant manual work. Nor was there any expectation that community service, like probation, had a deterrent value. However, the thinking behind the order was that the young person was not simply being helped with support by a case worker, but was receiving a light form of punishment or paying something back to society. Opinion, however, differed. Some practitioners believed that any attempt to require a young person to concentrate on some structured activity was both burdensome, and bound to fail. One Legal Aid lawyer described young people as “having the attention span of a gnat.” They regularly breached orders, and this resulted in some being sent to detention centers. For other practitioners, community service offered an additional sentencing option that could be used to delay more intensive supervision or detention.

In the following case, a young woman, aged 15 but 14 at the time of the offences, was charged with stealing letters containing checks and then trying to cash the checks at a bank. These extracts from a transcript of the hearing show how the sentencing decision was communicated:

#### Case 6D

M: Yes, if you could stand up now Jane, thank you. You have got these priors as you've admitted where you were formally cautioned for stealing in December of 2000 [and two dates in 2003], so to some extent you really haven't taken on board what you were cautioned about. And of course that may be the fact that of course you are a young person, and hopefully you are maturing all the time. But it does indicate that at the point when you entered into these matters, you hadn't learnt your lesson. And of course there has to be some deterrence in relation to these matters. Now I understand that in the report you indicated you wanted to do...I'm not sure what it was now. Was it childcare? Yes, childcare.

D: Yep.

M: And it's important of course when you want to have a specific career for you to have an unblemished record if you possibly can or as unblemished record as you can at the time when you go into that particular profession. The reason being of course is that you have to set an example to the children you are looking after etc and of course parents or whoever you will be working for will obviously want to be very sure that you are a proper person to be looking after their children. So you very much need to change your position [ ] I don't know whether I imposed [the curfew]

or somebody else imposed it but we don't impose these things for fun. And whilst New Year's Eve and the party period of the year is a great temptation, I don't regard that as a very good reason for you not obeying that order and it shows a lack of responsibility in regard to that matter. Now in respect of that charge which is X of 2005 I am going to impose 21 hrs of community service in respect of that, and hopefully that will enable you when you are doing that to reflect well was it really worth it going out for New Year's Eve? You might think it was but I certainly wouldn't have thought it was.

CC: Is that with or without conviction?

M: That's without conviction. I don't intend to impose convictions on you despite the seriousness of the charge bearing in mind your age and bearing in mind I would like you to develop so you can in fact become a child-carer [ ]. The other charges of course relate to the checks. You were not the instigator in terms of stealing the checks out of the letter box but certainly you must have been aware at 14, I think you're 14 now is that correct, I think you were 13 at the time, but the position is that in an adult this would call for a serious penalty such as a detention order and even in the Youth Division detention orders do occur so one can be placed at Ashley where there are some rather unpleasant children from time to time. And they certainly do not improve necessarily the people who go into incarceration, they do not necessarily come out better persons. That depends on how they react to the discipline and the assistance that is tried that the authorities try to give them. But in this case I certainly am not going to impose a detention order on you at this stage [ ]. And in relation to that offence there will be 119 hours of community orders<sup>8</sup>. Now that's quite a substantial amount of community service but it will give you a chance to understand that society [ ], and I think that you are starting to understand from the discussions you've had with Youth Justice

D: Yes.

M: how this affects people, because not only the larger community, but if you for example give it to a shopkeeper and they lose the money they are not covered by insurance so they put up their prices and millions are being lost not only from this, well perhaps not so much from this [offence], but from shoplifting. So that is the sum total of the penalty in relation to those offences. And you're to report to Youth Justice by 4.30 on Tuesday and you are to obey the reasonable requirements of Youth Justice in relation to those work matters. And you will understand that this is all part of paying back society for what we do so we all get penalised if we do the wrong

thing for what we do. If we go through a red light we get fined for it or whatever. Now having said all that I do not want to see you back here again. I do not believe I will see you back here again. I feel you understand the seriousness of the position. Young ladies are meant to be mature at 14. It takes men another 11 years apparently and some never mature. You have a chance to go ahead without the convictions and all I can say is good luck.

D: Thanks.

This defendant appeared nervous, but did not look remorseful or repentant. In this hearing, there was no reference to the contents of the pre-sentence report, or to the defendant's demeanour.<sup>9</sup> However, the magistrate did comment that she had not developed a sense of responsibility after previous contact with the police:

so to some extent you really haven't taken on board what you were cautioned about. And of course that may be the fact that of course you are a young person, and hopefully you are maturing all the time. But it does indicate that at the point when you entered into these matters, you hadn't learnt your lesson. And of course there has to be some deterrence in relation to these matters.

