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**Young Offenders and
Diversionary Options**

by

Rowena Johns

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EXECUTIVE SUMMARY

This briefing paper is intended to be a progress report on alternatives to court for juveniles who commit criminal offences in New South Wales. Primary attention is paid to the system of cautions, warnings and youth justice conferences available under the *Young Offenders Act 1997*. Some non-statutory pilot programs that focus on rehabilitation and diversion are also considered.

Application of the criminal law to juvenile offenders (pages 2-11)

- A child under 10 years cannot be guilty of a criminal offence in New South Wales, pursuant to s 5 of the *Children (Criminal Proceedings) Act 1987*. Children who are aged from 10 to less than 14 years are presumed to lack the criminal intent to commit an offence, according to the common law doctrine of *doli incapax*.
- Most criminal charges against children are heard in the Children's Court, but indictable offences may be referred to the District Court or Supreme Court for trial or sentence when the Children's Court determines that the charge may not be properly disposed of summarily. Serious children's indictable offences must be heard by the District Court or Supreme Court.
- Children who are convicted of offences other than serious children's indictable offences may be sentenced under the children's penalties outlined by s 33 of the *Children (Criminal Proceedings) Act 1987*. The most severe of these is a 'control order' to detain the child in a juvenile detention centre for up to a maximum of two years. Children who are convicted of indictable offences may be sentenced under s 33 or 'according to law', making them liable to the same penalties as adults. Serious children's indictable offences must be dealt with according to law.
- The protections for juvenile offenders provided by the *Children (Criminal Proceedings) Act 1987* include prohibiting the publication or broadcasting of the name of a child connected to criminal proceedings, and allowing certain offences committed by children to not be recorded as a conviction.

Outline of the Young Offenders Act 1997 (pages 12-25)

- The *Young Offenders Act 1997* was introduced by the Carr Government and had commenced in full by 6 April 1998. It formally recognised warnings, cautions, and conferences as alternatives to conventional court proceedings for children who commit crimes other than those resulting in the death of a person, serious drug offences, various sexual offences, domestic violence, traffic offences, and strictly indictable offences.
- Police officers may issue warnings to children who commit summary offences which are covered by the Act and do not involve violence. A warning cannot be accompanied by conditions or additional sanctions.
- Cautions are available for any offence that is covered by the Act if the child admits the

offence, agrees to be cautioned, and has not previously been cautioned on three occasions. An investigating police officer, a specialist youth officer (a type of police officer), a respected member of the community, or a court may deliver a caution. The only condition that can be attached to a caution is a written apology.

- An investigating police officer who decides that a warning or a caution is not appropriate may refer the matter to a specialist youth officer to consider whether a youth justice conference should be held. Courts can refer matters directly to a conference administrator.
- Conferences are conducted by a conference convenor and the offender must be in attendance. Other attendees may include members of the offender's family, the offender's lawyer, police officers, community and school representatives, the victim and their support persons. The participants discuss an 'outcome plan' which may involve the offender apologising, making reparation to the victim, receiving counselling, and completing a rehabilitation or educational program.

Evaluations of the Young Offenders Act 1997 (pages 26-37)

- Statistics indicate that the diversionary goals of the *Young Offenders Act 1997* are being achieved. Only 18.5% of juvenile offenders were dealt with by the courts in the 2001-2002 financial year. In the same period, 1482 young people participated in 1353 youth justice conferences.
- Numerous evaluations of the *Young Offenders Act 1997* have been conducted, with most focusing on the conferencing provisions. Studies published in 2000 and 2002 by the Bureau of Crime Statistics and Research found that the majority of offenders and victims were satisfied with the conferencing process and outcomes, and that the reoffending rates of those young people who attended conferences were significantly lower than for those who went to court.
- However, some studies have raised concerns about compliance with the legal obligations of the Act, such as informing young people of their right to obtain legal advice, and the necessity for an admission by the young person to be made in the presence of their parent or another designated adult. The statutory review of the *Young Offenders Act 1997*, which is expected to report by the end of 2003, will present further evidence on the performance of the Act.

Mentoring for young offenders (pages 38-45)

- Mentoring is a concept that matches a disadvantaged young person with a suitable adult who gives them guidance and support. The Mentoring for Young Offenders pilot program was established in 1999 in the Parramatta area of Sydney and the Coffs Harbour/Clarence region. The program was offered to young offenders who had received a police caution or attended a youth justice conference under the *Young Offenders Act 1997*. The evaluation report in 2002 found that the most significant barrier was attracting mentors, but the young offenders who participated experienced benefits including reduced offending, better family relationships, and higher self

esteem.

- The model for the New South Wales pilot was derived from the United States of America, where mentoring has an extensive history. An initiative specifically targeted at crime prevention is the Juvenile Mentoring Program (JUMP), which is administered by the Office of Juvenile Justice and Delinquency Prevention in the Federal Department of Justice. Between 1994 and 2002, over 9200 youths were mentored in 203 JUMP projects in 49 States and Territories.
- A national audit of mentoring programs around Australia is currently being undertaken by the Commonwealth Attorney General's Department and is investigating the success of mentoring as a crime prevention strategy.

Youth Drug Court (pages 46-54)

- The Youth Drug Court pilot program began on 31 July 2000 and is being conducted in a range of police Local Area Commands in Sydney and the Blue Mountains. The program targets young people who are charged with drug and/or alcohol-related crime and are ineligible to receive a caution or conference under the *Young Offenders Act 1997*.
- A team of representatives from the Department of Juvenile Justice, NSW Health, Department of Community Services, and Department of Education and Training assesses each applicant and tailors a Program Plan to their individual health and welfare needs. Sentencing is deferred for up to 12 months and the young person is released on bail, conditional upon complying with the program. Participants report back to the Magistrate on a regular basis and receive clinical treatment.
- By February 2003, the Youth Drug Court had produced 25 graduates. The program is continuing to take referrals, and the full evaluation of the pilot is scheduled to be completed by the end of 2003.

Political perspectives in 2002-2003 on the diversion of young offenders (pages 55-59)

- The Carr Government introduced the *Young Offenders Amendment Act 2002*, which commenced on 15 November 2002, to tighten some of the provisions of the *Young Offenders Act 1997*. Among the changes were: imposing a limit of three times that a young offender can be cautioned; requiring the investigating police officer to be consulted about whether a matter should be referred for a conference; and giving victims who attend conferences the power to veto the outcome plan.
- During the campaign for the State election of March 2003, several parties have referred to diversionary options in their policies. The Labor Party's policies on crime, youth justice, and drugs continue to emphasise rehabilitation programs, including diversionary programs.
- The Coalition's juvenile justice policy advocates a limit of one caution or warning for each young offender, and recording the names of juveniles who have received a

warning or caution for behaviour associated with gang activity on a 'gangs watch list' for the use of police. By contrast, the Greens oppose limitations on the number of warnings or cautions, and recommend establishing a network of youth advocates, who could be accessed by young people facing a caution or a conference.

1. INTRODUCTION

Juvenile justice is a complex and sensitive area of law. Policy formulation and operational delivery involve cooperation between a host of government agencies, such as the Department of Juvenile Justice, Attorney General's Department, NSW Police, Department of Community Services, NSW Health, and Department of Education and Training. The trend in New South Wales in recent decades has been to encourage the diversion of juvenile offenders from formal court proceedings and detention, into options that emphasise rehabilitation and restorative justice.

This briefing paper commences by explaining some general principles that are relevant to understanding the status of juvenile offenders in the criminal law, including the doctrine of *doli incapax*; the role of the Children's Court; and the jurisdictional choice between sentencing juveniles who commit indictable offences¹ according to children's or adult's penalties.

Secondly, the statutory framework of cautions, warnings, and youth justice conferences under the *Young Offenders Act 1997* is outlined, followed by a summary of studies that have been generated by government agencies and other organisations on the impact of the Act. Two pilot programs for the rehabilitation of young offenders are then examined: the Mentoring for Young Offenders program, which was fully evaluated in 2002, and the Youth Drug Court, which has been operating since July 2000. The paper concludes with a review of political perspectives on the treatment of juvenile offenders.

The terms 'child', 'juvenile' and 'young person' are used at different times, depending on the legislation or program in question. The meaning of those terms in the criminal law generally accords with the definition of 'child' in the *Young Offenders Act 1997*: a person who is of or over the age of 10 years and under the age of 18 years. In certain circumstances, other age limits apply and will be specified where relevant, such as the maximum age for staying in a juvenile detention centre.

This paper represents the laws of New South Wales, and information publicly available on diversionary programs for young offenders, as at the end of February 2003.

¹

Indictable offences are serious offences that may be presented on indictment in the District Court or Supreme Court. Summary offences are less serious offences, and are heard in the Local Court or Children's Court. However, many indictable offences are permitted to be dealt with summarily.

2. APPLICATION OF THE CRIMINAL LAW TO JUVENILE OFFENDERS

2.1 The age of criminal responsibility

In New South Wales the age of criminal responsibility is 10 years. Section 5 of the *Children (Criminal Proceedings) Act 1987* states: ‘It shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence.’

According to the common law doctrine of *doli incapax*, a child younger than 14 years is incapable of committing a crime because they lack criminal intent (*mens rea*). Consequently, children from the age of 10 until turning 14 years are covered by a rebuttable presumption that they cannot be found guilty of a crime. To overcome this presumption, the prosecution must prove beyond a reasonable doubt that the child knew that their conduct was seriously wrong, as opposed to mere naughtiness or childish mischief: *C v Runeckles* (1994) 79 A Crim App R 255; *R v CRH* (unreported, NSW CCA, 18 December 1996). The closer the child is to 10 years, the stronger the evidence must be to rebut the presumption of *doli incapax*: *B v R* (1958) 44 Crim App R 1.

In 1997 the Australian Law Reform Commission recommended that: ‘The principle of *doli incapax* should be established by legislation in all jurisdictions to apply to children under 14.’ The Commission regarded the principle as ‘a practical way of acknowledging young people’s developing capacities. It allows for a gradual transition to full criminal responsibility.’² But there are other perspectives on this issue. Some lawyers consider that a teenager of 13 years is too old to be presumed to lack criminal intent.³ Or it could be argued that the burden of proof should be shifted to the child’s legal representative to prove on the balance of probabilities that the child did not know that the act done was wrong.

In 1998, a 10 year old boy (who could not be named) became the youngest person in New South Wales to be charged with the crime of manslaughter, after he allegedly caused the drowning of 6 year old Corey Davis in the Georges River. Amid community debate, the Director of Public Prosecutions, Nicholas Cowdery QC, used his power to personally issue an indictment for the boy to be tried in the Supreme Court when the Senior Children’s Magistrate declined to commit him for trial. The boy was acquitted by a jury on 4 December 1999.⁴

² Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process*, Report No 84, 1997, para 18.20, Recommendation 195.

³ For example in 1999, the then Senior Children’s Magistrate, Stephen Scarlett, advocated that the ‘defence’ of *doli incapax* should only be available to the age of 12: ‘Boy to face trial for manslaughter’, *The Sydney Morning Herald*, 5 May 1999, p 3.

⁴ ‘Boy to face trial for manslaughter’, *The Sydney Morning Herald*, 5 May 1999, p 3; ‘Boy cleared of killing’, *The Sydney Morning Herald*, 5 December 1999, p 9.

2.2 Jurisdiction of the courts over juvenile offenders

The *Children (Criminal Proceedings) Act 1987* indicates that criminal proceedings against children should be commenced by summons or court attendance notice, rather than by arrest and charge. Exceptions to this principle are outlined by s 8(2) of the Act, for example, where the offence in question is a serious children's indictable offence⁵ or a serious drug offence, or the child is unlikely to comply with a summons/court notice, or the child should not be allowed to remain at liberty because of their violent behaviour.

Depending on the matter in question, children can appear before the Children's Court, Local Court, District Court or Supreme Court.

(i) Children's Court

Most criminal charges against juveniles are heard in the Children's Court. The main statutes which affect the operation of the court are the *Children's Court Act 1987* and the *Children (Criminal Proceedings) Act 1987* (especially Part 3 - Criminal Proceedings in the Children's Court).

The Children's Court has the power to hear and determine proceedings:

- in which the accused was a child (ie. under 18 years) when the offence was committed and was under 21 years when charged before the Children's Court; and
- which involve an indictable offence or summary offence, other than a serious children's indictable offence and certain traffic offences;⁶ or
- which are committal proceedings⁷ for any indictable offence, including a serious children's indictable offence.

The judicial officers of the Children's Court are called Children's Magistrates, and the chief children's judge in the State is the Senior Children's Magistrate. There are permanent Children's Courts such as Bidura Children's Court at Glebe, Cobham Children's Court at

⁵ A 'serious children's indictable offence' is defined in s 3 of the *Children (Criminal Proceedings) Act 1987* and includes: homicide; aggravated sexual assault and assault with intent to have sexual intercourse; offences punishable by a maximum penalty of 25 years imprisonment, eg. aggravated robbery, and drug offences involving large commercial quantities; and offences of manufacturing or selling firearms punishable by imprisonment for 20 years by the *Firearms Act 1996*. Note that the firearm offences were recently added to the definition by the *Crimes Legislation Amendment Act 2002* No 130, effective from 24 February 2003.

⁶ The Court generally does not have jurisdiction to hear proceedings for traffic offences, except in the limited circumstances outlined by s 28(2) of the *Children (Criminal Proceedings) Act 1987*.

⁷ A committal is a hearing at which a Magistrate determines whether there is sufficient evidence to commit an accused person to stand trial.

Werrington, Lidcombe Children's Court, Campbelltown Children's Court, and Worimi Children's Court in Newcastle. In addition, Children's Magistrates hear cases at Local Court venues across the State.

Children's Courts are operated as 'closed' courts and members of the general public are excluded. Section 10 of the *Children (Criminal Proceedings) Act 1987* entitles persons with a direct interest in the proceedings, members of the immediate family of a deceased victim, and journalists to be present. In practice, interested persons covers solicitors, counsellors from community and welfare organisations, and officers from the Department of Community Services and the Department of Juvenile Justice. Generally the rules pertaining to evidence and criminal procedure apply in the Children's Court, but the penalties that it may impose are specialised and do not include imprisonment: s 33(4).

(ii) Local Court

The Local Court is not permitted to hear charges against young people when the Children's Court has jurisdiction: s 7 of the *Children (Criminal Proceedings) Act 1987*. The majority of offences committed by juveniles that are heard in the Local Court are driving offences. This is because s 28(2) of the Act precludes the Children's Court from handling traffic offences, unless the offence arose out of the same circumstances as another charge before the court, or the offender was too young to hold a driver's licence at the time of the offence.

(iii) Higher Courts

If a child is charged before the Children's Court with an indictable offence and the Children's Magistrate decides that the charge may not properly be disposed of summarily, the Magistrate can commit the child for trial or sentence to the District Court or the Supreme Court, as appropriate: s 31.

These higher courts have a discretion to sentence a child convicted of an indictable offence according to the ordinary law (ie. as an adult), or to remit the offender to the Children's Court to be sentenced under the regime of children's penalties available in the *Children (Criminal Proceedings) Act 1987*. A court may only remit a child who is still under 21 years at the time of appearing before the court: s 20.

Serious children's indictable offences⁸ must be heard in either the District Court or Supreme Court, depending on the offence.⁹

⁸ See the definition of 'serious children's indictable offence' at Footnote 5.

⁹ All indictments are required to be presented in the District Court, except for the offences detailed by *Practice Note 98*, issued by the Chief Justice of the Supreme Court on 22 April 1998, as amended by *Practice Note 113*, issued on 14 April 2000, and *Practice Note 122*, issued on 28 August 2001. Some of the offences excepted from the direction to present indictments in the District Court are murder, manslaughter, and offences with a maximum penalty of life imprisonment where the imposition of a life sentence may be appropriate.

2.3 Penalty options when sentencing children

(i) Offences dealt with summarily

The penalties that may be imposed on children who have committed offences that are dealt with summarily, or when an indictable offence is remitted to the Children's Court for sentencing, are outlined by s 33 of the *Children (Criminal Proceedings) Act 1987*.

