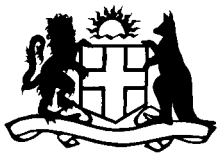

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Sentencing: young offenders

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CONTENTS

TERMS OF REFERENCE

To inquire into and report on the laws relating to sentencing in New South Wales with particular reference to:

(i) the formulation of principles and guidelines for sentencing;

(ii) the rationalisation and consolidation of current sentencing provisions;

(iii) the adequacy and use of existing non-custodial sentencing options with particular reference to home detention and periodic detention;

(iv) the adequacy of existing procedures for the release of prisoners by the Offenders Review Board and the Serious Offenders Review Council and the benefits that might accrue from the review of the decisions of the Offenders Review Board and the Serious Offenders Review Council by judicial officers; and

(v) any related matter.

In undertaking this reference, the Commission should have regard to the proposals in relation to sentencing contained in the Australia Labor Party policy documents formulated in Opposition.

PARTICIPANTS

Pursuant to s 12A of the *Law Reform Commission Act 1967* (NSW) the Chairperson of the Commission constituted a Division for the purpose of conducting the reference. The members of the Division are:

The Honourable Justice Michael Adams*
His Honour Judge Robert Bellear
Associate Professor Janet Chan
The Honourable Justice Greg James
Her Honour Judge Angela Karpin
The Hon Jeff Shaw QC

(* denotes Commissioner-in-Charge)

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The Commission invites submissions on the issues relevant to this review, including but not limited to the issues raised in this Issues Paper.

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There is no special form required for submissions. If it is inconvenient or impractical to make a written submission you may telephone the Commission and either direct your comments to a Legal Officer over the telephone, or else arrange to make your submission in person.

The closing date for submissions is 30 September 2001.

Use of submissions and confidentiality

If you would like your submission to be treated as confidential, please indicate this in your submission. Submissions made to the Commission may be used in two ways:

- Since the Commission's process of law reform is essentially public, copies of submissions made to the Commission will normally be made available on request to other persons or organisations. However, if you would like all or part of your submission to be treated as confidential, please indicate this in your submission. Any request for a copy of a submission marked "confidential" will be determined in accordance with the *Freedom of Information Act 1989* (NSW).
- In preparing further papers on this reference, the Commission will refer to submissions made in response to this Issues Paper. However, requests for confidentiality will be respected by the Commission in relation to the publication of submissions.

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LIST OF ABBREVIATIONS

C(CP)A: Children (Criminal Proceedings) Act 1987 (NSW)

SYO: Specialist Youth Officer

YOA: Young Offenders Act 1997 (NSW)

YJCD: Youth Justice Conferencing Directorate, Department of Juvenile Justice

LIST OF ISSUES

Chapter 2: Diversionary Sentencing

ISSUE 1

Is the range of offences covered by the *Young Offenders Act 1997* (NSW) appropriate?

ISSUE 2

Should the Children's Court continue to have a power to caution young offenders under the *Children (Criminal Proceedings) Act 1987* (NSW)? If so, when should this power, rather than the power to caution under the *Young Offenders Act 1997* (NSW) be used?

ISSUE 3

Should people who attend youth justice conferences as respected members of the offender's community be paid for their services?

ISSUE 4

Are the outcomes of youth justice conferences appropriate to achieve the objects of the *Young Offenders Act 1997* (NSW)?

ISSUE 5

Do lawyers advise young people against participation in youth justice conferencing? If so, why? Should the *Young Offenders Act 1997* (NSW) be amended to address this issue?

ISSUE 6

Do the Police Service and the Department of Juvenile Justice comply with the record keeping requirements under the *Young Offenders Act 1997* (NSW)?

Are the statutory record keeping requirements under the *Young Offenders Act 1997* (NSW) appropriate and adequate?

ISSUE 7

What is an appropriate rate for diversion of young offenders under the *Young Offenders Act 1997* (NSW)? How can this be achieved?

ISSUE 8

How effective is the Youth Drug Court, both in reducing re-offending by young offenders and improving their health and well being?

ISSUE 9

Are the alcohol and drug treatment services available for young people in New South Wales adequate?

ISSUE 10

Is circle sentencing an appropriate way of dealing with young people who commit offences? Is the currently understood structure of circle sentencing an appropriate one?

Chapter 3: Sentencing by Courts

ISSUE 11

Should the Director General of the Department of Juvenile Justice be able to exercise his or her power to discharge detainees under s 24(1)(b) and (c) of the Children (Detention Centres) Act 1987 (NSW) in relation to young offenders dealt with according to law as well as those dealt with under the C(CP)A?

ISSUE 12

What is the current procedure for dealing with care issues which come to the attention of the Children's Court in the course of sentencing a young offender? Is it adequate?

ISSUE 13

Is the range of sentencing options under the *Children (Criminal Proceedings) Act 1987* (NSW) fully utilised by sentencing courts? Is the current range of options adequate?

Should licence disqualification be available as a sentence for all offences?

ISSUE 14

Could community-based sentencing orders be better structured to enable young offenders to participate in educational or vocational work?

ISSUE 15

Is the current law dealing with young people and bail appropriate? If not, how should it be changed?

Do police and courts exercise their powers in relation to bail appropriately? If not, in what way? How should this be addressed?

ISSUE 16

Are Children's Magistrates appropriately trained, skilled and experienced?

ISSUE 17

Should the Children's Court be renamed? If so, what should it be called?

ISSUE 18

Is the law regulating the admissibility of evidence that a person pleaded guilty to or was found guilty of previous offences while aged under 18 appropriate?

Is the law regulating the admissibility of evidence that a person has been dealt with under the *Young Offenders Act 1997* (NSW) appropriate?

ISSUE 19

Should courts have the power to permit the identity of young offenders to be published or broadcast? If so, is the current law appropriate?

ISSUE 20

Should New South Wales introduce mandatory sentences for offences committed by young offenders?

ISSUE 21

Should guideline judgments apply to young offenders?

ISSUE 22

Does court-based sentencing of young offenders adequately emphasise the role of restorative justice? If not, how can more emphasis be given to restorative justice?

ISSUE 23

How should the over-representation of young Aboriginal and Torres Strait Islander in the juvenile justice system be addressed in the context of sentencing?

ISSUE 24

Do young people from particular ethnic groups or backgrounds encounter discrimination in the sentencing process? If so, which groups or backgrounds? How should this be addressed?

ISSUE 25

Do young people from regional or rural New South Wales encounter discrimination in the sentencing process? If so, how should this be addressed?

ISSUE 26

Do young offenders with intellectual disabilities encounter discrimination in the sentencing process? If so, how can this be addressed?

ISSUE 27

Do young offenders in state care encounter discrimination in the sentencing process? If so, how can this be addressed?

How are young offenders in need of state care dealt with by sentencing courts?

CHAPTER ONE: INTRODUCTION

BACKGROUND

1.1 On 12 April 1995, the then Attorney General, the Hon Jeff Shaw QC, referred the reform of sentencing law to the New South Wales Law Reform Commission (the Commission).[1] The Commission divided the reference into three phases.[2] The first phase, an evaluation of the general principles of sentencing law in New South Wales, was the subject of the Commission's Report entitled *Sentencing*.[3] The second phase involves a review of the particular problems which arise in sentencing groups of offenders requiring special consideration, such as Aboriginal people and juveniles.[4] In due course the Commission will undertake further work in connection with penalising corporations. The third phase will involve the review and rationalisation of the maximum penalties prescribed by statute in New South Wales.

DEFINITION

1.2 The age of criminal responsibility in New South Wales is 10. There is a conclusive presumption that no child who is younger than 10 years old can commit an offence.[5]

1.3 Children aged between 10 and 14 who commit criminal offences are presumed to be incapable of committing a crime because of a lack of mens rea (criminal intention). To rebut this presumption, the prosecution must prove that the child did the act charged and that when doing the act, the child knew that it was a wrong act of some seriousness, as distinct from an

1. The background to the reference is outlined in New South Wales Law Reform Commission, *Sentencing* (Discussion Paper 33, 1996) at para 1.1-1.9.

2. See NSWLRC DP 33 at para 1.11-1.20.

3. New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996).

4. See New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders* (Report 96, 2000).

5. *Children (Criminal Proceedings) Act 1987* (NSW) s 5. For discussion of this law, see Australian Law Reform Commission/Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report 84, 1997) at para 18.12-18.16 and Recommendation 194; New South Wales, Attorney General's Department, Criminal Law Review Division, *A Review of the Law on the Age of Criminal Responsibility of Children* (2000); L Doherty, "Children Still Presumed to be Innocent – At Least Until 14" *Sydney Morning Herald* (12 February 2001) at 5.

act of mere naughtiness or childish mischief. This must be proven to the criminal standard of proof which is beyond reasonable doubt.[6]

1.4 Offenders who are aged between 10 and 17 at the time they commit an offence, and who are under 21 when charged, are sentenced under a separate system to adults.[7] In order to determine questions of jurisdiction, a court may rely on the apparent age of an accused person if no other evidence is readily available.[8]

1.5 While older legislation dealing with people aged under 18 refers to them as "children" or "juveniles", recently enacted legislation uses the term "young offender", which is also the term preferred by the Commission.

EXTENT OF OFFENDING

1.6 Community perceptions about young offenders are influenced largely by the media, which often exaggerates and sensationalises the level and type of offending by young people. In fact, a study by the New South Wales Department of Juvenile Justice of over 50,000 young offenders who appeared before the Children's Court from 1984 to 1994 found that 70% of young people committed only one offence, and a further 15% committed only two offences. Nine percent of young offenders were responsible for almost one third of all criminal court appearances by young people and less than 2% were responsible for almost 10% of all criminal court appearances.[9]

6. *R v C R H* (Unreported, New South Wales, Court of Criminal Appeal, 18 December 1996). For discussion of this presumption, see ALRC Report 84 at para 18.17-18.20 and Recommendation 195; New South Wales, Attorney General's Department, Criminal Law Review Division, *A Review of the Law on the Age of Criminal Responsibility of Children* (2000); Australian Institute of Criminology, *The Age of Criminal Responsibility* (Trends and Issues in Crime and Criminal Justice, No 181, 2000).

7. C(CP)A s 3, 16, 28. If no other evidence is readily available, a court is entitled to rely on the apparent age of a person in order to determine whether it has jurisdiction: C(CP)A s 7A. For a discussion on the aspects of the juvenile justice system which apply to offenders who were under 18 when they committed an offence but aged 18-21 when charged see S Mullany, "The Child Offender who Turns 18" (1997) 35(10) *Law Society Journal* 48.

8. C(CP)A s 7A.

9. M Cain, "An Analysis of Juvenile Recidivism" in Australian Institute of Criminology, *Juvenile Crime and Justice* (1997) 12 at 13; New South Wales, Department of Juvenile Justice, *Recidivism of Juvenile Offenders in NSW* (1996).

1.7 The majority of offences committed by young people are property offences such as housebreaking with intent to steal, motor vehicle theft and stealing. Violent offences are in the minority, even for those few young people who are repeat offenders.[10]

COURSE OF THIS REFERENCE

Identifying the issues

1.8 The Commission commenced work on this reference by reviewing the literature on juvenile justice in Australia, particularly in New South Wales. There is an enormous body of published literature in this area, including the Report of the 1991 Royal Commission into Aboriginal Deaths in Custody[11] and numerous reports by a wide range of government and non-government agencies, including the Aboriginal Justice Advisory Council,[12] the Australian Institute of Criminology;[13] the Bureau of Crime Statistics and Research;[14] the Community Services Commission;[15] the Human Rights and Equal Opportunity Commission;[16] the Judicial Commission;[17] the Juvenile Justice Advisory Council;[18] the New South Wales Attorney

10. K Buttrum, "Juvenile Justice: What Works and What Doesn't" in Australian Institute of Criminology, *Juvenile Crime and Justice* (1997) 63 at 63-64.

11. Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* and *Regional Report for New South Wales, Victoria and Tasmania* (1991-1992).

12. New South Wales, Attorney General's Department, Aboriginal Justice Advisory Committee, *Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process* (Discussion Paper, 1999); New South Wales, Attorney General's Department, Aboriginal Justice Advisory Committee, *A Fraction More Power: Review of the Impact of the Children (Protection and Parental Responsibility) Act on Aboriginal People in Moree and Ballina* (1999); New South Wales, Attorney General's Department, Aboriginal Justice Advisory Committee, *Policing Public Order: Offensive Language and Conduct, The Impact on Aboriginal People* (1999). (In 1999 the Committee was renamed the Council).

13. Australian Institute of Criminology, *Family Conferencing and Juvenile Justice* (1994); Australian Institute of Criminology, *Juvenile Crime and Justice* (1997); Australian Institute of Criminology, *Juveniles in Australian Corrective Institutions 1981-1998* (1999); Australian Institute of Criminology, *Restorative Justice and Conferencing in Australia* (Trends and Issues 186, 2001).

14. New South Wales, Bureau of Crime Statistics and Research, *Race and Offensive Language Charges* (Bureau Brief, August 1999; New South Wales, Bureau of Crime Statistics and Research, *NSW Drug Court Evaluation: Program and Participant Profiles 2000* (Crime and Justice Bulletin 50); New South Wales, Bureau of Crime Statistics and Research, *Drug Court Evaluation: Interim Report on Health and Well being of Participants 2001* (Crime and Justice Bulletin 53); New South Wales, Bureau of Crime Statistics and Research, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (2000); New South Wales, Bureau of Crime Statistics and Research, *The Scope for Reducing Indigenous Imprisonment Rates* (2001).

15. New South Wales, Community Services Commission, *The Drift of Children in Care into the Juvenile Justice System* (1996).

16. Human Rights and Equal Opportunity Commission, *Bringing Them Home*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997); Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (ALRC, Report 84, 1997).

17. New South Wales, Judicial Commission, *Sentencing Disparity and the Ethnicity of Juvenile Offenders* (Report 17, 1998).

18. New South Wales, Juvenile Justice Advisory Council, *Aboriginal Over-representation and Discretionary Decisions in the NSW Juvenile Justice System* (1995).

General's Department;[19] the New South Wales Department of Juvenile Justice;[20] the New South Wales Ombudsman;[21] the New South Wales Parliament[22] and the Youth Justice Coalition.[23]

1.9 The Commission also engaged in extensive preliminary consultations with the Aboriginal Justice Advisory Council; the Australian Institute of Criminology; the Attorney General's Department; the Children's Court; the Department of Juvenile Justice; the Juvenile Justice Advisory Council; the Law Society of New South Wales; Legal Aid New South Wales; the New South Wales Bar Association; New South Wales Office of the Director of Public Prosecutions; the New South Wales Police Service; the Positive Justice Centre and Public Defenders. The Commission also established a reference group which greatly assisted the Commission in identifying relevant issues. The members of the reference group are listed at Appendix A.

This Issues Paper

1.10 During preliminary consultations, a wide range of issues were raised about many aspects of the criminal justice system including police powers, public order offences, alternative ways of commencing proceedings and legal representation of young people. The Commission has taken the view that although these issues are worthy of further consideration, they are outside the scope of this reference, which focuses on sentencing issues.

1.11 This Issues Paper consists of three chapters. Chapter 1 is an introduction. It sets out the background to this Issues Paper, the definition of "young offender" and the course of this reference.

19. New South Wales, Attorney General's Department, Crime Prevention Division, *Juvenile Crime in New South Wales Report: Statistical Profile of Juvenile Offenders* (1996); N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)* (1999).

20. New South Wales, Department of Juvenile Justice, *Juveniles in Detention: Issues of Over Representation* (1995); New South Wales, Department of Juvenile Justice, *Recidivism of Juvenile Offenders in NSW* (1996).

21. New South Wales, Ombudsman, *Inquiry into Juvenile Detention Centres* (1996); New South Wales, Ombudsman, *Policing Public Safety* (1999); NSW Ombudsman, *Investigation into Kariong Juvenile Justice Centre* (2000).

22. New South Wales, Parliament, Legislative Council, Standing Committee on Social Issues, *Juvenile Justice in NSW* (1992).

23. New South Wales, Youth Justice Coalition, *Kids In Justice – A Blueprint for the 90s* (1990).

1.12 Chapter 2 deals with existing schemes which divert young offenders away from courts, including warnings, cautions and youth justice conferences under the *Young Offenders Act 1997* (NSW) and the Youth Drug Court. It also considers circle sentencing.

1.13 Chapter 3 deals with sentencing by courts. It sets out the criminal jurisdiction of courts over young people, sentencing principles and the penalties which courts can impose. It describes police powers over young people, public order offences, the alternatives for commencing criminal proceedings and young peoples' right to legal representation when questioned by police and in court.

1.14 Chapter 3 raises issues in relation to bail; the name of the Children's Court and specialisation of the Children's Magistracy; the role of evidence of previous offences committed by a young person in later hearings and trials, media identification of young people and restorative justice. It looks at mandatory sentencing and guideline sentencing judgments. Finally, Chapter 3 considers particular groups of young people who are over represented as offenders.

Consultation and recommendations

1.15 This Issues Paper identifies 27 issues relating to sentencing young offenders. The Commission plans to consult extensively with the community on these issues before preparing its final report on young offenders. The Commission is interested in information and views about all of these issues. You do not have to address all of the issues raised in the Issues Paper in your submission if you have information or views on only one or some. The Commission would also welcome submissions about other issues related to sentencing young offenders not identified in this Issues Paper. The deadline for receipt of submissions for this Issues Paper is 30 September 2001.

CHAPTER TWO: DIVERSIONARY SENTENCING

2.1 Young offenders can be dealt with by warnings, cautions and youth justice conference under the *Young Offenders Act 1997* (NSW) ("YOA"). New South Wales is also currently trialing a Youth Drug Court as a diversionary option for young offenders with alcohol or drug problems.

2.2 This Chapter outlines these diversionary sentencing options. Issues raised include the scope of the YOA, the interaction between participation in youth justice conferencing and legal advice, the fairness of youth justice conferencing to young offenders, victims of crime and the community, and the rate of diversion under the YOA. This Chapter also raises the issue of the effectiveness of the Youth Drug Court, both in reducing re-offending by young people and improving their health.

2.3 This Chapter also outlines a diversionary sentencing option known as circle sentencing, which is increasingly used overseas and has been trialed on adult offenders in several Australian jurisdictions. The last issue raised in this Chapter is whether circle sentencing is an appropriate sentencing option for young offenders in New South Wales.

YOUNG OFFENDERS ACT 1997 (NSW)

2.4 Under the YOA, young people who commit certain offences can be dealt with by police warnings, cautions delivered by either police or courts or youth justice conferences, instead of being sentenced by a court.[1]

2.5 The YOA includes the following general principles:[2]

- The least restrictive sanction is to be imposed on young offenders.

1. For an overview of diversionary schemes in New Zealand, the United Kingdom and Europe, see Justice, *Restoring Youth Justice – New Directions in Domestic and International Law and Practice* (2000).

