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Young Offenders

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NEW SOUTH WALES LAW REFORM COMMISSION

Letter to the Attorney General

To the Honourable Bob Debus MP
Attorney General for New South Wales

Dear Attorney

Sentencing: young offenders

We make this Report to the reference to this Commission dated 12 April 1995.

The Hon Justice Michael Adams
Chairperson

The Hon Justice Michael Adams

Professor Janet Chan

Her Honour Judge Angela Karpin

Professor Michael Tilbury

December 2005

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Terms of reference

Pursuant to section 10 of the *Law Reform Commission Act 1967* (NSW), the Attorney General, the Honourable Jeff Shaw QC MP, referred the following matter to the Law Reform Commission by letter dated 12 April 1995:

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:

Commissioners

Hon Justice Michael Adams (Commissioner-in-Charge)

His Honour Judge Bob Bellear (until 9 September 2004)

Professor Janet Chan

Her Honour Judge Angela Karpin

Professor Michael Tilbury

Officers of the Commission

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Research assistance	Ms Lisa Hemingway
Paralegal assistance	Mr Joshua Smith
Librarian	Ms Anna Williams
Desktop publishing	Mr Terence Stewart
Administrative assistance	Ms Wendy Stokoe

LIST OF RECOMMENDATIONS

Recommendation 4.1 – see page 79
The definition of "child" in the *Young Offenders Act 1997* (NSW) should be amended to refer to persons who are of or over the age of 10 years and under the age of 18 years, when an offence is committed, or alleged to have been committed, and under the age of 21 years when dealt with under the Act.

Recommendation 4.2 – see page 87
Section 8(1) of the *Young Offenders Act 1997* (NSW) should be amended to provide that all offences committed, or alleged to have been committed, by children are covered by the Act, except serious children's indictable offences, as defined in s 3 of the *Children (Criminal Proceedings) Act 1987* (NSW), and except as otherwise provided by the *Young Offenders Act 1997* (NSW).

Recommendation 4.3 – see page 94
Sections 28 and 47(2) of the *Young Offenders Act 1997* (NSW) should be amended to include reference to a health and drug counselling professional where a child has been charged with an offence under the *Drugs Misuse and Trafficking Act 1985* (NSW).

Recommendation 4.4 – see page 95
Section 13 of the *Young Offenders Act 1997* (NSW) should be amended to provide that a warning may be given for an offence covered by the Act, other than an offence prescribed by the regulations for the purposes of the section.

Recommendation 5.1 – see page 110
Fisheries officers should be investigating officials for the purposes of the *Young Offenders Act 1997* (NSW) in respect of offences under the *Fisheries Management Act 1994* (NSW).

Recommendation 5.2 – see page 117
Neither an admission by a child of an offence, nor consent to diversionary processes, should be valid for the purposes of s 19, 23, 31, 36 or 40 of the *Young Offenders Act 1997* (NSW) unless the admission is made, and consent given, after the child has received legal advice or has had a reasonable opportunity to receive legal advice. A "reasonable opportunity" should be defined to mean not less than four days between the time an allegation is made to the child that he or she has committed an offence and the commencement of the diversionary processes.

Recommendation 8.1– see page 166
Section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) should be expanded to provide that, in imposing a penalty on a child, the court should, in appropriate cases, have regard to:

- the desirability that children should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties;
- the necessity for children who accept responsibility for their actions to make reparation; and
- the effect of the crime on the victim.

Recommendation 8.2– see page 178
A Traffic Offender Program should be made available to offenders being sentenced in the Children's Court.

Recommendation 8.3– see page 180
Section 33(5)(a) of the *Children (Criminal Proceedings) Act 1987* (NSW) should be amended to give the Children's Court the power to impose any disqualification under the road transport legislation within the meaning of the *Road Transport (General) Act 1999* (NSW) on a person whom it has found guilty of an offence. The Children's Court should have this power notwithstanding that a conviction cannot be, or has not been, entered in respect of the offence pursuant to s 14 of the *Children (Criminal Proceedings) Act 1987* (NSW).

Recommendation 8.4– see page 182
Section 53 of the *Fines Act 1996* (NSW) should be amended to provide that the Children's Court has power to review the amount specified in any penalty notice in the light of the young offender's means.

Recommendation 8.5– see page 183
Penalty notices issued under the *Fines Act 1996* (NSW) should contain a statement in plain English that a person under the age of 18 is entitled to challenge, in the Children's Court, both the allegation that they have committed the offence in question and the amount of the fine.

Recommendation 8.6– see page 186
The *Children (Community Service Orders) Act 1987* (NSW) should be amended to give the Children's Court express power to order that satisfactory participation in approved community-based, educational, vocational or personal development programs may be credited towards Community Service Orders.

Recommendation 10.3– see page 246
The bail criteria for young people should specify that the court, when assessing whether to grant or refuse bail, must have regard to the nature of the place where the young person will be detained in custody if bail is refused.

Recommendation 10.4 – see page 246
The *Bail Act 1978* (NSW) should specify that a young person must be granted bail if no appropriate place of detention is available.

Recommendation 10.5– see page 247
The *Bail Act 1978* (NSW) should be amended so that a court, in determining bail for a young person, may order that a background report relating to the young person's welfare be furnished to the court, by a deadline ordered by the court.

Recommendation 10.6– see page 256
The *Bail Act 1978* (NSW) should be amended to provide that conditions attaching to the grant of bail in the case of a young person must be reasonable having regard to the principles in s 6(b)-(d) of the *Children (Criminal Proceedings) Act 1987* (NSW), and are not excessive or unrealistic.

Recommendation 10.7– see page 256
The *Bail Act 1978* (NSW) should be amended to provide that information on the young person's accommodation circumstances must be provided to the court (although not necessarily in a formal report) before a curfew condition may be imposed.

Recommendation 10.8– see page 257
The *Bail Act 1978* (NSW) should be amended so that, before imposing a bail condition on a young person, the authorised officer or court must be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the young person to understand and comply with the bail condition.

Recommendation 10.9– see page 260
Section 9B of the *Bail Act 1978* (NSW) should be amended so as not to apply to young people.

Recommendation 10.10– see page 263
The Government should establish a Working Party to consider the provision of bail accommodation for young people, to identify the issues and problems pertaining to bail accommodation and to establish those areas most in need of increased bail accommodation, with the express aim of ensuring that no young person is held in remand unnecessarily.

EXECUTIVE SUMMARY

Because of their youth, young people between the ages of 10 and 17 years require special consideration at sentencing. For that reason, they are sentenced under a separate system to adults. This report examines the two main pieces of legislation governing the sentencing of young offenders and forming the basis of juvenile justice policy: the *Young Offenders Act 1997* (NSW) ("YOA") and the *Children (Criminal Proceedings) Act 1987* (NSW). Where necessary, the report makes recommendations for the reform of these and other statutes relating to the sentencing of young offenders. It also explores the distinct philosophy, practice and procedure of the juvenile justice system.

The implementation of the YOA is arguably one of the most significant developments in juvenile justice in the twentieth century. It established a scheme to divert, wherever possible, young offenders away from formal court processes through the use of warnings, cautions and conferencing. Youth justice conferencing, in particular, provides a community-based response to offending that seeks to identify the cause of the offending; to encourage the young offenders to take responsibility for their conduct; and to require offenders to make reparation for harm caused. In this way, it addresses the needs of victims and offenders more directly than traditional court proceedings, and holds out the promise of reduced rates of recidivism. The Commission supports the objectives and approach of the YOA.

The report considers a number of ways in which the YOA should be strengthened to achieve its objectives. First, the report focuses on the effectiveness of the discretionary decision-making processes under the Act. It expresses concern that recent legislation increasing police powers in areas likely to have a particular impact on young people, threaten the diversionary aims of the YOA.

Secondly, the report examines the case for extending the scope of the YOA beyond the offences to which it currently applies. The Commission concludes that the only reason why an offence should, in principle, be excluded from the operation of the YOA is that it is so serious that, even in the case of a young offender, it cannot appropriately be dealt with by a diversionary option. At the same time, we recognise that Parliament may from time to time, for broader policy reasons, decide to exclude certain offences from the operation of the YOA (as is currently the case, for example, with breaches of Apprehended Violence Orders and certain drug offences).

The report considers the particular problems that arise in sentencing young offenders convicted of serious offences. The present law requires the sentencing court to set a non-parole period and then the balance of the term. In cases of serious offences that attract lengthy prison sentences, uncertainties surrounding the offender's future emotional and intellectual development and maturing make it difficult for the court to apply the objectives of sentencing (that is, rehabilitation, incapacitation, deterrence, retribution and denunciation) to arrive at an appropriate punishment. In such cases, the Commission recommends that, while the young offender should still be sentenced according to the usual method, the sentencing judge should have a discretion to make an order, in appropriate cases, that the offender be re-sentenced at a specified time before the end of the non-parole period.

The Children's Court plays a central role in achieving the aims of juvenile justice in NSW. Its sentencing jurisdiction extends to serious and complex cases. In the Commission's view, the Court (which we recommend renaming the "Youth Court") should be strengthened by appointing as its head a District Court judge, who, in turn, would be primarily responsible for the appointment of Children's Magistrates. We also recommend that the Children's Court should consider initiating a rural circuit so that the benefits of a specialist jurisdiction are made available in country areas of NSW.

Decisions about bail have the potential to impact seriously on the diversion of young offenders from the criminal justice system and on sentencing outcomes, thereby undermining the policies upon which juvenile justice in New South Wales is based. The Commission recommends that the Bail Act 1978 (NSW) should be amended to identify separate criteria to be applied to young people. This would deter unnecessary refusals of bail and the imposition of harsh and inappropriate conditions. We also recommend that the presumption against bail for certain repeat offenders should not apply to young people.

1. Introduction

- Background to this report
- Who is a “Young Offender”?
- To what extent are young people involved in crime?
- Nature and conduct of the Commission’s inquiry
- Content of this report

BACKGROUND TO THIS REPORT

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 divided the reference into phases. The first phase, an evaluation of the general principles of sentencing law in New South Wales, was the subject of the Commission's Report 79, *Sentencing*.[1]

1.2 The second phase has involved a review of the particular issues that arise in sentencing groups of offenders requiring special consideration, namely, young offenders, Aboriginal offenders and corporate offenders. In October 2000, the Commission published Report 96, *Sentencing: Aboriginal Offenders*. In July 2001, Issues Paper 19 ("IP 19"), *Sentencing: Young Offenders* was published. In 2001, the Commission published Issues Paper 20, *Sentencing: Corporate Offenders* and in June 2003, the Commission published Report 102, *Sentencing: Corporate Offenders*.

WHO IS A "YOUNG OFFENDER"?

1.3 Offenders who are aged between 10 and 17 years at the time they commit an offence are sentenced under a separate system to adults. In its use of the expression "young offender", this report draws on the title of the *Young Offenders Act 1997* (NSW) ("YOA"), despite the content of the YOA referring to such persons as "children".[2] The YOA defines "child" as a person aged 10 and over, and under 18.[3]

1.4 The age of criminal responsibility in New South Wales is 10.[4] There is a conclusive presumption that children who are younger than 10 years old are *doli incapax* (a Latin term meaning "incapable of wrong-doing"). As such, they cannot be guilty of a criminal offence as they are conclusively presumed incapable of forming the requisite criminal intent (*mens rea*).[5] Children aged 10 and older, but who have

1. New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996).
2. *Young Offenders Act 1997* (NSW) s 4.
3. This use is consistent with the definition of "child" adopted in the *United Nations Convention on the Rights of the Child* as a person under 18 years of age See also other legislative descriptions of a child as a person under the age of 18 years: *Children (Care and Protection) Act 1987* (NSW); *Children (Detention Centres) Act 1987* (NSW); *Children (Community Service Orders) Act 1987* (NSW).
4. *Children (Criminal Proceedings) Act 1987* (NSW) s 5. At common law, the age of criminal responsibility is seven: see P Gillies, *Criminal Law* (Law Book Company, Sydney, 1997) at 208.
5. *Children (Criminal Proceedings) Act 1987* (NSW) s 5. See also NSW Attorney General's Department, Criminal Law Review Division, *A Review of the Law on the Age of Criminal Responsibility of Children* (2000); G Urbas, *The Age of Criminal Responsibility* (Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice, No 181, Sydney, 2000); The Law Reform Commission of Hong Kong, *Age of Criminal Responsibility in Hong Kong* (Report, 2000); Scottish Law Commission, *Report on Age of Criminal Responsibility* (Report No 185, 2002); and T Croft, *The Criminal Responsibility*

not yet turned 14, who commit criminal offences are also presumed *doli incapax* but, for this older age group, the presumption is rebuttable. The presumption is incorporated in legislation in a number of jurisdictions,[6] but remains a common law principle in New South Wales.[7]

1.5 To rebut the presumption of criminal incapacity and hence convict a child aged 10-13 years of a crime, the prosecution must prove beyond reasonable doubt that the child did the act charged and knew, when doing the act, that it was seriously wrong, as distinct from merely naughty or mischievous.[8] The act itself, no matter how apparently wrong, cannot be relied on to rebut the presumption.[9] The requisite guilty knowledge may be proved by circumstances attending the act, the manner in which it was done, and evidence as to the nature and/or disposition of the child.[10] The closer the child is to the age of 10, the stronger the evidence must be to rebut the presumption.[11]

1.6 The Commission is aware that some prosecutors use previous cautions and conferences under the YOA as evidence to rebut *doli incapax*. Under section 66(2) of the YOA, records of cautions and conferences may be divulged to the Children's Court for the purposes of deciding whether to take action under the Act, or making a decision concerning sentencing. It is arguable that this is a limited requirement that should not be extended to disclosure in order to rebut the *doli incapax* presumption. On the other hand, s 68(2)(c) of the YOA provides that the immunity granted in s 68(1) to a person who has been the subject of a caution or conference from having

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of Children and Young Persons: A Comparison of English and German Law (Ashgate Publishing Co, Aldershot, England, 2002).

6. For example, *Criminal Code* (Qld) s 29(2); *Criminal Code* (Tas) s 18(2); *Criminal Code* (WA) s 29; *Criminal Code* (NT) s 38(2); *Crimes Act* 1961 (NZ) s 22(1).
7. See *R v CRH* (NSW, Court of Criminal Appeal, No 60390/96, 18 December 1996, unreported).
8. See *C (A Minor) v Director of Public Prosecutions* [1996] AC 1. That case questioned whether the presumption of *doli incapax* was still part of English law. The House of Lords held that the presumption that a child between the ages of 10 and 14 was *doli incapax* was a rule of the common law that could only be abrogated by statute. The Court commented that "the time has now come to examine further a doctrine which appears to have been inconsistently applied and which is certainly capable of producing inconsistent results": headnote. "This is a classic case for parliamentary investigation, deliberation and legislation": at 40 (Lord Lowry). See also *R v CRH* (NSW, Court of Criminal Appeal, No 60390/96, 18 December 1996, unreported); *Ivers v Griffiths* (NSW, Supreme Court, No 10255/98, Newman J, 22 May 1998, unreported). See also NSW Attorney General's Department, Criminal Law Review Division, *A Review of the Law on the Age of Criminal Responsibility*.
9. *C (A Minor) v Director of Public Prosecutions* [1996] AC 1; *DK v Rooney* (NSW, Supreme Court, No 11370/96, McInerney J, 3 July 1996, unreported).
10. *DK v Rooney* (NSW, Supreme Court, No 11370/96, McInerney J, 3 July 1996, unreported).
11. *C (A Minor) v Director of Public Prosecutions* [1996] AC 1.

to disclose this criminal history[12] does *not* apply to proceedings before the Children's Court (including a decision concerning sentencing).

1.7 On one view, the rehabilitative effect of diversion under the YOA supports the position that previous, cautions or conferences should not be disclosed to rebut the *doli incapax* presumption. However, the Commission believes that the better view is that a record of interventions under the YOA is legitimately admissible as evidence to rebut the presumption. It is then up to the court what it makes of that evidence, and how it is considered in conjunction with any other evidence of guilty knowledge.

TO WHAT EXTENT ARE YOUNG PEOPLE INVOLVED IN CRIME?

Empirical evidence

1.8 The population of 10-17 year-olds in New South Wales in 2004 was approximately 727,622.[13] In 2004, police proceeded against 47,991 10-17 year-olds (excluding driving offences), or approximately 7%[14] of the juvenile population.[15] Of these, 13,600 (28%) were proceeded against to court and 34,391 (72%) were proceeded against by means of infringement notice (21%), referral to conferencing (3%), cautioning (27%) or, predominantly, warning (48%). These figures indicate that the vast majority of offences being committed by 10-17 year-olds are minor.

1.9 The proportion of 10-17 year-olds in New South Wales that appeared in the Children's Court in 2004 was approximately 1%.[16] Sixty-eight per cent of those appearances resulted in a finding of the offence proved.[17]

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12. The immunity in s 68(1) also extends to a question concerning the person's criminal history, which is taken not to refer to any such warning, caution or conference: *Young Offenders Act 1997* (NSW) s 68(1)(b).
13. In 2003, the population of 10-17 year-olds in New South Wales was 727,275: Australian Bureau of Statistics, *Population by Age and Sex, Australian States and Territories*, (2003) Table 1: Estimated Resident Population by Single Year of Age, New South Wales (Time Series Spreadsheet No 3201.0, 2004). The population of 10-17 year-olds in New South Wales in 2004 is not yet available. However, for the purposes of gleaning some idea of what proportion of young people are currently engaging in criminal activity, it could be estimated that the 2004 population would be roughly 727,622. (This is arrived at by taking the 2003 figures and adding the number of 9 year-olds and subtracting the number of 17 year-olds. It does not make allowance for deaths and movements in and out of the State.)
14. In this section, the Commission has rounded all percentages off to whole numbers.
15. New South Wales Bureau of Crime Statistics and Research, *New South Wales Recorded Crime Statistics 2001 to 2004* (2005). These figures are obtained from the NSW Police COPS database.
16. The number of young offenders appearing in the Children's Court in 2004 was 8,125: S Moffat, D Goh and J Fitzgerald, *New South Wales Criminal Courts*

1.10 Other significant features of the 2004 NSW Criminal Courts Statistics are as follows:

- Young persons appearing were predominantly male (84%).[18]
- Most appearances were by young people in the 16-17 and 18-plus age brackets (71% of all male appearances; and 64% of all female appearances).[19]
- Of those found guilty, 46% had no prior conviction.[20]
- Theft and related offences were the most common for which persons in Children's Courts were found guilty (20%).[21]
- The next most common offence proved was acts intended to cause injury (13%),[22] followed by unlawful entry with intent/burglary, break and enter (12%).[23]
- Serious violent offences (homicide and related offences, aggravated assault and aggravated sexual assault) constituted 2.5% of all charges proved; while less serious assaults[24] constituted 12% of all charges proved.[25]
- The majority of offences did not warrant a severe penalty: in 80% of cases, the offence resulted in a bond (31%), probation (15.5%), fine (15%) or dismissal with caution (18%).[26]

1.11 A 1994 study of young offending found that the majority of young offenders (70%) did not appear again in the Children's Court after their first offence.[27] For those

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Statistics 2004 (New South Wales Bureau of Crime Statistics and Research, Statistical Report Series No S93, 2005), Table 2.1 at 61.

17. *New South Wales Criminal Courts Statistics 2004*, Table 2.1 at 61.
18. *New South Wales Criminal Courts Statistics 2004*, Table 2.2 at 62.
19. *New South Wales Criminal Courts Statistics 2004*, Tables 2.4a and 2.4b at 69-73.
20. *New South Wales Criminal Courts Statistics 2004*, Table 2.5 at 74.
21. *New South Wales Criminal Courts Statistics 2004*, Table 2.1 at 59.
22. *New South Wales Criminal Courts Statistics 2004*, Table 2.1 at 58.
23. *New South Wales Criminal Courts Statistics 2004*, Table 2.1 at 59.
24. There were 660 persons convicted of non-aggravated assault and one person convicted of other acts intended to cause injury. Other than the 56 persons convicted of aggravated sexual assault, there was one other sexual assault conviction: *New South Wales Criminal Courts Statistics 2004*, Table 2.1 at 58.
25. *New South Wales Criminal Courts Statistics 2004*, Table 2.1 at 58. In 2004, a total of 21 persons appeared in the Children's Court for homicide, 125 for aggravated assault and 103 for aggravated sexual assault. This number constituted 3% of all persons appearing in the Children's Court that year. The proportion of persons appearing for non-aggravated assault and non-aggravated sexual assault was 13%.
26. *New South Wales Criminal Courts Statistics 2004*, Table 2.3 at 63-65.
27. C Coumarelos, *Juvenile Offending: Predicting Persistence and Determining the Cost-Effectiveness of Interventions* (NSW Bureau of Crime Statistics and Research, General Report Series R33, 1994) at 6.

who had more than one court appearance, the mean time between the first and last court appearance was 2.1 years.[28] Coumarelos concluded that, except for a small percentage who persist in offending, "juvenile involvement in crime appears to be extremely transitory".[29] Similarly, in a later study, Freeman found that among those who had more than one court appearance, the average time between the first and last court appearance was about two years.[30]

1.12 This study also found that the minority of juveniles who do reoffend account for a disproportionately large percentage of Children's Court appearances: almost half of the appearances (45%) were accounted for by only 15% of juveniles appearing before the Court. Freeman noted that the finding that a relatively small percentage of offenders (whether juvenile or adult) account for a disproportionately large number of offences, arrests and convictions has been shown many times by past research.[31]

1.13 While these studies were undertaken prior to the introduction of the YOA in April 1998, subsequent research has revealed similar findings. In 2002, The New South Wales Bureau of Crime Statistics and Research ("BOCSAR") published its findings of the effects of conferencing under the YOA on reoffending rates.[32] For first-offenders who attended court, there was very little difference in the time lapse between first and subsequent offences before and after the YOA was introduced. Those conferenced under the YOA, however, remained offence-free for longer and the difference between the court and conference groups increased over time.[33] Interestingly, this study found that those aged 13-17 were less likely to reoffend than those aged 10-12; males were more likely to reoffend than females; and those who committed less serious offences against the person, or theft offences, were more likely to reoffend than those who committed other types of offences.[34]

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28. Coumarelos at 7-8.
29. Coumarelos at 8.
30. K Freeman, *Young People and Crime* (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 32, 1996) at 5. Although, BOCSAR concedes that "this statistic may underestimate the length of juvenile criminal careers because juveniles may have been offending for some time before their first appearance in the Children's Court and may have offended after their last appearance in the Children's Court": at footnote 22.
31. Freeman at 5. See the research cited in footnote 23: M Wolfgang, R Figlio, and T Sellin, *Delinquency in a Birth Cohort* (University of Chicago Press, 1972); D P Farrington, R Loeber, D S Elliott, D J Hawkins, D B Kandel, M Kleun, J McCord, D C Rowe and R E Tremblay, "Advancing knowledge about the onset of delinquency and crime" in B B Lahey and A E Kazdin (ed) *Advances in Clinical and Child Psychology* (Plenum, New York, 1990) Vol 3; and K Polk, C Alder, G Bazemore, G Blake, S Cordory, G Coventry, J Galvin and M Temple, *An Analysis of Maturational Development from Ages 16 to 30 of a Cohort of Young Men* (University of Oregon Press, 1981).
32. G Luke and B Lind, *Reducing Juvenile Crime: Conferencing versus Court* (New South Wales Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 69, Sydney, 2002). This study is looked at in more detail in Chapter 7 at para 7.40.
33. Luke and Lind at 5.
34. Luke and Lind at 7.

1.14 A 2005 BOCSAR study followed 5,476 young offenders aged 10-18 for eight years from their first appearance in the NSW Children's Court in 1995.[35] Sixty-eight per cent of these had reappeared at least once[36] in a criminal court (juvenile or adult) by the end of 2003.[37] A reappearance was more likely for Indigenous defendants, males and those who were relatively young at their first appearance.[38] Those charged with offences other than property or violent crime were less likely to reappear.[39]

1.15 BOCSAR observed that the results of its study seem to conflict with those of the 1994 Coumarelos study.[40] It offered two main explanations for this. First, at the time of Coumarelos's research, it was not possible to track the criminal careers of juveniles into adulthood. Hence, many in her study who did not reappear in the Children's Court, may have later reappeared in an adult court.[41] Secondly, juveniles aged 10-12 were under-represented in the Coumarelos cohort. The true rate of juvenile reoffending may therefore have been higher than her data suggested because "past research suggests that those who first appear in court when they are young are more likely to reoffend than those who first appear in their late teenage years".[42]

Public perceptions of young people

1.16 Bearing in mind the empirical evidence set out in paragraphs 1.8-1.15 above, does the public have an accurate impression of the extent of juvenile criminality?

1.17 Except for those professionally involved in juvenile justice, people generally obtain their information on the extent and nature of juvenile crime from the mass media, which, as two empirical studies in Australia suggest, is often negative, singling young people out for special mention as allegedly among the most criminally active.[43] Bala and Bromwich have commented that:

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35. S Chen, T Matruglio, D Weatherburn and J Hua, *The Transition from Juvenile to Adult Criminal Careers* (New South Wales Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 86, Sydney, 2005).
36. On average, 3.5 appearances (both juvenile and adult courts).
37. Chen, Matruglio, Weatherburn and Hua at 2. Forty-three per cent reappeared at least once in the Children's Court and 57% appeared at least once in an adult court. "[Thirteen per cent] of those who appeared for the first time in a Children's Court in 1995 ended up in an adult prison within eight years": Chen, Matruglio, Weatherburn and Hua at 9-10.
38. Chen, Matruglio, Weatherburn and Hua at 2.
39. Chen, Matruglio, Weatherburn and Hua at 2.
40. See para 1.11-1.12 above.
41. Chen, Matruglio, Weatherburn and Hua at 1.
42. Chen, Matruglio, Weatherburn and Hua at 1.
43. See K Freeman, *Young People and Crime* at 1. BOCSAR observed that the casual newspaper reader might well conclude that most young offenders were "involved in violent crime and offend frequently". See also H Sercombe, "Easy pickings: the Children's Court and the economy of news production" Paper presented to *Youth 93: The Regeneration Conference* (Hobart, 3-5 November 1993) cited in C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, Melbourne, 2002) at 90. This paper surveyed

> *Reports of youth crime are frequently inflammatory. Youth crime, and especially youth violence, attract considerable media attention and contribute to the sense of "moral panic" and demands for government action to "do something" about crime.*[44]

1.18 Young people are vulnerable to public judgment due to their visibility, their occupation of public space, and their tendency to congregate in groups. The fact that they appear to be over-represented in groups targeted by police is both a symptom of this and feeds that judgment.[45]

1.19 Concerns about young people's use of public space are not without foundation. The NSW Department of Health points out that juvenile offences are often related to the use of public spaces, such as shopping centres and public transport.[46] However, this in itself, together with the fact that juvenile offences are often episodic and opportunistic in nature, makes them more visible and easier to detect.[47] In turn, high visibility and detection rates, especially as compared with adult offending, can result in skewed perceptions of the extent of juvenile offending.

1.20 There have been a number of research studies and surveys that demonstrate that the public overestimate the possibility of criminal victimisation[48] and the extent of crime.[49] It has been argued that this exaggerated fear of criminal activity easily

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newspaper reporting in Western Australia from 1990 to 1992, which showed that crime stories constituted 63% of all stories dealing with young people: Similarly, research in the United States in the 1990s showed that 47% of television news coverage of youth related to crime and violence and only about 15% to education issues: P Omaji, *Responding to Youth Crime: Towards Radical Criminal Justice Partnerships* (Hawkins Press, Sydney, 2003) at 35.

44. N Bala and J Bromwich, "International perspectives on youth justice" in N Bala, J P Hornick, H N Snyder and J J Paetsch (eds) *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (Thompson Educational Publishing Inc, Toronto, 2002) at 14. See also R White and D Habibis, *Crime and Society* (Oxford University Press, South Melbourne, 2005) at 279.
45. Chapter 3 examines interactions between young people and the police.
46. New South Wales Health Department, *NSW Youth Alcohol Action Plan – 2001-2005* (2002).
47. New South Wales Health Department, *NSW Youth Alcohol Action Plan – 2001-2005*.
48. See D Weatherburn, E Makta and B Lind, *Crime Perception and Reality: Public Perceptions of the Risk of Criminal Victimisation in Australia* (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 28, 1996); D Indermaur, *Crime Seriousness and Sentencing: a Comparison of Court Practice and the Perceptions of a Sample of the Public and Judges* (Australian Institute of Criminology, Criminology Research Council Report, Canberra, 1990); Queensland Criminal Justice Commission, *Fear of Crime: Research Notes* (Criminal Justice Research Paper Series Vol 1 No 2, Brisbane, 1994); K Freeman, *Crime Trends in New South Wales: The Crime Victim Survey Picture* (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 37, 1998). This research concluded that "the victim survey data show that the risk of crime is much lower than many people imagine" (at 4).
49. D Weatherburn and D Indermaur, *Public Perceptions of Crime Trends in New South Wales and Western Australia* (NSW Bureau of Crime Statistics and

attaches itself to the more visible sections of the population, such as young people or members of ethnic communities, and is fuelled by their representation in the media.[50] Bala and Bromwich have also put forward an interesting argument of particular relevance in Australia's multi-cultural society:

> *As young people are increasingly not just members of a different generation, but also of a cultural, ethnic, racial, or linguistic minority, these adolescents may be resented at least in part because they may not be perceived as the legitimate inheritors of their respective nations.*[51]

1.21 It is also possible that there is an exaggerated perception of the extent of juvenile criminality because it is not always easy to distinguish older juveniles from young adults. In media representations and in the public mind, the boundary between offences committed by older juveniles (16-17 year-olds) and those committed by young adults (18-24 year-olds) may not be clearly drawn. But the response of the law to juveniles and young adults is, and must be, tailored differently. Responses must be based on the facts of offending, including the pattern of offending and offence types, and the real danger posed by each group, not driven by impressions of who is engaging in crime. For example, in New South Wales in 2004, less than one per cent of 10-17 year olds were found guilty of an offence in the Children's Court,[52] compared with 11%(approximately)[53] of those aged 18-24.[54]

Research, Crime and Justice Bulletin No 80, 2004). See also M Hough and J Roberts, *Youth Crime and Youth Justice: Public Opinion in England and Wales* (The Policy Press, 2004): the findings of this research showed that the public has a more pessimistic view of youth crime than is justified by official crime statistics. As well, most people interviewed said that they wanted the youth justice system to be tougher.

50. Youth Action and Policy Association, *Submission.* For those surveyed for the *Crime Victim Survey Picture* who perceived a crime or public nuisance problem in their neighbourhood (approximately 43-55%), one of three main problems nominated was that of louts/youth gangs: K Freeman, *Crime Trends in New South Wales: The Crime Victim Survey Picture* at 3. (The other two primary concerns were house burglary and dangerous/noisy driving.)
51. N Bala and J Bromwich, "International perspectives on youth justice" at 15.
52. The exact proportion is 0.75%. It includes offenders who were 18 years or older at the time of their conviction in the Children's Court but who were younger than 18 when they committed the offence. However, the statistic does not include the 1,033 offenders under 18 found guilty of an offence in the Local Courts and the 95 offenders under 18 found guilty of an offence in the Higher Courts: New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2004* Table 1.11 at 39 and Table 3.9 at 93.
53. Arriving at an approximate figure for the population of 18-24 year-olds in New South Wales in 2004 involves a similar exercise to that carried out for estimating the number of 10-17 year-olds (see footnote 13). (The data for the number of 18-24 year-olds in 2004 is also not yet available.) In 2003, the population of 18-24 year-olds was 321,932: Australian Bureau of Statistics, *Population by Age and Sex, Australian States and Territories*, Table 1: Estimated Resident Population by Single Year of Age, New South Wales (Time Series Spreadsheet No 3201.0, 2004). Taking the 2003 figures and adding the number of 17 year-olds and

1.22 There are at least two reasons why public perceptions of young people as offenders are troubling. First, if there is a constant repetition of alarmist views in the media, a climate is created in which political decision-makers are presented with the increasing criminality of young people as a "fact" to be taken into account when determining policy.[55]

1.23 BOCSAR asserts that:

> *public perceptions of crime play an important, sometimes even critical role in shaping law and order policy.*[56] *There would be little cause for concern in this if public perceptions were always well founded, but often they are not. Public opinion on crime is strongly shaped by what the media have to say about it. Media coverage of crime is often selective and, on occasion, can be downright misleading.*[57]

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subtracting the number of 24 year-olds gives a figure of 323,386. This does not make allowance for deaths and movements in and out of the State.

54. It is important to note that these figures only pertain to offences proved in court and do not include those guilty of an offence but dealt with by diversionary measures. The percentage of 10-17 year-olds guilty of an offence will in reality be higher than 0.75%. As a guide, 6.6% of 10-17 year-olds were proceeded against by police (to court or otherwise) in 2004. Of course, not all proceedings would have resulted in a guilty plea or finding.
55. Brown and Hogg argue that there is a perceived consensus on the fundamentals of law and order issues, "built, layer upon layer, through constant repetition by popular and authoritative sources of a number of questionable views and assumptions which have assumed the status of a set of givens within the debate about crime": D Brown and R Hogg, "Law and order commonsense" (1996) 8(2) *Current Issues in Criminal Justice* 175 at 175. As Tonry notes, "Many people have strong commonsense beliefs about sentencing and punishment, but it is often common sense uninformed by knowledge": M Tonry, *Sentencing Matters* (Oxford University Press, New York, 1996) Preface at v. Warner has argued that "excessive, rhetorical, simplistic" law and order issues have been at the forefront of the political agenda in all State and Territory elections throughout Australia in recent years: K Warner, "The role of guideline judgments in the law and order debate in Australia" (2003) 27 *Criminal Law Journal* 8 at 8. See also D Brown, "The politics of law and order"(2002) 40(9) *Law Society Journal* 64.
56. See J V Roberts, L J Stalans, D Indermaur and M Hough, *Penal Populism And Public Opinion: Lessons From Five Countries* (Oxford University Press, 2003).
57. D Weatherburn and D Indermaur, *Public Perceptions of Crime Trends in New South Wales and Western Australia* at 1. BOCSAR adds this note to the quoted text: "A few years ago, for example, the NSW Bureau of Crime Statistics and Research pointed out when releasing the annual crime statistics that a sudden jump in stealing offences had resulted from a change in the way NSW police record the crime of stealing from the person. Sections of the media simply ignored the advice and reported an increase in stealing from the person."

1.24 Specifically in relation to juvenile crime, Cunneen and White argue that the media images by which policies are driven are based more on the image of threat than on the daily reality of young people,[58] and that:

> *[e]lectoral politics and the role of media reporting on young people and crime go hand in hand. Neither is fettered by appeals to rational discourse about the nature of juvenile offending. Empirical evidence and calls for reasoned debate on juvenile justice policy are lost when populist politics are in command.*[59]

1.25 Secondly, there is a danger that misleadingly negative views of young people will dictate public discussion of juvenile justice issues, drawing attention away from the real causes of, and solutions for, offending. The wider social issues surrounding juvenile crime, such as high unemployment, homelessness, child abuse and domestic violence, may be inadequately addressed.[60] This is especially so as young people generally have "neither official legitimacy, nor the institutional means of making their views known",[61] which might otherwise contribute to balanced debate.

1.26 The Commission hopes that this report will offer a positive contribution to reasoned debate on juvenile justice policy.

NATURE AND CONDUCT OF THE COMMISSION'S INQUIRY

1.27 During the Commission's preliminary consultations,[62] a wide range of issues was raised about many aspects of the criminal justice system including police powers,

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58. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 89 and 93.
59. Cunneen and White at 92. Cunneen and White cite the introduction of the *Summary Offences Act 1988* (NSW) as an example. In a similar vein, Brown refers to the "cudgel of media-driven moral panics" brought about by manufactured public outrage in respect of individual cases: "[L]egislative changes are produced literally over night, seriously distorting the processes of legal and social reform, ignoring machinery established to inform political and public debate such as parliamentary committees, advisory bodies and research agencies in the rush for a political quick fix": D Brown, *Neo-Liberal Governance, Criminal Law and Intoxication: Wild Nights with Norm Hewitt, Noa Nadruku, Craig Gower, Freddy Fittler et al* (Australasian Law Teachers Association Conference, Proceedings Vol 1, 1999) at 12-13.
60. In striving to reconcile the image of young people with the reality, it is also important to note that young people are much more likely to be victims that older people, particularly in the area of personal violence offences. In the period 1990-1997, persons in the 15-24 years age group were the most likely of any age group to have been victims of personal crime (6.8% of male and 6.1% of females falling to 0.7% of persons aged over 65): K Freeman, *Crime Trends in New South Wales: The Crime Victim Survey Picture*.
61. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 91.
62. Prior to the publication of IP 19, the Commission 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

public order offences, alternative ways of commencing proceedings and legal representation of young people. We took the view that although these issues called for further consideration, they were largely outside the scope of this reference, which is an inquiry into sentencing.

1.28 Ultimately, IP 19 identified 27 issues relating to sentencing young offenders. The Commission subsequently consulted extensively with the community on these issues before preparing this report. Written submissions were received from 18 key bodies and individuals. To ensure broad community input, we also held consultations in Coffs Harbour, Albury and Broken Hill.[63] Among those consulted were magistrates, Legal Aid solicitors, Public Prosecutors, youth liaison officers, youth health workers, solicitors of the Aboriginal Legal Service, officers of the Department of Juvenile Justice, Youth Justice Conference convenors, Community Legal Centre solicitors, and local council Youth Development Officers.

CONTENT OF THIS REPORT

1.29 Chapter 2 examines the historical development of juvenile justice policy in New South Wales, leading to the contemporary focus on diversion and the embodiment of this approach in the *Young Offenders Act 1997* (NSW) ("YOA").

1.30 Chapter 3 considers the impact of discretionary decision-making on the diversionary aims of the YOA. The focus is on the role of police, as the YOA seeks to achieve its objectives essentially through a structuring of police discretion in relation to the diversionary options.

1.31 Chapter 4 addresses the operation and interaction of the YOA and the *Children (Criminal Proceedings) Act 1987* (NSW). It considers whether the scope of the offences covered by the YOA is adequate and whether, if that scope were expanded, certain offences should be specifically excluded.

1.32 Chapter 5 discusses generally the operation of the diversionary scheme under the YOA, focusing on the role of "gatekeepers", admissions necessary to qualify for a caution or conferencing and legal advice given to young offenders who may be eligible for diversion.

1.33 Chapter 6 separately considers cautions and Chapter 7 focuses on the most serious form of diversion, youth justice conferencing, and the resulting outcome plans.

1.34 Chapters 8 and 9 focus on issues that arise in the context of the involvement of young offenders in court proceedings. Chapter 8 explores, among other things: the

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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. We also established a reference group, which greatly assisted us in identifying relevant issues.

63. These took place on 20 and 21 May, 30 and 31 May and 3 and 4 June, 2002, respectively.

role of restorative justice in court-based sentencing; admission of evidence of prior offences; identification of young offenders; sentencing options, including the Youth Drug and Alcohol Court; and whether guideline judgments and/or mandatory sentencing are appropriate in the context of sentencing for young offenders. Lastly, the chapter looks at care issues arising in criminal matters, both in sentencing and bail hearings.

1.35 Chapter 9 considers the name and status of the Children's Court; selection, tenure and education of Children's Magistrates; and the adequacy of court facilities.

1.36 Chapter 10 analyses the effect of bail law and practice on young offenders, having regard to the impact of issues such as homelessness and legislative changes limiting presumptions in favour of granting bail.

1.37 Chapter 11 focuses on the sentencing of young offenders for exceptionally serious crimes.

2. Development of Juvenile Justice

- Introduction
- Juvenile crime and juvenile delinquency
- The development of a juvenile justice “system”
- The establishment of children’s courts
- Twentieth century developments
- Restorative justice
- The Young Offenders Act 1997 (NSW)

INTRODUCTION

2.1 In the case of young offenders, sentencing must be considered as part of a broader process of juvenile justice, where the injunction of applying the least restrictive form of sanction has particular importance and meaning. This is to ensure that sentencing practices take into account the youth of the offenders and the desire to prevent them from "graduating" into adult criminals. The sentiment has a long history. It can be given effect to in a number of ways, and historically it has been – ranging from a welfare approach to juvenile justice, to a "justice" approach, to diversion and restorative justice.

2.2 In light of the Commission's endorsement of the policy of diversion underlying the contemporary approach to juvenile justice, and the *Young Offenders Act 1997* (NSW) ("YOA") in particular, a review of the historical evolution of this policy objective is instructive. However, in a report primarily concerned with sentencing, the historical description that follows can only be a brief précis of some key features.[1]

JUVENILE CRIME AND JUVENILE DELINQUENCY

2.3 Cunneen and White have observed that both the phenomenon of juvenile crime and the concept of juvenile delinquency developed around the same time in the early 19th century.[2] This observation stimulates an inquiry into the "relationship between the behaviours that are characterised as juvenile offending and the institutions and practices of the criminal justice system developed specifically to deal with youth".[3]

2.4 It has been argued that the development of the concept of juvenile delinquency and the emergence of juvenile crime can be traced to changes brought about by the Industrial Revolution, in particular: the shift of populations from rural to urban societies; population growth; urbanisation; industrialisation; the breakdown of traditional methods of social control; and juvenile justice mechanisms that systematically detected juvenile offending.[4]

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1. In the review of developments from the early 19th century to the 1980s, the Commission has relied to a large extent on John Seymour's excellent account contained in the first three chapters of J Seymour, *Dealing With Young Offenders* (Law Book Company, 1988), in which he gives an extensive and detailed description and analysis of the historical background to juvenile justice.
2. See C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, Melbourne, 2002) at 8. According to American academic, Thomas Bernard, one of the first uses of the term "juvenile delinquency" was in the *Report of the Committee for Investigating the Causes of the Alarming Increase of Juvenile Delinquency in the Metropolis*, a report published in London in 1816: T J Bernard, *The Cycle of Juvenile Justice* (Oxford University Press, New York, 1992) at 42.
3. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 8.
4. T J Bernard, *The Cycle of Juvenile Justice* at 8 and 43-48.

2.5 Another view of the effect of the Industrial Revolution places significance on the development of industrial capitalism, and the corresponding creation of an urban working class. Cunneen and White comment that "[n]ew systems of dealing with young people targeted the youth of this newly formed class".[5] Furthermore, the increased presence of working class youth, in conjunction with the materialisation of capitalist wealth in movable property, created an unprecedented potential for both juvenile crime and public concerns about delinquency.

2.6 This connection between a public "presence" of young people and public perception of juvenile crime remains an important factor in juvenile justice policy. Statistics both in New South Wales and other jurisdictions show that the majority of juvenile crime is property-related,[6] and much of the interaction between young people and the police stems from the very public visibility of young people.[7]

2.7 In New South Wales, Seymour argues that two developments in the mid to late 1880s increased the numbers of juveniles coming before the magistrates' courts. First, in 1850 an Act was passed extending summary jurisdiction to children under 14 charged with larceny or related offences.[8] He suggests that this "probably encouraged the prosecution of some juveniles whose behaviour would previously have been ignored".[9]

2.8 On the other hand, "the 1850 Act represented a substantial piece of discrimination in favour of children".[10] Although magistrates had, in the past, occasionally been discharging young offenders, the Act gave them the legal power to do so for the first time. The legislation provided that the court could dismiss the child with or without surety to be of good behaviour. Seymour also contends that the real significance of the 1850 Act was that "it paved the way for the development of Children's Courts".[11] The reason for this, he argues, is that:

> *the first step towards the creation of these courts was an acceptance of the notion that simple, speedy court procedures were appropriate for children. For these to be introduced, it was necessary for the existing rules on the*

5. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 9.
6. Twenty-three per cent of "offence[s] proven" in the Children's Courts were for theft and related offences, with a further 6% being for property damage: New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2003* (New South Wales Bureau of Crime Statistics and Research, 2004), Table 2.1 at 59-60. It is also interesting to note that 9% of "offence[s] proven" were for public order offences: Table 2.1 at 60.
7. See Chapter 3.
8. An Act for the more speedy trial and punishment of juvenile offenders of 1850 (NSW) (14 Vict No. 2). J Seymour, *Dealing With Young Offenders* at 27. The defendant could choose a summary trial, but it was not mandatory.
9. Seymour at 34.
10. Seymour at 31.
11. Seymour at 27.

> *jurisdiction of criminal courts to be modified. Trial by jury had to give way to summary trial.*[12]

2.9 The second development to increase the number of children caught up in the criminal justice system was the creation of new offences, triable summarily, including general vagrancy laws and laws directed at juvenile "larrikinism".[13] Legislation passed in the 1870s and 1880s created summary offences specifically to address concerns about juvenile misbehaviour, namely that of young male larrikins, such as indecent exposure, assault, obscene language, throwing stones, obstructing a railway and vandalism.[14] Although vagrancy laws applied to adults as well, their application to children provided a particularly easy and convenient way of controlling troublesome behaviour. Seymour points out that:

> *had the vagrancy charge not been available the police might well have turned a blind eye to the activities of children dwelling on the borderland of the criminal justice and child welfare systems.*[15]

2.10 As a result of these two developments, Seymour suggests that "the forerunners of the children's courts could be viewed as coming into existence to deal with a population which had previously been largely outside the criminal justice system".[16]

THE DEVELOPMENT OF A JUVENILE JUSTICE "SYSTEM"

2.11 The system of criminal law Australia inherited from England made few concessions to youth. From 1788 to the mid 19th century, young offenders in the Australian colonies were subject to the same penalties as adults. Sentences were often harsh and out of proportion to the seriousness of the offence. Some magistrates and judges, however, took the view that young offenders should be treated differently

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12. Seymour at 27.
13. Seymour at 34-35.
14. For example, *Criminal Law Amendment Act of 1883* (NSW). This Act only applied to young males.
15. J Seymour, *Dealing With Young Offenders* at 34.
16. Seymour at 35. Seymour submits that this analysis of the effect of the legislative changes is consistent with Anthony Platt's thesis of the "invention of delinquency", developed in A M Platt, *The Child Savers: The Invention of Delinquency* (2nd edition, University of Chicago Press, 1977). It has been argued that Platt's views "provided the turning point for welfare history by ushering in a new orthodoxy commonly called the 'social control' perspective". This perspective "was based on the perceived failure of reformist legislation to significantly alter the distribution of wealth and power in society. Social policy was viewed as one element in a number of social, economic, political and ideological controls whereby inequalities were perpetuated or enhanced": R Kerr, "Writing welfare history: An historiographical jigsaw?" (Proceedings, Western Australian Institute for Educational Research Forum, 1996) http://education.curtin.edu.au/waier/forums/1996/kerr.html; see also J Mcnicol, *The Movement for Family Allowances 1918-1945: A Study in Social Policy Development* (Heinemann, London, 1980).

from adults and used their powers to grant pardons, discharges, or conditional discharges, to avoid sending children to prison. Conditions attached included placing young offenders, particularly juvenile vagrants, in the child welfare institutions that developed in the early 19th century.[17] These approaches provide some early examples of a form of diversionary sentencing.

2.12 The development in Australia of a separate system for juvenile offenders was influenced by the agitation in England in the first half of the 19th century for this reform.[18] In addition, it came in response to the problem of absorbing the increasing number of young convicts transported from England.[19] Young male convicts were apprenticed to boat-builders and carpenters, and females assigned as servants, as a way of removing them from adult convict barracks. The construction of the Carters' Barracks in 1819,[20] with its training program and separate accommodation for boys under 16 introduced the following year, were further steps towards a separate system for juveniles.[21] Seymour has described Carters' Barracks as "Australia's first special institution for juveniles".[22] The construction in 1833 in Port Arthur, Van Dieman's Land, of dedicated accommodation for boy convicts at Point Puer was the next step taken in the development of special measures for juveniles.[23] Both Carters' Barracks and Point Puer were criticised as brutal regimes, unsuited to reforming and deterring juvenile offenders.[24] Seymour, however, argues that in their attempts to develop reformative regimes that emphasised education and training, they "can be seen as forerunners of

17. Seymour at 8-10.
18. Seymour at 10-11.
19. Seymour at 11: "By the end of the 18th century it had become common for capital sentences passed on juveniles to be commuted to transportation", citing L Radzinowicz and R Hood, *A History of English Criminal Law and its Administration from 1750: Vol 5 – The Emergence of Penal Policy* (Stevens and Sons Ltd, London, 1986) at 138.
20. These were barracks to house (initially) adult convicts, who cared for horses, carts and bullocks. Male juvenile convicts were admitted the following year.
21. Seymour at 12-13. The boys in Carters' Barracks were government apprentices and trained to work as tradesmen, such as blacksmiths, carpenters, painters and shoemakers. The boys were kept in the Barracks for up to three years and assigned to work as servants, for a term up to seven years, on their release. However, after 1834-1835, Carters' Barracks was no longer used and convict boys were assigned directly on arrival in Australia. Its demise was most likely attributable to institutional failings; the harsh regime was criticised, but more particularly, the grouping together of young criminals was thought to have mutual harmful influences. Seymour comments that this implies "a very early recognition of the pressures … which can operate in institutions for young offenders": at 13.
22. Seymour at 13.
23. Seymour at 13-14. A further early example of the use of apprenticeships to deal with young offenders is also discussed by Seymour (at 14): between 1842 and 1852, a scheme was instituted to send boys from Britain's Parkhurst Prison to Western Australia, Van Dieman's Land and New Zealand. (Parkhurst was designed especially for boys and was built on the Isle of Wight.)
24. Seymour at 14, referring to R Hood and L Radzinowicz, *A History of English Criminal Law and its Administration from 1750, Volume 5: The Emergence of Penal Policy* at 140.

the industrial schools and reformatories which were established much later in the century".[25]

Industrial and reformatory schools

2.13 The establishment of the industrial and reformatory schools in the period 1863 to 1874 represented a major development in the creation of a separate and distinctive system for young offenders.[26] The establishing legislation gave courts the power to commit children to these schools for extended periods, for the purpose of training and education.[27] Unlike other States, New South Wales courts could not commit a young offender to a reformatory for trivial offences.[28] The release date was not set by the court; wide administrative discretion was given to the school to determine the child's release. Committal to a school could be followed by a period of supervision in the community. The legislation also provided that school inmates could be apprenticed;[29] children could also be released "on licence" or "on trial" or be placed "at service". Seymour suggests that these options paved the way for flexible sentencing.[30]

2.14 The industrial and reformatory schools evolved out of charitable institutions, such as asylums and orphan schools.[31] Seymour argues that when the first moves were made by the Australian colony to make special provision for children in trouble, it was neglected and destitute children who were the focus of attention. The institutions that evolved to deal with these children, namely asylums and orphan schools, provided "the foundations on which the industrial and reformatory schools were built".[32] Seymour observes that "some of the functions performed by these early

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25. J Seymour, *Dealing With Young Offenders* at 14. However, as Seymour highlights (at 14), industrial schools and reformatories in Australia were not modelled on Carters' Barracks or Point Puer. Rather, they were modelled on English examples. See below for further discussion of industrial and reformatory schools in Australia.
26. Tasmania was the first State to pass legislation with the short-lived *The Industrial Schools Act* (27 Vict No 24) in 1863, which was replaced by *The Industrial Schools Act 1867* and *The Training Schools Act 1867*. Next, Victoria passed *The Neglected and Criminal Children's Act 1864;* Queensland passed the *Industrial and Reformatory Schools Act 1865*; New South Wales passed the *Industrial Schools Act 1866* and the *Reformatory Schools Act 1866*; South Australia passed *The Destitute Persons Relief Act 1866* and *The Destitute Persons Relief and Industrial and Reformatory Schools Act 1872*; and Western Australia passed *The Industrial Schools Act 1874*: see Seymour at 37-41 and Appendix 1.
27. See Seymour at 41-45. Seymour discusses the legislation in full at 48-52.
28. Pursuant to the *Reformatory Schools Act 1866*, an offence had to be punishable by imprisonment of 14 days or more before the courts were able to refer a child offender to a reformatory.
29. In New South Wales, apprenticeship was available for those dealt with under the *Industrial Schools Act 1866*. There was no similar provision under the *Reformatory Schools Act 1866*: Seymour at 50.
30. Seymour at 51.
31. See Seymour at 15-21 for a discussion of asylums and orphan schools in Australia in the early 19th century.
32. Seymour at 3.

institutions were taken over by the new schools, although the latter also catered for new categories of children, many of whom had previously been imprisoned as offenders or as vagrants."[33]

2.15 Seymour constructs an interesting argument that an appreciation of how similar the two types of schools were in aims and methods is vital to an understanding of the development of methods of dealing with young offenders. The existence of a system for dealing with non-offenders influenced both the methods employed for dealing with, and the attitudes towards, young offenders. From this can be traced the ambivalence which is still discernible in policies relating to young offenders[34] There are thus, Seymour concludes, "historical, as well as philosophical, reasons for viewing young offenders in the same light as neglected children".[35]

2.16 With the use of options such as apprenticeships and licenses, and eventual dissatisfaction with industrial and reformatory schools, came the realisation that placement in the community could provide a complete alternative to institutional committal. The belief was formed before the end of the century that institutions, especially large ones, should only be used as a last resort for dealing with young offenders.[36]

THE ESTABLISHMENT OF CHILDREN'S COURTS

2.17 At around the same time the industrial and reformatory schools were in use, separate children's courts were created in Australia. The introduction in 1869 and 1870 in America by the State of Massachusetts of a system for prosecuting children separately from adults and replacing the police prosecutor with a "State agent" provided the impetus for this. The State agent enquired into a child's family circumstances and presented the case in court.[37] The first Australian State to establish a children's court was South Australia in 1890, followed by all other States early in the 20th century. Polk calls children's courts "the first great form of diversion".[38]

2.18 As noted in paragraph 2.8 above, Seymour argues that the establishment of children's courts were a logical development of the extension of summary jurisdiction to certain offences introduced by the Act of 1850. Seymour argues that the first

33. Seymour at 63.
34. The oscillation between welfare models of justice and a "justice" approach to juvenile offending is discussed below at para 2.23-2.24.
35. Seymour at 64. See also the discussion of asylums and orphan schools at 15-21.
36. Seymour at 64.
37. Seymour at 68.
38. K Polk, "The search for alternatives to coercive justice" in F Gale, N Naffine and J Wundersitz (ed) *Juvenile Justice: Debating the Issues* (Allen & Unwin, Sydney, 1993) at 110.

children's courts were not completely new courts; "rather, they were modified courts of summary jurisdiction exercising special powers".[39]

2.19 The summary offences created by legislation in the 1870s and 1880s,[40] while intending to deal specifically with juvenile misbehaviour, were not strictly "status offences", that is, behaviour that is not a crime if committed by an adult, such as school truancy, "uncontrollability", "incorrigibility" or "running away from home". The juvenile courts, however, introduced true status offences such as "being in danger of leading a lewd or immoral life", "endangering one's own welfare" and "being in need of care and protection". In this way, Polk argues:

> *[T]he juvenile court became an explicit device for widening the mandate of control, from forms of strictly defined crimes to a wider set of concerns about the "conduct" of young persons thought to be in social "danger". … In other words, from its inception the juvenile justice system was both a diversion (from the adult system) and an exercise in net-widening (in the sense that the boundaries of controlled behaviour were widened).*[41]

2.20 The main purpose behind the establishment of children's courts in Australia was to ensure that young people were tried separately from adults in a more sympathetic system that would treat them less like criminals.[42] In a reflection of the contemporary concern with rehabilitation, the aim of the new system was to consider the offender and the causes of offending, not just the offence in isolation, and to employ preventative and corrective measures rather than punitive ones. Seymour points out that "[t]he need to reject punishment as a means of dealing with young offenders was constantly stressed".[43]

Children's courts in NSW

2.21 The *Neglected Children and Juvenile Offenders Act 1905* (NSW) established children's courts in New South Wales.[44] In addition to removing children from police courts, the Act eliminated jury trials for children and the risk of imprisonment on relatively minor matters. The Act laid the foundation for contemporary procedure. It

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39. J Seymour, *Dealing With Young Offenders* at 27
40. See para 2.9 above.
41. K Polk, "The search for alternatives to coercive justice" at 110.
42. Acts establishing such courts generally gave them jurisdiction over both criminal and welfare matters, so that these concerns were held to be paramount in respect of neglected children: C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 19.
43. J Seymour, *Dealing With Young Offenders* at 71.
44. While New South Wales was the first jurisdiction to technically pass a children's court statute, there had been piecemeal reform in South Australia prior to the enactment of the New South Wales legislation. See Seymour at 76-87 for a discussion of the first statutes establishing children's courts in Australia.

required that children's courts were to sit separately from other courts, and that special magistrates were to be appointed.[45] The legislation allowed for release on probation. Probation officers were attached to the children's courts with the role of preparing background reports and conducting supervision. The use of probation became an important diversionary sentencing option for the children's courts.[46]

TWENTIETH CENTURY DEVELOPMENTS

2.22 In New South Wales, existing juvenile justice and child welfare laws were consolidated in the *Child Welfare Act 1923* (NSW), which remained basically unaltered until the *Child Welfare Act 1939* (NSW) (which in turn remained in force until 1988).