The penalties under s 33 are available to an offender who is younger than 18 years at the time of committing the offence and less than 21 years at the time of appearing before the court: ss 20, 28. The penalties include:

- **dismissal of the charge** with or without a caution: s 33(1)(a);
- **good behaviour bond** not exceeding 2 years, with conditions:¹⁰ ss 33(1)(b), 33(1A);
- a maximum **fine** of 10 penalty units (\$1100), or as prescribed by law for the offence, whichever is less: s 33(1)(c);
- **release on condition of complying with an outcome plan** determined at a youth justice conference held under the *Young Offenders Act 1997*: s 33(1)(c1);
- **'Griffiths remand'**,¹¹ to adjourn the proceedings for a specified period and release the offender on bail for rehabilitation or other purposes: s 33(1)(c2);
- **release on probation**, not exceeding 2 years, on such conditions as the court determines: s 33(1)(e);
- **community service**: s 33(1)(f), subject to the provisions of the *Children (Community Service Orders) Act 1987*;¹²
- **control order** not exceeding 2 years: ss 33(1)(g), 33A. This involves the offender serving a period of detention and is only an option if the penalty at law for the same offence is imprisonment: s 34. Section 33(2) states that the court shall not impose a control order unless it is satisfied that it would be 'wholly inappropriate' to impose one of the other penalties at s 33(1)(a)-(f).

¹⁰ Various conditions can be imposed on the bond, in addition to the compulsory requirements of s 33(1A) that the young person must be of good behaviour and appear at court. But the bond must not entail the performance of community service or payment of a fine or compensation.

¹¹ The name is derived from the High Court case of *Griffiths v R* (1977) 137 CLR 293.

¹² Offenders under 16 years can be ordered to perform a maximum of 100 hours community service. For offenders aged 16 and over, the number of hours varies according to the severity of the offence, up to a maximum of 250 hours.

(ii) Sentencing choices for indictable offences

Section 18(1) of the *Children (Criminal Proceedings) Act 1987* confirms that children who plead guilty to or are convicted of indictable offences (other than serious children's indictable offences¹³) can be dealt with:

- according to the juvenile penalties available under s 33 of the *Children (Criminal Proceedings) Act 1987* (as described above); or
- according to law.

The second option means that the sentencing court considers the types of sentencing options described below at '*(iv) Penalties according to law*' on p 7.

When a court decides to deal with an offender under the children's sentencing regime at s 33 of the *Children (Criminal Proceedings) Act 1987*, the court may exercise the same functions as the Children's Court: s 18(2).

The factors that the court is to take into account in deciding whether to sentence 'according to law' a child who is convicted of an indictable offence (except a serious children's indictable offence, which must be dealt with according to law) are outlined by s 18(1A) of the *Children (Criminal Proceedings) Act 1987*:

- (a) the nature and seriousness of the indictable offence concerned;
- (b) the age and maturity of the person at the time of the offence and at sentencing;**
- (c) the seriousness, nature and number of any prior offences committed by the person; and
- (d) such other matters as the court considers relevant.

These principles were recently inserted by the *Crimes Legislation Amendment Act 2002* No 130, effective from 24 February 2003.¹⁴ Previous to the statutory amendments, similar principles had been developed by case law, most authoritatively in *R v WKR* (1993) 32 NSWLR 447.¹⁵

(iii) Serious children's indictable offences

Children who commit a serious children's indictable offence¹⁶ must be dealt with according to law in the District Court or Supreme Court: s 17. For example, a juvenile convicted of armed robbery with wounding is liable to a maximum penalty of 25 years imprisonment under s 98

¹³ See the definition of 'serious children's indictable offence' at Footnote 5.

¹⁴ *Government Gazette*, No 49 of 21 February 2003, p 2196.

¹⁵ Hunt CJ at CL (with whom Campbell J agreed) stated (at 451) that some of the matters to be taken into account were: the nature of the particular offence; the age and maturity of the offender (both at the time of the offence and at sentence); and the nature of the penalty which would be appropriate to the circumstances of the case in the light of those matters.

¹⁶ See definition at Footnote 5.

of the *Crimes Act 1900*. The range of sentencing options available at law are outlined immediately below.

(iv) Penalties according to law

The custodial and non-custodial penalties available at law (ie. the same as those imposed on adult offenders) are outlined by the *Crimes (Sentencing Procedure) Act 1999*:

- a term of **imprisonment**, as prescribed for the offence (procedures for imposing prison sentences are found at Part 4 of the Act);
- **home detention** – numerous restrictions apply to eligibility, as set out at Part 6;
- **periodic detention** – s 66(1) states that an order for periodic detention ‘may not be made...unless...the offender is of or above the age of 18 years’. This wording suggests that the offender must be 18 at the time the order is made, which would extend to juvenile offenders who have reached 18 since committing their offence;
- **good behaviour bond**, directing that the offender obey certain conditions for a specified term not exceeding 5 years: s 9;
- **suspended sentence**, enabling the court to suspend execution of the sentence for a specified period, on condition that the offender enter into a good behaviour bond: s 12;
- **deferral of sentence** (a ‘Griffiths remand’), whereby the court adjourns the proceedings to a specified date and grants bail for rehabilitation or other purposes: s 11;
- **fine** as prescribed for the offence or, if none specified, a maximum of 1000 penalty units (\$110,000) under s 15;
- **community service**, although separate legislation – the *Children (Community Service Orders) Act 1987* – applies to persons who are under 18 years at the time of the offence and under 21 when charged before the court;
- **dismissal of a charge**, or discharge on condition of entering into a good behaviour bond not exceeding 2 years: s 10.

(v) Undertakings

The *Children (Protection and Parental Responsibility) Act 1997* provides that a court exercising criminal jurisdiction which finds a child guilty of an offence may, instead of dealing with a child in any other way permitted by law, release the child on condition that the child give an undertaking to:

- (a) submit to parental or other supervision as ordered by the court; or
- (b) participate in a specified program or attend a specified activity centre; or
- (c) reside with a parent or other person, as directed by the court; or

(d) do such other thing as may be specified by the court: s 8.

Furthermore, s 9 allows the court to release the child on condition that one or more of the parents of the child give an undertaking to take specified action to assist the child's development, guarantee the child complies with his/her own undertaking, and so on. Section 7 also enables courts to require a parent or parents to be present at proceedings concerning their child.

These provisions were recently analysed in the *Review of the Children (Protection and Parental Responsibility) Act 1997* which was conducted 3 years after the Act's assent, as required by s 50. The review found that such undertakings had been used by only a small proportion of Magistrates and recommended that the Government consider relocating the provisions to the *Children (Criminal Proceedings) Act 1987*.¹⁷

(vi) Diversionary options

Rather than pursuing the conventional path to sentencing when a young person has admitted to an offence, courts can utilise the diversionary options available under the *Young Offenders Act 1997*, subject to eligibility requirements. Section 31 of the *Young Offenders Act 1997* authorises courts to caution a young offender, which seems to duplicate the power to caution under s 33(1)(a) of the *Children (Criminal Proceedings) Act 1987*. The court can also refer a matter to be considered for a youth justice conference, pursuant to s 40 of the *Young Offenders Act 1997*. Various eligibility criteria must first be satisfied before accessing these remedies. For example, offences must be summary offences or able to be dealt with summarily: s 8. The regime of the *Young Offenders Act 1997* is examined in detail in Chapter 3 of this briefing paper at p 12.

2.4 Serving custodial sentences in juvenile or adult facilities

Young offenders who receive a control order are sentenced to periods of detention. This is generally served in a juvenile detention centre, an institution administered by the Department of Juvenile Justice.

The *Children (Criminal Proceedings) Act 1987* sets guidelines on the age up to which a young offender can stay in a juvenile detention centre. Prior to January 2002, if a court imposed a prison sentence on a person who committed an indictable offence as a child and

¹⁷ Only 10% of Magistrates surveyed had used the provisions. Their reasons for employing them included to assist parents of child offenders to better manage their children, and to ensure that parents attended court. Some noted that equivalent powers were not available in the *Children (Criminal Proceedings) Act 1987* and the *Young Offenders Act 1997*. But other Magistrates believed that the wide range of options in those Acts had made the undertakings in the *Children (Protection and Parental Responsibility) Act 1997* redundant, particularly as the undertakings were not enforceable: *Review of the Children (Protection and Parental Responsibility) Act 1997: Report of the Co-ordination and Evaluation Committee*, July 2001, Appendix A - Part 2, para 4.1. Accessed on the website of the Crime Prevention Division of the Attorney General's Department at <www.agd.nsw.gov.au/cpd.nsf> on 30 January 2003.

was still under 21 years when ‘charged before the court with the offence’, the judge could direct that the whole or part of the sentence be served in a juvenile detention centre. This meant that many detainees remained in juvenile facilities well into adulthood.

The law became more restrictive with the commencement of the *Children (Criminal Proceedings) Amendment (Adult Detainees) Act 2001* on 25 January 2002. Section 19(2) of the *Children (Criminal Proceedings) Act 1987* now stipulates that a juvenile who receives a sentence of imprisonment for committing an indictable offence is not eligible to serve that sentence in a juvenile detention centre after attaining the age of 21 years, unless their time in custody ends within 6 months of their 21st birthday.¹⁸

A juvenile who is sentenced to imprisonment for a ‘serious children’s indictable offence’¹⁹ is not eligible to remain in a juvenile detention centre after reaching 18 years of age: s 19(3). Exceptions to this rule may apply if ‘special circumstances’ are found, or when the period in custody will end within 6 months of the offender’s 18th birthday. Issues which may be considered in determining special circumstances include the vulnerability of the offender and the availability of appropriate services or programs at particular facilities.

Therefore, unless the exceptions in the legislation apply, juvenile offenders will be transferred to adult prisons upon reaching the age specified.

2.5 Naming children connected to criminal proceedings

Legislative provisions restrict the naming of juvenile offenders. The name of an accused person or a witness who was a child at the time of an alleged criminal offence must not be published or broadcast in a way that connects the person with the criminal proceedings for that offence: s 11 of the *Children (Criminal Proceedings) Act 1987*. The section also covers any person who is mentioned in criminal proceedings or is otherwise involved in the proceedings and was a child at the time of the events in question.

The prohibition applies irrespective of whether the naming occurs before or after the proceedings are disposed of, and even if the person is no longer a child. The maximum penalty for contravening this provision is 12 months imprisonment and/or a fine of 500 penalty units (currently \$55,000) for a corporation or 50 penalty units (\$5500) for an individual: s 11(3). Exceptions are available in limited circumstances, such as when the person concerned consents to be named.

A court that sentences a person convicted of a serious children’s indictable offence may authorise publication or broadcasting of the offender’s name without their consent, if the prejudice to the person arising from making such an order does not outweigh the interests of justice: s 11(4B-4C).

¹⁸ The actual time spent in custody will be the non-parole period in cases where the judge divides the sentence into non-parole and parole periods, or the ‘term of the sentence’ where a non-parole period is not specified.

¹⁹ See definition of ‘serious children’s indictable offence’ at Footnote 5.

Naming is construed broadly by s 11(5) to include a reference to any information or material that is likely to lead to the identification of the person.

Similar protections are also extended to juveniles who participate in the system of cautions, warnings and conferences under the *Young Offenders Act 1997*: see ‘**3.9 Other aspects of the Young Offenders Act 1997**’ on p 24.

Some problems with revealing the identity of juveniles are that their rehabilitation, opportunities for future development, and reintegration back into society may be hampered. Family members could also be stigmatised if connected to a named juvenile offender.

However, others believe that juveniles should be named as part of being held accountable for their actions. Former Police Commissioner, Peter Ryan, expressed support on several occasions during his time in office for ‘naming and shaming’ violent juvenile offenders.²⁰

2.6 Criminal records of children

If a child commits an offence that can be dealt with summarily, a court shall not proceed to (or record) a conviction for a child under 16 years of age, and has a discretion not to convict a child 16 years or over: s 14 of the *Children (Criminal Proceedings) Act 1987*. However, a court can record a conviction when the offence is an indictable offence that is not disposed of summarily.

In the Local, District and Supreme Courts, evidence that a person pleaded guilty to, or was convicted of, an offence committed when they were a child, cannot be admitted into evidence if no conviction was recorded in relation to that offence and the person has not been punished for any other offence in the last 2 years. No such restriction applies to the Children’s Court: s 15 of the *Children (Criminal Proceedings) Act 1987*.

A person who has received a warning, caution, or conference under the *Young Offenders Act 1997* for an offence does not have to disclose the offence as a criminal antecedent, except in an application for certain types of employment. Again, the Children’s Court is not bound by the restriction and can take the prior matter into consideration, for example, when sentencing the young person for another offence: s 68 of the *Young Offenders Act 1997*.

Another statute of relevance on this subject is the *Criminal Records Act 1991* which limits the effect of a person’s conviction for a relatively minor offence if the person completes a period of crime-free behaviour. For convictions in the Children’s Court, a crime-free period of not less than 3 consecutive years applies. During this period, the person must not be convicted of an offence punishable by imprisonment. If the person achieves this, a conviction (except for a conviction for a sexual offence or an offence for which a sentence of more than 6 months imprisonment²¹ was imposed) is to be regarded as spent and, subject

²⁰ ‘Name and Shame Young Criminals Says Police Chief’, *The Daily Telegraph*, 30 October 1998, p 7; ‘Name and Shame the Thugs: Ryan’, *The Daily Telegraph*, 20 October 1999, p 7.

²¹ The definition of ‘prison sentence’ explicitly excludes periodic detention or detaining a

to some exceptions, is not to form part of the person's criminal history. In cases where the Children's Court found an offence proved but dismissed the charge (with or without administering a caution), the conviction is immediately spent.

Reducing the criminal history of a young person in this way can potentially have positive or negative effects. According to the New South Wales Law Reform Commission:

These laws are designed to minimise the labelling of young people...This reflects the fact that most young offenders "grow out" of crime and it is unfair to label them as criminals as adults merely because of youthful mistakes. Related to this is the view that an offence committed when a person was under 18 should not be allowed to affect their ability to obtain employment and travel...On the other hand, depriving sentencing courts of information about previous offences committed by offenders and previous sentences makes it more difficult for courts to sentence offenders appropriately.²²

person under a control order, ie. juvenile detention.

²² New South Wales Law Reform Commission, *Sentencing: Young Offenders*, Issue Paper 19, July 2001, paras 3.90-3.91.

3. OUTLINE OF THE YOUNG OFFENDERS ACT 1997

The *Young Offenders Act 1997* No 54 received assent on 2 July 1997 and had commenced in full by 6 April 1998.

Broadly, the role of the Act is to divert juveniles who commit less serious offences away from court and into alternative options for addressing their anti-social behaviour. The procedures available for dealing with children accused of offences covered by the Act are:

- giving a **warning** to the child: Part 3;
- issuing a **caution**: Part 4;
- holding a **youth justice conference**: Part 5.

3.1 Background to the Act

By the mid 1990s, numerous diversionary programs for juvenile offenders were operating across New South Wales. For example, a police cautioning model was implemented in Wagga Wagga between 1992 and 1995, and Community Aid Panels started in Wyong in 1987, using conferencing between a first-time offender (usually a juvenile), police, and community representatives to devise a suitable means of restitution for an offence.

The Carr Government expressed support for alternatives to court proceedings for juvenile offenders, pointing to research that showed that the rates of reoffending increase proportionately with the severity of the first penalty imposed on a juvenile; that incarceration can compound anti-social behaviour; and that families and victims were dissatisfied with their lack of involvement in formal court proceedings.²³

The Government advocated that legislation was necessary to regulate juvenile diversionary programs because:

...empirical evidence suggests that there is substantial variation across the State - and over time - in the use made of pre-trial diversionary options for young offenders and that, compared with many other jurisdictions, diversionary options have been underutilised in this State. Criticism has also been levelled at the proliferation of pre-court interventions currently operating in New South Wales. It has been suggested that these programs lack consistency and accountability and that there is a lack of guidance provided with respect to their use.²⁴

Introducing the Young Offenders Bill in May 1997, the then Attorney General, Hon. Jeff Shaw QC MLC, announced that the legislation:

²³ Young Offenders Bill, Second Reading Speech, Attorney General, Hon. Jeff Shaw QC MLC, *NSWPD*, 21 May 1997, p 8958.

²⁴ *Ibid*, p 8958.

...builds on the work that has already been done in the State, by introducing a structured, consistent and principled approach to dealing with juvenile offending across the State.

...

It is the Government's intention and belief that the bill will lead to a more effective system of limited police and justice system resources through a significant increase in the use of alternative interventions for young people alleged to have committed less serious offences.²⁵

3.2 Definitions

Terminology used in the *Young Offenders Act 1997* is defined at ss 4-5:

'Child' - a person who is of or over the age of 10 years and under the age of 18 years.

'Investigating official' - a police officer.

'Specialist youth officer' - a member of the police service who is appointed as a specialist youth officer by the Commissioner of Police for the purposes of the Act. Cases are referred to these officers for the determination of specific decisions under the Act.²⁶

'Victim' - a person who suffers harm as a direct result of an act committed by a child in the course of a criminal offence. The concept of harm includes actual physical bodily harm, mental illness, nervous shock, or the deliberate taking, destruction, or damage of property. A victim can be an organisation or a Government authority, and in such cases a representative of the organisation/authority can attend youth justice conferences.