2. *Young Offenders Act 1997* (NSW) s 7.

- Criminal proceedings should not be instituted against young offenders if there is an appropriate alternative.
- Where appropriate, young offenders should be dealt with in their communities.
- Parents are primarily responsible for the development of young people and should participate.
- Victims are entitled to be told about their potential involvement in and the progress of action taken under the YOA.

2.6 The YOA applies to summary offences and indictable offences triable summarily. This includes public order offences, property offences, many drug offences and assaults. Some offences, including offences that result in death, most sexual offences, serious drug offences and traffic offences (if the offender is old enough to hold a licence), cannot be dealt with under the YOA.[3]

2.7 During consultations, the Aboriginal Justice Advisory Council observed an emerging trend, particularly in the South Coast of New South Wales, for young Aboriginal people to be fined for committing offences under the *Fisheries Management Act 1994* (NSW). The Council argued that young people who commit offences under this Act should be dealt with under the YOA rather than by being sentenced by a court to a fine which they often have no way of paying.[4]

ISSUE 1

Is the range of offences covered by the *Young Offenders Act 1997* (NSW) appropriate?

Warnings

2.8 Warnings are available for non-violent summary offences. They cannot be given for indictable offences triable summarily, offences involving violence, or where the investigating police officer considers that it would be more appropriate in the interests of justice to deal with

3. *Young Offenders Act 1997* (NSW) s 8.
4. Preliminary consultation, M Ella-Duncan, Executive Officer, Aboriginal Justice Advisory Council, 25 January 2001.

the young offender by other means.[5] The intention of the YOA was that warnings would be given for all minor, summary offences not involving violence, such as offensive language.[6] The Director of the Department of Juvenile Justice Youth Justice Conferencing Directorate ("YJCD") has expressed disappointment that despite this intention a significant number of young Indigenous people continue to appear in court charged with offensive language.[7]

2.9 Warnings are given by the investigating police officer. Officers are not permitted to attach any conditions or other penalties to warnings,[8] and are required to explain the purpose and effect of being warned to the young offender.[9] Young offenders are not required to admit an offence to receive a warning.[10]

2.10 Warnings constituted 17% of the total number of police interventions for young people in the year 1999-2000.[11]

Cautions

2.11 Cautions are available for all offences covered by the YOA.[12] Young offenders must admit the offence to be eligible for a caution and must agree to be cautioned.[13] Young offenders must not be cautioned where it would be more appropriate in the interests of justice to deal with the young person by other means. The YOA prescribes a number of factors to be considered in deciding whether a caution would be appropriate, including the seriousness of the offence, the degree of violence, the harm suffered by the victim, any other offences committed by the young offender and any other instances in which the young person has been dealt with under the YOA.[14]

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5. *Young Offenders Act 1997* (NSW) s 13, 14.
6. J Bargen, "Young Offenders and the New Options in Youth Justice" (1999) 37(10) *Law Society Journal* 54 at 54 (Bargen 1999a).
7. Bargen 1999a at 54; J Bargen, "The Young Offenders Act 1997 – Is the Diversionary Scheme Being Diverted?" (2000) (April) 12 *Judicial Officers Bulletin* 17 at 18. See also para 3.55-3.56.
8. *Young Offenders Act 1997* (NSW) s 15.
9. *Young Offenders Act 1997* (NSW) s 16.
10. Compare *Young Offenders Act 1997* (NSW) s 19 and s 35.
11. NSW Police Service, *Annual Report 1999-2000* (2000) at 13.
12. *Young Offenders Act 1997* (NSW) s 18.
13. *Young Offenders Act 1997* (NSW) s 19.
14. *Young Offenders Act 1997* (NSW) s 20. See also para 3.86-3.91.

2.12 The YOA provides for the appointment of police officers as specialist youth officers ("SYOs").[15] SYOs are appointed by their Local Area Commanders. All existing Youth Liaison Officers and most custody managers have been appointed as SYOs. The decision to caution a young offender can be made by the investigating police officer, an SYO or the Director of Public Prosecutions.[16]

2.13 Where the investigating police officer decides that it is not in the interests of justice for a young offender to be cautioned, the matter must be referred to an SYO to consider whether a youth justice conference would be appropriate.[17] Where the offence did not involve violence and was not serious, but the victim has suffered substantial harm, or where other circumstances of the victim make it appropriate to do so, the investigating official can refer the matter to an SYO to decide whether the young offender should be referred to a youth justice conference.[18]

2.14 Cautions can be administered by a police officer or a respected member of the community.[19] Police officers are not permitted to attach any conditions or other penalties to warnings, except for requesting the young person to write an apology to the victim.[20] Courts can also caution young people under the YOA.[21] The YOA expressly provides that this does not affect the power of a court to caution a child under the *Children (Criminal Proceedings) Act 1987* (NSW).[22]

2.15 The Director of the YJCD has argued that it is preferable that courts rely on the power to caution young offenders under the YOA. This provides a formal opportunity for courts to influence the nature of police decision making, since magistrates who caution young offenders under the YOA are required to inform the relevant Area Commander of their reasons for doing so.[23]

15. *Young Offenders Act 1997* (NSW) s 4.
16. *Young Offenders Act 1997* (NSW) s 20(1), (4) and (5) and 23.
17. *Young Offenders Act 1997* (NSW) s 21. See para 2.17-2.34.
18. *Young Offenders Act 1997* (NSW) s 20(4).
19. *Young Offenders Act 1997* (NSW) s 27.
20. *Young Offenders Act 1997* (NSW) s 29(4) and 29(5).
21. *Young Offenders Act 1997* (NSW) s 31.
22. *Young Offenders Act 1997* (NSW) s 31(3). See para 3.32.
23. *Young Offenders Act 1997* (NSW) s 31(4); Bargen 2000 at 18. See para 2.39-2.43.

ISSUE 2

Should the Children's Court continue to have a power to caution young offenders under the *Children (Criminal Proceedings) Act 1987* (NSW)? If so, when should this power, rather than the power to caution under the *Young Offenders Act 1997* (NSW) be used?

2.16 In the first full year of operation, 8,128 young people were cautioned by police under the YOA. This represented 34% of all young people dealt with by police during the period. Females comprise 22% of young people dealt with by police, however, the proportion of females who received a caution was higher than for males – 44% of females were cautioned, compared with 31% of males.[24] No data is available on the number of young offenders cautioned by courts.[25]

Youth justice conferences

2.17 Youth justice conferencing is designed to encourage young offenders to accept responsibility for their behaviour, strengthen their families, provide developmental and support services and enhance the rights and interests of victims of crime.[26] The YJCD is responsible for conferencing under the YOA.

Referral

2.18 Youth justice conferencing is available for all the offences covered by the YOA.[27] The young offender must admit the offence and consent to conferencing.[28] Where an investigating police officer determines that a warning or caution would not be appropriate in the interests of justice, the matter must be referred to an SYO to consider whether a conference would be appropriate.[29] The SYO has a discretion to decide whether it would be more appropriate to

24. N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)* (1999) at para 38. See also Bargen 2000 at 19.

25. Bargen 2000 at 19.

26. *Young Offenders Act 1997* (NSW) s 34. For theoretical analysis of conferencing see A Ashworth, "Restorative Justice and Victims' Rights" [2000] (March) *NZLJ* 84; Australian Institute of Criminology, *Family Conferencing and Juvenile Justice* (1994). For an overview of conferencing schemes in Australia, see Australian Institute of Criminology, *Restorative Justice and Conferencing in Australia* (Trends and Issues 186, 2001) at 2.

27. *Young Offenders Act 1997* (NSW) s 35.

28. *Young Offenders Act 1997* (NSW) s 36 and s 40(1).

29. *Young Offenders Act 1997* (NSW) s 14(4), 21, 37(1) and 38(1). See para 2.12.

caution the young offender or commence criminal proceedings.[30] The YOA prescribes a number of factors to be considered when determining this, including the seriousness of the offence, the degree of violence, the harm suffered by the victim, any other offences committed by the young person and any other instances in which the young person has been dealt with under the YOA.[31]

2.19 Each youth justice conference is allocated to a conference administrator.[32] Where the administrator disagrees with a referral, the case is referred to the Director of Public Prosecutions for a final decision.[33] Hennessy has observed that SYOs and conference administrators would benefit from access to the Director of Public Prosecution's reasoning in these cases.[34]

2.20 Courts can also refer young offenders to youth justice conferences.[35] The court must take into account the factors outlined above in paragraph 2.18, but the consent of the young offender is not required.[36] During consultations, it was argued that where young offenders do not consent to being referred to youth justice conferences their full participation may be doubted.

2.21 Some magistrates who divert young offenders to conferences also make orders requiring progress reports to be given to the court, undermining the diversionary purpose of the YOA.[37] During consultations, it was suggested that in some cases young offenders are granted conditional bail or sentenced to good behaviour bonds in conjunction with diversion. This is also inconsistent with the diversionary policy of the YOA.[38]

30. *Young Offenders Act 1997* (NSW) s 37(2) and s 38(2) and (3).

31. *Young Offenders Act 1997* (NSW) s 37(3). See also para 3.86-3.91.

32. See *Young Offenders Act 1997* (NSW) s 4 and s 61.

33. *Young Offenders Act 1997* (NSW) s 38(1) and s 40 and 41.

34. Hennessy at para 67.

35. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(c1); YOA s 40.

36. *Young Offenders Act 1997* (NSW) s 40.

37. Bargen 2000 at 19; Preliminary consultation, Reference Group (18 December 2000).

38. Preliminary consultation, Reference Group (7 November 2000); Preliminary consultation, Reference Group (18 December 2000); M Dennis, "The Bail Act and Young People" paper presented to Legal Aid Commission at *Continuing Legal Education Conference*, (Dubbo, 2 December 2000) at 2.

2.22 The Director of the YJCD has also expressed concern that some magistrates refer young offenders to youth justice conferencing for first, minor offences, where a caution is more appropriate.[39]

2.23 During consultations, concern was also expressed that some magistrates continue to rely on diversion schemes outside the YOA. In particular, in appears that some magistrates continue to divert young offenders to Community Aid Panels, which are local initiatives run by police and magistrates and not based on restorative justice principles.[40] Hennessy recommended that magistrates should give consideration to confining their decisions to the diversionary options under the YOA.[41] A Practice Direction issued by the Children's Court states that any referral of young offenders to Community Aid Panels should be considered in light of the legislative intent expressed in the *Young Offenders Act 1997* (NSW).[42]

2.24 The YOA requires that where possible, youth justice conferences must be held within 21 days of referral, but more than ten days after the young offender has been notified of referral.[43] An evaluation of the conferencing scheme by the New South Wales Bureau of Crime Statistics and Research found that this statutory time frame was not met in most cases. On average, 40 days elapsed between the referral date and the date of the conference. 28% of conferences were held before the 10 day notice period expired. Only 8% of conferences met both statutory time frames.[44] The Bureau commented that the value of thorough preparation for conferences outweighed the value of meeting the statutory time frames.[45]

Process

2.25 The offender, a conference convenor,[46] a parent, carer, other members of the offender's family or other adult, a solicitor advising the young offender,[47] the investigating police officer

39. Bargen 2000 at 19.

40. Preliminary consultation, Reference Group (7 November 2000); Preliminary consultation, Reference Group (18 December 2000). See also Bargen 2000 at 18.

41. Hennessy Recommendation L.

42. New South Wales, Children's Court, Practice Direction 17 (12 October 2000).

43. *Young Offenders Act 1997* (NSW) s 43.

44. New South Wales, Bureau of Crime Statistics and Research, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (2000) (2000a) at Table 43 and 62-63.

45. Bureau of Crime Statistics and Research 2000a at 68-69.

46. See *Young Offenders Act 1997* (NSW) s 42.

47. Subject to *Young Offenders Act 1997* (NSW) s 50.

the and SYO, the victim and a support person for the victim are entitled to attend youth justice conferences. The conference convenor may also invite a respected member of the community and professionals such as social workers.[48]

2.26 These participants determine an outcome plan. This may require the offender to apologise to the victim, compensate the victim or the community, participate in an educational or vocational program, or address alcohol or drug misuse. The outcome plan must be realistic and appropriate and must not impose sanctions that are more severe than penalties that might be imposed by a court.[49] The outcome plan is not binding unless the young offender and the victim agree to it.[50] Where the young offender was referred to youth justice conferencing by a court, the court must also approve the outcome plan.[51]

2.27 A conference administrator supervises the completion of each outcome plan and issues a written notice detailing whether or not the young offender has completed the plan to the offender, the victim and the police or referring court.[52]

2.28 No further criminal proceedings may be taken against a young offender who completes an outcome plan.[53] Where a court refers a young person to youth justice conferencing without finding an offence proven, the court must dismiss the charge on receiving notice of completion of the outcome plan.[54]

2.29 According to police data, 806 young offenders, or 3% of all young people dealt with by police, were referred by police to youth justice conferencing in the first full year of operation of the YOA. The YJCD recorded 1,267 conferences and 710 completed outcome plans during the period.[55]

48. *Young Offenders Act 1997* (NSW) s 47.

49. *Young Offenders Act 1997* (NSW) s 52; *Young Offenders Regulation 1997* (NSW) r 18 and 19.

50. *Young Offenders Act 1997* (NSW) s 52(2) and (3).

51. *Young Offenders Act 1997* (NSW) s 54.

52. *Young Offenders Act 1997* (NSW) s 56.

53. *Young Offenders Act 1997* (NSW) s 58.

54. *Young Offenders Act 1997* (NSW) s 57.

55. Hennessy at para 49. Young Offenders have up to six months to complete Outcome Plans: *Young Offenders Regulation 1997* (NSW) r 18.

2.30 An evaluation of youth justice conferencing by the New South Wales Bureau of Crime Statistics and Research found a high level of satisfaction on the part of both victims and offenders with pre-conference preparation, conference proceedings and outcome plans.[56]

2.31 The YOA states that youth justice conferencing should be culturally appropriate where possible.[57] Commentators have criticised the conferencing system on the basis that it does not cater for the needs of Aboriginal and Torres Strait Islander communities. It is argued that there are not enough Aboriginal or Torres Strait Islander conference convenors to ensure that young Aboriginal or Torres Strait Islander offenders are matched with Aboriginal or Torres Strait Islander convenors, and that there should be scope for co-convenors.[58]

2.32 The Director of the YJCD reports that conference administrators have worked to recruit convenors from specific cultural groups and to train convenors to address specific cultural needs,[59] and to ensure a high level of community participation.[60] Thirty out of 350 conference convenors are Aboriginal or Torres Strait Islander people, enabling cultural matching of Indigenous offenders and convenors in most cases.[61]

2.33 Another criticism is that while the YOA provides for a respected member of the offender's community to attend youth justice conferences, it is expected that these people attend voluntarily rather than as paid consultants.[62]

2.34 Commentators have also expressed concern that one outcome of youth justice conferences may be that parents are blamed for the behaviour of their children. It has been observed that this has led to Aboriginal and Torres Strait Islander families feeling stigmatised.[63] In its preliminary submission to the Commission, the Australian Institute of Criminology

56. Bureau of Crime Statistics and Research 2000a at Chapter 3.

57. *Young Offenders Act 1997* (NSW) s 34(1)(a)(v).

58. L Kelly and E Oxley, "A Dingo in Sheep's Clothing? The Rhetoric of Youth Justice Conferencing" (February 1999) 4 *Indigenous Law Bulletin* 4 at 5. See also Australia, Human Rights and Equal Opportunity Commission, *Bringing Them Home*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997) at 490 and 502; C Cunneen, "Community Conferencing and the Fiction of Indigenous Control" (1997) 30 *Australian and New Zealand Journal of Criminology* 292.

59. Bargen 1999a at 57.

60. J Bargen, "Youth Justice Conferencing: The Debate Continues" (1999) 18 *Indigenous Law Bulletin* 18 (1999b) at 18.

61. Bargen 1999b at 18.

62. Kelly and Oxley at 6.

63. Kelly and Oxley at 6.

argued that research is needed to establish whether outcome plans are fair and consistent.[64] The New South Wales Bureau of Crime Statistics and Research evaluation found a high level of satisfaction with outcome plans.[65]

ISSUE 3

Should people who attend youth justice conferences as respected members of the offender's community be paid for their services?

ISSUE 4

Are the outcomes of youth justice conferences appropriate to achieve the objects of the *Young Offenders Act 1997* (NSW)?

Legal advice

2.35 Young offenders are entitled to obtain legal advice, and must be told how to obtain it, before being cautioned or referred to a youth justice conference.[66] The conference convenor must also give the young offender a written notice that informs them of their right to obtain legal advice before the conference takes place.[67]

2.36 The availability of independent legal advice at the police station is critical to ensure that such admissions under the YOA are made voluntarily.[68] Legal aid is available to young people in this situation by way of the Children's Legal Service telephone advice service.[69]

2.37 The Bureau of Crimes Statistics and Research found that 85% of young offenders who attended youth justice conferences had been informed of their right to obtain legal advice and

64. Australian Institute of Criminology, *Preliminary Submission* at 1. See para 2.38.

65. See para 2.30.

66. *Young Offenders Act 1997* (NSW) s 22(1)(b) and s 24(2)(g) and s 39.

67. *Young Offenders Act 1997* (NSW) s 45(3)(g). See Hennessy Recommendation G and NSWLRC Report 79 at para 12.24.

68. Bargen 1999a at 55.

69. See para 3.60.

80% were told how to get advice from a lawyer. Twenty one percent of young offenders obtained legal advice.[70]

2.38 Concern has been expressed that some lawyers have advised young offenders against youth justice conferencing because it can result in a more onerous outcome than court-based sentencing processes.[71] Hennessy observed that the number of legal advisers present at conferencing was very low.[72] She concluded that it would be in the interests of young people for lawyers working in the area to familiarise themselves with the YOA and attend some conferences.[73] On the other hand, it has also been argued that it is not valid to compare outcome plans with court-based sentences since the two process have different objectives.[74]

ISSUE 5

Do lawyers advise young people against participation in youth justice conferencing? If so, why? Should the *Young Offenders Act 1997* (NSW) be amended to address this issue?

Record keeping

Statutory requirements

2.39 When a young person is given a warning or caution by a police officer, the officer is required to enter a record of the warning on the Computerised Operational Policing system.[75] In relation to warnings, the name and gender of the young person and details of the offence must be recorded.[76] There is no requirement to record the cultural or ethnic background of young offenders given a warning. For cautions, additional information about the age and cultural or ethnic background of the young person and information about the caution must also

70. Bureau of Crime Statistics and Research 2000a at Table 28 at 50-52.

71. Hennessy at para 73; Bargen 1999a at 57; Bargen 2000 at 19.

72. Hennessy at para 75.

73. Hennessy at para 75.

74. Preliminary consultation, Reference Group (18 December 2000).

75. *Young Offenders Act 1997* (NSW) s 17, 33; *Young Offenders Regulation 1997* (NSW) r 15(2) and r 16(2).