2.23 Throughout Australia in the first half of the century, adherence to the welfare model of justice that had dominated since the inception of the children's courts continued.[47] However, in the 1960s, attitudes began to change. Some doubts about "child-saving"[48] policies had already begun to emerge in the 1920s and 1930s[49] and it was not long before the sole approach to juvenile justice was met with an alternative view. The prevailing view that the causes of juvenile offending, and the needs of the

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45. *Neglected Children and Juvenile Offenders Act 1905* (NSW) s 9.
46. Probation was regarded as one of the foundations on which the new children's courts were built, yet, paradoxically, it was a notion that developed quite separately and independently: J Seymour, *Dealing With Young Offenders* at 88. The *Neglected Children and Juvenile Offenders Act 1905* (NSW) allowed release on probation but without clear detail; it made no reference to supervision nor to the appointment of probation officers. For a general discussion of how probation was included in the various State Acts establishing Children's Courts, see Seymour at 90-92.
47. The welfare model had been underpinned by the positivist school of criminology. This was the acceptance, in the late 19th and early 20th centuries, that the causes of criminal behaviour could be understood and predicted, and that scientific method could be applied to identifying the factors that led to criminal behaviour: I O'Connor, "Models of juvenile justice" in A Borowski and I O'Connor (ed), *Juvenile Crime, Justice & Corrections* (Addison Wesley Longman Australia Pty Ltd, Melbourne, 1997) at 231. The welfare model emphasised the needs of the young person over his or her behaviour, looked at the behaviour in the context of social and economic factors outside his or her control, and focused on rehabilitation rather than punishment: New South Wales, Attorney General's Department, *Report of the New South Wales Working Party on Family Group Conferencing and the Juvenile Justice System* (Discussion Paper, 1996) ("Family Group Conferencing and Juvenile Justice System Report") at 2.
48. Seymour warns against the dangers of using this term, which was coined by analysts of 19th century reforms in the United States, for fear of obscuring differences in developments in juvenile justice systems in the two countries: Seymour at 65-66.
49. There was some concern about indeterminate sentences and disproportionate sentences, which were expressions of the court's paternal approach to the young offender, focusing more on the needs of the child and less on his or her culpability. Others, on the other hand, questioned the leniency shown by the courts: Seymour at 119-121, 131-136.

offender, ought to be addressed through treatment and education was balanced by a second view that focused primarily on the offence and called for firm punishment of the offender, both for deterrence and the public's protection. Seymour argues that "[t]he subsequent history of the children's courts can be seen as a search for the proper balance between" the two.[50]

2.24 In the 1960s, the doubts about the children's court and the welfare model of justice that had begun to emerge earlier became more pronounced.[51] There was concern about: the effectiveness of rehabilitation policies; the protection of the young person's legal rights; the potentially damaging impact of formal justice processes;[52] coercive penalties for non-criminal matters; net-widening; indeterminate sentences[53] and administrative discretion; and injustice resulting from needs-based sentencing (lack of proportionality and consistency).[54] This led to replacement of the welfare model of justice with a more traditional "justice" approach, which placed greater emphasis on proportionality of punishment, the accountability of young people for their behaviour, and the protection of the young person's legal rights.

2.25 By the time of a re-appraisal of children's courts in the 1970s and 1980s, there was a new emphasis on the need to recognise children's courts as part of the criminal justice system, and an emphasis on the features in common between children's and criminal courts.[55] In New South Wales, a package of legislative reforms was introduced in 1987 to remove young offenders from the ambit of general child welfare legislation.[56]

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50. J Seymour, *Dealing With Young Offenders* at 136.
51. O'Connor notes that the juvenile justice literature since the mid 1960s has been dominated by the failure and injustices of the welfare model, detailing the harm suffered by children at the hands of child welfare bureaucracies: I O'Connor, "Models of juvenile justice" at 234.
52. J Wundersitz, "Pre-court diversion: The Australian experience" in A Borowski and I O'Connor (ed), *Juvenile Crime, Justice & Corrections* at 271. Critically, assumptions about the causes of delinquency, and the system's capacity to treat those causes, were being questioned: J Seymour, *Dealing With Young Offenders* at 163-164.
53 There was concern with indeterminate sentences, not proportionate to the offence, for the purposes of rehabilitation.
54. It was suggested that juveniles could end up spending longer in custody than adults, with little effect on the rate of recidivism: Western Australia, Department for Community Services, *Report on the Review of Departmental Juvenile Justice Systems* (1986) at 21-25. See also I O'Connor, "Models of juvenile justice" at 234.
55. From their establishment, children's courts had sought to combine the characteristics of both criminal courts and specialist welfare tribunals: J Seymour, *Dealing With Young Offenders* at 162.
56. *Children (Care and Protection) Act 1987* (NSW); *Children (Community Service Orders) Act 1987* (NSW); *Children's Court Act 1987* (NSW); *Children (Criminal Proceedings) Act 1987* (NSW); and *Children (Detention Centres) Act 1987* (NSW).

The development of diversion

2.26 Dissatisfaction with the welfare model of justice in the 1960s led to a second significant development: the diversion of matters away from "formal adjudication by a court to non-court procedures or programs".[57]

2.27 Unlike the approach taken in the USA, which was to divert young people to community-based treatment programs, the approach taken to diversion in Australia was to make use of warnings and counselling to keep young people out of court.[58] Beginning in the late 1950s, some Australian States had developed police cautioning and community aid panels.[59] In New South Wales, however, development of diversionary options was "marked by resolute ambivalence".[60] There was some use of cautioning in the 1970s, though not on a systematic basis, as well as a proposal to adopt panels, but otherwise no structured diversionary program[61] until an "expanded and properly formulated" police cautioning system was introduced in 1985.[62]

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57. This is Wundersitz's definintion of "pre-court diversion" (at 270). Wundersitz further notes (at 271) that the move at this time towards pre-court diversion embodied the interrelated concepts of diversion, deinstitutionalisation, decarceration and decriminalisation: J Wundersitz, "Pre-court diversion: The Australian experience".
58. Wundersitz at 272.
59. The most important of these were the police cautioning schemes developed in Victoria in 1959 and Queensland in 1963 (Queensland established Juvenile Aid Bureaux, which were responsible for warning and counselling offenders); and the Children's Panels established in Western Australia in 1964 and South Australia in 1972 (*Juvenile Courts Act 1971* (SA)). Both States became dissatisfied with the Children's Panels and they were disbanded by the late 1980s: J Wundersitz, "Pre-court diversion: The Australian experience" at 274-275. Seymour argues that, while informal handling of some juvenile cases had always been present in the Australian system, this had been a practice that was tolerated rather than an official, promoted one: J Seymour, *Dealing With Young Offenders* at 146-147.
60. Seymour at 161.
61. The *Community Welfare Act 1982* (NSW) established screening panels, whose function was to determine whether action should be taken against a child and, if so, whether the child should be prosecuted, cautioned or required to take part in a conference. However, the relevant parts of the Act were never brought into operation: Seymour at 161-162.
62. J Seymour, *Dealing With Young Offenders* at 162. The NSW Police Commissioner's Instructions set out procedures and guidelines for warnings and cautions. Wundersitz notes (at 273-276) that, even after it was formally adopted in 1985, the police cautioning system failed to attract any real support from either the police or the government of the day. As such, its use was comparatively limited. Between 1980 and 1985, the rate of young offenders cautioned was, on average, only 6%. In the years immediately following the introduction of the new scheme, the rate of young offenders cautioned increased to 21%. However, by 1990-91, the rate had dropped down again to 12%. In contrast, the rate of young offenders cautioned in Queensland throughout the 1980s remained just under 70%. Similarly, the rate of cautioning in Victoria over the same period averaged 61%: J Wundersitz, "Pre-court diversion: The Australian experience".

2.28 In all Australian jurisdictions, the early aims of diversion were to avoid the potential stigmatisation of court proceedings and focus on the rehabilitation of the young offender. It was also hoped that diversion would result in: simpler and speedier resolution of matters; reduced costs; freeing up of court resources for more serious matters; reduced recidivism; and more meaningful participation in the justice process by young people and their families, eliciting a more positive response.[63]

2.29 Writing in 1997 shortly before New South Wales passed the *Young Offenders Act 1997* (NSW) ("YOA"), Wundersitz noted that it had been difficult to determine whether these aims had been achieved because many had not been evaluated.[64] The link between diversion and recidivism was, Wundersitz observed, ambiguous at best, with some American empirical studies showing reduced recidivism, others, increased recidivism, and others, no such link.[65] Also in the American context, both the link between diversion and reduced stigmatisation, and the labelling theory underpinning the belief that court processes stigmatise young people, have been questioned.[66]

2.30 Wundersitz also noted that diversionary measures[67] have been criticised on the basis that they "net-widen", bringing into the juvenile justice system young people who might otherwise have been ignored by police because of the trivial nature of their offences.[68] While the research she considers in support of this is American, there is research (either pre-YOA or in the early days of the YOA) in Australia reaching similar conclusions. This is despite the different approaches to diversion in the two countries.[69]

2.31 A further criticism is that diversionary measures fail to protect a young person's legal rights by requiring an admission of the allegations without legal advice, and because of possible pressure to make admissions to avoid court processes and criminal records.[70] It is also suggested that police may proceed with a matter where there is insufficient evidence to prosecute, because proof of the allegation is not required.[71]

2.32 Barry, and others, have argued that diversion tends to rely on white, middle-class concepts and methodology with the result that it disadvantages young offenders who are less educated, less articulate and who may distrust the good intentions of the

63. Wundersitz at 275.
64. Wundersitz at 275.
65. Wundersitz at 277.
66. Wundersitz at 277-278. As with the relationship between recidivism and diversion, there is a lack of evaluation of the relationship between stigmatisation and diversion in the Australian context.
67. Again, it needs to be remembered that, as Wundersitz is writing in 1997, diversionary measures under the YOA are not under the spotlight.
68. Wundersitz at 278.
69. See Wundersitz at 278-279.
70. Wundersitz at 279. Protection of a young person's legal rights under the YOA, and in particular access to legal advice, is discussed in detail in Chapter 5.
71. Wundersitz at 279.

state, the latter particularly applying to Aboriginal people.[72] The Commission does not agree with the premise of this argument, but we do note the existence of evidence that white, middle-class young offenders are more likely to be diverted than non-white, disadvantaged ones. University of New South Wales research found that, in the first three years of the YOA's operation, "Aboriginal young people were significantly more likely to have been taken to court (64% compared with 48% for non-Aboriginal young people) and half as likely to be cautioned (14% vs 28%)". [73]

2.33 Lastly, diversion may be seen to be objectionable when it results in greater intrusion into a young person's life than had he or she been dealt with by a court. However, prior to the use in Australia of conferencing in the 1990s, this had been a problem more associated with America, with its diversion to programs, than with Australia, with its use of warnings and cautions. Further, if diversion achieves its aims of engaging young offenders and their families more meaningfully and reducing recidivism, then the intrusiveness is arguably justified.

2.34 As Wundersitz points out, whether or not the justifications for diversion have been borne out, and outweigh its dangers, it is now a firmly entrenched feature of juvenile justice and given legislative expression in many jurisdictions, including in New South Wales in the YOA.[74] It also gives effect to Rule 11 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*,[75] which provides that "consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority".

Diversion and the review of juvenile justice in NSW

2.35 The Youth Justice Coalition conducted, in 19990, a significant review of juvenile justice in New South Wales. Its report, *Kids in Justice*, was an extensive

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72. M Barry, "Informal processing: The South Australian experience" in F Gale, N Naffine and J Wundersitz (ed) *Juvenile Justice: Debating the Issues* at 116, cited in J Wundersitz "Pre-court diversion: The Australian experience" at 280. Wundersitz (at 280) cites a South Australian study that found that "Aborigines were consistently under-represented in the number of youths being referred to Aid Panels but over-represented in the numbers directed to court. The difference in referral was traced to the operation of both race and class bias". For further discussion of this study see F Gale, B Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice?* (Cambridge University Press, Cambridge, 1990).
73. J Chan, S Doran, E Maloney and N Petkoska, with J Bargen, G Luke and G Clancy *Reshaping Juvenile Justice: A Study of the Young Offenders Act 1987* (Final Report, School of Social Science and Policy, University of New South Wales, 2003) at 166. "Note, however, that Aboriginal and non-Aboriginal young people were given warnings or referred to conferences at approximately the same rates (around 20% and just over 3% respectively)": at 166.
74. J Wundersitz, "Pre-court diversion: The Australian experience" at 280.
75. Adopted by General Assembly Resolution 40/33 of 29 November 1985 (the "Beijing Rules").

critique of juvenile justice culminating in a "blueprint for the 1990s".[76] The 1992 Legislative Council Standing Committee on Social Issues report, *Juvenile Justice in New South Wales*, commented that the *Kids in Justice* report was "[t]he most significant single piece of research in the area in recent times".[77] More importantly in the long term, the policy aims proposed in the Youth Justice Coalition's report brought into the debate on juvenile justice an awareness of the movement towards the use of "restorative justice" in dealing with young offenders. Its fundamental approach was that juvenile justice policy should be focused on: reorientation towards prevention; decriminalisation; increased diversion; priority given to community-based programs; and detention as a last resort and for the minimum period possible.[78] This position was formulated in the light of the *United Nations Convention on the Rights of the Child*,[79] and other international human rights instruments affecting juveniles.[80] Many of the report's recommendations were implemented, including establishing the Department of Juvenile Justice[81] and the Juvenile Justice Advisory Council. [82]

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76. Youth Justice Coalition (NSW), *Kids in Justice: A Blueprint for the 1990s* (Full Report of the Youth Justice Project, Law Foundation and Youth Justice Coalition, Sydney, 1990). See also A Pisarski, *Nobody Listens: The Experience of Contact between Young People and Police* (Youth Justice Coalition NSW, Sydney, 1994).
77. New South Wales, Legislative Council, Standing Committee on Social Issues, *Juvenile Justice in New South Wales* (Report No 4, 1992) at 18. Comments on the *Kids in Justice* report's recommendations can be found throughout the Committee's report.
78. *Kids in Justice: A Blueprint for the 1990s* at 10. Other key recommendations dealt with matters such as: culturally and ethnically appropriate official responses to young offenders; family involvement; the training of juvenile justice personnel; and the establishment of a separate department of juvenile justice and a ministerial advisory committee (ultimately the Juvenile Justice Advisory Council), and of a juvenile crime prevention section (and community advisory body) in the Attorney General's Department.
79. *United Nations Convention on the Rights of the Child*, opened for signature on 20 November 1989 by General Assembly resolution 44/25, entered into force 2 September 1990, in accordance with article 49, Art 37(b). Australia ratified the instrument on 17 December 1990 and it came into effect for Australia on 16 January 1991. On 22 December 1992, the Attorney-General made the Convention an international instrument within the terms of the *Human Rights and Equal Opportunity Act 1986* (Cth) pursuant to s 47(1). "This does not make the Convention part of Australian domestic law, however, breaches can be reported to the Commission": Australia, the Commonwealth Parliament Joint Standing Committee on Treaties, *United Nations Convention on the Rights of the Child* (17th Report, CanPrint Communication Pty Ltd, Canberra, 1998) at 11.
80. See *United Nations Standard Minimum Rules for the Administration of Justice* ("Beijing Rules"), Rules 13 and 19.
81. It was originally established as the Office of Juvenile Justice in the Department of Corrective Services but, after lobbying, was made independent of Corrective Services and reported directly to the Minister for Justice: J Bargen, "Going to court CAP in hand" (1992) 4(2) *Current Issues in Criminal Justice* 117 at 118.
82. There was, however, some criticism that there was only limited implementation of the report's policy aims: T Anderson, S Campbell and S Turner, *Youth Street Rights – A Policy & Legislation Review* (University of Technology Sydney's Community Law and Legal Research Centre and the Youth Justice Coalition Sydney, 1999) at 20: "The Youth Street Rights project believes that some of

2.36 The first task of the Juvenile Justice Advisory Council was to review all legislation, practices and policies governing juvenile justice in New South Wales. The Council published its report in 1993[83] in which it "emphasised the need to instigate crime prevention strategies for keeping children and young people out of the processes of juvenile justice".[84]

Community Aid Panels

2.37 During the late 1980s and early 1990s in New South Wales, Community Aid Panels ("CAPs"), a police/magistrate initiative, were utilised in juvenile justice. The Wyong magistrate and a police officer stationed at Wyong introduced the first CAP to Wyong Local Court in 1987 to involve the community in the criminal justice process.[85] CAPs in Parramatta followed in the late 1980s. The process was not used as a means of trial diversion, but rather, as an opportunity for mitigation prior to sentencing. At the same time, it promoted the young offender's rehabilitation and enabled him or her to make restitution to the community.

2.38 A young offender who consented to a referral and pleaded guilty to, generally, a first or minor offence could be referred to a CAP by the magistrate prior to sentencing. The magistrate then adjourned the case for approximately three months while the young offender attended the CAP and, with the panel members,[86] arrived at a plan to "undertake some form of community work, or educative or rehabilitative program".[87] The court sentenced the young offender after assessment of his or her involvement in the panel process, community work and/or a program.

2.39 The program was not without its critics and there were some concerns about "theoretical, ideological and organisational issues arising from the impact of CAPs on young offenders".[88] The panels were unregulated and occasionally inappropriate plans devised.[89] Despite these concerns, Juvenile Justice Advisory Council's 1993 *Juvenile Justice Green Paper* recommended their continued use as an alternative to

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these policies have in fact been considered during the intervening period, some of them have been compromised and some have been ignored".

83. Juvenile Justice Advisory Council of NSW, *Future Directions for Juvenile Justice in New South Wales* (Report, 1993).
84. J Chan, J Bargen, G Luke and G Clancey, "Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997" (2004) 28 *Criminal Law Journal* 72 at 76.
85. J Bargen, "Going to court CAP in hand" at 120.
86. Unlike youth justice conferencing, victims did not participate in the panel.
87. J Bargen, "Going to court CAP in hand" at 121.
88. Bargen at 125.
89. One anecdote reports a young Aboriginal person being required to sweep pavements wearing a t-shirt printed with the slogan "I'm a thief".

formal court proceedings.[90] By 1996, 75 CAPs were operating at various centres throughout New South Wales.[91]

2.40 CAPs were to be phased out for young offenders after the introduction of the YOA in April 1998, although it was subsequently discovered that some magistrates continued to refer children to the panels.[92] Accordingly, in July 2002, the Chief Magistrate gave a ruling against their continued use.[93]

RESTORATIVE JUSTICE

2.41 The early aims of diversion evolved into more complex aims of restoration, reconciliation, reintegration and healing, and the development of "restorative justice" theory. Dissatisfaction with the welfare and justice models of responding to juvenile crime, with their focus on rehabilitation and punishment respectively, shifted the focus to the role the victim should play in the justice process.[94] The restorative justice model is founded on the belief that "criminal behaviour is a conflict between individuals and that, when a crime is committed, it is the victim who is harmed rather than the state".[95] Restorative justice has been described as "a collaborative and peacemaking approach to conflict resolution".[96]

2.42 A frequently cited description of restorative justice is that it is "a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future."[97] Its aim is to "promote accountability, healing and justice".[98] In the context of dealing with young offenders, restorative justice has the following characteristics:

> *Classic restorative justice models use informal processes of negotiation and mediation, involving the offender, his or her family or supporters and where possible, the victim. The aim is to resolve the offences in a*

90. Juvenile Justice Advisory Council of NSW, *Future Directions for Juvenile Justice in New South Wales*. The Council also found a need to develop effective and regulated intervention for young offenders that empowered the victim.
91. Family Group Conferencing and Juvenile Justice System Report at 6.
92. CAPs being for first and minor offences, it was inappropriate to bring young offenders into the court processes who could have been dealt with by the diversionary options of the YOA.
93. Chief Magistrate's Circular No 398 (issued 15 July 2002).
94. This was given additional impetus by the growing political influence of victim lobby groups: J Wundersitz, "Pre-court diversion: The Australian experience" at 281.
95. Wundersitz at 281.
96. New Zealand, Restorative Justice Network, *Restorative Justice in New Zealand: Best Practice* (Ministry of Justice, Wellington, 2004) at 23.
97. T F Marshall, *Restorative Justice: An Overview* (United Kingdom, Home Office Research Development and Statistics Directorate, 1996) at 5.
98. New Zealand, Restorative Justice Network, *Restorative Justice in New Zealand: Best Practice* at 23.

> *constructive way for all parties. Such resolution will encourage the young person to take responsibility, will include reparation in some form, and will assist in addressing the causes of offending.*[99]

Family group conferencing in New Zealand

2.43 Restorative justice is epitomised in conferencing.[100] Family group conferencing originated in New Zealand, although both Australia and New Zealand have been described as "laboratories of experimentation" in conferencing.[101] The New Zealand model, given a legislative framework in the *Children, Young Persons and Their Families Act 1989* (NZ) ("CYPFA"), represented a "distinct departure" from the justice model and "sought specifically to avoid the pitfalls of justice and welfare models".[102]

2.44 As the title suggests, the CYPFA involves the families of young people as much as possible,[103] putting "family support and victim satisfaction at the centre, rather than the perimeter, of reactions to offending by young people".[104] The over-arching principles of the CYPFA,[105] contained in s 5, include: participation of the family in decision-making; maintaining and strengthening family bonds; and obtaining the support of the family and young person for the exercise of powers under the Act.[106] Hassall observes that the underlying philosophy of the CYPFA embraces

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99. JUSTICE, *Restoring Youth Justice: New Directions in Domestic and International Law and Practice* (2000) at 13. JUSTICE is the British section of the International Commission of Jurists.
100. See Chapter 7, which deals with youth justice conferencing under the *Young Offenders Act 1997* (NSW).
101. K Daly, "Conferencing in Australia and New Zealand: variations, research findings and prospects" in A Morris and G Maxwell (ed), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Hart Publishing, Oregon, 2001), Ch 4, at 59 and 63.
102. I O'Connor, "Models of juvenile justice" at 243.
103. In the case of Maori young people, this includes their recognised kin networks, the *whanau*, *hapu*, and *iwi*. The situating of family group conferencing within *whanaungatanga*, or kinship relationships, aims to ensure that the process is embedded in the community and to avoid the potential limitations of conferencing for indigenous young offenders referred to in Chapter 7 at 7.45 and 7.48-7.49.
104. J Chan, J Bargen, G Luke and G Clancey, "Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997" at 76.
105. The principles contained in s 7 of the *Young Offenders Act 1997* (NSW) were modelled on those in the *Children, Young Persons and Their Families Act 1989* (NZ). The first version of the *Children (Criminal Proceedings) Act 1987* (NSW) was drafted at or around the same time as the *Children, Young Persons and Their Families Act 1989* (NZ) so it is possible that there were exchanges of influences in the formulation of the principles in these two Acts.
106. Other principles are: taking into account the effect of decisions on a young person's welfare and family stability; considering the young person's wishes; and implementing decisions within an appropriate time-frame.

"family responsibility, children's rights, (including the right to due process), cultural acknowledgment and partnership between the state and the community".[107]

The Wagga scheme and "reintegrative shaming"

2.45 From 1991 to 1994, a police-run "effective cautioning" scheme[108] operated in Wagga Wagga.[109] This was the first example in Australia of family group conferencing.[110] The CYPFA had a direct influence on the Wagga scheme through observation by members of the Policy and Planning Branch of the NSW Police Service.[111] The formal objectives of the scheme were:

> *(1) to ensure that the young offender understands the seriousness of his/her offence; (2) to minimise the opportunity of the young person re- offending; (3) to provide the young offenders with an opportunity to accept responsibility for his/her offence; (4) to ensure that family and significant others are made accountable; (5) to provide the victim(s) with some input into the cautioning process; (6) to improve the opportunity for victim restitution or compensation; (7) to provide police with an opportunity to contribute in a significant and satisfying way to the processing of young offenders.*[112]

2.46 The theory used to explain what was being done in the Wagga effective cautioning scheme was Braithwaite's theory of "reintegrative shaming".[113] This was a

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107. I Hassall, "Origin and development of Family Group Conferences" in J Hudson, A Morris, G Maxwell and B Galaway (ed), *Family Group Conferences: Perspectives on Policy and Practice* (Federation Press, Sydney, 1996) at 19.
108. Terrence O'Connell referred to the process as "effective cautioning": D Moore and L Forsythe, with T O'Connell, *A New Approach to Juvenile Justice: An Evaluation of Family Conferencing in Wagga Wagga* (Charles Sturt University, Wagga Wagga, 1995) at 11.
109. See D Moore, "Facing the consequences" in L Atkinson and S Gerull (ed), *National Conference on Juvenile Justice: Conference Proceedings No. 22* (Australian Institute of Criminology, Canberra, 1993) at 203-220.
110. See D Moore and L Forsythe, with T O'Connell, *A New Approach to Juvenile Justice: An Evaluation of Family Conferencing in Wagga Wagga*.
111. K Daly, "Conferencing in Australia and New Zealand: variations, research findings and prospects" at 59 and 63.
112. B Coates, N Couling, K Dymond and J Jamieson, *Report on Support for Young Offenders Who Have Been Subject to the Wagga Wagga Police Cautioning Process* (Charles Sturt University, Wagga Wagga, 1992).
113. J Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press, Cambridge, 1989). For further discussion of this theory see J Braithwaite and P Pettit, *Not Just Desserts: A Republican Theory of Criminal Justice* (Clarendon Press, Oxford, 1990) and K Daly and H Hayes, *Restorative Justice and Conferencing in Australia* (Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice No 186, Canberra, 2001) at 2. Reintegrative shaming theories preceded restorative justice theories, the latter developing from an unease with an emphasis on shaming. Braithwaite's approach is now

separate but related theoretical formulation of the New Zealand model.[114] Braithwaite saw the conferencing process as a ceremony of social reintegration, as well as healing for the victim.

2.47 Braithwaite's theory of reintegrative shaming identifies the factors that influence the choice to offend or not to offend and the conditions and processes that lead to successful shaming.[115] The theory:

> *assumes that a person's immediate decisions are directly influenced by informal processes of social control constituted by the interaction between external social disapproval and the internal constraints of conscience.*[116]

2.48 The impact of the disapproval depends on its source and the offender's embeddedness in his or her primary social network.

2.49 Braithwaite maintains that without any process of reconciliation, traditional criminal justice sanctions simply operate to shame offenders publicly, thereby reinforcing the very social alienation that contributed to their offending in the first place. He argues that reintegrative shaming, unlike stigmatisation ("disintegrative shaming"), is positive because it is not open-ended but ends, after a finite period, in forgiveness; and because bonds of love or respect are maintained.[117]

2.50 The aim of the Wagga effective cautioning scheme was to include reintegrative shaming in a way that was positive for the offender by placing it within a context of reconciliation.[118] The scheme sought to confront young offenders with the real impact

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only one of several models of restorative justice. There are other forms that do not incorporate reintegrative shaming. While Braithwaite's theory has been highly influential in Australia and overseas, it is not without its critics: see, for example, R Watts, "John Braithwaite and *Crime, Shame and Reintegration*: some reflections on theory and criminology" (1996) 29 *Australian and New Zealand Journal of Criminology* 121, especially at 122 where Watts criticises the acclaim given to Braithwaite's work as "a sign both of intellectual desperation and of a pervasive nostalgia for a return to 'community'".

114. I O'Connor, "Models of juvenile justice" at 243.
115. O'Connor at 244.
116. O'Connor at 244.
117. J Braithwaite, *Crime, Shame and Reintegration* at 100-101.
118. JUSTICE, *Restoring Youth Justice: New Directions in Domestic and International Law and Practice* (London, 2000) at 38. "Although the concept of reintegrative shaming is thought to be *the* theory underpinning restorative justice, the two should not be conflated. In general, reintegrative shaming focuses on how a conference may affect an offender. Restorative justice assumes a broader set of *interactions* between an offender and victim (and their supporters) where recognition of the "other" is expected to encourage a more empathic orientation in the offender and a more sympathetic orientation by the victim to the offender's situation. This distinction is important in understanding the different emphases taken in research on conferencing.": K Daly and H Hayes, "Youth Justice Conferencing and Re-Offending" (2003) 20(4) *Justice Quarterly* 725 at 729.

of their offending on victims, in an out-of-court context and in a process of discussion between offender, victim and key family and community representatives, led and guided by the police officer. It emphasised restitution and reparation.

2.51 Although the scheme had been responsible for a substantial reduction in the number of matters referred to court,[119] it was replaced in 1994 by a pilot scheme of Community Youth Conferencing introduced by the Attorney General's Department and organised and run by local Community Justice Centres.[120] Despite being discontinued, the Wagga scheme "had an enormous influence on the development and location of conferencing in other parts of Australia".[121] It has been the subject of extensive study by criminal justice professionals throughout the world and has provided a blueprint for similar programs in a wide range of jurisdictions.[122]

Community Youth Conferences

2.52 As noted above, a pilot scheme of Community Youth Conferencing ("CYC") replaced the Wagga scheme in 1994.[123] The CYC pilot, together with revised training on informal and formal police cautioning, was established partly in response to the Government's 1994 White Paper on Juvenile Justice.[124] The *Juvenile Justice White Paper* recommended "the establishment of a formal, integrated, consistent, accountable and co-ordinated framework to be known as Community Youth Conferencing".[125] The CYC pilot was loosely based on the New Zealand Family Group Conference model and on the Wagga scheme. It was trialled in the six

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119. D Moore and L Forsythe, with T O'Connell, *A New Approach to Juvenile Justice: An Evaluation of Family Conferencing in Wagga Wagga*, Chapter 5 at 28. See also D Moore, "Evaluating Family Group Conferences – some early findings from Wagga Wagga" in D Biles and S McKillop (ed) *Criminal Justice Planning and Co-Ordination* (Australian Institute of Criminology, Canberra, 1994).
120. See J Bargen, "Kids, cops, courts, conferencing and children's rights – a note on perspectives" in M Jones and L Basser Marks (ed), *Children on the Agenda – The Rights of Australia's Children* (Prospect Publishing, Sydney, 2001) at 220.
121. Bargen at 220.
122. The Wagga Wagga model was adopted to varying extents in juvenile justice in Queensland, the ACT and Tasmania. For a discussion of the ACT model see D Moore and J McDonald, "Achieving the 'good community': A local police initiative and its wider ramifications" in K M Hazlehurst (ed), *Perceptions of Justice: Issues in Indigenous and Community Empowerment, Australia and New Zealand* (Central University Press, Queensland, 1995) at 142. A variant, known as Community Accountability Conferences, operated in schools in Queensland and New South Wales as an option for dealing with harmful behaviour (by students) within the school: see D Moore, "Pride, shame and empathy in peer relations: a case study with implications for theory in practice, in education and criminal justice", in K Oxenberry, K Rigby and P Slee (ed), *Children's Peer Relations: Co-Operation and Conflict: Conference Proceedings* (Institute of Social Research, University of South Australia, 1994) at 212-23.
123. K Daly, "Conferencing in Australia and New Zealand: variations, research findings and prospects" at 69.
124. New South Wales, Department of Juvenile Justice, *Breaking the Crime Cycle: New Directions for Juvenile Justice in New South Wales* (White Paper, 1994)
125. Family Group Conferencing and Juvenile Justice System Report at iii.

locations in which the Wagga scheme had operated and was run by Community Justice Centres using a mediation process. Community mediation was a court-alternative process available to young people, subsequent to police cautioning, but prior to court proceedings. It required voluntary participation by young offenders and a willingness to refer by police.

2.53 An evaluation of the CYC pilot in 1996 by Crown Prosecutor, Patrick Power found that police reluctance to refer and the lack of a co-ordinating statutory framework limited its success.[126] Nevertheless, the evaluation concluded that conferencing was an effective alternative to the traditional criminal justice process for young offenders. It recommended that legislation was needed to govern diversionary schemes for young offenders.[127]

THE YOUNG OFFENDERS ACT 1997 (NSW)

2.54 As a result of Power's evaluation of the CYC scheme, the government set up a working party, comprising representatives from the NSW Attorney General's Department, Department of Juvenile Justice, NSW Police, Ministry for Police and Department of Corrective Services, to explore the implementation of a conferencing scheme for young offenders and to improve police cautioning.[128] The Working Party decided that the New Zealand model was the most appropriate model of conferencing for young people in New South Wales.[129]

2.55 In developing a conferencing scheme, the Working Party:

> *took into account the need for a system which is formal and integrated and which is consistent, accountable and co-ordinated. Underlying the proposed scheme is the philosophy that young people should be held accountable for their offending behaviour; families and victims should be involved in making decisions about young people's offending behaviour and the main focus of the conference should be to put right the wrong dome to the victim. In addition, conferences should aim to deal with young people in a way that acknowledges their needs and that will give them the opportunity to develop in responsible, beneficial and socially acceptable ways.*[130]

2.56 It argued that a legislative base would give cautioning and conferencing schemes that consistency, accountability, co-ordination and inter-agency co-operation lacking in diversionary schemes to date, and would provide a degree of strength and

126. P Power, *An Evaluation of Community Youth Conferencing in New South Wales* (Report to the NSW Attorney General, unpublished, 1996).
127. Power at 209.
128. Family Group Conferencing and Juvenile Justice System Report at iii.
129. Family Group Conferencing and Juvenile Justice System Report at iv.
130. Family Group Conferencing and Juvenile Justice System Report at iv.

clarity to these schemes.[131] The Working Party's report, published in September 1996, formed the basis of the *Young Offenders Bill*[132] and the consultation leading up to the introduction of the Bill.

2.57 The consultation process was extensive,[133] complemented by observation of a range of diversionary schemes, especially the New Zealand model on which the YOA was largely based. Others examined were the Wagga scheme, the South Australian scheme of police cautions and family conferences under the *Young Offenders Act 1993* (SA), and CYCs.[134] The conferencing process as it had operated under the Wagga scheme was rejected in favour of the New Zealand model of non-police run conferencing. It was also decided that conferencing should not be used for minor offences, which should be dealt with by way of warning or caution. In addition, it was decided not to involve victims in the cautioning process, as the Wagga scheme had done. Where the *Young Offenders Bill* differed from the New Zealand model was in not adopting a mandatory referral system in relation to conferencing.

2.58 The Act that resulted established "a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings".[135] The YOA also states as its objects that the purpose of the scheme is to provide "an efficient and direct response" to offending[136] and to use conferencing to enable a community-based response; emphasise restitution and taking responsibility; and meet the needs of victims and offenders.[137]

2.59 The principles that are to guide the operation of the YOA are that:

- the least restrictive form of sanction is to be applied;
- children who are alleged to have committed an offence are entitled to be informed about their right to obtain legal advice and to have an opportunity to obtain that advice;

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131. Family Group Conferencing and Juvenile Justice System Report at vi.
132. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 18 June 1997, Speech of the Hon I Cohen at 10492 on the *Young Offenders Bill 1997*.
133. Over 50 submissions were received to the Working Party's report. The youth sector and other community groups participated in the consultation process. There was initially strong criticism and objections to the conferencing process, including from sections of the police, victims' groups and some magistrates. However, there was commitment by, and co-operation between, key government and criminal justice agencies. When the *Young Offenders Bill* was introduced into Parliament, there was support from all sides of politics: J Chan, J Bargen, G Luke and G Clancey, "Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997" at 78.
134. J Bargen, "The Young Offenders Act 1997: Is the diversionary scheme being diverted?" (2000) 12(3) *Judicial Officers Bulletin* 17 at 17.
135. *Young Offenders Act 1997* (NSW) s 3(a). These diversionary responses to offending by young people are dealt with in depth in Chapters 6 and 7.
136. *Young Offenders Act 1997* (NSW) s 3(b).
137. *Young Offenders Act 1997* (NSW) s 3(c).

- criminal proceedings are not to be instituted if there is an alternative and appropriate means of dealing with the matter;

- criminal proceedings are not to be instituted solely to provide any welfare assistance or services to the child or the child's family;

- where appropriate, children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties;

- parents are to be recognised and included in justice processes, including being recognised as being primarily responsible for the development of children; and

- victims are entitled to receive information about their potential involvement in, and the progress of, action taken under the Act.[138]

2.60 The legislative framework for diversionary options provided by the YOA, as well as the streamlining of procedures, the power given to investigating officers to determine the appropriateness of warnings and cautions, the provision of checks and balances and the establishment of Specialist Youth Officers, have all helped to address the barriers to diversion identified in the 1980s and 1990s.[139]

2.61 The YOA also provided for the establishment of the Youth Justice Advisory Committee, ("YJAC") consisting of members from various agencies, including the Juvenile Justice Advisory Council, Juvenile Crime Prevention Advisory Committee, the Attorney General's Department, Department of Juvenile Justice, the police and the Office of Children and Young Persons in the Cabinet Office, as well as a representative of victims.[140] Many of the initial members of YJAC had been on the Working Party that developed the YOA. The role of YJAC is to advise the Attorney General and the Director General of Juvenile Justice on: the making of regulations; the preparation of guidelines for conferences; selection and training of conference convenors; and the review and monitoring of the YOA.[141] The setting up of a multi-agency body like YJAC, as well as the roles given it, helped to ensure successful implementation of the YOA.[142] This was also promoted by the setting up, soon after the introduction of the YOA, of the Youth Justice Conferencing Directorate as an independent unit within the Department of Juvenile Justice, to take responsibility for the operation of youth justice conferences.

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138. *Young Offenders Act 1997* (NSW) s 7.
139. J Chan, J Bargen, G Luke and G Clancey, "Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997" at 79.
140. *Young Offenders Act 1997* (NSW) s 70(1).
141. *Young Offenders Act 1997* (NSW) s 70(2).
142. The success factors cited have been: broad and on-going consultation with major stakeholders; commitment and co-operation of stakeholders; solid inter-agency relationships (especially the partnership that developed between the Department of Juvenile Justice and the police); and transparency of the implementation process: J Chan, J Bargen, G Luke and G Clancey, "Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997" at 81.

2.62 The Commission has described the process leading to the enactment of the YOA to demonstrate the extent to which it is underpinned by restorative justice theory and to stress the importance of the influences shaping its policy objectives - objectives the Commission wholeheartedly endorses.

2.63 Chapter 3 continues with an examination of the YOA in the context of the modern approach to juvenile justice and the role of police discretion in the juvenile justice system.

3. Structuring Police Discretion

- Introduction
- Relevance of policing to sentencing
- Policing public space
- Policing and young people from racial and ethnic minorities
- Rates of diversion
- Conclusion

INTRODUCTION

3.1 Chapter 2 outlined the historical development of juvenile justice, leading to the contemporary focus on diversion and the embodiment of this approach in the *Young Offenders Act 1997* (NSW) ("YOA"). The YOA established a scheme to divert young offenders away from formal court processes through the use of warnings, cautions and conferencing.

3.2 The purpose of this chapter is to consider the impact of discretionary decision-making on the diversionary aims of the YOA. This is considered from two aspects: the exercise of discretion under the YOA itself; and discretionary decisions that bring a young person under the application of the YOA.

3.3 The focus is on the role of police, as the YOA seeks to achieve its objectives essentially through a structuring of police discretion in relation to the diversionary options. In fact, it has been argued that the key feature of the YOA is "the provision of statutory guidance for the exercise of police discretion at the gate-keeping level".[1] While not the only "gatekeepers" under the YOA, the police are the main "gatekeepers".[2]

3.4 The police have wide discretionary powers in administering cautions and warnings and in deciding how a young offender will be dealt with under the Act, and how far he or she will progress through the stages of the YOA's diversionary scheme.

3.5 Also significant is the role of police in deciding whether to proceed against a young person in the first place, thereby drawing them into the juvenile justice system. In the discharge of their duties to keep public order and prevent crime, police have a wide discretion to stop, search, arrest or charge suspects[3] – to take formal action, informal action or no action.

3.6 The principles that guide the operation of the YOA are very relevant to the way in which police are to exercise their discretion, including that the least restrictive form

1. J Chan, S Doran, E Maloney and N Petkoska, with J Bargen, G Luke and G Clancey, *Reshaping Juvenile Justice: A Study of the NSW Young Offenders Act 1997* (Final Report, School of Social Science and Policy, University of New South Wales, 2003) at Section 8.2.
2. Those that "gatekeep" entry to the application of the YOA ensure that young offenders are not sentenced by courts where they are more appropriately dealt with by a diversionary option and that the most appropriate diversionary option is chosen. In Chapter 5, the Commission describes the legislative framework of the YOA and the legislative structuring of all "gatekeeping" roles in greater detail. This chapter focuses on the structuring of police discretion.
3. J Chan, S Doran, E Maloney and N Petkoska, with J Bargen, G Luke and G Clancey, *Reshaping Juvenile Justice: A Study of the NSW Young Offenders Act 1997* at Section 8.2.

of sanction is to be applied.[4] To give full meaning to this principle requires a congruent approach at the earlier stages of contact with the justice system.

3.7 Chapter 2 noted that the report of the Working Party on Family Group Conferencing and the Juvenile Justice System,[5] which formed the basis of the *Young Offenders Bill*,[6] saw the need for a system that was formal, integrated, consistent, accountable and co-ordinated.[7] The reasons the YOA seeks to structure police discretion relate to:

- a lack of consistency in diversion decisions;[8]
- the risk that minorities may be targeted;[9]
- differential treatment of Aboriginal and Torres Strait Islander young people; and
- a low rate of diversion of young offenders prior to the YOA.

3.8 This chapter explores these issues against the backdrop of the YOA's objects and principles.[10] It considers whether the YOA has been successful in addressing these issues through structuring police discretion. It also considers whether interaction with NSW Police is bringing young people into unnecessary contact with the juvenile justice system.

RELEVANCE OF POLICING TO SENTENCING

3.9 Decisions taken by police from their first contact with a young person through to those taken in gate-keeping entry to the YOA may influence later judicial decisions and ultimately impact upon the sentencing outcome for that young person.[11] Cunneen

4. *Young Offenders Act 1997* (NSW) s 7.
5. NSW Attorney General's Department, *Report of the New South Wales Working Party on Family Group Conferencing and the Juvenile Justice System*. The Working Party was set up to explore the implementation of a conferencing scheme for young offenders and to improve police cautioning.
6. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 18 June 1997, The Hon I Cohen, Second Reading Speech at 10492.
7. NSW Attorney General's Department, *Report of the New South Wales Working Party on Family Group Conferencing and the Juvenile Justice System* (Discussion Paper, 1996) at iv.
8. See Youth Justice Coalition, *Kids in Justice Report: A Blueprint for the 1990s* (Law Foundation and Youth Justice Coalition, Sydney. 1990).
9. See para 3.51-3.56 below.
10. These are set out in the preceding chapter, Chapter 2 at para 2.58-2.59.
11. C Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, Sydney, 2001) at 132; G Luke and C Cunneen, *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System: Report to Juvenile Justice Advisory Council of NSW* (Juvenile Justice Advisory Council of NSW, Sydney, 1995) at 29-30; F Gale, B Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice?* (Cambridge University Press, 1990).

and White have argued that, consciously or unconsciously, the discretionary decision-making process of an individual police officer may ultimately translate into a *pattern* of discretion-exercising which operates to the detriment of certain societal sub-groups, such as Aboriginal young people or those of Lebanese or Indo-Chinese descent.[12]

3.10 Research on Aboriginal youth has found that the fact that a young person is arrested rather than issued with a field court attendance notice is one of the key determinants of a referral to court, as opposed to diversion away from court proceedings.[13] The reverse is also true: when police choose a diversionary method of dealing with the charge, the likelihood of the young offender acquiring a criminal record is reduced. Commentators have identified in this process a compounding effect,[14] in which early punitive decisions create "a chain of continuing escalation"[15] in the level of intervention and the severity of sanction.

3.11 It follows that, even if the sentencing process treats equally all young people with similar criminal histories, those who belong to groups disproportionately subject to intervention or arrest will be more likely to have more extensive criminal histories and so be more likely to receive sentences of greater severity.[16] Equitable treatment at the sentencing stage is subject to any pattern of discrimination that may occur earlier in a young person's contact with police.[17]

12. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 242. See also, for example, J Collins, G Noble, S Poynting and P Taber, *Kebabs, Kids, Cops and Crime: Youth, Ethnicity and Crime* (Pluto Press, Sydney, 2000).
13. F Gale, R Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice?* at 6-7; Western Australia, Crime Research Centre, *Aboriginal Youth and the Juvenile Justice System of Western Australia* (1995) cited in C Cunneen, "Community conferencing and the fiction of Indigenous control" (1997) 30(3) *Australian and New Zealand Journal of Criminology* 292 at 303.
14. C Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* at 132.
15. F Gale, R Bailey-Harris and J Wundersitz, *Aboriginal Youth and the Criminal Justice System: The Injustice of Justice?*; Western Australia, Crime Research Centre, *Aboriginal Youth and the Juvenile Justice System of Western Australi*a.
16. G Luke and C Cunneen, *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System: Report to Juvenile Justice Advisory Council of NSW* (Sydney, 1995) at v.
17. See P Gallagher, P Poletti and I MacKinnell, *Sentencing Disparity and the Gender of Juvenile Offenders*, (Judicial Commission of New South Wales, Monograph Series No 16, 1997) and P Gallagher and P Poletti, *Sentencing Disparity and the Ethnicity of Juvenile Offenders* (Judicial Commission of New South Wales, Monograph Series No 17, 1998). These reports found some disparity with respect to ethnicity and Aboriginality but not with respect to gender during the periods January–December 1995 (gender report) and the 1996 calendar year (ethnicity report).

3.12 Prior to the enactment of the YOA, "police decisions in relation to the cautioning of young offenders were uneven and inconsistent".[18] Chan, Bargen, Luke and Clancey relate that:

> *[t]he literature has also documented instances of police stereotyping, harassment and breaches of basic human rights of young people.[19] One issue of particular concern has been the differential treatment of Aboriginal and Torres Strait Islander young people, who were found to be less likely than non-indigenous young people to be cautioned or referred to diversionary processes.[20]*

3.13 Not only were decisions inconsistent, but the available diversionary options were not well utilised.[21] In the early 1980s, 6% of young people in New South Wales received a police caution. This rose to 21% following the introduction of new cautioning procedures in 1985 but by 1990-1991 had fallen to 12%. In other Australian jurisdictions around the same time, approximately 50-60% of young people were being diverted from court, mainly as a result of cautions.[22]

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18. J Chan, J Bargen, G Luke and G Clancey, "Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997" (2004) 28(2) *Criminal Law Journal* 72 at 74, referring to Youth Justice Coalition, *Kids in Justice Report: A Blueprint for the 1990s*.
19. See R White and C Alder (ed), *The Police and Young People in Australia* (Cambridge University Press, 1994); C Alder, I O'Connor, K Warner and R White, *Perceptions of the Treatment of Juveniles in the Legal System* (National Clearinghouse for Youth Studies, 1992); H Blagg and M Wilkie, *Young People and Police Powers* (Australian Youth Foundation, Sydney, 1995); L Maher, D Dixon, W Swift and T Nguyen, *Anh Hai: Young Asian Background People's Perceptions and Experiences of Policing* (University of New South Wales, Faculty of Law, Research Monograph Series, 1997).
20. J Chan, J Bargen, G Luke and G Clancey, "Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997" at 74. See G Luke and C Cunneen, *Aboriginal Over-representation and Discretionary Decisions in the NSW Juvenile Justice System: Report to Juvenile Justice Advisory Council of NSW*.
21. J Chan, J Bargen, G Luke and G Clancey, "Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997" at 76. "The NSW Standing Committee on Social Issues, in their review of the NSW juvenile justice system, suggested that police were reluctant to use cautions because they regarded cautions as ineffective": at 76. See New South Wales Parliament, Legislative Council, Standing Committee on Social Issues, *Juvenile Justice in New South Wales* (Report No 4, 1992) at 70.
22. J Wundersitz, "Pre-court diversion: The Australian experience" in A Borowski and I O'Connor (ed), *Juvenile Crime, Justice and Corrections* (Addison Wesley Longman Australia, Melbourne, 1997) at 276, referred to in J Chan, J Bargen, G Luke and G Clancey, "Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997" at 76. See also P Boss, S Edwards and S Pitman, *Profile of Young Australians: Facts, Figures and Issues* (Churchill Livingstone, 1995) at 154; H Blagg and M Wilkie, *Young People and Police Powers* (Australian Youth Foundation, Sydney, 1995) at 56.

3.14 The use of legislation to structure police discretion is one method of dealing with the problem of improper, or inadequate, exercise of that discretion. To a large extent, the YOA has been effective in this regard. The YOA guides the exercise of police discretion "to an extent not usually seen in legislation".[23] Further, the Act contains important "checks and balances" on police decisions, in particular, the requirements of s 31(4), 40(4) and 41. Sections 31 and 40 allow, respectively, a court to give a caution and a court, or the Director of Public Prosecutions ("DPP"), to refer a matter to conferencing. Section 31(4) provides that where a court gives a caution, it must notify the Area Commander of the local police area in which the offence occurred of its decision, and reasons, to do so. Similarly, s 40(4) provides that where a court or the DPP refers a young offender to a youth justice conference, the Commissioner of Police must be notified. Police are more likely to make careful decisions if these may later be scrutinised and overridden by the court, and if senior police officials are made aware of these initial decisions at the police "gate-keeping" level. Section 41 requires that conference administrators must independently apply the offence-related criteria and can question police decisions to refer to a conference, with the DPP acting as final arbiter where the conference administrator and specialist youth officer can not agree.

3.15 However, even under the operation of the YOA, the compounding effect of discrimination on the accumulation of "prior history" can be seen. The YOA allows decision-makers to take into account "the number and nature of any offences committed by the child and the number of times the child has been dealt with under" the Act when considering an appropriate response to the commission of an offence.[24] This is despite s 15(3) of the CCPA, which prohibits the admission of any evidence that a person has previously been dealt with under the YOA in relation to any subsequent offence.[25] It should be noted that this criterion is the fourth in a series that is designed to direct both police and courts to consider prior history only after they have considered the criteria of seriousness, harm and violence. In practice, prior history is often considered first, but the other considerations are deliberately listed first in the offence-related criteria set out in these sections of the YOA, for the reasons outlined in this chapter.

3.16 Furthermore, amendments to other pieces of legislation since the YOA was enacted call for policing methods and procedures at odds with the YOA. The YOA creates boundaries for the exercise of police discretion and emphasises the rights of the child, in keeping with the *United Nations Convention on the Rights of the Child*. Legislation subsequent to the YOA, such as the enactment in 2002 of "knife laws", have increased police powers, particularly in relation to young people. This is in contrast to the holistic approach seen in the New Zealand *Children, Young Persons and Their Families Act 1989* (NZ). That Act not only introduced processes such as family group conferencing, but also included strict limits on arbitrary police powers to stop, question, search and detain young people, and set out strict procedures for

23. J Chan, J Bargen, G Luke and G Clancey, "Regulating police discretion: An assessment of the impact of the NSW Young Offenders Act 1997" at 78.
24. *Young Offenders Act 1997* (NSW) s 20(3), s 37(3) and s 40(5).
25. *Children (Criminal Proceedings) Act 1987* (NSW) s 15(3).

police to follow when approaching and arresting young people, and when conducting interrogations.[26]

3.17 It is a matter for concern that, in New South Wales, changes to police powers appear to reflect contradictory approaches the government has taken since 1997 that undermine the spirit of the YOA. While it is not within the ambit of this report to elaborate on this concern in greater detail, it underpins the discussion of policing public space in the following paragraphs and is specifically referred to in paragraphs 3.19-3.28.

POLICING PUBLIC SPACE

3.18 This section considers the effect on young people of policing public space and whether the use of police powers under specific Acts, such as the *Law Enforcement (Powers and Responsibilities Act 2002* (NSW) ("Law Enforcement Act"), is impacting disproportionately on young people. It also raises the question whether young people are "over-policed".

Police powers used in public spaces

The "trifecta" offences

3.19 One means traditionally used by police to maintain public order is the laying of one or more of the "trifecta" charges.[27] These are: (i) offensive language;[28] (ii) resisting arrest; and (iii) assaulting a police officer in the execution of his or her duty.[29] They form part of a larger group of offences against public order.