'Parent' of the child - includes a guardian or a person who has lawful custody of the child.

'Person responsible' for the child - a parent of the child or a person who has the care of the child, whether or not the person has custody.

3.3 Objects and guiding principles

The objects of the Act are stated at s 3:

- **to establish alternatives to court proceedings**, through the use of youth justice

²⁵ Ibid, pp 8958, 8959.

²⁶ In practice, the Commissioner of Police delegated his power under the Act to appoint specialist youth officers (SYOs) to the Local Area Commander. Existing Youth Liaison Officers in the Police Service were all appointed as SYOs, and the majority of custody managers (police who have responsibility for the care, control and safety of persons detained at police stations or other places of detention) also became SYOs: N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW): Report to Youth Justice Advisory Committee*, October 1999, para 58.

- conferences, cautions and warnings, for children who commit certain offences;
- **to provide an efficient and direct response** to the commission of certain offences by children; and
 - **to use youth justice conferences** to deal with alleged offenders in a way that: enables a community-based, negotiated response to offences; emphasises the acceptance of responsibility and restitution by the offender; and meets the needs of victims and offenders.

Section 7 outlines the principles that guide the operation of the Act and persons exercising functions under it:

- **the least restrictive form of sanction** is to be applied against a child who is alleged to have committed an offence;
- children accused of an offence are entitled to be informed about their **right to obtain legal advice** and given the opportunity to do so;
- criminal proceedings are not to be instituted against a child if there is an **alternative and appropriate** means of dealing with the matter;
- criminal proceedings are not to be instituted against a child **solely in order to provide any assistance or services** to advance the welfare of the child or his or her family;
- children accused of an offence should be **dealt with in their communities** to assist their reintegration and to sustain family and community ties;
- **parents are to be included in legal processes** involving children and recognised as being primarily responsible for children's development;
- **victims are entitled to receive information** about action taken under the Act.

3.4 Offences covered by the Act

The *Young Offenders Act 1997* is aimed at diverting less serious juvenile offenders. An offence is covered by the Act if:

- it is alleged to have been committed by a child; AND
- it is a summary offence; OR
- it is an indictable offence that may be dealt with summarily under Part 2 of the *Criminal Procedure Act 1986* (see below); AND
- it is not explicitly excluded by s 8(2), for instance:
 - an offence resulting in the death of any person;
 - domestic violence offences;
 - serious drug offences (explained below);
 - various types of indecent assault and sexual assault;
 - a traffic offence committed by a child who was old enough to obtain a learner's licence when the alleged offence occurred - these offences are governed by road transport legislation and are heard in the Local Court.

Indictable offences that may be dealt with summarily pursuant to the *Criminal Procedure Act 1986* include larceny, common assault, and malicious damage. An example of an

offence that cannot be handled summarily is armed robbery. Therefore, a juvenile who commits an armed robbery could not be 'let off' with a warning, caution or conference under the *Young Offenders Act 1997*.

Drug offences that are covered by the *Young Offenders Act 1997* (ss 8(2), 8(3)) include:

- possession of a prohibited drug (and other offences in Part 2, Division 1 of the *Drug Misuse and Trafficking Act 1985*) where not more than a 'small quantity' is involved;
- knowingly taking part in the cultivation of a prohibited plant (s 23(1)(a) of the *Drug Misuse and Trafficking Act 1985*), or possessing a prohibited plant (s 23(1)(c)), or aiding, abetting, soliciting or inciting such an offence (ss 27-28), if in the opinion of the investigating police officer or prosecuting authority:
 - the offence involves not more than half the 'small quantity' applicable to the prohibited plant under the *Drug Misuse and Trafficking Act 1985*; OR
 - there are exceptional circumstances, in that the offence involves more than half but no more than the 'small quantity', and it is in the interests of rehabilitation, and appropriate in all the circumstances, to deal with the matter under the *Young Offenders Act 1997*.

The amount of a 'small quantity' depends on the prohibited drug in question. Quantities are stipulated in Schedule 1 of the *Drug Misuse and Trafficking Act 1985*. For example, a small quantity of heroin, cocaine or amphetamine is one gram, while 30 grams of cannabis leaf or five cannabis plants equal a small quantity of cannabis.

The definition of a 'prohibited plant' includes a cannabis plant, meaning a growing plant of the genus *Cannabis*: s 3 of the *Drug Misuse and Trafficking Act 1985*. Prior to the *Criminal Legislation Amendment Act 2001* No 117, which commenced on 21 December 2001, a juvenile could be dealt with under the *Young Offenders Act 1997* if they possessed or cultivated up to a small quantity of a prohibited plant, that is, double the amount that is now allowed.

3.5 Admission of offences

A prerequisite for cautioning a child or convening a conference under the *Young Offenders Act 1997* is that the child admit to the offence: ss 19, 36. But s 10 stipulates that a child's admission to an offence is not an admission for the purposes of the Act unless it takes place in the presence of:

- (a) a person responsible for the child; or
- (b) an adult (other than a police officer) who is present with the consent of a person responsible for the child; or
- (c) an adult chosen by the child - if the child is 16 years or over; or
- (d) a legal practitioner chosen by the child.

This list of acceptable persons is replicated whenever the Act requires something to be done in the presence of a person responsible for the child.

3.6 Warnings

Warnings may be issued by police officers to children who commit a summary offence covered by the *Young Offenders Act 1997*: s 13. (See excluded offences under ‘**3.4 Offences covered by the Act**’ on p 14.) However, a child may not be given a warning if the circumstances of the offence involve violence, or in the opinion of the police officer it is not in the interests of justice for the matter to be dealt with by a warning: s 14.

Police may give a warning to a child at any place. Conditions may not be attached to warnings, nor any additional sanctions imposed. A child is not precluded from being warned merely because the child has prior offences.

A police officer who issues a warning to a child must take steps to ensure that the child understands the purpose, nature and effect of the warning, and the officer must make a record of the warning: ss 16, 17.²⁷

3.7 Cautions

In what circumstances can a caution be given?

A formal police caution may be given for any offence covered by the *Young Offenders Act 1997*, provided that the child admits to the offence, consents to the giving of the caution, and is entitled to be given a caution: ss 18, 19.

Section 20 clarifies that a child is entitled to be dealt with by a caution if the police determine that the matter is not appropriate or eligible for a warning, and that it is in the interests of justice for the matter to be dealt with by a caution. In making this determination, the police officer is to consider:

- (a) the seriousness of the offence;
- (b) the degree of violence involved in the offence;
- (c) the harm caused to any victim;
- (d) the number and nature of any prior offences and the number of times the child has been dealt with under the Act. However, s 20(6) confirms that a child is not precluded from being given a caution merely because the child has previously committed offences or been dealt with under the Act;
- (e) any other matter the police officer thinks appropriate in the circumstances: s 20(3).

Limit of 3 cautions

An important restriction was recently introduced to the system of cautions. The *Young Offenders Amendment Act 2002* No 69, which commenced on 15 November 2002, inserts s 20(7) to provide that a child is not entitled to be cautioned if he or she has been dealt with

²⁷

Clause 15 of the *Young Offenders Regulation 1997* specifies the particulars that a record of a warning must contain: the name and gender of the child, the nature of the offence, the time of the offence and the place where it occurred.

by caution on 3 or more occasions. The limitation applies irrespective of whether a police officer, specialist youth officer, or court instigated the caution, and whether the offences were of the same or a different kind. See further commentary on this amendment at **'POLITICAL PERSPECTIVES IN 2002-2003 ON THE DIVERSION OF YOUNG OFFENDERS'** on p 55.

Who may issue a caution?

Under s 27, a caution is to be issued by a police officer or specialist youth officer authorised in writing by the Commissioner of Police to perform this function under the Act. A caution may also be given by a 'respected member of the community' at the request of any such officer, if the officer is of the opinion that it is appropriate in the circumstances to do so. For example, a caution could be given to an indigenous young offender by an Aboriginal elder. Courts are granted the power to caution by s 31, additional to their capacity to caution a child pursuant to s 33 of the *Children (Criminal Proceedings) Act 1987*. A court that delivers a caution under the *Young Offenders Act 1997* must supply written notification to the Local Area Commander of police where the offence occurred, and state reasons for giving the caution.²⁸ Section 23 also makes provision for the Director of Public Prosecutions to refer a child for a caution but not to directly administer the caution.

Explanation and notification to child before caution

Before a police officer proceeds to arrange for a caution to be given, the police officer must explain to the child:

- (a) the nature of the offence and the circumstances out of which it is alleged to arise;
- (b) that the child is entitled to obtain legal advice and where to obtain that advice;
- (c) that the child is entitled to elect that the matter be dealt with by a court;
- (d) the purpose, nature and effect of the caution: s 22.

The police officer must, if practicable, ensure that the explanation takes place in the presence of a suitable person – the same list of people as described above at **'3.5 Admission of offences'** on p 15.

Furthermore, s 24 requires the person arranging for the caution to supply a written notice to the child before the caution, outlining similar matters to those stated in the verbal explanation, plus details of where and when the caution is to be given, who may be present, the name of a contact police officer, and the consequences of failing to attend the caution. Another notice must be provided to the child after the caution, describing who was present, who gave the caution, and other details. This notice must be signed by the child: s 30.

Where and when to give a caution

A caution must, if practicable, be given not less than 10 days, and not more than 21 days,

²⁸ Note that only the provisions at ss 31-32 (power to caution, recording the caution, and no further proceedings to ensue) apply to cautions issued by courts.

after notice of the caution is provided: s 26. A caution is to be performed at a police station, or at some other place if the person delivering the caution is of the opinion that it is appropriate in the circumstances to do so.

Right not to proceed

At any time before the caution is administered, the child, the police, or the Director of Public Prosecutions can elect not to proceed with the caution: s 25.

Who may be present?

Section 28 lists the people who may be present at the caution along with the child and the person giving the caution, including: a person responsible for the child, members of the child's family, a respected member of the community chosen by the child, an interpreter, the investigating police officer (if they are not already giving the caution), an appropriate professional if the child has a communication or cognitive disability or is under care, and a supervising officer if the child is on probation. There is no explicit mention of legal practitioners. A positive duty is placed by s 29 on the person giving the caution to ensure, if practicable, that a person responsible for the child or an adult chosen by the child is present when the caution is given.

Conditions attached to a caution

A person who gives a caution to a child may request the child to provide a written apology to any victim of the alleged offence: s 29(4). But no other condition or additional sanction may be imposed.

Consequences of a caution

The consequence of a caution is that no further proceedings may be taken against the child for the same offence: s 32. However, s 33 requires a record of the caution to be made by the police officer or court that issues it. Clause 16 of the *Young Offenders Regulation 1997* states that the record must identify the child's name, address, date of birth, gender, cultural or ethnic background; the nature of the offence; the person who gave the caution; when and where the caution was issued and who was present. Clause 16 also requires the Police Service to keep a record on their computer database, COPS (Computerised Operational Policing System). Although a caution is not generally treated as a criminal antecedent, information about the caution will be available to the Children's Court, for example when sentencing a child for another matter: s 68.

3.8 Youth justice conferences

Youth conferencing is a type of restorative justice. The philosophy of restorative justice is to encourage offenders to take responsibility for their criminal behaviour and repair the damage done to the victim and the community. Conferencing brings the offender, the victim, and representatives from the community together to formulate a constructive remedy.

The inception of youth conferencing in Australia was influenced by New Zealand's experiences with family group conferences. The *Children, Young Persons and Their Families Act 1989* (NZ) gave a statutory framework to the conferences, which draw upon the cultural values of the Maori people.

The Carr Government when introducing youth conferences stated that: 'Conferences are not a soft option for young offenders and should not be utilised for first offenders unless the circumstances of the offence warrant such an intervention being taken.'²⁹

The conferencing scheme is coordinated by the Youth Justice Conferencing Directorate, which is located within the Department of Juvenile Justice. The first conference was held in June 1998.³⁰

Principles of conferencing

The principles and purposes of conferences are outlined at s 34 of the *Young Offenders Act 1997*. The chief purpose of a conference is to make decisions and recommendations about, and determine an outcome plan for, the child who is the subject of the conference: s 34(2).

The main principles that are to guide the operation of conferences are:

- to encourage the child to accept responsibility for his or her own behaviour;
- to deal with children in a way that reflects their rights, needs and abilities;
- to provide the child with developmental and support services to enable the child to overcome their offending behaviour;
- to empower families in making decisions about a child's offending behaviour and to promote the development of the child within their family, and;
- to be culturally appropriate, wherever possible;
- to impose the least restrictive sanction appropriate in the circumstances;
- to take into account: the age and level of development of the child; their gender, race and sexuality; and the needs of children who are disadvantaged, disconnected from their families, or who have disabilities;
- enhance the rights and interests of victims, and make reparation to victims.

²⁹ Young Offenders Bill, Second Reading Speech, Attorney General, Hon. Jeff Shaw QC MLC, *NSWPD*, 21 May 1997, p 8960.

³⁰ 'Conferencing' category on the Department of Juvenile Justice website at <www.djj.nsw.gov.au>

Eligibility for a conference

Sections 35-36 confirm that a conference may be arranged and held for a child who is alleged to have committed an offence, if:

- the offence is covered by the *Young Offenders Act 1997*; and
- the offence is one for which a conference may be held; and
- the child admits the offence; and
- the child consents to the holding of the conference; and
- the child is entitled to be dealt with by a conference.

A child is not entitled to be dealt with by holding a conference if, in the opinion of the specialist youth officer (see '**3.2 Definitions**' on p 13) to whom the matter is referred, it is not in the interests of justice and is more appropriate to deliver a caution or to commence proceedings against the child: s 37. A child is not precluded from being dealt with by a conference merely because the child has previously committed offences or been dealt with under the Act: s 37(5).

Referral by the police to specialist youth officer

If a police officer is of the opinion that it is not in the interests of justice to deal with a child under the cautioning or warning options of the Act, the officer must refer the matter to a specialist youth officer to consider whether a conference would be appropriate: ss 14(4), 21. Police also have a discretion under s 20(4) to refer the matter to a specialist youth officer if the victim has suffered substantial harm (or other circumstances of the victim make a referral appropriate), even though the offence 'does not involve any degree of violence or is not of a serious nature.'

The specialist youth officer must, not later than 14 days after receiving such a referral, determine whether or not the child concerned is entitled to have the matter dealt with by holding a conference. In assessing whether a conference is appropriate, a specialist youth officer is to consider the matters listed under s 37(3). These are the same as for cautions under s 20(3), namely:

- (a) the seriousness of the offence;
- (b) the degree of violence involved in the offence;
- (c) the harm caused to any victim;
- (d) the number and nature of any offences committed by the child and the number of times previously dealt with under the Act;
- (e) any other matter the officer thinks appropriate in the circumstances.

A specialist youth officer has a discretion to refer a matter to a conference administrator for a conference, or back to the police for a caution, or to the appropriate authority for commencement of court proceedings: s 38.

Section 39 imposes the same obligations on the specialist youth officer to explain to the

child the procedures and entitlements with regard to conferences, as apply under s 22 to police giving cautions: see '*Explanation and notification to child before caution*' under '**3.7 Cautions**' on p 17.

Referral by the court or DPP to conference administrator

Section 40 allows a court or the Director of Public Prosecutions to refer a matter involving a child who is alleged to have committed an offence to a conference administrator for a conference. In practice, the Director of Public Prosecutions has not exercised the 'gatekeeper' role envisaged in s 40 because the Director does not prosecute summary matters.³¹

Role of conference administrator

The conference administrator is a person appointed to implement the conferencing scheme at a local level in a managerial and administrative capacity, and consequently has little direct contact with participants. There are currently 17 conference administrators located in Department of Juvenile Justice offices around the State.³² If a specialist youth officer refers a matter for a conference and the conference administrator disagrees with the referral, the conference administrator must (unless it is impracticable) consult with both the specialist youth officer and the investigating police officer regarding whether a conference should be held. If they fail to agree, the conference administrator must refer the matter to the Director of Public Prosecutions for a decision on how to proceed: s 41. Since the *Young Offenders Act 1997* commenced, 138 determinations have been made by the Director of Public Prosecutions.³³

Conference convenor

When an offence is to be dealt with by a youth justice conference, the conference administrator appoints a conference convenor whose duties include arranging the date, time and place of the conference, deciding who should be invited to attend, and presiding over the conference.

Notifying participants

Section 45(3) requires the conference convenor, before a conference is held, to supply written notification to the child of the conference details; the rights of the child; and the

³¹ At the time of the enactment of the *Young Offenders Act 1997*, there were prospects that the prosecution of summary matters, including those involving children, would be transferred from Police Prosecutors to the Office of the Director of Public Prosecutions but that has not occurred.