76. *Young Offenders Regulation 1997* (NSW) r 15(1).

be recorded.[77] Where a court cautions a young offender under the YOA, the Registrar must notify the Area Commander of the caution, with reasons.[78]

2.40 Where a young offender is referred to a youth justice conference, the Commissioner of Police must be notified.[79] Details of conferences, including the name, gender and cultural or ethnic background of the young offender, the nature of the offence, and particulars of the outcome plan, including whether it was completed, must also be recorded.[80]

2.41 It has been observed that in the first year of operation of the YOA, the Police Service did not fulfil its record keeping duties under the YOA.[81]

ISSUE 6

Do the Police Service and the Department of Juvenile Justice comply with the record keeping requirements under the *Young Offenders Act 1997* (NSW)?

Are the statutory record keeping requirements under the *Young Offenders Act 1997* (NSW) appropriate and adequate?

Evidence of prior offences

2.42 While the fact that a young person has committed other offences or previously been dealt with under the YOA is a relevant factor in deciding whether it is appropriate to deal with them under the YOA,[82] a young person must not be denied access to diversion on this basis.[83]

2.43 The fact that a person has been dealt with under the YOA is not considered to be criminal history, except in subsequent proceedings before the Children's Court.[84]

77. *Young Offenders Regulation 1997* (NSW) r 16(1).
78. New South Wales, Children's Court, Practice Direction No 17 (12 October 2000).
79. *Young Offenders Act 1997* (NSW) s 40(4). The referral process is explained at para 2.18-2.24.
80. *Young Offenders Act 1997* (NSW) s 52(7), 56 and 59; *Young Offenders Regulation 1997* (NSW) r 20.
81. Hennessy at Recommendation A and para 35-43.
82. *Young Offenders Act 1997* (NSW) s 20(3)(d) and s 37(3)(d).
83. *Young Offenders Act 1997* (NSW) s 13(3), 20(6) and s 37(5).
84. *Young Offenders Act 1997* (NSW) s 68. See para 3.86-3.91.

Media identification

2.44 The name or any information tending to identify a young offender dealt with under the YOA must not be published or broadcast at any time, unless the offender is 16 or over and consents to being identified.[85]

Diversion rate

2.45 Although no specific targets were set for diversion under the YOA, it was originally anticipated that the majority of young offenders would be diverted away from court proceedings.[86] Hennessy concluded that the diversion rate for 1998, the first full year of operation of the YOA, was lower than anticipated. In this year, 37% of young people dealt with by police received a caution or a referral to a youth justice conference.[87] Hennessy observed that this diversion rate was lower than rates achieved in other jurisdictions.[88] The diversion rate for 1999 was 35% and in 2000 it increased to 41%.[89]

Young Aboriginal and Torres Strait Islander offenders

2.46 Hennessy concluded that diversion rate for young Aboriginal and Torres Strait Islander offenders was significantly lower than the overall diversion rate: 24% of young Aboriginal and Torres Strait Islander people dealt with by police were diverted, compared with the overall rate of 37%.[90] In a preliminary submission, the Australian Institute of Criminology also drew attention to the under-representation of young Aboriginal and Torres Strait Islander offenders in diversion schemes, and the need for further research.[91]

2.47 Fourteen percent of youth justice conferences held during the period examined by Hennessy were recorded as involving young Aboriginal and Torres Strait Islander offenders. Hennessy found that recording of information about the cultural background of young

85. *Young Offenders Act 1997* (NSW) s 65.

86. Hennessy at para 3.

87. Hennessy at para 38.

88. Hennessy at para 3-6, 35, 38 and 52. Note that the statistics do not separate out offences not covered by the YOA, or warnings.

89. G Clancey and P Jackson, "The Young Offenders Act 1998-2001: Three Years of Diverting Young People Away From Court" (2001) 13(13) *Police Service Weekly* 4.

90. Hennessy at para 38 and 54. See also Human Rights and Equal Opportunity Commission at 501.

91. Australian Institute of Criminology, *Preliminary Submission* at 1.

offenders dealt with by conference was inadequate. Therefore, the actual rate of participation by young Aboriginal and Torres Strait Islanders may have been higher than the recorded rate.[92]

Ethnicity

2.48 The YJCD recorded 6% of young people who participated in conferences as being from a non-English speaking background, although the actual rate may have been higher.[93] Hennessy observed that the inadequacy of police records made it impossible to draw conclusions about the operation of the YOA in relation to young offenders from particular ethnic groups. She recommended that the Police Service should develop strategies to record information about race as required by the YOA, observing that the Judicial Commission has developed a questionnaire to identify ethnicity which could be adapted for use in the Police Service so that this data can be captured.[94]

Geography

2.49 Hennessy found a disparity between diversion rates across Area Commands during the first year that the YOA was in operation.[95] Diversion rates for young non-Aboriginal people over one month ranged from 33% in Northern New South Wales to 16% in the Hunter region. Diversion of young Aboriginal people also varied from 3% in the Macquarie region to 34% in the Endeavour region during the same month. Concern about different levels of diversion of young offenders in different parts of New South Wales was also expressed during preliminary consultations for this project.[96]

2.50 A related concern is a serious lack of services such as alcohol and drug misuse assessment and treatment, counselling, educational and vocational services in certain areas.[97]

Intellectual disability

2.51 The over representation of people with an intellectual disability in the criminal justice system is discussed in Chapter 3 of this Issues Paper. Chapter 3 also summarises the Commission's previous recommendations in relation to people with an intellectual disability and

92. Hennessy at para 48 and 49.

93. Hennessy at para 48 and 49.

94. Hennessy at Recommendation A and para 42 and 43. See para 2.39-2.43.

95. Hennessy at para 44. See also Bargen 1999a at 54.

96. Preliminary consultation, Reference Group (7 November 2000).

97. Preliminary consultation, Reference Group (7 November 2000).

the criminal justice system. These include the need for a statutory definition of intellectual disability and a police Code of Practice dealing with the identification of intellectual disability and the adjustment of police procedures, such as interview techniques.[98] These recommendations are also relevant to diversion of young offenders under the YOA.

2.52 Hennessy noted that police records of incidence of intellectual disability among young people dealt with by police were inadequate, making it impossible to draw conclusions about the operation of the YOA in relation to young people with intellectual disabilities.[99] During consultations, concern was expressed that some young offenders with an intellectual disability were inappropriately referred to youth justice conferences, and that the provisions for participation in conferencing may need to be strengthened to encourage attendance by parents or other support people of young offenders with cognitive and developmental disorders.[100]

State care

2.53 In a preliminary submission to the Commission, the Positive Justice Centre argued that diversion under the YOA is under-utilised for state wards.[101]

Referral to youth justice conferences by magistrates higher than referral by police

2.54 Hennessy concluded that more young people were referred to youth justice conferences by magistrates than by police.[102] Hennessy observed that magistrates' powers of referral were designed as a safety net and were not intended to be the most common source of referral to conferencing.[103] In 1999, Bargen observed that it was originally envisaged that 70% of referrals under the YOA would be made by police, however in practice, 50% of young people were referred by magistrates.[104]

2.55 Police officers are required to divert young offenders in relation to offences covered by the YOA unless instructed to commence proceedings by an SYO. Hennessy expressed concern

98. See para 3.144-3.149.

99. Hennessy at para 54.

100. Preliminary consultation, Reference Group (18 December 2000).

101. Positive Justice Centre, *Preliminary Submission* at 5. The concept of wardship has now been abolished in NSW. The Children's Court has the power to make care orders in relation to children and young people in need of state care, including an order placing a young person in the sole guardianship of the Minister for Community Services. The care jurisdiction of the Children's Court is discussed at para 3.13-3.21.

102. Hennessy at para 50.

103. Hennessy at para 50 and 53. See also Bargen 1999a at 55.

104. Bargen 1999a at 55.

that police officers do not always comply with this requirement, recommending that the Police Service should organise comprehensive training for investigating police officers who are likely to make decisions under the YOA.[105] The Police Service has developed and implemented several training initiatives, as well as publicising the YOA in the Police Service Weekly, Police Issues and Practice Journal and on Police TV.[106]

2.56 Anecdotal evidence suggests that one reason for police reluctance to use diversionary processes is that they are more time consuming to institute than court-based procedures.[107]

2.57 Hennessy also expressed concern that there were not enough adequately resourced SYOs to perform the functions required by the YOA.[108] The position of SYO was created to ensure that decision making about referrals to diversion by police was kept at arms length from investigations.[109] Hennessy observed that the appointment of existing custody managers as SYOs was problematic in rural and regional areas, where, because there are fewer police, custody managers were likely also to be involved in criminal investigations.[110]

Supervising police discretion

2.58 In a preliminary submission, the Australian Institute of Criminology argued that consideration should be given to supervising the exercise of police discretion in relation to diversion.[111] Hennessy recommended establishing a mechanism for review by police prosecutors of police decisions to commence criminal proceedings against young people for offences covered by the YOA.[112]

Net widening

2.59 Condliffe argues that there is a risk that diversionary schemes are being imposed on young people who would have a lesser or no action taken against them if diversion was not

105. Hennessy Recommendation B, E and F and para 56-59 and Appendix F.

106. Clancey and Jackson at 4.

107. J Wundersitz, "Pre-court Diversion: The Australian Experience" in A Borowski and I O'Connor, *Juvenile Crime, Justice and Corrections* (Sydney, Longman, 1997) at 275.

108. Hennessy at para 79, Recommendation D.

109. Hennessy at para 61.

110. Hennessy at para 62.

111. Australian Institute of Criminology, *Preliminary Submission* at 1.

112. Hennessy Recommendation Q and para 171-177.

available. For example, cases which would be hard to prove in court may be referred to youth justice conferences.[113]

2.60 Hennessy found that the diversion rate of 37% achieved in the first full year of operation of the YOA was accompanied by some decline in the number of new matters dealt with by the Children's Court, but not to the extent that would have been expected.[114] This may be attributable in part to net-widening, as well as the increased police powers referred to in Chapter 2.[115] More recent evidence suggests that the number of appearances in the Children's Court has significantly fallen since the YOA was introduced.[116]

Evaluation

2.61 The Aboriginal Justice Advisory Council and the University of New South Wales have commenced a joint review of the YOA.

ISSUE 7

What is an appropriate rate for diversion of young offenders under the *Young Offenders Act 1997* (NSW)? How can this be achieved?

TREATMENT FOR ALCOHOL AND DRUG MISUSE

2.62 National drug use surveys indicate that in 1995, 32% of young people aged between 14 and 19 used an illegal drug. In 1998, this figure had increased to 38%.[117] Recent research has estimated that there are 74,000 dependent heroin users in Australia, of whom 35,400 live in New South Wales.[118] These figures suggest that Australia has a substantial public health

113. P Condliffe, "The Challenge of Conferencing: Moving the Goal Posts for Offenders, Victims and Litigants" [1998] *Australian Dispute Resolution Journal* 139 at 147.

114. Hennessy at para 45-47.

115. See para 3.45-3.54.

116. Clancey and Jackson at 7-8.

117. New South Wales, Bureau of Crime Statistics and Research, *Drug Crime Prevention and Mitigation: A Literature Review and Research Agenda* (2000) (2000b) at 5, citing Australia, Institute of Health and Welfare, *National Drug Strategy Household Survey* (1999).

118. T Hall, "How Many Dependent Heroin Users are there in Australia?" (2000) 173 *Medical Journal of Australia* 528 at 528 and 532.

problem with dependent heroin use that is of magnitude similar to that in comparable European societies.[119]

2.63 Illegal drugs cause approximately 1,000 deaths in Australia every year.[120] Over the past eight years there has also been significant growth in levels of property crime in Australia. The growth has been marked in the offence of robbery, which is often committed by heroin dependent people because it provides ready access to cash to buy heroin.[121]

Treatment services

2.64 Alcohol and drug treatment can be provided through either residential or outpatient services. Services focus either on reducing or eliminating use of the drug or dependence, or minimising harm associated with drug use.

2.65 The initial treatment for reducing or eliminating drug use is detoxification, which involves managing the symptoms of withdrawal from drug use. Detoxification is available in hospitals, community health services and designated detoxification units. There are currently 355 beds in New South Wales dedicated to detoxification treatment, 80% of which are located in metropolitan areas. There is very little data on the extent of need for detoxification treatment. There are no specialist detoxification services for young people. The New South Wales Health Department has recognised the need for a detoxification service specifically for young people.[122] Detoxification is not a cure for drug dependence and must be followed up by long term treatment.

2.66 The principal form of long term treatment for dependence on opioid drugs is pharmacotherapy. This involves substituting use of the drug of dependence with a longer acting drug of the same pharmacological class, which prevents the onset of withdrawal and therefore reduces or eliminates consumption of the drug of dependence.[123] The principal pharmacotherapy service in New South Wales is methadone maintenance treatment. Approximately 13,500 people in New South Wales currently receive this treatment. 1,300 new

119. Hall at 532.

120. Australia, Institute of Health and Welfare, *National Drug Strategy Household Survey* (1999) at 26.

121. Bureau of Crime Statistics and Research 2000b at 5.

122. New South Wales, Department of Health, *The NSW Drug Treatment Services Plan: 2000-2005* (2000) at 18-22.

123. Department of Health at 33.

places in methadone programs will be created in New South Wales by the end of 2001.[124] Several new forms of pharmacotherapy are currently being trialed in New South Wales.[125]

2.67 Medically supervised drug injection is an alternative to pharmacotherapy which aims to stop the contraction and spread of blood-borne viral infections such as HIV/AIDS and Hepatitis B and C among injecting drug users. The Uniting Church has begun an 18 month trial of this treatment in inner-city New South Wales.[126]

Drug Courts

2.68 In 2000, the New South Wales Bureau of Crime Statistics and Research examined the existing research on preventing drug related crime.[127] The Bureau observed that the research indicates that legally coerced drug treatment can decrease drug use and criminal activity by offenders. In particular, research suggests that offenders dealt with by drug courts in the United States have lower re-arrest rates than offenders dealt with by the traditional criminal justice system. The Bureau concluded that while this research is limited and is open to criticism on methodological grounds, legally coerced treatment is worthy of further investigation.[128]

New South Wales Youth Drug Court

2.69 New South Wales is currently conducting a pilot Youth Drug Court.[129] The trial commenced in July 2000. Young offenders are referred to the Youth Drug Court by the Children's Court. In deciding whether to refer a young offender, the Children's Court considers the severity of their dependence on drugs or alcohol, their health, educational and vocational

124. Department of Health at 43.

125. These are Naltrexone, buprenorphine and LAAM (levo-alpha-acetyl-methadol): "Is Naltrexone a Cure for Heroin Dependence?" (Editorial) (1999) 171 *Medical Journal of Australia* 9; Department of Health at 35-39; www.turningpoint.org.au (17 May 2001).

126. M Sun, "Drug Room Open for Business" *Daily Telegraph* (7 May 2001) at 5. The Supreme Court of New South Wales has upheld the licence for this trial issued pursuant to the *Drug Summit Legislative Response Act 2000* (NSW): *Kings Cross Chamber of Commerce and Tourism v Uniting Church of Australia Property Trust (NSW)* [2001] NSWSC 245.

127. New South Wales, Bureau of Crime Statistics and Research, *Drug Crime Prevention and Mitigation: A Literature Review and Research Agenda* (2000) (2000b).

128. Bureau of Crimes Statistics and Research 2000b at 38-48. See also T Miethe, H Lu and E Reese, "Reintegrative Shaming and Recidivism Risks in Drug Court: Explanations for Some Unexpected Findings" [2000] *Crime and Delinquency* 522 which reports the results of a study drug courts in two jurisdictions in the United States that found that drug court participants had substantially higher recidivism risks than non-drug court participants.

129. The Youth Drug Court was established as a result of a recommendation made at the 1999 NSW Drug Summit: New South Wales, *NSW Drug Summit 1999 – Government Plan of Action* (1999) Recommendation 6.11.

status, family and peer relationships, social skills and attitude towards drug treatment.[130] The Children's Court is targeting serious injecting drug users for referral to the Youth Drug Court. Young people on remand and young women are targeted as a priority for referrals.[131]

2.70 Young offenders referred to the Youth Drug Court are initially assessed to confirm that they have a demonstrable drug or alcohol problem and to determine immediate needs such as detoxification and accommodation.[132] They then appear before the Youth Drug Court, which determines whether they are eligible to participate in the trial. Young offenders who are aged between 14 and 18, who are charged with an offence which the Children's Court has jurisdiction over,[133] who plead guilty, who agree to participate in the trial, who have a drug or alcohol problem, who are ineligible for diversion under the YOA; and are likely to be sentenced to detention, are eligible.[134]

2.71 In addition, because the Youth Drug Court is a trial program operating out of the Campbelltown and Cobham Children's Courts, young offenders are required to have a connection to one of these areas through family or work.[135]

2.72 After the Youth Drug Court accepts a young offender, their case is adjourned for 14 days while a joint assessment and review team involving the Departments of Health, Community Services, Education and Training and Juvenile Justice assesses their needs and develops an individual plan requiring the young offender to submit to tests and attend programs that aim to reduce or eliminate drug or alcohol misuse and related criminal behaviour.[136]

2.73 The Youth Drug Court makes orders requiring the young offender to comply with the conditions in their individual plan and deferring the final sentencing for a minimum of six months.[137] Each young offender is allocated a Program Manager and a Support Worker to

130. K Graham, "Piloting a Youth Drug Court Program" [2000] (8) *Law Society Journal* 34.

131. D De Fina, "New Youth Drug Court – The Pilot Programme Commences" (2000) 12 (5) *Judicial Officers Bulletin* 33 at 34.

132. De Fina at 33.

133. See para 3.7-3.8 and Table 3.1.

134. Graham at 34.

135. Graham at 34.

136. De Fina at 34.

137. De Fina at 34.

supervise, monitor and assist their progress. Participants also have regular meetings with the Youth Drug Court Magistrate, initially on a fortnightly or monthly basis.[138]

2.74 Offenders who complete the program are sentenced more favourably by the Children's Court. It is expected that young offenders who successfully complete the program will receive unsupervised orders such as suspended sentences.[139]

2.75 If an offender has difficulty complying with their individual plan, the Youth Drug Court Magistrate can adjust it to increase the level of supervision or extend the initial orders for up to six months. Offenders who continually or seriously breach their individual plans may be discharged from the Youth Drug Court and transferred to the Children's Court for sentencing. The Children's Court will also take into account their achievements in the Youth Drug Court.[140]

2.76 The Youth Drug Court trial will be evaluated to determine the rate of participation by eligible offenders, the level of re-offending by participants, the factors which affect completion or non-completion of the program by young offenders, the health and social impact of participation and the resources required to maintain and expand the program.[141]

Other Drug Courts

2.77 New South Wales is also trialing an adult Drug Court.[142] The New South Wales Bureau of Crime Statistics and Research is evaluating this trial. Preliminary evaluation has found that the rate of re-offending by participants is low, participants have experienced significant health improvements, and report a high level of satisfaction with the fairness of the program and the treatment services available under it.[143]

138. De Fina at 35.

139. De Fina at 35.

140. Graham at 34.

141. De Fina at 35.

142. *Drug Court Act 1998* (NSW).