Although the official purpose of children's courts is to punish and rehabilitate young offenders, these sentencing remarks suggest that there is also a concern with assisting young people to become adults. This happens when they develop a sense of responsibility in relation to their behavior towards other people, such as the victims of their offending or their parents. It also involves developing an understanding or awareness of the consequences to themselves that follow from breaking the law. In this case, the magistrate expressed the hope that appearing in court had helped this defendant to "understand the seriousness of the position", which meant that she could receive a conviction or possibly detention if she committed further offences.

This transcript also illustrates how magistrates explained the reasons for punishment in some detail. In this case, it appears that Youth Justice already had reported some success in explaining why stealing and attempting to cash checks is an offence, and the magistrate also tried to explain why it, and related criminal activities, damage both small businesses and society:

M: because not only the larger community, but if you for example give it to a shopkeeper and they lose the money they are not covered by insurance so they put

up their prices and millions are being lost not only from this, well perhaps not so much from this [offence], but from shoplifting.

This magistrate presented both probation and community service as a punishment that is “all part of paying back society for what we do”. The example he used was receiving a fine for going through a red light, perhaps because the potential harm that might be caused is clearer in this case. He stated at a number of points that the offending behavior was serious which explains why he sentenced her to 70 hours, the maximum period of community service for her age. Although this is not explicitly stated, it may be that the seriousness lies in the fact this was a pre-meditated offence involving an attempt to deceive. There is a contradiction between this and the youthful spontaneous offence of breaching a curfew on New Year’s Eve: however, disobeying this court order resulted in 21 hours of community service.

### **Serious Enough For Detention**

The heaviest penalty that can be imposed by children’s courts is a sentence of detention, or what in New South Wales is called a control order. The powers given to magistrates in the three states differ, but it is possible in New South Wales to be sent to an institution for a period of two or even three years (although with a date for release on parole set by the magistrate as part of the sentence). However, in most cases the periods of detention were for a few months. According to one magistrate, this had a greater deterrent effect than sending someone away for a shorter period, and made it possible to complete rehabilitative programs while in detention. It was not really expected that detention was effective in reducing crime. The threat initially had a deterrent effect, but this wore off once a young person had experience of being in detention. Moreover, it was recognized that young people learnt from mixing with older and more experienced offenders.<sup>10</sup>

Again, the best way to understand the issues, and get a sense of how repeat offenders respond to the juvenile justice system, is through looking at actual cases. The following hearings in Tasmania give an example of two defendants who were sentenced to detention although, in the second case, this was a suspended sentence. In the first case, the offender had committed many offences, including assaults, to support a drugs habit. However, this was not seen as excusing the crime, or identifying the offender as a “vulnerable” person in need of help rather than punishment. In the second case, the magistrate had to address the difficult but common case of a sexual assault committed by a young person.

*A case of “crocodile tears”?*

Because offenders sentenced to detention had often already spent a few months as remand detainees, an important consideration for magistrates was whether there was any recent evidence that they had come to recognize they had behaved badly, and would change their pattern of behavior. In this case, the defense lawyer suggested that there was a significant chance of rehabilitation since his client had started to participate in programs, but the magistrate took a different view. The main reason was because the case workers supervising the young person in the detention centre believed that he had not shown any sign of remorse:

#### Case 6E

M: Thanks Mr. Jones. Stand up please Peter. You've pleaded guilty to 33 separate offences. You indicated that you had stopped offending but you continued till [ ] and that last offence was a very serious offence with four assaults, two were very serious. There were eight breaches of bail. Mary Smith [a security guard] thought she was going to be stabbed by you no one deserves that. The offences also show you're not prepared to obey court orders. You consistently breached police bail. You did not follow the directions of Youth Justice. You were just faulting authority and thinking you can get away with it. You punched and set upon Constable A in a most serious way and abused and spat upon Constable B. Your violence is not going to be tolerated and you should just take some time out to think about the effect on other people.

You are 17. For most offences you have not received convictions but there is violence and dishonesty. You received a good behaviour bond but continued to offend. You are not as powerful and clever as you think. This shows to the court you are a weak person. If you can't change your behavior, you will be sentenced to periods of imprisonment for a very long time. I hope it won't happen. It is possible the changes you made in Ashley will continue. I also note that you pleaded guilty. If you had not pleaded guilty, this would have occupied a large number of days for the court.