The knife laws

3.20 Part 5 of the *Summary Offences Act 1988* (NSW) ("Summary Offences Act") increased the powers given to police by allowing them to search without warrant for knives and other dangerous implements.[30] The Law Enforcement Act repealed Part 5 of the Summary Offences Act.[31] However, the Law Enforcement Act enacted similar provisions to those of the Summary Offences Act to search without warrant for "knives and other dangerous implements". Such a search may take place if the police officer has "reasonable grounds" to suspect the person in a public place or school has

26. *Children, Young Persons and their Families Act 1989* (NZ) s 214–s 232.
27. M Liverani, "For the disadvantaged young, NSW is a police state" (1999) 37(10) *Law Society Journal* 62 at 64; J Collins, G Noble, S Poynting and P Taber, *Kebabs, Kids, Cops and Crime* (Pluto Press, Sydney, 2000) at 185-186. They are known as "trifecta charges" because all three charges are often laid together.
28. *Summary Offences Act 1988* (NSW) s 4A.
29. *Crimes Act 1900* (NSW) s 546C.
30. *Summary Offences Act 1988* (NSW) s 28A.
31. *Law EnforcementLegislation Amendment (Public Safety) Act 2005* (NSW), assented to on 15 December 2005, amends the *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW). It inserts Part 6A, which, in essence, gives the police emergency powers to deal with public disorder.

custody of a dangerous implement.[32] "Reasonable grounds" is defined to include taking into account "the fact that a person is present in a location with a high incidence of violent crime".[33]

3.21 While search powers under the knife laws are not solely applicable to young people, the debate on the bill that introduced Part 5 of the Summary Offences Act, the *Crimes Legislation Amendment (Police and Public Safety) Bill 1998*, clearly indicated that the knife laws were drafted with them in mind. During the debate, the Police Minister informed the Legislative Assembly that:

> *[t]here are also indications that young people, in particular, go out armed with knives more often. … Whether this is a matter of fashion, a show of bravado, a matter of cultural preference or a consequence of a misguided sense of security, the Government wants to stop it.*[34]

Similar statements were made by members of the Opposition, and the Bill was passed with bipartisan support.

3.22 Clause 22 of the *Young Offenders Regulation 2004* (NSW) requires investigating officials to consider whether to deal with a young person under the YOA before issuing a penalty notice for offences under s 11C (custody of a knife in a public place or a school) of the Summary Offences Act or s 199 ("failure to comply with direction") of the Law Enforcement Act.

Move-on powers

3.23 In addition to widening police search powers, the Summary Offences Act also armed police with a "move-on" power. Section 28F of that Act allowed police to "give reasonable directions in public places". The Law Enforcement Act has repealed s 28F but has enacted a similar provision in s 197. Pursuant to s 197 of the Law Enforcement Act:

> *a police officer may give a direction to a person in a public place if the police officer believes on reasonable grounds that the person's behaviour or presence in the place … :*
>
> *(a) is obstructing another person or persons or traffic; or*

32. *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) s 26(1). Compare *Summary Offences Act 1988* (NSW) s 28A(1).
33. *Law Enforcement (Powers and Responsibilities) Act* 2002 (NSW) s 26(3). If the person refuses to submit to a search, the officer must again warn that a failure to submit may be an offence, and make a second request for a search: s 26(4). The person must submit to the search unless he or she has a reasonable excuse: s 27. Compare *Summary Offences Act 1988* (NSW) s 28A(3).
34. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 28 April 1998, the Hon P. Whelan, Minister for Police, *Crimes Legislation Amendment (Police And Public Safety)*, Second Reading Speech at 3969.

> *(b) constitutes harassment or intimidation of another person or persons; or*
>
> *(c) is causing, or likely to cause, fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness*[35]*...*

3.24 A principal purpose of the "reasonable directions" power is to enable police to deal with anti-social behaviour which, while falling short of criminal behaviour, may yet cause harassment, intimidation or fear in others. Prior to the power being made available to police, requests to move on were made informally or with the threat of an arrest for breach of the peace. These methods continue to be used.[36]

3.25 A further provision that may operate in a "street sweeping" capacity is the power given to police under the *Children (Parental Responsibility) Act 1994* (NSW) and the *Children (Protection and Parental Responsibility) Act 1997* (NSW) to pick up persons under 16 years of age who are seen to be at risk of harm or at risk of committing a crime, and taking them home or to a designated "safe house".[37] Police have this power only in areas declared operational under the Act.[38]

3.26 The particular significance of these police powers for young people, and the potential for drawing them into the criminal justice system, relates to their tendency to occupy public space and their public visibility.

Targeting of young people

3.27 It has been argued that young people disproportionately attract police attention because "youth" is one of the indicators used by police to predict trouble.[39] More

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35. The other "move-on" grounds are if the officer has reasonable grounds to believe that a person's behaviour or presence in the public place:
(d) is for the purpose of unlawfully, supplying or intending to unlawfully supply, or soliciting another person or persons to unlawfully supply, any prohibited drug, or
(e) is for the purpose of obtaining, procuring or purchasing any prohibited drug that it would be unlawful for the person to possess.
The direction must be reasonable in the circumstances for the purpose of reducing or eliminating the obstruction, harassment, intimidation or fear, or preventing the drug transactions: s 198.
36. New South Wales Ombudsman, *Policing Public Safety: Report under s 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998 (NSW)* (Sydney, 1999) at para 10.7-10.8.
37. *Children (Protection and Parental Responsibility) Act 1997* (NSW) Pt 3, Div 2.
38. *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 14; Pt 3, Div 1. Only four areas have been declared operational to date: Walgett, Orange, Moree and Ballina Local Government Areas. For a report on the (largely negative) impact of the declaration for the Aboriginal people in Moree and Ballina, see Aboriginal Justice Advisory Council, *A Fraction More Power: Evaluation of the Impact of the Children (Protection and Parental Responsibility) Act on Aboriginal People in Moree and Ballina* (Research and Evaluation Series No 1, 1999).
39. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 249; S James and K Polk, "Policing young Australians", in D Chappell and P Wilson

controversially, it has been argued that police resources are often pre-emptively directed towards individuals whose appearance, language or demeanour suggest to police the potential for disturbance.[40]

3.28 The 1999 NSW Ombudsman's report, *Policing Public Safety*, highlights features of the interaction between police and young people. It included a review of the (then newly introduced) police power to search for dangerous implements and concluded that a disproportionately high number of teenagers was searched under the knife laws. Forty-two per cent of all searches over the review period were of persons aged 17 years or younger.[41] Seventeen year olds were six times more likely to be searched than 27 year olds, and 23 times more likely to be searched than 37 year olds. Despite the frequency of searches of teenagers, the proportion of searches in which a knife was actually found was one in seven for 17 year olds, but jumped to one in three for 27 year olds and almost one in two for 37 year olds.[42] The report stated:

> *In assessing the fairness of police search practices, it is important to acknowledge the comparatively high proportion of young people involved in knife-related crime. Of concern, however, is why so many knife searches of young people lead to no knife being found, whereas the ratio of productive searches is much higher for searches of suspects aged in their 20s and 30s. One factor might be differences in the way that young people make use of public space, including a propensity for groups of young people to 'hang out' at busy commercial precincts and transport interchanges.*[43]

3.29 The Ombudsman recommended that the Police should carefully monitor the ages of persons searched without warrant.[44]

3.30 The Ombudsman's report also reviewed the operation of the "reasonable directions" power. It noted that both this power and the search power were applied to

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(ed), *Australian Policing: Contemporary Issues* (2nd edition, Sydney, 1996) at 183; 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 18.63; R White, "Street Life: police practices and youth behaviour" in R White and C Alder (ed), *The Police and Young People in Australia* at 103-104. White submits that young people from a wide range of socio-economic backgrounds have been stopped by the police in the street, and that police officers view shopping centres and malls as places where the presence of young people is of particular concern.

40. C Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* at 150.
41. New South Wales Ombudsman, *Policing Public Safety: Report under s 6 of the Crimes Legislation Amendment (Police and Public Safety) Act 1998* at para 5.57-5.58.
42. NSW Ombudsman, *Policing Public Safety* at para 5.59.
43. NSW Ombudsman, *Policing Public Safety* at para 5.63.
44. NSW Ombudsman, *Policing Public Safety* at para 5.64.

high numbers of young people.[45] Of all those "moved on" during the review period, 47% were 17 years old or younger. The most important factor identified in this trend was the propensity of young people to socialise in public places, often in large groups.[46] The report cites examples of the use of the "reasonable directions" power to disperse groups of young people who had attracted police attention, not by their behaviour, but simply by their presence and possibly by their ethnicity.[47]

The occupation of public space by young people

3.31 Areas in which young people tend to congregate include street footpaths, central business districts, school grounds, train stations, shopping centres and malls, and parks and ovals. While these places may not strictly be public space, in that they are not always publicly owned, they are open to, and used by, the public and hence we have described them as such.

3.32 Factors that "pull" young people to public areas are the low cost of visiting and staying, their proximity to facilities, services and products, and their easy access via public transport. Additionally, as leisure activities are increasingly commercialised, business owners actively encourage the development of the youth market – the "young person as consumer".[48] In doing so, they draw young people to commercial centres. Factors which "push" young people to congregate in street spaces and shopping centres may include escaping parental control or financial and other tensions in the home, a lack of their "own" space, boredom with, or unavailability of, other facilities, and the over-policing of other areas.[49]

3.33 Perhaps the most frequent use of police discretion arises from conflicts over the use of public space by young people. It is arguably the main point of intersection for political, community, legal, commercial and media interest in the activities of young people:

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45. NSW Ombudsman, *Policing Public Safety* at para 10.24. During the review period, 16 year olds were the group most affected by the new move-on power, and were nine times more likely to be "moved on" than 26 year olds, and 19 times more likely than 36 year olds: at para 10.25.
46. NSW Ombudsman, *Policing Public Safety* at para 10.31.
47. NSW Ombudsman, *Policing Public Safety* at para 10.32. See para 3.50-3.57.
48. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, Melbourne, 2002) at 139-144. It was estimated in 1998 that young people in Australia constitute a market worth more than $4.6 billion: P Quinlivan, "Shopping centres and youth: friend or foe?" (1998) 16 *Shopping Centre News* cited in Youth Action Policy Association, "You're banned! Shopping centres, banning notices and young people" *Factsheet* «http://www.yapa.org.au/youth/publicspace/banned.htm».
49. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 143. Other reasons young people congregate in shopping centres include "employment, low-cost (or free) recreation, safety, peer interaction, romantic attachment and the purchasing and consumption of goods and services": G Clancey, S Doran and D Robertson, *NSW Shopping Centre Protocol – Creating the Space for Dialogue: the Report* (University of Western Sydney, 2003) at 3.

> *As more and more space has been commodified, privatised and/or corporatised so the logic of design and management has shifted away from ideals of civic rights and participation to ones of niche marketing and risk management. In this, the policing, security and health and safety industries are substantial and influential players with vested interests in a lucrative marketplace which fuels and is fuelled by fear of crime media coverage and law and order politics.*[50]

3.34 The use of public space by young people is often contested, as it may involve conflict over differing perceptions of legitimate public behaviour[51] and the purposes of that public space.[52] Particularly in shopping centres or consumer areas, the mere congregation of young people is regularly objected to by older people and business owners, who perceive such socialising as being related to "rowdiness", "loitering" or other antisocial behaviour.[53] Behaviour among young people that is considered by them as merely ordinary social interaction with their peers may be viewed by other members of the public as a nuisance, if not in some way a prelude to criminal activity. White asserts that:

> *Images of anarchy, "ethnic youth gangs", juvenile crime waves and various moral panics over the state of youths today, have gone hand-in-hand with concerted campaigns to make young people unwelcome in our … shopping centres.*[54]

3.35 There is, however, some evidence to suggest that such community concerns are not without foundation. The historical nexus between the public "presence" of young people and their involvement with the criminal justice system noted in Chapter 2, remains of contemporary relevance. In 1999, the Commonwealth Attorney General's Department published a National Crime Prevention report, *Hanging Out: Negotiating Young People's Use of Public Space*. The report cited the following factors linking the use of public space and young offending:

- young people tend to hang around in groups, and youth crime tends to be committed in groups;

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50. P Crane and M Dee, "Young people, public space & NEW URBANISM" (2001) 20(1) *Youth Studies Australia* 11 at 15.
51. C Cunneen, "Enforcing genocide? Aboriginal young people and the police" in R White and C Alder (ed), *The Police and Young People in Australia* at 145. See also G Clancey, S Doran and D Robertson, *NSW Shopping Centre Protocol – Creating the Space for Dialogue: the Report* at 3 and 4.
52. See G Clancey, S Doran and D Robertson, *NSW Shopping Centre Protocol – Creating the Space for Dialogue: the Report* at 3.
53. R Goldsmith, *Hanging Out: Negotiating Young People's Use of Public Space* (Australia, Attorney-General's Department, National Crime Prevention Program, 1999) at 23.
54. R White "Regulating youth space – Are young people losing the struggle for space of their own?" (1997) 22(1) *Alternative Law Journal* 30 at 30.

- the social dynamics of the offence means that it is often public, gregarious and attention seeking; and

- youth crime is often episodic, unplanned and opportunistic, occurring when young people use public space in areas such as shopping centres and public transport where there is more surveillance.[55]

3.36 These factors show that it is possible that collective use of public space by young people may be a factor leading towards the very type of offences most often committed by them. At the same time, two other factors noted in this report suggest the potential for perceptions about the extent of youth crime to be exaggerated:[56]

- the public congregation of young people makes them particularly visible, and thus youth crime tends to be more readily apparent and detectable; and

- young people tend to commit crime in their own neighbourhood, where there is greater likelihood that they will be recognised and identified by observers.

3.37 If public spaces are over-policed, this may ultimately lead to a greater number of young people becoming involved with the criminal justice system than would otherwise be the case. It has been argued that where "pervasive and strong intervention" into young people's lives combines with "prior difficulties of economic hardship, low self-esteem, few social resources and general boredom" the result can be "an explosive mixture of desperation and anger".[57]

3.38 The Commonwealth Attorney General's Department's publication, "Public Spaces for Young People: A Guide to Creative Projects and Public Strategies", [58] noted that "how public space is managed plays a big part in constructing the social climate in which young people and others interrelate, and whether or not conflicts and tensions will predominate in any particular locality".[59] It argued that "a negative regulatory environment can make young people feel unwelcome, and frustrated at what they perceive to be unfair and unjust policies and policing practices". [60]

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55. R Goldsmith, *Hanging Out: Negotiating Young People's Use of Public Space* at 7, drawing on the findings of C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia*, Chapter 5. The New South Wales Legislative Council Standing Committee on Social Issues noted that a comparatively high proportion of offences committed by 10-17-year-olds, including assault, were committed in public spaces such as the street, parks, parking areas and sports grounds. Overall, the majority of assaults were committed on school premises: New South Wales Parliament, Legislative Council Standing Committee on Social Issues, *A Report into Youth Violence* (Report No 8, 1995) at 42.
56. See Chapter 1 at para 1.17-1.20.
57. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 151.
58. R White, *Public Spaces for Young People: A Guide to Creative Projects and Public Strategies* (Australia, Attorney General's Department, 2002)
59. White at 10.
60. White at 10.

3.39 Thus, a key issue in the debate about young people's use of public space is the treatment of young people who are *not* engaged in criminal - or "pre-criminal" - activity. A heavy-handed police response to young people gathering in public space may in fact compound the very processes of youth social alienation which lead to offending.

3.40 This issue is complicated by the diminution of truly public spaces, often in exchange for facilities that, although open to the public, are privately owned. The most obvious example of this is the transforming of "old style village or street shopping areas" into "mega shopping malls or centres where a vast variety of shops and essential services are located under one roof".[61]

3.41 This trend raises two issues. One is that young people are obvious targets for what has been described as the "criminalisation of the non-consumer".[62] From the point of view of business owners, young people who frequent shopping centres but cannot, or do not wish to, consume are virtually and literally worthless.[63] Also, the presence of young people using consumer space for their own purposes may be viewed as a security risk, or as discouraging other consumers. Police[64] may be called upon by business owners to "clear" young people from consumer areas, thereby setting in process the impact of police powers, outlined in paragraphs 3.19-3.25.[65]

3.42 A number of local government authorities and State government departments have responded positively and creatively to the public space needs of young people, as part of an ongoing process of consultation, in an attempt to minimize the potential for conflict.[66] White cites examples such as Launceston's "Youth Spaces Consultation Project", Adelaide's "OutaSpace Youth Speak" and Parramatta's "CBD Public Space Research Project" as constructive and inclusive models for the use of public space by young people.

3.43 A further issue arising out of the commercialisation of public space is the "policing" of young people by security guards hired by shopping centre management. Clancey, Doran and Robertson observe that:

> *[t]he competing perceptions about shopping centres and how they should be used has resulted in conflict between young people and security personnel. Young people*

61. C Grant, "Banning the banning notice" (2000) 25(1) *Alternative Law Journal* 32. "For young people these shopping centres are the modern equivalent of the old local streetscape which contained shops, parlours and community halls."
62. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 143.
63. Cunneen and White at 141.
64. Or, increasingly in shopping centres, security guards.
65. White argues that "[t]he social polarisations in Australian society are not only manifest in high levels of youth unemployment and poverty; they are increasingly being translated into a series of interrelated spatial polarisations": R White, "Regulating youth space – Are young people losing the struggle for space of their own?" at 30.
66. See R White, *Public Spaces for Young People: A Guide to Creative Projects and Public Strategies*.

> *believe that they have a right to access shopping centres, to meet friends and to utilise the facilities available, often without understanding that shopping centres are private or semi-private property. Security personnel often perceive young people as potential threats to retail trade and to the general order of a centre, often without acknowledging that centres deliberately seek to attract young people as consumers. … For young people, these conflicting perspectives can and have resulted in increased surveillance, significant contact with security personnel, admonishment, exclusion or banning and even criminal charges for trespassing (where bans are not abided).*[67]

3.44 While young people may see themselves as being entitled to make use of space they understand to be public, their presence in consumer areas is subject to implied licences granted by shopping centre owners. Increasingly, proprietors are acting to revoke these licences. Concerns have been raised by commentators about the use of "banning orders" by security guards,[68] which prohibit persons from accessing shopping centres for specified or indefinite periods of time,[69] thereby effectively operating as a type of "informal sentence".[70]

3.45 Banning orders run the risk of operating unfairly, as they are often wider in scope than any sanction that would be imposed by a court; they may operate oppressively in locations where essential services are within the boundaries of the shopping centre; and because they are not subject to appeal. And as Clancey, Doran and Robertson suggested, previously non-criminal behaviour becomes criminalised

67. G Clancey, S Doran and D Robertson, *NSW Shopping Centre Protocol – Creating the Space for Dialogue: the Report* at 4. See also S Rotherham, "Youth on the streets: better ways to share our spaces" (2002) 22 (6) *Government News* 12; C Grant, "Banning the banning notice" (2000) 25(1) *Alternative Law Journal* 32.
68. The lack of comprehensive record-keeping and a centralised data base, as well as shopping centre concerns about privacy, make it extremely difficult to give statistics on the number of banning notices issued by shopping centres across New South Wales. One shopping centre revealed that in the period 2001-February 2003, it had issued a total of 469 banning notices, including two for life and several for three or five years: G Clancey, S Doran and D Robertson, *NSW Shopping Centre Protocol – Creating the Space for Dialogue: the Report* at 6.
69. R White, "Regulating youth space – Are young people losing the struggle for space of their own?" at 31; S Campbell, "Reality checks: the changing relationship in the policing of young people and its implications for legal practitioners" (1997) 37(10) *Law Society Journal* 58. The number of ban notices issued throughout Australia in 2000 was conservatively estimated to be at least 1760: Youth Action Policy Association, "You're banned! Shopping centres, banning notices and young people" (See «http://www.yapa.org.au/youth/publicspace/banned.htm»).
70. See also N Gannon, "Young people banned: is it legal?" (2002) *Article 13: Law and Policy Journal of the National Children's and Youth Law Centre* 3.

when a person breaches a banning order, as police may then be called upon to charge that person with trespass.[71]

3.46 Given their potential impact, banning orders ought to be applied sparingly by shopping centre management. The Youth Action and Policy Association, in conjunction with the Youth Justice Coalition, the New South Wales Attorney General's Department Crime Prevention Division, the NSW Police, the NSW Commission for Children and Young People and the Shopping Centre Council of Australia have developed the NSW Shopping Centre Youth Protocol, finalised in October 2003.[72] Local protocols are now being developed in various locations. The Commission supports this initiative, but also suggests that it would be valuable to include in any Protocol compulsory training in the area of young people's use of public space for any person seeking registration as a security guard under the *Security Industry Act 1997* (NSW).[73]

The use of arrest

3.47 Section 8 of the CCPA (which is subject to exceptions) requires that criminal proceedings be commenced against a child by court attendance notice (CAN) rather than arrest. In both 2004 and 2003, 77% of matters that proceeded to court were dealt with by charge.[74] Charging an offender usually involves arrest, but not always, and hence it is difficult to draw definitive conclusions on the use of arrest in recent years.

3.48 It has been argued that the arrest process is seen as important to police in establishing their authority and effecting deterrence.[75] However, case law indicates

71. The number of trespass charges for young people who have breached banning notices has shown a steady increase for the period 1995-2000, but still remain relatively low. "Anecdotal evidence suggests that those young people being charged with trespass are but a tiny fraction of the total number of young people being banned across New South Wales": G Clancey, S Doran and D Robertson, *NSW Shopping Centre Protocol – Creating the Space for Dialogue: the Report* at 6.
72. Youth Action and Policy Association, *Creating the Space for Dialogue: A Guide to Developing a Local Youth Shopping Centre Protocol* (University of Western Sydney, Sydney, 2003). The Guide was funded by the New South Wales Attorney General's Department Crime Prevention Division. The Shopping Centre Council of Australia also made a financial contribution.
73. This suggestion has the support of the Youth Policy and Programs Unit, New South Wales Police.
74. New South Wales Bureau of Crime Statistics and Research, *Recorded Crime Statistics 2001-2004: Method by which police proceeded against juvenile persons of interest (aged 10 to 17), Excluding driving offences*. In 2004, 13,600 matters were proceeded against to court. A further 34,391 juveniles were proceeded against by way of infringement notice (21%), referral to youth conference (3%), caution under the *Young Offenders Act 1997* (NSW) (27%) and warning (48%). In 2003, 15,097 matters were proceeded against to court. A further 29,117 juveniles were proceeded against by way of infringement notice (30%), referral to youth conference (4%), caution under the *Young Offenders Act 1997* (NSW) (36%) and warning (64%).
75. Youth Justice Coalition, *Kids in Justice Report: A Blueprint for the 1990s* at 246.

that it is inappropriate for police to use the power of arrest for minor offences where the defendant's particulars are known and there is no reason to suggest a CAN will not be effective in bringing him or her before the court.[76] It is vital that the Police ensure that all police officers are familiar with, and comply with, the provisions of s 8 of the CCPA so that the arrest of a child is strictly confined to those exceptional situations provided for in s 8(2).

3.49 It is also imperative that the Computerised Operational Police System ("COPS")[77] makes it easy for police to process and record CANs. If police have to go through a complicated, multi-step process, as they did with issuing a summons, in order to issue a CAN, compared with the immediacy of charging, the temptation to charge will be too great. The structure must support the desired approach.

POLICING AND YOUNG PEOPLE FROM RACIAL AND ETHNIC MINORITIES

3.50 One subject specifically raised in Issues Paper 19 ("IP 19") was whether young people from particular ethnic groups or cultural backgrounds encounter discrimination in the sentencing process.[78] The evidence to date is inconclusive, although it tends to suggest that there is no discernible pattern of sentencing discrimination. However, having regard to the "compounding effect" of police decision-making referred to above in paragraph 3.9, any minority group which is the subject of disproportionate levels of entry into the criminal justice system will inevitably be over-represented at the sentencing stage.

3.51 Research undertaken throughout Australia over the two decades leading up to the year 2000 has found that young people who visibly belong to racial, ethnic or cultural minorities often experience direct or indirect racism when dealing with police.[79] Other research from this time cites the existence of poor relations between police and young people from racial or ethnic minorities,[80] in particular, Aboriginal young people and those from Indo-Chinese, Arabic or Pacific Islander backgrounds.

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76. *DPP v Carr* (2002) 127 A Crim R 151 at [35] (Smart AJ); see also *DPP v Carr* (2002) 9 Crim LN (3) at 22.
77. This is the NSW Police's database.
78. New South Wales Law Reform Commission, *Sentencing: Young Offenders* (Issues Paper 19, 2001), Issue 24 at para 3.131-3.135.
79. See J Collins, G Noble, S Poynting and P Tabar, *Kebabs, Kids, Cops and Crime*, Chapter 6. The term "ethnic minority" is used to describe non-Indigenous Australians from a non-English-speaking-background: see generally, S Zelinka, "Ethnic minority young people" in C Guerra and R White (ed), *Ethnic Minority Youth in Australia* (National Clearing House for Youth Studies, Department of Education, University of Hobart, Tasmania, 1995) and P Easteal, "Migrant youth and juvenile crime" in A Borowski and I O'Connor (ed), *Juvenile Crime, Justice and Corrections* at 151-166. See also R White, S Perrone, C Guerra and R Lampugnani, *Ethnic Youth Gangs in Australia: Do They Exist?* (Report, Australian Multicultural Foundation, 1999).
80. J Chan, "Policing youth in 'ethnic' communities: is community policing the answer?" in R White and C Alder (ed), *The Police and Young People in Australia*

3.52 In the context of the Summary Offences Act, Chan and Cunneen noted the disparity in the use of move-on powers in areas with high Aboriginal populations: its use in Bourke and Brewarrina was 30 times higher than the New South Wales average.[81]

3.53 An unpublished NSW Ethnic Affairs Commission survey of community organisations identified harassment and stereotyping as a problem in police work with young people from non-English-speaking backgrounds. The stereotypes that were observed as being part of police attitudes included the following:

- Youth of non-English-speaking background are trouble-makers.

- Youth of non-English-speaking background constitute themselves as gangs and not as groups. An example referred to in this case was of groups which dressed in tracksuits, Reebok shoes, and were identified as colour gangs instead of groups of kids.[82]

3.54 The survey concluded that police tend to judge people by the way they dress. This is especially important for young people who are often on the street, as it can lead to unwarranted attention and harassment.[83]

3.55 In her 1997 study of police culture in New South Wales, Professor Janet Chan reviewed the research and identified four general aspects of racism among Australian police generally and in the NSW Police in particular. These were: insensitivity to language and cultural differences; prejudice and stereotyping; over-policing of minorities; and abuse of power and excessive force.[84] Each of these has been reported as present in the interaction between police and ethnic minority youth. The NSW Ethnic Affairs Commission survey referred to above, documents incidents of police harassment reported by young people from racial or ethnic minorities as including excessive attention from police in the streets, racist taunts, under-policing of instances of youth victimisation, occasional physical abuse by police, and police

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at 176. See also C Cunneen, "Enforcing genocide? Aboriginal young people and the police" at 142-145; C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 190-193; J Chan, *Changing Police Culture: Policing in a Multicultural Society* (Cambridge University Press, Cambridge, 1997); R White, "Hassle-free policing and the creation of community space" (1998) 9(3) *Current Issues in Criminal Justice* 313; B Delahunty "Taking 'Kiddie Cops' and 'Care Bears' seriously".

81. C Chan and C Cunneen, *Evaluation of the Implementation of the New South Wales Police Service Aboriginal Strategic Plan* (Sydney Institute of Criminolgy, 2000) at 32.
82. New South Wales Ethnic Affairs Commission, *Policing and Ethnicity in NSW* (unpublished report, 1992) cited in J Chan "Policing youth in 'ethnic' communities: is community policing the answer?" at 179.
83. New South Wales Ethnic Affairs Commission, *Policing and Ethnicity in NSW* cited in Chan at 179.
84. J Chan, *Changing Police Culture: Policing in a Multicultural Society* at 17-25.

brutality while being detained or questioned.[85] A 1991 HREOC report noted that 85% of Aboriginal young people in detention centres in New South Wales, Queensland and Western Australia reported being hit, punched, kicked or slapped by police.[86] Similarly, Chan cites various documented instances of police violence against young people of Vietnamese origin.[87]

3.56 Relations between police and young people of Middle Eastern background in Sydney have come under the spotlight in recent years, most particularly following the 1998 killing of Edward Lee and, in the same year, the drive-by shooting attack upon the Lakemba police station. These events led to media, police and political focus on "Lebanese gangs".[88] It has been suggested that what was arguably a heavy-handed police response to these events was greatly resented by Lebanese young people and their communities, and reinforced pre-existing perceptions of victimisation of Lebanese youth by police. More recently, the issue of ethnic-based offending has been raised by the much-publicised gang rape trials of a number of Lebanese youths.[89] This has exacerbated tensions between police and the Arabic-speaking community generally.[90]

3.57 Relations between police and Aboriginal young people have also been strained following the death of Thomas ("TJ") Hickey in February 2004. Police were accused of recklessly pursuing the 17-year-old on his bicycle, causing him to crash into a fence, where he was impaled. The incident sparked street rioting in Redfern "by dozens of young Aborigines".[91] The *Sydney Morning Herald*'s editorial on the issue stated that this reaction "spoke volumes about the failures of black-white relations in and around the Aboriginal ghetto of Redfern".[92] It also concluded that the reaction could be explained by Aboriginal disadvantage typified, among other things, "by a

85. New South Wales Ethnic Affairs Commission, *Policing and Ethnicity in NSW* cited in J Chan "Policing youth in 'ethnic' communities: is community policing the answer?" at 179.
86. Australia, Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence* (Sydney, 1991) at 96.
87. J Chan, *Changing Police Culture: Policing in a Multicultural Society* at 111-112.
88. J Collins, G Noble, S Poynting and P Tabar, *Kebabs, Kids, Cops and Crime* at 39-42. Poynting argues that the police response to the Lakemba drive-by shooting was a "well-orchestrated, 'in-your-face' stop-and-search program" focusing on Lebanese youth in the Bankstown area which resulted in a large number of move-on directions and searches, and several arrests for minor offences such as offensive language: S Poynting, "When 'zero tolerance' looks like racial intolerance: 'Lebanese youth gangs', discrimination and resistance" (1999) 11(1) *Contemporary Issues in Criminal Justice* 74 at 74-75.
89. See K Warner, "Gang rape in Sydney: Crime, the media, politics, race and sentencing" (2004) 37(1) *The Australian and New Zealand Journal of Criminology* 344 for a discussion of these crimes and the implications for sentencing.
90. See, generally, R Lozusic, *Gangs In NSW* (NSW Parliamentary Library, Briefing Paper No 16/2002, 2003), in particular Chapter 5, "The ethnic gang debate in NSW".
91. "The root cause of TJ Hickey's death" (editorial) *Sydney Morning Herald*, 17 July 2004 at 40.
92. "The root cause of TJ Hickey's death" at 40.

ghetto existence which excites hatred and distrust on both sides, where Us v Them tensions and bitterness flourish".[93]

3.58 Since March 2002, the NSW Police has collected information on "Country of Birth" from all persons of interest (POIs) and their parents. POIs are all people proceeded against by police whether involving court proceedings or formal diversion.[94] This information is recorded on COPS and integrated into a central database called the Enterprise Data Warehouse from which it may be extracted by the Bureau of Crime Statistics and Research in order to provide empirical evidence as to the commission of offences by members of ethnic communities. Although there are concerns that ethnic-based record keeping may be used "as a marker of social distinction" which provides a "shorthand means to identify potential troublemakers",[95] the information may ultimately assist in clarifying whether or not there is over-policing of minorities.

3.59 NSW Police is involved in a number of constructive programs to address the issue of relations between police and members of ethnic communities, especially young people from such communities. One example is the expansion of the Ethnic Community Liaison Officer Program, which currently has 31 Liaison Officers (including a dedicated program co-ordinator), covering the Greater Metropolitan, Inner Metropolitan and Southern regions. The objectives of the program are:

- Crime reduction and crime prevention by facilitating strategic police-CALD/Indigenous community partnerships.
- Enhancing police awareness about cultural diversity issues and their relevance to local policing priorities.
- Enhancing community awareness/knowledge about policing roles and responsibilities.
- Facilitating trust and improved communication between police and communities.[96]

3.60 Their range of responsibilities include:

- improving communication between police and multicultural and Indigenous communities
- providing advice to police for better service delivery regarding multicultural and Indigenous communities
- support police in meeting the needs of diverse ethnic communities

93. "The root cause of TJ Hickey's death" at 40.
94. The country of birth used is based on the Australian Bureau of Statistics "Classification of Countries".
95. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* at 205.
96. Australasian Police Multicultural Advisory Bureau, *Multicultural Liaison Officers: Introduction* http://www.apmab.gov.au/mlo/index.html Other examples include involvement in the New South Wales Government's Youth Partnership with Arabic Speaking Communities: http://www.youthpartnership.nsw.gov.au/

- develop and implement community education programs on safety and crime prevention
- in some cases provide victim support
- participate in police-community projects
- provide language assistance, where appropriate
- assisting multicultural and Indigenous communities in understanding their rights and responsibilities as citizens and how to access police services
- providing victim support
- increase community awareness about criminal activity and how to access policing services.[97]

3.61 The Commission commends these positive initiatives and points out that they have the potential to include youth justice issues within their ambit.

3.62 Translating policy into improved outcomes means that initiatives must be:

> *developed with the participation of operational police, backed up by relevant programs, adequate resources, appropriate administrative support, rigorous monitoring and an effective accountability structure.*[98]

RATES OF DIVERSION

3.63 One of the formative influences on the YOA was the New Zealand *Children, Young Persons and Their Families Act 1989* (NZ).[99] Research following the implementation of this Act found that a high percentage of suitable cases were indeed being diverted from the formal court system.[100] This led to the suggestion in New South Wales that a specific rate at which young offenders ought to be diverted under the YOA might be agreed upon and was raised as an issue in IP 19.[101]

3.64 In response to IP 19, YJAC submitted that "clear diversionary goals" should be set under the YOA, and that inter-jurisdictional comparisons were a reasonable

97. Australasian Police Multicultural Advisory Bureau, *Multicultural Liaison Officers: Introduction*.
98. J Chan, *Changing Police Culture: Policing in a Multicultural Society* at 53.
99. See Chapter 2 at para 2.55.
100. There was a significant drop in the number of young people going to court between 1989 and 1990, from 8,193 to 2,352, but a gradual increase since then. Nevertheless, the 1998/99 figure of 4,851 – the highest since the Act was introduced – is still over 60% less than in 1987: G Maxwell and A Morris, "Juvenile Crime and Justice in New Zealand" in N Bala, J P Hornick, H N Snyder and J J Paetsch (ed), *Juvenile Justice Systems: An International Comparison of Problems and Solutions* (Thompson Educational Publishing, Toronto, 2002) 189 at 210-211. See also N Hennessy, "Review of the Gatekeeping Role in *Young Offenders Act 1997* " (October 1999) *Report to Youth Justice Advisory Committee* at 6-7.
101. NSWLRC Issues Paper 19, Issue 7.

means of establishing these goals.[102] YJAC pointed to the original review of the diversionary process under the YOA that was conducted for YJAC by Nancy Hennessy in 1999. Hennessy suggested that the level of diversion achieved within the first two years of the YOA's operation was lower than had been expected by YJAC and was lower than diversionary figures obtained from other jurisdictions, especially New Zealand and South Australia.

3.65 Since the publication of the Hennessy Report, the number of matters recorded as diverted under the YOA has risen considerably. The most recent figures show that between 1 July 2003 and 30 June 2004, police referred 720 young people for conferencing (42% of all referrals) and the courts referred 995. By the end of the 2003-2004 financial year, these referrals had resulted in 1,365 youth justice conferences.[103] In the same period, appearances in the Children's Court declined to a total of approximately 6,765, a decrease of approximately 43% since 1989-1990.[104]

3.66 While the majority of submissions on this issue agreed that the current rate of diversion might still be improved, the general tenor of response, both in written submissions and in community consultations, was that a target diversion rate was not desirable and its achievement would not provide a means of measuring the success of the YOA. The general view expressed was that the issues surrounding the diversionary process in practice are not easily reducible to the adoption of a target percentage for diversion of young offenders. As the Children's Court noted:

> *Cases should be dealt with upon their individual merit and any predetermined "rate" of referral by court or "quotas" by police should be firmly rejected.*[105]

3.67 A number of submissions maintained that the key to widening the practical application of the YOA - and thereby increasing the rate of diversion - is an expanded program of education and training to familiarise all those involved in juvenile justice with the YOA's provisions, together with improved resourcing of Youth Liaison Officers and Specialist Youth Officers.[106]

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102. Youth Justice Advisory Committee, *Submission* at 3. YJAC also considered that targets ought to be set for "groups traditionally over-represented" in the juvenile justice system, especially for Aboriginal participation in diversionary schemes under the YOA: *Submission* at 4.
103. Department of Juvenile Justice, *Annual Report 2003-2004* at 18.
104. See Department of Juvenile Justice, *Annual Report 2003-2004* at 5: in 2003-2004, for every 1000 10-17 year-olds resident in New South Wales, 9.3 had a criminal matter finalised in the Children's Court. The population of 10-17 year-olds in New South Wales in 2003-2004 was approximately 727,448. In 1989-90, the number of court appearances for young people was 15,879.
105. The Children's Court of New South Wales, *Submission* at 10. The submission of the Minister for Juvenile Justice noted that the most effective means of continuing the upward diversionary trend is "[c]ontinued training, educating and resourcing all those involved in the operation of the [YOA]": (then) Minster for Juvenile Justice, Hon Carmel Tebbutt MLC, *Submission* at 6.
106. The Legal Aid Commission of New South Wales, *Submission* at 5**;** The Shopfront Youth Legal Centre, *Submission* at 7; NSW Young Lawyers,

3.68 As the main gatekeepers under the YOA, the role of officers of the NSW Police was generally singled out for comment in submissions. As noted in paragraph 3.65 above, in the year 2003-2004, police officers referred approximately 16% fewer young offenders to youth justice conferencing than did the courts. However, it is possibly unfair to draw adverse inferences from this. In particular, two of the conditions required to be met before a conference may be held are that the young person admits the offence and consents to the holding of the conference.[107] The necessary admissions and consents may, in some cases, only be given after a matter has proceeded to court. In some Local Area Commands, Youth Liaison Officers report that legal advice not to admit an offence is limiting the number of matters that they can refer to conferencing.

3.69 In its submission to the Commission, the NSW Police re-iterated its unease with Hennessy's original findings, namely that there was no comparison between previous diversionary rates in New South Wales and rates subsequent to the introduction of the YOA; that in the absence of agreed "targets", criticisms of "lower than expected diversion rates" were unsupported; and that there should be some agreed understanding of what constituted diversion.[108] In addition, by disputing Hennessy's definition of diversion, the Police argued that the statistics do *not* in fact show that the majority of formal interactions between police and young people result in court action. The police submission also raised the relevant point of the *qualitative* nature of any indicators which might be agreed upon:

> *…rather than setting an arbitrary target, a more helpful and sophisticated measure would be determining what percentage of young people referred to court should have been diverted (based on objective criteria such as admission of guilt, offence excluded from the Act, young person electing not to proceed with caution or conference, doli incapax, capacity to admit guilt, etc.). Analysis of this nature would determine how close to optimal diversion has been reached, which acknowledges the reasons why young people will rightly be referred to court rather than being diverted.*[109]

3.70 Failing the adoption of such a process of analysis, the Police proposed that a target diversion rate would in effect provide an "agreed benchmark" for measuring the extent of diversion under the YOA.[110]

3.71 The Commission has carefully considered the submissions of YJAC and the Police Service. On balance, we have concluded that the range and complexity of issues surrounding the implementation of diversionary practices under the YOA are

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Submission at 3; the Office of the Director of Public Prosecutions, *Submission* at 3; the Law Society of New South Wales, *Submission* at 4; the Children's Court of New South Wales, *Submission* at 10.

107. *Young Offenders Act 1997* (NSW) s 36(b) and (c).
108. New South Wales Police Service, *Submission* at 4.
109. New South Wales Police Service, *Submission* at 5.
110. New South Wales Police Service, *Submission* at 5.

such that the adoption of a set rate of diversion would not be an appropriate means of furthering the aims of the YOA and evaluating its effectiveness.

CONCLUSION

3.72 Research on the first three years of the operation of the YOA suggests that the implementation of the Act has largely been successful.[111] The research found that the introduction of the YOA has led to a substantial increase in the use of cautions and warnings, and a corresponding decline in the use of court proceedings.[112] At the same time, the greater utilisation of diversionary options was not found to have resulted in net-widening.

3.73 Looking at the YOA's impact on the over-representation of Aboriginal young people in the criminal justice system, the research found that the Act had achieved a 50% reduction on Aboriginal first offenders being taken to court.[113] However, even among first offenders, Aboriginal young people were 1.8 times more likely to be taken to court than a non-Aboriginal young person.[114] As well, although Aboriginal young people were equally likely as non-Aboriginal young people to be given warnings or referred to conferences, they were less likely to be cautioned than non-Aboriginal young people.

3.74 Perhaps it is still too early to evaluate the extent of the YOA's success in structuring police discretion and addressing actual and potential misuse of discretion. Nonetheless, the conclusion of the Commission is that there is no evidence to suggest that the overall approach of the YOA is misconceived. Our objective in this report, therefore, is to build on, and strengthen, that approach.

3.75 However, the Commission notes with concern that the approach of the YOA and its effective regulation of police discretion has been undermined by subsequent legislation. Powers such as the "reasonable directions" power examined in paragraphs 3.23-3.24 will be exercised in areas that particularly impact on young people and are likely to bring police into direct confrontation with young people.

3.76 It is therefore not enough to consider, in isolation, police practice, and criticisms of that practice, from the point of view of discretion properly or improperly used. It must also be considered in the context of increased powers handed to police by legislation, and the impact this may be having on introducing young people into the juvenile justice system.

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111. J Chan, S Doran, E Maloney and N Petkoska, with J Bargen, G Luke and G Clancey, *Reshaping Juvenile Justice: A Study of the NSW Young Offenders Act 1997* at Section 8.1.
112. Chan, Doran, Maloney and Petkoska, with Bargen, Luke and Clancey at Section 8.1: "About 5% of cases were dealt with by youth justice conferencing. … There were, however, substantial geographical variations in outcomes."
113. Chan, Doran, Maloney and Petkoska, with Bargen, Luke and Clancey at Section 8.1
114. This was the rate found when other factors, such as gender, type of offence, age and location, were controlled for.

4. Scope of the YOA

- Introduction
- Age of young offender
- Offences covered by the YOA

INTRODUCTION

4.1 A fundamental issue addressed in the Commission's consultations and submissions was the scope of the *Young Offenders Act 1997* (NSW) ("YOA"), including its interaction with the *Children (Criminal Proceedings) Act 1987* (NSW) ("CCPA"). As these two Acts are at the core of juvenile justice law in New South Wales, this issue is of central importance in the sentencing of young offenders.[1]

4.2 Offences within the jurisdiction of the YOA can be dealt with by options that are intended to divert a young offender away from formal court processes. As diversion has great potential benefits for a young offender, as well as victims of crime and the community, it becomes important to test whether there is an optimal range of offences falling within the ambit of the YOA. This chapter explores whether the offences presently falling within the jurisdiction of the YOA are adequate, both in meeting community expectations and in fulfilling the legislation's expressed aims. It also considers whether, if the application of the YOA were to be expanded, certain offences should be specifically excluded from its operation.

4.3 A preliminary issue reviewed in this chapter is the age range of offenders that fall within the jurisdiction of the YOA, and the YOA's interaction with the CCPA in this regard.

AGE OF YOUNG OFFENDER

4.4 The CCPA defines "child" as a person under the age of 18 years. However, in proceedings in the Children's Court, and for the purposes of sentencing in other courts, the CCPA applies to a person who was a child when the offence was committed and under the age of 21 years when charged.[2]

4.5 It is arguable that the YOA, which defines a "child" as a person over the age of 10 and under the age of 18,[3] applies only to persons who are under 18 at the time they are dealt with under the Act, not merely under 18 at the time of the commission of the offence.[4] If so, the two Acts are inconsistent. Considerations of equity and public policy require that the Acts should be made compatible in their application to "children".

4.6 There is no reason why, if a person is going to be sentenced under the CCPA, the diversionary options provided by the YOA should not be available to him or her, if the offence was committed as a child. The policy considerations that dictate that children, with their undeveloped maturity and self-discipline, should be treated

1. Other laws creating offences and extending police powers are also highly relevant in the context of conflicting juvenile justice policies in New South Wales.
2. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1)(c) and (d).
3. *Young Offenders Act 1997* (NSW) s 4.
4. Although, the Children's Court refers a small number of young people between 18 and 21 to youth justice conferencing.

differently when they offend from adults, should not be discarded when there is a delay in dealing with the offence. The Commission is therefore of the view that both the CCPA and the YOA should apply to all persons who have allegedly committed an offence before they turned 18, provided they are under 21 at the time they are dealt with under either Act.

Recommendation 4.1

The definition of "child" in the *Young Offenders Act 1997* (NSW) should be amended to refer to persons who are of or over the age of 10 years and under the age of 18 years, when an offence is committed, or alleged to have been committed, and under the age of 21 years when dealt with under the Act.

OFFENCES COVERED BY THE YOA

Current scope of the YOA

4.7 In order for the diversionary options of the YOA to be available to a young offender, it is necessary for the offence with which the young person is charged to be covered by the YOA.[5] The YOA currently applies to summary offences[6] and to indictable offences triable summarily under the *Criminal Procedure Act 1986* (NSW) or other law prescribed under the YOA itself.[7] Many indictable offences may be dealt with summarily, including property offences, many drug offences and assaults.[8] The YOA excludes its operation in relation to specified offences.[9] These include traffic offences (if the offender is old enough to hold a permit or a licence), offences that result in death, most sexual offences, breaches of apprehended violence orders and serious drug offences.[10]

4.8 In determining whether the ambit of the YOA should be expanded, it is important to bear in mind the objects and principles of that Act, which have been set out in Chapter 2 at paragraphs 2.58-2.59. It is clear from the objects of the YOA that Parliament is committed to diversionary options, in particular youth justice conferencing, as providing a more satisfactory way of dealing with young offenders than traditional methods of punishment. And it is clear from the principles underpinning the YOA that restorative justice themes, with their emphasis on community reintegration and concern for victims, inform the operation of youth justice conferencing, in particular.

5. *Young Offenders Act 1997* (NSW) s 8.
6. *Young Offenders Act 1997* (NSW) s 8(1)(a).
7. *Young Offenders Act 1997* (NSW) s 8(1)(b).
8. See *Criminal Procedure Act 1986* (NSW) Ch 5 and Sch 1.
9. *Young Offenders Act 1997* (NSW) s 8(2).
10. *Young Offenders Act 1997* (NSW) s 8(2).

4.9 Perhaps the major reason why youth justice conferencing (the centrepiece of the YOA)[11] is thought to be a more satisfactory response to young offending than more traditional forms of punishment is that it obliges the young offender to consider fully, and take responsibility for, the consequences of his or her actions, in particular the harm caused to the victim, usually in a face-to-face encounter between offender and victim. Some empirical research suggests that the process is more effective in terms of outcome than traditional methods of punishment, with both victims and offenders showing a high level of satisfaction with the process. Chapter 7 looks at this research and evaluates conferencing more fully.

The views in submissions

4.10 There was a general consensus in the submissions received by the Commission that the scope of the YOA ought to be expanded.[12] It was argued that the YOA should cover all summary offences that may be dealt with under the CCPA (which are not "prescribed laws" for the purposes of the YOA), including drug offences, and breaches of apprehended violence orders. The consequence of expanding the offences covered by the YOA would, of course, be that the diversionary options available under the YOA, notably youth justice conferencing, would be available in relation to these offences.[13] In support of the desirability of this, the Children's Court submitted that:

> *it is the experience of the Court that many individual offences could appropriately be dealt with by conferencing in appropriate cases, especially robbery in company and robbery while armed with an offensive weapon: Crimes Act (NSW)*

11. See Chapter 7.
12. The Children's Court of New South Wales, *Submission* at 2; The Shopfront Youth Legal Centre, *Submission* at 1; The Law Society of New South Wales, Criminal Law Committee and Children's Legal Issues Committee, *Submission* at 1; New South Wales Young Lawyers – Criminal Law Committee, *Submission* at 1; National Children's and Youth Law Centre, *Submission* at 1; Legal Aid Commission of New South Wales, *Submission* at 1; Women's Legal Resource Centre, *Submission* at 1; Public Defenders, *Submission 3* at 1. The New South Wales Police Service, the Director of Public Prosecutions, the Hon Carmel Tebbutt and the New South Wales Bar Association thought that the current range of offences was generally appropriate but submitted that any jurisdictional problems with statutory provisions that permit investigating officials to levy fines on young people, such as the *Fisheries Management Act 1994* (NSW) and the *Road Transport (Driver Licensing) Act 1999* (NSW) should be corrected: The New South Wales Police Service, *Submission* at 1; Director of Public Prosecutions, *Submissions* at 1; the Hon Carmel Tebbutt, MLC, (then) Minister for Juvenile Justice, *Submission* at 1; The New South Wales Bar Association, *Submission* at 1. The Public Defenders also submitted that the YOA should be extended to fisheries and driving offences where fines are generally imposed: *Submission* at 1.
13. Under the *Children (Criminal Proceedings) Act 1987* (NSW), a young offender can be cautioned (s 33(1)(a)) but not referred to conferencing.

> *section 97(1), especially where the amount taken is below a certain value.*[14]

4.11 The NSW Police submission to the statutory review of the YOA also observed that offences for which a child can receive a penalty notice, such as traffic offences and offences related to the *Liquor Act 1982* (NSW) and the *Rail Safety Act 1993* (NSW), are not covered by the YOA.[15] The NSW Police argued that, as children do not generally have the capacity to pay monetary penalties, it is inappropriate for children to be issued with penalty notices. The review committee recommended that the YOA be extended to cover offences for which penalty notices may be issued to children.[16]

4.12 Against the weight of opinion in favour of expanding the scope of the YOA was the submission made by the New South Wales Commission for Children and Young People (CCYP).[17] The CCYP was also opposed to extension of the YOA to cover minor traffic and fisheries offences (usually victimless offences).[18] One of the principal functions of the CCYP is "to make recommendations to government and non-government agencies on legislation, policies, practices and services affecting children",[19] with priority given to vulnerable children.[20] Having regard to its statutory obligations, the CCYP opposes the expansion of the scope of the YOA to include more serious offences on the grounds of public accountability and public perception. While the CCYP strongly supports youth justice conferencing, it submitted that as the community has a legitimate interest in accountability for criminal behaviour, including that of young people, the very public setting of a court is the appropriate venue for such accountability to take place. The CCYP argued that if the current range of offences under the YOA were widened to include more serious offences, the nature of the process would damage the credibility of youth justice conferencing.[21] The CCYP did, however, support the application of youth justice conferencing to traffic offences that involve significant personal injury or property damage.[22]

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14. The Children's Court of New South Wales, *Submission* at 3.
15. The exceptions to this are offences under s 11C and s 28F of the *Summary Offences Act 1988* (NSW) or, after the repeal of the latter section, under s 199 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW): *Young Offenders Regulation 2004* (NSW) cl 22.
16. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997*, Recommendation 3. The NSW Government supported this recommendation: New South Wales, *Government Response to Report on the Review of the Young Offenders Act 1997* (tabled in New South Wales Legislative Assembly, 24 June 2004).
17. NSW Commission for Children and Young People, *Submission* at para 4.02.
18. NSW Commission for Children and Young People, *Submission* at para 4.09.
19. *Commission for Children and Young People Act 1998* (NSW) s 11(d). And see NSW Commission for Children and Young People, *Submission* at para 1.04.
20. *Commission for Children and Young People Act 1998* (NSW) s 12.
21. NSW Commission for Children and Young People, *Submission* at para 4.04.
22. NSW Commission for Children and Young People, *Submission* at para 4.09. It was proposed that this might be done by regulation under the *Young Offenders Act 1997* (NSW).

The Commission's view

4.13 In the objects and principles underlying the YOA, Parliament has made obvious its conviction that diversionary schemes can be a far better response to young offending than traditional court processes and punishment. The Commission strongly supports these objects and principles. While there may well be some public perception that diversionary options, such as youth justice conferencing, are a "soft option" for young offenders, our consultations, particularly with those professionally involved in youth legal or social welfare issues, persuaded us that such perceptions would not be well founded.[23]

4.14 We are persuaded, rather, that the process of an offender facing his or her victim is, generally, both daunting for the offender and empowering for the victim.[24] This is particularly so where both offender and victim are young people, as is often the case.[25] We also reiterate our previous support for the appropriate involvement of victims in the criminal justice system,[26] and note that conferencing provides a particularly suitable occasion for such involvement. For these reasons, the Commission takes the view that, in principle, the application of the diversionary options in the YOA ought to be made applicable to all offences except those that cannot appropriately be made the subject of diversionary options (especially conferencing).

4.15 Extending the scope of the YOA would also address the NSW Police submission to the statutory review of the YOA pointing out that larceny involving theft from a shop, a generally minor offence, is currently ineligible for a warning, as it is not a summary offence.[27] The NSW Police commented that a warning would be

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23. Research carried out for the New Zealand Ministry of Social Development on family group conferences concluded that "young offenders did not find the family group conference to be an easy option. At the conference, they were required to face their victims and their family and they were expected to apologise and to repair the harm that they had done. Going to court and receiving an order, according to some young people, was much simpler and easier": G Maxwell, J Robertson, V Kingi, A Morris and C Cunningham, *Achieving Effective Outcomes in Youth Justice: An Overview of Findings* (New Zealand, Ministry of Social Development, 2004) at 33.
24. The Legal Aid Commission, for example, submitted that "[t]he conference process is arguably more difficult and personally demanding than receiving a probation order or a suspended sentence.": Legal Aid Commission of New South Wales, *Submission* at 2.
25. See C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia*, (Sydney, Oxford University Press, 2002) at 370.
26. See New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996) at para 2.16.
27. New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* (2002) at 41. Larceny is an indictable offence, triable summarily unless the prosecutor elects otherwise where the value of the property is less than $5,000, or unless the prosecutor or person charged elects otherwise where the value of the property exceeds $5,000: *Criminal Procedure Act 1986* (NSW), Sch 1, Tables 1 and 2.

appropriate in many instances of this offence, particularly where the value of the stolen property is low.[28]

4.16 However, after careful consideration of the further aspect of the NSW Police submission,[29] we are unable to agree that penalty notice offences should be brought within the YOA. On the face of it, it is a fair and sensible suggestion to enable young offenders to escape the burden of fines that stretch, or are beyond, their resources. Our concern is that the practical effect of extending the diversionary options of the YOA to penalty notice offences would be to net-widen and bring a young person further into the criminal justice system than they otherwise would be.