143. New South Wales, Bureau of Crime Statistics and Research, *NSW Drug Court Evaluation: Program and Participant Profiles 2000* (Crime and Justice Bulletin 50); New South Wales, Bureau of Crime Statistics and Research, *Drug Court Evaluation: Interim Report on Health and Well being of Participants 2001* (Crime and Justice Bulletin 53).

2.78 Western Australia is the only other Australian jurisdiction currently conducting a trial Youth Drug Court. Queensland, South Australia and Western Australia are also piloting adult drug courts.[144]

ISSUE 8

How effective is the Youth Drug Court, both in reducing re-offending by young offenders and improving their health and well being?

ISSUE 9

Are the alcohol and drug treatment services available for young people in New South Wales adequate?

CIRCLE SENTENCING

2.79 Circle sentencing is a community-based sentencing process administered by community committees. A sentencing circle can be held in a court house or a community space.[145]

2.80 Participants include the offender and the victim and their respective supporters; a judge, community elder, prosecutor, defence counsel, police and court workers; who sit arranged in a circle; and friends and relatives of the offender and the victim, professionals such as alcohol and drug treatment workers and members of the local community; who sit in an outer circle.[146]

2.81 While procedures vary from community to community, generally the judge or community elder formally opens the sentencing circle, then each participant introduces themselves, and explains why they are attending. The prosecutor outlines the facts of the offence, and defence counsel responds. Then all participants address the offender and the victim and discuss the

144. *Drug Rehabilitation (Court Diversion) Act 2000* (Qld); www.courts.sa.gov.au/courts/magistrates/drug_court.html (at 17 May 2001). For a recent summary of Australian drug courts see A Freiberg, "Australian Drug Courts" (2000) 24 *Criminal Law Journal* 213.

145. New South Wales, Attorney General's Department, Aboriginal Justice Advisory Committee, *Circle Sentencing: Involving Aboriginal Communities in the Sentencing Process* (Discussion Paper, 1999), available at http://www.lawlink.nsw.gov.au/ajac.nsf/ pages/circlesentencing

146. Aboriginal Justice Advisory Committee; M Linker, "Sentencing Circles and the Dilemma of Difference" (1999) *Criminal Law Quarterly* 116 at 117.

extent of similar crime in their community, the underlying reasons for it, the impact on victims and on the community, what must be done to heal the victim and rehabilitate the offender, and what the community can do to prevent similar crimes.[147] Participants develop a sentence plan which the judge uses to sentence the offender. Custodial sentences can be included in a sentence plan; but this is rare.[148]

2.82 The sentencing circle reconvenes several months later to examine the offender's progress towards completing the sentencing plan. If their progress has not been satisfactory, participants can agree to modify or extend the sentence plan, or abandon it. In this case the offender is sentenced by a traditional court.[149]

2.83 The concept of circle sentencing evolved in Canada, initially as an alternative to traditional sentencing of indigenous offenders.[150] The Aboriginal Justice Advisory Council supports circle sentencing for Aboriginal offenders, arguing that it makes sentencing practices more culturally relevant to Aboriginal people and ensures that the offender sees the punishment as being more appropriate as it comes from his or her own community.[151]

2.84 Proponents of circle sentencing also argue that it enables participants to contribute directly to the sentencing process, and provides much more information about the offender, the impact of the offence, and problems experienced in the community, than a traditional court receives by way of pre-sentence reports. This enables the circle to tailor the sentence to the unique situation of the offender, increasing the likelihood of rehabilitation.[152] It also enables communities to take responsibility for broader issues identified during the process and fosters mutual respect between the criminal justice system and communities.[153] In a preliminary submission, the Senior Public Defender, Mr John Nicholson QC, emphasised that sentencing

147. Linker at 117; C Pollard, "Victims and the Criminal Justice System: A New Vision" [2000] *Criminal Law Review* 5 at 13-15.

148. Aboriginal Justice Advisory Committee.

149. Aboriginal Justice Advisory Committee.

150. *R v Moses* (1992) 71 C C C (3d) 347.

151. Aboriginal Justice Advisory Committee.

152. Aboriginal Justice Advisory Committee; Pollard at 13.

153. Aboriginal Justice Advisory Committee; Linker at 117.

initiatives need to be developed and implemented at the local level to maximise their effectiveness.[154]

2.85 Critics of circle sentencing argue that it costs much more than traditional court sentencing processes. While an initial circle sentencing session usually takes between one and three hours to complete, about four to five times longer than a traditional court hearing,[155] the additional cost may be outweighed when the lower rate of custodial sentences and increased prospects of rehabilitation are taken into consideration. However, as circle sentencing is in its infancy, there is no long term empirical research on its costs compared to traditional sentencing processes.

2.86 Circle sentencing is also criticised on the basis that it gives communities an unstructured discretion in dealing with offenders, leading to inconsistent sentencing outcomes.[156] On the other hand, it is arguable that the flexibility afforded by closely examining the circumstances of individual offenders and communities facilitates responsive sentencing which increases the prospects of rehabilitating offenders.[157]

2.87 Another criticism of circle sentencing is that it leads to lack of proportionality in sentencing, with sentence plans which may be too lenient or too harsh for the offence committed, depending on the attitudes of participants.[158] However, it is also arguable that the extensive information gathering processes associated with circle sentencing lead to more proportionate sentencing outcomes. Further, the focus on proportionality of sentences ignores the role of restorative justice, crime prevention and rehabilitation in sentencing.[159]

2.88 Circle sentencing is increasingly being used to sentence both indigenous and non-indigenous offenders in North America, the United Kingdom, Europe, Singapore and New Zealand.[160] The Australian Capital Territory[161] and Queensland[162] have also experimented with

154. J Nicholson, *Preliminary Submission*.

155. Aboriginal Justice Advisory Committee.

156. J Roberts and C LaPrairie, "Sentencing Circles: Some Unanswered Questions" (1997) 39 *Criminal Law Quarterly* 69 at 75.

157. Linker at 121-128.

158. Roberts and LaPrairie.

159. Linker at 119-121.

160. Pollard at 13.

circle sentencing. The New South Wales Government is planning a pilot circle sentencing project for adult Aboriginal offenders early in 2002. In a preliminary submission, the New South Wales Director of Public Prosecutions expressed concern about this trial.[163]

ISSUE 10

Is circle sentencing an appropriate way of dealing with young people who commit offences?

Is the currently understood structure of circle sentencing an appropriate one?

161. See L Sherman, Experiments in Restorative Policing: A Progress Report on the Canberra Reintegrative Shaming Experiments (Australian Federal Police and Australian National University, Canberra, 1998).

162. See H Hayes, T Prenzler and R Wortley, *Making Amends: Final Evaluation of the Queensland Community Conferencing* Pilot (Queensland Department of Justice, 1998).

163. N Cowdery QC, *Preliminary Submission.*

CHAPTER THREE: SENTENCING BY COURTS

3.1 This Chapter outlines the jurisdiction of courts over young people, sentencing principles and the penalties which courts can impose on young offenders. It describes police powers over young people, public order offences, alternative ways of commencing criminal proceedings, and young peoples' right to legal representation when questioned by police and in court.

3.2 The Chapter then discusses the issues identified by the Commission so far, including bail; the role of evidence of previous offences committed by a young person in later hearings and trials; media identification of young people and restorative justice. It looks at the name and status of the Children's Court; mandatory sentencing and guideline sentencing judgments.

3.3 Chapter 3 also considers particular groups of young people who are over represented as offenders, including young Aboriginal people, particular ethnic groups, young people with intellectual disabilities and young people in State care. Finally, geographical sentencing disparity is considered.

3.4 The main Act which governs sentencing of young offenders by courts is the *Children (Criminal Proceedings) Act 1987* (NSW). This Act is referred to throughout this Chapter as the C(CP)A.

JURISDICTION

3.5 Courts have both criminal and care jurisdiction over young people. The Children's Court, Local, District and Supreme Courts all hear criminal charges against young people.[1] The Children's Court also has jurisdiction over children and young people in need of care and protection.[2]

1. *Children's Court Act 1987* (NSW) s 12 and C(CP)A.
2. *Children and Young Persons (Care and Protection) Act 1998* (NSW).

Criminal jurisdiction

3.6 The Children's Court, Local, District and Supreme Courts all hear criminal charges against young people, depending on the offence that the young person is charged with.

Table 3.1: Criminal proceedings in the Children's Court 1998/1999[3]

TYPE OF OFFENCE	NUMBER OF APPEARANCES	NUMBER OF CHILDREN WITH OFFENCES PROVEN[1]	AGE[2]									SEX[3]	
			10	11	12	13	14	15	16	17	18+	MALE	FEMALE
Homicide[4]	12	5	0	1	0	0	0	2	1	5	3	12	0
Assault, abduction	2,172	1,588	3	16	33	91	211	347	466	668	337	1631	541
Sexual offences	125	74	0	1	1	4	11	26	33	29	20	121	4
Property offences[5]	6,522	4,946	13	33	121	297	669	1179	1505	1914	791	5,489	1,033
Offences against justice procedures	933	559	2	5	12	27	62	121	163	269	272	747	186
Offences against good order	1,200	996	1	4	8	30	74	213	308	435	127	986	214
Drug offences[6]	1,116	982	0	1	9	28	84	159	308	399	128	947	169
Driving offences[7]	715	631	0	1	5	11	32	107	187	286	86	637	78
Weapons and explosives offences	119	88	0	1	0	3	11	18	28	45	13	108	11
Other	758	408	3	4	25	53	81	147	213	188	44	559	199
Total	**13,672**	**10,277**	**22**	**67**	**214**	**544**	**1,235**	**2,319**	**3,212**	**4,238**	**1,821**	**11,237**	**2,435**

NOTES TO TABLE 3.1

1. This includes charges referred to the District and Supreme Courts.
2. These figures include all appearances, including where the offence was not proven.
3. Tables 2.4a and 2.4b provide breakdowns of males and females in each age bracket for each category of offence.
4. Category includes murder, attempted murder, manslaughter and driving causing death.
5. Category includes robbery, blackmail, extortion, break and enter, theft from a person, retail and motor vehicle theft, receiving stolen property, fraud and property damage offences.
6. Category includes possession, trafficking, cultivation and manufacture.
7. Category includes driving under the influence of alcohol and drugs, dangerous driving and traffic offences.

Children's Court

3.7 The Children's Court hears most criminal charges against young people. It has jurisdiction over all offences except certain driving offences and "serious children's indictable offences", including homicide, other offences which attract the most severe penalties (imprisonment for life or 25 years or more), and a number of serious sexual offences.[4] Table 3.1 summarises criminal proceedings heard in the Children's Court in 1998/1999.[5]

3. New South Wales, Bureau of Crime Statistics and Research, *NSW Criminal Court Statistics 1999* (2000) at Table 2.1, 2.4, 2.4a and 2.4b.

4. C(CP)A s 3, 7, 28.

5. The NSW Bureau of Crime Statistics and Research publishes criminal court statistics for New South Wales. The statistics for 2000 were not available at the time of going to print.

3.8 In 1998/1999 the Children's Court heard 13,672 charges against young people. 10,277 of these charges were proven. Property offences were the most common, followed by assault, offences against good order and drug offences. Most young people who appeared in the Children's Court were male. In general, increase in age correlated with an increase in the number of offences proven.[6]

Local Courts

3.9 The Local Courts cannot hear charges that the Children's Court has jurisdiction over, except where permitted under the C(CP)A.[7] The jurisdiction of the Local Courts over young people mainly relates to driving matters where the young person was old enough to have a licence or permit.[8] In 1998/1999, 1,028 young people were found guilty of offences in the Local Courts. Table 3.2 summaries the number of young people found guilty of offences in the Local Courts in 1998/1999.

Table 3.2: Young people found guilty in the Local Courts, 1998/1999[9]

TYPE OF OFFENCE	NUMBER OF CHILDREN FOUND GUILTY	SEX	
		MALE	FEMALE
Assault, abduction	9	8	1
Property offences[1]	39	32	7
Offences against justice procedures	44	42	2
Offences against good order	40	32	8
Drug offences[2]	17	17	0
Driving offences[3]	870	767	103
Other	9	7	2
TOTAL	**1,028**	**905**	**123**

NOTES TO TABLE 3.2

1. Category includes robbery, blackmail, extortion, break and enter, theft from a person, retail and motor vehicle theft, receiving stolen property, fraud and property damage offences.
2. Category includes possession, trafficking, cultivation and manufacture.
3. Category includes driving under the influence of alcohol and drugs, dangerous driving and traffic offences.

District and Supreme Courts

3.10 The District Court and the Supreme Court have jurisdiction over young people charged with indictable offences along with the Children's Court. In addition, only the District Court

6. The NSW Department of Juvenile Justice Annual Report for 1999-2000 estimated that the number of charges heard in 1999-2000 was 12,300: New South Wales, Department of Juvenile Justice, *Annual Report 1999-2000* at 7-8.

7. C(CP)A s 7.

8. C(CP)A s 28. The Local Courts are not permitted to hear charges against young people that the Children's Court has jurisdiction over: C(CP)A s 7.

9. Bureau of Crime Statistics and Research 2000 at Table 1.13, 1.13a, 1.13b. Note that unlike the statistics for the Children's Court at Table 1.1, the Local Court statistics do not distinguish between appearances finalised and persons found guilty.

and the Supreme Court can hear charges against young people involving "serious children's indictable offences".[10] Young people accused of "serious children's indictable offences" must be dealt with according to law.[11] These Courts have a discretion to deal with young people accused of indictable offences either according to law or under the C(CP)A.[12]

3.11 Where the District Court or Supreme Court deals with a young accused person according to law, this has a number of procedural consequences. One consequence arises where the young person is convicted and sentenced to a period of detention. The Director General of the Department of Juvenile Justice has the power to discharge young offenders dealt with under the C(CP)A from full time detention, but does not have this power in relation to young offenders dealt with according to law.[13] The New South Wales Court of Criminal Appeal has observed that it is anomalous that this power is not available for young offenders dealt with according to law.[14]

ISSUE 11

Should the Director General of the Department of Juvenile Justice be able to exercise his or her power to discharge detainees under s 24(1)(b) and (c) of the Children (Detention Centres) Act 1987 (NSW) in relation to young offenders dealt with according to law as well as those dealt with under the C(CP)A?

3.12 The District and Supreme Courts can also remit young offenders to the Children's Court for sentencing.[15] In 1998/1999, 35 young offenders were convicted in the District Court and the Supreme Court.[16]

10. C(CP)A s 3, s 16-18 and s 28. See para 3.7.

11. C(CP)A s 17.

12. C(CP)A s 18. See *R v WKR* (1993) 32 NSWLR 447; *R v DAR* (Unreported, New South Wales, Court of Criminal Appeal, 2 October 1997).

13. *Children (Detention Centres) Act* 1987 (NSW) s 24. See also *R v SLR* [2000] NSWCCA 436 at para 27 and *R v XYJ* (Unreported, New South Wales, Court of Criminal Appeal, No 60823/1991, 15 June 1992). See *R v SLR* [2000] NSWCCA 436 at para 27 and *R v XYJ* (Unreported, New South Wales, Court of Criminal Appeal, No 60823/1991, 15 June 1992).

14. *R v SLR* [2000] NSWCCA 436 at para 27 and *R v XYJ* (Unreported, New South Wales, Court of Criminal Appeal, No 60823/1991, 15 June 1992).

15. C(CP)A s 20 (This section applies to offenders aged under 21 when they are sentenced).

Care jurisdiction

3.13 The Children's Court also has care jurisdiction over young people in need of care and protection. This jurisdiction was completely overhauled by the *Children and Young Persons (Care and Protection Act) 1998* (NSW).[17]

3.14 The Department of Community Services can bring proceedings in the Children's Court for a care order. The Children's Court may make a care order if satisfied that the child or young person is in need of care or protection for any of the following reasons:[18]

- There is no parent available to care for them.
- The parents acknowledge that they have serious difficulty caring for them.
- They have been, or are likely to be, physically or sexually abused.
- The parents are not meeting, or are not likely to meet, their basic physical, psychological or educational needs.
- They are suffering, or are likely to suffer, serious developmental impairment or psychological harm because of the environment they live in at home.
- They are aged under 14 and have exhibited sexually abusive behaviours.
- They are subject to a care order in another Australian jurisdiction that is being breached.

3.15 The Act encourages the use of alternative dispute resolution to avoid the need to bring care proceedings. The Department, a child or young person and their family are able to reach an agreement about care, which can be registered in the Children's Court. If approved by the Children's Court, a care agreement has the effect of a consent order without the need for the Department to formally initiate care proceedings.[19]

16. Bureau of Crime Statistics and Research 2000 at Table 3.11.

17. This Act implemented the recommendations of the New South Wales Community Welfare Legislation Review, *Review of the Children (Care and Protection) Act 1987: Recommendations for Law Reform* (Department of Community Services, 1997). For a summary of the Act see P Parkinson, "Child Protection Law Reforms in NSW" (1999) 13 *Australian Family Law Journal* 1.

18. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 71.

19. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 37 and s 38.

3.16 If the Department initiates care proceedings, a preliminary conference between the Department, the child or young person and their family is held with a Children's Registrar, to attempt to resolve the matter by consent.[20]

3.17 If the matter proceeds to hearing, the Department must put forward a care plan covering the proposed allocation of parental responsibility, the kind of placement which will be sought for the child or young person, the agency which will supervise the placement, arrangements for contact with parents, and any services that the child or young person requires. The Department must endeavour to obtain agreement with the parents on the care plan.[21]

3.18 When the Children's Court makes a care order, it allocates parental responsibility. Care may be allocated between the parents and others, most commonly family members or foster parents.[22] The Court can also place the child or young person in the sole guardianship of the Minister, which is the equivalent of a wardship order, although wardship has been abolished.[23] The important legal and fiduciary functions for children and young people in the care of the Minister are exercised by the person holding the newly created position of Children's Guardian.[24]

3.19 When a child or young person is placed in out-of-home care, the Act distinguishes between care responsibility, which is vested in the person with whom they are placed, and covers the authority necessary to care for them on a daily basis; and supervisory responsibility, which is vested in a designated agency to ensure that the placement promotes their well being.[25]

3.20 The Department of Community Services and police officers also have emergency powers to remove a child or young person from a place of risk, including their home. When considering the emergency removal of a child or young person from their home, they must first consider whether to ask police to obtain an apprehended violence order to remove the person who is endangering the child or young person instead.[26] Where the emergency removal powers

20. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 65.

21. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 78. Where there is a realistic possibility of restoring parents' care, the Department must also develop a restoration plan: s 83.

22. New South Wales, Department of Community Services, *Annual Report 1999-2000* at 39.

23. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79 and s 81.

24. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 181.

25. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 140.

26. *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 43.

are exercised, the Department must apply to the Children's Court for an emergency care and protection order. In this situation the child or young person is to be kept at a place approved by the government and the Director-General of the Department has care responsibility for them.[27]

3.21 The separation of the criminal and care jurisdictions of the Children's Court in New South Wales occurred as part of a national move to separate welfare from justice matters in most Australian jurisdictions, beginning in the late 1970s.[28] The Children's Court sentencing a young offender in the course of its criminal jurisdiction may become aware that the young offender is in need of care and protection. While the formal separation of the care jurisdiction and the criminal jurisdiction of the Court in this situation is clear, it is important to ensure that the two jurisdictions operate together effectively to ensure that care issues which arise in this situation are adequately addressed.

ISSUE 12

What is the current procedure for dealing with care issues which come to the attention of the Children's Court in the course of sentencing a young offender? Is it adequate?

SENTENCING PRINCIPLES

3.22 Courts sentencing young offenders can choose from a range of sentencing options.[29] The exercise of judicial sentencing discretion is guided by common law sentencing objectives, principles set out in the C(CP)A and international law.

Common law sentencing objectives

3.23 While the objectives of sentencing are traditionally stated as retribution, deterrence, rehabilitation and incapacitation,[30] the New South Wales Court of Criminal Appeal has

27. *Children and Young Persons (Care and Protection) Act 1998* (NSW) Chapter 5 Part 1. See also Chapter 6 which provides for Children's Court procedure in care proceedings.

28. C Cunneen and R White, *Juvenile Justice: An Australian Perspective* (Melbourne, Oxford University Press, 1995) at 189-197.

29. See para 3.30-3.41 and Table 3.3.

30. NSWLRC, *Sentencing* (Report 79, 1996) at para 14.12.

emphasised on a number of occasions that distinct principles apply in the sentencing of young offenders, where the focus is on promoting rehabilitation.[31] However, tension between these objectives does arise. The High Court has observed that the objectives of sentencing are "guideposts to the appropriate sentence but sometimes they point in different directions".[32]

3.24 This tension can also arise in relation to the practical operation of the juvenile justice system. For example, a 2000 Report by the New South Wales Ombudsman on Kariong Juvenile Justice Centre criticised the Department of Juvenile Justice and the management team at Kariong for conflict and role confusion between rehabilitative and custodial functions. The Report commented that Kariong was operated for the purpose of containing detainees and did not address the goal of rehabilitation.[33]

3.25 When a young offender conducts themselves like an adult, and commits a crime involving violence or of considerable gravity, sentencing focuses on protecting the community by giving effect to the retributive and deterrent elements of sentencing, rather than rehabilitation.[34] Preliminary submissions by both the Director of Public Prosecutions, Mr Nicholas Cowdery QC, and the Senior Public Defender, Mr John Nicholson QC, commented on the difficulty resolving conflict between the sentencing principles of rehabilitation, retribution and deterrence in these cases.[35]

Children (Criminal Proceedings) Act 1987 (NSW)

3.26 The C(CP)A also sets out the following principles which courts must take into account when dealing with young people:[36]

- Children have the same rights and freedoms before the law as adults, including the right to be heard and to participate in processes leading to decisions that affect them.

31. *R v GDP* (1991) 53 A Crim R 112; *R v XYJ* (Unreported, New South Wales, Court of Criminal Appeal, 15 June 1992; *R v Wilkie* (Unreported, New South Wales, Court of Criminal Appeal, 2 July 1992). See also *Children (Detention Centres) Act 1987* (NSW) s 4.

32. *Veen v The Queen (No 2)* (1987) 164 CLR 465 at 476.

33. NSW Ombudsman, *Investigation into Kariong Juvenile Justice Centre* (2000) Chapter 6 and para 9.45 and 11.4.

34. *R v Pham* (1991) 55 A Crim R 128; *R v Tran (Hoai Vinh)* (Unreported, New South Wales, Court of Criminal Appeal, 12 May 1999).

35. NR Cowdery QC, Director of Public Prosecutions, *Preliminary Submission* at 1; J Nicholson SC, Senior Public Defender *Preliminary Submission* at 1.

36. C(CP)A s 6. See also C(CP)A s 33B and *Crimes (Sentencing Procedure) Act 1999* (NSW) which provide that a court sentencing a child must take into account that the child pleaded guilty, and may reduce the sentence.

- Children who commit offences need to bear responsibility for their actions, but because of their dependency and immaturity, they require guidance and assistance.
- It is desirable, wherever possible, not to interrupt the education or employment of a child.
- It is desirable, wherever possible, to allow a child to reside in his or her home.
- The penalty imposed on a child should be no greater than the penalty imposed on an adult who commits the same offence.

3.27 These principles apply whenever a court sentences a young offender, whether sentencing according to law or under the C(CP)A.[37]

International law

3.28 Australia is signatory to a number of international conventions relating to the rights of children in particular and human rights in general, including the United Nations Convention on the Rights of the Child[38] and the International Covenant on Civil and Political Rights.[39] These conventions also include principles relevant to sentencing young offenders:

- The best interest of the child is the paramount consideration in all actions concerning young people, including legal proceedings.[40]
- No child should be subject to cruel, inhuman or degrading punishment, and a child who is imprisoned must be treated with humanity and dignity, taking into account the needs of a person of their age.[41]
- Imprisonment of children must be a measure of last resort, and a variety of other appropriate and proportionate penalties should be available to children found guilty of criminal offences, with a focus on rehabilitation.[42]
- Imprisonment of children must be for the shortest appropriate period of time.[43]

37. *R v GDP* (1991) 53 A Crim R 112; *R v R* (1993) 32 NSWLR 447.
38. Entered into force for Australia on 16 January 1991 (CROC).
39. Entered into force for Australia on 13 November 1980 (ICCPR).
40. CROC, article 3.
41. CROC, article 37; ICCPR, article 7 and 10.
42. CROC, article 37, 40; ICCPR, article 10.
43. CROC, article 37.

- Children are entitled to privacy at all stages of criminal proceedings.[44]

3.29 The principle that the best interests of the child is the paramount consideration in legal proceedings does not mean that the interests of the community are to be disregarded by courts sentencing young people. Nor does it mean that courts are required to be lenient when sentencing young people.[45]

PENALTIES

Sentencing under C(CP)A and sentencing at law

3.30 The Children's Court must sentence young offenders under the C(CP)A.[46] Other courts have a discretion to sentence young offenders wither under the C(CP)A or at law.[47] In deciding which approach to take, a court should consider the penalty which would be appropriate in the circumstances, including the nature of the offence and the age of the offender.[48]

Range of penalties

3.31 The range of penalties under the C(CP)A consists of cautions, good behaviour bonds, fines, probation, community service orders and detention.[49]

3.32 ***Dismissal, caution.*** In 1998/1999, the Children's Court cautioned 1,786 young offenders under the C(CP)A.[50] Courts also have the power to caution young offenders under Part 4 of the Y*oung Offenders Act* 1997 (NSW). This power is discussed in Chapter 2.[51]

3.33 ***Good behaviour bond.*** The maximum period for a bond is 2 years. There are a number of compulsory conditions, which are set out in s 33(1A) of the C(CP)A. A good behaviour bond must not require the young offender to perform community service work or

44. CROC, article 40(2)(b)(vii); ICCPR, article 14.
45. See para 3.25.
46. C(CP)A s 33.
47. C(CP)A s 18.
48. *R v R* (1993) 32 NSWLR 447; *R v Nguyen* (Unreported, New South Wales, Court of Criminal Appeal, 14 April 1994).
49. C(CP)A Part 3, Division 4, s 18 and s 19.
50. Bureau of Crime Statistics and Research 2000 at Table 2.3.
51. See para 2.14-2.15.

pay a fine or compensation.[52] In 1998/1999, the Children's Court sentenced 2,236 offenders to a bond.[53]

3.34 ***Fine.*** The maximum fine courts can impose is either the maximum fine at law for the offence, or $1,100 – whichever is less.[54] In 1998/1999 the Children's Court fined 1,568 young offenders.[55] Courts can sentence young offenders to a combined good behaviour bond and fine. In 1998/1999 117 offenders sentenced by the Children's Court received this sentence.[56]

3.35 ***Probation.*** The maximum time for a probation order is 2 years. In 1998/1999 the Children's Court sentenced 1,715 children to probation.[57]

3.36 ***Community service.*** Courts can sentence offenders aged under 16 to a maximum of 100 hours of community service. For offenders aged 16 or over, the maximum number of hours depends on the offence, up to a maximum of 250 hours.[58] Community service orders can only be imposed where the court can also sentence the young offender to detention.[59] In 1998/1999 the Children's Court imposed 918 community service orders.[60]

3.37 ***Detention.*** The maximum period for a detention order is 2 years.[61] Courts can only sentence young offenders to detention where the penalty for the offence at law is imprisonment,[62] and cannot impose a detention sentence that is more severe than the penalty at law.[63] Detention can be suspended or combined with a good behaviour bond.[64] Courts cannot sentence a young offender to detention unless satisfied that all the other sentencing options

52. C(CP)A s 33(1A). See s 24 for the power to order children to pay compensation.
53. Bureau of Crime Statistics and Research 2000 at Table 2.3.
54. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.
55. Bureau of Crime Statistics and Research 2000 at Table 2.3.
56. Bureau of Crime Statistics and Research 2000 at Table 2.3.
57. Bureau of Crime Statistics and Research 2000 at Table 2.3.
58. C(CSO)A s 13.
59. C(CP)A s 34; *Children (Community Service Orders) Act 1987* (NSW) s 5. See para 3.37.
60. Bureau of Crime Statistics and Research 2000 at Table 2.3.
61. C(CP)A s 33(1)(g).
62. C(CP)A s 35.
63. C(CP)A s 34.
64. C(CP)A s 33(1B).

available under the C(CP)A are inappropriate.[65] In 1998/1999 the Children's Court sentenced 876 young offenders to detention.[66]

3.38 ***Alcohol and drug rehabilitation.*** Courts can adjourn a hearing for up to 12 months and release the young accused person on bail in order to assess their suitability for rehabilitation and/or permit them to participate in a rehabilitation program (formerly known as a "Griffith remand"). At Campbelltown and Cobham, this includes referring the offender to the Youth Drug Court.[67] The Youth Drug Court is a pilot program which began operating in July 2000. It is discussed in Chapter 2.

3.39 ***Youth justice conferencing.*** Courts can also refer a young offender to a youth justice conference.[68] Youth justice conferencing is a diversionary sentencing option available under the *Young Offenders Act 1997* (NSW). It is discussed in Chapter 2.[69]

3.40 ***Licence disqualification.*** Young people found guilty of driving offences can be disqualified from holding a driver's licence.

3.41 Table 3.3 shows the sentences imposed by the Children's Court in 1998/1999 by type of offence.

Table 3.3: Sentences imposed by the Children's Court, 1998/1999

TYPE OF OFFENCE	PENALTY								TOTAL PENALTIES FOR TYPE OF OFFENCE
	DETENTION	CSO[1]	PROBATION	BOND AND FINE	FINE	BOND	CAUTION	OTHER	
Homicide	0	1	0	0	0	0	0	4	5
Assault, abduction	173	156	343	34	122	464	200	96	1588
Sexual offences	7	3	31	0	0	25	2	6	74
Property offences[2]	539	611	1010	42	483	1,191	721	349	4946
Offences against justice procedures	78	27	82	5	93	100	136	38	559
Offences against good order	11	19	79	13	410	145	295	24	996
Drug offences[3]	27	36	93	14	292	198	314	8	982
Driving offences[4]	29	46	60	5	123	80	79	209	631
Weapons and explosives offences	4	12	12	3	20	16	17	4	88

65. C(CP)A s 33(2). This is consistent with international law: See para 3.28.

66. Bureau of Crime Statistics and Research 2000 at Table 2.3.

67. C(CP)A s 33(1)(c2). This power was introduced to enable the Youth Drug Court to adjourn proceedings and grant bail to participants in its program.

68. C(CP)A s 33(1)(c1).

69. See para 2.17-2.34.

Other	8	7	5	1	25	17	22	323	408
Total	**876**	**918**	**1,715**	**117**	**1,568**	**2,236**	**1,786**	**1,061**	**10,277**

NOTES TO TABLE 3.3

1. CSO: Community Service Order
2. Category includes robbery, blackmail, extortion, break and enter, theft from a person, retail and motor vehicle theft, receiving stolen property, fraud and property damage offences.
3. Category includes possession, trafficking, cultivation and manufacture.
4. Category includes driving under the influence of alcohol and drugs, dangerous driving and traffic offences.

3.42 During preliminary consultations, it was suggested that it would be valuable for the Commission to consider whether the community-based sentencing options available under the C(CP)A are fully utilised. It was also suggested that the Commission should consider whether the range of non-custodial sentencing options available under the C(CP)A needs to be increased.[70] One option may be to widen the availability of licence disqualification as a sentence so that it is available generally, rather than restricted to driving offences.

3.43 Another issue raised during preliminary consultations was whether community-based sentencing orders such as community service orders could be better structured to enable young offenders to participate in educational and vocational activities, rather than menial work. [71]

ISSUE 13

Is the range of sentencing options under the *Children (Criminal Proceedings) Act 1987* (NSW) fully utilised by sentencing courts? Is the current range of options adequate?

Should licence disqualification be available as a sentence for all offences?

70. Preliminary consultation, Reference Group (18 December 2000). See also para 3.136-3.140.

71. Preliminary consultation, Reference Group (18 December 2000).

ISSUE 14

Could community-based sentencing orders be better structured to enable young offenders to participate in educational or vocational work?

Breach of community based orders

3.44 Where a young offender breaches the conditions of a good behaviour bond or probation order, or fails to comply with a community service order, the court may impose any of the penalties originally available for the offence.[72]

POLICE POWERS

3.45 Police in New South Wales have a range of powers to enable them to carry out their law enforcement function in relation to young people.

3.46 ***Searches.*** At common law, a police officer may search a person under arrest if the officer reasonably believes that this is necessary to discover a concealed weapon, or secure or preserve evidence.[73] This is enhanced by a more general statutory power to search a person in lawful custody and take anything found during the search. The suspect's consent is not required.[74]

3.47 ***Forensic tests.*** Forensic procedures can be carried out on young people, but only if police obtain an order from a Magistrate or authorised justice. Forensic procedures include taking photographs, finger-prints, palm-prints, casts, physical measurements, hair, nail, blood or saliva samples, dental impressions or swabs.[75]

3.48 Since 1998, several new police powers have been enacted. These powers have a significant impact on young people.

72. C(CP)A s 41, *Children (Community Service Orders) Act 1987* (NSW) Part 5.

73. *Leigh v Cole* (1853) 6 Cox CC 329; *Dillon v O'Brien* (1887) 16 Cox CC 245.

74. *Crimes Act 1900* (NSW) s 353A(1) and (3)(D).

75. *Crimes (Forensic Procedures) Act 2000* (NSW) s 4, s 8, s 18 and Part 5.

3.49 ***Knives.*** Police can search a person in a public place or school who is reasonably suspected of having a knife. This includes the power to search the person's school bag or locker. Police can confiscate knives and it is an offence to refuse to submit to a search.[76]

3.50 ***Give directions.*** Police can give directions to a person in a public place reasonably suspected of obstructing, harassing, intimidating or frightening another person. Refusal to comply with a direction without reasonable excuse is an offence.[77]

3.51 ***Name and address.*** Police can demand the name and address of a person at or near the place of an alleged indictable offence who the police officer suspects may be able to assist in an investigation. Refusal to provide this information without reasonable excuse is an offence.[78]

3.52 A police officer can only search a person for a knife, give directions or demand their name and address if the police officer first tells the person their name and place of duty, gives a reason for exercising the power and warns that failure to comply may be an offence. If the police officer is not in uniform, they must also provide evidence that they are a police officer.[79]

3.53 ***Remove young people.*** Police can also remove a person believed to be under 16 years old from a public place which has been declared an "operational area". This power can be exercised if the police officer believes on reasonable grounds that the young person is not subject to the supervision or control of a responsible adult and is at risk of harm or of committing an offence. The young person must be escorted to the residence of a parent or carer. Police officers may request the name, age and address of the child, remove concealed weapons and use reasonable force to exercise this power.[80]

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76. *Summary Offences Act 1998* (NSW) s 28A-28E, inserted by the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) s 3 and Schedule 1. These amendments also introduced a new offence of carrying a knife in a public place or school without a reasonable excuse: see para 3.55.

77. *Summary Offences Act 1998* (NSW) s 28F, inserted by the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) s 3 and Schedule 1. See C Grant and C Quayle, "Workshops at Walgett and Bourke", Working Out West Project (unpublished, 2001) for a discussion of the impact of this power on young people in rural New South Wales.

78. *Crimes Act 1900* (NSW) s 563, inserted by the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) s 4 and Schedule 2.

79. *Summary Offences Act 1988* (NSW) s 28A(4) and s 28F(4) and *Crimes Act 1900* (NSW) s 563(2).

80. *Children (Protection and Parental Responsibility) Act 1997* (NSW) Part 3. A public place is declared an "operational area" by the Attorney General on the application of a local council.

3.54 The enactment of these additional police powers and their effect in practice has been criticised by the Aboriginal Justice Advisory Council,[81] the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission[82] and commentators.[83] Concerns were raised with the Commission during preliminary consultations for this review.[84] While an examination of this issues is outside the scope of the Commission's terms of reference, the Commission considers that they merit further consideration.

PUBLIC ORDER OFFENCES

3.55 There are a number of statutory public order offences in the *Crimes Act 1900* (NSW) and the *Summary Offences Act 1988* (NSW). Commonly prosecuted public order offences include offensive conduct,[85] offensive language,[86] assault police[87] and resist arrest.[88] In 1998 a new offence of carrying a knife in a public place or school without reasonable excuse was enacted.[89]

3.56 The incidence of offensive language charges is increasing, while the incidence of other categories of offence is stable or falling.[90] This increase, and the impact of prosecuting adults and young people for public order offences, has been criticised by the Aboriginal Justice Advisory Council;[91] Magistrate David Heilpern;[92] the Human Rights and Equal Opportunity

81. Aboriginal Justice Advisory Committee, *A Fraction More Power: Review of the Impact of the Children (Protection and Parental Responsibility) Act on Aboriginal People in Moree and Ballina* (1999).

82. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (Report 84, 1997) at para 18.73-18.79 and Recommendation 204.