³² 'Conferences' category on the Department of Juvenile Justice website at <www.djj.nsw.gov.au>

³³ As at 17 February 2003. Personal communication from Philip Dart, the Assistant Solicitor for Public Prosecutions (Sydney).

requirements to be met by the child. The conference convenor also advises any victim of the victim's right to attend and be accompanied by support persons, or to be represented by a person of their choosing: s 45(2)(b).

Conference timeframe

A conference must, if practicable, be held not later than 21 days after the referral for the conference is received by the conference administrator and not less than 10 days after the child is notified: s 43.

If practicable, the conference must be concluded not later than 7 days after it is first convened: s 48(7). Adjournments may be granted to allow discussions between the child and the child's family/person responsible for the child.

Young person's right to not proceed

A child may, at any time before a conference is held, decide not to proceed with the conference and elect that the matter be dealt with by a court: s 44.

Conference locations

A conference may be held at a location agreed to by the participants and the conference convenor but may not be held at a police station, a court house or any office of the Department of Juvenile Justice: s 46. However, a conference may be held in a juvenile detention centre, if the child is detained there.

Who may attend?

Section 47 creates a division between people entitled to join the convenor and the child offender at the conference, and additional persons who may be invited to attend. Those who have a right to attend are: a person responsible for the child; members of the child's family or extended family; an adult chosen by the child; a legal practitioner advising the child; the investigating police officer; a specialist youth officer; a victim or their representative; and support persons of the victim. Although a legal practitioner is entitled to advise the child at the conference, the practitioner may only 'represent' the child at the discretion of the conference convenor and subject to any conditions or limitations that the convenor imposes.

If the conference convenor thinks it appropriate, invitations may be extended to: a respected member of the community (for the purpose of advising participants on relevant issues); an interpreter; a representative of a school attended by the child; an appropriate professional if the child has a communication or cognitive disability, or is under care, or is subject to a probation or community service order; and any other person requested by the child's family or extended family.

The convenor may eject from the conference any person (other than the child or the victim) whose presence is not in the best interests of the child or who frustrates the conduct of the conference: s 48(3).

Outcomes of conferences

The participants at a conference may agree to make such recommendations or decisions as they wish. An outcome plan is, if possible, to be determined by consensus but a unanimous decision is not compulsory. The crucial opinions are those of the child and any victim who personally attends; they each have the right to veto the outcome plan in whole or part: s 52(4). An added requirement, pursuant to s 54, is that if a court referred a matter for a conference, the court must also approve the outcome plan.

Without limiting the kinds of decisions and recommendations that may be contained in an outcome plan, it may provide for:

- an oral or written apology to any victim;
- making reparation to the victim or the community;
- participation by the child in an appropriate program, such as counselling, drug and alcohol rehabilitation, or an educational program;
- reintegration of the child into the community: s 52(5).

An outcome plan must set a time frame for the implementation of the plan, contain realistic recommendations, and not impose sanctions that are more severe than those available to a court.

According to cl 18 of the Young Offenders Regulation 1997, the child has up to 6 months to complete the outcome plan. The conference administrator supervises the implementation and completion of each outcome plan, and is to give written notice to the victim and the person who referred the matter to a conference, of whether or not the child satisfactorily completed the outcome plan: s 56. When a plan is not completed, court proceedings may be commenced or continued against the child. If the child satisfactorily completes the plan, no further criminal proceedings may be taken against the child for the offence: s 58. The same comments apply that were made above in relation to the '*Consequences of a caution*' under '**3.7 Cautions**' on p 18.

A record of the conference is to be made by the conference administrator, noting the child's details, the nature of the offence, the date of referral, the identities of the attendees, the particulars of the outcome plan and other aspects outlined at cl 20 of the Young Offenders Regulation 1997.

Juvenile arsonists

Special conditions apply to outcome plans for children who admit to offences covered by the *Young Offenders Act 1997* that involve the lighting of a bush fire, or the destruction or damage of property by fire. Clause 19A of the Young Offenders Regulation 1997 states that an outcome plan developed for a juvenile bushfire or arson offender must provide for:

- (a) attendance by the child at a burns unit or ward of a hospital that agrees to participate in the youth justice conference scheme;

- (b) the child to meet any victim of the offence who is willing to meet the child;
- (c) the making of reparation for the offence, such as:
 - (i) assistance in clean-up operations and in treatment of injured animals; and
 - (ii) the payment of compensation, not exceeding the amount that a court may impose on conviction for the offence.

These provisions commenced on 9 January 2002³⁴ and were created in response to the spate of bushfires lit by juveniles during the summer of 2001-2002.

3.9 Other aspects of the Young Offenders Act 1997

Prohibition on publication of names

The name of a young offender dealt with under the *Young Offenders Act 1997*, or any other information tending to identify them, must not be published or broadcast at any time: s 65. There are limited exceptions, for example if the offender is 16 years or over and consents to being identified. The maximum penalty for contravening this section is a fine of 50 penalty units (\$5500) and/or 12 months imprisonment for an individual, or 500 penalty units (\$55,000) for a corporation. The prohibition against naming a child involved with a prosecution in court is outlined separately at '**2.5 Naming children connected to criminal proceedings**' on p 9.

Impact upon criminal history

The fact that a person has been dealt with under the *Young Offenders Act 1997* does not count towards their criminal antecedents, except when applying for certain employment or in proceedings before the Children's Court: s 68. For further information on children's prior offences see '**2.6 Criminal records of children**' on p 10.

Youth Justice Advisory Committee

The Youth Justice Advisory Committee was created by s 70 of the *Young Offenders Act 1997*. Its diverse members include police, victims, representatives from the Attorney General's Department and the Department of Juvenile Justice, and other professionals who work for the interests of children. The Committee advises the Attorney General, relevant Ministers, and the Director General of Juvenile Justice on:

- the making of regulations;
- the preparation of guidelines for youth justice conferences;
- the selection, appointment and training of conference convenors;
- the monitoring and evaluation of the Act, including the review under section 76;
- any other matter relevant to the administration of the Act.³⁵

³⁴ *Government Gazette*, No 17 of 9 January 2002, p 1.

³⁵ For further information and a list of current members, visit the YJAC website via

Review of the Act

Section 76 of the *Young Offenders Act 1997* states that a review of the Act is to be undertaken as soon as possible after 3 years from the commencement date (ie. 6 April 1998), and a report is to be tabled in Parliament within a further 12 months.

The statutory review has become part of 'a collaborative research project between Dr Janet Chan of the School of Social Science and Policy at the University of NSW...as the Principal Researcher, and industry partners the Aboriginal Justice Advisory Council and the Youth Justice Conferencing Directorate of the Department of Juvenile Justice. The three year project, Reshaping Juvenile Justice, principally funded by the Australian Research Council...is fully supported and endorsed by the Youth Justice Advisory Committee.'³⁶ The review commenced in June 2001 and is due to present a final report by the end of 2003.³⁷

The Attorney General, Hon. Bob Debus MP, indicated last year that he expected further amendments to be made to the *Young Offenders Act 1997* after the completion of the review.³⁸

<www.djj.nsw.gov.au>

³⁶ Information on the Department of Juvenile Justice website at <www.djj.nsw.gov.au> Select 'Youth Justice Advisory Committee' then 'Statutory role'. Accessed on 31 January 2003.

³⁷ NSW Police Service, *Annual Report 2000-2001*, p 63.

³⁸ Young Offenders Amendment Bill, Second Reading Speech, *NSWPD*, 4 June 2002, p 2489.

4. EVALUATIONS OF THE YOUNG OFFENDERS ACT 1997

This chapter summarises a selection of the articles, reports and statistics that have been produced on the *Young Offenders Act 1997* since its commencement. Some general performance statistics are outlined first, then specific studies are presented individually because their methodology, the periods covered, and the size of the samples are distinctive. Most of the studies focus on the progress of youth justice conferencing, and that emphasis is replicated here.

4.1 General data

Overall diversion rates

The operation of formal warning and cautioning procedures and youth conferencing under the *Young Offenders Act 1997* has contributed to a decrease in appearances in the Children's Court of about 40% between the 1997-1998 and 2001-2002 financial years.³⁹

In the 2001-2002 financial year, only 18.5% of alleged juvenile offenders were dealt with by the courts.⁴⁰ This indicates substantial use of warnings, cautions and conferences, and would suggest that the Act's diversionary purpose is being fulfilled to a significant degree.

Warnings and cautions

In the period from July 2000 to June 2001, police gave warnings to 38% of alleged young offenders and issued formal cautions to 24% of alleged young offenders.⁴¹

There has been a sharp decline since the 1998-1999 financial year in the number of drug offences dealt with by the Children's Court. The Department of Juvenile Justice considers that, 'It is possible that police cautioning under the Young Offenders Act for the possession of small amounts of cannabis has impacted on these figures.'⁴²

According to the NSW Bureau of Crime Statistics and Research, a total of 9097 alleged offenders were dealt with by a caution under the *Young Offenders Act 1997* in 2000, rising to 10,004 in 2001, and decreasing to 9263 in 2002. The number of alleged offenders who received a warning in 2000 were 13,393, with substantial increases to 20,664 in 2001 and 33,952 in 2002.⁴³

³⁹ Department of Juvenile Justice, *Annual Report 2001-2002*, p 9.

⁴⁰ NSW Police Service, *Annual Report 2001-2002*, p 17.

⁴¹ NSW Police Service, *Annual Report 2000-2001*, p 12.

⁴² Department of Juvenile Justice, *Annual Report 2001-2002*, p 9.

⁴³ P Doak et al, *New South Wales Recorded Crime Statistics 2002*, NSW Bureau of Crime Statistics and Research, 2003, Table 2.1, Table 2.2, Table 2.3.

Conferences and outcome plans

In the financial year after the commencement of the *Young Offenders Act 1997* (ie. July 1998 to June 1999), there were 1267 youth justice conferences and 710 completed outcome plans.⁴⁴ By the 2001-2002 financial year, 1482 young people participated in 1353 conferences and 1600 outcome plans were due to be completed. Of these, 91.31% were actually completed.⁴⁵

Since the commencement of conferencing, a total of 808 conference convenors have been trained. Of those, 460 remain active convenors. In the period from July 2001 to June 2002, 149 convenors were trained.⁴⁶

Conference referrals

In 2000, Jenny Bargaen, the Director of Youth Justice Conferencing, reported that referrals to youth justice conferences from the police and the courts were not fulfilling expectations in some respects:

Unfortunately, some judicial officers are referring children to Youth Justice Conferences for minor or first offences, for which the child is entitled to be cautioned. This is contrary to the principles of the Act. It is also an inappropriate, expensive and time consuming way of dealing with a minor offence.

...

It was originally anticipated that at least 70 per cent of all conference referrals would be from the police, and the remainder from the courts. This aim has not yet been universally achieved. At present, about 50 per cent of all conference referrals are from the courts, although there are significant local variations.⁴⁷

The Local Court's *Annual Review* substantiated that in 2000 the Children's Court made 53% of the referrals for youth conferences, with the balance coming from the police.⁴⁸

⁴⁴ N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)*, Report to Youth Justice Advisory Committee, October 1999, para 49.

⁴⁵ Department of Juvenile Justice, *Annual Report 2001-2002*, pp 14, 35. The latest available figures from the NSW Bureau of Crime Statistics and Research (BOCSAR) are somewhat lower. According to BOCSAR, 1248 alleged offenders were proceeded against by way of a youth conference in 2000, 1171 in 2001 and 1103 in 2002: P Doak et al, *New South Wales Recorded Crime Statistics 2002*, NSW Bureau of Crime Statistics and Research, 2003, Table 2.1, Table 2.2, Table 2.3. However, it is not clear whether the BOCSAR data includes conferences referred from all sources.

⁴⁶ Department of Juvenile Justice, *Annual Report 2001-2002*, p 14.

⁴⁷ J Bargaen, 'The Young Offenders Act 1997: Is the Diversionary Scheme Being Diverted?' (2000) *Judicial Officers' Bulletin*, Vol 12, No 3, p 17 at 19.

⁴⁸ Local Court New South Wales, *Annual Review 2000*, p 15. The *Annual Review 2001* did not

In the first full year of operation of the *Young Offenders Act 1997*, 806 young offenders (3.36% of all young people dealt with by the police) were referred by police to youth conferences.⁴⁹ In the 2000-2001 financial year, this figure had risen to 6% of alleged young offenders being referred by police to youth conferences.⁵⁰

4.2 Specific studies

The purpose of this section is to trace the commentary and feedback, both positive and negative, that developed as the statutory provisions on cautions, warnings and conferences were utilised. The material is arranged chronologically and the findings of each study represent a particular point in time. It must be remembered that the results recorded, problems identified, or concerns raised in any of the articles or reports may have changed or been acted upon since they were published. The statutory review of the *Young Offenders Act 1997* that is presently being conducted (see '*Review of the Act*' under '**3.9 Other aspects of the Young Offenders Act 1997**' on p 25) will provide a current, comprehensive assessment of the diversionary provisions.

Report to the Youth Justice Advisory Committee, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW), 1999*

The Youth Justice Advisory Committee commissioned Nancy Hennessy, a Member of the Administrative Decisions Tribunal, to review the first 12 months of operation of the *Young Offenders Act 1997*. The report was finalised in October 1999 and released in June 2000.⁵¹ It concentrated on the role of police and Magistrates in referring matters for cautions or conferences, and the extent of their compliance with the statutory provisions.

Diversion rates – a total of 24,003 young people were dealt with by police during the 12 month period from July 1998 to June 1999. Of these, 8128 (33.86%) received a caution, 806 (3.36%) were referred to a conference, and 15,069 (62.78%) were dealt with by court.⁵² Therefore, the overall diversion rate was 37.22%. The proportion of females who received a caution was 44.32%, compared with 31% for males, although the rates of conference referrals were similar for both sexes. Overall, 47.52% of females were diverted from court compared with 34.40% of males. Diversion rates were lower for Aboriginal and Torres

contain statistics on referrals for youth conferences.

⁴⁹ N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)*, Report to Youth Justice Advisory Committee, October 1999, para 38.

⁵⁰ NSW Police Service, *Annual Report 2000-2001*, p 12.

⁵¹ N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)*, Report to Youth Justice Advisory Committee, October 1999. Accessed on the Legislation and Policy Division of the Attorney General's Department website at <www.lawlink.nsw.gov.au/report/lpd_reports.nsf/pages/yoa_index>

⁵² *Ibid*, para 38.

Strait Islanders at 24.38%, but their rate of conference referral was only slightly lower than for all offenders.⁵³

Conference referrals – the rate of conference referrals at 3.36% was low compared with New Zealand (13%) and South Australia (16.5%) at the time.⁵⁴ However, as Hennessy noted, it was difficult to label this result as insufficient because Parliament had not indicated a suitable level of diversion. Hennessy was concerned that more matters were being referred to conferences from Magistrates than from police, whereas the court referral powers were designed to be merely a ‘safety net’ when criminal proceedings had been commenced inappropriately.

Police compliance with the Act – the report found that many police opted for court proceedings even though the offences were covered by the *Young Offenders Act 1997*, and that often police who were not specialist youth officers were commencing proceedings. Hennessy asserted that police should not make decisions to commence criminal proceedings without first referring the matter to a specialist youth officer. Also, police practices did not always conform with the procedural requirements of the Act in other areas such as informing young people of their right to obtain legal advice. Hennessy recommended that a protocol document be developed for all police officers, describing best practice in relation to obtaining admissions, conducting interviews, young people’s access to legal advice, and statutory time periods under the Act.

Reducing police discretion – Hennessy presented two options that could be pursued by Parliament if it wished to increase the diversion rates. The first was to restrict the discretion of police by amending the Act to prescribe that certain offences should be the subject of a warning, caution or conference, unless special circumstances existed. This would enable a reduction in the number of matters going to court but, on the other hand, most stakeholders considered that there were too many variables in each case for general rules about offences to be appropriate. Hennessy did not reach a specific recommendation on this issue.

Adding another gatekeeper – The second method to boost diversion rates was to add an extra ‘gatekeeper’ between the specialist youth officer and the Magistrate, with the power to review the specialist youth officer’s decision to commence criminal proceedings. Hennessy believed this role would best be performed by Police Prosecutors because they could comfortably liaise with other police and their ability to review briefs in advance of the matter proceeding to a hearing would save time and costs. Any referral by a Police Prosecutor back to the investigating police officer for a caution would be a final decision. Hennessy supported this option.