4.17 At present, an officer with the authority to issue a penalty notice can, in his or her discretion, simply warn the young person about the offending behaviour and thereby bring the incident to a close. A warning given under the YOA is recorded[30] and kept on the COPS (Computerised Operational Policing) computer system maintained by NSW Police.[31]

4.18 In order to caution a young person under the YOA (he or she must admit the offence and consent to the caution[32]), the young person must attend at a police station,[33] a record of the caution is kept and the tally of a maximum of three cautions begins to run. Once a child has been dealt with by caution on three or more occasions, he or she is no longer entitled to be dealt with by caution in relation to an offence.[34] Furthermore, if penalty notices were covered by the YOA, the gatekeepers under the Act would need to be expanded to include such people as railway ticket inspectors. It is difficult to see how this would work in practice.

4.19 In Chapter 8, we explore the problem of fines, and a young person's ability to pay, in greater detail. We have recommended that the Children's Court be given the power to review the amount specified in any penalty notice in the light of the young offender's means.

4.20 Otherwise, we believe that the only reason why an offence should be excluded from the operation of the YOA is that it is so serious that, even in the case of a young offender, it cannot appropriately be dealt with by a diversionary option.

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28. The Review agreed with this submission and recommended that this offence be included in those eligible to be dealt with by warning: New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997*, Recommendation 2. The New South Wales Government did not support the recommendation, believing that the existing responses of cautioning and conferencing, are satisfactory: New South Wales, *Government Response to Report on the Review of the Young Offenders Act 1997.*
29. See para 4.11.
30. *Young Offenders Act 1997* (NSW) s 17(1).
31. *Young Offenders Regulation 2004* (NSW) cl 14(2).
32. *Young Offenders Act 1997* (NSW) s 19(b) and (c).
33. *Young Offenders Act 1997* (NSW) s 26(2). A caution can be given at a place other than a police station if appropriate: *Young Offenders Act 1997* (NSW) s 26(3).
34. *Young Offenders Act 1997* (NSW) s 20(7).

4.21 The current legislation recognises the legitimate community concern that serious offences ought not to be the subject of diversionary options, even in the case of young offenders, by:

- *the general exclusion of all indictable offences that cannot be dealt with summarily under Chapter 5 of the Criminal Procedure Act 1986 (NSW); and*
- *the specific exclusion of particular offences under s 8(2) of the YOA itself.*

The general exclusion

4.22 The Commission considers that the current legislative framework of criminal justice in NSW does not identify the offences that ought generally to be excluded from the operation of the YOA with sufficient precision. The general exclusion of all indictable offences that cannot be dealt with summarily under Chapter 5 of the *Criminal Procedure Act 1986* (NSW) seems inappropriate. The classification of offences as indictable or summary (and if indictable, nevertheless triable summarily) is made to identify the seriousness of offences for more general purposes of the criminal law, such as determining the mode of trial or the jurisdiction of courts. It is not directed to the specific question whether the classification is appropriate in the context of the impact of the criminal justice system on young offenders, especially the question whether the offence is, or should be, amenable to diversion under the YOA.

4.23 In the CCPA, however, Parliament has addressed that specific question by creating a category of "serious children's indictable offences" for the purposes of that Act. "Serious children's indictable offences" refer to: homicide; offences punishable by imprisonment for life or for 25 years; a number of serious sexual offences (including attempts to commit such offences); offences relating to the manufacture or sale of firearms punishable by imprisonment for 20 years; and, by regulation,[35] certain sexual offences where the victim is under ten years of age.[36]

4.24 All these offences must be dealt with according to law,[37] thus excluding the operation of diversionary options under the YOA. Except for committal proceedings, the Children's Court has no jurisdiction to hear and determine "serious children's indictable offences",[38] which means that these offences must be heard in the District or Supreme Courts.

4.25 A general exclusion of "serious children's indictable offences" as defined in the CCPA from the operation of the YOA is justified in terms of the objects and principles of the YOA. In addition, it creates a consistency of approach between the YOA and

35. See *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1)(e).
36. *Children (Criminal Proceedings) Regulation 2005* (NSW) cl 4, bringing the offences under s 78I and 80A of the *Crimes Act 1900* (NSW) within the definition of "serious children's indictable offence".
37. *Children (Criminal Proceedings) Act 1987* (NSW) s 17.
38. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1) and (2).

CCPA, generally aligning that approach with the jurisdiction of the Children's Court. Further, a general exclusion in the terms we propose takes account of the legitimate considerations of accountability outlined in the submission of the CCYP.[39]

4.26 We note that the statutory review of the YOA recommended that "the range of offences covered by the Act be extended to cover all offences for which the Children's Court has jurisdiction".[40] While the Government did not support this recommendation, this was by reason of the seriousness of some of the offences dealt with under the CCPA.[41] The Commission is firmly of the view, for the reasons outlined above, that the YOA should be reformed as recommended in Recommendation 4.2 below. Excluding serious children's indictable offences should meet the government's objections to enlarging the scope of the YOA.

4.27 As well, it is open to Parliament to legislate from time to time to exclude further specific offences from the operation of an Act. Parliament may legitimately want to exclude offences from the operation of the YOA without expanding the category of "serious children's indictable offence" under the CCPA, that is, without ousting the jurisdiction of the Children's Court.

Recommendation 4.2

Section 8(1) of the *Young Offenders Act 1997* (NSW) should be amended to provide that all offences committed, or alleged to have been committed, by children are covered by the Act, except serious children's indictable offences, as defined in s 3 of the *Children (Criminal Proceedings) Act 1987* (NSW), and except as otherwise provided by the *Young Offenders Act 1997* (NSW).

Specific exclusions

4.28 Section 8(2) of the YOA excludes identified specific offences from its operation. The scope of the exclusions in section 8(2) of the Act was the subject of comment in submissions and consultations. The comments focused on the exclusion, in s 8(2)(e), of offences under Part 15A of the *Crimes Act 1900* (NSW) (apprehended violence order offences); and on the treatment of offences relating to drugs in s 8(2)(e1), (f) and 8(3).

4.29 ***Apprehended Violence Orders.*** Section s 8(2)(e) of the YOA excludes offences under Part 15A of the *Crimes Act 1900* (NSW). Offences under Pt 15A are:

39. See para 4.12.
40. New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997*, Recommendation 1. Although the report was published in October 2002, it was not tabled in Parliament until 24 June 2004: see New South Wales Legislative Assembly, Votes and Proceedings, Hansard at 907.
41. New South Wales, *Government Response to Report on the Review of the Young Offenders Act 1997.*

- *breaches of an Apprehended Violence Order ("AVO");*[42] *and*
- *stalking and intimidation.*[43]

4.30 AVOs are the primary legal means by which people may seek protection against threatened acts of personal (including domestic) violence.[44] It should be noted here, however, that they do not, and should not, act as a replacement for the laying of criminal charges in serious cases of violence, abuse or harassment. As the name suggests, these orders are intended to act as a circuit breaker, to apprehend or prevent existing or potentially violent situations from escalating. AVOs can be obtained relatively quickly and easily. Any person may apply to the local court,[45] for an order against another person if he or she suspects that some form of personal violence, or other abuse, harassment or intimidation, is imminent. A police officer may apply for an AVO on behalf of an applicant, and *must* apply for an order where the officer suspects that a domestic violence offence[46] or a stalking offence[47] has been, or is likely to be, committed, or where the applicant is under the age of 16 years. [48]

4.31 Submissions and consultations tended to favour bringing breaches of AVOs within the ambit of the YOA.[49] The Director of Youth Justice Conferencing proposed the inclusion of AVOs generally (not just breaches) within the operation of the YOA as

42. *Crimes Act 1900* (NSW) s 562I.
43. *Crimes Act 1900* (NSW) s 562AB.
44. See New South Wales Law Reform Commission, *Apprehended Violence Orders* (Report 103, 2003) for a detailed treatment of the subject by the Commission.
45. Where the applicant is under 18 years of age, the matter will be dealt with in the Children's Court: *Crimes Act 1900* (NSW) s 562G(1)(b). Applications in both the Local Court and the Children's Court are made by way of complaint orally or in writing and substantiated on oath: see *Crimes Act 1900* (NSW) s 562C(1).
46. A domestic violence offence is a personal violence offence committed within a domestic relationship, as defined in s 4 of the *Crimes Act 1900* (NSW).
47. *Crimes Act 1900* (NSW) s 562C(3). Section 562AB provides that a person who stalks or intimidates another person with the intention of causing that person to fear physical or mental harm, is guilty of an offence. For the purposes of s 562AB, a person intends to cause fear of physical or mental harm if he or she knows that the conduct is likely to cause fear in the other person: s 562AB(3). The prosecution is not required to prove that the person alleged to have been stalked or intimidated actually feared physical or mental harm: s 562AB(4).
48. *Crimes Act 1900* (NSW) s 562C(2A).
49. Public Defenders, *Submission* at 1; The Shopfront Youth Legal Centre, *Submission* at 2; New South Wales Young Lawyers – Criminal Law Committee, *Submission* at 1; Legal Aid Commission of New South Wales, *Submission* at 1. The Children's Court of New South Wales, *Submission* at 3. The Law Society of New South Wales, Criminal Law Committee and Children's Legal; Issues Committee, *Submission* at 1; although, it submitted that conferencing would be inappropriate for many domestic violence offences; see also para 4.33. The National Children's and Youth Law Centre submitted that trivial breaches of domestic violence orders by young people against their siblings or parents should be covered by the YOA where a caution or a conference would be a more appropriate punishment: *Submission* at 2. The Women's Legal Resource Centre submitted that any violent offences should only be covered by the YOA at the discretion of a judicial officer: *Submission* at 1.

early as November 1999.[50] A number of people told the Commission, both in submissions and in consultations, that many AVOs taken out against young people do not necessarily relate to actual or potential violence by the young person. Rather, it was asserted that they are sometimes used as a behaviour management tool by parents.[51]

4.32 Similarly, it was suggested that many breaches of AVOs that have been taken out against young people are insignificant.[52] A number of respondents to the statutory review of the YOA made the same point and argued that such breaches could be appropriately dealt with by a caution or conferencing.[53] The Senior Children's Magistrate submitted to the review that the YOA should cover AVOs where there is no actual violence, and the victim is an adult and agrees to the referral.[54]

4.33 Other submissions to the review of the YOA, while advocating inclusion of some AVO matters, noted that conferencing may be inappropriate for many domestic violence offences, as it may compound the abuse already suffered by the victim.[55]

4.34 The review found that:

> *While it may be appropriate for certain breaches of AVOs to be dealt with under the Act (such as the breach of a condition not to come with[in] a certain distance of an applicant's home/workplace), it would not be appropriate for the Act to cover breaches where actual violence has occurred.*[56]

50. J Bargen, "Young Offenders and the New Options in Youth Justice" (1999) (10) *Law Society Journal* 37 at 54.
51. Legal Aid Commission of New South Wales, *Submission* at 2; Law Society of New South Wales, *Submission* at 1. The Shopfront Youth Legal Centre also made this comment in its submission to the committee reviewing the YOA: New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 42.
52. Shopfront Youth Legal Centre, *Submission* at 2. It has also been suggested to the Commission that applications for AVOs frequently relate to schoolyard incidents that are not serious, with bullying between girls being common grounds for seeking an AVO (which doesn't necessarily mean that the application is granted). In its submission to the statutory review of the *Young Offenders Act 1997*(NSW), Shopfront Youth Legal Centre commented that "AVOs are often taken out by friends who have had a falling out with the young person": New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 42.
53. New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 42.
54. New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 42.
55. New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 42.
56. New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 42.

4.35 The review concluded that the YOA should be extended to enable certain breaches of AVOs to be dealt with under the Act, and that this could be achieved by extending its scope to cover all offences for which the Children's Court has jurisdiction

4.36 ***Drug Offences.*** Some submissions made specific reference in relation to widening the scope of the YOA to include drug offences.[57] Likewise, a number of submissions to the statutory review of the YOA submitted that the YOA should cover "all drug offences capable of being dealt with summarily by the Children's Court".[58]

4.37 Currently, the bulk of drug offences are excluded from the operation of the YOA pursuant to s 8(2)(e1) and (f).[59] Exceptions to these exclusions are contained in s 8(3):

> *(3) An offence under section 23 (1) (a) or (c) of the Drug Misuse and Trafficking Act 1985 is covered by this Act if in the opinion of the investigating official or prosecuting authority:*
>
> *(a) the offence involves not more than half the small quantity applicable to the prohibited plant within the meaning of the Drug Misuse and Trafficking Act 1985, or*
>
> *(b) there are exceptional circumstances in that:*
>
> *(i) the offence involves more than half, but not more than the total, small quantity applicable to the prohibited plant within the meaning of the Drug Misuse and Trafficking Act 1985, and*
>
> *(ii) it would be in the interests of rehabilitation, and appropriate in all the circumstances, to deal with the matter under [the YOA].*

4.38 A number of submissions suggested that diversionary options under the YOA, especially youth justice conferencing, are a particularly suitable response to drug

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57. Legal Aid Commission of New South Wales, *Submission* at 1; The Shopfront Youth Legal Centre, *Submission* at 2; New South Wales Young Lawyers, *Submission* at 1; National Children's and Youth Law Centre, *Submission*, at 1; and Law Society of New South Wales, *Submission* at 2. The submission from the Children's Court proposed expanding the jurisdiction to include all matters other than a "serious children's indictable offence", thereby including those drug offences that are not serious children's indictable offences; and the Youth Justice Advisory Committee endorsed the submission of the Legal Aid Commission without specific reference to drug offences.
58. These included submissions from the Law Society of New South Wales and the Shopfront Youth Legal Centre. New South Wales Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 40.
59. Section 8(2)(e1) of the *Young Offenders Act 1997* (NSW) excludes from the operation of the Act offences under Pt 2 Div 1 of the *Drug Misuse and Trafficking Act 1985* (NSW) that, in the opinion of the investigating official or prosecuting authority, involve more than a small quantity of a prohibited drug as defined in the latter Act; s 8(2)(f) excludes from the operation of the *Young Offenders Act 1997* (NSW) certain other offences under Pt 2 Div 2 of the *Drug Misuse and Trafficking Act 1985* (NSW).

offences committed by young people.[60] The Legal Aid Commission was in favour of bringing an increased range of drug offences within the ambit of the YOA if the range of persons able to attend a caution were expanded to include health and drug counselling professionals.[61]

The Commission's view

4.39 For three interrelated reasons, the Commission has decided that it cannot make any recommendations in respect of the particular offences that s 8(2) ought to exclude from the operation of the YOA.

4.40 First, and most importantly, it is within the particular provenance of Parliament to identify from time to time which particular offences are of that degree of seriousness that they should be excluded from the operation of the diversionary options of the YOA. Secondly, it follows that cogent reasons or evidence are needed to support any suggestion that an offence currently listed in s 8(2) is inappropriately excluded from the operation of the YOA. Thirdly, whether or not an offence is of such a nature that it ought not to be conferenced ultimately involves an analysis of the overall objectives of that offence in the context of the criminal law. That task is more appropriate to a review of the offence in question. Taken as a whole, arguments put forward in submissions and consultations, as well as our own researches, have failed to persuade us that a case has been made out for adding any of the offences currently listed in s 8(2), particularly offences under Part 15A of the Crimes Act and drug offences.

4.41 Parliament's decision to exclude offences under Part 15A of the Crimes Act from the YOA reflects the potential seriousness of stalking, intimidation or breach of an AVO, as well as that such offences are often serious in fact. That seriousness is grounded in actual or threatened violence, often in a domestic context. And, while Parliament envisages that the degree of violence involved in offences falling within the YOA is a factor relevant to determining whether or not such offences are appropriately subject to diversion,[62] it has, at the same time, deliberately chosen to exclude Pt 15A offences from the operation of the YOA. This is explicable considering that the focus of Part 15A is on domestic violence offences, for which conferencing can be seen as generally inappropriate.

4.42 Generally, attempts to mediate disputes where violence is present are considered inappropriate.[63] However, where one of the parties to the dispute is a child

60. The Shopfront Youth Legal Centre, *Submission* at 2; The Law Society of New South Wales, Criminal Law Committee and Children's Legal; Issues Committee, *Submission* at 2; National Children's and Youth Law Centre, *Submission* at 2; Legal Aid Commission of New South Wales, *Submission* at 1; Public Defenders, *Submission 3* at 1.
61. Legal Aid Commission of New South Wales, *Submission* at 2.
62. *Young Offenders Act 1997* (NSW) s 20(3)(b), 37(3)(b) and 40(5)(b).
63. See New South Wales Law Reform Commission, *Apprehended Violence Orders* (Report 103, 2003) at para 5.28; New South Wales Law Reform Commission, *Community Justice Centres* (Report 106, 2005) at para 4.31-4.74.

who has committed or threatened violence, different considerations apply.[64] Therefore, our conclusion that Parliament's decision to exclude breaches of AVOs from the availability of warnings, cautions and conferencing should stand, would not necessarily preclude recourse to mediation. Where there is a dispute involving a young person and there is an AVO in the background (but not a breach of an AVO)[65] and providing certain factors are present,[66] the parties could take their dispute to, say, a Community Justice Centre or Relationships Australia, or use some other appropriate conflict resolution mechanism.

4.43 In the case of drug offences, their fairly general exclusion from the YOA no doubt reflects a much broader governmental policy attempting to deal with such offences in a holistic fashion. Thus, s 8(2)(e1) of the YOA[67] was passed in response to the 1999 NSW Drug Summit.[68]

4.44 Furthermore, in response to the Drug Summit, the NSW Government established the NSW Youth Drug and Alcohol Court pilot program in July 2000, especially to target young offenders with drug and alcohol use problems.[69] While the offences that the court processes are obviously not confined to drug offences, the program is tailor-made to address the "wide range of young offenders' needs and problems in a holistic way through intensive case management".[70]

4.45 Moreover, we note that, in so far as drug offences have unidentified victims, the restorative justice objectives of the YOA may be incapable of full achievement. Otherwise, while we sympathise with the view that it seems sensible to use, or at least to trial the use of, diversionary options as a response to drug offences in the case of young offenders, we have no basis for making recommendations to this effect.

4.46 In the Commission's view, it is nevertheless appropriate that Parliament should reflect on the continuing justifications for the current exclusions in s 8(2) of the YOA when considering its response to the recommendations in this report, particularly Recommendation 4.2.

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64. NSWLRC Report 106 at para 4.48.
65. See NSWLRC Report 106 at para 4.48.
66. In our report, *Community Justice Centres*, the Commission nominated ten factors that should be taken into account when considering whether a particular dispute is suitable for mediation, including such things as the safety of the parties and the imbalance in bargaining power: NSWLRC Report 106, Recommendation 7.
67. The section is summarised in footnote 58 above.
68. See *Drug Summit Legislative Response Act 1999* (NSW) Sch 3.3. (Schedules 1-3 have since been repealed.)
69. New South Wales, *New South Wales Drug Summit 1999 - Government Plan of Action* (Sydney, 1999), Recommendation 6.11.
70. T Eardley, J McNab, K Fisher and S Kozlina, with J Eccles and M Flick, *Evaluation of the New South Wales Youth Drug Court Pilot Program* (Report 8/04, The University of New South Wales Social Policy Research Centre, 2004), Executive Summary at ii.

4.47 The Commission agrees with the suggestion of the Legal Aid Commission to expand the range of persons able to attend a caution to include health and drug counselling professionals. We recommend that this should apply not just to cautioning but conferencing as well.

Recommendation 4.3

Sections 28 and 47(2) of the *Young Offenders Act 1997* (NSW) should be amended to include reference to a health and drug counselling professional where a child has been charged with an offence under the *Drugs Misuse and Trafficking Act 1985* (NSW).

Exclusions in respect of particular diversionary options

4.48 The discussion in paragraphs 4.28-4.46 considers the exclusion from the YOA of specific offences identified by Parliament. Parliament may also wish to identify further the particular diversionary options available in relation to specific offences.

4.49 Cautions[71] and conferencing[72], but not warnings, are available in respect of all offences covered by the YOA, other than offences excluded from those options by regulation.[73] However, warnings (which are the least harsh diversionary option) are only available where the offence is a "summary offence covered by this Act",[74] unless the offence is otherwise excluded by regulation. There are currently no such offences excluded by regulation.

4.50 The Commission recognises that warnings should only be a diversionary option in less serious offences, but, for the reasons pointed out in paragraph 4.22, the fact that an offence is summary may not be the most appropriate way of identifying relevant offences for the purpose of determining whether they can attract warnings. It would be preferable to adopt the YOA's approach to cautions and conferencing and to provide that warnings may be given in respect of all offences covered by the Act except those prescribed by regulation. This recommendation does not, of course, restrict the discretion of an investigating official to refuse to deal with the matter by a warning where it is not in the interests of justice to do so.[75] It does, however, require the identification by regulation of offences that are not appropriately dealt with by means of a warning.

Recommendation 4.4

71. *Young Offenders Act 1997* (NSW) s 18.
72. *Young Offenders Act 1997* (NSW) s 35.
73. A caution may not (other than in exceptional circumstances) be given for an offence under s 10 of the *Drug Misuse and Trafficking Act 1985* (NSW) if it involves more than half of the small quantity of cannabis leaf within the meaning of that Act: *Young Offenders Regulation 2004* cl 16(1).
74. *Young Offenders Act 1997* (NSW) s 13.
75. *Young Offenders Act 1997* (NSW) s 14(2)(b).

Section 13 of the *Young Offenders Act 1997* (NSW) should be amended to provide that a warning may be given for an offence covered by the Act, other than an offence prescribed by the regulations for the purposes of the section.

5. The Diversionary Scheme of the YOA

- Introduction
- Gatekeepers
- Admissions and legal advice

INTRODUCTION

5.1 The *Young Offenders Act 1997* (NSW) ("YOA") establishes a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences that fall within the ambit of the Act.[1] The diversionary procedures available are: to give a warning; to give a caution; and to hold a youth justice conference.[2]

5.2 This chapter examines the scheme generally, focusing on: the role of "gatekeepers" under the YOA; admissions necessary to qualify for a caution or conferencing; and legal advice given to young offenders who may be eligible for diversion. Chapter 6 separately considers cautions and Chapter 7 focuses on the most serious form of diversion, youth justice conferencing, and the resulting outcome plans.

GATEKEEPERS

5.3 The YOA provides for "gatekeepers" to its diversionary scheme, that is, people whose discretionary decisions determine a young offender's entry to the levels of diversion. These are: investigating officials; specialist youth officers ("SYO"); the Office of the Director of Public Prosecutions ("DPP"); and Children's Court magistrates, in that order. The role of these gatekeepers is to ensure that a young offender is dealt with by the appropriate option available under the Act. In particular, their role is to ensure that young offenders are not sentenced by courts where they are more appropriately dealt with by a diversionary option.

5.4 Nancy Hennessy, in her report to the Youth Justice Advisory Committee on the role of gatekeepers, identified some ways in which the YOA addresses the objective of diverting appropriate matters away from court.[3] These include:

- stating principles in the Act which are intended to underpin its operation;
- listing factors in the Act which gatekeepers must take into account when making decisions;
- appointing specialist police to make decisions under the Act;
- providing that a magistrate who decides that a caution or conference is more appropriate than a court hearing, can caution the young person on the spot or refer the matter for a conference;
- providing for an independent umpire (the DPP) to arbitrate in certain cases where there is a disagreement about the decision; and

1. *Young Offenders Act 1997* (NSW) s 3(a). See Chapter 4 for an exploration of the range of offences covered by the YOA.
2. *Young Offenders Act 1997* (NSW) s 9(1).
3. N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)* (Report to the Youth Justice Advisory Committee, 1999) at para 33.

- enacting statutory time limits to increase the likelihood that decisions are made and implemented in a timely manner and that the process is flexible enough to respond in certain circumstances if a young person changes his or her mind.[4]

5.5 The expansion of the scope of the YOA recommended in Chapter 4 would not remove the public accountability inherent in the discretion to refer (or not to refer) to diversionary options under the YOA. The exercise of discretion by these gatekeepers should continue to ensure that matters obviously inappropriate to be dealt with under the YOA will continue to be dealt with by the Court.

The investigating official

5.6 The YOA defines an investigating official as a "police officer, or a person appointed by or under an Act and whose functions include functions in respect of the prevention or investigation of offences, prescribed by the regulations".[5] Currently, the investigating official has primary responsibility for making determinations under the YOA before a court attendance notice is issued,[6] or before issuing a penalty notice in respect of offences prescribed by the regulations.[7] First, the investigating official must determine whether the offence falls within the operation of the YOA.[8] If it does, he or she must determine whether to deal with the matter by way of warning or caution, or to refer the matter to an SYO for possible conferencing.[9]

5.7 The gatekeeping function has obvious relevance to the sentencing of young people, as decisions made by a police officer in this capacity bear directly upon whether a young person will face a sentencing court.[10]

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4. Hennessy at para 33.
5. *Young Offenders Act 1997* (NSW) s 4.
6. *Children (Criminal Proceedings) Act 1987* (NSW) s 8(1): "Criminal proceedings should not be commenced against a child otherwise than by way of court attendance notice."
7. *Young Offenders Act 1997 (NSW)* s 9(2A). Pursuant to cl 22 of the *Young Offenders Regulations 2004* (NSW), there are two offences currently prescribed for the purposes of the diversionary scheme established by the YOA:
   1. *Offences pursuant to s 11C of the Summary Offences Act 1988 (NSW) relating to custody of a knife in a public place or school; and*
   2. *Offences pursuant to s 199 of the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) relating to a failure to comply with a reasonable direction given in a public place.*

   Cl 22 of the *Young Offenders Regulation 1994* (NSW) provides that a s 199 offence is prescribed for the purposes of the diversionary scheme established by the YOA.
8. *Young Offenders Act 1997* (NSW) s 9(2)(a)
9. *Young Offenders Act 1997* (NSW) s 9(2)(b) and 14(4).
10. Chapter 3 expands the discussion of how the *Young Offenders Act 1997* (NSW) structures police discretion.

Part 3 of the YOA - warnings

5.8 It is the investigating official who conducts all stages of the warning process provided for under Part 3 of the YOA. This process involves:

- determining whether the offence is one for which a warning may be given;[11]
- determining whether a child is entitled to have the matter dealt with by way of warning – this entails asking whether violence was involved, and making a determination as to whether a warning would be in the "interests of justice";[12]
- giving the warning;[13]
- explaining the purpose, nature and effect of the warning;[14] and
- making a record of the warning.[15]

5.9 The 2002 statutory review of the YOA undertaken by the NSW Attorney General's Department recommended that investigating officials have the power to notify in writing a young offender's parent or guardian that a warning has been given, having regard to the effect that this might have on the young person's welfare.[16] The review did not give its reasons for recommending this, other than noting that this was suggested by the NSW Police as a way of formalising what is already an informal practice and providing the police with direction. The government's response was to call for further refinement of the proposal and consultation with the Commissioner for Children and Young People, the Department of Community Services and the Office of the NSW Privacy Commissioner.[17]

5.10 As this is not a matter on which the Commission has consulted, we express no concluded opinion on this proposal. However, we are concerned that, in some circumstances, notification of parents could lead to double punishment of the young offender - one at warning and one at home. If routine notification is to occur, it is essential that protocols be developed to protect children already at risk in the home environment. In principle, however, obtaining parental co-operation is a desirable goal.

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11. *Young Offenders Act 1997* (NSW) s 13.
12. *Young Offenders Act 1997* (NSW) s 14.
13. *Young Offenders Act 1997* (NSW) s 15.
14. *Young Offenders Act 1997* (NSW) s 16.
15. *Young Offenders Act 1997* (NSW) s 17.
16. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* ("Report on the Review of the Young Offenders Act 1997"), Recommendation 23. Although the report was published in October 2002, it was not tabled in Parliament until June 2004: see New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 24 June 2004 at 907.
17. New South Wales Government, *Response to the Report on the Review of the Young Offenders Act 1997* ("Response to the Report on the Review of the Young Offenders Act 1997") at 10: see New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 24 June 2004 at 907.

Part 4 of the YOA - cautions

5.11 Part 4 of the YOA deals with a "formal police caution".[18] The investigating official is the primary (but not sole) authority in the operation of that Part. The responsibilities of the investigating officer during the cautioning process include:

- determining whether the offence is one for which a caution may be given;[19]
- determining whether a child has admitted the offence,[20] and consents to the caution;[21]
- determining whether the child is entitled to be given a caution – this involves evaluating the "interests of justice" in light of the seriousness of the offence, the degree of violence, the harm caused to any victim, the child's previous record, and anything else the official thinks appropriate;[22]
- making detailed explanations to the child as to the offence and the caution;[23]
- giving a caution notice to the child;[24] and
- making a record of the caution.[25]

5.12 If the investigating official is a police officer authorised in writing by the Commissioner of Police for the purposes of s 27, he or she may personally give the caution, or request a respected community member to do so.[26] If the investigating official is not giving the caution, he or she is entitled to be present for the caution.[27]

5.13 If the investigating official thinks that the situation requires a more serious sanction than a caution, despite the young offender's entitlement to a caution,[28] he or she must refer the matter to an SYO to consider whether conferencing is appropriate.[29] Prior to the 2002 amendments to the YOA,[30] the investigating official did not play a primary role in the determination of whether a conference should subsequently be held, or in convening a conference. Since then, however, an SYO

18. *Young Offenders Act 1997* (NSW) s 4 and 19.
19. *Young Offenders Act 1997* (NSW) s 18, and 19(a).
20. *Young Offenders Act 1997* (NSW) s 19(b).
21. *Young Offenders Act 1997* (NSW) s 19(c).
22. *Young Offenders Act 1997* (NSW) s 19(d) and 20.
23. *Young Offenders Act 1997* (NSW) s 22.
24. *Young Offenders Act 1997* (NSW) s 30.
25. *Young Offenders Act 1997* (NSW) s 33.
26. *Young Offenders Act 1997* (NSW) s 27. In particular, the legislation provides that a respected member of the Aboriginal community may give the caution if the young offender is a member of that community.
27. *Young Offenders Act 1997* (NSW) s 28(j).
28. See *Young Offenders Act 1997* (NSW) s 20.
29. *Young Offenders Act 1997* (NSW) s 21(2). If a conference is subsequently convened, the investigating officer is entitled to be a participant: *Young Offenders Act 1997* (NSW) s 47(g). In this capacity, he or she may assist the conference to arrive at decisions and recommendations which may be contained in an outcome plan, which may impose various sanctions upon the child: *Young Offenders Act 1997* (NSW) s 52.
30. *Young Offenders Amendment Act 2002* (NSW) s 3 and Sch 1, cl 5 and 6.

and/or the DPP must consult with the investigating official before making any decision as to conferencing, unless it is impracticable to do so.[31]

Other responsibilities

5.14 Finally, the investigating official may be called upon to continue or commence proceedings in situations where:

(i) the YOA does not cover the offence;[32]

(ii) the SYO or the DPP determine, or the conference administrator, SYO and investigating official agree, that proceedings should be commenced against the child;[33]

(iii) a decision is otherwise made not to give a caution or hold a conference;[34]

and, in respect of an offence where an applicable limitation period for those proceedings has expired, where:

(iv) a child elects not to proceed with a caution or a conference, or fails to attend a caution or conference;[35]

(v) the conference participants fail to produce a plan in accordance with the YOA;[36] or

(vi) the child fails to complete the outcome plan satisfactorily.[37]

The specialist youth officer

5.15 An SYO is defined as "a member of the Police Service appointed as a specialist youth officer for the purposes of this Act by the Commissioner of Police".[38] As mentioned above, when an investigating official determines that a matter should be dealt with other than by warning or caution, the matter must be referred to an SYO. The SYO then makes a determination as to the appropriate way to proceed in the matter, whether by conferencing, cautioning or commencing proceedings against the young offender.[39]

5.16 Initially, there was some conflict between the role of the investigating official and that of the SYO. The NSW Police has since acknowledged that SYOs are the only officers authorised under the YOA to make a decision to commence proceedings

31. *Young Offenders Act 1997* (NSW) s 38(4) and 40(6).
32. *Young Offenders Act 1997* (NSW) s 9(2)(a).
33. *Young Offenders Act 1997* (NSW) s 38(3) and 41(8).
34. *Young Offenders Act 1997* (NSW) s 64(1)(a). This applies even where the applicable limitation period has expired.
35. *Young Offenders Act 1997* (NSW) s 64(1)(b).
36. *Young Offenders Act 1997* (NSW) s 64(1)(c).
37. *Young Offenders Act 1997* (NSW) s 64(1)(d).
38. *Young Offenders Act 1997* (NSW) s 4.
39. *Young Offenders Act 1997* (NSW) s 38. Note that, pursuant to s 38(4), consideration by the SYO must now, where practicable, be taken in consultation with the investigating official.

against young people,[40] and have remedied the problem of investigating officers laying charges on their own initiative by making changes to the reporting system.[41] The Computerised Operational Policing System (COPS), used to record and report criminal incidents, has been modified so that only SYOs are authorised to accept charges.

5.17 The SYO's primary role is to determine the suitability of the case for conferencing. Under s 37(4) he or she must, within 14 days of the referral, determine:

(i) whether the offence is one for which a conference may be held;[42]

(ii) whether the child admits the offence,[43] and consents to the conference;[44] and

(iii) whether the child is entitled to be dealt with by way of conference – this involves evaluating the "interests of justice" in light of the seriousness of the offence, the degree of violence, any harm caused to the victim, the child's previous record, and any matter which the SYO thinks appropriate.[45]

5.18 If the SYO determines that a conference ought to be held, he or she must refer the matter to a conference administrator, who will arrange for the conference to be held.[46] Alternatively, the SYO may arrange for a caution to be given to the young person, or refer the matter back to the investigating official or other appropriate authority to commence proceedings.[47]

5.19 While the SYO does not personally convene the conference, he or she must provide the young person with explanations of the alleged offence and the conference process.[48] In addition, the SYO is entitled to attend the conference,[49] and thereby participate in the creation of an outcome plan.[50]

5.20 The SYO retains the right to determine, at any time before the conference is held, that it is not in the interests of justice to deal with the matter by way of conference. If so determined, the SYO then arranges for proceedings to be commenced, or a caution to be given, as appropriate.[51] If the SYO has been authorised by the Commissioner of Police for the purposes of s 27, he or she may personally give a caution, or request a respected community member to do so.

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40. N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)* at para 80.
41. G Clancey and P Jackson, "The Young Offenders Act 1998 – 2001: three years of diverting young people away from court" (2001) 13(3) *Police Service Weekly* 4 at 4-5.
42. *Young Offenders Act 1997* (NSW) s 35 and 36(a).
43. *Young Offenders Act 1997* (NSW) s 36(b).
44. *Young Offenders Act 1997* (NSW) s 36(c).
45. *Young Offenders Act 1997* (NSW) s 36(d) and 37.
46. *Young Offenders Act 1997* (NSW) s 38(1).
47. *Young Offenders Act 1997* (NSW) s 38(2) and 38(3).
48. *Young Offenders Act 1997* (NSW) s 39(1).
49. *Young Offenders Act 1997* (NSW) s 47(h).
50. *Young Offenders Act 1997* (NSW) s 52.
51. *Young Offenders Act 1997* (NSW) s 44(2).

The DPP

5.21 The next level of gatekeeping under the YOA is that of the DPP. The YOA prescribes a role for the DPP substantially similar to that of the Children's Court in respect of the power to refer matters for conferencing.[52] However, there are two points of distinction.

5.22 First, the YOA provides that the DPP cannot refer a matter for conferencing unless the child's consent is obtained,[53] whereas the Court only requires that the child admits the offence.[54] Secondly, unlike the Court, the DPP has no role in approving outcome plans. Under the YOA, once the DPP refers a matter to a conference administrator, the matter joins the general stream of references, with the exception that the Commissioner of Police must be notified of the successful or unsuccessful completion of the outcome plan.[55]

5.23 The DPP has two further functions under the YOA. The first is that he or she may determine whether a child should be cautioned in respect of an offence that is covered by Part 4. He or she may do so if the child admits the offence, and consents to being cautioned.[56] If the DPP determines a caution is appropriate, he or she must refer the child for cautioning to a person authorised by the Commissioner of Police for the purposes of s 23 of the YOA.[57] A referral of a child for cautioning by the DPP joins the main stream of cautions (as opposed to those given by the Court, which need not observe the substance of Part 4). Nonetheless, the DPP retains the right to determine, at any time before the caution is given, that it is not in the interests of justice for the matter to be dealt with by way of caution.[58]

5.24 In practice, the DPP does not directly caution a young offender nor refer young offenders to a youth justice conference. This is because the DPP only deals with serious children's indictable offences. The DPP appears in the Children's Court in a committal hearing to seek to have the matter sent up to the District or Supreme Court, but does not otherwise prosecute cases that come within the ambit of the YOA. This is left to the police. The intention when the legislation was enacted was that the DPP would take over from the police the function of prosecuting all summary matters involving children.[59] As this has not occurred, the DPP's functions under s 23 and 40

52. *Young Offenders Act 1997* (NSW) s 40.
53. *Young Offenders Act 1997* (NSW) s 40(1)(c).
54. *Young Offenders Act 1997* (NSW) s 31(1).
55. *Young Offenders Act 1997* (NSW) s 56.
56. *Young Offenders Act 1997* (NSW) s 23(1). The Director of Public Prosecutions must determine whether to refer the child for a caution in light of the seriousness of the offence, the degree of violence involved, the harm caused to any victim, the child's previous record, and any other matter the Director thinks appropriate: s 23(2).
57. *Young Offenders Act 1997* (NSW) s 23(3).
58. *Young Offenders Act 1997* (NSW) s 25(3).
59. N Hennessy, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)* at para 32. See also New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 August 2002 at 4227, Speech of the Hon R Jones on the *Young Offenders Amendment Bill 2002*.

have not been exercised. However, the DPP indirectly refers a matter back to a youth justice conference administrator when acting as an umpire for disputed referrals under s 41 of the *Young Offenders Act 1997* (NSW).

The Children's Court

5.25 The Children's Court is the final gatekeeper under the YOA. Its gatekeeping responsibility was one of the focal points of the submission of the Children's Court magistrates. Given that one of the purposes of the YOA is to provide a fundamental alternative to court proceedings,[60] it is not surprising that the Children's Court currently has a limited role under the YOA.

5.26 However, the Children's Court may still employ diversionary options under the YOA, even when proceedings have already commenced and been brought before the Court. For example, it is possible that the young offender did not admit the offence until after proceedings were commenced, or would not consent to a caution or conferencing. Children's Courts may, in certain circumstances, give cautions, and may refer matters for conferences under Part 5.

5.27 The Court may give a caution if a child admits the offence, and it is one covered by the YOA.[61] The Court is bound by s 31 and s 32 (where a child is cautioned, no further proceedings may be taken in respect of the offence) and s 33 (a record of any cautions given must be made). But otherwise, Part 4 (Cautions) does not apply to a caution given by a court.[62]

5.28 The other diversionary option the Children's Court may currently use is youth justice conferencing, pursuant to Part 5 of the YOA.[63] In determining whether a matter ought to be conferenced, the court must take into account: the seriousness of the offence; the degree of violence involved; the harm caused to any victim; the number and nature of any offences committed by the child and the number of times the child has been dealt with under the Act; and any matter the Court thinks appropriate.[64]

5.29 The Court may refer a matter to conferencing at any time in the proceedings, including after a finding of guilt has been made.[65] Once the court determines that the matter should go to conference, the SYO is bypassed and the matter is referred directly to a conference administrator. The Court retains the power to determine at

60. *Young Offenders Act 1997* (NSW) s 3(a).
61. *Young Offenders Act 1997* (NSW) s 31(1). The child does not need to have consented to a caution being given.
62. *Young Offenders Act 1997* (NSW) s 31(2).
63. *Young Offenders Act 1997* (NSW) s 40(1) gives the court the power to refer a matter for a conference if:
    (a) the offence is one for which a conference may be held, and
    (b) the child admits the offence, and…
    (d) the … court is of the opinion that a conference should be held under this Part.
64. *Young Offenders Act 1997* (NSW) s 40(5).
65. *Young Offenders Act 1997* (NSW) s 40(3).

any time before the conference has been held that the matter should not be dealt with by conference.[66]

5.30 If a conference is held on referral from the Court, the conference convenor must seek the Court's approval for any agreed outcome plan.[67] If the Court does not approve the outcome plan, it may then continue proceedings.[68] Furthermore, the note to s 57 of the YOA provides that if the Court releases a child on condition that the child complies with an outcome plan, and he or she fails to do so, an authorised justice may issue a court attendance notice or warrant for the arrest of the child.[69]

5.31 Aside from the Court's power to continue proceedings, the child retains the right to elect that the matter be dealt with in Court rather than by way of either caution or conference.[70]

5.32 In its submission, the Children's Court proposed that any expanded ability to refer matters for conferencing could be complemented by providing conference administrators with the power to refer back to the Court any matter that, in the opinion of the administrator, has become unsuitable for conferencing. This might be the situation "if, for example, the case is too complex, there are too many offenders and/or victims involved, or the Conference Administrator becomes aware of facts which would make a just conference impossible".[71]

5.33 The Children's Court also suggested that the range of offences that may be referred to conferencing by the Court should be expanded so that the Court may, subject to certain exceptions, refer all matters other than a "serious children's indictable offence" as defined in s 3 of the *Children (Criminal Proceedings) Act 1987* (NSW).[72] This accords with the Commission's approach in Recommendation 4.2.

Other gatekeepers?

5.34 The statutory review of the YOA recommended that fisheries officers be included as gatekeepers under the YOA, authorised to warn or caution, or refer to conferencing, young people who are charged with offences under the *Fisheries Management Act 1994* (NSW).[73] This recommendation was prompted by a submission from the Department of Aboriginal Affairs expressing concern that an "increasing number of young ATSI people … are coming into contact with the criminal

66. *Young Offenders Act 1997* (NSW) s 44(3).
67. *Young Offenders Act 1997* (NSW) s 54(1).
68. *Young Offenders Act 1997* (NSW) s 54(2).
69. See s 41 of the *Children (Criminal Proceedings) Act 1987* (NSW).
70. *Young Offenders Act 1997* (NSW) s 25(1) and 44(1). It should be noted that s 11(1) expressly provides that the YOA does not affect any jurisdiction conferred on the Children's Court under the *Children (Criminal Proceedings) Act 1987* (NSW) or on any other court under any other law.
71. The Children's Court of New South Wales, *Submission* at 3.
72. The Children's Court of New South Wales, *Submission* at 2.
73. Report on the Review of the Young Offenders Act 1997, Recommendation 18, para 9.5.

justice system as a result of fisheries offences".[74] The government accepted the review's recommendation and noted that it is consistent with the NSW Fisheries *Indigenous Fishing Strategy*.[75]

5.35 As noted above, an investigating official is defined by the YOA to mean a police officer or "a person appointed by or under an Act and whose functions include functions in respect of the prevention or investigation of offences". In drafting this section, Parliament therefore clearly envisaged that persons other than a police officer could act as gatekeepers under the Act. We note that Part 9 (Enforcement) of the *Fisheries Management Act 1994* (NSW) appoints fisheries officers[76] and gives them functions to prevent and investigate offences, including powers of arrest.[77]

5.36 On the other hand, we also note that police officers have the functions of fisheries officers under s 244 of the *Fisheries Management Act 1994* (NSW). This could support an argument that there is no need to appoint other investigating officials to process fisheries offences under the YOA. However, it may not always be practicable or desirable to summon a police officer to attend the charging process, whereas the fisheries officer investigating an alleged offence is already working in the environment. Furthermore, the fisheries officer is likely to have the greater expertise in responding to these particular offences as well as being well equipped to attend a conference and assist in the formulation of an outcome plan.

5.37 For these reasons, we support the recommendation of the statutory review that fisheries officers be appointed as investigating officials where offences under the *Fisheries Management Act 1994* (NSW) are in issue. A regulation should be made under the YOA to make the position clear.

Recommendation 5.1

Fisheries officers should be investigating officials for the purposes of the *Young Offenders Act 1997* (NSW) in respect of offences under the *Fisheries Management Act 1994* (NSW).

ADMISSIONS AND LEGAL ADVICE

5.38 Two of the prerequisites for a young person being cautioned or conferenced under the YOA are that he or she has admitted the offence and consents (except

74. Report on the Review of the Young Offenders Act 1997 at 9.5. The example given is of young ATSI people being charged for fisheries offences in areas where seafood is a customary food source.
75. Response to the Report on the Review of the Young Offenders Act 1997 at 8.
76. *Fisheries Management Act 1994* (NSW) s 243. Section 243 authorises the Minister to appoint fisheries officers and to grant them either some or all of the functions accorded to fisheries officers.
77. *Fisheries Management Act 1994* (NSW) s 248-263.

where the matter is already in court) to the caution being given or the conference being held.[78]

5.39 Before a caution can be given, or a matter referred for conferencing, the investigating official in the former case, and the SYO in the latter, must explain to the child matters pertaining to the nature of the alleged offence and the caution or conferencing process, and that he or she is entitled to obtain legal advice.[79] These explanations must, if practicable, be given in the presence of either: a person responsible for the child; another adult present with the consent of the person responsible for the child; an adult chosen by a young offender older than 16; or a legal practitioner chosen by the child.[80]

5.40 In addition, s 7(b) of the YOA provides that one of the principles that are to guide the operation of the Act, and persons exercising functions under it, is that a child who is alleged to have committed an offence is entitled to be informed about his or her right to obtain legal advice and to have an opportunity to obtain that advice.[81]

5.41 The connection between the legal advice received by a young person, and a refusal to make the necessary admissions or give the necessary consents was canvassed in Issues Paper 19 ("IP 19").[82] The Commission sought to ascertain whether, and in what circumstances, lawyers advise against participating in conferencing. Several submissions pointed out that it is not possible to know fully the content of advice given as the communications between lawyer and client are covered by legal professional privilege and can only be revealed if the client waives the privilege. Nevertheless, the "Reshaping Juvenile Justice" study found that advice included telling the young person: "to be honest and tell them what happened"; "that if

78. *Young Offenders Act 1997* (NSW) s 19(1)(b), 19(1)(c), 36(1)(b) and 36(1)(c). The other two are that the offence is one for which a caution may be given or conference held, and the child is entitled to be cautioned or conferenced. However, note that where the Director of Public Prosecutions or a court refers a matter for a conference under s 40(1)(b), the child's admission of the offence is required but not his or her consent to conferencing.
79. *Young Offenders Act 1997* (NSW) s 22(1) and 39(1). (c) These sections also provide that the investigating official or specialist youth officer must explain to the child that he or she is entitled to elect that the matter be dealt with by a court: s 22(1)(c) and 39(1)(c).
80. *Young Offenders Act 1997* (NSW) s 22(2) and 39(2).
81. Research on the first three years of the operation of the YOA found that 54% of young offenders who attended a caution and 75% of those who attended a conference were told of their right to obtain legal advice, of whom only 26% and 14% respectively actually took advantage of this right and spoke to a lawyer: J Chan, S Doran, E Maloney and N Petkoska, with J Bargen, G Luke and G Clancey, *Reshaping Juvenile Justice: A Study of the NSW Young Offenders Act 1997* (Final Report, School of Social Science and Policy, University of New South Wales, 2003) ("*Reshaping Juvenile Justice*") at section 5.3.
82. New South Wales Law Reform Commission, *Sentencing: Young Offenders* (Issues Paper 19, 2001).

they make an admission, they will get a caution instead of court"; and "not to say anything".[83]

5.42 Most submissions that addressed the issue of legal advice indicated that there are occasions when advising a young person against youth justice conferencing, or against making admissions in the circumstances, is quite appropriate.[84] For example, it would obviously be unethical to advise a young person to admit guilt if that young person maintains that they are innocent. In addition, a lawyer is obliged to obtain the best result possible for his or her client.[85] Thus, a lawyer would rightly advise against participation in a conference if the outcome was likely to be more severe than if the case proceeded to a hearing. Notwithstanding s 52(6)(a) of the YOA, which provides that a conference outcome must not be more severe than that which might have been imposed in court proceedings for the offence concerned, anecdotal information suggests that this is not always the case.[86]

5.43 In its submission, the Children's Legal Service of the Legal Aid Commission noted that it advises children against making admissions where:[87]

- *The child does not admit the offence;*
- *The child is under 14 and doli incapax is in issue;*
- *The arresting police are insisting on proceeding on an inappropriate charge … or a non-existent charge…;*
- *The arresting police do not have sufficient evidence against a child to make out the elements of any offence;*

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83. Chan, Doran, Maloney and Petkoska, with Bargen, Luke and Clancey at section 5.3.
84. Shopfront Youth Legal Centre, *Submission* at 4-5; New South Wales Young Lawyers (Criminal Law Committee), *Submission* at 2; Office of the Director of Public Prosecutions, *Submission* at 2; New South Wales Police Service, *Submission* at 3; The Law Society of New South Wales, Criminal Law Committee and Children's Legal Issues Committee, *Submission* at 3.
85. See *Revised Professional Conduct and Practice Rules 1995,* r 23 A.16. Rule 23 states that it applies to all legal practitioners when they are acting as advocates. These professional rules are made by the Council of the Law Society of New South Wales pursuant to the *Legal Profession Act 2004* (NSW) s 703. Section 711 of the Act makes these rules binding on practitioners and states that a failure to comply may amount to unsatisfactory professional conduct or professional misconduct.
86. The Shopfront Youth Legal Centre, *Submission* at 5. The NSW Police Service noted that "for many reasons, outcome plans may often exceed a court imposed penalty for the same or similar offence": *Submission* at 3. Shopfront (at 4) suggested the possibility of "clearer limitations on conference outcome plans in regard to community service hours, so as to ensure that outcomes are no more onerous than a court would have imposed". It should be noted, however, that the *Young Offenders Regulation 2004* (NSW) cl 19 provides that an outcome plan must not impose more community service hours than the maximum that may be imposed under the *Children (Community Service Orders) Act 1987* (NSW) for the same offence.
87. Legal Aid Commission of New South Wales, *Submission* at 4.

- *The arresting police refuse to give an undertaking that the child will be dealt with under the YOA if an admission is made;*
- *The arresting police have arrested the child inappropriately…;*
- *The child does not wish to accept a caution or participate in a youth justice conference; or*
- *The child has a developmental disability or mental illness and should be dealt with under the Mental Health (Criminal Proceedings) Act 1990 (NSW).*

5.44 We note that the Children's Legal Service of the Legal Aid Commission advises against making admissions where "the arresting police refuse to give an undertaking that the child will be dealt with under the YOA if an admission is made". The "Reshaping Juvenile Justice" study reported feedback from submissions and consultations that some police are using the YOA as a bargaining tool, putting pressure on the young person to make admissions of guilt in order to be given the option of a caution or conference.

5.45 However, the NSW Police told the Commission that, pursuant to the NSW Legal Aid Commission and NSW Police Youth Hotline Protocol, investigating officers cannot give undertakings, or offer any inducement, that a young offender will be dealt with under the YOA if he or she makes an admission.[88] In that case, logically, they cannot "refuse to give an undertaking that the child will be dealt with under the YOA if an admission is made". What the police can do pursuant to the protocol, and what they try to do, is give the child's legal advisor as much information as possible about the offence and the child's history, which can indicate to the legal advisor the appropriate response under the YOA. The police can also give the legal advisor an indication of what they themselves consider might be the appropriate response. However, a decision about what action will be taken under the YOA cannot be reached until either an admission is made or the young offender makes it clear that he or she will make no admissions.

5.46 The "Reshaping Juvenile Justice" study also reported that many of its focus group participants were concerned that "the practice by lawyers advising young offenders (especially Aboriginal young offenders) not to make an admission to the offence" was "one of the key difficulties with the operation of the YOA".[89] Some of the Aboriginal Legal Service's Regional Commands, for example, advise young people against making any admissions to police, regardless of the circumstances of the alleged offence, because of issues it has with some perceived policing procedures.[90] It stated that, although advice not to make any admissions does not advance the

88. Information supplied by NSW Police Service (22 August 2005).
89. J Chan, S Doran, E Maloney and N Petkoska, with J Bargen, G Luke and G Clancey, *Reshaping Juvenile Justice* at section 7.2.
90. NSW Law Reform Commission Consultations, Coffs Harbour (20-21 May, 2002).

function of the YOA, "police practice often limits the young person's access to a solicitor, making more meaningful advice difficult".[91]

Timing of legal advice

5.47 As noted previously, the YOA provides that the investigating official or the SYO must tell a young offender that he or she is entitled to obtain legal advice. However, the YOA imposes no condition that the legal advice be received *before* an admission is made and consent given.

5.48 The "Reshaping Juvenile Justice" study found that only 8 of the 17 young offenders in the sample group who were cautioned and 11 out of 25 of those who were conferenced were told about their right to obtain legal advice at the start of the interview.[92]

5.49 The Legal Aid Commission submitted that the YOA is "effectively a statutory inducement to a child to waive their right to silence" and as such "an admission by a child should not be used unless the child has first had the opportunity to obtain legal advice".[93] Of course, admissions cannot be used to activate either the cautioning or conferencing processes unless the child consents - Court cautioning or referrals to conferencing excepted. But the point remains that the child should ideally be advised prior to making any admissions.

5.50 Although young people have access to legal assistance such as the Legal Aid Hotline for under 18s, run up by the Legal Aid Commission's Children's Legal Service,[94] a young person's right under the YOA to obtain legal advice is impaired unless the young person has been advised of that right at the outset of any proceedings, and given an opportunity to exercise the right.