83. S Campbell, "Reality Checks – The Changing Relationship in the Policing of Young People and its Implications for Legal Practitioners" (1999) 37(10) *Law Society Journal* 58 at 58-59; N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)* (1999) at para 46, M R Liverani, "For the Disadvantaged Young, NSW is a Police State" (1999) 37(10) *Law Society Journal* 62 at 64. The *Crimes Amendment (Police and Public Safety) Act 1998* (NSW) was reviewed by the NSW Ombudsman in 1999: New South Wales, Ombudsman, *Policing Public Safety* (1999).

84. Preliminary consultation, Reference Group (18 December 2000).

85. *Summary Offences Act 1988* (NSW) s 4.

86. *Summary Offences Act 1988* (NSW) s 4A.

87. *Crimes Act 1900* (NSW) s 60.

88. *Crimes Act 1900* (NSW) s 546C.

89. *Summary Offences Act 1988* (NSW) s 11B and s 11C, inserted by the *Crimes Legislation Amendment (Police and Public Safety) Act 1998* (NSW) s 3 and Schedule 1.

90. New South Wales, Bureau of Crime Statistics and Research, *Race and Offensive Language Charges* (Bureau Brief, August 1999) at 1; New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders* (Report 96, 2000) at para 1.7.

91. Aboriginal Justice Advisory Committee, *Policing Public Order: Offensive Language and Conduct, The Impact on Aboriginal People* (1999).

Commission;[93] and commentators.[94] It was also raised as an issues of concern during preliminary consultations for this Issues Paper.[95] While consideration of public order offences is outside the scope of the Commission's terms of reference for this review, the Commission considers that the increase in prosecutions for public order offences and the impact of charging adults and young people with public order offences warrants further attention.

COMMENCING PROCEEDINGS

3.57 Police can commence criminal proceedings either by issuing a summons or court attendance notice or arresting and charging the suspect. The C(CP)A states that criminal proceedings against young people should be commenced by summons or attendance notice rather than arrest, except where:[96]

- The young person is suspected of committing a "serious children's' indictable offence".[97]
- The young person is suspected of committing a indictable drug offence.[98]
- The violent nature of the offence or the violent behaviour of the young person indicates that they should be held in custody.
- There are reasonable grounds to believe either that the young person is unlikely to comply with a summons, or is likely to commit further offences if proceedings are commenced by way of summons.

3.58 This effectively establishes a statutory presumption in favour of commencing proceedings by summons or attendance notice (this is consistent with the common law position).[99]

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92. *Police v Shannon Thomas Dunn* (Unreported, New South Wales, Dubbo Local Court, Magistrate Heilpern, 27 August 1999). See also *Police v Lance Carr* (Unreported, New South Wales, Wellington Local Court, Magistrate Heilpern, 8 June 2000).

93. Human Rights and Equal Opportunity Commission, *Bringing Them Home*, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (1997) at 511-513.

94. Campbell at 58; C Cunneen, "Zero Tolerance Policing: How Will it Affect Indigenous Communities?" (March 1999) 4 *Indigenous Law Bulletin* 7; Liverani at 64; Hennessy at para 46 and 47.

95. Preliminary consultation, Reference Group (7 November 2000).

96. C(CP)A s 8.

97. See para 3.7.

98. See *Drug Misuse and Trafficking Act 1985* (NSW) Part 2 Division 2.

3.59 The Australian Law Reform Commission and Human Rights and Equal Opportunity Commission,[100] the Juvenile Justice Advisory Council,[101] Magistrate David Heilpern,[102] the Royal Commission into Aboriginal Deaths in Custody[103] and commentators[104] have observed that the statutory preference for summonses and attendance notices is not always observed in practice, and that the arrest process is likely to escalate conflict between police and young people. This concern was also raised with the Commission during preliminary consultations.[105] It is likely that the fact that issuing a summons involves more paperwork for police officers than arresting a suspect contributes to the low use of summons.[106] This issue is not within the terms of reference for this review, but the Commission considers that is has merit.

POLICE QUESTIONING

3.60 During consultations, it was argued that the availability of adequate legal representation for young people at police stations, as well as during court hearings, including bail hearings, is an issue that significantly affects court-based sentencing of young offenders.[107] New South Wales Legal Aid Children's Legal Service operates a legal advice hotline for young people who have committed or are suspected of committing an offence.

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99. *Fleet v District Court* [1999] NSWCA 363.

100. ALRC Report 84 at para 18.84-18.93 and Recommendation 207; Human Rights and Equal Opportunity Commission at 516-518.

101. New South Wales, Juvenile Justice Advisory Council, *Aboriginal Over-representation and Discretionary Decisions in the NSW Juvenile Justice System* (1995) at 22, 48.

102. *Police v Shannon Thomas Dunn* (Unreported, New South Wales, Dubbo Local Court, Magistrate Heilpern, 27 August 1999). See also *Police v Lance Carr* (Unreported, New South Wales, Wellington Local Court, Magistrate Heilpern, 8 June 2000).

103. Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991-1992) at Recommendations 87 and 239 and para 30.2.6.

104. M Dennis, "The Bail Act and Young People" paper presented to Legal Aid Commission at *Continuing Legal Education Conference*, 2 December 2000 at 3.

105. Preliminary consultation, Reference Group (18 December 2000).

106. Preliminary consultation, Reference Group (18 December 2000); New South Wales, Parliament, Legislative Council, Standing Committee on Social Issues, *Juvenile Justice in NSW* (1992) at 74.

107. Preliminary consultation, Reference Group (18 December 2000). See *Bail Act 1978* (NSW) s 19; *Crimes Act 1900* (NSW) s 356N; C(CP)A s 13(1)(a)(iv).

3.61 In October 2000 the Law Society of New South Wales adopted a statement of principles for lawyers representing children which deals with the role of the lawyer, and duties of representation.[108]

3.62 The Law Society Specialist Accreditation Board has also given in principle approval to setting up Children's Law as an area of accreditation for lawyers. The Law Society will establish a Children's Law advisory committee which will be responsible for structuring the speciality and formulating the accreditation assessment process.[109]

3.63 In England and Wales, the arrest, detention, questioning and treatment of adults and young people by police is extensively regulated by the *Police and Criminal Evidence Act 1984* (Eng) ("PACE") and a number of police Codes of Practice enacted under PACE. While the treatment of young people by police is not within the terms of reference for this review, the Commission considers that there is merit in considering whether it is desirable to introduce legislation governing the arrest, detention, questioning and treatment of young people in New South Wales, using PACE as a model.

BAIL

3.64 A young person who is charged with a criminal offence can either be released on bail or held on remand.

3.65 People charged with minor offences are entitled to be released on bail.[110] There is a presumption in favour of bail for most offences except serious drug offences, homicide and related offences, kidnapping, aggravated forms of robbery, certain sexual assaults and certain domestic violence offences.[111] There is a presumption against bail in relation to serious drug offences, but no presumption either for or against bail in relation to the rest of these

108. Law Society of NSW, *Representation Principles for Children's Lawyers* (October 2000).

109. Telephone conversation with S Currie, Senior Legal Officer, Law Society of NSW, 23 April 2001.

110. *Bail Act 1978* (NSW) s 8.

111. *Bail Act 1978* (NSW) s 8A and s 9.

offences.[112] This is consistent with the international law principle that detention be used only as a measure of last resort.[113]

3.66 The initial decision on bail is made by police.[114] Where police refuse bail, the young accused person must be brought before a court as soon as practicable, (and no later than the following day).[115] The court reconsiders the issues of bail.

3.67 Dennis argues that police often refuse bail, but then do not oppose the granting of bail by a magistrate, in order to shift responsibility to the court for any offences which the accused person may commit whilst on bail.[116]

Discretion to dispense with bail

3.68 A court that may grant bail to a young accused person may instead dispense with the requirement for bail.[117] This means that the young person is entitled to remain at liberty until required to appear in court.[118]

3.69 During consultations it was suggested that courts sometimes place young people on bail in circumstances where it would be more appropriate to dispense with bail, such as where the young person has been charged with a summary offence which does not attract a control order as its maximum penalty.[119]

Discretion to grant bail

3.70 The *Bail Act 1978* (NSW) prescribes the factors to be considered in deciding whether to grant bail. These criteria relate to the probability that the young accused person will appear in court, considering his or her background and community ties. Their previous history of

112. *Bail Act 1978* (NSW) s 8A.
113. See para 3.28.
114. *Bail Act 1978* (NSW) s 17.
115. *Bail Act 1978* (NSW) s 20; C(CP)A s 9.
116. Dennis at 7.
117. *Bail Act 1978* (NSW) s 10.
118. *Bail Act 1978* (NSW) s 11.
119. Preliminary consultation, Reference Group (18 December 2000).

attending court, the circumstances of the offence, their interests, the likelihood of re-offending and the interests of the victim and the community are also relevant factors.[120]

3.71 The Juvenile Justice Advisory Council[121] and the Human Rights and Equal Opportunity Commission[122] have expressed concern that young Aboriginal and Torres Strait Islander people are more likely to be refused bail and held on remand than young non-Aboriginal people. The Australian Institute of Criminology also expressed concern about this in a preliminary submission to this review.[123]

3.72 The *Bail Act 1978* (NSW) states that where the young accused person is under 18, the fact that he or she does not live with his or her parents is not a relevant factor.[124] Despite this provision, it has been argued that homeless young people and young people in state care are sometimes refused bail and held on remand because they are considered to be at risk or flight, or by well intentioned police and Magistrates as a way of finding accommodation for them.[125] This issue was also raised during preliminary consultations for this Issues Paper.[126]

3.73 The Australian Law Reform Commission and Human Rights and Equal Opportunity Commission also observed that young people from rural communities are often transported long distances to detention centres pending a bail hearing. If granted bail and released, the young person often has no way of returning home.[127]

3.74 During consultations concern was also expressed that young people are sometimes released on bail with no way of getting home, or with nowhere to live.[128] A case manager from Reiby Juvenile Detention Centre commented that young accused people under the age of 14 who are initially refused bail by a rural court are often subsequently granted bail by a

120. *Bail Act 1978* (NSW) s 32.

121. Juvenile Justice Advisory Council at 23-24.

122. Human Rights and Equal Opportunity Commission at 519-520.

123. Australian Institute of Criminology, *Preliminary Submission* at 1. See also para 3.120-3.130.

124. *Bail Act 1978* (NSW) s 32(4).

125. ALRC Report 84 at Recommendation 228 and para 18.164 and 18.171. See the *Bail Act 1978* (NSW) s 32(4). See also Royal Commission, Report at para 14.3.2, and Australia, Royal Commission into Aboriginal Deaths in Custody, *Regional Report for New South Wales, Victoria and Tasmania* at 352. See also para 3.150-3.154.

126. Positive Justice Centre, *Preliminary Submission* at 4; Preliminary consultation, Reference Group (7 November 2000). The over-representation of young people in state care in the sentencing process is discussed at para 3.150-3.154.

127. See para 3.136-3.143.

128. Positive Justice Centre, *Preliminary Submission* at 4; Preliminary consultation, Reference Group (7 November 2000).

metropolitan court. It is often difficult to arrange transport back to rural areas serviced intermittently by public transport during the week and even less often, or not at all, during public holidays. In these situations, the young person may be held in custody for up to two days until transport can be arranged.[129]

3.75 The Australian Law Reform Commission and Human Rights and Equal Opportunity Commission recommended that this issue should be addressed by the establishment of bail hostel programs, and that police should have a statutory duty of care to ensure that young people released on bail are either able to return home immediately or referred to suitable alternative accommodation.[130]

Bail conditions

3.76 A young accused person who is granted bail must undertake to appear in court.[131] Bail can be granted with or without conditions.[132] There is a statutory presumption in favour of unconditional bail, [133] and a statutory prohibition on inappropriately onerous bail conditions.[134]

3.77 The Australian Law Reform Commission and Human Rights and Equal Opportunity Commission[135] and commentators[136] have criticised the imposition of inappropriate and harsh bail conditions on young people which they cannot meet, effectively setting them up to breach bail.[137] This was also raised during preliminary consultations.[138]

3.78 For example, concern was expressed about young Aboriginal people living in rural New South Wales being granted bail on the condition that they reside in one place and comply with a curfew. This is often unrealistic because young, rural Aboriginal people often do not reside in

129. Telephone call with B Manyen, Case Manager, Reiby Juvenile Detention Centre, 23 April 2001. See also S Schreiner, "The Law Has Lost its Marbles" (17 December 1999) *Sydney Morning Herald* at 17.

130. ALRC Report 84 Recommendation 228 and para 18.166.

131. *Bail Act 1978* (NSW) s 34.

132. *Bail Act 1978* (NSW) s 36, s 36A.

133. *Bail Act 1978* (NSW) s 36 and 37.

134. *Bail Act 1978* (NSW) s 37(2).

135. ALRC Report 84 at Recommendation 228 and para 18.159. See also Youth Justice Coalition, *Kids In Justice – A Blueprint for the 90s* (1990) at 284-285; Royal Commission Regional Report at 129.

136. Dennis.

137. See para 3.80.

138. Preliminary consultation, Reference Group (7 November 2000).

one place, but have three or four places that they consider home. Curfews may also prevent them from fulfilling family responsibilities including caring for younger children and shopping for food at night.

3.79 A young accused person who has been granted conditional bail can apply to a magistrate to review the conditions imposed.[139] Dennis has emphasised the importance of vigilance by solicitors in insisting that courts exercise this supervisory power.[140]

3.80 A police officer who believes on reasonable grounds that a young person has breached a bail condition can arrest the young person without a warrant, or obtain a warrant or summons.[141] Dennis has observed that police officers frequently rely on their power to arrest without a warrant in this situation.[142] This is likely to reflect the fact that the procedure for arresting suspects involves less paperwork for police than the procedure for issuing a summons.[143]

ISSUE 15

Is the current law dealing with young people and bail appropriate? If not, how should it be changed?

Do police and courts exercise their powers in relation to bail appropriately? If not, in what way? How should this be addressed?

CHILDREN'S COURT

Specialisation

3.81 The Australian Law Reform Commission and Human Rights and Equal Opportunity Commission recommended that criminal jurisdiction over young people should be exercised

139. *Bail Act 1978* (NSW) s 44(2).

140. Dennis at 4.

141. *Bail Act 1978* (NSW) s 50.

142. Dennis at 4.

143. See para 3.57-3.59.

exclusively by a specialised children's magistracy, including a rural circuit to overcome the practical difficulty of providing this service in rural areas.[144]

3.82 Until recently, the jurisdiction of the Children's Court was exercised by both specialist Children's Magistrates and Magistrates authorised to exercise the jurisdiction of the Children's Court.[145] In amendments to the composition of the Children's Court in December 2000, the concept of "authorised Magistrates" was abolished.[146] The qualifications for appointment as a Children's Magistrate were also strengthened.[147]

ISSUE 16

Are Children's Magistrates appropriately trained, skilled and experienced?

Name of Court

3.83 Most other Australian jurisdictions use the name Children's Court for the specialised court which deals with young people.[148] The Northern Territory uses the name Juvenile Court,[149] while South Australia uses the term Youth Court.[150] In Tasmania, the Youth Justice Division of the Magistrates Court has criminal jurisdiction over young people.[151]

3.84 England,[152] and New Zealand[153] have also adopted the term Youth Court. While court structures in Canada vary between the various provinces, the Provincial Court in each province includes either a Youth Division or Young Offenders Division.[154]

144. ALRC Report 84 at Recommendation 130, 230 and 231.

145. *Children's Court Act 1987* (NSW) Part 2. See also para 3.139-3.140.

146. *Children and Young Person's Legislation (Repeal and Amendment) Act 1998* (NSW) Schedule 1[6], which commenced operation on 18 December 2000: NSW Government Gazette No 159, 8 December 2000 at 12781.

147. *Children's Court Act 1987* (NSW) s 7, as amended by the *Children and Young Person's Legislation (Repeal and Amendment) Act 1998* (NSW) Schedule 1[2] and 1[7], which commenced operation on 18 December 2000: NSW Government Gazette No 159, 8 December 2000 at 12781.

148. *Children And Young People Act 1999* (ACT) s 53, *Children's Court Act 1992* (Qld) s 4, *Children and Young Persons Act 1989* (Vic) s 8, *Children's Court of Western Australia Act 1988* (WA) s 5.

149. *Juvenile Justice Act 1996* (NT) s 14.

150. *Youth Court Act 1993* (SA) s 4.

151. *Youth Justice Act 1997* (Tas) s 159.

152. *Criminal Justice Act 1991* (Eng).

153. *Children, Young Persons and Their Families Act 1989* (NZ) s 272.

3.85 Recently enacted legislation in New South Wales has also moved away from using the term children when referring to all people aged under 18, to better recognise the wide range of developmental capacities of young people.[155]

ISSUE 17

Should the Children's Court be renamed? If so, what should it be called?

CRIMINAL RECORDS

Recording criminal offences

3.86 Where a person aged under 16 pleads guilty to or is found guilty of an offence, the court must not proceed to conviction or record the finding as a conviction.[156] The Children's Court and the Local Courts also have a discretion not to proceed to or record a conviction against young offenders who are 16 or older.[157] The District and Supreme Courts can record a conviction where a young offender is found guilty of an indictable offence.[158]

Evidence of prior offences

3.87 In the Children's Court, there is no restriction on the admissibility of evidence that a young person has pleaded guilty to or been found guilty of a previous offence or has previously been dealt with under the *Young Offenders Act 1997* (NSW).[159]

3.88 In hearings and trials in the Local, District and Supreme Court, evidence that a person pleaded guilty to or was convicted of an offence when they were aged under 18 cannot be

154. www.canada.justice.gc.ca/en/dept/pub/trib/PC.html#tp (as at 9 May 2001).

155. *Children and Young Persons (Care and Protection) Act 1998* (NSW).

156. C(CP)A s 14(1)(a.

157. C(CP)A s 14(1)(b). This discretion operates in addition to the discretion at law to decline to record a conviction for any offence under s 556A of the *Crimes Act 1900* (NSW).

158. C(CP)A s 14(2).

159. C(CP)A s 15(2) and *Young Offenders Act 1997* (NSW) s 68(2)(c). See para 2.39-2.43.

admitted into evidence if no conviction was recorded and the person has not been punished for any other offence for the last 2 years.[160]

3.89 Evidence that a young person has been warned or cautioned or participated in a youth justice conference under the *Young Offenders Act 1997* (NSW) is not admissible in subsequent proceedings in the Local, District or Supreme Courts.[161]

3.90 These laws are designed to minimise the labelling of young people who commit offences as criminals. 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.[162] It also reflects current criminological theory which argues that labelling young people as deviant or criminal ("stigmatic shaming") creates a social stigma which is likely to entrench criminal behaviour rather than promote rehabilitation.[163] The same policy is reflected in the criminal record expungement legislation in New South Wales, which is more lenient in relation to offences dealt with by the Children's Court than for adult convictions.[164]

3.91 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.