The only appropriate sentence is a detention order. The sentence is for ten months, with three months suspended backdated to [ ]. I'll talk about when I think you'll get out in a minute. I will also make a probation order and when you get out 49 hours community service orders [long pause while looks through papers]. It seems, Mr. Jones, Peter has two to three weeks left to serve. I take into account you have spent a long time in detention. You now have three months hanging over your

head if you commit further offences. The sentence is a global one. Just go with the officer [leaves the dock]. Thank you Mr. Jones. Thank you Miss Green.<sup>11</sup>

The chronology of offending and sentencing was unclear from the sentencing hearing, since the facts had been presented at a previous hearing. The most serious offences were committed on bail in between periods of detention. Nevertheless, from these remarks, it is possible to see that these were serious offences, both in terms of the number of charges, and their nature. It also seems likely that this defendant had already received penalties for minor offences: there were no other options available than detention. Although drug-taking was involved, this 17 year old was presented as a calculating person with a propensity for violence and no respect for authority.

Perhaps because of the report, the magistrate was not optimistic that he would change, and the emphasis in the remarks was on deterrence, rather than rehabilitation. If he committed a further offence, there would be another three month period of detention. What, though, was most striking about the hearing is that the defendant was crying while the magistrate commented on his behavior and imposed this sentence. After the hearing, the case worker described this as “crocodile tears”: he had not really changed his attitude towards taking drugs, or showed remorse for his actions either when formally interviewed, or with staff in the detention centre.<sup>12</sup> He was likely to re-offend, even if he was now engaging with rehabilitative programs such as drug and alcohol counseling.

#### *A sexual assault*

The cases observed for this study do not include any offences that were so serious that the courts immediately sentenced the offender to detention. The following hearing, however, shows that in the case of a sexual assault magistrates will consider a detention order, or impose a suspended sentence that would result in detention if there was a similar offence. In this case, a young boy was charged with asking a younger girl staying at his house to undress, getting on top of her and “touching her below her pants.” He initially denied committing the offence but later admitted he had “taken advantage of her.” This was the only hearing observed where the defense view differed from the magistrate, in that the lawyer asked for a conviction not to be imposed:<sup>13</sup>

#### Case 6F

[The defense lawyer started to make a submission, talking about the family background]

M: I'm a bit troubled by the comment that he presented with little understanding of the seriousness of the offence and minimal victim empathy.

DL: This is to do with his age and an attention deficit disorder and just his lack of experience.

M: Yes. This was a girl of [ ]. He's [ ] and he tried to take her pants off her and has interfered with her. It's a very serious matter.

DL: It is clear that the victim has no manifest impact. Your Worship, the charges themselves are serious but the state has acknowledged the charge of rape is not appropriate in these circumstances, and the fact penetration has not been alleged. In my submission this sets it apart from more serious sexual offences. Your Worship, otherwise the defendant is of good character and you should take that into account. If Your Worship was minded, you have the ability to give a suspended detention order without a conviction so he is not held back in later life. I refer Your Worship to [ ] for the considerations that can be taken into account on the conviction. The youth's age and subsection [ ] the aim to rehabilitate the youth, are significant.

M: Thank you. Yes. Stand up. You are age [ ]. The little girl was age [ ]. You have indicated you knew what you were doing was wrong and it was a bad thing. You told the person who wrote the report that you weren't sure how she felt at the time or now although you think she must feel bad now. You understand that this little girl was a child. She would not have known at all when you asked her to take her pants off and climbed on top of her. Fortunately, you were not able to penetrate her with sexual intercourse or with your fingers. It's unknown as to whether this young girl will be affected. No one can work that out. What you did was terrible, quite frankly, and very much deserving of you going to detention and staying there for a long time [long pause].

This is a serious matter and the law regards it like that. Children like that should not have their childhood affected. You're [ ]. You're having sexual feelings and you took advantage. Taking account of the submission there should be no conviction, there will be a conviction. It is a serious case. You should have thought about her. I make an order that you are sent to six months detention. I will return to that in a minute [short pause]. I further make a probation order under the usual conditions for the next six months. I suspend the detention order on condition you commit no offences containing a sexual element for 12 months. Now you have only just escaped going into detention for six months. This is because of your age and because no

penetration occurred. If you commit an offence in the next 12 months, I will send you to detention. Do you understand this?

D: Yes.

M: Do you understand how serious the matter was?

D: Yes.

M: Go to the back of the court please.

This magistrate used stronger, retributivist language while sentencing (“what you did was terrible”), but still applied the rehabilitative principles in the legislation. It seemed to be accepted that, when a young person commits an offence of this kind, there must be a psychological disorder, although this does not necessarily justify a lenient sentence.<sup>14</sup> When interviewed by police and Youth Justice this young person was, apparently, unaware that he had done anything wrong. During the hearing, he was looking at the floor, playing with his cap, as if keeping occupied in the presence of adults discussing something he had done wrong in a language he did not understand.<sup>15</sup>

### Professional Realism

The hearings considered in this chapter illustrate how magistrates only had a limited range of options in responding to repeat offenders. Unless the offence was particularly serious, such as a violent assault, they tended to give many chances. The legislation made this possible by allowing them to start with a probation order (itself not involving more consequences than a good behaviour bond), and to then combine this with community service orders, or give convictions. In many hearings observed, the young person was given a second chance: a probation order was continued, with longer periods of community service. Detention was often threatened and, eventually, if there was no change in behavior, was imposed for a short period after which the young person might receive further non-custodial orders and periods of detention.