5.51 Furthermore, while the Legal Aid Hotline is a very valuable resource, it does have its limitations. First, advice given over the phone is not the same as face-to-face advice, particularly as many of the children are in custody at a Police Station and are anxious and stressed. Secondly, complex advice must be delivered simply, in plain English, sometimes through an interpreter, which is not always easy to achieve over

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91. J Chan, S Doran, E Maloney and N Petkoska, with J Bargen, G Luke and G Clancey, *Reshaping Juvenile Justice* at section 7.2.
92. Chan, Doran, Maloney and Petkoska, with Bargen, Luke and Clancey at section 5.3. However, it is important to note that the report has commented that "the poor response rates from conference and court participants and from victims in caution cases have meant that the samples of interviewees were likely to be biased through self-selection. The results from these surveys are therefore not generalisable to the populations from which the samples came": section 1.5.
93. Legal Aid Commission of New South Wales, *Submission* at 4.
94. This was established in 1998 in direct response to the introduction of the *Young Offenders Act 1997* (NSW), and its guiding principle that a child is entitled to receive legal advice (s 7(b)): T O'Sullivan, "Provision of Legal Advice and the Legal Aid Commission's Youth Hotline" paper presented to Institute of Criminology, University of Sydney (Sydney, 7 May 2003) at 1.

the phone. Thirdly, due to a lack of adequate facilities at some Police Stations, the child is not always given proper privacy while receiving advice.[95]

5.52 The "Reshaping Juvenile Justice" research into legal advice received by young offenders found that, in the majority of cases, legal advice was given over the telephone. Eight of the ten people in the caution group who spoke to a lawyer said they understood the advice completely, while two understood only partly. Two of the five people in the conference group who spoke to a lawyer said they understood the advice completely, two understood only partly and one did not answer the question.[96]

5.53 Both the NSW Legal Aid Commission and the Youth Justice Advisory Committee suggested that an effective means of giving the right to legal advice some substance might be by including within the YOA a formal "cooling-off" period.[97] During this time, a young person would be released in order to obtain legal advice prior to making any admissions or giving the required consent. While the Hotline would remain an important crisis contact, a cooling-off period would then enable a young person to follow-up initial telephone advice with "face-to-face" legal advice, overcoming the shortcomings of telephone interaction.

5.54 It could be argued, for two reasons, that amendment of the YOA to legislate a mandatory cooling-off period is not necessary.

5.55 First, the NSW Police has already implemented a protocol that provides for a cooling-off period. This is the Young Offenders Legal Referral Protocol ("YOLR"), implemented in 2002. It involves police faxing a notification to an Aboriginal Legal Service, or to the Legal Aid Hotline (in metropolitan areas) or other legal representative, indicating that a young person has been spoken to by the police in relation to an offence covered by the YOA. The young person is then released to get legal advice before being dealt with.[98] He or she must then reappear at the police station on a nominated date, preferably 7-14 days later but within 21 days. It is colloquially known as "tag and release".[99]

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95. O'Sullivan at 5-6.
96. J Chan, S Doran, E Maloney and N Petkoska, with J Bargen, G Luke and G Clancey, *Reshaping Juvenile Justice* at section 5.3. However, as was pointed out in footnote 92, there was a severe problem with non-response in these surveys and hence, in the words of the authors, the samples are likely to be biased.
97. Legal Aid Commission of New South Wales, *Submission* at 5; Youth Justice Advisory Committee, *Submission* at 3.
98. If a child in a metropolitan area, or in a country town where there is no Aboriginal Legal Service, has been arrested at a time when the Legal Aid Hotline is closed, he or she may be kept in custody until 9am the next morning when the Hotline can be reached.
99. See P Lalor, "Young Offenders Legal Referral and Cautioning Aboriginal Young Persons Protocol", paper presented at the conference *Youth Liaison Officers* (Goulburn, 18-20 October 2004). See also J Chan, "Implementation of the Young Offenders Act" in J Chan (ed), *Reshaping Juvenile Justice: The NSW Young Offenders Act 1997* (Sydney Institute of Criminology, 2005) at 45.

5.56 Secondly, s 43 of the YOA provides a form of cooling-off period for conferencing, in that it stipulates that a conference must, if practicable, not be held less than 10 days after the convenor has given certain information about the conference to the young offender,[100] during which time he or she can get legal advice.

5.57 However, each of these existing safeguards has its limitations. The YOLR is only a protocol, with no legislative standing or imperative. While the protocol allows a generous period of time to obtain legal advice, again, these are guidelines only with no compulsion. If a young person and the adult present at the explanation of the child's rights[101] waive the opportunity to obtain legal advice, the matter may proceed then and there with admissions being made. The Commission was told in consultations that the presence of a parent in particular often resulted in pressure upon the young person to simply admit the offence and "get it over and done with", regardless of the facts surrounding the alleged offence.

5.58 In relation to the time requirements for conferencing, by the time a conference has been convened, although not yet held, the young person has already made admissions. In addition, a study of cases between 1998 and 1999 carried out by the NSW Bureau of Crime Statistics and Research found that 28% of conferences were held before the 10-day notice period had expired.[102] Lastly, there is no similar hiatus built into the cautioning process.

5.59 Accordingly, the Commission has concluded that, despite the operation of the YOLR, the s 7(b) principle that a child should have an opportunity to obtain legal advice should be enshrined in an enforceable provision in the Act. The YOA should stipulate that neither an admission of an offence made by a child, nor consent given by a child, should be valid for the purposes of the Act unless the child has received legal advice, or unless the admission is made and consent given after a cooling-off period during which the child has had the opportunity to seek legal advice.

5.60 While we think it is preferable for admissions to be made and consents given only after the child has received legal advice on the matter, we feel that a child should not be forced into obtaining legal advice. The benefit of the cooling-off period is that the child has the opportunity to reflect, and consult with others, on whether or not to obtain advice.

100. For the information required to be given to the child, see *Young Offenders Act 1997* (NSW) s 45(3).
101. As required by s 10 of the *Young Offenders Act 1997* (NSW).
102. L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (NSW Bureau of Crime Statistics and Research, Legislative Evaluation Series No 12, Sydney, 2000) at para 3.2.2. See, for further discussion of this research, Chapter 7 at para 7.15.

Recommendation 5.2

Neither an admission by a child of an offence, nor consent to diversionary processes, should be valid for the purposes of s 19, 23, 31, 36 or 40 of the *Young Offenders Act 1997* (NSW) unless the admission is made, and consent given, after the child has received legal advice or has had a reasonable opportunity to receive legal advice. A "reasonable opportunity" should be defined to mean not less than four days between the time an allegation is made to the child that he or she has committed an offence and the commencement of the diversionary processes.

6. Cautions

- Introduction
- Limits on the entitlement to a caution
- Reasons for giving a caution
- Cautioning under the YOA and the CCPA
- Police record keeping

INTRODUCTION

Section 18 of the *Young Offenders Act 1997* (NSW) ("YOA") enables, where appropriate, a young offender to be cautioned, rather than sentenced, in respect of an offence covered by the Act. The provisions regulating the giving of cautions are contained in Part 4 of the YOA.

6.1 A caution can be administered by a police officer or specialist youth officer,[1] a respected member of the community at the request of any such officer, if appropriate[2] or by the Court.[3] In addition, the Director of Public Prosecutions ("DPP") may refer a young offender to an authorised police officer or specialist youth officer for a caution.[4]

6.2 The provision for a respected member of the community to administer a caution in appropriate circumstances could, for example, be utilised by a respected member of the Aboriginal community if the child is a member of that community. In 2002, the NSW Police, Operational Policy and Programs Unit implemented the Cautioning Aboriginal Young Persons Protocol, which is a program that trains Aboriginal people to give cautions to Aboriginal young people on behalf of police.

6.3 If a court is giving a caution, it is only necessary that the offence is one for which a caution may be given and the young offender admits the offence, but not that he or she consents to being cautioned.[5] Otherwise, a caution can only be given if the young offender: has admitted the offence; consents to being cautioned; and is entitled to be cautioned.[6] A young offender is entitled to be dealt with by caution if the investigating official determines that the matter is not appropriate for a warning or the offence is one for which a warning may not be given.[7]

6.4 On the other hand, the investigating official may determine that it is not in the interests of justice for the matter to be dealt with by giving a caution.[8] The matters to be taken into account in reaching this decision include: the seriousness of the offence; the degree of violence involved; the harm caused to any victim; the number and nature of any offences committed by the young offender; the number of times he or she has been dealt with under the YOA; and any other matter considered appropriate by the official.[9] However, the fact that the young offender has previously committed offences or been dealt with under the YOA does not preclude a caution,[10] except in certain circumstances where he or she has already been cautioned three or more

1. *Young Offenders Act 1997* (NSW) s 27(1).
2. *Young Offenders Act 1997* (NSW) s 27(2).
3. *Young Offenders Act 1997* (NSW) s 31(1).
4. *Young Offenders Act 1997* (NSW) s 23(1).
5. *Young Offenders Act 1997* (NSW) s 31(1).
6. *Young Offenders Act 1997* (NSW) s 19.
7. *Young Offenders Act 1997* (NSW) s 20(1).
8. *Young Offenders Act 1997* (NSW) s 20(2).
9. *Young Offenders Act 1997* (NSW) s 20(3).
10. *Young Offenders Act 1997* (NSW) s 20(6).

times.[11] The investigating official also has the power to refer the matter to a specialist youth officer for a determination on whether the young offender should be cautioned or referred to conferencing.[12]

6.5 This chapter deals with three main issues that arise either from amendments to the legislation in 2002[13] or from submissions to the Commission, namely:

- the limits on the number of occasions on which a caution can be given;
- the accessibility of a court's reasons for imposing a caution; and
- the relationship between cautioning under the YOA and the *Children (Criminal Proceedings) Act 1987* (NSW).

LIMITS ON THE ENTITLEMENT TO A CAUTION

6.6 A young offender is not entitled to be dealt with by caution in relation to an offence if he or she has previously been cautioned on three or more occasions, whether by, or at the request of, a police officer or specialist youth officer under s 29, or by a court under s 31, and whether for offences of the same or a different kind.[14]

6.7 Prior to the 2002 amendments, there was no provision in the YOA limiting the number of cautions that may be given to a young person. These amendments have effectively increased the severity of the response to an offence that might otherwise be the subject of a further caution, by diverting the matter to conferencing or referring it to court proceedings.[15]

6.8 The debate on the Second Reading of the *Young Offenders Amendment Bill 2002* referred to concerns expressed by the Children's Legal Issues Committee of the NSW Law Society on the proposal to limit the number of cautions available to a young offender. The Committee argued that:

> The imposing of a mandatory limitation on the number of cautions will inhibit the flexibility of the *Young Offenders Act* and may result in an inappropriate escalation to court of quite minor offences for which a conference is an inappropriate response, for example, offensive language charges or possession of a small quantity of marijuana.

11. *Young Offenders Act 1997* (NSW) s 20(7).
12. *Young Offenders Act 1997* (NSW) s 20(4) and s 21(2).
13. *Young Offenders Amendment Act 2002* (NSW).
14. *Young Offenders Act 1997* (NSW) s 20(7). See *Young Offenders Amendment Act 2002* (NSW) s 1-3.
15. See New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 4 June 2002, the Hon R J Debus, Attorney General, Second Reading Speech at 2487.

> Further, by limiting the ability of the Children's Court to order a caution, costs to police, the court system and the community will be increased.
>
> The number of times that a child has previously been dealt with under the *Young Offenders Act* for similar offences is a matter that a Specialist Youth Officer, the DPP and/or the court must take into account when determining whether it is appropriate to deal with a matter under the Act.
>
> However, the Children's Legal Issues Committee is not aware that there is a high incidence of children receiving multiple cautions or participating in multiple conferences. The Committee understands that data collated by the NSW Police Service indicates that 96% of children cautioned in the first three years of the operation of the *Youth Offenders Act* (*sic*) received no more than two cautions. Over the same period, only 1.4% of children participated in more than 2 conferences.[16]

6.9 The Commission shares these concerns. In particular, we are apprehensive that fettering the ability to caution conflicts with the aims of the YOA as set out in s 3, especially the aim of providing an efficient and direct response to the commission of certain offences by children.[17] We are also concerned that limiting the number of cautions conflicts with the guiding principles of the YOA as set out in s 7, especially the principle that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence.[18]

6.10 While the Commission does not presently support limiting the number of cautions that may be given to a young person under the YOA, we are not aware of any evidence so far that the amendment are causing injustice. The effects of the restriction should be monitored in order to establish whether or not it operates in a manner that is incompatible with the overall aims and principles of the YOA. That monitoring should be the responsibility of the Department of Juvenile Justice.

Recommendation 6.1

> The application of s 20(7) of the *Young Offenders Act 1997* (NSW), which limits the number of times that a young offender is entitled to be dealt with by caution, should be monitored by the Department of Juvenile Justice to ensure its compatibility with the Act's aims and principles.

16. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 27 August 2002, Speech of the Hon R Jones at 4227 on the *Young Offenders Amendment Bill 2002*.
17. *Young Offenders Act 1997* (NSW) s 3(b).
18. *Young Offenders Act 1997* (NSW) s 7(a).

6.11 A separate issue arises in relation to s 20(3)(d) and 23(2)(d) of the YOA. In considering whether it is appropriate to deal with a matter by caution, an investigating official under the former section and the DPP under the latter section, must consider the number and nature of any offences committed by the child and the number of times the child has been dealt with under the YOA.

6.12 A submission by the Department of Aboriginal Affairs to the statutory review of the YOA argued that, in making a decision under s 20(3)(d), the police place greater emphasis on the number of offences previously committed, rather than their nature.[19] This, the Department argued, "can lead to more indigenous children being directed to court, increasing their criminal convictions and their further marginalisation".[20]

6.13 In response to this submission, the review recommended that "a more general discretion be established for gatekeepers by removing the mandatory requirement to consider the number of offences committed by the child when applying the [YOA]".[21]

6.14 The Government did not accept this recommendation, arguing that it would be contrary to the amendments to the YOA limiting the number of cautions that can be given.[22] The Government put forward instead that "alternative methods of improving the way Aboriginal children are dealt with under the Act [would] be developed in consultation with NSW Police".[23] The Commission supports this initiative. In our view, the number of offences committed by a child is, inevitably, relevant to a gatekeeper's discretion under the YOA.

REASONS FOR GIVING A CAUTION

6.15 Under s 31(4) of the YOA, once a court has decided to give a caution, it must notify the police of its decision and reasons. The Children's Court has argued that it is inappropriate for the reasons for giving a caution to be provided to police only, but should be available generally.[24]

6.16 The general availability of the court's reasons for imposing a caution would have two benefits. First, it would create a body of precedents to assist in determining whether or not a caution should be given. A caution administered by a court can

19. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* (2002) at 51-52.
20. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 52.
21. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997*, Recommendation 15 at 52.
22. New South Wales, *Government Response to Report on the Review of the Young Offenders Act 1997* (tabled in New South Wales Legislative Assembly, 24 June 2004).
23. New South Wales, *Government Response to Report on the Review of the Young Offenders Act 1997*.
24. The Children's Court of New South Wales, *Submission* at 5.

signify the court's decision that the particular offence ought more appropriately to have been dealt with by way of caution in the first instance (unless the necessary admissions and consent were not initially forthcoming). As such, the reasons for giving a caution are of potential value in guiding the discretion of investigation officials and specialist youth officers. Secondly, the transparency of the process would increase public confidence in the consistent application of the YOA. The Commission agrees with these observations.

6.17 However, the value of making known the court's reasons for administering a caution must be balanced against privacy issues. To the extent that the young offender is entitled to have his or her identity and identifying facts of the case concealed, this right must be protected in the disclosure of the court's reasons.

Recommendation 6.2

Section 31(4) of the *Young Offenders Act (1997)* (NSW) should be expanded to ensure that the reasons for a court's giving a caution under that section are generally available, subject to any rights the young offender has to have his or her identity kept private.

CAUTIONING UNDER THE YOA AND THE CCPA

6.18 The Children's Court has the power to give a caution under s 31 of the YOA for offences covered by that Act where the young offender has admitted the offence. In addition, the Children's Court may administer a caution under s 33(1)(a) of the *Children (Criminal Proceedings) Act 1987 (NSW)* ("CCPA"), if the Court has found a young offender guilty of an offence to which the Act applies.[25] An issue raised in Issues Paper 19, ("IP 19"),[26] was whether the Children's Court should continue to have a power to caution young offenders under the CCPA, in addition to its cautioning power under the YOA.

25. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1): If the Children's Court finds a person guilty of an offence to which this Division applies…(a) it may make an order dismissing the charge, or it may make an order dismissing the charge and may administer a caution to the person; *Children (Criminal Proceedings) Act 1987* (NSW) s 32: "[Division 4 – Penalties] applies to any offence for which proceedings are being dealt with summarily or in respect of which a person has been remitted to the Children's Court under section 20." (Section 20 applies to indictable offences other than a serious children's indictable offence.)
26. New South Wales Law Reform Commission, *Sentencing: Young Offenders* (Issues Paper 19, 2001) Issue 2, para 2.14-2.15.

Response to Issues Paper 19

6.19 There was overwhelming support in submissions to IP 19 for the retention of the Court's cautioning power contained in s 33(1)(a) of the CCPA, in addition to that under s 31 of the YOA.[27] Two main reasons were given for retaining these powers: to enable cautioning for offences not covered by the YOA; and to enable cautioning even where there has been no admission of guilt.

The first reason: offences outside the scope of the YOA

6.20 At present, the YOA does not apply to a significant range of offences.[28] For example, it excludes from its operation most sex offences, apprehended violence offences and certain drug offences. By contrast, under the CCPA, the Children's Court has jurisdiction to deal with all matters relating to young offenders with the exception of serious children's indictable offences.[29]

6.21 Almost all the submissions in favour of retention of dual powers argued that it is important that the Children's Court has the option to caution for offences that fall outside the ambit of the YOA.[30] An example given by Shopfront illustrates the dangers in limiting the Court's power to caution for only those offences covered by the YOA:

> Although it may seem difficult to envisage, even sex offences may be deserving of a caution. For example, a 16-year-old boy is criminally charged for having sex with his 15-year-old girlfriend. The relationship is loving and consensual, and the parties are of similar age and maturity. However, because the girlfriend is below the age of consent, the boyfriend has technically committed a sex offence. The level of criminality is

27. Legal Aid Commission of New South Wales, *Submission* at 3; Shopfront Youth Legal Centre, *Submission* at 2-3, New South Wales Young Lawyers (Criminal Law Committee), *Submission* at 1; the Law Society of New South Wales, *Submission* at 2; New South Wales Police Service, *Submission* at 2; the Hon Carmel Tebbutt, MLC, (then) Minister for Juvenile Justice, *Submission* at 2; and the Children's Court of New South Wales, *Submission* at 3-6. On the other hand, both the NSW Bar Association (*Submission* at 1) and the NSW Director of Public Prosecutions (*Submission* at 1) submitted that: "The Children's Court should have only one cautioning power. The present duplication ["of the power": DPP] is confusing and unnecessary." However, the Director of Public Prosecutions then went on to say: "It is of course important that the Children's Court has the option to caution for the range of offences to which the YOA does not apply and that power should be retained in the [CCPA]": at 1.
28. See *Young Offenders Act 1997* (NSW) s 8. The scope of the *Young Offenders Act 1997* (NSW) is the subject of Chapter 4.
29. See *Children (Criminal Proceedings) Act 1987* (NSW) s 28.
30. The Children's Court of New South Wales, *Submission* at 4: "[T]he continuation of the two provisions is supported under the principle of providing the Children's Court with as wide a range of sentencing options as possible."

> extremely low and a caution under s 33(1)(a) of the *Children (Criminal Proceedings) Act* may be an appropriate disposition.[31]

The second reason: no admission of offence

6.22 For the Court to be able to administer a caution under the YOA, the young person must admit the offence.[32] This is not a requirement under the CCPA. Where a young person pleads not guilty to a minor matter but the offence is found proved, the court has the power pursuant to s 33(1)(a) of the CCPA to dismiss the matter with a caution.[33]

The Commission's view

6.23 These two justifications for retaining the Court's cautioning power under the CCPA are compelling. In Chapter 4, the Commission examines whether the scope of the YOA is appropriately drawn and recommends that all offences, except serious children's indictable offences, come within the general ambit of the YOA.[34] However, even if this recommendation is accepted, there will still be offences that Parliament may, from time to time, wish to exclude from the operation of the YOA.[35] In that case, some offences will continue to fall within the ambit of the CCPA and not the YOA. There is no reason in principle to exclude the Court's power to administer a caution for all offences dealt with under the CCPA.

The disposal of charges under each Act

6.24 The Children's Court has noted that a caution given by the Court under the YOA does not follow an adjudication of the matter, while a caution under the CCPA comes after there has been an adjudication of the matter, a finding of guilt, and a dismissal of the charge.[36] The Court explains the difference in this way:

> The power to find an offence proven but dismiss the charge, with or without cautions or bonds, exists in all courts, including the Children's Court. The dismissal is an adjudication of the charge or information laid. … If a caution is given by the court under the [YOA] there is no adjudication of the charge. Rather, the offender is dealt with by way of a caution which is a process having a parallel with the role of the police.[37]

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31. Shopfront Youth Legal Centre, *Submission* at 3.
32. *Young Offenders Act 1997* (NSW) s 31(1)(b). See Shopfront Youth Legal Centre, *Submission* at 3; the Law Society of New South Wales, *Submission* at 2.
33. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(a). It can also simply dismiss the matter, without a caution.
34. See Recommendation 4.2 and para 4.13-4.14.
35. See Chapter 4 at para 4.28-4.47.
36. The Children's Court of New South Wales, *Submission* at 4-6. See *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(a).
37. The Children's Court of New South Wales, *Submission* at 4.

6.25 The Children's Court points out that there is no adjudication of the charge when a caution is given under the YOA, but there is no mention of how a charge is formally disposed of. It submits that, when cautioning under s 31 of the YOA, it may be more appropriate for the Court to make an order deeming the proceedings to have been withdrawn, rather than dismissing the charge.[38] The Commission agrees that, in a formal sense, it is more appropriate to deem that proceedings have been withdrawn where there is no adjudication on the charge. This would not have any effect on the consequences of a caution under the YOA (especially the recording of the caution[39]).

Recommendation 6.3

Section 31 of the *Young Offenders Act (1997)* (NSW) should be amended to provide that where a court gives a caution it must make an order deeming the proceedings to have been withdrawn.

The effect of cautions on criminal records

6.26 A caution under the YOA does not, in general, have to be disclosed as criminal history.[40] Likewise, a caution and dismissal by the Children's Court under the CCPA does not, in general, have to be disclosed under the *Criminal Records Act 1991* (NSW).[41] There are exceptions to these "need not disclose" provisions under the respective Acts that are similar but not identical. The YOA specifies that a caution

38. The Children's Court of New South Wales, *Submission* at 4 and 5. The Children's Court submits that the power to dismiss a charge without proceeding to a conviction under s 33(1)(a) of the *Children (Criminal Proceedings) Act 1987* (NSW) should be retained: *Submission* at 4.
39. *Young Offenders Act 1997* (NSW) s 33.
40. *Young Offenders Act 1997* (NSW) s 68(1):
    If a person has been the subject of a warning, caution or conference under this Act:
    (a) the person is not required to disclose to any other person for any purpose information concerning the warning, caution or conference, and
    (b) a question concerning the person's criminal history is taken not to refer to any such warning, caution or conference, and
    (c) in the application to the person of a provision of an Act or statutory instrument, a reference in the provision to the person's character or fitness is not to be interpreted as permitting or requiring account to be taken of any such warning, caution or conference.
41. Section 8(3) of the *Criminal Records Act 1991* (NSW) provides that "[a]n order of the Children's Court dismissing a charge and administering a caution is spent immediately after the caution is administered". Section 12 of that Act provides that spent convictions do not have to be disclosed as criminal history.

must be disclosed in two circumstances: first, in applications for certain occupations;[42] and secondly, in proceedings before the Children's Court.[43] Section 15(1) of the *Criminal Records Act 1991* (NSW) also provides that a caution must be disclosed when applying for certain occupations, which are the same ones as those listed in the YOA. However, s 15(1A) lists an additional field of employment where a caution must be disclosed, not listed in the YOA, namely in applications for child-related employment within the meaning of Part 7 of the *Commission for Children and Young People Act 1998* (NSW). The other difference is that, unlike s 68(2)(c) of the YOA, s 15 of the *Criminal Records Act 1991* (NSW) does not specify that a caution must be disclosed in proceedings before the Children's Court.

6.27 This inconsistency results in cautions given by courts being treated differently from those given by other authorised persons under the YOA, for which there is no justification. As well, the legislative policy expressed in s 68(2) of the YOA (requiring the disclosure of a caution in an application for certain types of employment *and* in proceedings before the Children's Court) is well justified and ought also to apply to an order of the Children's Court dismissing a charge and administering a caution under s 33(1)(a) of the CCPA. The Commission has concluded that there should be one procedure for dealing with disclosure of cautions and that this should be contained in the *Criminal Records Act 1991* (NSW). We note that this was suggested by the Children's Court[44] and recommended by the statutory review of the *Young Offenders Act 1997* (NSW).[45]

Recommendation 6.4

Sections 12 and 15 of the *Criminal Records Act 1991* (NSW) should be amended so as to encompass warnings, cautions or conferences administered under the *Young Offenders Act (1997)* (NSW) and orders of the Children's Court dismissing a charge and administering a caution. Section 15 of the *Criminal Records Act 1991* (NSW) should be further amended by expanding the exceptions to the application of s 12 to include proceedings before the Children's Court (including a decision concerning sentencing). Section 68 of the *Young Offenders Act (1997)* (NSW) should then be repealed.

42. *Young Offenders Act 1997* (NSW) s 68(2). For example, a caution for acts of arson must be disclosed where a young person later wishes to become a fire fighter.
43. *Young Offenders Act 1997* (NSW) s 68(2)(c).
44. The Children's Court of New South Wales, *Submission* at 5.
45. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997*, Recommendation 8. The Government accepted this recommendation, pointing out that it is consistent with the Government's approach to employment screening to protect young children: New South Wales, *Government Response to Report on the Review of the Young Offenders Act 1997*.

Other records relating to the offence

6.28 Under s 38(1) of the CCPA, the Children's Court must order the destruction of photographs, finger-prints and palm-prints, and other prescribed records (other than records of the Children's Court) relating to the offence following the dismissal of the charge and the giving of a caution under s 33(1)(a). By contrast, the YOA is silent on the retention of material relating to the offence following cautioning.

6.29 The Commission believes that the consequences of a caution under the YOA should, in this respect, be brought into line with the CCPA.[46] It is consistent with the focus of the law on rehabilitation of young offenders that such records be destroyed following a caution, whether administered by a court or other authorised person.

Recommendation 6.5

The *Young Offenders Act (1997)* (NSW) should be amended to require that, when a court or other authorised person administers a caution under that Act, any photographs, finger-prints and palm-prints, and any other prescribed records (other than records of the Children's Court) relating to the offence be destroyed.

POLICE RECORD KEEPING

6.30 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 or caution on the Computerised Operational Policing System (COPS).[47] In relation to cautions, the officer must record: the young person's name, address, age, gender, and cultural or ethnic background; details of the offence; and information about the caution.[48]

6.31 Where the Court gives a caution, it must notify the Local Area Commander of the police area in which the offence occurred of its decision and reasons why the caution was given.[49] This is one of the important "checks and balances" on police decisions that were intentionally built into the YOA. It is, in effect, a notification from the court to the police that the young offender ought to have been cautioned by the investigating official.[50]

46. See also the Children's Court of New South Wales, *Submission* at 6.
47. *Young Offenders Act 1997* (NSW) s 17 and s 33; *Young Offenders Regulation 2004* (NSW) cl 14 and cl 15.
48. *Young Offenders Regulation 2004* (NSW) cl 15(1).
49. *Young Offenders Act 1997* (NSW) s 31(4). See also New South Wales Children's Court, *Practice Direction No 17* (12 October 2000).
50. However, almost invariably, cautions given at the court proceedings stage are as a result of the young offender having refused to make the necessary admissions at the police investigation stage and then later changing his or her mind and pleading guilty.

6.32 Police compliance with the record-keeping requirements of the YOA was an issue raised in IP 19.[51] IP 19 referred to an observation made by Hennessy that, in the first year of operation of the YOA, the Police did not fulfil its record keeping duties under the YOA.[52]

6.33 Other than the submission of the NSW Police itself, no other submission the Commission received addressed the issue as to whether the statutory record-keeping requirements were being met.[53] NSW Police admits that it failed to meet these requirements during the early period of the operation of the YOA, but asserts that the relevant information will now be routinely collected from all persons brought into police custody. According to the Police, this will "satisfy the criticisms raised by Hennessy", and will "ensure total compliance of the Service with the record keeping requirements of the YOA and the amendment Act".[54]

51. NSWLRC 1P 19, Issue 6, para 2.39-2.41.
52. N Hennessy, *Review of the Gatekeeping Role in Young Offenders Act 1997* (NSW) (Report to Youth Justice Advisory Committee, 1999), Recommendation A and paragraphs 35-43.
53. The submission of the Minister for Juvenile Justice noted that, for the Youth Justice Advisory Committee, the issue was neither "the extent nor the adequacy of the records kept, but the difficulty of comparing and contrasting the reports that each Department generates": see Minister for Juvenile Justice, *Submission* at 5.
54. NSW Police Service, *Submission* at 4.

7. Youth Justice Conferencing

- Introduction
- Referral to a youth justice conference
- Time frames between referral and conference
- The conference process
- Outcome plans
- A soft option ?
- Evaluation of conferencing
- Submissions and response to Issues Paper 19
- The Commission's view

INTRODUCTION

7.1 Youth justice conferencing is the most serious diversionary response under the *Young Offenders Act 1997* (NSW) ("YOA"). In the second reading speech introducing the *Young Offenders Bill 1997* (NSW), the then Attorney General emphasised that:

> Conferences are not a soft option, and should not be utilised for first offenders unless the circumstances of the offence warrant such an intervention being taken … the introduction of conferences [was not intended to] result in a lowering of the threshold for cautions, so that matters that might previously have been cautioned, will now be conferenced.[1]

7.2 Youth justice conferences are available for all offences covered by the YOA,[2] where the young offender has admitted the offence[3] and (except in the case of referrals by the Court) has consented to conferencing,[4] and is entitled to be dealt with by way of a conference.[5] Section 3(c) of the YOA provides that youth justice conferences are a "community based negotiated response to offences involving all affected parties", which "emphasise restitution by the offender and the acceptance of responsibility by the offender for his or her behaviour".

7.3 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.[6]

1. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 21 May 1997, the Hon J Shaw QC MLC, Attorney General, *Young Offenders Bill 1997* (NSW), Second Reading Speech at 8960.
2. *Young Offenders Act 1997* (NSW) s 35: "A conference may be held for an offence covered by this Act, other than an offence prescribed by the regulations for the purposes of this section."
3. *Young Offenders Act 1997* (NSW) s 36(b) and s 40(1)(b).
4. *Young Offenders Act 1997* (NSW) s 36(c).
5. *Young Offenders Act 1997* (NSW) s 37
6. *Young Offenders Act 1997* (NSW) s 34(1)(a). For a theoretical analysis of conferencing see A Ashworth, "Restorative justice and victims' rights" (March) [2000] *New Zealand Law Journal* at 84; Australian Institute of Criminology, *Family Conferencing and Juvenile Justice* (1994). For an overview of conferencing schemes in Australia, see K Daly and H Hayes, *Restorative Justice and Conferencing in Australia* (Australian Institute of Criminology, Trends and Issues No 186, 2001) at 2.

7.4 As the Attorney General observed in his Second Reading Speech:

> *The aim of conferencing is to encourage discussion between those affected by the offending behaviour and those who have committed it in order to produce an agreed outcome plan which restores the harm done and aims to provide the offender with developmental and support services which will enable the young person to overcome his or her offending behaviour.*[7]

Youth justice conferencing and restorative justice

7.5 Much of the ethos of the YOA stems from theories of restorative justice.[8] Youth justice conferencing, in particular, falls squarely within the practices of restorative justice.

7.6 Earlier policy models, based either on the punishment or the treatment of the offender, placed the offender in a passive role "as the object of services on the one hand, and punishment and surveillance on the other".[9] It followed that little or no constructive effort was required from the offender. In contrast, restorative justice has as its goal the re-situating of the offending behaviour within a community framework, by providing reparation for harm caused and the active involvement of the offender.[10] From this base, it aims to "build safer communities in which most conflicts which lead to crime can be peacefully resolved and the cycle of violence broken".[11]

REFERRAL TO A YOUTH JUSTICE CONFERENCE

The roles of the police and the specialist youth officer

7.7 Where an investigating police officer determines that it is not in the interests of justice to give a warning or caution,[12] the matter must be referred to a specialist youth

7. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 21 May 1997, the Hon J Shaw, Attorney General QC MLC, *Young Offenders Bill 1997* (NSW), Second Reading Speech at 8960.
8. See Chapter 2 at para 2.42-2.54.
9. United States of America, Office of Juvenile Justice and Delinquency Prevention, *Balanced and Restorative Justice for Juveniles: A Framework for Juvenile Justice in the 21st Century* (Balanced Restorative Justice Project, University of Minnesota, 1997) at 9.
10. Section 52(5) of the *Young Offenders Act 1997* (NSW) suggests the kinds of decisions and recommendations appropriate for inclusion in an outcome plan as follows: "(a) the making of an oral or written apology, or both, to any victim, (b) the making of reparation to any victim or the community, (c) participation by the child in an appropriate program, (d) the taking of actions directed towards the reintegration of the child into the community."
11. United States of America, Office of Juvenile Justice and Delinquency Prevention, *Balanced and Restorative Justice for Juveniles: A Framework for Juvenile Justice in the 21st Century* (1997) at 19.
12. *Young Offenders Act 1997* (NSW) s 14(2)(b), s 20(2).

officer ("SYO") to consider whether a conference would be appropriate.[13] The SYO must consider: the seriousness of the offence; the degree of violence; the harm suffered by the victim; the number and nature of any other offences committed by the young person; and any other instances in which the young person has been dealt with under the YOA.[14] The SYO can decide that it is not in the interests of justice for the matter to be dealt with by holding a conference and that it would be more appropriate either to caution the young offender or commence criminal proceedings.[15] Unless it is impracticable to do so, the SYO must consult with the investigating official before deciding how best to proceed in the matter.[16]

7.8 Where the SYO determines that a conference should be held, the matter must be referred to a conference administrator for a conference.[17] If the conference administrator disagrees with the referral, he or she must, unless it is impracticable to do so, consult with both the SYO and the investigating official; and if there is then failure to agree, the conference administrator must refer the matter to the DPP for a final decision.[18]

Referral by the DPP or a court

7.9 The DPP or a court may also refer young offenders to youth justice conferences.[19] In practice, however, the DPP does not directly refer matters to a youth justice conference.[20] Unless it is impracticable to do so, the DPP must consult with the investigating official (if any) before making any decision as to whom the matter is to be referred.[21] As mentioned above, the DPP may refer a matter back to a youth justice conference administrator when acting as an umpire for disputed referrals. [22]

7.10 For a referral to a conference by the DPP or a court, the young person must have admitted the offence and, in the case of referral by the DPP, must have consented to conferencing.[23] In determining whether to refer a matter to conferencing, the DPP or a court must take into account the same matters that the SYO takes into account, set out in paragraph 7.6.[24] The DPP or the Court must notify the Area

13. *Young Offenders Act 1997* (NSW) s 14(4), s 21(2).
14. *Young Offenders Act 1997* (NSW) s 37(3).
15. *Young Offenders Act 1997* (NSW) s 37(2).
16. *Young Offenders Act 1997* (NSW) s 38(4).
17. *Young Offenders Act 1997* (NSW) s 38(1).
18. *Young Offenders Act 1997* (NSW) s 41(2).
19. *Young Offenders Act 1997* (NSW) s 40.
20. This is for the reasons set out in Chapter 5 at para 5.24.
21. *Young Offenders Act 1997* (NSW) s 40(6).
22. *Young Offenders Act 1997* (NSW) s 41(2) and (3).
23. *Young Offenders Act 1997* (NSW) s 40(1)(b) and (c). The Commission notes that the report of the statutory review of the YOA recommended that the young person's consent to a referral to conferencing by the court should be required, on the basis that otherwise it is debatable whether he or she can participate fully in the process: NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* (2002), Recommendation 22 at 55.
24. *Young Offenders Act 1997* (NSW) s 40(5).

Commander of the local police area in which the offence was committed of a decision to refer and reasons for doing so.[25] The Court may refer a matter at any stage in proceedings, including after a finding of guilt.[26]

7.11 A court-referred youth justice conference is exactly the same as any other youth justice conference administered by the Department of Juvenile Justice, except that the court that referred the matter has the power not to approve the outcome plan and can continue proceedings as if the conference had not been held.[27]

TIME FRAMES BETWEEN REFERRAL AND CONFERENCE

7.12 The YOA requires that, where practicable, youth justice conferences are to be held within 21 days of receipt of the referral by the conference administrator, but not less than ten days after the young offender has been notified of the date, time and place of the referral.[28] The New South Wales Bureau of Crime Statistics and Research ("BOCSAR") examined 1,885 conferences held between 12 June 1998 and 28 November 1999 to determine whether these statutory time frames were being met.[29]

7.13 BOCSAR found that the statutory time-frames were not met in the majority of cases in the examined data set.[30] In fact, 92% of the conferences held over a 17-month period did not meet the statutory time-frames.[31] Conferences were held between 4 and 241 days after the date that the conference was referred to the conference administrator. On average, 40.3 days elapsed between the conference referral date and the date of the conference.[32]

7.14 However, BOCSAR noted that the longer time-frames were likely to be due to the time and effort required to accomplish the numerous administrative tasks associated with organising conferences, which seem to occupy more time than the

25. *Young Offenders Regulation 2004* (NSW) cl 17.
26. *Young Offenders Act 1997* (NSW) s 40(3).
27. *Young Offenders Act 1997* (NSW) s 54.
28. *Young Offenders Act 1997* (NSW) s 43.
29. L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (NSW Bureau of Crime Statistics and Research, Legislative Evaluation Series No 12, Sydney, 2000) at para 3.2.2.
30. Only 15% were held within the statutory time-frame of 21 days from the date of the referral to the conference administrator and 66.9% conferences were held within twice the period of time permitted by the legislation; 27.6% of conferences were held before the stipulated ten-day period from the date of the offender's written notification, with some conferences being held on the same day of the offender's written notification. Only 8.1% met both statutory time-frames: Trimboli at para 3.2.2.
31. Trimboli at para 4.2.2. Percentages in this section have been rounded up or down to the nearest whole figure.
32. Trimboli at para 3.2.2. Participants in the Commission's consultations in May-June 2002 likewise reported that the statutory time frames were often not being met.

legislation allows.[33] BOCSAR surmised that convenors appear to have given higher priority to completing the pre-conference tasks fully, rather than strictly adhering to the statutory time-frames and perhaps compromising the quality of the pre-conference preparation.[34]

7.15 The Attorney General's statutory evaluation of the YOA noted that a number of submissions argued that the time frame stipulated by the YOA is unrealistic, as a result of which "the interests of the young person may be being jeopardised".[35] The NSW Department of Aboriginal Affairs submitted that unrealistic time frames can have an adverse impact in rural areas, where participants may have to travel long distances, and hence may affect Indigenous people disproportionately, given the large numbers living in rural areas.[36] On the other, the NSW Police was of the view that the time frames under the YOA are not "unrealistic or problematic" and that the Act provides a "timely response to offences committed by children".[37]

7.16 BOCSAR also found that 28% of conferences were held *before* the 10 day notice period expired.[38] The Youth Justice Conferencing Directorate of the Department of Juvenile Justice ("YJCD") reports that for these conferences, there was usually a good reason for holding the conference earlier than 10 days after the young person has been notified of the details of the conference date, time and place.[39] For relatively simple referrals, which require less preparation, it may often be more appropriate to hold the conference sooner rather than later. In some cases, young people and their family, or the victim, had planned to travel overseas. If the conference had been delayed until their return, this would have meant that it was held well after the 21 days had elapsed. In most of these instances, the proper preparation of conferences was not compromised.

7.17 The Commission notes that the statutory evaluation of the YOA recommended that the Act be amended to extend the time limit for conferences to 28 days.[40] Before acting on this recommendation, it may be appropriate to update the research on compliance with the statutory time-frames, as BOCSAR's research is now six years

33. Time factors include: locating conference participants; availability of police; adequately preparing for each case; finding an appropriate venue for the conference; and allowing sufficient time for victims to prepare themselves: NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* (2002) at 50.
34. L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* at para 4.2.2.
35. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 50.
36. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 50.
37. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 50.
38. L Trimboli, *An Evaluation of the NSW Youth Justice Conferencing Scheme* at para 3.2.2.
39. J Bargen, *Consultation*.
40. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997*, Recommendation 13 at 50.

old. If the time-frames are still not being met, one needs to know why and how the "if practicable" qualifier contained in s 43 of the YOA is being interpreted. The government can respond as needed to the findings of this research. One option may be to relax slightly the time frames to allow sufficient time for thorough preparation, but retain the qualifier as a reminder that the longer the period that elapses between the conference and the offence, the more all participants' recall of what happened and how they were affected will be diminished.

THE CONFERENCE PROCESS

7.18 The YJCD is responsible for conferencing under the YOA. Upon referral,[41] the conference administrator must appoint a conference convenor,[42] who prepares for and holds the conference.[43] Convenors must operate in accordance with the written guidelines for the conduct of conferences that are approved by the Director General of Juvenile Justice.[44]

7.19 The offender, a person responsible for the child, members of the offender's family or extended family, an adult chosen by the offender, a legal practitioner advising the offender,[45] the investigating official, an SYO, any victim or his or her representative, and a support person for any victim, are entitled to attend the conference.[46] Where appropriate, the conference convenor may also invite a respected member of the community, an interpreter, a representative of the offender's school, an appropriately skilled person for an offender with a disability, a supervising officer, or a social worker or other health professional.[47]

7.20 All participants in the conference have the opportunity to hold forth on what happened, who has been harmed and how, and what can be done to address the harm caused. The young offender is expected to speak first, followed by his or her family members, the victim/s and then other participants.

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41. Unless the referral is disputed and the conference administrator has referred the matter to the DPP.
42. See *Young Offenders Act 1997* (NSW) s 42.
43. *Young Offenders Act 1997* (NSW) s 60 and Schedule 1. Conference convenors are statutory appointees who must undergo specific competency based training provided by the YJCD.
44. These comprehensive guidelines, set out in the Youth Justice Conferencing Policy and Procedure Manual, are available on the Department of Juvenile Justice web site: http://www.djj.nsw.gov.au/pdf/pdf_yjc/YJC_Procedures_Manual.pdf
45. Subject to *Young Offenders Act 1997* (NSW) s 50.
46. *Young Offenders Act 1997* (NSW) s 47(1). The Attorney General's Department has recommended that s 47 be expanded to permit police (out of uniform) to observe a youth justice conference for training purposes at the discretion of the conference convenor and with the consent of the young person and victim/s: NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997*, Recommendation 10 at 48.
47. *Young Offenders Act 1997* (NSW) s 47(2).

7.21 In this way, the conference participants move from looking backward to what has happened to looking to the future. In the process, many emotions are expressed, and often very forcefully. However, a well-facilitated conference will end with general satisfaction by the participants and confidence that the young person will move on from his or her offending behaviour and grow in maturity and responsibility, knowing that they have the support of their family and community. Victims should be satisfied with the process, having been able to express their hurt and anger, and, hopefully, receive sincere apologies from the young person and promises that they will not offend in future.

OUTCOME PLANS

7.22 The purpose of a youth justice conference is that, guided by a neutral convenor, participants will agree on a set of tasks for the young person designed to address the harm they have caused, and to link them to developmental and support services that will help them to stay out of trouble in future.[48] An outcome plan may include: a written or verbal apology to the victim by the young person; tasks that provide concrete reparation to the victim; or tasks that are reparatory but not undertaken directly for the victim but in the community; and participation by the offender in an appropriate program, such as counselling or drug and alcohol programs.[49] An outcome plan is not itself a "punishment", but rather the final stage of a process that emphasises restitution by the offender and the acceptance of responsibility for his or her behaviour, and which meets the needs of both victim and offender.[50]

7.23 An outcome plan is, if possible, to be determined by consensus of the participants in the conference. However, subject to a right of veto by the offender and any victim who personally attends the conference, the outcome plan may be agreed to by the conference even though it is not agreed to by all the participants.[51] If the participants are unable to agree on an outcome plan, or at least on one that complies with the YOA, the conference administrator must refer the matter back to the person or body that referred the matter for a conference.[52] Where the offender was referred by the Court, the conference convenor must submit any outcome plan agreed to at a conference to the Court.[53] The court may approve the plan or, if it does not, may continue the proceedings.[54]

7.24 The individualised approach that characterises youth justice conferencing avoids some of the problems of court-based sentencing. Representations were made to the Commission during its consultations that some court-based sentences are effectively "designed to fail", as they include conditions that young offenders will

48. The full statement of the principles and purposes of conferencing can be found in s 34 of the *Young Offenders Act 1997* (NSW).
49. *Young Offenders Act 1997* (NSW) s 52.
50. As required by the objects of the *Young Offenders Act 1997* (NSW) s 3(c).
51. *Young Offenders Act 1997* (NSW) s 52(3), s 52(4).
52. *Young Offenders Act 1997* (NSW) s 53.
53. *Young Offenders Act 1997* (NSW) s 54(1).
54. *Young Offenders Act 1997* (NSW) s 54(2).

inevitably breach. Examples given were curfews where a young person living without any effective adult supervision may need to leave the house after a 6pm curfew to buy food, or orders made to attend school where there was no transport available.[55] The YOA seeks to avoid such situations by setting out guidelines for the creation of outcome plans that are based on the individual circumstances of the participants.[56] In particular, an outcome plan must "contain outcomes that are realistic and appropriate and sanctions that are not more severe than those that might have been imposed in court proceedings for the offence concerned".[57] The outcome plan must also set out times (not exceeding any limits imposed by the regulations) for the implementation of the plan[58] and must not impose more community service hours than the maximum that may be imposed under the *Children (Community Service Orders) Act 1987* (NSW) for the same offence.[59]

7.25 While offering some indicators to conference participants, s 52 provides the greatest possible latitude in order to implement the objectives of the YOA. This flexibility of outcome, together with the accountability and transparency of the process, provides a valuable means of balancing the needs of victim and offender with the interest of the wider community in rehabilitation and reparation.

7.26 However, where the offence is an arson/bush fire offence, the legislation is more prescriptive.[60] The outcome plan must provide that the young offender must: visit a hospital burns unit; view a film on the harmful effects of fire; assist in clean-up operations and the treatment of injured animals; and pay compensation.[61]

7.27 A conference administrator supervises the monitoring, implementation and completion of each outcome plan and issues written notices to the offender, any victim, the referring person or body, the Commissioner of Police (if the offender was referred by the DPP or a court) and any other person on whom the outcome plan imposed obligations, detailing whether or not the young offender has satisfactorily completed the plan.[62]

A SOFT OPTION ?

7.28 As the most public aspect of the YOA's diversionary scheme, conferencing must retain the support and confidence of the community. The Commission agrees with the comment by the DPP that:

55. NSW Law Reform Commission, *Consultations*, Coffs Harbour (20-21 May 2002) and Broken Hill (3-4 June 2002).
56. The guidelines are contained in s 52(6) of the *Young Offenders Act 1997* (NSW).
57. *Young Offenders Act 1997* (NSW) s 52(6)(a).
58. *Young Offenders Act 1997* (NSW) s 52(6)(a) and (b). The outcome plan must be implemented within six months (or more if the Director-General approves in an individual case): *Young Offenders Regulation 2004* (NSW) cl 18.
59. *Young Offenders Regulation 2004* (NSW) cl 19.
60. *Young Offenders Regulation 2004* (NSW) cl 20.
61. *Young Offenders Regulation 2004* (NSW) cl 20(2).
62. *Young Offenders Act 1997* (NSW) s 56.

> *[a]ll diversionary processes run the risk of losing community acceptance through just a few unacceptable outcomes. It is essential therefore that outcomes are constantly monitored and any concerns addressed immediately.*[63]

This is especially so given that: no further criminal proceedings may be taken against a young offender who satisfactorily completes a conferencing outcome plan;[64] and, where a court refers a young person to youth justice conferencing without finding an offence proved,[65] the court must dismiss the charge on receiving notice of satisfactory completion of the outcome plan.[66]

7.29 Community confidence in conferencing as a legitimate diversionary option is undermined by negative media portrayal. Conferencing has from time to time been the subject of some media criticism as being a "soft option" for the young offender involved, and one that does not sufficiently take into account the needs of the victim.[67] It has sometimes even been referred to in the media as "counselling" rather than "conferencing", thereby softening and even misrepresenting the process.

7.30 Much of the negative media attention appears to stem from a misunderstanding of the way in which the diversionary process operates. The focus of media criticism is almost inevitably on a perceived lack of a punitive response to juvenile offending and overlooks the express aims of the YOA and, to some extent, s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) ("CCPA").[68] While there is a legitimate public interest in conferencing generally, there is a danger that negative media coverage will drive political response:[69]

> *[T]he media focus on sensational cases frequently distorts the law reform agenda. The media's conception of the public interest is a key driving force in the reform process. … The potential for community outrage regarding some aspect of the*

63. The NSW Bar Association, *Submission* at 1. A similar view was expressed by the Office of the Director of Public Prosecutions, *Submission* at 3.
64. *Young Offenders Act 1997* (NSW) s 58.
65. Prior to the introduction of the *Young Offenders Act 1997* (NSW), approximately 90% of all Children's Court matters were undefended. Since the introduction of the *Young Offenders Act 1997* (NSW), the majority of young offenders admit the offence after receiving legal advice prior to appearing in court, and the court papers are marked "admissions for the purposes of the *Young Offenders Act*". If the young offender has pleaded not guilty but the offence is proved after a defended hearing, the court may make an order under s 33(1)(c1) of the *Children (Criminal Proceedings) Act 1987* (NSW) releasing the young person on condition that he or she complies with an outcome plan determined at a conference held under the *Young Offenders Act 1997* (NSW).
66. *Young Offenders Act 1997* (NSW) s 57(2).
67. See, for example, D Weatherburn, "Forget the hardline, the soft, and politicking – think rationally on crime" (23 May 2002, *Sydney Morning Herald* at 15).
68. *Young Offenders Act 1997* (NSW) s 3; see *Children (Criminal Proceedings) Act 1987* (NSW) s 6(b): "children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance".
69. See Chapter 1 at para 1.22-1.24.

> *criminal justice system (usually sentencing and sentences) is a subversive sleeper in every election campaign.*[70]

7.31 Conferencing was not intended as a soft option. The challenging nature of youth justice conferencing as an integral component of diversion under the YOA was stressed in the second reading speech introducing the *Young Offenders Bill 1997*. The then Attorney General explained the object of conferencing in the following terms:

> *[Y]oung people are required to consider and articulate what they have done, face their extended family and the victim, and actively participate in analysing and making decisions about their offending behaviour. Conferences are focused upon the young person taking positive action to put right the wrong they have done.*[71]

7.32 As Coumarelos and Weatherburn observed (although some time prior to the introduction of the YOA and referring principally to the Wagga Wagga extended cautioning scheme[72]) conferencing is "potentially onerous, stressful and/or humiliating and may involve significant restraints on the offender's liberty".[73] These properties "may be the preconditions of successful reintegration but they are also sanctions by another name".[74]

7.33 This is borne out by research for the New Zealand Ministry of Social Development which found that:

> *Young offenders did not find the family group conference to be an easy option. At the conference, they were required to face their victims and their family and they were expected to apologise and to repair the harm that they had done. Going to court and receiving an order, according to some young people, was much simpler and easier.*[75]

70. P Fairall, "The reform of the criminal law" in D Chappell and P Wilson (ed), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (Butterworths, Sydney, 2000) at 37.
71. New South Wales Legislative Council, Parliamentary Debates (Hansard) the Hon J W Shaw QC MLC, Attorney General and Minister for Industrial Relations, *Young Offenders Bill 1997* (NSW), Second Reading Speech (21 May 1997) at 8960.
72. Which was overtly based on the theories of reintegrative shaming.
73. C Coumarelos and D Weatherburn, "Targeting intervention strategies to reduce juvenile recidivism" (1995) 28 *Australian and New Zealand Journal of Criminology* 55 at 69.
74. Coumarelos and Weatherburn at 69.
75. G Maxwell, J Robertson, V Kingi, A Morris and C Cunningham, *Achieving Effective Outcomes in Youth Justice: An Overview of Findings* (New Zealand, Ministry of Social Development, 2004) at 33. See para 7.42-7.43 below.

EVALUATION OF CONFERENCING

7.34 The most widely accepted measurements of the effectiveness of conferencing are: for the offender and victim, satisfaction with the actual conferencing process; and, for the community, reduced recidivism and costs.