Indigenous critique of conferencing, *A Dingo in Sheep’s Clothing*, 1999

Some critics, both Aboriginal and non-Aboriginal, have asserted that community conferencing programs in various Australian jurisdictions have negative ramifications for

⁵³ Ibid, paras 38-39.

⁵⁴ Ibid, para 52.

indigenous people.⁵⁵ A critique specifically of the NSW youth justice conferencing scheme was written in 1999 by Loretta Kelly and Elvina Oxley, two indigenous women from the mid-north coast, who worked as a conference administrator and a conference convenor respectively.⁵⁶ The main allegations raised by Kelly and Oxley were that:

- There was inadequate consultation with Aboriginal communities and organisations at a ‘grass roots’ level in developing the scheme.
- The principle that youth justice conferencing is ‘to be culturally appropriate, wherever possible’⁵⁷ implies that cultural appropriateness will be followed ‘only when it suits the bureaucrats who ultimately control the scheme. All too often, ‘wherever possible’ means ‘whenever we can find the time and money’.
- The lack of success in recruiting indigenous people reflected their scepticism about the scheme. For example, of the 350 conference convenors recruited and trained in 1998, only 30 were indigenous people. Conferencing of indigenous young offenders by non-indigenous convenors can result in further alienation of the offenders.
- The concept of co-convenors instead of a single convenor should be allowed when the offender and victim are indigenous and non-indigenous.
- The ‘respected community members’ who participate in the conferencing process should be remunerated. Too often in government or community programs, indigenous people are expected to provide their services on a voluntary basis, whereas non-indigenous counsellors and social workers are paid as professionals or consultants.
- The scheme increases police discretionary powers, emphasising the power of police to control access to conferencing and to be present throughout the process.
- Opportunities should be created for conferencing to be developed by indigenous communities, to facilitate their self-determination.

Bureau of Crime Statistics and Research, *An Evaluation of the NSW Youth Justice Conferencing Scheme, 2000*

This report evaluated youth justice conferences under the *Young Offenders Act 1997*,

⁵⁵ Eg. Chris Cunneen and other authors cited by him in ‘Community Conferencing and the Fiction of Indigenous Control’ (1997) *Australian and New Zealand Journal of Criminology*, Vol 20, No 3, p 293.

⁵⁶ L Kelly and E Oxley, ‘A Dingo in Sheep’s Clothing?: the Rhetoric of Youth Justice Conferencing and the Indigenous Reality’ (1999) *Indigenous Law Bulletin*, Vol 4, Issue 19, p 4. A reply by the Director of Youth Justice Conferencing, Jenny Barga, challenged the criticisms and was followed by a further response from Kelly and Oxley: ‘Youth Justice Conferencing: the Debate Continues’ (1999) *Indigenous Law Bulletin*, Vol 4, Issue 20, p 18.

⁵⁷ Section 34(1)(a)(v) of the *Young Offenders Act 1997*.

covering issues such as the level of satisfaction of participants. A state-wide survey was conducted of offenders, victims, and support persons who participated in conferences from 24 March to 20 October 1999. The survey was in the form of a written questionnaire completed by 969 respondents at the conclusion of 391 conferences.⁵⁸ A total of 626 offences were dealt with at the conferences. The biggest offence category (30.4%) comprised theft offences, including motor vehicle theft, illegal use of a motor vehicle, receiving stolen goods and theft from retail premises.

The responses to the survey indicated a positive attitude towards the conference experience.⁵⁹

- at least 96% of survey respondents stated that they had been given either ‘some’ or ‘a lot’ of information about what would happen at the conference;
- at least 92% of respondents stated that they understood what was going on in the conference;
- at least 95% of respondents believed that the conference was either ‘somewhat fair’ or ‘very fair’ to the offender, while at least 91% believed that the conference was either ‘somewhat fair’ or ‘very fair’ to the victim;
- at least 91% felt they were given the opportunity to express their views in the conference, and at least 89% felt their input was taken into account in deciding what should be done;
- at least 89% were satisfied with the conference outcome plan;
- at least 9 out of 10 offender respondents agreed or strongly agreed with the statement, ‘What happened in the conference will encourage you to obey the law in the future’;
- more than 91% of the offenders and their support persons agreed or strongly agreed that by the end of the conference the offender had a proper understanding of the harm caused to the victim.

Data was also extracted from the Client Information System maintained by the Department of Juvenile Justice for a period of 17 months from 12 June 1998 to 30 November 1999. During this time, approximately 1800 conferences were held.⁶⁰

The records showed a high degree of participation in the conferences by victims and family members of the offender, especially considering that attendance is optional for these persons. 72.5% of the conferences were attended by a victim of the offence, while 87.4%

⁵⁸ L Trimboli, *An Evaluation of the Youth Justice Conferencing Scheme*, NSW Bureau of Crime Statistics and Research, 2000, para 3.1.

⁵⁹ *Ibid*, paras 3.1.2 to 3.1.4.

⁶⁰ Para 3.2.1 and Table 42.

were attended by at least one member of the offender's immediate family.⁶¹

Young offenders of Aboriginal or Torres Strait Islander origin also participated to a significant degree. Almost 25% of the offenders in the sample from 24 March to 20 October 1999 identified themselves as being of indigenous origin, compared to 17% of the offenders of comparable age who went to court during the study's data collection period (12 June 1998 to 30 November 1999).⁶²

The study found that the majority of conferences in the sample observed the specific statutory rights of offenders, such as informing them of their right to obtain legal advice. The interests of the victims and the support persons of offenders were also respected. This accorded with the objective of 'meeting the needs of victims and offenders', at s 3(c) of the *Young Offenders Act 1997*.

However, a problem was identified regarding compliance with the statutory time frames. Only 8.1% of conferences (152 out of 1885) met the statutory time periods within which conferences are to be held, namely, that where practicable a conference is to be held within 21 days of the referral to the conference administrator, but not less than 10 days after written notification of the conference to the young offender.⁶³ On average, 40.3 days elapsed between the date of the conference referral and the conference date. Nevertheless, 60.1% of conferences were held within double the statutory time period.⁶⁴ The failure of conferences to meet the legislation's deadlines was largely due to the time and effort required to accomplish the numerous administrative tasks associated with organising conferences, such as locating key participants and negotiating a conference time, location and venue that is mutually convenient.

Although the majority of subjects in the sample survey were satisfied with their conference, some subjects suggested that improvements would be made to the way that conferences are conducted and the negotiation of outcome plans if convenors:⁶⁵

- make greater efforts to select a venue which is private, quiet, comfortable, and of an appropriate size for the number of participants;
- encourage the police officer(s) directly involved in the matter to attend the conference personally rather than delegating the responsibility to colleagues;
- encourage all participants to be punctual, treat the process seriously, and be fair and respectful to each other;
- protect the participants' privacy by not disclosing residential addresses to the other parties, given that some participants feared reprisals;

⁶¹ Table 42.

⁶² Para 4.1.

⁶³ Section 43.

⁶⁴ Para 3.2.2.

⁶⁵ Para 4.1.2.

- ensure that convenors always remain neutral and do not advance the interests of any specific participant(s);
- research more thoroughly the feasibility of a range of appropriate options for inclusion in the outcome plan.

Bureau of Crime Statistics and Research, *Transient Offenders in the 1996 Secondary School Survey: a Cautionary Note on Juvenile Justice Diversion*, 2001

Dr Don Weatherburn, the Director of the Bureau of Crime Statistics and Research, and Joanne Baker, Senior Research Officer, advise in this report that juvenile justice diversion programs should not be relied on too heavily to control juvenile crime.

The research was based on a survey which involved a self-completion questionnaire administered during 1996 to a randomly selected sample of 5178 students from Years 7 to 12 in public and private secondary schools in NSW.

The results seem to support the notion that juvenile crime is a passing phase for most children who commit offences:

...much juvenile crime is committed by typical everyday students who desist from crime of their own accord without the need for any significant intervention (whether this be in the form of juvenile justice diversion programs or punitive sanctions such as a custodial sentence).⁶⁶

A small minority of juvenile offenders faced the prospect of court, therefore juvenile justice diversion programs were only ever likely to reach a tiny minority of those who actually offend. The study reflected the importance of paying attention to preventative measures:

...transient or adolescent-limited offending is predominantly imitative and opportunistic...This suggests that rather than attempting to control transient offending through juvenile justice diversion strategies, we would be better off attempting to control the incentives, opportunities and triggers for juvenile involvement in crime.⁶⁷

Examples of 'situational crime prevention' given by the authors include improvements in anti-theft devices on motor vehicles, rapid repair of public facilities, responsible alcohol serving practices, and programs to expand the employment opportunities for young people in disadvantaged areas.

The study concludes that interventionist, diversionary programs 'would therefore seem only likely to prove cost-effective when restricted to persistent offenders or those whose

⁶⁶ D Weatherburn and J Baker, 'Transient Offenders in the 1996 Secondary School Survey: a Cautionary Note on Juvenile Justice Diversion' (2001) *Current Issues in Criminal Justice*, Vol 13, No 1, p 60 at 69.

⁶⁷ Ibid, p 69.

antecedents suggest they are at serious risk of becoming persistent offenders'. The authors commend the diversionary schemes of youth conferencing and the Youth Drug Court in New South Wales for being contingent upon the juvenile offender failing to respond to less intrusive forms of intervention such as warnings and formal cautions.⁶⁸

Bureau of Crime Statistics and Research, *Reducing Juvenile Crime: Conferencing Versus Court, 2002*

This study, using data collected by the Bureau of Crime Statistics and Research, examined the reoffending patterns of 590 juvenile first offenders who participated in conferences, compared with 3830 juvenile first offenders who attended court during the first year of operation of the *Young Offenders Act 1997* from 6 April 1998 to 5 April 1999.⁶⁹

The study found that **first time offenders** who were conferenced between 6 April 1998 and 5 April 1999:

- remained offence-free for longer than first offenders whose case was finalised in court that year, or in the year before the commencement of the Act (ie. 6 April 1997 to 5 April 1998);⁷⁰
- had a reoffending rate 16% lower than the reoffending rate for first offenders who went to court;⁷¹
- had lower reappearance rates in both the age groups of 10-12 years and 13-17 years than those who appeared in court in the year before and the year after the commencement of the Act.⁷²

The study compared these outcomes with **all juvenile offenders** who went to court (6476 offenders) or to a conference (717 offenders) in the first year of the Act's operation, and found that, according to a model that measured the 'risk of reoffending', juveniles who were conferenced had a risk of reoffending that was 28% lower than those who went to court. Using a model of 'reappearance rates', the reoffending rate for juveniles who were conferenced was 24% lower than for those who attended court.⁷³

⁶⁸ Ibid, pp 61, 69.

⁶⁹ G Luke and B Lind, 'Reducing Juvenile Crime: Conferencing versus Court' (2002) *Crime and Justice Bulletin*, NSW Bureau of Crime Statistics and Research, No 69, p 1 at 3. The term 'reoffending' is defined as: 'an appearance at court which results in the offence being proven, or an appearance at a conference, for a new offending episode': p 1.

⁷⁰ Ibid, p 5.

⁷¹ Ibid, p 8.

⁷² Ibid, p 9.

⁷³ Ibid, p 10.

Observations were also made on the basis of **Aboriginality**:

- it appeared that Aboriginal young offenders were more likely than non-Aboriginals to be referred to a conference rather than go to court (a degree of uncertainty was present because of court appearances where the Aboriginality of the offender was unknown);
- among first offenders who were conferenced in the first year of operation of the *Young Offenders Act 1997*, the proportion of offenders who had reoffended after two years of follow-up was higher for Aboriginal young people;
- Aboriginal juveniles attending conferences appeared to have a lower risk of reoffending than those Aborigines attending court.⁷⁴

The study drew some **overall conclusions**, after allowing for the differences of gender, age, offence type, Aboriginality and prior record:

- when the effects of other factors are controlled for, it appears that both the risk of reoffending and the rate of reappearances per year in the 'follow-up period' are about 15-20% lower for those who had a conference than for those who went to court;⁷⁵
- it is possible that the lower level of reoffending for conferences is partly due to 'selection decisions' by the police, the courts, and the young people themselves.⁷⁶ However, the consistency in court reoffending rates, both before and after the introduction of the conferencing option, and the persistence of lower levels of reoffending for conference attendees, even allowing for personal variables, strongly suggests that the difference in reoffending levels is largely due to the conference experience itself.⁷⁷

Youth Justice Coalition Study, *Young People's Experiences of the Young Offenders Act, 2002*

The Youth Justice Coalition (YJC) is a network of youth workers, children's lawyers, policy officers and academics concerned about the rights of young people. It obtained funding from the New South Wales Law Foundation to commission a study, which was

⁷⁴ Ibid, p 12.

⁷⁵ Ibid, p 13. In the study, the 'follow-up period' for each offender began on the date of the conference (or date of finalisation of court matters for those who went to court), and ended on 30 June 2001, or the date of the offender's 18th birthday, whichever occurred first.

⁷⁶ For example, police and Magistrates may be influenced in their decisions to refer young people to conferencing or court by such factors as employment status and the presence of parental support. In other words, the type of young person who seems worthy to be selected for a conference might already be less likely to reoffend.

⁷⁷ Ibid, p 14.

published in 2002, on young people's experiences of the *Young Offender's Act 1997*. The research was based on interviews conducted with 24 young people in 6 locations (Cabramatta, Campbelltown, Sydney, Kempsey, Wagga Wagga and Wollongong) between March and December 2000, about their involvement in cautions and conferences.⁷⁸ The small size of the sample should be borne in mind when considering the findings.

The study concentrates on whether the provisions and spirit of the Act are being observed, particularly whether the rights of young people are being protected. The young people surveyed were aged between 12 and 17 years. Over 80% were born in Australia and 13% identified themselves as Aboriginal or Torres Strait Islander.⁷⁹

Some of the main findings in relation to **cautions** were:

- 57% of young people who were given a caution indicated that they understood what a caution was, while the rest were unsure.
- Only 36% were told that they could elect to go to court instead of receiving a caution.
- 42% thought they were not fairly treated or were unsure whether they were fairly treated at the caution.⁸⁰

Some of the main findings about **conferences** were:

- 35% of young people claimed that the concept of going to a conference was offered to them before they admitted to the offence.
- In 23% of cases, the young people referred for a conference were not told of the alternative to attend court.
- 59% felt that the conference convenor helped them to understand more about the conference and 41% said the convenor informed them of their entitlement to obtain legal advice;
- 59% felt supported at the conference.⁸¹

Concerns were raised that the **legal rights of young offenders** were not sufficiently observed, especially by police:

- In 31% of cases (9 young people) there was no responsible adult present at the police station when the offenders were cautioned or referred for a conference, despite the fact that s 10 of the Act requires a responsible person to be present in order for a child's admission to be accepted.⁸² (Children must admit to an offence before they can be

⁷⁸ Youth Justice Coalition, *Young People's Experiences of the Young Offenders Act*, July 2002, p 6.

⁷⁹ Ibid, p 10.

⁸⁰ Ibid, p 19.

⁸¹ Ibid, p 20.

⁸² Ibid, p 17.

formally cautioned or referred to a conference.)

- In 41% of the cases, the young person did not think they were treated fairly by the police.⁸³
- 66% (19) of the young people involved in cautions or conferences reported that they were not told, or were unsure of whether they were told, that they had a right to legal advice.⁸⁴
- Only 6 young people obtained legal advice at some stage during the criminal justice process, but none prior to making an admission.⁸⁵

Some of the **recommendations** of the study were:⁸⁶

- If admissions are made without complying with s 10 of the Act, the police and/or conference administrators and convenors should not proceed to a caution or conference.
- Consideration should be given to a system that ensures the provision of legal advice to young people, for example, by funding a network of youth advocates based in community legal centres and other community organisations throughout New South Wales.
- A system to monitor the efficacy of outcome plans should be implemented.

⁸³ Ibid, p 15.

⁸⁴ Ibid, p 13.

⁸⁵ Ibid, p 13.

⁸⁶ Ibid, pp 24-26.

5. MENTORING FOR YOUNG OFFENDERS

The concept of mentoring is designed to encourage the personal development of a disadvantaged young person by bringing them into contact with an adult who is a positive role model. Mentoring programs which focus on young offenders typically evolve slowly and operate on a small scale, largely because establishing and sustaining mentor-offender relationships is a painstaking process. The use of such programs is being explored in most Australian jurisdictions.