The statistical evidence collected in New South Wales and Queensland (Chen et al 2005, Weatherburn 2007, Livingston et al 2008) indicates that many young people continued offending after age 18, and some spend time in adult prisons. However, the practitioners interviewed for this study believed that most stopped offending while subject to supervisory orders, and that fewer offences were committed after turning 18. They were unable to explain this other than that the threat of going to an adult prison was effective, and that many young people matured around this age, and no longer got into fights, or committed burglaries or took cars.<sup>16</sup> It seemed to be accepted that, after a period of offending or mixing with the wrong

crowd, perhaps because of some personal insecurity, most young people grew up. A magistrate in one country area reported that a father who promised to keep his son on a tight rein had himself committed similar offences in his youth.

None of these young people were described by magistrates or in the pre-sentence report as having had particular social experiences, or suffering from specific social or psychological conditions that might be relevant as a mitigating factor in sentencing. They were not in care, did not have learning disabilities, and had been attending (if not engaging with) school. Nevertheless, practitioners knew very well that most repeat offenders were not simply young people, but usually young people from economically disadvantaged backgrounds. In many courts, a large proportion of repeat offenders come from particular neighborhoods, suggesting a social and environmental basis for offending, and some of the worst offenders belong to well-known problem families.<sup>17</sup> Practitioners know that the rehabilitative programs, or the threat or experience of detention, cannot address these social causes of crime, even though in many cases young people do eventually stop offending or “desist” from crime.

An extract from an interview with a case worker in Tasmania indicates the problems faced by practitioners in trying to reach defendants who have different values both from their youthfulness and their social backgrounds:

Q: You are also dealing with people with different social backgrounds to the norm.

A: Yep. And I think that is something we all struggle with as well and we are all quite lucky to have lived in the way we have. I think we have all been to private schools and we have all had fairly stable sorts of family upbringing. To understand the culture that these other people are living in is a real culture shock and also you sort of, you have to really twist around to work out where they are coming from and you have to imagine yourself in that situation because that’s challenging to put yourself in that situation. If you were in a situation where I didn’t have any food or any money, what would I do? And it’s also very difficult for us to see where the responsibility of our client’s parents ends and where their’s begins, because a lot of the young people have been so badly damaged by their childhood that you almost think what hope have they got of not stealing things when their parents have taught them to steal. And another thing that really strikes me is that a lot of these people find that, say they’ve knocked off somebody’s car or something like that, and then it’s a real shock for them to be told that they are going to detention as a result.

Q: They don’t see it as a crime?

A: They don't put their action and the consequence together. They have a gap in their understanding of what's going to happen to me if I do this. And it's really hard for me to understand that they weren't thinking at the time of stealing somebody's car that a) it belongs to somebody else and b) they deserve to be in trouble for taking it and c) the trouble that they get in is going to have ramifications for them like going to Ashley or something like that. That is just part of their experience.

In addition, young people did not understand sentencing in the same way as adults:

As long as they don't go to Ashley, some of them just don't care what happens. I think that is why dealing with children is quite difficult because you try to get them to that point where they understand that having a probation order's a pretty bad thing. Some of them will come in and they will say, "Oh do you think I'll get a good behaviour bond?" because they think that's an important outcome from the court because they've heard it on the news or whatever and they've come from a family that doesn't understand the system. And so when they say I've got a good behaviour bond they just think it's a big order and they've got in big trouble and they don't really come from an understanding of what court should be about. A lot of them will talk to their friends about it and their friends will say, "Oh as long as you don't go to Ashley, it's all right." So if you're on a probation order, it's OK and nothing's going to happen to you until you actually get put in Ashley.

This interviewee is not suggesting that only physical confinement has an effect on repeat offenders, because in many cases they continue offending after spending periods of time in the detention centre. There are youths who are scarred by this experience, but others for whom having been in detention increases their status among their peers. There are even young people who see a good behaviour bond as a badge of honor.<sup>18</sup>

Another way of stating that young offenders have a cognitive or psychological deficit is that they do not see their actions as wrong. Practitioners working in the children's court know more than most members of society the frustrations involved in trying to rehabilitate young people who have grown up in disadvantaged circumstances and hold different values to respectable members of society. Although one can view the children's court as successful in that the majority of defendants only appear once or twice, it has less success in rehabilitating or changing persistent repeat offenders.