7.35 The satisfaction of the participants in conferencing is based on their sense of the fairness of the process and outcome, and their ability to have a positive effect on decision-making. "Fairness" is of particular importance in the context of limiting re-offending. Research suggests that, for young people, the greater the degree of perceived fairness of a sentence, the greater the deterrent effect of that sentence.[76]

7.36 Hayes and Daly note that although satisfaction is a "notoriously fuzzy concept with varied referents for victims and offenders", a recurring finding to emerge from the literature on conferencing (and restorative justice generally) is that there are generally high levels of satisfaction with the process and outcomes among victims and offenders.[77]

7.37 Hayes and Daly reviewed a number of studies, including in Australia and New Zealand, to ascertain the effect on offenders of being satisfied with, or judging to be fair, a justice process. In addition, they carried out their own research based on data collected by the South Australia Juvenile Justice project from 89 conferences conducted in South Australia in 1998.[78] They found that young people who were observed to be remorseful and who were in conferences in which the outcome was decided by genuine consensus, were less likely to reoffend.[79]

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76. See, for example, R R Corrado, I M Cohen, W Glackman and C Odgers, "Serious and violent young offenders' decisions to recidivate: an assessment of five sentencing models" (2003) 49 (2) *Crime & Delinquency* 179 at 183.
77. H Hayes and K Daly, "Youth justice conferencing and reoffending" (2003) 20(4) *Justice Quarterly* 725 at 733 and references cited there. See also K Daly and H Hayes, *Restorative justice and Conferencing in Australia* (Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice No 186, 2001); and H Hayes and K Daly, "Conferencing and re-offending in Queensland" (2004) 37(2) *Australian and New Zealand Journal of Criminology* 167; and H Hayes, "Assessing reoffending in restorative justices conferences" (2005) 38 *Australia and New Zealand Journal of Criminology* 77. Hayes and Daly note that there are some exceptions: see the early work in New Zealand by Maxwell and Morris: G Maxwell and A Morris *Family, Victims and Culture: Youth Justice in New Zealand* (Institute of Criminology, Victoria University of New Zealand, Wellington, 1993).
78. See H Hayes and K Daly, "Youth justice conferencing and reoffending" at 737.
79. H Hayes and K Daly, "Youth justice conferencing and reoffending" at 756. Their analysis indicates that "about one quarter of the young people were changed by the conference process toward more law-abiding behaviour": at 757. Daly and Hayes note that "advocates and commentators have given a variety of reasons for why conferencing is likely to be more effective than regular court processes in reducing crime": at 755. However, they also comment that the usual method of evaluation of comparing measures of reoffending for different kinds of legal interventions, while having value, also has its limitations. These limitations

7.38 In a later study, Hayes and Daly gathered data from conference case files and offending history records of 200 young offenders conferenced in Queensland from April 1997 to May 1999 to assess the link between offender characteristics and conference features and reoffending.[80] After three to five years following their conference, just over half the offenders (56%) had gone on to commit one or more offences. Hayes and Daly concluded that, while there remains uncertainty about how conference features are related to reoffending, what offenders bring to their conference is highly predictive of what they do afterwards.[81] In this study, Hayes and Daly again provide a comprehensive summary of the research and the equivocal results on conferencing and reoffending, principally in Australia and New Zealand.[82] Despite equivocal results, they summarise the research as showing:

> *(1) offenders and victims rate conferences highly on measures of satisfaction and fairness, (2) compared to offenders going to court, conference offenders are less likely to reoffend and (3) when conference offenders are remorseful and conference decisions are consensual, re-offending is less likely.*[83]

7.39 In a survey of 329 conferences held across New South Wales between 24 March and 13 August 1999, BOCSAR found a high level of satisfaction with both the process[84] and the outcomes:[85]

> *In summary, at least 89 per cent of the subjects in the current study believed that they had received procedural justice and had been treated fairly during the conference proceedings.*

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include sample selection bias by the police (or other referring groups); differences in offenders' orientations to admit more immediately to an offence (or to deny it); and temporal differences in court and conferencing processes, which give different windows of time for measuring reoffending: at 755. They conclude that they "cannot make a causal claim that conferences induce remorse or contrition or that consensually based outcomes cause reductions in reoffending": at 757.

80. H Hayes and K Daly, "Conferencing and re-offending in Queensland".
81. H Hayes and K Daly, "Conferencing and re-offending in Queensland" at 167.
82. See also K Polk, C Adler, D Muller and K Rechtman, *Early Intervention: Diversion and Conferencing* (National Crime Prevention, Commonwealth of Australia Attorney-General's Department, Canberra, 2003) at 50: "What is found in a review of the empirical record regarding recidivism and conferencing … is the common pattern of conflicting data and claims which is true of diversion generally."
83. H Hayes and K Daly, "Conferencing and re-offending in Queensland" at 170.
84. L Trimboli, *An Evaluation of NSW Youth Justice Conferencing Scheme* at 30-49. However, see Youth Justice Coalition, *Young People's Experience of the Young Offenders Act* (2002) for criticisms of the conferencing process under the *Young Offenders Act 1997* (NSW).
85. "At least 89 per cent of the victims, offenders and support persons participating in the NSW conferences either 'agree[d]' or 'strongly agree[d]' that they were satisfied with the outcome plan. In fact, approximately half of the victims (46.7%) and the offenders' support persons (55.8%) strongly agreed with the statement. Of the offenders, 39.1 per cent gave this response.": L Trimboli, *An Evaluation of NSW Youth Justice Conferencing Scheme* at 45.

> *Subjects understood the conference process and perceived that the conference was fair to both the offender and the victim involved. Furthermore, they believed that they had been treated with respect, could express their own views and could influence the decisions made about what should be done in their case. Victims and offenders also believed that the conference respected their rights.*[86]

7.40 Other research by BOCSAR supports a connection between conferencing and reduced recidivism.[87] BOCSAR reviewed the re-offending patterns of young people conferenced in NSW during the first year of operation of the YOA and compared their re-offending with young people who went to court during the same period, the follow-up period being between 27 and 39 months. It found that:

> *When the effects of other factors are controlled for, it appears that both the risk of reoffending and the rate of reappearances per year in the follow-up period are about 15 to 20 per cent lower for those who had a conference than for those who went to court.*
>
> *… [T]he consistency in court reoffending rates, both before and after introduction of the conference option, and the persistence of lower levels of reoffending for conferences, even after controlling for the effects of gender, age, offence type, Aboriginality and prior record, strongly suggests that the difference in reoffending levels is largely due to the conference experience itself.*[88]

7.41 This same study also reviewed empirical research of restorative justice schemes in other jurisdictions and concluded that:

> *[t]he results of this research are consistent with the general findings of other restorative justice research on recidivism but the strength and consistency of the effect in the present study is more notable.*[89]

7.42 New Zealand research undertaken by Gabrielle Maxwell, Alison Morris and others since 1990 indicates that "family background factors, the responses of the youth justice system that affected young offenders' views of family group conferences, and events subsequent to the conference, all … affected young offenders' likelihood

86. Trimboli at 40.
87. G Luke and B Lind, *Reducing Juvenile Crime: Conferencing versus Court* (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 69, Sydney, 2002) at 14.
88. Luke and Lind at 13-14.
89. Luke and Lind at 14. Their explanation for the more notable effects is that: "[i]t is likely that the relatively large sample and long follow-up period used in this study have allowed clearer differences to emerge than in some of the previous research".

of reoffending and achieving positive life outcomes".[90] They concluded that there are "a number of different aspects of the family group conference that were important in making reoffending less likely".[91] These were:

> *good preparation before the conference and, at the conference, the young person should feel supported, understand what is happening, participate in the conference and not feel stigmatized or excluded. A conference that generates feelings of remorse, of being able to repair harm and of being forgiven, and encourages the young offender to form the intention not to reoffend, is likely to reduce the chances of further offending.*[92]

7.43 Maxwell, Morris, Robertson, Kingi and Cunningham surveyed 24 youth justice co-ordinators and 1,003 young people whose family group conferences were facilitated by members of the co-ordinator sample. A second sample of 115 family group conferences was obtained in 2001/2002. This research found that in the process of conferencing: young offenders were held accountable for their behaviour; restorative outcomes were agreed to for most; young offenders and victims believed the outcomes were fair and appropriate; victims were more likely to receive some reparation as a result of conferencing than through a court hearing; and most young offenders were doing all they could to repair the harm they had caused. The study also found that reoffending in New Zealand is not increasing and may have declined.[93]

7.44 Much of the research on the impact that participation in a conference has on future offending demonstrates that, because many young offenders who are dealt with by way of a conference have chaotic and unsupported lives, it is neither possible nor appropriate to identify a direct correlation between participation in a conference and future offending. The research does indicate, however, that conferences that do not shame young offenders or their families, and that result in young people accessing services that help them to deal with the problems they are facing, and provide them with reliable adult support, are more likely to result in diminished or no future offending, than those that shame an offender or do not provide for adequate and appropriate services following the conference.

Conferencing and Indigenous young offenders

7.45 Included in the principles and purposes of youth justice conferences is that they should be culturally appropriate where possible[94] and that any measures for dealing with, or imposing sanctions on, children must take into account the race of the

90. G Maxwell, J Robertson, V Kingi, A Morris and C Cunningham, *Achieving Effective Outcomes in Youth Justice: An Overview of Findings* (2004) at 15.
91. Maxwell, Robertson, Kingi, Morris and Cunningham at 15.
92. Maxwell, Robertson, Kingi, Morris and Cunningham at 15-16.
93. Maxwell, Robertson, Kingi, Morris and Cunningham.
94. *Young Offenders Act 1997* (NSW) s 34(1)(a)(v).

child.[95] Despite these safeguards, an early criticism of youth justice conferencing was that it did not cater for the needs of Aboriginal and Torres Strait Islander communities.

7.46 In an article written in 1999, it was argued that cultural appropriateness was hindered by there not being enough Indigenous conference convenors to match with Indigenous offenders.[96] Where Indigenous offenders are conferenced by non-Indigenous conference convenors, the argument continued, not only is this culturally inappropriate, but it results in further alienation of the offender rather than reintegration into the community.[97] It was also suggested that, where offender and victim are from Indigenous and non-Indigenous backgrounds, there could be co-convenors from each of those cultural backgrounds.[98]

7.47 The YJCD has addressed these concerns by recruiting convenors from specific cultural groups and training convenors to address specific cultural needs,[99] in addition to aiming for a high level of community participation.[100] Five of the 17 full-time youth justice conference administrator positions (seven metropolitan and 10 rural) are held by Indigenous people.[101] Around 8-10% of the 500 active conference convenors are Aboriginal or Torres Strait Islander people, enabling cultural matching of Indigenous offenders and convenors in appropriate cases.[102]

7.48 Two other issues relevant to Indigenous young people are: ensuring a level of diversion under the YOA comparable with non-Indigenous young people; and meeting the needs of respected Indigenous community members in both the conferencing process and the implementation of outcome plans.

7.49 The Commission has been advised that, since 1998, one quarter of all referrals to youth justice conferences have been for Aboriginal young people. [103] In addition, research comparing the outcomes of the first three years of the operation of the YOA with those for the three years prior to its introduction, found that Aboriginal young people were still more likely to be taken to court and less likely to be cautioned

95. *Young Offenders Act 1997* (NSW) s 34(1)(c)(iv).
96. L Kelly and E Oxley, "A dingo in sheep's clothing? The rhetoric of Youth Justice Conferencing" (1999) 4(18) *Indigenous Law Bulletin* 4 at 5. See also 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(3) *Australian and New Zealand Journal of Criminology* 292.
97. L Kelly and E Oxley, "A dingo in sheep's clothing? The rhetoric of Youth Justice Conferencing" at 5.
98. Kelly and Oxley at 5.
99. J Bargen, "Young Offenders and the new options in Youth Justice" (1999) 37(10) *Law Society Journal* 54 at 57.
100. J Bargen, "Youth Justice Conferencing: The Debate Continues" (1999) 20(4) *Indigenous Law Bulletin* at 18.
101. Department of Juvenile Justice, *Annual Report 2002-2003* at 13.
102. J Bargen, Director, Youth Justice Conferencing Directorate, Department of Juvenile Justice, *Consultation*.
103. Youth Justice Conferencing Directorate, data held on the New South Wales Department of Juvenile Justice CIDS data base, 2004.

than non-Aboriginal young people, even though they were equally likely to be warned or referred to conferences compared with non-Aboriginal young people. The available data show that the YOA has had a substantial impact on the over-representation of Aboriginal young people: it has resulted in an almost 50% drop in the odds ratio of Aboriginal first offenders being taken to court compared with the situation before the Act.[104]

7.50 The Commission does not wish to dismiss concerns as to the applicability to Indigenous young offenders of the restorative justice processes of youth justice conferencing under the YOA. However, we have not received any evidence to suggest that this is a cause for disquiet for those Indigenous people currently working with the YOA. Nonetheless, it remains important that conference convenors consider the requirements of the YOA that the process be "culturally appropriate, wherever possible".[105]

SUBMISSIONS AND RESPONSE TO ISSUES PAPER 19

Court referral to a youth justice conference

7.51 During the Commission's consultations following its release of Issues Paper 19, *Sentencing: Young Offenders*[106] ("IP 19"), it was suggested that in some cases courts do not dispense with, but in fact order, conditional bail or add good behaviour bonds when referring young offenders to youth justice conferences.[107]

7.52 The Commission was also advised that some magistrates refer young offenders to youth justice conferencing for minor or first offences, for which the child is entitled to be cautioned. This is contrary to the principles of the YOA and the clear intentions expressed in the second reading speech, as well as being "an inappropriate, expensive and time consuming way of dealing with a minor offence".[108] Bargen has argued that:

> *A set of finalised Practice Directions that are consistent with the diversionary principles of the Act may enable more judicial officers to play their part in ensuring that all children in New South Wales, in accordance with the entitlements that*

104. J Chan, J Bargen, G Luke and G Clancey, "Regulating Police Discretion: An assessment of the impact of the NSW Young Offenders Act 1997" (2004) 28 (2) *Criminal Law Journal* 72 at 90.
105. *Young Offenders Act 1997* (NSW) s 34(1)(v)(a).
106. New South Wales Law Reform Commission, *Sentencing: Young Offenders* (Issues Paper 19, 2001).
107. Preliminary consultation, Reference Group (7 November 2000); Preliminary consultation, Reference Group (18 December 2000); see 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.
108. See J Bargen, "The *Young Offenders Act 1997* Is the diversionary scheme being diverted?" (2000) 12(3) *Judicial Officers Bulletin (Judicial Commission of NSW)* 17 at 19.

> *have been established by the Act, have access to these clearly defined diversionary options.*[109]

7.53 It was also suggested that some magistrates seem unwilling to send matters to conferencing if the victim will not attend – an irrelevant issue under s 40 – or will send young offenders to conferences despite the fact that they do not wish to participate.[110]

Respected community members

7.54 As noted above, the YOA authorises the conference convenor, if he or she thinks it appropriate, to invite a respected member of the offender's community to attend youth justice conferences, for the purpose of advising conference participants about relevant issues.[111] Such participants appear voluntarily and do not receive payment.

7.55 The issue of payment for participation in the conferencing process was raised in IP 19[112] and in the Commission's consultations. The Commission was informed that, particularly in respect of Indigenous young offenders, the responsibilities of attendees at conferences may be of an ongoing nature, such as transporting a young offender to and from unpaid work pursuant to the outcome plan.[113] The lack of payment for a respected community member's participation has also been criticised by Kelly and Oxley.[114]

Other issues

7.56 A number of submissions raised additional issues relating to youth justice conferencing under the YOA. The Young Lawyers' submission noted that police prosecutors regularly cite the attitude of the victim as a reason that renders a matter unsuitable for conferencing. As this is not a relevant criterion under s 40 of the YOA, it was suggested that prosecutors would benefit from ongoing training about conferencing and the objects of the YOA.[115]

7.57 The Children's Court noted that the fact that it approves most outcome plans indicates that, at a basic level, outcome plans are appropriate. However, the Children's Court also noted that, as such matters are dealt with in chambers without submissions from the prosecution or input from the victim, "[a]pproval of outcome plans should not necessarily imply a 'ringing endorsement' of the outcome plan or of

109. Bargen at 19.
110. The Law Society of NSW, Submission at 3.
111. *Young Offenders Act 1997* (NSW) s 47(2)(a).
112. NSWLRC IP 19, Issue 3 at 20.
113. NSW Law Reform Commission Consultations, Coffs Harbour, 20 May 2002.
114. L Kelly and E Oxley, "A dingo in sheep's clothing? The rhetoric of youth justice conferencing" (1999) 4(18) *Indigenous Law Bulletin* 4 at 6. See Jenny Bargen's response to this article: J Bargen, "Youth justice conferencing: the debate continues" (1999) 4(20) *Indigenous Law Bulletin* 18; and Kelly's and Oxley's reply: (1999) 4(20) *Indigenous Law Bulletin* 19.
115. NSW Young Lawyers, *Submission* at 3.

all aspects of it".[116] Nonetheless, the Children's Court's general support for the process is one of the reasons it advocates expanding the range of offences that can be conferenced.[117]

7.58 The Anti-Discrimination Board stressed the need for youth justice conference convenors to have "adequate understanding of anti-discrimination legislation that prohibits discrimination, vilification and harassment on the ground of homosexuality", and advocated training, working guidelines and a code of conduct to avoid homophobic behaviour at conferences.[118] We note that the importance of issues relating to the sexuality of a young offender are currently dealt with in s 34(1)(3)(c), which provides as a basic principle of the YOA that any measures for dealing with, or sanctions imposed on, a child who is alleged to have committed an offence take into account the sexuality of any such child. While there is no harm in ensuring awareness of anti-discrimination and anti-vilification laws through education, guidelines and/or a code of conduct, the Commission is unaware of any evidence to suggest that conference convenors are in need of behaviour modification. As far as we are aware, no formal complaints have been made against conference convenors to the Anti-Discrimination Board. On the other hand, several years ago a complaint was made to the Board by a conference convenor against a conference administrator.

Court outcomes after successful completion of an outcome plan

7.59 The Children's Court queried the status of a dismissal under s 57(2) of the YOA. [119] Pursuant to s 57(2), if the court refers a charge to conferencing without making a finding of guilt, and the outcome plan is satisfactorily completed, it *must* dismiss the charge.[120] It submitted that it is not clear whether the requirement to dismiss the charge under s 57(2) "is a specific dismissal power under the YOA, or a direction to dismiss under the [CCPA]".[121]

THE COMMISSION'S VIEW

Court referral to a youth justice conference

7.60 Practice Direction No 17 was issued by the Senior Magistrate of the Children's Court on 12 October 2000 with the aim of encouraging "consistency of practice in the

116. The Children's Court of New South Wales, *Submission* at 7.
117. Chapter 4 examines the range of offences that fall within the *Young Offenders Act 1997* (NSW).
118. Anti-Discrimination Board of New South Wales, *Submission* at 6.
119. The Children's Court of New South Wales, *Submission* at 8.
120. *Young Offenders Act 1997* (NSW) s 57(2).
121. The Children's Court of New South Wales, *Submission* at 8. The Children's Court made a similar submission to the Attorney General's Department's review of the YOA, which recommended that clarification of this issue be sought from the Crown Solicitor: NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 49.

administration of the [YOA]" but without limiting or interfering with "the powers and discretions of a magistrate either generally or in a particular case".[122]

7.61 Setting of conditional bail or imposing a good behaviour bond when a young offender is referred to conferencing is inconsistent with the diversionary intentions of the YOA and explicitly contrary to the provisions of the YOA and the CCPA and to Practice Direction No 17.

7.62 Section 57(2) of the YOA provides that "a court that referred a matter for a conference without making a finding that the child concerned was guilty of an offence must dismiss a charge against a child on receiving notice that an outcome plan relating to the offence concerned has been satisfactorily completed by the child." Section 33(1)(c1) of the CCPA provides that a court may make an order releasing the young offender on condition that he or she complies with a conferencing outcome plan. Paragraph 5 of Practice Direction No 17 provides that when a court is dealing with a matter to which s 57(2) of the YOA or s 33(1)(c1) of the CCPA applies, the child should be excused from attending court and bail dispensed with.

7.63 Paragraph 7 of Practice Direction No 17 provides that the magistrate who referred a young offender to conferencing will consider the outcome plan in chambers. If the plan is approved, the magistrate should excuse the child from appearing on the adjourned date. However, it also provides that: "the registrar is to notify the child and the conference administrator … of any requirement for the child to personally appear before the court on the adjourned date". The Practice Direction does not otherwise deal with excusing a young offender referred to conferencing by a court from attendance before the court. Nor does the Practice Direction address the other concerns raised in paragraphs 7.50-7.52.

7.64 Consideration should be given to revising Practice Direction No 17 to address the concerns above. Among other things, the Practice Direction should make clear that conferencing should only be used in accordance with s 7(a) of the YOA, that is, where it is the least restrictive form of sanction in the circumstances.

7.65 The Commission notes that the report of the Attorney General's review of the YOA recommended that the Act be amended to create a statutory presumption that bail be dispensed with when a matter is referred to conference, although retaining a court discretion to impose unconditional bail in special circumstances.[123] We recommend in Chapter 10 that the *Bail Act 1978* (NSW) be amended to provide that a court should generally exercise a discretion to dispense with bail where it has referred a young person to a youth justice conference.[124]

122. The Children's Court of New South Wales, *Practice Direction No 17: Practice Direction for the Young Offenders Act 1997* (issued 12 October 2000) at para 1.
123. NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* Recommendation 20 at 55.
124. See Chapter 10, Recommendation 10.1 and para 10.22.

Respected community members

7.66 Much of the ethos of the YOA stems from theories of restorative justice, in which crime is seen not in the abstract as an act against the state or a violation of law, but in a much more direct way as an act against another person and the community. The involvement in the conferencing process of a person who is personally important to the young offender is a crucial part of the link between offender and community.

7.67 In many instances, the presence of a respected community member forms a vital part of conferencing, especially where a parent of the young person is unavailable. It reinforces the "positive shaming" aspect of the process. The inability of a community member to attend due to cost potentially weakens the impact of conferencing upon the offender. However, the obverse of this issue is the concern expressed to the Commission that payment by the state to the community member weakens that very community ownership on which the process relies.[125]

7.68 Furthermore, the YJCD considers that the views of Kelly and Oxley do not generally represent those of any of the five Aboriginal YJCD conference administrators. These administrators are strongly of the view, based on their experiences over the last six years, that to pay Aboriginal "elders" to attend youth justice conferences in the way Kelly and Oxley suggest would be counter-productive and perhaps create a "conferencing industry" for certain Aboriginal people. Their strong view, which is YJCD practice, is to ensure that out-of-pocket expenses are paid to any people who attend and participate in a youth justice conference but would be unable to do so without some financial help. YJCD also offers to provide financial support to community members who assume responsibilities for helping young offenders undertake their outcome plan tasks in appropriate cases.[126]

7.69 The Commission acknowledges that the contribution of a community member is valuable, significant and can be extensive, and that he or she ought not to be out of pocket for attending a conference and assisting in achieving successful completion of an outcome plan. Accordingly, we support the direction given to conference convenor's by the YJCD that respected community members attending youth justice conferences receive re-imbursement for verifiable expenses associated with the conferencing process and the implementation of the outcome plan. We see no need or justification to recommend more than this.

Court outcomes after successful completion of an outcome plan

7.70 Pursuant to s 33(1)(a) of the CCPA, if the Children's Court finds a person guilty of an offence to which Division 4 - Penalties applies, it *may*, among other things, make an order dismissing the charge. Section 32 provides that Division 4 applies to

125. See, for example, Minister for Juvenile Justice, *Submission* at 2; Office of the Director of Public Prosecutions, *Submission* at 1; and New South Wales Bar Association, *Submission* at 1.
126. J Bargen, *Consultation* (August 2004).

any offence for which proceedings are being dealt with summarily or in respect of which a person has been remitted to the Children's Court under s 20 of the YOA.

7.71 The Commission regards s 57(2) of the YOA as clear and the resulting situation appropriate. The requirement of s 57(2) of a dismissal of the charge is tied to there being no finding of guilt. This is appropriate in the case of a discretionary scheme. In contrast, the dismissal power under the CCPA is tied to a finding of guilt. Furthermore, the CCPA creates a penalties regime in which it is important to retain discretion. The Commission considers that the YOA's requirement to dismiss the charges under s 57(2) is a specific dismissal power under the YOA and not a direction to dismiss under the CCPA.[127]

7.72 For the avoidance of doubt, s 33 of the *Children (Criminal Proceedings) Act 1987* (NSW) should be amended to ensure that the Children's Court has the power, on the completion of a youth justice conference outcome plan, to make orders dismissing the original charge.

Recommendation 7.1

The *Young Offenders Act 1997* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW) should be amended to ensure that the Children's Court has the power, on the completion of a youth justice conference outcome plan, to make orders that proceedings have been discontinued and that the original charge is dismissed outright.

127. The same conclusion was reached by the Youth Justice Advisory Committee: NSW Attorney General's Department, *Report on the Review of the Young Offenders Act 1997* at 49.

8. Court-based Sentencing

- Introduction
- Court-based sentencing and restorative justice
- Evidence of prior offences
- Identification of young offenders
- Sentencing options
- Guideline judgments and young offenders
- Mandatory sentencing of young offenders
- Care issues in sentencing

INTRODUCTION

8.1 Chapters 6 and 7 dealt specifically with procedures under the *Young Offenders Act 1997* (NSW) ("YOA") that aim to divert young people from the court process. This diversionary approach is largely premised upon the belief that the less a child is exposed to traditional criminal justice procedures, the less likely that he or she will re-offend.[1] Nonetheless, some young people will inevitably need to appear in the Children's Court or District Court as a result of their offending. This is made explicit in the YOA itself, by the limitations to its applicability set out in s 8.[2]

8.2 This chapter and the next focus on issues that arise in the context of the involvement of young offenders in court proceedings and that were identified in submissions to, and consultations with, the Commission.

8.3 This chapter explores issues relating to:

- the role of restorative justice in court-based sentencing;
- admission of evidence of prior offences;
- identification of young offenders;
- whether the current range of sentencing options under the *Children (Criminal Proceedings) Act 1987* (NSW) ("CCPA") is being fully used by magistrates.
- the use of licence disqualification, fines and community-based sentencing;
- whether more holistic approaches to sentencing are appropriate where the young offender is drug- or alcohol-dependent; and
- whether guideline judgments and/or mandatory sentencing are appropriate in the context of sentencing for young offenders

Lastly, the chapter looks at care issues arising in criminal matters, both in sentencing and bail hearings.

8.4 The following chapter, Chapter 9, explores issues pertaining to the Children's Court itself, recognising that the sentencing process will only work successfully if it is supported by an effective judicial structure.

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1. The development of diversion is discussed in detail in Chapter 2; see especially para 2.26.
2. Chapter 4 deals with the range of offences covered by the *Young Offenders Act 1997* (NSW).

COURT-BASED SENTENCING AND RESTORATIVE JUSTICE

8.5 Sentencing in the Children's Court is subject to the principles of the CCPA as set out in s 6 and reinforced by s 33. In addition, in the cases to which it applies, the diversionary options under the YOA are available even where the matter has proceeded to court, such as the magistrate's power to caution under s 31 of the YOA or refer a young offender to youth justice conferencing under s 40(3) of the YOA.

8.6 Youth justice conferencing, which is the subject of Chapter 7, is particularly suited to the achievement of "restorative justice" outcomes. This is hardly surprising if "restorative justice" is understood principally in terms of a process, as in this frequently-cited definition:

> Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.[3]

8.7 Accordingly, while it may not be referred to expressly, restorative justice currently forms part of the backdrop to the judicial decision-making process in the practice of juvenile justice.

8.8 Aspects of the court-based sentencing process for young offenders have restorative justice features, either in a procedural or substantive sense, for example, Victim Impact Statements ("VIS") and compensation. VIS set out the harm suffered by the victim of an offence or, where the victim died as a result of the offence, the impact of the death on the victim's immediate family.[4] VIS are admissible in criminal proceedings for certain offences after the offender has been convicted and before sentencing.[5] Aside from VIS, victims participate indirectly in the sentencing process in so far as their testimony is admitted as relevant evidence of the commission of an offence and its effect.

8.9 The Children's Court may order a young offender to pay compensation to the victim of the offence to a maximum amount of $1,000.[6] Compensation is only

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3. T Marshall, "Criminal mediation in Great Britain 1980-1996" (1996) 4(4) *European Journal on Criminal Policy and Research* 21 at 37.
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 26.
5. 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 as a result of s 33C of the CCPA.
6. *Children (Criminal Proceedings) Act 1987* s 36(3).

awarded after the court has considered the young offender's means, income and ability to pay.[7] Having regard to the fact that most young people cannot be expected to pay large amounts, compensation orders are rarely made in the Children's Court, and when made, are for small amounts.

8.10 IP 19 queried whether court-based sentencing of young offenders adequately emphasises the role of restorative justice, and if not, how a greater emphasis could be achieved.[8]

8.11 The DPP noted that, in the Children's Court, "restorative justice should be seen as a common and acceptable sentencing outcome".[9] Two methods of ensuring this were suggested in a number of submissions.[10] The first was the expansion of the range of offences able to be dealt with under the YOA. This is addressed in Chapter 5. The second method was to cement the position of restorative justice by expressly including it in s 6 of the CCPA, as a principle relating to the exercise of criminal jurisdiction in relation to young offenders.

8.12 There are at least two reasons why the Commission does not agree that "restorative justice" as such should be listed as a principle relating to the exercise of criminal justice in the CCPA (any more than it is identified as such in the YOA). First, the concept of "restorative justice" lacks any precise meaning. Would it be used in a "process" or substantive sense? It can hardly be incorporated in legislation without a legislative definition, on which it would be difficult, if not impossible, to find agreement.

8.13 Secondly, the relationship of "restorative justice" to the existing objects of sentencing is controversial.[11] At the least, "restorative justice" focuses on the rupture of the relationships between the victim, the community and the offender. In contrast, the focus of sentencing in the current law is on punishment in the light of the nature of the offence and the circumstances of the offender.[12] Whether or not the law will, or can, accommodate these two concepts is a question that is in the process of evolution, even in the case of young offenders. Interference with that evolution runs the risk of rendering the restorative approach meaningless through its absorption into the traditional sentencing paradigm. As Walgrave writes:

> In the punitive climate of today, restorative ethics and practices would gradually fade away and the punitive core of the

7. *Children (Criminal Proceedings) Act 1987* s 24 and s 36.
8. New South Wales Law Reform Commission, *Sentencing: Young Offenders* (IP 19, 2001), Issue 22.
9. New South Wales Office of the Director of Public Prosecutions, *Submission* at 8.
10. **Cite submissions?**
11. See L Walgrave, "On restoration and punishment: favourable similarities and fortunate differences" in A Morris and G Maxwell, *Restorative justice for juveniles: conferencing, mediation and circles* (Hart Publishing, Oregon, 2001) Ch 2.
12. See NSW Law Reform Commission, *Sentencing* (Report 79, 1996) at para 13.2, 14.10-14.13.

> traditional approach would increasingly be re-accentuated. If we accept so-called restorative punishment, the restorative element would soon be forgotten or distorted, and punishment would remain.[13]

8.14 We do, however, recognise that sentencing under the CCPA may, in appropriate cases, serve objectives similar to those underpinning the diversionary scheme of the YOA. We therefore favour the expansion of s 6 of the CCPA to provide that, in imposing a penalty on a child, the court should, where appropriate, have regard to:

- the desirability that children should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties;[14]
- the necessity for children who accept responsibility for their actions making reparation; and
- the effect of the crime on the victim.[15]

Recommendation 8.1

Section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) should be expanded to provide that, in imposing a penalty on a child, the court should, in appropriate cases, have regard to:

- the desirability that children should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties;
- the necessity for children who accept responsibility for their actions to make reparation; and
- the effect of the crime on the victim.

EVIDENCE OF PRIOR OFFENCES

8.15 The rules governing practice and procedure in courts exercising jurisdiction over young offenders differ from those applying in the adult criminal jurisdiction in two important ways: a young offender's prior offences are inadmissible; and the court has a discretion to prohibit publication of information identifying young people involved in criminal trials. Paragraphs 8.17-8.21 below discuss the first issue, while paragraphs 8.22-8.34 turn to the second.

8.16 Section s 14(1) of the CCPA prohibits a court from proceeding to conviction or recording a finding as a conviction, where a child under 16 years pleads guilty to, or is

13. L Walgrave, "On restoration and punishment: favourable similarities and fortunate differences" at 29-30.
14. Compare *Young Offenders Act 1997* (NSW) s 7(e) and also *Drug Court Act 1998* (NSW) s 3(1)(b).
15. Compare *Young Offenders Act 1997* (NSW) s 7(g).

found guilty of, an offence.[16] The Children's Court and the Local Courts also have a discretion not to proceed to, nor record, a conviction against a child who is 16 years or older in respect of an offence which is disposed of summarily.[17] However, any power of a court to proceed to, or record a finding as, a conviction in respect of a child who is charged with an indictable offence that is *not* disposed of summarily, is not limited.[18]

8.17 In criminal proceedings in courts, *other than* the Children's Court, evidence that a person pleaded guilty to, or was convicted of, an offence when they were aged under 18 cannot be admitted into evidence if no conviction was recorded, and the person has not been punished within the period of 2 years prior to the commencement of proceedings for the other offence.[19] Nor is evidence that a young person has been warned or cautioned or participated in a youth justice conference under the YOA admissible in subsequent criminal proceedings in courts, *other than* the Children's Court.[20] In the Children's Court, however, 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 YOA.[21]

8.18 As noted in IP 19,[22] laws restricting the admissibility of prior offences are designed to minimise the labelling of young people who commit offences as criminals. This reflects the view that most young offenders "grow out" of crime and it is unfair to label them as criminals when adults merely because of mistakes as youths.[23] 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 to travel.[24] It also reflects current criminological theory that argues that labelling young people as deviant or criminal ("stigmatic shaming") creates a social stigma that is likely to entrench criminal behaviour rather than promote rehabilitation.[25] The same policy is reflected in the

16. *Children (Criminal Proceedings) Act 1987* (NSW) s 14(1)(a).
17. *Children (Criminal Proceedings) Act 1987* (NSW) s 14(1)(b). This discretion operates in addition to the discretion at law to decline to record a conviction for any offence under the *Crimes Act 1900* (NSW).
18. *Children (Criminal Proceedings) Act 1987* (NSW) s 14(2).
19. *Children (Criminal Proceedings) Act 1987* (NSW) s 15(1).
20. *Children (Criminal Proceedings) Act 1987* (NSW) s 15(3).
21. *Children (Criminal Proceedings) Act 1987* (NSW) s 15(2) and *Young Offenders Act 1997* (NSW) s 68(2)(c).
22. NSWLRC IP 19 at para 3.90.
23. For example, "If juvenile delinquency is defined in terms of naïve risk-taking, the function of the juvenile justice system should be to communicate that actions have consequences. Such communication should involve the minimum consequences possible. That is, the extent of the consequences should be determined by the need to communicate with the juvenile, not by the nature of the offense": T J Bernard, *The Cycle of Juvenile Justice* (Oxford University Press, New York, 1992) at 170.
24. Australian Law Reform Commission, S*een and Heard: Priority for Children in the Legal Process* (Final Report 84, 1997) at para 19.117-19.127.
25. K Buttrum, "Juvenile Justice: What Works and What Doesn't", paper presented at the *Australian Institute of Criminology Conference - Juvenile Crime and*

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. [26]

8.19 IP 19 raised the question of the appropriateness of the current law regarding admissibility of matters dealt with under the YOA and the CCPA.[27] The overwhelming response was that the current law ought to remain unchanged, given that it reflects the rehabilitative aims of juvenile justice and ensures that a young person's involvement with the criminal justice system is not prejudicial to them in adult life. The Commission generally agrees with this view.

8.20 In relation to the admissibility of pleas of guilty or convictions in the Children's Court in criminal proceedings in other courts, the Shopfront Youth Legal Centre "concede[d] that it is often necessary for adult courts to have access to information about Children's Court convictions."[28] While this may be so, the Commission is of the view that the current s 15(1) of the CCPA achieves a satisfactory compromise between making such information available and the rehabilitative aims of juvenile justice mentioned in paragraph 8.19.

8.21 The National Children's and Youth Law Centre suggested that the diversionary aims of the YOA may be compromised by the admissibility of prior dealings under the YOA.[29] However, the Commission is persuaded by the opinion of magistrates and practitioners expressed strongly in consultations that it is in the best interests of the administration of justice that prior dealings under the YOA remain admissible, as is currently the position under s 15 of the CCPA and s 66(2)(c) and s 8(2)(c) of the YOA.[30] Unlike non-specialist courts, the Children's Court has the experience and expertise to give the appropriate weight to prior matters where relevant.

IDENTIFICATION OF YOUNG OFFENDERS

8.22 One of the primary means of ensuring the fair administration of justice is that proceedings are open to public scrutiny. This includes allowing media reporting of court proceedings. However, it is considered that it is not in the public interest that some types of proceedings or parts of proceedings be published. Subject to judicial discretion, there has traditionally been a prohibition on publishing criminal proceedings involving young offenders, if that publication would identify those involved.

Justice: Towards 2000 and Beyond (Adelaide, 26 June 1997) at 4. See also generally, J Braithwaite, *Crime, Shame and Reintegration* (Cambridge, Cambridge University Press 1989).

26. *Criminal Records Act 1991* s 9 and s 10.
27. NSWLRC IP 19, Issue 18, para 3.87-3.91.
28. The Shopfront Youth Legal Centre, *Submission* at 14.
29. National Children's and Youth Law Centre, *Submission* at 4.
30. *Young Offenders Act 1997* (NSW) s 66(2)(c) and s 68(2)(c) provide exemptions to the law against disclosure of records and disclosure of criminal history respectively in the case of sentencing in the Children's Court.

8.23 Section 11 of the CCPA makes it an offence in New South Wales 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.[31] There are several exceptions:

- The prohibition does not apply to young people convicted of driving offences in the Local Courts.[32]
- The prohibition does not apply to official reports of court proceedings.[33]
- A young person aged 16 or over may be identified if he or she consents.[34]
- A young person aged under 16 may be identified with the consent of the court. If the young person is capable of consenting to identification, 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.[35]

8.24 Following amendments made to the CCPA in 1999, the District Court or Supreme Court may order that a young person's name be broadcast or published without his or her consent when the Court is sentencing the young person for a "serious children's indictable offence".[36] The Court must be satisfied that such an order is in the interests of justice and that the prejudice to the young person arising from identification does not outweigh the interests of justice.[37] This departure from the traditional prohibition has been somewhat contentious,[38] although it has been suggested that the Courts use the amended power sparingly.[39]

8.25 In 2001, the CCPA was further amended by the insertion of s 11(1A)(b) to make it clear that the prohibition on publication remains applicable even after the

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31. 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
32. *Children (Criminal Proceedings) Act 1987* (NSW) s 11(2).
33. *Children (Criminal Proceedings) Act 1987* (NSW) s 11(4)(a).
34. *Children (Criminal Proceedings) Act 1987* s 11(4)(b)(ii).
35. *Children (Criminal Proceedings) Act 1987* s 11(4)(b)(ii), 11(4A).
36. *Children (Criminal Proceedings) Act 1987* s 11(4B).
37. *Children (Criminal Proceedings) Act 1987* s 11 (4C), (4D) and (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. This exception was introduced pursuant to the *Crimes Legislation Amendment (Sentencing) Act 1999* s 6 and Schedule 4.66[1] and [2].
38. See, for example, Law Society of New South Wales, *Submission* at 12: "Anonymity is an important part of the philosophy of Children's Court. The Law Society maintains its opposition to the existing legislative provision which gives superior courts the power to disclose the identity of young persons found guilty of serious children's indictable offences."
39. NSW Commission for Children and Young People, *Submission* at para 15.06.

young offender has reached the age of 18.[40] Obviously, if this were not the case, there would be nothing to stop the publication of identifying information as soon as the offender turned 18.[41] Similar provisions are contained in s 65 of the YOA, although the prohibition on identification without consent remains.

8.26 Submissions generally agreed that the prohibition on publication as it relates to young offenders should not be relaxed.[42] The NSW Young Lawyers described the current regime under the CCPA and the YOA as the "the very minimum protections necessary to protect young offenders from being unnecessarily identified".[43]

8.27 The Legal Aid Commission of New South Wales submitted that identifying young offenders is fundamentally inimical to the ethos of the CCPA, as it may impact adversely upon a young offender's rehabilitative prospects.[44] Commentators opposed to public identification of young offenders have likewise emphasised the importance of protecting young offenders from stigma and reprisals as a component of the rehabilitation process.[45]

8.28 The National Children's and Youth Law Centre submitted that, ultimately, any perceived "benefit" to the community will most likely be outweighed by the harmful consequences:

> Although accountability to the state and society is very important, the identification of young offenders could produce detrimental consequences that could outweigh its benefits. The benefits could include raising awareness of the troubled youths within the community and the need to develop programs to minimise this offending behavior and also protect other members of the community from this offending behaviour ... sources have suggested that identification could create unwanted publicity amongst young people and may even encourage future offending. Public identification could also

40. *Children (Criminal Proceedings) Act 1987* s 11(1A)(b).
41. Hon R J Debus, Attorney General, *Criminal Legislation Amendment Bill 2001*, Second Reading Speech Legislative Assembly (Hansard, NSW Parliamentary Debates, 30 November 2001) at 19298.
42. NSW Commission for Children and Young People, *Submission* at para 15.01; NSW Bar Association, *Submission* at 3; New South Wales Office of the Director of Public Prosecutions, *Submission* at 7; Law Society of New South Wales, *Submission* at 12; Legal Aid Commission of New South Wales, *Submission* at 13; National Children's and Youth Centre, *Submission* at 4.
43. NSW Young Lawyers, *Submission* at 6.
44. See, for example, Legal Aid Commission of New South Wales, *Submission* at 13.
45. See, for example, I Cram, "Publish and damn" (1998) 148 *New Law Journal* 1748.

> subject the young offender to community reprisal and stigma beyond what may be warranted for the offence committed.[46]

8.29 On the other hand, proponents of public identification of young offenders argue that identifying young offenders in the media would force them to accept responsibility for their actions and would act as a deterrent to further offending behaviour, and offending by others.[47] 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.[48] This was disputed by the NSW Law Society, which submitted that:

> [t]here is no evidence to suggest that this will beneficially alter behaviour especially when the readership of the same media amongst children and young people is low. Where the behaviour is peer-influenced then such publicity is likely to have exactly the opposite effect. If someone is acting out, especially boys, then the greater the publicity the more support for the acting out.[49]

8.30 Other commentators have taken up this last point. For example, the Australian Law Reform Commission has argued that publicly designating a young person as an offender simply gives him or her a label to "live up to".[50]

8.31 Competing with the restrictions on publication of identifying information is the principle of "open justice", the public right to scrutinise and criticise courts and court proceedings. Although the prohibition on identifying young offenders stems from the rehabilitative focus of juvenile justice, research in the United Kingdom suggests that in the course of protecting the identity of young people involved with the criminal justice system, whether as offenders or victims, the public credibility of the juvenile justice process may suffer. A Home Office Research Study relating to the UK Youth Court found that:

> the public rated the Youth Court worse than any other part of the criminal justice system, and that those with least knowledge about youth justice had the least confidence in the Youth Court. The Research Study report suggests that improving knowledge about youth justice should increase confidence in the Youth Court.[51]

8.32 The process of balancing the requirement for "open justice" and the rehabilitation of young offenders may at times be difficult. This is especially so if, as suggested by the research of the UK Home Office, the prohibition on publication may

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46. National Children's and Youth Law Centre, *Submission* at 4.
47. "Name and Shame Young Criminals Says Police Chief" (30 October 1998) *Daily Telegraph* at 7.
48. Editorial comment, "The Protection of Juveniles" (1998) 148 *New Law Journal* 5.
49. NSW Law Society, *Submission* at 12.
50. Australian Law Reform Commission, *Seen and Heard: Priority for Children in the Legal Process*, (1987) ALRC Report 84.
51. See United Kingdom Judicial Studies Board, www.jsboard.co.uk/magistrates/ycbb/annex/mf_06.htm

tend to further a process which "breeds suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law".[52] The Commission has considered together the weight of the evidence in favour of retaining the discretionary prohibition on publication and the courts' ability to publish when it considers it is in the public interest to do so and, on balance, do not support any relaxation of the current prohibitions on identifying young offenders contained in s 11 of the CCPA and s 65 of the YOA.

8.33 One additional issue raised by NSW Young Lawyers was that there is currently no means whereby a magistrate can ensure that a young offender is not effectively identified by a process of reading together various media reports that individually comply with the provisions of s 11. It was suggested that s 11(5) of the CCPA should be amended to allow a magistrate specifically to prescribe the type of information that may or may not be published about a child, such as the school which he or she attends, or the suburb in which he or she lives.

8.34 We believe that as s 11 does not refer to a *single* publication or broadcast, it should not be read down, and is currently sufficient to overcome the concerns expressed by NSW Young Lawyers.

SENTENCING OPTIONS

8.35 The Children's Court is required to sentence young offenders pursuant to the provisions of the CCPA.[53] The range of penalties under the CCPA consists of cautions, good behaviour bonds, fines, probation, community service orders, control orders and detention.[54] IP 19 asked whether this range was adequate and whether it was being fully utilised by sentencing courts. IP 19 also specifically asked whether licence disqualification should be available as a sentence for all offences,[55] a suggestion raised during the Commission's preliminary consultations.[56]

8.36 Although some submissions that addressed the issue of the range of options were of the view that both the range, and the utilisation of that range, were

52. *Richmond Newspapers Inc et al v Virginia et al* [1980]448 U.S 555 at 595 (Brennan J).
53. *Children (Criminal Proceedings) Act 1987* (NSW) s 33.
54. See NSWLRC IP 19 at para 3.32-3.3.40 for a description of these sentencing options.
55. NSWLRC 1P 19, Issue 13.
56. Preliminary consultation, Reference Group (18 December 2000). See also NSWLRC IP 19, para 3.136-3.140.

adequate,[57] a number of other submissions suggested that available options were not being fully utilised.[58]

8.37 A possible disparity between the practice of country Children's Court magistrates and those of the Sydney metropolitan region in the utilisation of the current range of sentencing options under the CCPA was raised as a matter of concern in the Commission's consultations.

8.38 There was acknowledgement that in some parts of New South Wales some sentencing options are unavailable in practice. Magistrates outside the Sydney metropolitan region may be willing to use the full range of sentencing options, but resource constraints mean that they are unable to do so.[59]

8.39 The Children's Court would welcome more sentencing options, or possibly solutions for individual cases. It submitted that "magistrates in the Children's Court are always looking for non-custodial solutions to the cases before the Court".[60]

8.40 The Commission agrees that the current range of options should constantly be reviewed to explore alternatives to detention, in order to implement the policy aims of the CCPA as fully as possible. Two submissions suggested that consideration should be given to a form of home detention for young offenders as an option of last resort in appropriate circumstances before a control order is made.[61] However, Shopfront, although it thought that it may be worth considering adapting the adult sentencing options of home detention and periodic detention for young offenders, did not "at this stage" support their introduction.[62] It pointed out that periodic detention can be very difficult to comply with in practice, especially for those without an independent means of transport, and that home detention is a very intrusive option involving electronic surveillance, which it sees as "generally inappropriate for children".

8.41 We consider that court-based sentencing of young offenders should be monitored in order to establish in which particular areas of the State the full range of sentencing options is not being utilised. This may be a task best undertaken by the Bureau of Crime Statistics and Research ("BOCSAR") or the Judicial Commission. Any information obtained should be used as the basis for further investigation to establish whether an increased allocation of resources in those areas would facilitate a more comprehensive application of the sentencing options under the CCPA.

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57. Law Society of New South Wales, *Submission* at 6; Legal Aid Commission of New South Wales, *Submission* at 9; NSW Young Lawyers, *Submission* at 5.
58. The Shopfront Youth Legal Centre, *Submission* at 10; the (then) Minster for Juvenile Justice, the Hon C M Tebbutt MLC, *Submission* at 7; New South Wales Office of the Director of Public Prosecutions, *Submission* at 5;
59. The Commission's consultations in Albury, Broken Hill and Coffs Harbour.
60. Children's Court of New South Wales, *Submission* at 17.
61. NSW Law Society, *Submission* at 7; and NSW Young Lawyers, *Submission* at 5.
62. The Shopfront Youth Legal Centre, *Submission* at 10.

8.42 It is essential that community-based options receive adequate funding, both within and outside the Sydney metropolitan region. It is unacceptable that a young offender should be denied the benefit of an appropriate sentencing option merely by reason of its unavailability.

Licence disqualification

8.43 Submissions were unanimous in their rejection of the suggestion that licence disqualification should be a widely available sentencing option, rather than one restricted to driving offences.[63] In the words of the submission of Shopfront:

> As to whether licence disqualification should be available as a "sentence" for all offences, our answer is a resounding *no*. To put it bluntly, this is one of the worst ideas we have heard. Our experience shows that, contrary to conventional wisdom, licence disqualification does not act as a deterrent for young people and is of dubious value in promoting road safety.[64]

8.44 The extension of licence disqualification would impact particularly severely on young offenders, given that many of them are unemployed and may need a driver's licence to find and keep employment. This is particularly so in many rural and suburban areas, which "are so bereft of public transport that a car and licence are essential".[65] In the view of the Legal Aid Commission of New South Wales, the punishment would be "disproportionately harsh".[66] The Minister for Juvenile Justice likewise submitted that it would be "a very harsh measure to impose on children, a measure that could potentially disadvantage them for life".[67] Shopfront called the measure both harsh and illogical, "akin to expelling a child from school because they do not do their chores at home".[68]

8.45 The temptation to drive while disqualified invites further sanctions,[69] including being declared an "habitual traffic offender" (and disqualification for a further five years),[70] and may even lead to incarceration.[71] On the other hand, getting an

63. The New South Wales Bar Association, *Submission* at 2; Children's Court of New South Wales, *Submission* at 17; New South Wales Office of the Director of Public Prosecutions, *Submission* at 5; Law Society of New South Wales, *Submission* at 6; Legal Aid Commission of New South Wales, *Submission* at 9
64. The Shopfront Youth Legal Centre, *Submission* at 10.
65. Public Defenders, *Submission* at 4. The point was also made by the Women's Legal Resource Centre, *Submission* at 5.
66. Legal Aid Commission of New South Wales, *Submission* at 9.
67. The Hon C M Tebbutt, MLC, (then) Minister for Juvenile Justice, *Submission* at 7-8.
68. The Shopfront Youth Legal Centre, *Submission* at 11.
69. See the NSW Bar Association, *Submission* at 2; New South Wales Office of the Director of Public Prosecutions, *Submission* at 5; Public Defenders, *Submission* at 4.
70. The Shopfront Youth Legal Centre, *Submission* at 11.

unlicensed or inexperienced friend to drive puts the safety of young people - already over-represented in road casualty statistics[72] - at risk.

8.46 Shopfront submitted that as a result of the operation of the *Fines Act 1996* (NSW) ("Fines Act"), licence disqualification is already a *de facto* punishment for many types of non-traffic offences when young people accumulate fines they cannot repay.[73] The implications of the Fines Act for young people are discussed in paragraphs 8.57-8.64 below.

8.47 Even where licence disqualification is a direct sanction for traffic offences, it was the subject of criticism in submissions. Shopfront submitted that the lengthy disqualification periods that are currently prescribed for traffic offences, "are out of proportion to the seriousness of the offences, and are at odds with the rehabilitation principles of the juvenile justice system".[74] The Children's Court expressed concern that the current "draconian legislative disqualification periods" of 30 or even 50 years will inevitably lead to young people being detained in custody.[75] The Public Defenders further submitted that:

> Taking away a licence … will engender disrespect for the law as arbitrary and uncaring of the reality of life for young people. At present disqualifications are imposed with little or no discretion in a court to moderate the effect of the disqualification where injustice or disproportionate punishment will result. There is no evidence in any event that licence disqualification deters. Any proposal that increases the operation of this imposed injustice should be resisted.[76]

Conviction for traffic offences

8.48 Rather than expanding the option of licence disqualification, a wider and more offence-focused range of sentencing options relating to traffic offences ought to be available. Widespread access to driver education programs for young people would be much more effective in helping to ensure that young people drive lawfully and safely.[77]

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71. The Children's Court of New South Wales, *Submission* at 17.
72. In 2002, 17-25 year olds accounted for 27% of road fatalities among drivers and 32.9% among passengers: Australian Transport Safety Bureau, *Road Fatalities Australia: 2002 Statistical Summary* (2003) at 6.
73. The Shopfront Youth Legal Centre, *Submission* at 11.
74. The Shopfront Youth Legal Centre, *Submission* at 11.
75. Children's Court, *Submission* at 18.
76. Public Defenders, *Submission* at 4.
77. See The Shopfront Youth Legal Centre, *Submission* at 11.

8.49 The Children's Court submitted that the introduction of a State-wide Traffic Offender Program in Children's Courts would assist".[78] The Traffic Offender Program ("TOP") is a voluntary program available to offenders found guilty in a Local Court of a drink-driving offence. The offender attends the program before being sentenced by the court. The participant in a TOP program is assessed on attendance, attitude, journal, and weekly and final assessments. "The precise form of these programs varies from court to court but all involve some form of driver safety education".[79] The aim is to reduce re-offending. The Children's Court also points out that, as TOPs are currently not available in Children's Courts, there is a discrepancy between the treatment of traffic offenders in the Children's Court and traffic offenders in Local Courts.

8.50 Traffic offences can only be heard in the Children's Court in conjunction with another offence (for example, stealing a motor vehicle and a prescribed content alcohol offence).[80] A charge of a traffic offence alone must be heard in a Local Court. Nonetheless, there is still a sufficiently large volume of cases in the Children's Court involving traffic offences to make a Youth Traffic Offender Program worthwhile. This is particularly so in view of the apparent success of these programs. The results from evaluation of two programs show that these programs may be effective in reducing the risk of re-offending for drink driving.[81]

Recommendation 8.2

A Traffic Offender Program should be made available to offenders being sentenced in the Children's Court.

78. The Children's Court of New South Wales, *Submission* at 17. Evaluation of two programs (at Mt Penang and Blacktown) show that these programs may be effective in reducing the risk of re-offending for drink driving: S Moffat, D Weatherburn and J Fitzgerald, *Sentencing Drink Drivers: The Use of Dismissals and Conditional Discharges* (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 81, 2004) at 2, referring to D Saffron, N Wallington and A Chevalier, "NSW Traffic Offender Programs: evaluation" in *Proceedings of Road Safety Research, Policing and Education Conference* (Australian Transport Safety Bureau, 1999) Vol 1 at 509-516.
79. S Moffat, D Weatherburn and J Fitzgerald, *Sentencing Drink Drivers: The Use of Dismissals and Conditional Discharges* at 2.
80. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(2): "Notwithstanding subsection (1), the Children's Court does not have jurisdiction to hear or determine proceedings in respect of a traffic offence that is alleged to have been committed by a person unless:
(a) The offence arose out of the same circumstances as another offence that is alleged to have been committed by the person and in respect of which the person is charged before the Children's Court …"
81. D Saffron, N Wallington and A Chevalier, "NSW Traffic Offenders Programs: evaluation" in *Proceedings of Road Safety Research Policing and Education Conference* Vol 1 (Australian Transport Safety Bureau, Canberra, 1999) at 509-516.

Power to disqualify

8.51 There are two issues to consider in this section:

- Does the Children's Court have the power to disqualify a young offender from holding a driver's licence where there has not been a conviction?

- If so, can this power apply to a person under 16 years of age (given that these young offenders are not legally able to hold a diver's licence)?

8.52 Where a person is convicted of an offence under road transport legislation,[82] a court has the power to order the disqualification of that person from holding a driver's licence for a specified period.[83] A court dealing with an adult has a discretion under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) to find the offender guilty of an offence but not proceed to a conviction. In that case, where an adult offender is found guilty of a traffic offence, disqualification of his or her licence could not be imposed (a conviction being a prerequisite).