5.1 New South Wales pilot program

(i) Introduction

The Mentoring for Young Offenders pilot program was developed and managed as a partnership between five NSW Government agencies: the Crime Prevention Division of the Attorney General's Department, the Department of Juvenile Justice, NSW Police, the Department of Community Services, and the Office of Children and Young People in the Cabinet Office. The pilot was funded in April 1999 and projects were established in the second half of 1999 at two locations: a metropolitan site in Parramatta, and a regional site in the Coffs Harbour/Clarence area of the North Coast of NSW. Matches between mentors and offenders continued to be made up to March 2002.⁸⁷

Participation in the pilot was offered to young people who were cautioned by police or attended a youth justice conference under the *Young Offenders Act 1997*. The objective of the pilot program was 'to ensure that through the provision of appropriate mentoring young people at risk of further offending would be diverted from the juvenile justice system and integrated into the community.'⁸⁸

(ii) Project outline

The YWCA of Sydney won the tender to establish the pilot program, using its 'Big Sister Big Brother' model of one-to-one mentoring. The model was influenced by the mentoring approach of an American organisation called 'Big Brothers Big Sisters'. The three key elements of the NSW program were:

- *referring young people* – referral agents were police Youth Liaison Officers and youth justice conference convenors. The basic eligibility criteria were that the young person had been cautioned or conferenced; resided within the catchment area; wanted to participate; and that their parent, guardian or carer agreed to the initial referral.⁸⁹

⁸⁷ ARTD Management & Research Consultants, *Mentoring for Young Offenders: Final Report of the NSW Pilot Program*, Prepared for the Crime Prevention Division of the Attorney General's Department and the Department of Juvenile Justice, April 2002, paras 1.1, 2.3.

⁸⁸ Ibid, para 1.2.

⁸⁹ Ibid, paras 1.3, 8.2. The likelihood of the young person re-offending was initially a criterion

- *recruiting volunteer mentors* – adult volunteers were carefully screened and underwent a training program to provide friendship, guidance and leadership to a young offender. Ideally, the mentors were to make themselves available for 12 months.⁹⁰
- *matching young people and mentors* – meetings between young offenders and their mentors were usually held for 2-5 hours at the weekend. Ongoing support was provided for both parties and progress was monitored by trained program staff.⁹¹

Regular group outings of the young offenders and their mentors were also arranged, and a family support worker was available to assist the families of the young people enrolled in the program.

(iii) Matching participants and mentors

Around a third of the young people who took part in the program were repeat offenders.⁹² Most were from sole parent families and were experiencing significant conflict at home and at school, while others had left school early. Many participants were socially isolated, had poor communication skills, problems with anger management and low self esteem.

The majority of the young offenders recruited were ‘Anglo Australian’, as were the volunteer mentors. Four indigenous Australian young offenders were recruited, but no indigenous mentors.⁹³

(iv) Findings

In March 1999, a consultancy team, ARTD Management & Research Consultants, were commissioned to conduct an independent evaluation of the pilot program. Methods of data collection and interpretation included: analysis of referral forms and assessment records of young people, field visits, and interviewing mentors, young people, their families, and program personnel. A series of reports were produced, culminating in the Final Report in April 2002.

of eligibility but was removed in May 2001 because it was impeding referrals.

⁹⁰ Ibid, paras 1.3, 7.4.

⁹¹ Paras 1.3, 1.4.

⁹² Executive Summary – ‘Impacts of mentoring’, p vii.

⁹³ Para 5.1. Loretta Kelly and Elvina Oxley, two indigenous women experienced in youth conferencing, claimed that the lack of Aboriginal response to mentoring and other diversionary programs was due to insufficient consultation with Aboriginal people at the development stage: ‘The mentor pilot is yet another mainstream scheme that will be imposed on Indigenous people. Once again the bureaucrats will be perplexed when they find it difficult to recruit Indigenous volunteers as mentors.’ L Kelly and E Oxley, ‘A Dingo in Sheep’s Clothing?: the Rhetoric of Youth Justice Conferencing and the Indigenous Reality’ (1999) *Indigenous Law Bulletin*, Vol 4, No 18, p 4 at 6, 7.

Effects on behaviour: All the young people who were in ‘performing matches’ (meaning effective, ongoing matches) with their mentor for 6 months or more (13 individuals at 31 October 2001) reported reduced offending, greater community involvement, higher self esteem, better communication skills and more motivation. Families particularly noted the changes in the young person’s attitudes and behaviour and that relationships at home improved as a result.⁹⁴

Low intake: An estimated 31% of young people who attended cautions or conferences and lived within the catchment area of Coffs/Clarence were referred to the mentor program, compared with only 14% of those from the Parramatta area. The remainder were screened out as either unsuitable or were not interested in participating.⁹⁵

Difficulty of recruiting mentors: Securing volunteers who were willing to mentor a young person in the juvenile justice system was the most significant barrier faced by the program. Only around 5% of people who made an enquiry actually became a mentor.⁹⁶ It seems that volunteers are more likely to be recruited if the program has an identity in the community. For example, the Coffs/Clarence project developed an accredited mentor training course with the local TAFE, which proved successful in recruiting volunteers. Meeting volunteer’s costs such as travel, especially in rural communities, may reduce barriers for potential volunteers.

Matches: The majority of offenders referred were boys aged 13 to 15 years. The most common type of match was a female mentor and a male offender aged 13 years, due to the pattern of referrals and volunteer recruitment. There was no evidence that a particular combination was more or less likely to succeed.⁹⁷ Notwithstanding the low intake of young offenders, they exceeded the available number of mentors, with numerous young people waiting to be matched.

Coffs/Clarence outcomes: The project took considerable time to establish, with 11 matches in the 22 months to October 2001.⁹⁸ The Coffs/Clarence Local Area Command proved too large a geographic area to be covered effectively. Many mentors faced the barrier of travelling long distances to visit the young person they were mentoring. At the time of the evaluation report, the project was only operating effectively in the city of Grafton. The

⁹⁴ ARTD Management & Research Consultants, *Mentoring for Young Offenders: Final Report of the NSW Pilot Program*, Prepared for the Crime Prevention Division of the Attorney General’s Department and the Department of Juvenile Justice, April 2002, paras 4.2, 4.3, 5.1.

⁹⁵ Ibid, para 8.1.

⁹⁶ Para 7.3.

⁹⁷ Executive Summary – ‘Creating matches’, p vii, ‘Referrals from the juvenile justice system’, p ix.

⁹⁸ This marked the end of the ‘data analysis period’. An additional 8 matches were made to March 2002: para 5.3.

Coffs/Clarence pilot worked to some degree because it adopted a community development approach, engaging with local services to address youth and family support issues and expanding from its core function of creating matches to provide broader services such as dispute resolution and parenting skills.

Parramatta outcomes: The project in Parramatta did not become viable for reasons including difficulty in recruiting mentors and young people, high staff turnover, and a large catchment area encompassing 5 Local Area Commands. Only 6 matches were made in the 22 months to October 2001.⁹⁹

Conclusions: Notwithstanding the problems of the pilot program, the report concluded that mentoring, using the adapted Big Sister Big Brother model, can be an effective intervention for suitable young offenders by reducing their criminal behaviour and producing positive benefits for the young people and their families.

However, the report found that the scope of mentoring as an intervention strategy with young offenders is limited. Firstly, it is likely to be appropriate for only a minority of those who are cautioned or conferenced. Secondly, recruiting volunteers and making matches are difficult - the total number of matches in both pilot programs for the 22 month period was 27 matches, and there were 16 young people waiting to be matched at March 2002.¹⁰⁰

While it is not clear whether the same difficulties would be experienced in other locations, these findings bring into question the model's scope and sustainability. To survive, a mentoring program may need to reach a certain minimum size (eg. 20-30 current volunteer mentors), or be delivered in conjunction with other youth and family support programs.¹⁰¹

Lessons from the pilot program suggest that a successful mentoring program requires:¹⁰²

- an effective referral process, including strong partnerships with local referral agencies.
- a community development approach, to foster wide local support.
- a limited geographical area.
- investing considerable time and resources to attract suitable volunteers to become mentors. This is best achieved through connections in local communities.
- a lengthy lead-up period to build the project to a sustainable level.
- giving consideration to the social context of the program. Factors such as the size, location (rural, regional, city) and demographics of the target area, the range of other support services available, and the experience of the auspice agency in implementing similar projects, can have a major impact on operations.

⁹⁹ After the 'data analysis period' ended in October 2001, an additional 3 matches were made to March 2002: para 5.3.

¹⁰⁰ Executive Summary, 'Overall conclusion', p vi.

¹⁰¹ Para 10.8.

¹⁰² Executive Summary, 'Issues for replication', pp vi-vii.

- assessing whether adjustments or specialised approaches are warranted to attract mentors and offenders from ‘non-Anglo’ cultural backgrounds.

5.2 Commonwealth audit of mentoring programs

A national project is being undertaken by the Commonwealth Attorney General’s Department to produce a profile of mentoring programs for young offenders around Australia.

23 projects were identified nationally, over a third being from Victoria and the rest from the other jurisdictions, except Queensland and Tasmania where no suitable projects were identified. The New South Wales mentoring pilot project conducted at Parramatta and the Coffs Harbour/Clarence region was counted as two separate projects.

Preliminary findings of the audit included:¹⁰³

- It is preferable for a mentoring program to be perceived by young people as being a community-based operation, regardless of whether the funding source is government or otherwise. ‘More successful mentoring projects seem to be viewed by young people and others as being ‘separate’ from the ‘standard’ agencies which might be working with young people such as juvenile justice and welfare.’¹⁰⁴
- Clear and realistic objectives and operating principles should be developed in consultation with potential participants and stakeholders, and a degree of flexibility should be maintained as the program develops.
- Mentoring projects that were integrated into other services, rather than ‘stand-alone’ projects were likely to be more effective. It is quicker, easier and less costly to establish a mentoring program if the existing infrastructure, administrative support, and networks with other key agencies and potential clients are already established.
- Programs need to have a strong structure and be well organised. The role of the co-ordinator is crucial in this regard.
- The characteristics of successful mentors are a non-judgmental attitude, the ability to listen, flexibility, reliability, and respect for young people. Personality was thought to be more important than age, ethnicity or other demographics.
- Training, feedback and support should be provided to mentors on a consistent and regular basis. Mentors should also be supervised and accountable because the ‘clients’

¹⁰³ A Wilczynski, ‘A National Audit Review of Mentoring Projects for Young Offenders: Preliminary Findings’, Paper presented at the Crime Prevention Conference, convened by the Australian Institute of Criminology and the Crime Prevention Branch of the Commonwealth Attorney General’s Department, Sydney, 12-13 September 2002.

¹⁰⁴ Ibid, para 1.4.1.

are children in difficulty who may be vulnerable.

- About half of the programs surveyed used volunteers and the other half paid the mentors a modest stipend or hourly rate. There was no evidence to support a preferable approach one way or the other. However, it is regarded as good practice to reimburse mentors for agreed costs and out of pocket expenses, eg. fares, petrol etc.

In attempting to address whether mentoring is an effective crime prevention strategy, the preliminary report of the national audit stated:

Some overseas studies have demonstrated that mentoring programs have had positive benefits such as reduced offending, reduction in drug use, improved school attendance and self-esteem and so on - at least over the relative short periods used for the evaluation.

The small amount of Australian evaluation material available on mentoring means that we cannot confidently draw any conclusions about the effectiveness of mentoring in Australia at this current time. Certainly the small number of evaluations done here have overall produced mixed results, while indicating that some positive benefits can be experienced by at least some young people (again at least in the shorter term period covered by the evaluations). No conclusions can be drawn on the basis of the Australian material about whether mentoring reduces recidivism.

Nonetheless, at a qualitative level there was certainly an overall view amongst the project staff, mentors, young people and external stakeholders interviewed that mentoring can make a real difference to some young people...These differences included reduced offending and drug use, improved self-esteem, and a general increase in social functioning and capacity to form and maintain relationships with others.¹⁰⁵

5.3 Mentoring programs in the United States of America

Mentoring programs are a long-standing institution in the United States of America. A diverse range of organisations exist at State and Federal level but most are oriented to providing mentoring services in the broad sense of facilitating the development of disadvantaged children, rather than being specifically directed at juvenile offenders. For example, the **Big Brothers Big Sisters** (BBBS) organisation was founded in 1904 and today is involved with hundreds of thousands of children in 5000 communities throughout the country. BBBS provides one-on-one mentoring for 5 to 18 year olds, often from single parent families:

Youth development experts agree that, in addition to their parents, children need additional supportive, caring adults in their lives. BBBS works closely with parents to match every child with the right Big Brother or Big Sister. Each potential Big is screened, trained, and supervised to help ensure that the

¹⁰⁵

ibid, para 1.8.

relationship will be safe and rewarding for everyone involved.¹⁰⁶

Although the BBBS program is not explicitly geared towards juvenile offenders, it has been credited with producing lower rates of school absenteeism and drug and alcohol use.¹⁰⁷ The BBBS model also influenced the pilot program for mentoring young offenders in New South Wales in 1999-2001.

An important US Federal Government initiative that has a crime prevention objective is the **Juvenile Mentoring Program (JUMP)**, which is operated by the Office of Juvenile Justice and Delinquency Prevention (part of the US Department of Justice). In 1992, Congress amended the *Juvenile Justice and Delinquency Prevention Act* of 1974 to establish JUMP. By 1998, the Office of Juvenile Justice and Delinquency Prevention supported 93 mentoring projects under JUMP, in addition to mentoring initiatives funded through its grants program. Nearly 300 initiatives were funded in 1997.¹⁰⁸ Since 1994, the Office of Juvenile Justice and Delinquency Prevention has funded 203 'JUMP sites' in 47 States and 2 Territories. More than 9,200 youth have received one-to-one mentoring.¹⁰⁹

The principal purpose of JUMP is to target youth 'at risk' of poor academic performance, dropping out of school, or becoming involved in gangs, substance abuse, firearms and violence. The approach therefore has a more preventative scope than serving young people who have already offended. JUMP evaluations suggest that there has been a statistically significant improvement in peer relationships, aggressive behavior and delinquency risks in participants.¹¹⁰

However, a common problem was recruiting a sufficient number of mentors. As in the New South Wales pilot program, mentors in the USA are most likely to be white and female. Male mentors, particularly from 'minority groups' are highly sought. Other difficulties experienced by JUMP projects were lower than expected intake rates of young people, unrealistic timetables, inadequate staff resources, lack of parental involvement, and insufficient community support. The program guidelines were revised in 2000 to reduce the required number of matches to sustain a program, from 50-60 each year to a minimum of 25

¹⁰⁶ 'About Us', National Website of the Big Brothers Big Sisters of America at <www.bbbs.org>

¹⁰⁷ S Jekielek et al, 'Mentoring: A Promising Strategy for Youth Development', *Child Trends Research Brief*, February 2002, accessed at <www.childtrends.org> However, the same report stated that 'there were no significant differences between youth mentored through Big Brothers/Big Sisters and the control group on such measures as how often the youth stole or damaged property over the past year,...were involved in a fight, cheated, or used tobacco.'

¹⁰⁸ Foreword, *Juvenile Mentoring Program: 1998 Report to Congress*, Office of Juvenile Justice and Delinquency Prevention, December 1998.

¹⁰⁹ 'Overview', JUMP website, <www.ojjdp.ncjrs.org/jump>

¹¹⁰ 'Evaluation', JUMP website, <www.ojjdp.ncjrs.org/jump>

new matches per year.¹¹¹ Some of the strategies employed to enhance mentor recruitment and program success are:¹¹²

- forming a partnership with a business entity and recruiting mentors from among the company's staff, who in turn are granted a special leave allowance;
- recruiting from church congregations, fraternal organisations and the like;
- locating mentoring projects in colleges and other educational settings where adult students who are interested in youth work as a career option can participate as mentors;
- attracting commercial or corporate sponsors, for example, to provide work experience for the young people or donate equipment for use in their activities.

The **National Mentoring Center** is maintained with funding from the Office of Juvenile Justice and Delinquency Prevention. It is another useful resource for further information about American programs, with links to various evaluation studies.¹¹³ The studies are largely positive about the overall benefits of mentoring but some advise that success depends on the relationship between mentor and child being of substantial duration and involving regular interaction.

¹¹¹ 'Overview', JUMP website, <www.ojjdp.ncjrs.org/jump>

¹¹² L Novotney et al, 'Juvenile Mentoring Program: A Progress Review', *Juvenile Justice Bulletin*, September 2000, Office of Juvenile Justice and Delinquency Prevention, pp 6-7.

¹¹³ The website of the National Mentoring Center is <www.nwrel.org/mentoring>

6. YOUTH DRUG COURT

The Youth Drug Court trial program commenced on 31 July 2000 and was originally scheduled for two years. The trial has been extended and a full evaluation is due to be completed by the end of 2003. Further details about the future of the Youth Drug Court are given at the end of this chapter.