160. C(CP)A s 15(1).

161. C(CP)A s 15(3).

162. ALRC Report 84 at para 19.117-19.127.

163. K Buttrum, "Juvenile Justice: What Works and What Doesn't" in Australian Institute of Criminology, *Juvenile Crime and Justice* (1997) 63 at 64. See also J Braithwaite, *Crime, Shame and Reintegration* (Cambridge, University Press, 1989).

164. *Criminal Records Act 1991* (NSW) s 9 and s 10.

ISSUE 18

Is the law regulating the admissibility of evidence that a person pleaded guilty to or was found guilty of previous offences while aged under 18 appropriate?

Is the law regulating the admissibility of evidence that a person has been dealt with under the *Young Offenders Act 1997* (NSW) appropriate?

MEDIA IDENTIFICATION

3.92 In New South Wales it is an offence to publish or broadcast the name of or any identifying information about a young person who is the subject of criminal proceedings at any time before, during or after the proceedings.[165] There are several exceptions:

- The prohibition does not apply to young people convicted of driving offences in the Local Courts.[166]
- A young person aged 16 or over may be identified if he or she consents.[167]
- A young person aged under 16 may be identified with the consent of the court. If the young person is capable of consenting to be identified, consent is required. If the young person is unable to consent, the court must be satisfied that publishing or broadcasting their identity is in the public interest. [168]
- When the District Court of Supreme Court sentences a young person convicted of a "serious children's indictable offence"[169] the Court can order that their name be broadcast or published. The Court must be satisfied that such an order is in the interests of justice and the prejudice to the young person arising from identification does not outweigh the interests of justice. Consent is not required.[170] This exception was introduced in 1999.[171]

165. C(CP)A s 11. The penalty is a maximum fine of $55,000 for corporations and imprisonment for a maximum of 12 months and/or a maximum fine of $5,500 for individuals.

166. C(CP)A s 11(2).

167. C(CP)A s 11(4).

168. C(CP)A s 11(4), 4A.

169. C(CP)A s 11(4).

170. C(CP)A s 11(4), (4B), (4C), (4D), (4E). The prosecution bears the burden of proving that this test is satisfied. A court, which makes an order authorising the identification of a child under these provisions, must record its reasons for doing so and explain its reasons to the child.

3.93 Commentators who support a prohibition on the public identification of young offenders emphasise the importance of protecting young offenders from stigma and reprisals as part of rehabilitation.[172]

3.94 Proponents of public identification of young offenders, who include the New South Wales Commissioner for Police, Mr Peter Ryan, argue that identifying young offenders in the media would force them to accept responsibility for their actions and act as a deterrent.[173] It is also argued that as the identity of young offenders would be known within their communities, informing others would not have any harmful effect.[174]

ISSUE 19

Should courts have the power to permit the identity of young offenders to be published or broadcast? If so, is the current law appropriate?

MANDATORY SENTENCES

3.95 Mandatory sentences are compulsory sentences imposed by statute for particular offences that remove general judicial sentencing discretion.[175] Mandatory sentences are imposed for a range of minor offences in New South Wales, including traffic infringements.[176]

3.96 Mandatory sentences for property offences have been introduced in two Australian jurisdictions. In 1996 Western Australia introduced a mandatory 12 month custodial sentence for young offenders convicted of home burglary with at least one prior conviction.[177] In 1997 the Northern Territory introduced a mandatory 28 day custodial sentence for young offenders convicted of certain property offences with at least one prior conviction.[178] This law was

171. *Crimes Legislation Amendment (Sentencing) Act 1999* (NSW) s 6 and Sch 4.66[1] and [2].

172. I Cram, "Publish and Damn" (1998) 148 *New Law Journal* at 1748. See para 3.86-3.91.

173. "Name and Shame Young Criminals Says Police Chief" *Daily Telegraph* (Friday 30 October 1998) at 7. But see K Gledhill, "The Naming of Juvenile Defendants" [1994] *New Law Journal* 365.

174. "The Protection of Juveniles" (Editorial) (1998) 148 *New Law Journal* 5.

175. "Mandatory Sentences for Young Offenders" (Editorial) (1998) 22 *Criminal Law Journal* 201 at 201.

176. N Morgan, "Mandatory Sentences in Australia: Where Have we Been and Where are we Going?" (2000) 24 *Criminal Law Journal* 164.

177. *Young Offenders Act 1994* (WA) s 124; *Criminal Code* (WA) s 401.

178. *Juvenile Justice Act 1996* (NT) s 53AE-G.

subsequently amended to provide for compulsory diversionary sentencing options for more minor offences, and at police discretion for more serious offences.[179]

3.97 Proponents of mandatory sentences argue that they operate as an effective deterrent.

3.98 Opponents of mandatory sentences argue that mandatory sentences do not deter offenders. Crime prevention requires long term strategies, which address economic, educational, employment and social disadvantage and drug and alcohol misuse. Opponents argue that mandatory detention sentences which remove young offenders from their families and communities is actually likely to promote recidivism. Moreover, the severe penalties imposed to achieve deterrence can be far more severe than the objective criminality requires.

3.99 Proponents of mandatory sentences argue that government intervention in judicial sentencing discretion is required to address leniency[180] and inconsistency.[181]

3.100 Opponents of mandatory sentences argue that mandatory sentencing actually reduces the level of consistency in sentencing because the consequences of criminal behaviour hinge on charging discretions exercised by individual police officers. For example, when mandatory sentences were introduced in the Northern Territory, one response was increased use of the charge of unlawful possession, which did not attract a mandatory sentence, in place of the charge of stealing or receiving stolen property, which did (the law was subsequently amended so that unlawful possession also attracted a mandatory sentence).[182]

3.101 This transfer of discretion also reduces the level of accountability of the criminal justice system because charging decisions made by police officers are not open to public scrutiny.[183]

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179. The Northern Territory mandatory sentencing laws were amended in response to a Commonwealth Government Senate Committee Report, which found that the laws breached Australia's international law obligations and recommended federal legislation to override them: Australia, Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing and Juvenile Offenders) Bill 1999* (2000). The Senate inquiry arose from the introduction of the *Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* (Cth) into Federal Parliament. This bill sought to override the mandatory sentencing laws in their application to young offenders. For commentary on the impact of the amendments, see J Hardy, "Mandatory Sentencing in the Northern Territory – A Breach of Human Rights" (2000) 11 *Public Law Review* 172.

180. See N Morgan, "Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories" (1999) 22 *University of NSW Law Journal* 267 at 269.

181. See Morgan 1999 at 269; "Mandatory Sentences for Young Offenders" (Editorial) (1998) 22 *Criminal Law Journal* 201 at 201-202; Morgan 2000 at 171-174; R Hogg, "Mandatory Sentencing Laws and the Symbolic Politics of Law and Order" (1999) 22 *University of NSW Law Journal* 262 at 263; G Zdenkowski, "Mandatory Imprisonment of Property Offenders in the NT" (1999) 22 *University of NSW Law Journal* 302 at 305.

182. Morgan 2000 at 164-183.

183. Morgan 2000 at 177-178; Hogg at 264; Zdenkowski at 306.

Justice Santow of the Supreme Court of New South Wales has argued that the transfer of sentencing discretion from judges and magistrates to police may be unconstitutional as it amounts to a usurpation of an essential judicial function by the executive.[184]

3.102 It is also argued that such laws conflict with international law principles including the prohibition on racial discrimination and the requirement of proportionality in sentencing, as well as the principles referred to at paragraph 3.28 of this Chapter.[185]

3.103 Another criticism of mandatory sentences is that they adversely affect the administration of the criminal justice system. Mandatory sentences eliminate any incentive for offenders to admit guilt in return for sentencing leniency. This leads to an increased number of contested hearings, increasing the resources consumed by police, legal aid, and courts. Mandatory sentences also increase the population of offenders in custody.[186] The existence of mandatory sentences for certain offences may create pressure to plead guilty to an offence, which does not attract a mandatory sentence, in order to avoid the mandatory laws.[187]

3.104 It has also been argued that the discriminatory impact of mandatory sentencing on young Aboriginal offenders is exacerbated by the low participation of young Aboriginal people in diversion schemes in the Northern Territory and Western Australia.[188] The under representation of young Aboriginal people in diversion schemes under the *Young Offenders Act 1997* (NSW) is discussed in Chapter 2 of this Issues Paper.[189]

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184. G F K Santow, "Mandatory Sentencing: A Matter for the High Court?" (2000) 74 *Australian Law Journal* 298 at 298. But see Morgan 2000 at 180-182.

185. Australia, Senate Legal and Constitutional References Committee, *Inquiry into the Human Rights (Mandatory Sentencing and Juvenile Offenders) Bill 1999* (2000); United Nations, Committee on the Rights of the Child, *Concluding Observations: Australia* (1997) [crc/c/15/Add.79; para 22]; United Nations, Committee on the Elimination of Racial Discrimination, *Concluding Observations: Australia* (2000) [CERD/C/56/Misc.42/rev.3, para 16]; M Flynn, "Mandatory Sentencing, International Law and the Howard/Burke Deal" (2000) 4(30) *Indigenous Law Bulletin* 7 at 8-9; "Mandatory Sentences for Young Offenders" (Editorial) (1998) 22 *Criminal Law Journal* 201 at 203-204; M Flynn, "International Law, Australian Criminal Law and Mandatory Sentencing: The Claims, the Reality and the Possibilities" (2000) 24 *Criminal Law Journal* 184 at 188-189; Zdenkowski at 311; J Blockland, "International Law Issues and the New NT Mandatory Sentencing Regime", paper delivered to the NT Criminal Lawyers Association *Sixth Biennial Conference*, 22-26 June 1997; H Bayes, "Punishment is Blind: Mandatory Sentencing of Children in Western Australia and the Northern Territory" (1999) 22 *University of NSW Law Journal* 286 at 286; Santow at 299-300; M Jaskulski, "Mandatory Sentencing" (2000) 9(1) *Human Rights Defender* 2.

186. "Mandatory Sentences for Young Offenders" (Editorial) (1998) 22 *Criminal Law Journal* 201 at 202.

187. Morgan 2000 at 178; C Thomson, "Preventing Crime or 'Warehousing' the Underprivileged? Mandatory Sentencing in the NT" (1999-2000) 4(26) *Indigenous Law Bulletin* 4 at 5.

188. Morgan 2000 at 179.

189. See para 2.46-2.47.

3.105 The ALRC/HREOC and the Human Rights and Equal Opportunity Commission have both recommended that the mandatory sentencing laws operating in Western Australia and the Northern Territory should be repealed.[190]

ISSUE 20

Should New South Wales introduce mandatory sentences for offences committed by young offenders?

SENTENCING GUIDELINE JUDGEMENTS

3.106 Guideline judgments are judgments formulated by appellate courts that go beyond the facts of a particular case to suggest a sentencing scale, or appropriate sentence for common factual situations, to trial courts.[191] The purposes of guideline judgments are to foster consistency, to improve public confidence in the legal system by bringing sentences in line with public expectations and to deter potential offenders by raising awareness that particular offences will attract particular levels of sentence.[192]

3.107 In 1998 the New South Wales Court of Criminal Appeal established a formal system for formulating guideline judgments in response to public debate about the introduction of legislation confining judicial sentencing discretion, including debate about mandatory sentencing laws.[193] The Court's guidelines judgments do not bind sentencing judges,[194] but a judge who does not apply a guideline judgment is expected to provide reasons for this decision.[195] The Court has now published guideline judgements dealing with four offences: driving causing grievous bodily harm or death,[196] armed robbery,[197] drug importation[198] and

190. ALRC Report 84 at Recommendation 242; Human Rights and Equal Opportunity Commission at 528-530 and Recommendation 53b.

191. J J Spigelman, "Sentencing Guideline Judgements" (1999) 73 *Australian Law Journal* 876 at 881.

192. *R v Jurisic* (1998) 45 NSWLR 209 at 216, 220-223, 229, (but see comments by Adams J on the limitations of assertions as to what public perceptions might be at 255-256), J J Spigelman, "Sentencing Guideline Judgements" (1999) 73 *Australian Law Journal* 876 at 878-881.

193. J J Spigelman, "Sentencing Guideline Judgements" (1999) 73 *Australian Law Journal* 876 at 876.

194. *R v Jurisic* (1998) 45 NSWLR 209 at 220-221.

195. *R v Jurisic* (1998) 45 NSWLR 209 at 221.

196. *R v Jurisic* (1998) 45 NSWLR 209. (*Crimes Act 1900* (NSW) s 52A).

197. *R v Henry* [1999] NSWCCA 111. (*Crimes Act 1900* (NSW) s 97).

break, enter and steal.[199]The Court has also published a guideline judgment dealing with guilty pleas.[200]

3.108 The system has been afforded statutory recognition.[201] The *Crimes (Sentencing Procedure) Act 1999* (NSW) empowers the Attorney General to request a guideline judgement and make submissions on how guidelines should be framed.[202] The guideline can be delivered separately or included in an appropriate judgement. Guidelines can apply generally or in relation to particular instances or classes of courts, penalties, offences or offenders.[203]

3.109 During consultations, it was suggested that there is uncertainty surrounding the application of guideline judgments to young offenders and that guideline judgments may be inconsistent with the rehabilitative focus of sentencing young offenders.[204]

3.110 The Court of Criminal Appeal has referred to the relevance of the age of the offender in a number of its guideline judgments. The guideline judgement on dangerous driving causing grievous bodily harm or death refers to the earlier Court of Criminal Appeal judgment in *Musumeci*[205] where Hunt CJ at CL observed that the need for public deterrence meant that the youth of an offender is given less weight as a subjective matter than in other cases. The guideline judgment dealing with drug offences committed by couriers and persons low in the hierarchy or drug importing organisations refers to the statutory requirement that sentencing courts take into account the age of the offender.[206] The guideline judgement on armed robbery refers to the fact that an offender is of a young age as one of the characteristics common to the category of offenders to which the guideline applies.[207] The guideline judgment on break, enter and steal includes an observation that juveniles and young persons are an identifiable group of

198. *R v Wong* [1999] NSWCCA 420. (*Customs Act 1901* (Cth) s 233B).

199. *R v Ponfield* [1999] NSWCCA 435. (*Crimes Act 1900* (NSW) s 112(1)).

200. *R v Thomson* [2000] NSWCCA 309. This judgment dealt with s 22 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which requires a sentencing judge to take into account the fact that an offender has pleaded guilty. The C(CP)A s 33B imposes the same requirement in relation to offences committed by young people.

201. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 36-42.

202 *Crimes(Sentencing Procedure) Act 1999* (NSW) s 37.

203 *Crimes(Sentencing Procedure) Act 1999* (NSW) s 36

204. Preliminary consultation, Reference Group (18 December 2000). See para 3.23.

205. (Unreported, NSWCCA, 30 October 1997), cited in *R v Jurisic* (1998) 45 NSWLR 209 at 228.

206. *R v Wong* [1999] NSWCCA 420 at para 140, referring to the *Crimes Act 1914* (NSW) s 16A(2)(m).

207. *R v Henry* [1999] NSWCCA 111 at para 162.

offenders in relation to this offence and considers whether the guideline should apply to sentencing in the Children's Court.[208]

ISSUE 21

Should guideline judgments apply to young offenders?

RESTORATIVE JUSTICE IN COURT-BASED SENTENCING

3.111 "Restorative justice" is a term used to describe a wide range of formal and informal ways of dealing with criminal offences that increase the emphasis given to the role and experience of victims of crime, encourage more discussion about the offence, the surrounding circumstances and sentencing, and expand the power to make decisions about the outcome of offences.[209] It is most often used in relation to young offenders. Proponents of restorative justice argue that it appropriately recognises the role and rights of victims of crime and is an effective method of rehabilitating offenders and reducing re-offending.[210]

3.112 Youth justice conferencing, discussed in Chapter 2, is an example of a sentence which emphasises restorative justice. Several aspects of the court-based sentencing process for young offenders have restorative justice features.

Victims

3.113 A Victim Impact Statement ("VIS") is a statement setting out the harm suffered by the victim of an offence or, where the victim died as a result of the offence, a statement setting out the impact of their death on the victim's immediate family.[211] VISs are admissible in criminal

208. *R v Ponfield* [1999] NSWCCA 435 at para 38-41.

209. Australian Institute of Criminology, "Restorative Justice and Conferencing in Australia" (Trends and Issues 186, 2001) at 2.

210. A Ashworth, "Restorative Justice and Victims' Rights" [2000] (March) *NZLJ* 84 at 84 and 86; P Condliffe, "The Challenge of Conferencing: Moving the Goal Posts for Offenders, Victims and Litigants" [1998] *Australian Dispute Resolution Journal* 139 at 144-145.

211. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26.

proceedings for certain offences after the offender has been convicted but before sentencing.[212].

3.114 VIS's permit victims to directly participate in the sentencing process. Victims also indirectly participate in this process because evidence of victims is always admitted as evidence of the commission of an offence and its effect.

3.115 The Children's Court may order a young offender to pay compensation to the victim of the offence. The court must consider the young offender's means, income and ability to pay when deciding whether to make a compensation order and the amount of compensation. The maximum amount of compensation that the Children's Court may award is $1,000.[213]

Parents

3.116 Parents may accompany their child to court, apologise to the court on behalf of their child, appear as a witness or even represent their child.[214] Courts exercising criminal jurisdiction over a young person may compel one or both of their parents to attend court.[215]

3.117 Courts may order a young offender to submit to parental supervision, order a young offender's parents to guarantee that their child will comply with a supervision order, require parents to provide security for the good behaviour of their child, or order young offenders to attend counselling with their parents.[216] When considering whether to impose a supervision order on a parent of a young offender, it is important to consider whether the parent will be capable of fulfilling the order. Factors such as the occurrence of violence in the family, financial resources and cultural factors may influence this.[217]

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212. In the Supreme Court and District Court, the sentencing judge may receive and consider a VIS in relation to offences involving actual or threatened violence or sexual assault. Where the victim has died, the Court must receive and consider any VIS given by the victim's family: In Local Court and Children's Court proceedings where the victim has died, VIS given by the victim's family must also be received and considered by the magistrate at the sentencing stage *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27 and s 28. These provisions apply to Children's Court proceedings s a result of the C(CP)A s 33C.

213. C(CP)A s 24 and s 36.

214. New South Wales, Youth Justice Coalition, *Kids In Justice* (1990) at 157.

215. *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 7.

216. *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 8, s 9 and s 10. If the child does not comply with a supervision order, the court can impose any penalty available for the original offence.