8.53 The Shopfront Youth Legal Centre submitted that "as far as traffic matters are concerned, it has generally been the practice of the Children's Court to treat a finding of guilt as if it were a 'conviction' and to disqualify the young person even if no conviction is recorded".[84] Shopfront notes, however, that there is an argument that this is wrong in law, and that a child cannot be disqualified from driving unless a conviction is recorded. They also stated that there have been some decisions of the Children's Court on this point, but the issue remains unresolved.

8.54 The divergence of opinion appears to be one of statutory interpretation. Section 33 of the CCPA sets out the penalties a Children's Court can impose where it finds a young offender guilty of an offence. These include cautions, good behaviour bonds, fines, referral to conferencing, probation, community service and detention. Section 33(5) provides that:

> Nothing in this section limits or affects any power that the Children's Court may have apart from this section:
> (a) to impose any disqualification under the road transport legislation within the meaning of the *Road Transport (General) Act 1999* on a person whom it has found guilty of an offence, …

82. Pursuant to the *Road Transport (General) Act 2005* (NSW) s 5, "road transport legislation" means that Act itself; the *Road Transport (Driver Licensing) Act 1998* (NSW); the *Road Transport (Heavy Vehicles Registration Charges) Act 1995* (NSW); the *Road Transport (Safety and Traffic Management) Act 1999* (NSW); the *Road Transport (Vehicle Registration) Act 1997* (NSW); any other Act prescribed by the regulations; and any regulations made under these Acts.
83. Any disqualification imposed under the legislation is in addition to any other penalty imposed for the offence: see, for example, *Road Transport (General) Act 2005* (NSW) s 187(3).
84. The Shopfront Youth Legal Centre, *Submission* at 11.

8.55 It would appear that this section is being interpreted by some magistrates as giving the Children's Court the power to disqualify a young offender from holding a driver's licence on the basis of a finding of guilty only. However, this interpretation avoids giving effect to the words "under the road transport legislation". An alternative interpretation, and one which the Commission prefers, is that the words "any power that the Children's Court may have" restricts the Court to the power arising under road transport legislation, which itself is dependent on a conviction being entered.

8.56 The Commission believes that where the Children's Court finds a young person guilty of a traffic offence, it ought to have the power to disqualify him or her from driving even if no conviction has been entered. This gives the Court the flexibility in sentencing that is consistent with the purposes of the YOA. The Court is not forced into entering a conviction where it is not appropriate, simply in order to avail itself of an appropriate sentencing option. This would also address the concern of some Children's Court magistrates that there is no legal power to disqualify from driving young offenders under the age of 16.[85]

Recommendation 8.3

Section 33(5)(a) of the *Children (Criminal Proceedings) Act 1987* (NSW) should be amended to give the Children's Court the power to impose any disqualification under the road transport legislation within the meaning of the *Road Transport (General) Act 1999* (NSW) on a person whom it has found guilty of an offence. The Children's Court should have this power notwithstanding that a conviction cannot be, or has not been, entered in respect of the offence pursuant to s 14 of the *Children (Criminal Proceedings) Act 1987* (NSW).

Fines

8.57 There are of two types of fine.[86] The first is court-imposed. For example, the Children's Court has power to fine a young offender found guilty of an offence, provided the fine does not exceed either the maximum fine prescribed or 10 penalty units (currently $1,100), whichever is the lesser.[87] The second type of fine is one imposed by penalty notice issued pursuant to statutory authority, typically in response to "regulatory" offences.[88] Two major issues arise in connection with the imposition of fines on young persons:

- the amount of the fine imposed on the young person; and
- the likely escalation of penalties imposed on young persons who cannot pay their fines.

85. Children's Court, *Submission* at 17.
86. See *Fines Act 1996* (NSW) Pt 2 (Fines imposed by Courts), Pt 3 (Penalty notices).
87. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(c).
88. See *Fines Act 1996* (NSW) ss 20-22.

8.58 Chapter 4 considers whether offences for which a child can receive a penalty notice should be brought within the jurisdiction of the YOA.[89]

The amount of the fine

8.59 In accordance with general sentencing principles, a court imposing a fine tailors the penalty to fit the individual offender's circumstances.[90] The court is required by statute to have regard to the means of the accused in fixing the amount of any fine.[91] In contrast, a fine imposed by penalty notice is not generally tailored to the offender's means. Penalty notices (which generally[92] apply irrespective of age[93]), thus ignore the fact that young people are generally likely to have lower incomes than the rest of the population.[94]

8.60 The Children's Court suggested that on-the-spot fines should be brought into line with court-based fines so that neither can exceed 10 penalty units when being imposed on a young offender. One way in which this may be achieved is by granting greater access to the courts, perhaps by written pleas, so that the court can exercise the task of taking the young person's means into consideration.[95] The Commission agrees with the substance of this submission. It would, of course, be administratively impossible to require on-the-spot-fines to differentiate on the basis of a person's age: the offender may not be present; his or her age may not be apparent; and identification may not be available or offered. The amount specified in any penalty notice ought, in the case of a young offender, to be subject to review in the Children's Court to enable an assessment of the young offender's means. Rules of Court should implement a simple procedure for such review.

89. See Chapter 4 at para 4.11 and 4.16-4.19.
90. The Commission discusses the necessity for this in *Sentencing* (Report 79, 1996) paras 1.7-1.15.
91. *Fines Act 1996* (NSW) s 6; *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(c).
92. Penalty notices do not apply to children less than 10 years of age: *Fines Act 1996* (NSW) s 53(2).
93. *Fines Act 1996* (NSW) s 53(1).
94. See Children's Court of New South Wales, *Submission* at 19.
95. Children's Court of New South Wales, *Submission* at 19.

Recommendation 8.4

Section 53 of the *Fines Act 1996* (NSW) should be amended to provide that the Children's Court has power to review the amount specified in any penalty notice in the light of the young offender's means.

Penalty escalation

8.61 The Commission pointed out in its general review of the law of sentencing that the imposition of a further penalty for fine default becomes more likely for an offender without the financial means to pay.[96] Many young offenders would fall into this category. The Children's Court informed the Commission that "[t]here is evidence that young persons are burdened with fines which they do not have the capacity to pay",[97] one result being that, in the context of sentencing, the "court is from time to time asked to proceed through the difficult maze of the Fines Act to annul old fines and re-sentence a young person."[98] The Public Defenders submitted that the consequences flowing from an inability to pay a fine mean that, in the case of young offenders, the use of fines as a penalty should be discouraged.[99]

8.62 Schedule 1 of the Fines Act lists some 75 pieces of legislation under which penalty notices may be issued. The Act provides for a system of fine enforcement, starting with civil enforcement and escalating to imprisonment as a sanction of last resort.[100] Civil sanctions include the inability to apply for a driver's licence[101] or the cancellation of such a licence,[102] the implications of which were discussed above. The penalty notice procedure, contained in Part 3 of the Act, includes a process whereby an alleged offender may elect to have a matter under the Act dealt with by a Court.[103]

8.63 The Fines Act does not require that the rights of an alleged offender be included in any penalty notice.[104] However, penalty notices generally contain the following:

96. NSWLRC, R 79 at para 3.5.
97. Children's Court of New South Wales, *Submission* at 18.
98. Children's Court of New South Wales, *Submission* at 18-19.
99. Public Defenders, *Submission* at 4.
100. See *Fines Act 1996* (NSW) Pt 4.
101. *Fines Act 1996* (NSW) s 68.
102. *Fines Act 1996* (NSW) s 66.
103. *Fines Act 1996* (NSW) ss 35-37.
104. Section 27 of the *Fines Act 1996* (NSW) provides that a penalty notice must inform the recipient:
(a) that the person has until the due date specified in the notice to make the payment for the offence specified in the notice, and
(b) of enforcement action that may be taken under this Act if the amount is not paid by the due date, and
(c) of additional enforcement costs that become payable under this Act if enforcement action is taken.

> In certain circumstances you may be able to have this matter considered by a court. Specific criteria including time limits and application fees apply. Call the State debt Recovery Office for more information.

8.64 The Commission is of the view that penalty notices should also contain a statement, in plain English, directed to young offenders alerting them to their right to challenge, in the Children's Court, both the allegation that they have committed the offence in question and the amount of the fine imposed. This simple administrative step would contribute to the fairer treatment of young people who are in receipt of penalty notices and, possibly, to a reduction in the problem of penalty escalation.

Recommendation 8.5

Penalty notices issued under the *Fines Act 1996* (NSW) should contain a statement in plain English that a person under the age of 18 is entitled to challenge, in the Children's Court, both the allegation that they have committed the offence in question and the amount of the fine.

Community service orders

8.65 One of the sentencing options available under the CCPA is for a young offender to perform community service work.[105] The Court may make a community service order ("CSO") under s 5 of the *Children (Community Service Orders) Act 1987* (NSW) or issue a control order. The court may attach conditions to the order.[106] "Community service work" is defined by the Act to mean unpaid work approved by the Minister, or of an approved class or description.[107] "Work" is defined to include "any form of work, service or activity".[108]

8.66 IP 19 asked whether CSOs could be better structured to enable young offenders to participate in educational or vocational work.[109] This is particularly significant given that it is an express principle of s 6 of the CCPA that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption.

8.67 The Children's Court noted that a common condition of a bond or probation order is that the young person should continue, or undertake, education/employment. The Court also noted that CSOs "are also designed to allow the penalty to be served without interrupting education or employment".[110] What was not made explicit was

105. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(f).
106. *Children (Community Service Orders) Act 1987* (NSW) s 11.
107. *Children (Community Service Orders) Act 1987* (NSW) s 3(1).
108. *Children (Community Service Orders) Act 1987* (NSW) s 3(1).
109. NSWLRC IP 19, Issue 14, para 3.43.
110. Children's Court of New South Wales, *Submission* at 19. The Court also noted that as a result of the decision in *R v Gamgee* (2001) 51 NSWLR 707, there is a comparable ability to accommodate education and employment arrangements in the case of partially suspended sentences.

whether the Court attaches, or can attach, conditions to a community service order specifically ordering the young offender to continue or undertake education/employment. Separately from the issue of education/employment, the question arises whether the power to attach conditions to a community service order also includes the power to order participation in a rehabilitative or personal development program, such as anger management. This is not made explicit in the legislation, although it can be argued that the Court does have this power. A further issue is whether the community service order *itself* can consist of an order to undertake education or attend programs, courses or counselling. It is not clear whether "activity" in the definition of "work" would include these things.

8.68 Submissions received in response to IP 19, and feedback in the Commission's community consultations, supported the inclusion of educational or vocational work in community service orders where appropriate.[111] It was felt that the community as a whole would ultimately benefit from a process that sought to address some of the social causes of young offending, such as illiteracy and unemployment.

8.69 Two factors are relevant to a consideration of whether CSOs can be better structured. The first is the purpose of CSOs and the second is the nature of the young offender who can qualify for a CSO.

8.70 In practice, the Department of Juvenile Justice ("DJJ") and the Children's Court have a firm view that the purpose of a CSO is for the young offender to make reparation to the community, and that it should be used as such. It is a sentencing option considered to be the last resort before a custodial sentence, with this message being clearly delivered to the young offender. While conditions can be attached, they are treated as quite separate from the community work to be performed and usually operate more as a recommendation. For example, the Court may order 100 hours of community work and ask DJJ to take steps towards securing the young person a place back at school. The dialogue between court and department is extensive; it may not be reflected formally in the CSO but may result in action DJJ takes towards the welfare and rehabilitation of the young offender.

8.71 Secondly, there are limitations to what can be achieved within a CSO. A young offender is assessed by DJJ for suitability for a CSO and must demonstrate a level of reliability and stability. A person with a substance dependency or mental health issue would not be considered a suitable candidate. Instead, DJJ would seek a probation order or a suspended sentence where the young offender could be channelled into rehabilitative programs. Furthermore, once the designated hours of a CSO are completed, DJJ has no further power to supervise the young offender or compel

111. See Legal Aid Commission of New South Wales, *Submission* at 9; The Shopfront Youth Legal Centre, *Submission* at 11; NSW Commission for Children and Young People, *Submission* at 6; NSW Young Lawyers, *Submission* at 5; New South Wales Office of the Director of Public Prosecutions, *Submission* at 5; NSW Bar Association, *Submission* at 3; Law Society of New South Wales, *Submission* at 7; and the Children's Court of New South Wales, *Submission* at 19;

continued attendance at a course, program or employment. As a result, participation in drug and alcohol counselling or extended courses, long-term education or employment could not be ordered as part of a CSO. However, there are other courses and programs, such as vocational training or anger management, which would be appropriate and could form a valuable part of a CSO.

8.72 Section 90 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) allows a court sentencing adult offenders to impose conditions on a community service order, which can include requiring an offender to participate in development programs.[112] An amendment to the *Children (Community Service Orders) Act 1987* (NSW) along these lines to enable a court to order that a specified number of hours of a CSO be spent in attendance at a vocational, educational or personal development program would be of benefit to both the community and the young offender.

8.73 In making the following recommendation, we are mindful that without proper program resourcing and availability of options, issues raised above, an expanded Community Service Order power will be of limited practical benefit.

Recommendation 8.6

The *Children (Community Service Orders) Act 1987* (NSW) should be amended to give the Children's Court express power to order that satisfactory participation in approved community-based, educational, vocational or personal development programs may be credited towards Community Service Orders.

Options addressing substance abuse

8.74 Two matters raised in IP 19 that are particularly dependent upon proper resourcing are the linked issues of the availability of drug and alcohol treatment services for young people and the operation of the Youth Drug and Alcohol Court.[113]

8.75 According to the 2004 National Drug Strategy Household Survey,[114] 29.3% of young people in Australia aged between 14 and 19 had used illicit drugs at least once in their lifetime and 21.3% had used illicit drugs in the 12 months preceding the date of survey.[115] In the 12-15 years age bracket, 7.6% had used an illicit drug in the 12 months preceding the survey, of which 5.2% was marijuana/cannabis use.[116] In the 16-17 years age bracket, 20.9% had used an illicit drug in the past 12 months, of which 18% was marijuana/cannabis use.[117] The Survey also reported that 0.7% of 14-19 year olds (11,400) had used heroin once in their lifetime and 0.1% had used drugs

112. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 90(2)(a).
113. NSWLRC IP 19, Issues 9 .
114. Australian Institute of Health and welfare, *2004 National Drug Strategy Household Survey: First Results* (Drug Statistics Series No 13, Canberra, 2005) http://www.aihw.gov.au/publications/index.cfm/title/10122
115. *2004 National Drug Strategy Household Survey: First Results* at 23.
116. *2004 National Drug Strategy Household Survey: First Results* at 25.
117. *2004 National Drug Strategy Household Survey: First Results* at 25.

in this category in the past 12 months;[118] and 5.5% of 14-19 year olds (109,300) had used meth/amphetamines once in their lifetime and 4.4% (73,600) had used drugs in this category in the past 12 months.[119] Another interesting fact to emerge from the survey is that female teenagers (14-19 year olds) report as being slightly more likely than male teenagers to have ever used an illicit drug (30.4% of girls compared with 28.2% of boys) and also slightly more likely to have used an illicit drug in the past 12 months (21.8% of girls compared with 21.3% of boys).[120]

8.76 The 2002 Australian School Students' Alcohol and Drugs Survey[121] showed that, across all age groups, 89% of males and 87% of females reported drinking at least part of an alcoholic drink. By age 17, 74% of males and 69% of females had consumed alcohol in the past month and 25% of males and 19% of females had consumed alcohol "at a risky level" in the past week.[122]

8.77 In relation to all offenders, alcohol is linked to a high proportion of crimes of violence and public order[123] and nearly half of all alcohol-related deaths in Australia are due to violence.[124] Thirty-four per cent of adult offenders in New South Wales had been drinking prior to committing their most serious offence.[125] In relation to young offenders, the NSW Department of Health notes that surveys of adolescents suggest

118. *2004 National Drug Strategy Household Survey: First Results* at 28-29.
119. *2004 National Drug Strategy Household Survey: First Results* at 30-31.
120. *2004 National Drug Strategy Household Survey: First Results* at 23.
121. V White and J Hayman, *Australian Secondary Students' Use of Alcohol in 2002* (National Drug Strategy Monograph Series No 55, Australian Government Department of Health and Ageing, 2004) http://www.nationaldrugstrategy.gov.au/pdf/mono55.pdf
122. *Australian Secondary Students' Use of Alcohol in 2002* at 11. "At a risky level" is at a level that exceeds the National Health and Medical Research Council of Australia guidelines of no more than four standard drinks a day on average and no more than six standard drinks on any one day; for females this rate is no more than two standard drinks a day on average and no more than four standard drinks on any one day: *Australian Secondary Students' Use of Alcohol in 2002* at 12. The 17 year-old boys surveyed had had seven plus drinks on one occasion in the past week and the 17 year-old girls surveyed had had five plus drinks on one occasion in the past week.
123. New South Wales Health Department, *NSW Youth Alcohol Action Plan – 2001-2005* (2002) at 14.
124. D English, C D J Holman, E Milne, M G Winter, G K Hulse, J P Codde, C I Bower, B Corti, N de Klerk, M Kniuman, J J Kurinczuk, G F Lewin and G A Ryan, *The Quantification of Drug Caused Morbidity and Mortality in Australia* (Department of Human Services and Health, Canberra, 1995) cited in New South Wales Health Department, *NSW Youth Alcohol Action Plan – 2001-2005* at 14.
125. New South Wales Health Department, *NSW Youth Alcohol Action Plan – 2001-2005* at 14.

that alcohol use is a factor in violent behaviour in this group.[126] The NSW Department of Health also notes that alcohol is a known contributor to domestic violence.

8.78 In its NSW Youth Alcohol Action Plan 2001-2005, the NSW Department of Health signals the importance of channelling resources into alcohol treatment services for young offenders and the value of dedicated Drug and Alcohol Courts. The Department reports that:

> research clearly illustrates a much higher risk for young people who misuse alcohol with respect to antisocial, delinquent or criminal behaviours, either as victims or perpetrators. The odds of committing an alcohol-related offence, such as physical abuse, property damage, theft, public disturbance and verbal abuse all decreased with age. The 14 to 19-year age group was most likely to be involved in committing these crimes, significantly more so than the 20 to 29 and 30 to 39 year age groups. As victims of alcohol-related disorders, the 14 to 19 year age group once again figures highly.[127]

Youth Drug and Alcohol Court

8.79 New South Wales is currently conducting a pilot Youth Drug and Alcohol Court ("YDAC").[128] A two-year pilot program commenced on 31 July 2000 under its original title of "Youth Drug Court" and has since been extended until 30 June 2007. The YDAC is "concerned with reducing drug and/or alcohol related criminal activity by children through judicial and therapeutic interventions that are designed to reduce or manage drug and/or alcohol usage".[129] It was modelled on the Adult Drug Court,[130] with adaptations to make it more relevant to the particular needs of young people. Unlike the Adult Drug Court, sentencing is postponed until the young offender has completed the program or ended participation in it.[131] The judicial supervision involved

126. New South Wales Health Department, *NSW Youth Alcohol Action Plan – 2001-2005* at 15.
127. New South Wales Health Department, *NSW Youth Alcohol Action Plan – 2001-2005* at 15. See T Makkai, *Alcohol and Disorder in the Australian Community: Part I – Victims* (Australian Institute of Criminology, Canberra, 1997); T Makkai *Alcohol and Disorder in the Australian Community: Part II – Perpetrators* (Australian Institute of Criminology, Canberra, 1998).
128. 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* (Sydney, 1999) at Recommendation 6.11.
129. The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004).
130. The NSW Drug Court began operation as a two-year trial in February 1999, conducted under sentencing rules and procedures set out in the *Drug Court Act 1998* (NSW), and having both Local and District Court jurisdiction.
131. T Eardley, J McNab, K Fisher and S Kozlina, with J Eccles and M Flick, *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report* (University of New South Wales Evaluation Consortium, Social Policy

takes place under the *Bail Act 1978* (NSW). The YDAC also differs from the Adult Drug Court in that the former operates within the existing legislative framework of the CCPA (with some minor amendments) whereas the latter "is codified and regulated by its own legislation, the *Drug Court Act 1998* (NSW)".[132]

8.80 Young offenders are referred to the YDAC by the Children's Court.[133] In deciding whether to refer a young offender, the Children's Court considers whether the young person has a drug or alcohol problem, and whether other diversionary options, particularly youth justice conferencing would be more suitable.[134]

8.81 Young offenders referred to the YDAC are initially screened to confirm that they have a demonstrable drug or alcohol problem and to determine immediate health needs such as detoxification and primary health care.[135] They then appear before the YDAC, which determines whether they are eligible to participate in the trial. Eligibility for the YDAC is confined to offenders aged between 14 and 18 (although children under 14 may also be referred); who are charged with an offence over which the Children's Court has jurisdiction;[136] who plead guilty to the charge being referred;[137]

Research Centre, School of Social Science and Policy, School of Public Health and Community Medicine, Submitted December 2003, Revised March 2004) ("*Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report*") http://www.lawlink.nsw.gov.au/lawlink/drug_court/ll_drugcourt.nsf/vwFiles/YDAC_FinalReport_revised_March%2004PRINT.doc/$file/YDAC_FinalReport_revised_March%2004PRINT.doc#target='_blank' at 2.

132. R Dive, M Killen, D Cole and A Poder, ""NSW Youth Drug Court Trial" paper presented at the conference *Juvenile Justice: From Lessons of the Past to a Road Map for the Future* convened by the Australian Institute of Criminology in conjunction with the NSW Department of Juvenile Justice (Sydney, 1-2 December 2003) at 3.
133. Pursuant to s 33(1)(c2)(iii) of the *Children (Criminal Proceedings) Act 1987* (NSW). See also Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 5.
134. K Graham, "Piloting a Youth Drug Court Program" (2000) 8 *Law Society Journal* 34.
135. D de Fina, "New Youth Drug Court - The Pilot Programme Commences" (2000) 12(5) *Judicial Officers Bulletin* at 33.
136. Excluding sex offences: The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 6(b).
137. Originally a young person was required to plead guilty to *all* outstanding matters in order to be eligible, but after representations from the Children's Legal Issues Committee of the NSW Law Society, this was altered so that he or she must plead guilty to only the most serious charge: M Flick and T Eardley, *Evaluation of the NSW Youth Drug Court Pilot Program: First Implementation Review* (Social Policy Research Centre, University of NSW, 2001) at 10.

who have a drug or alcohol problem; and who are ineligible for diversion under the YOA.[138]

8.82 In addition, the YDAC has a residence criterion.[139] The young offender must either live within, or have committed the offence within, the boundaries of nominated Local Area Commands (police areas), or can demonstrate that he or she identifies with such area. This criterion, in its early limited geographical ambit, was cited as one of the reasons for a relatively low take-up of the program. The YDAC originally operated out of Lidcombe, Campbelltown and Cobham Children's Courts and young offenders were required to have a connection to one of these areas that would allow them to attend treatment and support services in Western Sydney.[140] There were many instances of solicitors and parents outside the Western and South Western Sydney region contacting the YDAC hoping to obtain a place for a young offender.[141] As a result, Windsor was added to the ambit of the program in 2001 and Gladesville, Eastwood, Burwood, Flemington and Blue Mountains Local Area Commands were added in 2002. A significantly larger expansion of the catchment area, to Central and Eastern Sydney occurred in July 2004, with a weekly sitting of the YDAC in Bidura Children's Court.

8.83 Following the first appearance in the YDAC to assess eligibility, the case is adjourned for 14 days for the child to undergo a Comprehensive Assessment.[142] This is conducted by a Joint Assessment and Review Team involving the Departments of Health, Community Services, Education and Training and Juvenile Justice. The Team assesses the young offender's needs and develops an individual plan requiring the young offender to attend programs that aim to reduce or eliminate drug or alcohol misuse and related criminal behaviour.[143]

8.84 Upon development of a suitable Program Plan and acceptance into the YDAC Program, the YDAC makes orders: requiring the young offender to comply with the conditions in the plan; placing the young offender on bail; and deferring sentencing for a minimum of six months.[144] Each young offender is allocated a Case Manager and a DJJ officer to supervise, monitor and assist their progress. Participants also have

138. The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 6.
139. The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 6(d).
140. K Graham, "Piloting a Youth Drug Court Program" at 34.
141. M Flick and T Eardley, *Evaluation of the NSW Youth Drug Court Pilot Program: First Implementation Review*, at 10.
142. The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 8.6.
143. The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 8; see R Dive, M Killen, D Cole and A Poder, ""NSW Youth Drug Court Trial" at 5-7.
144. The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 9-10.

regular Report Back sessions with the YDAC Court Team,[145] initially on a fortnightly basis.[146] The object of these sessions "is to provide an intensive monitoring process and continuing supervision of the child's progress and general compliance with the Program Plan".[147] They are deliberately informal and encourage open discussion to build a rapport between the young person and the members of the Court Team:[148]

> It encourages the young person to assume responsibility for their actions and to actively contribute to the ongoing development and adherence to their program plan.[149]

8.85 If an offender has difficulty complying with his or her individual plan, with the young person's consent, the YDAC magistrate may 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, or who are absent from the program for more than six months, may be discharged from the YDAC and transferred to the Children's Court for sentencing.[150]

8.86 A young offender's participation in the YDAC Program is taken into account in sentencing, whether or not he or she has successfully completed the program.[151] Any sentence imposed cannot be more severe than that which would have been imposed had the young offender not participated in the program.[152] Currently, young offenders who successfully complete the program will receive unsupervised orders such as suspended sentences.[153]

8.87 In its first two years, 164 young offenders facing possible custodial sentences for serious offences were referred to the YDAC, of whom 75 (46%) were judged eligible and suitable for intensive case management. Of these, 29 (39%) satisfactorily completed the program.[154] From July 2002 to June 2003, 33 new participants were accepted into the YDAC Program, with a total of 47 participating in the program during

145. This comprises the sitting Children's magistrate, police prosecutor, Legal Aid solicitor, YDAC Registrar and a representative of the Joint Assessment and Review Team.
146. The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 11.2.
147. The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 11.1.
148. R Dive, M Killen, D Cole and A Poder, ""NSW Youth Drug Court Trial" at 5.
149. Dive, Killen, Cole and Poder at 5.
150. The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 14, 16 and 17.
151. The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 19.1.
152. The Children's Court of New South Wales, *Practice Direction No 23: Practice Direction for the Youth Drug and Alcohol Court* (2004) para 19.2.
153. D de Fina, "New Youth Drug Court - The Pilot Programme Commences" (2000) 12(5) *Judicial Officers Bulletin* 34.at 35.
154. *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report*, Executive Summary at iii.

this 12-month period. During the same period, 80 young people were referred to the YDAC for initial assessment. Of these, 49 proceeded to comprehensive assessment.[155]

8.88 The YDAC trial has been the subject of an extensive evaluation by a University of New South Wales Evaluation Consortium, led by the Social Policy Research Centre. It was commissioned by the New South Wales Attorney General's Department to provide data on its implementation and determine its short-term impacts and longer-term effectiveness. A "first implementation review" evaluated the YDAC's first year's operation.[156] It was based on interviews with 25 key stakeholders of the YDAC and with five participants, as well as observation of Court hearings and team meetings, and review of policy documents.

8.89 Despite the small number of participants interviewed for the 2001 study, views on the program were on the whole positive.[157] The authors concluded that the program was operating effectively as a pilot, in that problems were being identified, discussed and addressed.[158]

8.90 Other early assessments of the YDAC Program were also supportive. In its *Annual Review* for 2001, the Local Court made the following comments on the program:

> it is clearly a successful model for high level, court-monitored intervention for serious criminals with high level addictions to illegal drugs … The pilot program is providing some fascinating insights into the level of intervention required to achieve change in behaviour and into the efficacy of using more informal court room settings.[159]

8.91 In February 2003, Premier Carr announced that the YDAC Program had produced 25 graduates so far, and that 88 young people had been accepted into the program since it commenced in July 2000. He included the YDAC among the successful drug and alcohol programs that would continue to receive support from the State Government.[160]

8.92 There was then a fuller evaluation of the first two years of the program's operation to end of July 2002.[161] The Consortium found that, initially, the successful implementation and operation of the YDAC was hampered by a critical shortage of

155. NSW Department of Juvenile Justice, *Annual Report 2002-2003* at 21.
156. M Flick and T Eardley, *Evaluation of the NSW Youth Drug Court Pilot Program: First Implementation Review.*
157. Flick and Eardley, Executive Summary at ii.
158. Flick and Eardley, Executive Summary at ii-iii.
159. Local Court of New South Wales, *Annual Review 2001* (Sydney, 2001) at 20.
160. Premier of New South Wales, "Securing a Better Future: Premier Carr Releases Raft of New Drug Initiatives" *News Release* (23 February 2003) at 2.
161. *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report.*

accommodation and residential treatment services for participants, leading to some participants spending time in custody awaiting suitable placements.[162] The First Implementation Review of the YDAC had also noted that youth accommodation providers usually refused young people with alcohol or drug issues and that "the name 'Youth Drug Court' was often a barrier to placing a young person with a service" for accommodation.[163]

8.93 However, the problem was alleviated in November 2001 with the opening of an Induction Unit, which the Evaluation Consortium cited as "a key element in the program's subsequent successful development".[164] The Consortium noted that "although there is still a general shortage of crisis accommodation suitable for YDC participants, particularly for young women, the situation has much improved through partnerships forged with community housing agencies"[165] as well as through the opening of the Induction Unit.[166] The Consortium noted, however, that "some of the available accommodation is designed for independent living, but participants often lack the skills and stability to make successful transitions to this kind of housing".[167] For this reason there is still a need "both for more supported accommodation and more training in life skills".[168]

8.94 The Consortium was unable to state definitively, within the framework of its evaluation, "that the program had been achieving outcomes superior to those that might have been gained through other forms of intervention". However, it concluded that, overall, "the program is having an important, positive impact on the lives of many of those participating". While it recommends a number of legislative, policy and administrative changes to improve the operation and outcomes of the YDAC, its key recommendation is that the program should continue and possibly be expanded to other geographical areas.[169]

8.95 This positive conclusion on the value of continuing the YDAC is supported by empirical research relating to legally coerced drug treatment. Although not specific to young offenders, in 2000, BOCSAR observed that research indicates that legally

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162. M Flick and T Eardley, *Evaluation of the NSW Youth Drug Court Pilot Program: First Implementation Review*, at 15; *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report* at 55.
163. Flick and Eardley at 14.
164. *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report*, Executive Summary at ii.
165. *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report* at 55.
166. *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report*, Executive Summary at ii.
167. *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report* at 55.
168. *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report* at 55.
169. *Evaluation of the New South Wales Youth Drug Court Pilot Program: Final Report*, Executive Summary at v.

"coerced"[170] drug treatment can decrease drug use and criminal activity by offenders.[171] In particular, research suggests that offenders dealt with by drug courts in the United States had lower re-arrest rates than offenders dealt with by the traditional criminal justice system. BOCSAR concluded that while this research was limited and open to criticism on methodological grounds, legally coerced treatment was worthy of further investigation.[172]

8.96 Hall has also researched the role of legal coercion in the treatment of offenders with drug and alcohol problems.[173] He cited a number of studies that provide evidence that treatment under coercion of heroin-dependant offenders reduces drug-use and criminal activity.[174] Conversely, heroin-dependant offenders

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170. The offender has to plead guilty to be eligible to participate in drug court treatment and must be willing to be assessed for rehabilitation. As well, participation has to be co-operative in order to succeed.
171. D Weatherburn, L Topp, R Midford and S Allsopp, *Drug Crime Prevention and Mitigation: A Literature Review and Research Agenda* (NSW Bureau of Crimes Statistics and Research, 2000). See also T Makkai, *Drugs Courts: Issues and Prospects* (Australian Institute of Criminology, Trends and Issues in Crime and Criminal Justice No 95, 1998), which concluded that drug courts have had successes, but not in every case and that judgments will need to be made about acceptable failure rates.
172. Bureau of Crimes Statistics and Research, *Drug Crime Prevention and Mitigation: A Literature Review and Research Agenda* 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" (2002) 46 *Crime and Delinquency* 522, which reports the results of a study of 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.
173. W Hall, "The role of legal coercion in the treatment of offenders with alcohol and heroin problems" (1997) 30 *Australian and New Zealand Journal of Criminology* 103. At the time of writing his research, Professor Wayne Hall was the Director (1994-2001) of the National Drug and Alcohol Research Centre, University of New South Wales.
174. J Bell, W Hall and K Blythe, "Changes in criminal activity after entering methadone maintenance" (1992) 87 *British Journal of Addiction* 251; J Ward, R P Mattick and W Hall, *Key Issues in Methadone Maintenance* (University of New South Wales Press, Sydney, 1992); D R Gerstein and H J Harwood, *Treating Drug Problems Volume 1: A Study of Effectiveness and Financing of Public and Private Drug Treatment Systems* (Institute of Medicine, National Academy Press, Washington DC, 1990); R L Hubbard, J J Collins, J V Rachal and E R Cavanaugh, "The criminal justice client in drug abuse treatment" in C G Leukefeld and F M Tims (eds), *Compulsory Treatment of Drug Abuse: Research and Clinical Practice* (NIDA Monograph No 86, NIDA Rockville, MD, 1988); M D Anglin, "The efficacy of civil commitment in treating narcotic drug addiction" in C G Leukefeld and F M Tims (eds), *Compulsory Treatment of Drug Abuse: Research and Clinical Practice* (National Institute on Drug Abuse, Research Monograph 86, Maryland, 1988).

who are imprisoned relapse into drug use, and re-offending, on their release.[175] Hall concluded that coerced treatment provides an alternative to imprisonment that may reduce recidivism.[176] He found that the limited research evidence suggested that the more intensive alcohol treatment programs were, the larger the reductions in recidivism.[177]

8.97 In relation to adult drug courts, Makkai has noted the increasing criticism of traditional criminal justice responses to drug-related crime.[178] She observes that "given the high rates of illicit drug use and property offending, the courts have been identified as having not dealt adequately with the problem".[179]

Treatment services

8.98 Alcohol and drug treatment may be provided through either residential or outpatient services. Services focus either on reducing or eliminating use of the drug of dependence, or minimising harm associated with drug use. 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. As at 2005, there were approximately 210 beds in New South Wales dedicated to detoxification treatment, 80% of which are located in metropolitan areas.[180]

8.99 The New South Wales Health Department has recognised the need for a detoxification service specifically for young people and has established the Neapean Youth Drug and Alcohol Service (NYDAS) within the 15-bed Centre for Drug and Alcohol at Nepean Hospital. The service provides specialist management of adolescent and youth substance misuse problems, including detoxification. The Commission notes, however, that, in relation to YDAC Program participants, Flick and Eardley voiced a concern that placing juveniles in facilities with adults undergoing detoxification could place the young people at risk.[181]

8.100 The Ted Noffs foundation provides adolescent rehabilitation facilities, with some 32 places at a number of locations throughout New South Wales. In addition, Youth Off the Streets operates a non-residential adolescent detoxification service

175. D R Gerstein and H J Harwood, *Treating Drug Problems Volume 1: A Study of Effectiveness and Financing of Public and Private Drug Treatment Systems*; B Thompson, *Recidivism in New South Wales: General Study* (New South Wales Department of Corrective Services, Research Publication No 31, 1995).
176. W Hall, "The role of legal coercion in the treatment of offenders with alcohol and heroin problems" at 104.
177. Hall at 110.
178. T Makkai, "The emergence of drug treatment courts in Australia" (2002) 37 *Substance Use and Misuse* 1567. Dr Makkai is Director of the Australian Institute of Criminology.
179. Makkai at 1584.
180. New South Wales Department of Health, *Consulation*.
181 M Flick and T Eardley, *Evaluation of the NSW Youth Drug Court Pilot Program: First Implementation Review* at 17.

called “Dunlea” at Merrylands in Sydney. Youth Off the Streets also operates the Residential Induction Unit for participants in the YDAC Program. The Residential Induction Unit can accommodate six clients for a usual stay of 2 to 3 weeks (although some clients may need to stay longer and others may leave prematurely).

8.101 Submissions received by the Commission, and participants in our community consultations, expressed concern that the current level of alcohol and drug treatment services for young people in New South Wales, especially outside the Sydney metropolitan region, is inadequate.[182]

8.102 While the level of services has increased since the submissions were received and consultations held, accommodation in facilities is still limited and remains concentrated in the metropolitan area. The Commission advocates a State-wide coordinated review of the provision of drug and alcohol treatment services for young people across New South Wales to identify where resources are needed and establish an appropriate level of resource allocation.

GUIDELINE JUDGMENTS AND YOUNG OFFENDERS

8.103 One of the main emphases of this chapter has been the flexibility that courts currently use in devising sentences for young offenders. Submissions and community consultations confirmed that this flexibility and inventiveness is one of the strengths of current juvenile justice policy in New South Wales under the YOA and the CCPA. However, there have been suggestions from some quarters that the community’s expectations of proportionality – that is, that the punishment fit the crime – and consistency in sentencing, warrant a standardisation of the sentences given to young offenders. It is argued that this can be achieved through guideline sentences and/or statutory minimum or fixed sentences for young offenders (“mandatory sentencing”).[183]

182. NSW Legal Aid Commission, *Submission* at 6; The Shopfront Youth Legal Centre, *Submission* at 8; NSW Young lawyers, *Submission* at 3; New South Wales Office of the Director of Public Prosecutions, *Submissions* at 3; NSW Bar Association, *Submission* at 2; Law Society of New South Wales, *Submission* at 5; and the Children’s Court of New South Wales, *Submission* at 11. While not a drug treatment service, one positive note being struck in rural New South Wales is the “Nimbal Program”. This is a mentoring initiative, operating in the Shoalhaven Local Area Command for young Aboriginal offenders who have been dealt with under the *Young Offenders Act 1997* (NSW) for an alcohol-related offence, and who are in danger of becoming involved in alcohol-related risk-taking. It is run by local police and the Aboriginal community and provides the young offender with a mentor from the local community, including Aboriginal and police representatives. It involves peer support meetings and overnight camps.
183. See para 8.126-8.130 below.

8.104 Guideline judgments are judgments formulated by appellate courts that go beyond the facts of a particular case to propose a more generally applicable sentencing scale or appropriate sentence for common factual situations.[184] The aims 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.[185]

8.105 In 1998, the New South Wales Court of Criminal Appeal established a formal system for formulating guideline judgments. This was in response to public debate about the introduction of legislation confining judicial sentencing discretion, including debate about mandatory sentencing laws.[186] The Court's guideline judgments are not binding upon sentencing judges.[187] However, a judge who does not apply a guideline judgment is expected to provide reasons for this decision.[188] The Court has published guideline judgments dealing with five offences: driving causing grievous bodily harm or death;[189] armed robbery;[190] drug importation;[191] break, enter and steal;[192] and high range drink-driving.[193] The Court has also published a guideline judgment dealing with guilty pleas.[194]

8.106 The system has been afforded statutory recognition in the *Crimes (Sentencing Procedure) Act 1999* (NSW), which empowers the Attorney General to request a guideline judgement and make submissions on how guidelines should be

184. Justice J Spigelman, "Sentencing Guideline Judgements" (1999) 73 *Australian Law Journal* 876 at 881.
185. *R v Jurisic* (1998) 45 NSWLR 209 at 216, 220-223 and 229, but see comments by Adams J on the limitations of assertions as to what public perceptions might be at 255-256; Justice J Spigelman, "Sentencing Guideline Judgments" at 878-881.
186. Spigelman at 876.
187. *R v Jurisic* (1998) 45 NSWLR 209 at 220-221.
188. *R v Jurisic* (1998) 45 NSWLR 209 at 221.
189. *R v Jurisic* (1998) 45 NSWLR 209: *Crimes Act 1900* (NSW) s 52A. See also *R v Whyte* (2002) 55 NSWLR 252 (revision of *Jurisic* guideline).
190. *R v Henry* (1999) 46 NSWLR 346: *Crimes Act 1900* (NSW) s 97.
191. *R v Wong; R v Leung* (1999) 48 NSWLR 340: *Customs Act 1901* (Cth) s 233B.
192. *R v Ponfield* (1999) 48 NSWLR 327: *Crimes Act 1900* (NSW) s 112(1).
193. *Application by Attorney General (No 3 of 2002) Re (2004) 61 NSWLR 305*.
194. *R v Thomson* (2000) 49 NSWLR 383. 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 same requirement in relation to offences committed by young people is imposed by s 33B of the *Children (Criminal Proceedings) Act 1987* (NSW). See also *R v Mansour* (1999) 29 MVR 409, applying the *Jurisic* guideline; *R v Israil* [2002] NSWCCA 255, affirming the decision in *R v Sharma* (2002) 54 NSWLR 300; and *R v Cook* (2002) 36 MVR 231.

framed.[195] The guideline may be delivered separately or included in an appropriate judgment. Guidelines may either apply generally or in relation to particular instances or to classes of courts, penalties, offences or offenders.[196] The Court of Criminal Appeal has held that the jurisdiction so conferred upon the Supreme Court is constitutionally valid.[197] Guideline judgments are prone to attack in so far as they proscribe judicial discretion inconsistently with fundamental sentencing principles (particularly as stated in legislation) and with constitutional norms requiring the separation of judicial and legislative powers.[198]

Application of existing guideline judgments to young offenders

8.107 The age of an offender has been referred to by the Court of Criminal Appeal in the following guideline judgments:

- *R v Jurisic*:[199] this is a guideline judgment on dangerous driving causing grievous bodily harm or death.[200]

- *R v Whyte:*[201] this guideline judgment on dangerous driving causing death or bodily harm (s 52A of the *Crimes Act 1900* (NSW)) reformulated the *Jurisic* guidelines. It is the primary reference for guideline judgments concerning young offenders. Justice Hunt commented that being a "young offender" was a characteristic of the "frequently recurring case of an offence under s 52A".[202]

- R *v Wong; R v Leung*: this guideline judgment on drug offences committed by couriers and persons low in the distribution hierarchy or importing organisation refers to the statutory requirement that sentencing courts take into account the age of the offender. [203] Although R *v Wong; R v Leung* was overturned by the

195. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37. Note that s 41 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) retrospectively validates all guideline judgments issued by the Court of Criminal Appeal in the hope of obviating the application to such judgments of the High Court's decision in *Wong v The Queen* (2001) 207 CLR 584.
196. *Crimes(Sentencing Procedure) Act 1999* s 36.
197. *R v Whyte* (2002) 55 NSWLR 252 at [117]-[140].
198. See *Wong v the Queen* (2001) 207 CLR 584. Compare *R v Whyte* (2002) 55 NSWLR 252.
199. *R v Jurisic* (1998) 45 NSWLR 209 at 228.
200. It refers to the earlier Court of Criminal Appeal judgment in *R v Musumeci* (NSW, Court of Criminal Appeal, No 60359/97, 30 October 1997, unreported), where Justice Hunt 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: cited in *R v Jurisic* (1998) 45 NSWLR 209 at 228.
201. *R v Whyte* (2002) 55 NSWLR 252.
202. *R v Whyte* (2002) 55 NSWLR 252 at [204] (Hunt J).
203. R *v Wong; R v Leung* (1999) 48 NSWLR 340 at 365, referring to the *Crimes Act 1914* (Cth) s 16A(2)(m).

High Court in *Wong v The Queen*, the sentencing ranges there identified are still influential.[204]

- *R v Henry*: this guideline judgment on armed robbery notes that the fact that the accused is a "young offender with little or no criminal history" is one of a number of sufficiently common characteristics to enable such a guideline judgment to be made by the court.[205]

- *R v Ponfield*: this guideline judgment on break, enter and steal includes an observation that juveniles and young persons form an "obvious" group of offenders in relation to this particular offence, although Justice Grove noted that "[t]he prominence to be given to rehabilitation of the young in determining sentence is recognised to the point of being axiomatic".[206]

8.108 There is no doubt that guidelines may apply to young offenders, at least when dealt with at law.[207] However, there are two points to make in relation to the applicability of guideline judgments to young offenders.

8.109 First, this report uses the expression "young offender" to refer specifically to an offender aged between 10 and 17 years at the time he or she commits an offence. Guideline judgments have not generally given the expression the same specific meaning. In guideline judgments to date, the expression "young offender" must take its meaning from the context. It could, for example, include persons in their early to mid-20s, but not in the late 20s or early 30s.[208] The fact that an offender is not "young", in the sense that the guideline in question envisages, does not mean that the guideline is completely irrelevant to sentence determination where the offender is older. Nor, in principle, can it preclude the application of the guideline to an offender who is a child,[209] whether or not the guideline was intended to apply to children.[210] This follows from the very nature of guideline judgments, which "are not to be regarded as equivalent to statutory instruments, which invite interpretation or which bind judges strictly within their terms, and from which there can be no departure".[211]

8.110 The second point to make is that where the offender is a child, the application of a guideline judgment operates in two ways. First, the guideline will be

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204. *Wong v the Queen* (2001) 207 CLR 584. See *R v Otto* [2005] NSWCCA 333.
205. *R v Henry* (1999) 46 NSWLR 346 at 380 per Spigelman CJ.
206. *R v Ponfield* (1999) 48 NSWLR 327 at 335-336.
207. See *R v SDM* (2001) 51 NSWLR 530 at [7] (Wood CJ at CL, Giles JA agreeing); compare Simpson J at [40], which is not entirely, but largely, consistent.
208. For example, while Chief Justice Spigelman expressly referred to a "young offender" in *R v Henry* ((1999) 46 NSWLR 346 at [162]), Justice Simpson subsequently noted in *R v SDM* that "[t]he reference to 'young offender' has nothing to do with 'children'" as the term is used in the *Children (Criminal Proceedings) Act 1987* (NSW): *R v SDM* (2001) 51 NSWLR 530 at [40].
209. *R v SDM* (2001) 51 NSWLR 530 at [7].
210. *R v SDM* (2001) 51 NSWLR 530 at [40].
211. *R v SDM* (2001) 51 NSWLR 530 at [7] (Wood CJ at CL).

qualified where the child is being sentenced in the Children's Court under Part 3 Division 4 of the CCPA, which establishes a more benign sentencing regime than that at law. For example, in so far as the guideline suggests imprisonment ranges,[212] it will be subject to the restrictions that apply to the Children's Court making a control order under s 33(1)(g) of the CCPA, namely, that the period of control must not exceed two years[213] and it must be a penalty of last resort.[214] Secondly, where the child is being sentenced at law, the provisions of s 6 of the CCPA remain relevant.[215] The existence of a more severe penalty regime at law is relevant to the determination, under s 18 of the CCPA, whether the child should be dealt with under Part 3 Division 4 of the CCPA or at law.[216]

8.111 There is, however, some ambiguity as to the application to young offenders of the guidelines developed in *R v Henry*.[217] In 2000, in *R v Sua*, Justice Hidden stated that these guidelines did not "embrace the special facts governing the sentencing of children";[218] and in *R v RLS*, Justice Hulme noted that the applicant was "of a younger age than contemplated by the [*R v Henry*] guidelines".[219] Subsequently, in *R v SDM*, the Court of Criminal Appeal concluded that the suggestion in *R v Sua* and *R v RLS* that the R *v Henry* guidelines were *not* applicable to young offenders was "overstated".[220] Nonetheless, the court found that while the relevant guideline

212. It should be noted that although the Children's Court cannot sentence a young offender to imprisonment, sentencing principles are nevertheless relevant by analogy to control orders: *Children (Criminal Proceedings) Act 1987* (NSW) s 33C(a).
213. *Children (Criminal Proceedings) Act 1987* (NSW) s 33((1)(g).
214. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(2).
215. *R v SDM* (2001) 51 NSWLR 530 at [18] and [36]. See also *R v Tobar; R v Jan* [2004] NSWCCA 391 at [55] (Simpson J). Section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) sets out the principles which must guide a court exercising criminal jurisdiction over children.
216. See *JIW v DPP* [2005] NSWSC 760 at [64]. Section 18 of the *Children (Criminal Proceedings) Act 1987* (NSW) provides that the Court has a discretion to deal with a young offender charged with an indictable offence (other than a serious children's indictable offence) according to law (that is, in the District or Supreme Court as an adult) or as a child. Section 18(1A) sets out the matters that the Court must take into account in making this determination. In addition, the decision of *R v Bendt* [2003] NSWCCA 78 has provided guidance on the exercise of the discretion.
217. *R v Henry* (1999) 46 NSWLR 346.
218. *R v Sua* [2000] NSWCCA 94 at [12].
219. *R v RLS* [2000] NSWCCA 175 at [4]. See also *R v Tobar; R v Jan* (2004) 150 A Crim R 104 at [55].
220. *R v SDM* (2001) 51 NSWLR 530 at [43] (Simpson J). See also *R v Mohamadin* [2004] NSWCCA 401, applying the *R v Henry* guidelines (19 year-old offender).

judgments could be applied to young offenders, an offender's youthfulness remained a matter for consideration in sentencing.[221]

Should guideline judgments be developed for young offenders?

Submissions to IP 19

8.112 IP 19 asked whether guideline judgments should apply to young offenders.[222] In an adult jurisdiction, guideline judgments may encourage consistency and proportionality, thereby strengthening public confidence in the criminal justice system and acting as a deterrent to offending. By way of contrast, the general tenor of submissions was that the emphases and aims of juvenile justice are so different from those applicable to adult offenders that the provisions of the CCPA, together with the common law, should continue to provide the necessary balance between flexibility and consistency in sentencing.[223]

8.113 The NSW Commission for Children and Young People submitted that guideline judgments "would restrict the ability of Judges and Magistrates to impose innovative sentences tailored to the particular needs of individual young offenders".[224]

8.114 The Children's Court noted that there were varying views within the Court as to whether guideline judgments should apply to that court. However, it expressed a "major concern" about "result-based" guideline judgments in that "they may set fixed custodial sentence results". The Children's Court could not simply choose to follow guideline judgments that set out general sentencing principles, but would also have to follow those setting out expected custodial sentences.[225]

8.115 Both the DPP and the NSW Bar Association argued that guideline judgments are not necessarily punitive - citing the decision in *R v Thomson*[226] with respect to standardising the mitigation of sentence resulting from a guilty plea.[227] However, the Children's Court noted that the trend of guideline judgments has been to *increase* the length of custodial sentences for adult offenders.[228]

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221. *R v SDM* (2001) 51 NSWLR 530 at [2] (Giles JA); [14-20] (Wood CJ at CL); and [40-46] (Simpson J).
222. NSWLRC IP 19, Issue 21.
223. See, for example, Legal Aid Commission of NSW, *Submission*; NSW Young Lawyers, *Submission*; The Shopfront Youth Legal Centre, *Submission*; National Children's and Youth Law Centre, *Submission*; NSW Law Society *Submission*; and the NSW Commission for Children and Young People, *Submission*.
224. NSW Commission for Children and Young People, *Submission* at para 17.01.
225. The Children's Court of New South Wales, *Submission* at 29.
226. *R v Thomson* (2000) 49 NSWLR 383.
227. New South Wales Office of the Director of Public Prosecutions, *Submission* at 8; and the NSW Bar Association, *Submission* at 4.
228. The Children's Court of New South Wales, *Submission* at 29.

8.116 The Shopfront Youth Legal Centre "vigorously oppose[d] any attempt to apply existing guideline judgments to juvenile offenders". It submitted that "a primary aim of guideline judgments is general deterrence, which is of limited relevance in the children's jurisdiction", where rehabilitation generally takes precedence.[229]

8.117 NSW Young Lawyers noted that in *R v Ponfield and Ors*,[230] the Court of Criminal Appeal declined to issue a guideline judgment for break and enter matters. This was based partly on the fact that the "overwhelming majority" of such cases are dealt with in the Local Court, where the maximum sentence was considerably below the guideline judgment sought by the DPP.[231]

The Commission's view

8.118 Three main arguments emerge from the submissions:

- Guidelines are not sufficiently flexible when it comes to young offenders.
- Their general tendency is to impose a harsher sentencing regime that is inappropriate in relation to young offenders.
- Their emphasis on general deterrence undermines, or is at least of limited relevance to, juvenile justice's primary goal of rehabilitation.

8.119 First, general deterrence is not, and should not, be irrelevant in the sentencing of young offenders. For example, the need for general deterrence in the case of dangerous driving[232] or armed robbery[233] is such that youth is given rather less weight that may be the case in the context of other offences.

8.120 Secondly, where there is a guideline for such an offence, its effect will be more qualified where the young offender is dealt with under the CCPA rather than at law. That is a factor that is appropriately taken into account under s 18 of the CCPA.

8.121 That said, the Commission does not believe that guidelines specifically directed to the sentencing of children would add anything to (and perhaps would undermine) the flexibility injected into sentencing by s 6 and Part 3 Division 4 of the CCPA. It would be very difficult to frame guideline judgments specifically with young offenders in mind and still retain the flexibility appropriate to their sentencing.

8.122 Furthermore, the ability of the Children's Court to deal summarily with a range of strictly indictable matters - including offences which are currently the subject of guideline judgments for adults - is the means of providing appropriate sentencing for children in matters that would ordinarily result in a custodial sentence for an adult.

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229. The Shopfront Youth Legal Centre, *Submission* at 15.
230. *R v Ponfield* (1999) 48 NSWLR 327 at 335 (Grove J).
231. NSW Young Lawyers, *Submission* at 7.
232. See *R v Jurisic* (1998) 45 NSWLR 209; and *R v Whyte* (2002) 55 NSWLR 252.
233. See *R v SDM* (2001) 51 NSWLR 530; and *R v Sharma* (2002) 54 NSWLR 300 at [74].

8.123 In conclusion, the Commission does not support the formulation of guideline judgments to apply specifically to children.

MANDATORY SENTENCING OF YOUNG OFFENDERS

8.124 IP 19 also canvassed whether mandatory sentences for offences committed by young offenders ought to be adopted.

8.125 As a general rule, statutes prescribe maximum penalties, leaving the determination of the actual sentence to the court, which has a wide discretion to decide what is appropriate in all the circumstances.[234] The exercise of this discretion is guided by common law sentencing principles and doctrines, developed over many years, and is supervised by appellate courts. Mandatory sentencing operates to prescribe either the actual sentence, a minimum sentence, or a range of sentences, displacing to a greater or lesser extent common law sentencing principles and judicial discretion.

8.126 There was a unanimous view expressed in submissions and in consultations that mandatory sentencing was completely inappropriate for young offenders.