6.1 Commentary on principles and operation of the Youth Drug Court

(i) *Background*

The first Drug Court in New South Wales was established as a two year pilot project in February 1999 for drug-dependent adult offenders who resided in western Sydney. Eligibility and procedural requirements for the adult Drug Court are outlined in the *Drug Court Act 1998* and the *Drug Court Regulation 1999*. Following the full evaluation of the Drug Court by the Bureau of Crime Statistics and Research, the Government decided to continue the pilot until 2004.¹¹⁴ Premier Carr confirmed support for the program when he released the Government's drug policy, 'Securing a Better Future', on 23 February 2003.¹¹⁵

The New South Wales Drug Summit, which took place in May 1999 at Parliament House in Sydney, generated support for a Youth Drug Court. Recommendation 6.11 of the Drug Summit proposed that 'the current Drug Court trial be expanded to be available at other venues in NSW and the Children's Court be given comparable diversionary powers to the Drug Court.' From August 1999, an Interagency Project Management Group, consisting of a wide range of criminal justice and social service government agencies, worked on developing a Youth Drug Court model.

(ii) *Purpose*

The overall aim of the Youth Drug Court (YDC) is to divert young people charged with drug and/or alcohol-related crime away from custody and onto a rehabilitation program which combines intensive judicial supervision, case management and clinical drug treatment. The YDC is a pre-sentence program, whereas the adult Drug Court convicts and sentences offenders, then suspends execution of the sentence while they undertake the program.

(iii) *Jurisdiction*

The YDC operates within the Children's Court jurisdiction, sitting at Cobham Children's

¹¹⁴ 'About the Drug Court of New South Wales' under 'What We Do' on the Drug Court website at <www.lawlink.nsw.gov.au/drugcrt> Accessed on 25 February 2003. The three evaluation reports published by the Bureau of Crime Statistics and Research in 2002 are accessible at <www.lawlink.nsw.gov.au/bocsar>

¹¹⁵ Premier of NSW, 'Securing a Better Future: Premier Carr Releases Raft of New Drug Initiatives', *News Release*, 23 February 2003, p 2.

Court on Mondays and Campbelltown Children's Court on Thursdays.¹¹⁶ Unlike the adult Drug Court, the YDC is not governed by its own legislation. However, procedural guidance is provided by Practice Directions No 18 and No 19 of the Children's Court of New South Wales, which the Senior Children's Magistrate, Roger Dive, issued in April 2001 and March 2002 respectively.

(iv) Eligibility

Initially, access to the YDC pilot program depended upon the applicant meeting the following criteria:

- aged between 14 and 17 years at the time of the offence, although children aged 10-14 years could participate if assessed as suitable;
- charged with an offence over which the Children's Court has jurisdiction;¹¹⁷
- not charged with a sexual offence;
- have a demonstrated drug and/or alcohol problem;
- enter a plea of guilty;
- consent to participate;
- ineligible for a caution or conference under the *Young Offenders Act 1997*;
- have an association with one of the police Local Area Commands that feed into Campbelltown or Cobham or Lidcombe Children's Courts, due to either:
 - residing within the boundaries of the Local Area Command; or
 - committing the offence within the Local Area Command; or
 - demonstrating some other identification with the area.

During the course of the pilot program, some of the criteria were widened:¹¹⁸

- the young person now only needs to indicate an intention to plead guilty to major matters, not formally enter a guilty plea, and to be able to defend matters that would not result in a custodial penalty if proven;
- extra Local Area Commands were added to the program, namely, Gladesville, Eastwood, Burwood, Flemington, and the Blue Mountains. The same requirements

¹¹⁶ Except where separately footnoted, general information about the Youth Drug Court in subheadings (iii)-(xi) was obtained from: D De Fina, 'New Youth Drug Court: the Pilot Programme Commences' (2000) *Judicial Officers' Bulletin*, Vol 12, No 5, p 1; and two Practice Directions of the Children's Court of New South Wales, issued by the Senior Children's Magistrate, Roger Dive: *Practice Direction No 18*, 'Practice Direction for the Youth Drug Court', 30 April 2001; and *Practice Direction No 19*, 'Compliance with Youth Drug Court Programs', 12 March 2002.

¹¹⁷ The Children's Court deals with offences allegedly committed by persons aged from 10 years to under 18 years at the time of the offence, excluding serious children's indictable offences, as defined in s 3 of the *Children (Criminal Proceedings) Act 1987*, and excluding most traffic offences, as explained by s 28 of the Act.

¹¹⁸ Letter to the author from Bruce Flaherty, Principal Policy Officer, Crime Prevention Division, Attorney General's Department, dated 5 March 2003.

applied with regard to demonstrating a connection with one of these areas.

(v) Referrals

A Magistrate at any Children's Court in New South Wales can refer a child to the YDC. The actual court program is conducted from Cobham and Campbelltown Children's Courts, where specially trained staff are located. The intake was initially capped at 120 participants each year, but this proved to be unnecessary. The selective criteria has meant that all eligible, approved candidates are accepted.

(vi) Assessment

The first stage of the assessment process is an Initial Assessment at court to determine if the young person is legally eligible for the program. Submissions may be made by the prosecution and defence. The YDC Magistrate has the discretion to exclude people who are otherwise eligible, for example, because the offence or history of offending is so severe that the young person would be sentenced to a control order (ie. juvenile detention) even if he or she successfully completed the YDC program.

If the Magistrate determines that the young person is eligible, he or she is referred for Comprehensive Assessment by the Joint Assessment and Review Team (JART). This involves the matter being adjourned for 14 days while the JART representatives from the Department of Health, Department of Community Services, Department of Education and Training, and Department of Juvenile Justice evaluate the health, social, and welfare needs of the young person and formulate a Program Plan. During this period the young person is located, depending on bail status and personal needs, either at home, in custody, in a 'stabilisation unit' (a six bed residential unit to accommodate candidates for the purpose of assessment), or in other accommodation approved by JART.

(vii) Program plans

The Program Plan is tailored to the situation of the individual young person. Some of the conditions it may feature are:

- residing at a location directed by JART;
- attending a drug or alcohol residential program as directed;
- participating in weekly individual counselling;
- attending educational, vocational and recreational programs;
- submitting to urinalysis;
- attending 'report back' sessions at court.

(viii) Acceptance onto the program

At the second appearance before the YDC, the Magistrate may formally accept onto the program a young person for whom a Program Plan has been developed. The Magistrate defers sentencing and orders the young person to be released on bail, initially for 6 months

with a possible extension of up to a further 6 months.¹¹⁹ The order requires the young person to participate in the program and observe the conditions contained in the Program Plan. Upon entering bail, the young person signs an undertaking to comply with the YDC regimen.

Two types of support persons are assigned to each young person. One is from the Department of Juvenile Justice (often referred to as the 'Program Manager' in commentaries on the YDC) and is responsible for supervising the young person's progress and legal compliance with the bail conditions. The other is from a non-government, community organisation that receives funding from the Department of Community Services to take part in the YDC. This person is usually described in the literature as the Case Manager or Support Worker. Their role is to assist the young person to attain the goals set out in their Program Plan, such as addressing their housing situation.

(ix) Ongoing court involvement

Intensive monitoring is conducted through regular contact between the Court Team and the young person. The Court Team consists of the YDC Magistrate, the police prosecutor, a Legal Aid solicitor dedicated to Youth Drug Court matters, and a representative of JART. The Department of Juvenile Justice Worker (hereafter DJJ Worker) and the community organisation support worker (hereafter DOCS-funded Worker) may also attend the meetings as required.

These meetings are called 'report back sessions' and are initially held fortnightly, reduced to once per month if the young person is making satisfactory progress. The young person's compliance, or lack thereof, with the Program Plan and other YDC requirements is examined at the meetings.

(x) Breaches

Breaches can be dealt with by adjusting the Program Plan, extending the time needed to complete the program or, ultimately, discharge from the YDC. Drug use while on the program may prompt a review of the Program Plan, increased counselling, or greater supervision. Practice Direction No 19 requires that a breach of the YDC program is to be assessed by the Manager of JART as either a 'serious breach' or a 'minor breach'. A second or subsequent minor breach will be automatically regarded as a serious breach. If the breach is a serious breach, or if the young person is at risk of serious harm because of lack of compliance, the young person is arrested and brought before the court, whereas a young person who commits a minor breach is directed to appear at court. If either type of breach is admitted or proved, the YDC Magistrate will hear any application by the young person to remain on the program, or to adjust or extend the program. The Magistrate can direct that a

¹¹⁹ This complies with s 33(1)(c2) of the *Children (Criminal Proceedings) Act 1987* which allows sentencing to be deferred for up to 12 months and the young offender to be released on bail for rehabilitation and other purposes. This procedure is commonly known as a Griffiths Remand.

discharge hearing be conducted.¹²⁰

(xi) Sentencing

If a young person is discharged from the program due to continuous or serious breaches, he or she can be sentenced by the YDC itself, or sent back to the Children's Court for sentencing.¹²¹ Even when the young person is discharged, Practice Direction 18 states that Magistrates shall still have regard to the young person's participation in the program.¹²²

With regard to young people who graduate from the YDC, Practice Direction 18 states that, 'Any sentence imposed following successful completion of the program shall not be more punitive than that which may have been imposed had the child not participated in the program.'¹²³

There is an 'aftercare' component of the program and this can be incorporated into the sentence. Aftercare may include ongoing casework and support to assist the young person in continuing to progress after completing their Program Plan.

6.2 Implementation review of the pilot program

At the end of 2000, the NSW Attorney General's Department commissioned a consortium led by the Social Policy Research Centre at the University of New South Wales to conduct an evaluation of the YDC pilot. The *First Implementation Review* was overseen by the Youth Drug Court Monitoring and Evaluation Committee, with representatives from all the agencies involved. The report, which was released in June 2001, was based on interviews with 25 'key stakeholders' of the YDC and 5 young people enrolled in the program, as well as observation of court hearings and team meetings, and a review of policy documents.¹²⁴

The following findings are extracted from the report, which covers the period from mid 2000 to early 2001. Changes have occurred since that time.

¹²⁰ The Children's Court of New South Wales, Practice Direction No 19, 'Compliance with Youth Drug Court Programs', issued by the Senior Children's Magistrate, Roger Dive, on 12 March 2002.

¹²¹ *Evaluation of the NSW Youth Drug Court Pilot Program: First Implementation Review – A Report for the Youth Drug Court Monitoring and Evaluation Committee*, June 2001, para 9.2. Accessed on the Attorney General's Department website at <www.lawlink.nsw.gov.au/cpd.nsf/pages/Youth_drug_contents> on 9 December 2002.

¹²² The Children's Court of New South Wales, *Practice Direction No 18*, 'Practice Direction for the Youth Drug Court', issued by the Senior Children's Magistrate, Roger Dive, on 30 April 2001, p 8.

¹²³ *Ibid*, p 8.

¹²⁴ *Evaluation of the NSW Youth Drug Court Pilot Program: First Implementation Review – A Report for the Youth Drug Court Monitoring and Evaluation Committee*, June 2001, para 1.5. Accessed on the Attorney General's Department website at <www.lawlink.nsw.gov.au/cpd.nsf/pages/Youth_drug_contents> on 9 December 2002.

(i) *Intake*¹²⁵

In practice, the participants accepted onto the YDC program had higher levels of substance abuse than was anticipated at the planning stage. Most of the participants in the period reviewed were injecting drug users and heroin was the main drug of choice. This prompted a greater than expected need for detoxification and rehabilitation services. Young women comprised just over a quarter of the participants.

The intake for the pilot was originally capped at 120 young people per year but referral rates for the YDC were much lower. By 31 March 2001, after 8 months of operation, 58 young people had been referred and only 29 were accepted onto the program. Some of the reasons suggested by the *First Implementation Review* for the low intake were:

- the original requirement for applicants to reside in, or otherwise be associated with, Western or South Western Sydney excluded young persons who were willing to apply from other areas;
- the initial need for young persons to plead guilty may have caused some defence lawyers to not recommend that their clients participate in the YDC;
- for some eligible young people it was quicker to serve their sentence than invest the time and commitment required for the YDC program;
- the policy decision to keep a low profile limited the amount of publicity received and may have reduced awareness of the program among solicitors, parents and others.

(ii) *Assessment*¹²⁶

There were usually 2-3 referrals from the Children's Court each week, most of which generally continued to the assessment stage. It was originally intended that the Initial Assessment of young persons would occur before their first appearance at the YDC, but this had to be changed because of time constraints. From May 2001, young people were screened on the day of their first YDC appearance.

JART members found that the time allocated for completing the assessments was unrealistic, for example, because of difficulties in locating participants who were on bail. They suggested that the adjournment for Comprehensive Assessment be extended to 21 days, whereas the time frame given in Practice Direction 18 is 14 days.¹²⁷ Insufficient time to organise and set up the practical elements of the Program Plan was also reported. Delays could have a detrimental effect on the motivation and commitment of young persons.

¹²⁵ This material was sourced from paras 2.1-2.3 of the report.

¹²⁶ Ibid, paras 3.1-3.3.

¹²⁷ The Children's Court of New South Wales, *Practice Direction No 18*, 'Practice Direction for the Youth Drug Court', issued by the Senior Children's Magistrate, Roger Dive, on 30 April 2001, p 5.

(iii) Accommodation¹²⁸

It was crucial for YDC participants to be living in suitable circumstances to undertake the Program Plan and other YDC services. One of the greatest challenges facing the pilot program was the provision of accommodation in the community, both short-term and longer-term. Some of the reasons nominated by the report for the shortage of accommodation were:

- more YDC participants were assessed as requiring immediate removal from their current living arrangements than was anticipated at the planning stage;
- others led highly transient lifestyles and needed to be placed in appropriate accommodation in order to successfully engage with the program;
- youth accommodation services generally have policies of refusing young people with alcohol and drug issues, and were unlikely to readmit YDC participants who had previously accessed these services.

(iv) Residential rehabilitation¹²⁹

YDC participants had to compete for rehabilitation beds in existing facilities. There was only one youth-specific residential rehabilitation service in Western Sydney, and the YDC program did not have priority access. Some YDC participants were placed in rehabilitation services as far away as Cowra, the Central Coast and Canberra. In these circumstances, it was difficult for the DOCS-funded Workers to implement the Program Plan and bring the participant to court for report back sessions, or for the DJJ Workers to conduct supervision and manage health and safety risks.

(v) Detoxification¹³⁰

Detoxification was expected to take place either in custody if bail was refused, or in the community for those on bail. Detoxification in the community can be provided to a person as an in-patient of a hospital, or provided at home by Area Health Services.

Most of the in-patient detoxification services are designed for adults. JART members were concerned that mixing YDC participants with adults in these services could place them at some risk. In many cases the family home also proved not to be a viable location for detoxification, for example, because there were child protection issues, drugs in the home,

¹²⁸ *Evaluation of the NSW Youth Drug Court Pilot Program: First Implementation Review – A Report for the Youth Drug Court Monitoring and Evaluation Committee*, June 2001, paras 4.1-4.2. Note that the six bed ‘stabilisation unit’, where young people could stay for up to two weeks while undergoing Comprehensive Assessment or during a review of their Program Plan, was not intended to be used for accommodation purposes. There were delays in establishing the stabilisation unit as a stand-alone service, and it was operating out of two locations as an interim arrangement: para 5.2.

¹²⁹ *Ibid*, para 5.3.

¹³⁰ *Ibid*, para 5.1.

or family members involved in crime. The lack of youth-specific detoxification beds in the community required greater use of detoxification services in custody.

(vi) Program co-ordination¹³¹

During the first six months of the trial program, there was some confusion about the roles and responsibilities of different staff involved in the program. This was due to the large number of government and non-government agencies contributing to the delivery of services. To redress the situation, regular meetings were established between JART and the Court Team, and between JART and the DOCS-funded case management services to discuss problems. Formal case reviews are also now convened between DOCS-funded Workers and DJJ Workers and written documentation of these reviews is provided to JART.

(vii) Court processes¹³²

Participants, family members and service providers found the process of court appearances and ‘report back’ sessions to be time consuming. As a result, the Court Team endeavoured to streamline the procedures. On the positive side, the involvement of only two YDC Magistrates facilitated consistency of operation and established rapport with the young people during the course of the program. Participants interviewed for the review commented favourably on being able to express themselves at the report back sessions and receiving encouragement from the Magistrate, prosecutor, Legal Aid representative and others, to succeed on the program.

(viii) Breaches and sanctions¹³³

The comments of YDC operational staff in relation to breaches and sanctions seemed to reflect their personal views of how strict the program should be, rather than any obvious problem with its approach or structure in this area. However, recurring concerns were expressed about consistency of treatment between participants, for example, in urinalysis testing and in delineating the boundaries of acceptable behaviour. The report noted that the standards that some interviewees advocated, such as ‘custody for non-compliance’ or a ‘three strikes and you’re out’ model of termination, were problematic because they conflicted with the YDC’s ideal of keeping young people on the program in spite of challenging behaviour. A clearer picture may emerge in the final report.