217. R White "Regulating Youth Space" (1997) 1 *Alternative Law Journal* 31.

3.118 A parent who, by wilful default, contributes to the commission of an offence for which their child has been found guilty, is guilty of an offence punishable by a fine of up to $1,100. The court can order a parent convicted of this offence to undergo counselling in addition to, or instead of imposing a fine.[218]

3.119 During consultations, the Aboriginal Justice Advisory Council suggested that parents of Aboriginal young people are often unlikely to participate in Children's Court hearings. It was suggested that many Aboriginal people regard the atmosphere of court as alienating and intimidating. Some parents may be unwilling to attend court because of outstanding warrants against themselves. Many young Aboriginal people are cared for primarily by their grandparents rather than their parents. There are often physical barriers to travel and court attendance for grandparents. Due to the low life expectancy of Aboriginal people, many young Aboriginal people find themselves without a parent or grandparent to participate in their court hearing.

ISSUE 22

Does court-based sentencing of young offenders adequately emphasise the role of restorative justice? If not, how can more emphasis be given to restorative justice?

YOUNG ABORIGINAL OFFENDERS

3.120 Young Aboriginal people are grossly over represented as offenders. While young Aboriginal comprise 1.9% of the youth population in New South Wales, 25% of young people serving detention sentences are Aboriginal.[219] The rate of over-representation has not improved since the 1992 Royal Commission into Aboriginal deaths in Custody.[220]

218. *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 11.

219. Juvenile Justice Advisory Council at 6; New South Wales, Department of Juvenile Justice, *Juveniles in Detention: Issues of Over Representation* (1995) at 7 and 13; New South Wales, Judicial Commission, *Sentencing Disparity and the Ethnicity of Juvenile Offenders* (1998) at 17. See also Cunneen at 7.

220. Royal Commission, Report at para 14.3.10-14.3.12. See also para 14.3.29-14.3.31.

3.121 Young Aboriginal people are also likely to receive harsher penalties and progress faster through the stages of the juvenile justice system than other young offenders. The Royal Commission into Aboriginal Deaths in Custody referred to this as "deviation amplification".[221]

3.122 Reasons for this include that young Aboriginal people are more likely to have prior convictions at an earlier age,[222] both because Aboriginal people are younger when they first commit offences than non-Aboriginal people, and because they are less likely to be diverted under the *Young Offenders Act 1997* (NSW).[223] A recent report by the New South Wales Bureau of Crime Statistics and Research which examined the reasons for the over-representation of Aboriginal adults in prison concluded that increasing the number of offenders efforts to reduce this over-representation should focus on increasing the use of diversion schemes.[224] The under-representation of young Aboriginal people in diversion under the *Young Offenders Act 1997* (NSW) is discussed in Chapter 2.[225]

3.123 Another reason may be that courts sometimes discriminate against young Aboriginal people when considering the suitability of community-based sentencing orders. Courts assessing the stability of a young offender's home environment may apply Anglo-Australian standards, disregarding the role of extended kinship networks in Aboriginal communities.[226] The Commission has previously commented that failure to appropriately consider cultural factors in sentencing contributes to the over representation of adult Aboriginal people in prison.[227]

3.124 Involvement in the criminal justice system as a young person sets a pattern for involvement as an adult. Aboriginal adults are also over represented as offenders.[228]

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221. Royal Commission, Regional Report at 352.

222. Royal Commission, Report at para 14.3.32-14.3.34; Juvenile Justice Advisory Council at 19-31.

223. Hennessy at para 7 and 41.

224. New South Wales, Bureau of Crime Statistics and Research, *The Scope for Reducing Indigenous Imprisonment Rates* (2001).

225. See para 2.46-2.47.

226. ALRC Report 84 at para 19.112; Human Rights and Equal Opportunity Commission at Recommendation 46b.

227. NSWLRC Report 96 at para 1.46.

228. NSWLRC Report 96 at para 1.6; Royal Commission, Regional Report at 353. For a recent examination of over representation of adult Aboriginal people in the New South Wales court system see Bureau of Crime Statistics and Research 2001.

3.125 In 1997 the Human Rights and Equal Opportunity Commission emphasised the importance of the sentencing principle that custodial sentences should be the last resort for young indigenous offenders.[229] The Commission has previously emphasised the importance of this principle in relation to adult Aboriginal offenders, and noted that the imposition of a custodial sentence on a young Aboriginal person is likely to dislocate or alienate them from their culture, community and traditional values.[230]

3.126 In its recent report on sentencing Aboriginal offenders, the Commission recommended that Aboriginal customary law should be given statutory recognition in New South Wales.[231] The Commission accepted that customary law is relevant to Aboriginal communities in New South Wales. Evidence that an offender has or will receive punishment in accordance with customary law; that an offence was committed as required by or in furtherance of customary law or of an offender's future responsibilities under customary law are examples of customary law which may be relevant to sentencing.[232]

3.127 The Commission noted that South Australia and Western Australia have statutory provisions specifically referring to the cultural background of young offenders as a relevant factor in the sentencing process.[233] The Commission also noted the ways in which customary law could receive greater recognition by increasing the involvement of Aboriginal people in the design and delivery of sentencing options.[234]

3.128 The Commission has also previously noted that there are inherent limitations in focusing purely on sentencing in addressing the over-representation of Aboriginal adults in the

229. Human Rights and Equal Opportunity Commission Recommendation 53b. The Royal Commission into Aboriginal Deaths in Custody also recommended that custodial sentences should be used only as a last resort: Royal Commission, Report at Recommendations 62 and 92. See para 3.28.

230. NSWLRC Report 96 at para 2.32-2.33.

231. NSWLRC Report 96 at Recommendation 1. Recognition of Aboriginal customary law was first recommended in 1986 by the Australian Law Reform Commission: Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws Summary Report* (Report 31, 1986). This recommendation was subsequently endorsed by the Royal Commission into Aboriginal Deaths in Custody: Royal Commission, Report at Recommendation 219 and para 29.2.39-29.2.54, and the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission: ALRC Report 84 at Recommendation 252.

232. NSWLRC Report 96 at para 3.9 and 3.24 and 3.30.

233. *Young Offenders Act 1993* (SA) s 3(3)(e); *Young Offenders Act 1994* (WA) s 46(2)(c).

234. NSWLRC Report 96 at para 4.1 and 4.4.

criminal justice system, as economic, educational, employment, health and social disadvantage are critical issues that need to be addressed beyond reform of sentencing laws.[235]

ISSUE 23

How should the over-representation of young Aboriginal and Torres Strait Islander in the juvenile justice system be addressed in the context of sentencing?

Communication

3.129 In Report 96 the Commission identified a wide range of communication problems arising during the sentencing process which affect Aboriginal offenders, including unfamiliarity with the courtroom, language differences, which are often exacerbated by the technical and formal nature of communication in court, differences in non-verbal communication, cultural communication restrictions, the tendency of some Aboriginal people to gratuitously agree with persons in authority, and hearing loss, which is extremely common among Aboriginal people.[236]

3.130 The Commission recommended that court staff receive training to improve understanding of these issues.[237] The Commission also discussed the need to employ linguistic and cultural experts for use in sentencing proceedings involving Aboriginal offenders.[238] The Queensland Government has published a handbook for courts on understanding Aboriginal English.[239]

ETHNICITY

3.131 There is very little empirical research on the relationship between the ethnicity of young offenders and sentencing, or the over-representation of particular ethnic groups in detention centres, compared to the extensive research on the over-representation of Aboriginal people in

235. NSWLRC Report 96 at para 1.51.

236. NSWLRC Report 96 at para 7.5.

237. NSWLRC Report 96 at para 7.8.

238. NSWLRC Report 96 at para 7.20-7.41.

239. Queensland, Department of Justice and Attorney General and Department of Aboriginal and Torres Strait Islander Policy and Development, *Aboriginal English in the Courts* (2000).

the criminal justice system. The Commission considers that the limited research available raises a significant policy issue requiring further examination.

3.132 In 1998 the New South Wales Judicial Commission published research examining disparity in sentences received by young offenders from diverse ethnic backgrounds.[240] The research examined sentences imposed on young offenders in the following ethnic groups: Pacific Islands, Southern European, Middle Eastern and East Asian.[241]

3.133 The Judicial Commission found that young offenders from Pacific Islands backgrounds received harsher penalties than young offenders from Anglo-Australian backgrounds, including more frequent and longer control orders.[242]

3.134 The Judicial Commission found that there were no statistically significant differences in sentences for other ethnic groups, although the direction of the difference was consistently in favour of Anglo- Australians.[243]

3.135 Previous research by the Department of Juvenile Justice examining the ethnicity of all young people detained in New South Wales in 1994 found that young Indo-Chinese, Lebanese, Pacific Islander and New Zealand Maori people were grossly over-represented on remand and on control orders.[244]

240. New South Wales, Judicial Commission, *Sentencing Disparity and the Ethnicity of Juvenile Offenders* (1998).

241. The research also examined sentences imposed on young Aboriginal and Torres Strait Islander people: see para 3.120-3.128.

242. Judicial Commission at 18.

243. Judicial Commission at 17.

244. Department of Juvenile Justice at 7 and 13.

ISSUE 24

Do young people from particular ethnic groups or backgrounds encounter discrimination in the sentencing process? If so, which groups or backgrounds? How should this be addressed?

GEOGRAPHY

Disparity

3.136 As with sentencing and ethnicity, there is very little empirical research on the relationship between the geographical location of young offenders and sentencing, or the over-representation of young offenders from particular geographical areas in detention centres. The limited empirical research on this issue has found significant regional variations in sentencing practices in New South Wales.[245] The Commission considers that this raises a significant policy issue requiring further investigation.

3.137 One factor contributing to this is likely to be the limited availability of non-custodial sentencing options and alcohol and drug rehabilitation services in some areas.[246] Non-custodial programs in rural and remote areas also tend to involve much less supervision and support than those in metropolitan areas. For example, in country areas a departmental officer may only make monthly visit to a young person on a supervised order.[247]

3.138 Since most Aboriginal people in New South Wales live in rural areas, these issues contribute to the over-representation of young Aboriginal people in detention discussed in paragraphs 3.120-3.128 above.[248]

3.139 Until 2000, young offenders in regional and rural New South Wales were often dealt with by Authorised Magistrates.[249] Authorised Magistrates tended to impose more severe

245. Juvenile Justice Advisory Council at 33-69; Hennessy at para 44 and 70.

246. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission at para 19.4, 19.100; S Schreiner, "The Law Has Lost its Marbles" (17 December 1999) *Sydney Morning Herald* at 17; J Nicholson, *Preliminary Submission*.

247. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission at para 19.100.

248. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission at para 19.99-19.100, 2.119-2.122; New South Wales, Ombudsman, *Inquiry into Juvenile Detention Centres* (1996) at vol 1 at 71; Human Rights and Equal Opportunity Commission at 535-6; NSWLRC Report 96 at para 1.46, 5.12 and 5.50. See also Royal Commission, Report at para 14.3.35-14.3.38.

penalties on young offenders than Children's Magistrates, and in particular, were more likely to sentence young offenders to detention.[250] In a preliminary submission, the Senior Public Defender, Mr John Nicholson QC argued that this occurred because non-specialist Magistrates routinely sentence adult offenders for similar offences and were less likely to distinguish between young and adult offenders, less likely to apply the relevant sentencing principles which apply to young offenders,[251] and less likely to be aware of the destructive ling term impact of sentencing young Aboriginal people to custodial sentences.[252]

3.140 The concept of Authorised Magistrates was abolished in 2000.[253]

Effect of detention

3.141 Young offenders sentenced to detention may be accommodated in detention centres a considerable distance from family and community. This results in a high level of dislocation, making it more difficult for the young person to maintain links with their family and community by visits and participation in work release and pre and post release programs.[254]

3.142 One response to this issue would be to build new detention centres in regional areas. This would be expensive. Commentators have also observed that it would also result in increasing the total number of young offenders in detention, especially young Aboriginal offenders.[255]

3.143 Another response would be to facilitate contact between young offenders in detention and their families and communities. For example, a 1996 Ombudsman's Inquiry into Juvenile Detention centres commented that the Department of Juvenile Justice performed well in the assistance it provided to young Aboriginal detainees to attend important family occasions. The

249. See para 3.82.

250. Juvenile Justice Advisory Council at 33. See also Australian Law Reform Commission and Human Rights and Equal Opportunity Commission at para 19.99; Hennessy at para 70.

251. See para 3.22-3.29.

252. J Nicholson, *Preliminary Submission*.

253. See para 3.82.

254. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission at para 19.4, 19.99, 20.117-20.118; NSW Ombudsman at para 8.9-8.25.

255. New South Wales, Ombudsman, *Inquiry into Juvenile Detention Centres* (1996) at para 8.9-8.25; J Nicholson, *Preliminary Submission*.

Report also emphasised the importance of supportiveness and flexibility in relation to family visits.[256]

ISSUE 25

Do young people from regional or rural New South Wales encounter discrimination in the sentencing process? If so, how should this be addressed?

INTELLECTUAL DISABILITY

Over-representation

3.144 Adults with intellectual disabilities comprise 2 to 3% of the New South Wales population yet comprise 12-13% of the prison population.[257] Research also suggests that more than one third of adults who appear in New South Wales Local Courts on criminal charges may have significant intellectual deficits.[258] Although there has been minimal research, it is reasonable to infer that young offenders with intellectual disabilities are similarly over-represented.[259]

3.145 Researchers explain this over-representation on the basis of increased vulnerability in the criminal justice process, for example during police questioning and psychological and socio-economic disadvantage, for example the fact that young people with an intellectual disability are more likely to be living in communities where they will be suspected of committing, and commit, crimes.[260]

256. New South Wales, Ombudsman, *Inquiry into Juvenile Detention Centres* (1996) at para 8.9-8.15.

257. S C Hayes and D McIlwain *The Prevalence of Intellectual Disability in the NSW Prison Population: An Empirical Study I* (Sydney, 1998) at 48.

258. New South Wales Law Reform Commission, *Intellectual Disability and the Criminal Justice System* (Research Report 4, 1993).

259. New South Wales, Attorney General's Department, Crime Prevention Division, *Juvenile Crime in New South Wales Report: Statistical Profile of Juvenile Offenders* (1996).

260. New South Wales Law Reform Commission, *People With an Intellectual Disability and the Criminal Justice System* (Report 80, 1996) at 27.

3.146 The Commission has previously reported on people with intellectual disabilities and the criminal justice system.[261] A number of the Commission's previous recommendations are relevant to young offenders with intellectual disabilities.[262]

Defining and identifying intellectual disability

3.147 The Commission recommended the introduction of the following standard statutory definition of intellectual disability: "'Intellectual disability' means a significantly below average intellectual functioning, existing concurrently with two or more deficits in adaptive behaviour".[263]

3.148 A significant issue in the participation of young people with an intellectual disability in the juvenile justice system is the ability of police and courts to identify intellectual disability. The Commission also recommended the development and adoption of a Code of Practice for police procedures for identifying intellectual disability and conducting criminal investigations involving people with intellectual disabilities.[264]

3.149 The Hayes Ability Screening Index ("HASI"), which identifies the possibility of intellectual disability, may be appropriate for use by police. The HASI can be administered by non-psychologists in around 10 minutes. The HASI was developed after extensive testing on inmates of correctional centres in New South Wales, including young offenders. It has been trialed in prisons, and results indicted that the index was 100% successful at predicting intellectual disability. The HASI also identifies individuals suffering from psychiatric illness, substance abuse disorder, or who cannot speak English.[265]

261. New South Wales Law Reform Commission, *People With an Intellectual Disability and the Criminal Justice System* (Report 80, 1996).

262. In September 1998, Attorney General's Department of NSW established committee to consider the Commission's Report and the needs of people with an intellectual disability within the criminal justice system. The Committee is currently considering these recommendations.

263. NSWLRC Report 80 Recommendation 1 and 52-54.

264. NSWLRC Report 80 Recommendation 5 and 6. See also Australian Law Reform Commission and Human Rights and Equal Opportunity Commission at Recommendation 217 and para 18.122-18.124.

265. S Hayes, *The Importance of Identifying Intellectual Disability Amongst Juvenile Victims and Offenders,* paper presented at the conference *Legal Aid Commission of NSW – Juvenile Justice Conference* (Dubbo, 2 December 2000) at 4.

ISSUE 26

Do young offenders with intellectual disabilities encounter discrimination in the sentencing process? If so, how can this be addressed?

STATE CARE

3.150 The care jurisdiction of the Children's Court is outlined at paragraphs 3.13-3.21 of this Chapter. At June 2000, there were 8,517 children and young people in state care in New South Wales. Of these, 40% were placed with extended family and 31% were placed in foster care.[266]

3.151 In 1996, 0.2% of the population of New South Wales were State Wards. The New South Wales Government estimated that at that time 17% of young people involved in the juvenile justice system were State Wards.[267] Also in 1996, the Community Services Commission estimated that young people who are in state care are 15 times more likely to enter a juvenile detention centre than other young people.[268]

3.152 In a preliminary submission, the Positive Justice Centre raised the issue of over representation of young people in the care of the State in the juvenile justice system.[269] The Centre argued that young people in state care encounter discrimination at sentencing hearings because behavioural difficulties that are attributable to being in care are rarely raised before the court in the context of the assessment of an offender's character.[270] It also argued that young people in state care are unlikely to have the factors commonly used to argue mitigation such as a good home, sporting or community organisation membership, educational achievements and strong employment history.[271]

3.153 Young people in state care also encounter difficulty in earlier stages of the juvenile justice system. For example, while young people are entitled to the support of an independent

266. New South Wales, Department of Community Services, *Annual Report 1999-2000* at 39.

267. NSW Cabinet Office, *Draft Youth Policy Statement* (1996). See also K Carrington, *Offending Girls* (Allen and Unwin, Sydney, 1993); United Kingdom, Select Committee on Health, *Children Looked After by Local Authorities* (Report 2, 1998).

268. Community Services Commission, *The Drift of Children in Care into the Juvenile Justice System* (1996) at 7-8.

269. Positive Justice Centre, *Preliminary Submission.*

270. Positive Justice Centre, *Preliminary Submission* at 2.

271. Positive Justice Centre, *Preliminary Submission* at 2.

adult during police interviews,[272] police on occasion find it difficult to locate an independent adult for young people in state care.

3.154 The C(CP)A provides that when deciding how to sentence a young offender, the fact that the offender is in need of care is not to be taken into account.[273] This section is designed to protect young people in need of care against discrimination in sentencing. However, it is important that a court that identifies that a young offender is in need of care ensures that the offender is dealt with under the care jurisdiction of the Children's Court, if necessary, by way of formal care proceedings resulting in a care order.

ISSUE 27

Do young offenders in state care encounter discrimination in the sentencing process? If so, how can this be addressed?

How are young offenders in need of state care dealt with by sentencing courts?

272. *Crimes Act 1900* (NSW) s 356 and s 356N.

273. C(CP)A s 33(3).

APPENDIX A

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