6.3 Since the implementation review

The period reflected in the *First Implementation Review* was the second half of 2000 and early 2001. In April 2001 the Senior Children’s Magistrate issued Practice Direction No 18,

¹³¹ Ibid, para 6.1.

¹³² Ibid, paras 7.1-7.2.

¹³³ Ibid, paras 8.1-8.5.

followed by Practice Direction No 19 in March 2002. These provide some clarification of procedures to be followed and standards to be met. As previously stated, the criteria for eligibility were broadened to increase the number of potential applicants, and the agencies involved in operating the program have made practical modifications to improve communication and service delivery.

The Local Court *Annual Review* of 2001 was optimistic about the value of the YDC:

...it is clearly a successful model for high level, court-monitored intervention for serious criminals with high level addictions to illegal drugs. There are graduates from the program who have stayed away from drugs and crime, re-joined their families and successfully entered the work force. The pilot program is providing some fascinating insights into the level of intervention required to achieve change in behaviour and into the efficacy of using more informal court room settings.¹³⁴

The latest *Annual Report* of the Department of Juvenile Justice gives some performance indications. During the period from July 2001 to June 2002, 26 new participants were accepted by the YDC, contributing to a total of 56 individuals undertaking the program. During the same period, 76 young people were referred to the YDC for Initial Assessment. Of these, 49 proceeded to Comprehensive Assessment.¹³⁵ In February 2003, Premier Carr announced that the program had produced 25 graduates so far, and that 88 young people had been accepted into the program since it commenced in July 2000. The Premier named the YDC among the successful drug programs that would continue to receive support.¹³⁶

The two year YDC pilot was originally due to finish in July 2002. An extension was granted to take referrals for another 12 months to the end of the 2002-2003 financial year.¹³⁷ The findings of the *First Implementation Review* in June 2001 will be put into perspective by the full evaluation of the pilot program. The evaluation is scheduled to be completed by the end of 2003.¹³⁸

¹³⁴ Local Court New South Wales, *Annual Review 2001*, p 20.

¹³⁵ Department of Juvenile Justice, *Annual Report 2001-2002*, p 21.

¹³⁶ Premier of NSW, 'Securing a Better Future: Premier Carr Releases Raft of New Drug Initiatives', *News Release*, 23 February 2003, p 2.

¹³⁷ Personal communication, Youth Drug Court Registry, 10 December 2002.

¹³⁸ Letter to the author from Bruce Flaherty, Principal Policy Officer, Crime Prevention Division, Attorney General's Department, dated 5 March 2003.

7. POLITICAL PERSPECTIVES IN 2002-2003 ON THE DIVERSION OF YOUNG OFFENDERS

This chapter attempts to gauge the level of political interest in, and support for, diversionary options for young offenders, by examining recent legislative proposals and the policies of political parties.

7.1 Young Offenders Amendment (Reform of Cautioning and Warning) Bill 2002

In March 2002, Andrew Stoner, National Party MP for Oxley, introduced the Young Offenders Amendment (Reform of Cautioning and Warning) Bill, which sought to amend the *Young Offenders Act 1997* to provide that:

- young offenders who have been previously found guilty of an offence by a court or have been dealt with under the Act are not entitled to receive a warning or a caution;
- a parent of a young offender is required to be given notice when the offender is warned or cautioned under the Act;
- a warning, caution or conference is required to be given or held as close as possible to the date when the offence was committed;
- the police or the conference convenor be given the power to appoint a respected member of the community to be present at the time of the admission, caution or conference, if the child (or a person responsible for the child) refuses to choose an adult to be present;
- specialist youth officers, conference administrators and the Director of Public Prosecutions cease to have the discretion to overturn referrals for conferences in favour of cautions.¹³⁹

The Second Reading Debate on the Young Offenders Amendment (Reform of Cautioning and Warning) Bill was adjourned on 11 April 2002 and did not proceed. The Government introduced its own legislation soon after.

7.2 The Government's Young Offenders Amendment Bill 2002

The Police Minister, Hon. Michael Costa MLC, indicated in February 2002 that police were concerned with the number of cautions that young offenders were receiving prior to conferencing and that the Government was planning to limit the number of cautions that could be granted.¹⁴⁰

On 4 June 2002 the Attorney General, Hon. Bob Debus MP, introduced the Young Offenders Amendment Bill 2002. It proposed a number of refinements to the regime of

¹³⁹ For the Second Reading Speech on the Bill, see *NSWPD*, 21 March 2002, p 951; 11 April 2002 (resumed), p 1409.

¹⁴⁰ Speech to the New South Wales Press Forum on 21 February 2002, quoted by Andrew Stoner MP, in the Second Reading Speech (resumed) on the Young Offenders Amendment (Reform of Cautioning and Warning) Bill, *NSWPD*, 11 April 2002, p 1409.

cautions and conferences under the *Young Offenders Act 1997*, including a limit of 3 cautions per young offender. The Opposition moved amendments in the Legislative Assembly and the Legislative Council to preclude young offenders from being referred for a caution if they had previously been cautioned for another offence, but the amendments were negated. In the Legislative Council the Greens moved an amendment to delete the proposed limitation on the number of cautions altogether. That amendment was also negated.¹⁴¹

The Bill passed the Legislative Assembly on 19 June 2002 and the Legislative Council on 3 September 2002. The *Young Offenders Amendment Act 2002* No 69 commenced on 15 November 2002.¹⁴²

The Act provides:

- for a **limit of 3 cautions** under the *Young Offenders Act 1997*, irrespective of whether the offences committed are the same or different. If a young offender has already received cautions on 3 occasions, a specialist youth police officer will determine, in consultation with the investigating police officer, whether the offender should be referred to a youth justice conference or whether the matter should proceed to court;
- that specialist youth officers, conference administrators and the Director of Public Prosecutions are required to **consult with the investigating police officer** when deciding whether a young offender should be conferenced;
- that a **representative of the young offender's school** may to be invited to attend a youth justice conference if the conference convenor considers it appropriate;
- that the **young offender's participation in an appropriate program** (eg. drug and alcohol rehabilitation, counselling, or educational program) must be considered when an outcome plan is being developed at a youth conference;
- that **victims have the right to veto an outcome plan** proposed at a conference if they personally attend the conference.

Introducing the legislation, the Attorney General stated:

I am aware that there is a perception among some members of the public that juveniles who repeatedly offend are being treated too leniently under the Act. While the Government does not believe there is strong evidence to support this perception, limiting the number of cautions a young offender can receive should address some community concerns in this regard.¹⁴³

¹⁴¹ Young Offenders Amendment Bill, Second reading debate, *NSWPD*, LA: 19 June 2002, pp 3398-3404; LC: 27 August 2002 p 4268-4270, 3 September 2002 p 4381-4382.

¹⁴² *Government Gazette*, No 220 of 15 November 2002, p 9614.

¹⁴³ Young Offenders Amendment Bill, *NSWPD*, 4 June 2002, p 2488.

The Attorney General also anticipated that the Government would pursue further amendments to the *Young Offenders Act 1997* once the 3 year review of the Act was completed.¹⁴⁴

7.3 Juvenile justice policies for the State election in March 2003

(i) Labor Party

The policy of the Australian Labor Party (NSW Branch) is that ‘emphasis must be based on community based programs which do not isolate youth from the society which they must re-enter.’ The Labor Party’s youth policy pledges, among other things, to:

- redirect resources to help beat the cycle of incarceration;
- provide funding for programs focusing on the rehabilitation of young offenders;
- maintain the separation between juvenile and adult detention facilities.¹⁴⁵

There is no suggestion in its stated policies that the Carr Government, if re-elected, would retreat from a diversionary approach. Rather, diversionary programs seem to be an intrinsic element of broader plans such as the Drugs Policy, ‘Securing a Better Future’, which Premier Carr released in February 2003. The 4 year plan is budgeted at \$223 million and includes a range of crime prevention and education programs, many targeting young people. Among the proposed new initiatives is a trial of early intervention counselling of school students using cannabis, while continued support is pledged for existing programs including the Youth Drug Court.¹⁴⁶

(ii) Coalition

The main juvenile justice policies of the Liberal Party and National Party in New South Wales are outlined in a statement entitled ‘Busting Juvenile Gangs: A Law and Justice Policy Initiative’, which was released on 16 February 2003.¹⁴⁷ The policy advocates that further restrictions be made to cautions and warnings but also proposes an additional diversionary rehabilitation program:

- *Limit of one caution and one warning:* Multiple warnings for juvenile offenders would be abolished. Only one warning and one caution could be issued by the police to each offender.

¹⁴⁴ Young Offenders Amendment Bill, *NSWPD*, 4 June 2002, p 2489.

¹⁴⁵ NSW Labor Policy No. 27, ‘Youth: 6. Youth Justice’, accessed on the ALP (NSW Branch) website at <www.nsw.alp.com.au> on 10 February 2003.

¹⁴⁶ Premier of NSW, ‘Securing a Better Future: Premier Carr Releases Raft of New Drug Initiatives’, *News Release*, 23 February 2003.

¹⁴⁷ See ‘Policies’ on <www.liberal.com.au> Accessed on 17 February 2003.

- *Gangs Watch List*: The names of juveniles who have received a warning, caution, or a conviction for anti-social or threatening behaviour associated with gang activity may be recorded on a Gangs Watch List for a period of 12 months. The decision to record the names on the Gangs Watch List can only be made by a police officer of the rank of Sergeant or above. Only police will have access to the list, which will be maintained on a central database.
- *Preventative Directives*: Police of the rank of Sergeant or above will be allowed to issue non-association and place-restriction directives for the protection of juveniles on the Gangs Watch List. These directives will ban specific juveniles from nominated places such as shopping centres, beaches and train stations (unless accompanied by a responsible adult) and will prohibit association with nominated persons. The directives last for up to 6 months and can be renewed or extinguished if justified. Juveniles who breach a directive are required to attend a youth justice conference, if no other offence has been committed, or otherwise to appear before court.¹⁴⁸
- *Notification of parents*: The warning/caution procedures will be changed so that parents and guardians are notified of any warning/caution that is issued to their child/ward. In addition, parents and guardians will be notified when a child's name is added to the Gangs Watch List.
- *Second chance camps*: young people convicted of non-violent, less serious crimes will be able to attend a camp to improve their life skills. Two camps will be conducted on a trial basis, offering programs of two to 12 weeks duration. Activities will include counselling, community service, job training, outdoor skills and, where appropriate, drug and alcohol rehabilitation. Referrals may be made by: Magistrates at sentencing; police in respect of juveniles who are on the Gangs Watch List or are subject to a Preventative Directive; community workers who may recommend an at-risk juvenile; and school principals in consultation with families, to deal with discipline problems.

(iii) Greens

The NSW Greens overtly promote diversionary options for young offenders. Their policy on juvenile justice:

- declares support for the *Young Offenders Act 1997* and commitment to the principle of diversion from the court system;
- recommends the introduction of a network of youth advocates, accessible to young people when facing a caution or conference;
- regards detention as an option of last resort;
- advocates separating children and adults in the criminal justice system and that every

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It seems, however, that a juvenile can only be placed on the Gangs Watch List or be the recipient of a Preventative Directive if they agree to accept the caution or warning. The policy states (at p 4): 'As under existing legislative arrangements, juveniles may choose not to accept a caution/warning or Preventative Directive. They can then pursue the matter through a Youth Justice Conference or in the court and risk the associated penalties.'

effort be made to prevent the transfer of young people from juvenile detention centres to adult gaols;

- opposes the public naming of young offenders.¹⁴⁹

The Greens also opposed the Government's Young Offenders Amendment Bill 2002 in the Legislative Council. On the question of limiting the number of cautions, the Greens argued that no maximum should be stipulated because 'There needs to be flexibility in delivery of justice so that each individual case can be judged on its own merits.'¹⁵⁰

(iv) Democrats

In their Law and Order policy, the Australian Democrats (NSW Division) propose that:¹⁵¹

- 'Courts would have diversion programmes to identify reversible factors and a network of preventive services would be resourced.'
- 'A gaol diversion programme would identify suitable accused and provide an alternative to gaol for these offenders.'
- Prison would be a last resort for serious offences.
- Offenders should meet with victims if the victim agrees, and the offender should make restitution to the victim.
- Certain criminal legislation should be repealed including the *Young Offenders Amendment Act 2002* - this would abolish the limit of 3 cautions for each juvenile offender.

¹⁴⁹ NSW Greens Policies, *Juvenile Justice*, accessed on the Greens website at <www.nsw.greens.org.au> on 10 February 2003.

¹⁵⁰ Hon. Ian Cohen MLC, Second Reading Debate, Young Offenders Amendment Bill, *NSWPD*, 20 June 2002, p 3523.

¹⁵¹ 'Law and Order', under Policies and Issues, Australian Democrats (NSW Division) website at <www.nsw.democrats.org.au> Accessed on 5 March 2003.

8. CONCLUSION

Diversions options have become increasingly prominent in recent years as a strategy for dealing with juvenile offenders. Alternatives to court proceedings usually emphasise a community-based approach and are influenced by the ideals of rehabilitation and restorative justice. By attempting to intervene in the cycle of criminal behaviour at an early age, juvenile diversionary programs ultimately aim to prevent further crime.

The *Young Offenders Act 1997* signalled a major development in juvenile justice in New South Wales. It formally recognised the use of warnings, cautions, and conferences to divert from the court system those juveniles who had committed less serious offences. Statistics indicate that the *Young Offenders Act 1997* has significantly boosted diversion rates. During the first 12 months of the Act's operation (July 1998 to June 1999), 62.78% of young offenders were dealt with by the courts.¹⁵² By the 2001-2002 financial year, only 18.5% went to court.¹⁵³ Furthermore, there is some evidence that the *Young Offenders Act 1997* is assisting crime prevention, as the re-offending rates of young people who have attended conferences are lower than those who appeared at court. Various studies have also found that conferences give offenders and victims a greater sense of input and satisfaction than conventional court processes allow. These results are consistent with the guiding principles of the Act, for example, to use the least restrictive sanction that is appropriate in the circumstances, to encourage young offenders to accept responsibility for their actions, and to acknowledge the rights of offenders, their families, and victims.¹⁵⁴

Other diversionary initiatives have operated as trial programs without statutory basis. The Mentoring for Young Offenders program sought juveniles living in the pilot areas who had been cautioned or conferenced under the *Young Offenders Act 1997*. Ongoing contact with a positive adult role model led to improvements in the behaviour, communication skills, and motivation of the juvenile participants. The Youth Drug Court pilot program fulfils a more specialised function, providing judicial supervision and medical treatment to juvenile offenders with substance abuse problems. It targets juveniles who are ineligible to receive a caution or conference under the *Young Offenders Act 1997*. Premier Carr pledged continued support for the Youth Drug Court when announcing the Government's drug policy prior to the State election of March 2003.

Rehabilitation programs are a key feature of the Labor Party's policies on youth and crime, although in 2002 the Carr Government introduced some modifications to the *Young Offenders Act 1997*. These included a limit of three cautions for each young offender and an entitlement for victims who attend conferences to veto the outcome plan. The Coalition

¹⁵² N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)*, Report to Youth Justice Advisory Committee, October 1999, para 38.

¹⁵³ NSW Police, *Annual Report 2001-2002*, p 17.

¹⁵⁴ These factors are adapted from s 3 ('Objects of Act'), s 7 ('Principles of scheme') and s 34 ('Principles and purposes of conferencing') of the *Young Offenders Act 1997*.

claimed that juvenile recidivists were receiving lenient treatment under the Act.¹⁵⁵ The current juvenile justice policy of the Coalition proposes a limit of one caution or warning per offender, and compulsory notification of parents whose children are warned or cautioned. The Greens, however, assert that numerical limits impede flexibility and discretion being exercised in each individual's case, and that juveniles should have access to youth advocates when facing a caution or conference.

The statutory review under s 76 of the *Young Offenders Act 1997* is due to be completed at the end of 2003 and should clarify how effectively the Act is operating. It can be expected that further amendments will be introduced as a result of the review. But studies showing the beneficial consequences of the Act signify that diversionary options have become a valuable component of juvenile justice in New South Wales and are likely to remain in the future.

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For example, see the comments of Andrew Stoner, National Party MP for Oxley, in the Second Reading Speech on the Young Offenders Amendment (Reform of Cautioning and Warning) Bill, *NSWPD*, 21 March 2002, p 951.