8.127 The Commission is of the view that the principles relating to the sentencing of children as set out in s 6 CCPA cannot be met under a mandatory sentencing scheme. In addition, a mandatory sentencing scheme for young offenders directly conflicts with Australia's international law obligations, especially Articles 3(1), 37(b) and 40 of the *United Nations Convention on the Rights of the Child*.[235]

8.128 The Children's Court proposed the following conclusions from the extensive international research on mandatory sentencing:

- Mandatory sentencing inevitably leads to harsh, capricious and unjust punishment.
- Mandatory sentencing escalates court costs and the cost of custodial confinement.
- In overseas research, mandatory sentencing has had either no demonstrable marginal deterrent effects or has only had short-term effects that diminish over time.
- Mandatory sentencing increases police and prosecutorial discretion, which, because they are largely invisible and unreviewable, leads to potential for abuse

234. One exception is the prescribing of standard non-parole periods for a number of serious offences by the *Crimes (Sentencing Procedure) Act 1999* (NSW), Division 1A. This scheme was established by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* (NSW).
235. The Shopfront Youth Legal Centre, *Submission* at 13.

and injustice (such discretion may sometimes be used to avoid the harsh consequences of mandatory sentencing).

- Mandatory sentencing has adverse specific impacts on: mentally ill and intellectually disabled offenders; juvenile offenders; Aboriginal offenders; and the bail process.

- Mandatory sentencing laws would violate the provisions of an international treaty binding on Australia for the protection of children and young persons, namely, the *Convention on the Rights of the Child*.

- The overwhelming body of judicial opinion in Australia favours the retention of judicial discretion.[236]

8.129 The Commission does not support the enactment of mandatory sentences, including mandatory minimum sentences, for crimes committed by young offenders.

CARE ISSUES IN SENTENCING

8.130 Traditionally, the involvement of young people in the court system often arose as the result of an overlap between welfare and criminal justice issues.[237] 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 divide welfare from justice matters in most Australian jurisdictions, beginning in the late 1970s.[238] The Children's Court's care jurisdiction over young people in need of care and protection was overhauled by the *Children and Young Persons (Care and Protection) Act 1998* (NSW).[239]

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236. In its submission, the Children's Court noted the following sample of the "significant literature" on legislative sentencing: New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996); D Johnson and G Zdenkowski, *Legislative Injustice: Compulsory Imprisonment in the Northern Territory* (Australian Centre for Independent Journalism, University of Technology, Sydney, 2000); N Morgan, "Capturing Crims or Capturing Votes? The Aims and Effects of Mandatories" 22 *University of New South Wales Law Journal* 267; M Tonry, "Legislative Penalties" in M Tonry (ed), *Crime and Justice: A Review of Research* (University of Chicago Press, 1992); Justice J Spigelman, "Sentencing Guidelines", Address to the National Conference of District and County Court Judges (1999): Senate Legal and Constitutional References Committee, *Report of the Inquiry into the Human Rights (Legislative Sentencing of Juvenile Offenders) Bill 1999* (AGPS, Canberra, 2000).
237. See Chapter 2, especially at para 2.9 and 2.23.
238. C Cunneen and R White, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, Melbourne, 2002) at 118-122.
239. 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

8.131 In the course of sentencing a young offender in its criminal jurisdiction, the Children's Court may become aware that the young offender is in need of care and protection. IP 19 raised the adequacy of the current procedure for dealing with care issues when they come to the attention of the Children's Court.[240]

8.132 The Law Society submitted that, unlike the position in the Family Court, there is no protocol or legislative scheme requiring a magistrate hearing criminal proceedings in the Children's Court to report his or her suspicion to DOCS that the young offender is at risk of harm.[241] In the Law Society's view, it can be argued that a Children's Court magistrate is a person who, in the course of his or her professional work, delivers law enforcement to children and is therefore subject to the reporting requirements under s 27 of the *Children and Young Persons (Care and Protection Act) 1998* (NSW).[242] The NSW Commission for Children and Young People is sure that s 27 applies to Children's Court magistrates.[243] It submitted that there is therefore no need for legislative amendment to bring these magistrates within s 27, but that a Practice Direction would remind them of their obligations if care issues emerge during sentencing. It stressed that:

> [w]hile there is a need to separate the care and youth offending jurisdictions of the Children's Court, children in need of care should not be denied the benefit of child protection services.

8.133 The Law Society also submitted that "some magistrates attempt care/welfare outcomes via the criminal justice system".[244] For example, with the aim of addressing care issues, onerous conditions are placed on grants of bail, bonds and probation, such as curfews or "do not associate" orders.

8.134 In relation to this point, both the DPP and the Bar Association submitted that it is important to maintain the separation of the care and criminal jurisdictions "so that there is as little confusion as possible on the part of young people before the Court as to what the Court is attempting to achieve".[245] Similarly, New South Wales Young

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Community Services, 1997). For a summary of the Act see P Parkinson, "Child Protection Law Reforms in NSW" (1999) 13 *Australian Family Law Journal* at 1.

240. NSWLRC IP 19, Issue 12.
241. The Law Society of New South Wales, *Submission* at 6.
242. Section 27 applies to "a person who, in the course of his or her professional work or other paid employment delivers health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly, to children". Section 27(2) provides that if a person to whom the section applies has reasonable grounds (arising during the course of or from the person's work) to suspect that a child is at risk of harm, he or she must report the concern to DOCS.
243. The NSW Commission for Children and Young People, *Submission* at para 9.02.
244. The Law Society of New South Wales, *Submission* at 6.
245. The New South Wales Bar Association, *Submission* at 2; New South Wales Office of the Director of Public Prosecutions, *Submission* at 5.

Lawyers emphasised that it is not appropriate for care considerations to be incorporated into sentences.[246]

8.135 Where care considerations arise in the context of sentencing, magistrates should then have the power to deal with them as such. Clearly, care issues ought not to be a factor in sentencing, such as by the imposition of stringent conditions in bail. The matter could be clarified by a Practice Direction if necessary.

8.136 Having said that, magistrates are often placed in a difficult position in trying to balance the child's welfare and rights in a criminal matter. For example, where a homeless child comes before the Court, who is neither known to DOCS and therefore not officially within its care, nor in custody and therefore not the responsibility of DJJ, the Court is faced with a dilemma. It can refuse bail (which otherwise could have been granted) or send the child back onto the streets.

8.137 Concerns as to the responsiveness of DOCS to care issues that arise in the Children's Court were expressed both in submissions and in community consultations, notably by magistrates and DJJ staff.[247] In cases such as the above example, the Commission understands that DOCS is sometimes reluctant to get involved in the finding of emergency accommodation. Nor does the Children's Court have any authority to direct DOCS as to how it should apply and prioritise its time and resources.

8.138 A matter for particular concern is the situation of 13-year-old offenders, who are too young to be accepted into refuges, but who may have no alternative accommodation. The only means to resolve this problem is for DOCS to become involved. However, in its submission, the Children's Court noted that there is difficulty in ensuring that a responsible Departmental officer is available to assist the court in both bail and/or sentencing matters.

8.139 While it would appear to be primarily a question of allocation of sparse funding and resources, the Children's Court made the practical suggestion that ready access to Departmental court liaison officers would alleviate the problem to some extent. The role of Aboriginal Client Service Specialists in the Local Courts might provide a blueprint for establishing Children's Court Liaison Officers.

8.140 The Children's Court also indicated its frustration with its limited capacity to help a young offender with care and protection issues, beyond reporting the problems to DOCS.[248] The Court receives no assurance that action will flow from its reporting of its concerns and no information as to what action might have been taken. Accordingly, a magistrate cannot build input from DOCS into any probation plan.

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246. New South Wales Young Lawyers, *Submission* at 4.
247. Law Society of New South Wales, *Submission* at 6; the Children's Court of New South Wales, *Submission* at 16; NSWLRC Consultations held in Albury, Broken Hill and Coffs Harbour (May-June 2002).
248. The Children's Court of New South Wales, *Submission 2* (31 October 2005) at 1-2.

8.141 Furthermore, the relationship between the Children's Court, DOCS and DJJ in care matters that come before the court seems to be problematic. As noted above, it is not always clear who has, or should have, responsibility for the young person before the Court. Nor is it always clear what services and resources are available and who has the authority to utilise these in a particular matter. Benefits would flow to young people caught up in the criminal justice system if the ambiguities in the Court/departmental interrelationships were resolved and if there were greater co-operation between these bodies in matters before the Court. Such co-operation should extend to providing the Court with the information it needs to make the most appropriate orders in respect of the young offender.

Recommendation 8.7

A Protocol should establish which department or departments has responsibility for a young person appearing before the Children's Court in a criminal matter who is in need of care and protection and/or bail or crisis accommodation. The Protocol should promote co-operation in such matters between the Children's Court, the Department of Juvenile Justice and the Department of Community Services, in the child's best interests.

8.142 Even when the young offender who comes before the Children's Court is in the care of DOCS, there are frequently obstacles in the way of the Court achieving appropriate outcomes for the young person. Although DOCS has a policy that every child before the criminal courts for whom the Minister or the Director General has responsibility should have a DOCS support person present, the Children's Court has reported that it often has difficulty making contact with the DOCS worker who has day-to-day responsibility for the child.[249] As a result, the young offender ends up appearing alone. The Court misses out on the full information about the young person's circumstances that a parent or other responsible adult may have been able to provide and the young person misses out on the guidance and assistance of a support person.

8.143 Once again, DOCS's reluctance or inability to have a caseworker in court is likely to be a resource issue. Nevertheless, although it would not be appropriate for the Court to command DOCS in matters where it does not have parental responsibility for a young person, different considerations apply where a care order is in place. The Children's Court currently has the power under s 7 of the *Children (Protection and Parental Responsibility) Act 1997* (NSW), when exercising criminal jurisdiction, to require the attendance at court of the young offender's parents. The Children's Court has submitted that this power should be extended to apply to the Director-General of DOCS or his or her delegate.[250] Currently, s 3 of the *Children (Protection and Parental Responsibility) Act 1997* (NSW) specifically excludes the Minister and the Director-General of DOCS from the definition of "parent" under the Act.

249. The Children's Court of New South Wales, *Submission 2* (31 October 2005) at 1.

250 The Children's Court of New South Wales, *Submission 2* (31 October 2005) at 1.

8.144 The Commission sees the merit and logic of the Court's submission. However, amendment of the definition of "parent" in the *Children (Protection and Parental Responsibility) Act 1997* (NSW) to include the Minister and the Director-General of DOCS would have consequences in many difference areas of parental rights and responsibilities, extending far beyond sentencing. Accordingly, it would not be appropriate for the Commission to recommend this change in this review. This is particularly so given that the submission was made late in the review and we have not had the opportunity to consult widely on it. We do, however, recommend that Parliament consider the issue and the Children's Court's submission, at the least in relation to DOCS's attendance in court in criminal proceedings where the young offender is subject to a care order.

Recommendation 8.8

The New South Wales Parliament should review the definition of "parent" in the *Children (Protection and Parental Responsibility) Act 1997* (NSW) with a view to extending the definition to include the Director-General of the Department of Community Services. At the least, the Government should consider extending the definition in relation to the power given to a court pursuant to s 7 to require the attendance in court of one or more parents.

9. A Youth Court

- Introduction
- Name of the children’s court
- Status of the children’s court
- Children's magistrates
- Facilities

INTRODUCTION

9.1 Both this and the previous chapter deal with the Children's Court, but with different focuses. Whereas Chapter 8 explored issues relating to the sentencing process, this chapter explores issues relating to the Court itself. In particular, this chapter considers:

- whether the name of the Children's Court ought to be changed;
- whether the status of the Children's Court ought to be elevated;
- selection, tenure and education of Children's Magistrates; and
- the adequacy of court facilities.

NAME OF THE CHILDREN'S COURT

9.2 The Children's Court is constituted under the *Children's Court Act 1987* (NSW). Issues Paper 19 ("IP 19") asked whether the Children's Court ought to be renamed.[1] The Commission received a divided response in submissions, with good reasons both for and against a name change.[2] A number of submissions also suggested that consultation with young people should form part of any proposed changes.[3]

9.3 Most of the arguments in favour of retaining the name "Children's Court" were of a practical nature. Examples given included:

- it is simpler;

1. New South Wales Law Reform Commission, *Sentencing: Young Offenders* (Issues Paper 19, 2001), Issue 17, para 3.83-3.85.
2. Those in favour were: New South Wales Bar Association, *Submission* at 3; The Shopfront Youth Legal Centre, *Submission* at 13 ('We do not have strong views on whether the Children's Court should be renamed. We are amenable to the idea of calling it a "Youth Court" (but there is the potential problem that "youth" is a term often used to include people aged up to 21 or even 25).'); the Office of the Director of Public Prosecutions, *Submission* at 7; Victims' Services, *Submission*. Those against were: the Legal Aid Commission of New South Wales, *Submission* at 12; NSW Commission for Children and Young People, *Submission* at para 14.03; Youth Justice Advisory Council, *Submission*; the National Children's and Youth Law Centre, *Submission* at 3; and New South Wales Young Lawyers, *Submission* at 6. Those neither for nor against a change were: Public Defenders, *Submission* at 5; Law Society of New South Wales, *Submission* at 11; the (then) Minister for Juvenile Justice, the Hon C M Tebbutt MLC, *Submission* at 8 and the Children's Court of New South Wales, *Submission* at 26. Similarly, there was no consensus of opinion expressed in the course of the Commission's community consultations.
3. New South Wales Young Lawyers, *Submission* at 6; Law Society of New South Wales, *Submission* at 11.

- the name is currently well known in the community;
- it reflects the United Nations definition of "child"; and
- any change would involve cost and cause some confusion.[4]

9.4 Although there was no consensus on a new title among the Children's Magistrates themselves, the submission of the Court did note that the Court's current title does not adequately represent the work of the court.[5]

9.5 The Commission has concluded that there are several justifications for changing the name of the Court and that these reasons outweigh arguments for maintaining the present title. The main reasons relate to the seriousness of the Court's work and the age group of the majority of the young people appearing before the Court.

9.6 The Children's Court exercises criminal jurisdiction under the *Children (Criminal Proceedings) Act 1987* (NSW) ("CCPA"),[6] and care jurisdiction under the *Children (Care and Protection) Act 1998* (NSW). The Children's Court also carries out the function of Parole Board for young offenders who have been sentenced in the Supreme and District Courts for serious offences.[7] Accordingly, the work of the Children's Court is substantial and far-reaching, involving serious and difficult decisions. This applies both to the criminal and care jurisdictions, the latter often involving decisions to remove a child from his or her parents. Unlike the Local Courts, the Children's Court frequently tries serious offences.

9.7 While the work of the court extends across more than one jurisdiction, the majority of its matters are criminal. In 2004, 84% of matters commenced and 86.5% of matters finalised in the Children's Court were criminal matters.[8] Of these criminal matters, 70% of males and 64.5% of females were aged 16 to 18 and over, the last-named group including those who were under 18 years at the time of the alleged offence, but were 18 years or over at the time of the finalisation of the matter.[9]

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4. NSW Commission for Children and Young People, *Submission* at para 14.03.
5. The Children's Court of New South Wales, *Submission* at 26.
6. Section 28(1) of the *Children (Criminal Proceedings) Act 1987* (NSW) provides that the Court may hear and determine: (a) proceedings in respect of any offence (whether indictable or otherwise) other than a serious children's indictable offence, and (b) committal proceedings in respect of any indictable offence (including a serious children's indictable offence).
7. *Children (Detention Centres) Act 1987* (NSW) s 29. In short, this section provides that the provisions of Parts 6 and 7 (Parole) of the *Crimes (Administration of Sentences) Act 1999* (NSW) apply to juvenile detainees and to the Children's Court as if it were the Parole Board.
8. S Moffat, D, Goh, and J Fitzgerald, *New South Wales Criminal Courts Statistics 2004* (NSW Bureau of Crime Statistics and Research, Statistical Report Series No S93, 2005), Summary at 10, Tables 2.4, 2.4a and 2.4b.
9. New South Wales Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2004* (Statistical Report Series No S93, 2005) Summary at 10, Tables 2.4, 2.4a and 2.4b.

Children appearing in parole matters are almost without exception in the higher age bracket, given that it usually takes time for a young offender to get to a point in their involvement in the criminal justice system where they are sentenced to detention or imprisonment.[10] On the other hand, children appearing in care matters, which forms less than 20% of the Court's caseload, are usually under 8 years of age, and certainly rarely 16 years or older.[11]

9.8 Changing the name of the court to the "Youth Court" would therefore reflect the reality of Children's Court practice. Moreover, it would go some way to bolstering community confidence in a specialised court as the most appropriate venue for dealing with this age group of young offenders, and to stressing the seriousness of the court process to the young offenders themselves.

9.9 The divergence of opinion among those professionally involved with the Children's Court might suggest that its name is not of vital importance. The Commission, however, thinks that the Court's title is of significance. It ought to establish an immediate and obvious connection between the Court's role in exercising the wide jurisdiction granted by the CCPA and the *Young Offenders Act 1997* (NSW)("YOA"), and the public perception of that role, which is important in maintaining public confidence in the system. As the Director of Public Prosecutions noted:

> *There is likely to be a public perception that 17-year-olds should not be dealt with in a "Children's" Court, and that such a jurisdiction is inappropriate for those more accurately described as youths. The older young offenders themselves may also consider that being dealt with in the "Children's" Court reflects a perception that their crimes are not serious.*[12]

9.10 We note that South Australia is currently the only jurisdiction in Australia to have a Youth Court[13] and that New South Wales would therefore, at least for now, be in the minority in Australia in having a Youth Court. On the other hand, New Zealand,[14] England[15] and Canada[16] all have Youth Courts. It would follow that, if the

10. Again, there are no available statistics analysing ages of children appearing in the Children's Court in its capacity as Parole Board, and this information comes from the Court's experience: SCM S Mitchell, *Consultation.*
11. There are no available statistics analysing ages of children appearing in the care jurisdiction. This information comes from the Court's experience as well as the evidence that the Department of Community Services tends to focus on younger children: SCM S Mitchell, *Consultation.*
12. Office of the Director of Public Prosecutions, *Submission* at 7.
13. *Youth Court Act 1993* (SA).
14. The Youth Court is part of the District Court. New Zealand's history surrounding youth offenders is focused on the development of specific procedures and systems for youth, adjacent to the general criminal justice system and separate from the welfare system. The first Children's Court was established under the *Child Welfare Act 1925* (NZ), but it was not until the *Children and Young Persons Act 1974* (NZ) (the predecessor to the *Children, Young Persons and Their Families Act 1989* (NZ)) was enacted that the first Youth Court, with proceedings entirely separate from an adult court, was established. At all times,

court was designated as the Youth Court, its magistrates should be designated Youth Court Magistrates.

Recommendation 9.1

The name of the Children's Court should be changed to the Youth Court and magistrates of that court should be known as Youth Court Magistrates.

STATUS OF THE CHILDREN'S COURT

9.11 A number of submissions argued that it is the status, rather than the name, of the Children's Court that ought to be reconsidered.[17] In view of the significant nature of its jurisdiction, as described in paragraph 9.6, the Commission recognises the importance of its status. It is less obvious how that status should be enhanced.

9.12 Two views have emerged. First, that of the Standing Committee on Social Issues - that the Children's Court's status should be elevated to that of a District Court.[18] Secondly, the one pressed in submissions to IP 19 – that the Children's Court should be headed by a District Court Judge.[19]

9.13 An evaluation of these views must be made against the background of the current structure. The Children's Court consists of magistrates appointed to it by the Chief Magistrate of the Local Courts. The Senior Children's Magistrate is approved by the Attorney General (with the concurrence of the Chief Magistrate). To this extent,

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the ability to remit a child/youth (the age of which has varied over the past 150 years) to the District or High Court where a jury trial is conducted has been available.

15. The Youth Court is a specialised form of magistrates' court.
16. *Young Offenders Act 1985* (Canada) s 5. A youth court judge is a justice and provincial court judge, and has the jurisdiction and powers of a summary conviction court under the *Criminal Code*.
17. See NSW Commission for Children and Young People, *Submission* at para 14.04; Legal Aid Commission of New South Wales, *Submission* at 12; National Children's and Youth Law Centre, *Submission* at 3; The Shopfront Youth Legal Centre, *Submission* at 13; the (then) Minister for Juvenile Justice, the Hon C M Tebbutt MLC, *Submission* at 8-9; Youth Justice Advisory Council, *Submission*; and the Law Society of New South Wales, *Submission* at 11.
18. New South Wales, Parliament, Legislative Council, Standing Committee On Social Issues, *Inquiry into Children's Advocacy* (Report No 10, 1996), Recommendation 12. The National Children's and Youth Law Centre likewise submitted that the Children's Court needed to acquire an independent jurisdiction from the general Local Courts, *Submission* at 3.
19. Law Society of New South Wales, *Submission* at 11; Legal Aid Commission of New South Wales, *Submission* at 12; National Children's and Youth Law Centre, *Submission* at 3; The (then) Minister for Juvenile Justice, the Hon C M Tebbutt MLC, *Submission* at 9; The Shopfront Youth Legal Centre, *Submission* at 13.

then, the Children's Court is bound up with the Local Courts, although the Chief Magistrate cannot give directions to the Senior Children's Magistrate.[20]

9.14 The first approach argues for a radical restructure: the Children's Court would effectively become independent of the Local Courts. Its relationship to or with the District Court would need determining. This is a big issue with significant resource implications. We have not consulted on this and it would be inappropriate in a reference devoted to sentencing issues to recommend such a restructure.

9.15 The second suggestion would necessitate at least two changes. First, a President of the Children's Court would need to be appointed by the Attorney General, independent of the Chief Magistrate.[21] Secondly, there would be a change in the appointment of magistrates to the Court, a matter addressed below.

9.16 In the Commission's view, the appointment of a District Court judge to head the Children's Court would enhance its status and be in line with other jurisdictions. The NSW Commission for Children and Young People ("CCYP") pointed out that New South Wales is the only jurisdiction in mainland Australia that does not have a District Court judge as the head of the equivalent children's courts.[22] It argued that "the Children's Court has a low status in the Court hierarchy and that this can discourage suitably qualified people from serving as Children's Court Magistrates".[23]

Recommendation 9.2

> Section 8 of the *Children's Court Act 1987* (NSW) should be amended to provide that the Attorney General should appoint a District Court judge to head the Children's Court.

9.17 Another suggestion recommended in submissions was that there should be a "two-tiered system" in the Children's Court, with either the upper tier being headed by a District Court judge,[24] or the status of the upper tier being equivalent to the District Court.[25] One submission explicitly recommended that a District Court judge be appointed to the Children's Court to hear all appeals from decisions of Children's magistrates.[26] This submission argued that this would "promote a more coherent and consistent system for the generation of precedents".[27] While the other two submissions did not elaborate on what each meant by a "two-tiered system", we are assuming that they likewise intended that the District Court judge would have the power to hear appeals from decisions of Children's Magistrates. One submission

20. *Local Courts Act 1982* (NSW).
21. Note that the Chief Magistrate is not a District Court judge: Compare s 14A of the *Local Courts Act 1982* (NSW) with s 14.
22. NSW Commission for Children and Young People, *Submission* at para 14.04.
23. NSW Commission for Children and Young People, *Submission* at para 13.02.
24. The (then) Minister for Juvenile Justice, the Hon C M Tebbutt MLC, *Submission* at 9; National Children's and Youth Law Centre, *Submission* at 3.
25. The Shopfront Youth Legal Centre, *Submission* at 13.
26. National Children's and Youth Law Centre, *Submission* at 3.
27. National Children's and Youth Law Centre, *Submission* at 3.

noted that this is a model that has been successfully adopted in other jurisdictions, such as Western Australia.[28] The former Minister for Juvenile Justice, the Hon C M Tebbutt MLC, argued that it would permit:

> *better appeal handling, better dissemination and application of appeal decisions, and [provide] an enhanced status to the court in the eyes of the public and of lawyers and other professionals working in the court.*[29]

9.18 The Commission is of the view that, within the current structure, (and even if the Court were headed by a District Court judge) appeals from the Children's Court should continue to be heard by the District Court. First, it seems unrealistic for the burden of hearing all appeals to fall to one person, the Chief Judge (or President, if that is the term adopted) of the Children's Court, who presumably would also have the many roles that the current Senior Children's Magistrate has, including administration of the court, as well as perhaps hearing serious cases.[30] Secondly, public perceptions of fairness of the court process are vital and are promoted by having appeals heard by a court that is outside the Children's Court itself.

CHILDREN'S MAGISTRATES

9.19 Although as early as 1905 the *Neglected Children and Juvenile Offenders Act 1905* (NSW) provided for a separate Children's Court with specialist magistrates, in practice, magistrates were simply designated as children's magistrates and only the major cities had specialist courts.[31] The training, skills and experience of Children's Magistrates was raised as an issue in IP 19.[32]

Selection and tenure of magistrates

9.20 While training and education can achieve a great deal in developing a highly responsive and skilled Children's Court judiciary, a theme discussed in more detail below, selection of magistrates suited to this jurisdiction is equally important. It is a

28. The President of the Children's Court of Western Australia is a judge of the same status as a judge of the District Court of Western Australia. A judge of the Children's Court has the same powers in sentencing as a Supreme Court judge, and can also hear appeals against the decisions of Children's Magistrates or Justices of the Peace. The judge only deals with the most serious charges brought before the court, and must deal with any matter requiring a sentence of detention or imprisonment greater than six months.
29. The (then) Minister for Juvenile Justice, the Hon C M Tebbutt MLC, *Submission* at 9.
30. Currently, pursuant to s 16(1) of the *Children's Court Act 1987* (NSW), the Senior Children's Magistrate has the following functions: administering the Court; arranging Court sittings; convening Magistrates' meetings; public consultation; providing judicial leadership; developing practice directions and recommendations for rules; and overseeing judicial training.
31. J Seymour, *Dealing With Young Offenders*, (Law Book Company, Sydney, 1998) at 19.
32. NSWLRC IP 19, Issue 16.

jurisdiction that calls for particular communication skills, pragmatism and personality traits. It can be an especially stressful, draining and confronting jurisdiction, taking into account that it covers both juvenile crime and the care and protection of children at risk.

9.21 The *Children's Court Act 1987* (NSW) recognises this in providing that an existing magistrate is qualified to be appointed as a Children's Magistrate if he or she:

> *has, in the opinion of the Chief Magistrate, such knowledge, qualifications, skills and experience in the law and the social or behavioural sciences, and in dealing with children and young people and their families, as the Chief Magistrate considers necessary to enable the person to exercise the functions of a Children's Magistrate.*[33]

9.22 It is important that the selection process gives full weight to this provision of the *Children's Court Act 1987* (NSW). But it is also important not to overlook the personal qualities that the Children's Court calls for, and not merely focus on legal or social/behavioural science qualifications and skills.

9.23 In New South Wales, the Chief Magistrate of the Local Courts appoints Children's Magistrates from the bench of Local Courts Magistrates[34] and, as noted above, appoints, with the concurrence of the Attorney General, the Senior Children's Magistrate[35] (who then has the status of a Deputy Chief Magistrate of the Local Courts).[36] In Victoria, on the other hand, it is the President of the Children's Court, in consultation with the Chief Magistrate of the Magistrates' Court, who determines who is appointed to that court.[37] The advantage of the Victorian approach is that an expert in juvenile matters has significant input into the choice of persons who will preside over these matters. The President may approach people she believes to be particularly suited to the jurisdiction to canvass their interest in being appointed. The system has worked well for Victoria, which currently has six full-time, long-serving Children's Magistrates. We see merit in following this approach in New South Wales, particularly if a District Court judge were to head the Court.

Recommendation 9.3

> The head of the Children's Court, after consulting the Chief Magistrate of the Local Courts, should appoint magistrates to be Children's Magistrates.

33. *Children's Court Act 1987* (NSW) s 7(2)(b).
34. *Children's Court Act 1987* (NSW) s 7.
35. *Children's Court Act 1987* (NSW) s 8(1).
36. *Children's Court Act 1987* (NSW) s 8(4).
37. *Children and Young Persons Act 1989* (Vic) s 11: "(1) The President, after consulting the Chief Magistrate, may assign any person who is appointed as a magistrate under section 7 of the *Magistrate' Court Act 1989* or as an acting magistrate under section 9 of that Act to be a magistrate for the Court, whether exclusively or in addition to any other duties."

9.24 A Children's Magistrate is appointed for a term not exceeding three years, but can be re-appointed.[38] The question arises as to whether this term is long enough. There are clear arguments in favour of long tenure for Children's Magistrates, centred on building up specialised expertise and retaining people who are demonstrably well qualified and well suited to hear Children's Court matters. The Commission believes that, with the option to re-appoint such people, an initial three-year term is appropriate. We understand that magistrates who want to be re-appointed almost invariably are.[39] Our confidence in this conclusion would be further increased if selection of Children's Magistrates were in the control of the head of the Children's Court.

Judicial education

9.25 With better selection and training, the level of expertise and skill of Children's Magistrates has improved in recent years, especially at the Sydney metropolitan courts.[40] There are currently 12 specialist Children's Magistrates hearing cases and five Children's Registrars.[41] On the other hand, concerns still remain, centred on the fact that not all matters receive the benefit of a specialist Children's Magistrate.[42] The Shopfront Youth Legal Centre submitted that some magistrates who are not specialist Children's Magistrates, but spend most of their time in the Local Court, had difficulty adapting to the Children's Court jurisdiction with its very different philosophy from the adult jurisdiction. Such magistrates, it was submitted, could benefit from further training and skills development.[43]

9.26 The lack of specialist Children's Magistrates outside the Sydney metropolitan region was a particular concern.[44] The Legal Aid Commission of New South Wales said in its submission:

> *We often see children sentenced by these regional courts through the Children's Legal Service juvenile detention centre visiting service. We are concerned that children in regional New South Wales may receive harsher sentences because they*

38. *Children's Court Act 1987* (NSW) Sch 1 cl 2.
39. SCM S Mitchell, *Consultation*.
40. Legal Aid Commission of New South Wales, *Submission* at 12. The Shopfront Youth Legal Centre (*Submission* at 13) expressed the view that "the specialist children's magistrates at the Sydney metropolitan Children's Court possess a high level of training, skills and experience".
41. Local Court of New South Wales, *Annual Review 2004* at 17.
42. The New South Wales Bar Association (*Submission* at 3) and the Office of the Director of Public Prosecutions (*Submission* at 7) submitted that: "The criminal law recognises the unique position of young offenders and treats them quite differently [from] adult offenders. Children's Magistrates should be those with specialised knowledge, chosen for their ability to deal effectively with young offenders."
43. The Shopfront Youth Legal Centre, *Submission* at 13.
44. See New South Wales Legal Aid Commission, *Submission* at 12; The Law Society of New South Wales, *Submission* at 10.

> *are sentenced by magistrates who are not appropriately trained, skilled and experienced in children's court matters.*[45]

9.27 In its submission, the Law Society of New South Wales suggested the creation of a rural Children's Court circuit. Although Children's Magistrates need to become aware of and understand the particular needs of the local communities, regular rotation of appointments would address the need to be, and be seen to be, impartial towards particular individuals or families who may regularly appear in court.[46] On the whole, we think the Law Society's suggestion a good one and recommend that the Children's Court consider introducing regular regional Children's Court circuits.

Recommendation 9.4

The Children's Court should consider initiating a rural circuit.

9.28 A generally proposed solution to perceived limitations on magistrates' abilities to deal with young offenders was to increase specialist training and education, especially given that the current Chief Magistrate requires all new magistrates to serve in the Children's Court for a period of at least 3 months before being posted to a Local Court country circuit.[47]. In addition, the establishment of a set of "core competencies" was proposed to assist in maintaining consistency in the exercise of discretion among Children's Magistrates. Additional training could then be provided to magistrates whose experience and skills did not meet the standards required by the core competencies.[48]

9.29 In the short term, it was suggested that particular focus ought to be on those magistrates outside metropolitan Sydney who are required to preside over Children's Court matters. It needs to be said, however, that it became obvious to the Commission in the course of our regional consultations that these magistrates are committed to implementing the rehabilitative policy aims of both the CCPA and YOA.

9.30 The Children's Court is aware of the need for rigorous training of magistrates and is addressing this by means of extending education opportunities, particularly for new magistrates. Foremost among these are seminars for new Children's Magistrates and magistrates who will sit in the Children's Court. These are provided principally by the Judicial Commission of NSW working with the Local Courts and Children's Court Education Committees.[49] For example, each year the Judicial Commission holds a Magistrate's induction day and Orientation Program, with 100% attendance by new magistrates at these sessions for over 10 years.[50] In 2002-2003, the Judicial Commission hosted two Children's Court conferences and two Children's Court seminars, as well as sessions on Children's Court care matters, with extended

45. New South Wales Legal Aid Commission, *Submission* at 12.
46. Law Society of New South Wales, *Submission* at 10.
47. Local Court of New South Wales, *Annual Review 2004* at 17.
48. See, for example, National Children and Youth Law Centre, *Submission* at 3
49. See Judicial Commission of New South Wales, *Annual Report 2003-2004* at 10.
50. Judicial Commission of New South Wales, *Annual Report 2003-2004* at 10.

sessions for country magistrates.[51] In 2003-2004, the Judicial Commission hosted three Children's Court conferences attended by 61 magistrates and Children's Court registrars.[52]

9.31 In a similar vein, the Children's Court raised the issue of judicial education for judges of the District and Supreme Court who hear appeals from the Children's Court in both its criminal and care jurisdictions.[53] We agree that all judicial officers dealing with young offenders would benefit from the type of training currently offered by the Judicial Commission.

FACILITIES

9.32 The CCYP has argued that Children's Court facilities need to be upgraded.[54] It submitted that the low standard of these facilities reflects the Court's low status.[55] The CCYP noted that many Children's Court hearings are conducted in adult criminal courts or in old buildings poorly adapted for the purpose. For example, Rod Blackmore, Senior Children's Magistrate from 1978 to 1995, argues that the use of the St James Centre in the Sydney CBD "is demonstrably inappropriate for families involved in care and protection cases".[56]

9.33 The Law Society of NSW's 2001 report into Sydney metropolitan Children's Courts concluded that these courts needed more interview rooms, appropriate "holding rooms", safe witness rooms, child care facilities, installation of pay phones and a general upgrade and "backlog maintenance" of the facilities.[57] The report highlighted that "the condition of Children's Courts facilities can contribute to unnecessary stress for the children and families using the courts".[58]

9.34 In opening the extensively-renovated Woy Woy courthouse, with special Children's Court facilities, the Attorney General, the Hon R Debus, said that traditional courthouses were "intimidating and frightening" and that a new generation in courthouses would ensure that "sensitivity and dignity" played a part in the justice system and deliver the message that the justice system wants to help young people, not just punish them.[59]

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51. Judicial Commission of New South Wales, *Annual Report 2002-2003* at 11.
52. Judicial Commission of New South Wales, *Annual Report 2002-2003* at 10.
53. Children's Court, *Submission* at 25-26.
54. NSW Commission for Children and Young People, *Submission* at para 13.03-13.04.
55. NSW Commission for Children and Young People, *Submission* at para 13.03-13.04.
56. R Blackmore, "Children's Courts are 100 years old … and we still deserve better" (2005) 43(3) *Law Society Journal* 26 at 27.
57. Law Society of NSW, *New South Wales Children's Court Facilities Report Card 2001* (Media Release, 29 January 2001).
58. Law Society of NSW, *New South Wales Children's Court Facilities Report Card 2001* (Media Release, 29 January 2001).
59. M Nolan, "What the law gets for $2.7m" *The Daily Telegraph* (4 March 2004).

9.35 In February 2007, six new Children's Courts (four crime and two care jurisdiction) will open at Parramatta, as part of the Parramatta Justice Precinct.[60] In addition, another Metropolitan Children's Court will be built at a yet-to-be-decided city location. These will be customised courts for the hearing of children's matters, with a high standard of facilities. As well, in March 2006, the old Wollemi Court will be changed to a Children's Court, no doubt with the appropriate transformations. At the same time, older facilities at Bidura, Lidcombe, Cobham and Campsie will close. The St James Children's Court, exercising the Court's care jurisdiction, will also close.

9.36 Children's Courts at Campbelltown, Woy Woy, Wyong and Port Kembla will continue to serve the greater Sydney region. The standard and appropriateness of facilities at these (excepting Woy Woy) and regional courts should ideally be evaluated as part of the general upgrading of the Children's Court courthouses.

9.37 The CCYP gave a number of practical suggestions for improving the operation of Children's Courts, which are worth considering. Where it is not practically or economically feasible to build specially designed facilities, there are simple improvements that can be made to alleviate the discomfort that must surely be felt by children involved in either the criminal or care jurisdictions of the court. The CCYP suggested, for example, rearranging furniture to allow easy interaction between magistrate, child, family and other agencies; and the provision of books, games, toys, videos or other activities for young people waiting for their case to be called and for younger children in the waiting area.[61] The CCYP also referred to the success in several London juvenile courts of cafeterias staffed by volunteers who double as information providers.[62]

9.38 The UK Home Office, in a study of the UK Youth Court, similarly suggested changes to the court environment that could be made within existing architectural constraints. It pointed out that:

> *the physical court environment – the type of furniture, layout, seating arrangements – can directly promote or hinder communication. It can help draw parties into the process as active participants or tend to sideline them in a more passive role.*[63]

60. However, the concern has been raised that "[t]ravel to Parramatta will involve enormous distances and times for many of those involved. The location is not near the station, and even for those families who can afford to drive, the availability of day-long parking at Parramatta is notoriously scarce": R Blackmore, "Children's Courts are 100 years old … and we still deserve better" at 27. In 1994, Mr Blackmore chaired an accommodation research project on behalf of the Attorney General, which urged the location of satellite courts within the metropolitan area, including, for example, the northern suburbs.
61. NSW Commission for Children and Young People, *Submission* at para 13.04.
62. NSW Commission for Children and Young People, *Submission* at para 13.04.
63. United Kingdom, Home Office, Lord Chancellor's Department, *The Youth Court 2001: The Changing Culture of the Youth Court: Good Practice Guide* (Home Office Communication Directorate, 2001) at 9.

9.39 For example, the UK Youth Court Demonstration Project introduced sitting parents next to their children and moving magistrates from a raised bench into the well of the court to facilitate communication and the parties' involvement in the process.[64] The Home Office reported that there was some resistance from magistrates to the changes in layout, partly out of concern that this might undermine the court's authority, but that when the magistrates got used to the changes they came to accept them. Ultimately, changes in layout were regarded as having had the biggest positive impact on the culture of the Youth Court.[65]

9.40 Out of the Youth Court Demonstration Project, the Home Office distilled "Good Practice" guidelines, which include:

- Review the physical environment of the courtroom, and make changes to foster better communication without compromising the security and authority of the court
- Consult all court users before making changes …
- Include changed procedures in a protocol.[66]

9.41 The construction of the new Parramatta Justice Precinct provides the opportunity to design youth courts that incorporate these suggestions and philosophies. It is to be hoped that the opportunity will be taken and that the Parramatta courts, as well as the initiatives at Woy Woy, will act as "best practice" blueprints for future youth court developments.

64. *The Youth Court 2001: The Changing Culture of the Youth Court: Good Practice Guide* at 9.
65. *The Youth Court 2001: The Changing Culture of the Youth Court: Good Practice Guide* at 9.
66. *The Youth Court 2001: The Changing Culture of the Youth Court: Good Practice Guide* at 10.

10. Young People and Bail

- Introduction
- The bail act
- Arrest of young people
- The bail decision
- Criteria considered in bail applications
- Background information in bail determinations
- Bail undertakings and conditions
- Repeat offenders
- Bail accommodation

INTRODUCTION

10.1 Bail is a crucial point of the criminal justice process for young people[1] at which policing, care issues, and court procedures intersect. The special problems facing young people with respect to bail tend towards undermining the policies upon which juvenile justice in New South Wales is based, and have the potential to impact seriously upon sentencing of young offenders. In addition, bail refusal, or the imposition of harsh bail conditions, may have a particularly punitive effect on young people.

10.2 This chapter examines the law of bail as originally set out in the *Bail Act 1978* (NSW) ("Bail Act") and changes wrought by subsequent amending legislation. It then examines how procedural and practical issues, such as the granting of conditional bail, breach of bail, and bail accommodation, impact upon young people.

The relevance of bail to the sentencing process

10.3 Bail law and procedure is relevant to the sentencing of young offenders in a number of ways. First, the process of bail assessment forms a part of the gatekeeping role to the juvenile justice system that police and judicial officers perform. The outcome of a bail determination may have a significant impact on whether a young person progresses further into the system or is successfully diverted from it.

10.4 Secondly, the outcome of a bail determination may ultimately have a bearing on the content and severity of a young offender's sentence. The Judicial Commission has found that there is some evidence that people who are refused bail, and held in custody, may be disadvantaged when the matter proceeds to trial:

> *Not only do those on remand have fewer resources to prepare their defence, they may make a less favourable impression when they appear in court (they will probably be less well dressed and have experienced a loss of morale). They also miss the opportunity to impress the court by showing that they have met their bail conditions and appeared in court. The accused on remand will have limited opportunities for rehabilitation, will endure upset to their family life, and will suffer stigmatisation and possible contamination by contact with criminals. Furthermore, judicial officers*

1. As bail applies to people who have been charged with a crime but have not pleaded, or been found, guilty, the term "young person" is the appropriate one to use in this chapter, rather than "young offender". "Young person" is used in this chapter to refer to people who are aged between 10 and 17 years at the time they are taken into custody.

> *may feel obliged to justify pre-trial custody by guiding the outcome of the trial towards a guilty verdict.*[2]

10.5 Thirdly, a bail outcome of itself may have a punitive quality, and have the effect of an "interim sentence". A young person who is refused bail, or who has been granted bail but cannot meet bail conditions, is remanded in a juvenile detention centre. On average, on any given day, there are 125 young people remanded in custody awaiting court appearances, which represents approximately 44% of all young people in custody.[3]

10.6 Particularly in circumstances where the young person is charged with a minor offence, a young person's experience of being held on remand, or subject to harsh bail conditions, may effectively be the main component of "punishment". This is fundamentally contrary to the purpose of bail, which is simply to ensure a young person's appearance in court, and to protect the community from further offending. The Australian Law Reform Commission ("ALRC") has described how being held on remand can be a sanction in itself:

> *Children report feeling isolated and frustrated by the experience, particularly as they often do not have access to the same programs as detainees serving a sentence. In addition, placing a child on remand can put stress on family relationship and disrupts the child's education. Young people on remand feel that they are often treated as if they have already been found guilty.*[4]

10.7 Alternatively, a bail outcome may be punitive where a young person is released, but only with harsh bail conditions such as curfews, area restrictions or non-association orders.[5]

THE BAIL ACT

10.8 In New South Wales, the Bail Act forms a "comprehensive code for both judicial officers and police to assess persons applying for bail".[6] Currently, the Bail Act is generally applicable to anyone charged with an offence, regardless of whether they are an adult or a child.[7] The sole section which provides some mitigation for this

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2. See G Brignell, *Bail: An Examination of Contemporary Issues* (Judicial Commission of New South Wales, Sentencing Trends and Issues No 24, 2002) at 3.
3. New South Wales, Department of Juvenile Justice, *Annual Report 2004-05* at 35.
4. Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process* (ALRC Final Report 84, 1997) at para 18.170.
5. Bail conditions are discussed in detail at para 10.50-10.82.
6. M Marien and J Hickey, "The *Bail Act Amendment (Repeat Offenders) Bill 2002*", Paper presented to the Institute of Criminology seminar *Crisis in Bail and Remand* (Sydney, 29 May 2002).
7. Section 5 of the *Bail Act 1978* (NSW) states that "the Act applies to a person whether or not the person has attained the age of 18 years".

general application is s 32(1)(b)(v), which requires that, in making a bail determination, a court must take into consideration any "special needs" which may arise from the fact that a person is under the age of 18.

10.9 Under the Bail Act, bail is defined as the authorisation to be at liberty under the Act instead of in custody, subsequent to being charged with a criminal offence.[8] A person who is released on bail must agree to attend court on a specified day to answer the charge. The right to be released on bail while awaiting trial is closely linked to the presumption of innocence that underpins criminal law. However, this right must be balanced against the need to protect the community against the possibility of the accused offending while on bail, and to ensure the accused appears in court.[9]

10.10 The initial bail determination is made by police.[10] Pursuant to s 9 of the *Children (Criminal Proceedings) Act 1987* (NSW) ("CCPA"), if police refuse bail, a young person must be brought before a court as soon as practicable, and no later than the following day (or no later than the next day that is not a Saturday, Sunday or public holiday). The court then reconsiders the application for bail, having regard to the provisions of the Bail Act.

ARREST OF YOUNG PEOPLE

10.11 Of fundamental importance to the bail process is the decision of police to proceed against a young person by way of arrest. Where a young person is alleged to have committed an offence, police can proceed by way of the diversionary options of the *Young Offenders Act 1997* (NSW) ("YOA"),[11] or can charge the young person (proceed against the young person to court). Charging an offender may or may not involve arrest. It is where criminal proceedings are commenced by charge and arrest that the question of bail arises.

10.12 Section 8 of the CCPA requires that the arrest procedure be used sparingly. "Criminal proceedings should not be commenced against a child otherwise than by way of court attendance notice."[12] This requirement does not apply if:

- the alleged offence is a serious children's indictable offence, an indictable offence under the *Drug Misuse and Trafficking Act 1985* (NSW), or an offence prescribed by the regulations for the purposes of s 8;[13]

- there are reasonable grounds for believing that: the child is unlikely to comply with a court attendance notice; or is likely to commit further offences;[14] or

8. *Bail Act 1978* (NSW) s 4(1) and Part 3.
9. New South Wales, *Parliamentary Debates (Hansard)*, Legislative Council, 9 May 2002,Speech of the Hon H Sham-Ho at 1888 on the *Bail Amendment (Repeat Offenders) Bill*.
10. *Bail Act 1978* (NSW) Part 3.
11. See Chapter 5 at para 5.6.
12. *Children (Criminal Proceedings) Act 1987* (NSW) s 8(1).
13. *Children (Criminal Proceedings) Act 1987* (NSW) s 8(2)(a).

- the child should not be allowed to remain at liberty because of his or her violent behaviour or the violent nature of the offence.[15]

10.13 Even if the proceedings have not been commenced by court attendance notice ("CAN"), a CAN is now issued at some point in all cases where the person is proceeded against to court. A bail CAN is issued following arrest where the person is granted bail by police; a no-bail CAN is issued following arrest where the person is refused bail by police (but may or may not be granted bail by the court); a field CAN is issued at the scene of the alleged offence (and may involve being taken into custody, but usually not); and a future CAN is equivalent to the old summons to appear at a nominated future date.

10.14 In recent years, there has been a decrease in commencing proceedings by charge and arrest and an increase in commencing proceedings by CAN. In 1995, 52% of proceedings (against all offenders) in the Local Court were initiated by charge and arrest, whereas by 2000 this had decreased to 36%.[16] In 2001, of all matters (excluding driving offences) where police proceeded against "juvenile persons of interest" (including proceeded against other than to court), 29% were by way of charge and arrest.[17] This percentage decreased gradually over the next three years until, in 2004, it was 22%.[18]

10.15 The Legal Aid Commission, Shopfront and the Director of Public Prosecutions ("DPP") have submitted that police sometimes arrest and charge when it would be more appropriate to commence proceedings by CAN.[19] The Law Society of New South Wales submitted that "practitioners suggest that police often charge a young person so that bail conditions (such as a curfew) can be imposed".[20] The DPP argued that while the inappropriate use of arrest is a problem in the criminal justice

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14. *Children (Criminal Proceedings) Act 1987* (NSW) s 8(2)(b).
15. *Children (Criminal Proceedings) Act 1987* (NSW) s 8(2)(c).
16. M Chilvers et al, "Bail in NSW: Characteristics and Compliance" (September 2001) *Crime and Justice Statistics Bureau Brief Issue Paper No.15* (NSW Bureau of Crime Statistics and Research, Sydney) Table 1 at 2.
17. Just over 62% of matters were proceeded against other than to court. Of the 37.5% proceeded against to court, 11.7% were issued with a Court Attendance Notice – including Field CANs - and 10.6% were issued with a summons and the remaining 77.7% were charged: New South Wales Bureau of Crime Statistics and Research, *Recorded Crime Statistics 2001-2002 – Method by which police proceeded against juvenile persons of interest (aged 10 to 17)*.
18. Seventy two per cent of matters were proceeded against other than to court: New South Wales Bureau of Crime Statistics and Research, *Recorded Crime Statistics 2001-2004 – Method by which police proceeded against juvenile persons of interest (aged 10 to 17)*.
19. The Legal Aid Commission of New South Wales contends that police continue to charge young people for a wide range of offences, including breaches of non-custodial orders and minor summary matters: *Submission* at 11. See also Shopfront Youth Legal Centre, *Submission* at 12; New South Wales Office of the Director of Public Prosecutions, *Submission* at 5.

20 The Law Society of New South Wales, *Submission* at 7.

system generally, the unnecessary time in custody after arrest is particularly inappropriate for young offenders.[21]

10.16 The submission of the Children's Court recommended commencing proceedings by way of summons (now CAN) because it has the advantage of providing a "cooling-off" period in the wake of the alleged offence, and increases the available investigation time.[22] It was also submitted that police might be more inclined to commence proceedings by way of a CAN if the process were simplified,[23] and made compatible with the use of the Computerised Operational Policing System.[24] Without making a specific recommendation in relation to this suggestion, the Commission supports its adoption.

10.17 After carefully considering these submissions, the Commission is not convinced that any amendment to the legislation is required. In our view, both the drafting and effect of s 8 of the CCPA are satisfactory in that, clearly, a CAN should generally commence proceedings. Section 8 is weighted against the use of arrest and charge. We also believe that the exceptions to the use of CANs, set out in s 8(2), are reasonable. To the extent to which proceedings are not being commenced by CANs where they appropriately should be, this should be addressed by education. However, we note that the Recorded Crime Statistics demonstrate that the legislation appears to be having the desired effect in reducing the use of arrest and charge.

10.18 Nor are we persuaded that anything would be gained by adopting the New Zealand approach of requiring enforcement officers to give a written report why a young person was arrested without warrant.[25] Although these sections are intended to deter the inappropriate use of arrest and charge, it is unclear what effect the reporting may in fact have. In addition, different conditions operate in the two jurisdictions. As was made clear above, the issue is better managed, in our view, by education.

THE BAIL DECISION

10.19 Once a young person has been arrested and charged, and a bail decision is to be made by a police officer or court, there are four possible outcomes. The first is to dispense with bail altogether and release the young person, subject only to the

21. New South Wales Office of the Director of Public Prosecutions, *Submission* at 5.
22. The Children's Court of New South Wales, *Submission* at 21.
23. Children's Court of New South Wales, *Submission* at 21; Legal Aid Commission of New South Wales, *Submission* at 11.
24. Children's Court of New South Wales, *Submission* at 21.
25. Pursuant to s 214(3) and (4) of the *Children Young Persons and Their Families Act 1989* (NZ), every "enforcement officer" who arrests a child or young person without warrant must, within three days of making the arrest, prepare a written report stating the reason why the child or young person was arrested without warrant. Where the enforcement officer is a member of the police, or a traffic officer who is a non-sworn member of the police, the report must be made to the Commissioner of Police. Where the enforcement officer is an officer or employee of the Public Service, and an officer of a local authority, the report is to the Chief Executive Officer of the relevant Department or local authority.

requirement to appear at court at a later date; the second is to grant bail, usually with the requirement that an amount of money is to be provided as a surety that the young person will appear at the later date; the third is to grant bail, but to attach conditions governing the young person's liberty prior to reappearing in court; and the fourth is to refuse bail.

Dispensing with bail

10.20 Under the Bail Act, a court has the power generally to dispense with bail, so that a young person charged with an offence may remain at liberty until required to appear before a court, without the imposition of any bail requirements or conditions.[26] The Bail Act does not specify when this will be appropriate.

10.21 As noted in paragraph 10.12, police should only arrest a young person in the circumstances set out in s 8 of the CCPA. If there is full compliance with this requirement, there may be few occasions for dispensing with bail, as the offence for which a young person had been proceeded against by way of arrest will be of a more serious nature, or the young person will have a history of non-compliance.

Referral to a youth justice conference

10.22 In its submission, the Law Society of New South Wales observed that, contrary to Children's Court Practice Direction 17, in some instances, courts do not dispense with bail when making a referral to a youth justice conference.[27] This, the Law Society noted, has led to situations where a young person, having attended a court-referred conference, was subsequently arrested and held overnight in custody for breach of onerous bail conditions on the day that they had informed the conference administrator they had completed their outcome plans. Such a situation conflicts with the principles of the YOA. The Law Society submitted that "both police and courts should be strongly encouraged to dispense with bail when referring a child to a youth justice conference".[28] The Commission agrees that police and courts should *generally* dispense with bail when referring a young person to conferencing. However, there should not be a blanket directive to dispense with bail as there may be cases where conferencing occurs as part of sentencing for a serious offence, but where the young offender needs to be kept in confinement before the conferencing.

Recommendation 10.1

The *Bail Act 1978* (NSW) should be amended to provide for a presumption in favour of bail where the court has referred a young person to a youth justice conference.

26. *Bail Act 1978* (NSW) s 10-12.
27. The Law Society of New South Wales, *Submission* at 10.
28. The Law Society of New South Wales, *Submission* at 10.

Granting bail

10.23 Section 32 of the Bail Act sets out the criteria that a police officer or court must apply in considering whether to grant bail. The section goes into considerable detail as to the relevant matters to be taken into account. The criteria are:

- the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered;[29]
- the interests of the person;[30]
- the protection of certain specified types of person;[31] and
- the protection and welfare of the community.[32]

10.24 There is some evidence that, in practice, young people and adults are treated differently. For example, the DPP observed that the Supreme Court looks more favourably on, and treats differently, bail applications by young people than by adults.[33] There is evidence that bail may be granted to young people in circumstances where it would otherwise be refused, and that judges place great weight on the interests of the young person, and his or her family situation.[34]

10.25 However, submissions also observed that many young people spend time in remand charged with offences that are unlikely to attract a custodial sentence. In addition, it was submitted that bail conditions imposed on young people can be "unnecessarily onerous",[35] in fact, more onerous than those imposed on adults for the same offence.[36] While the reasoning behind these conditions is linked to the perceived welfare needs of the young person, it nonetheless conflicts with the requirements of s 37(2) of the Bail Act that:

29. *Bail Act 1978* (NSW) s 32(1)(a); note that s 32(1)(a)(i)-(iv) enumerates the only matters to which the court may have regard in determining the interests of the person.
30. *Bail Act 1978* (NSW) s 32(1)(b); note that s 32(1)(b)(i)-(vi) enumerates the only matters to which the court may have regard in determining the interests of the person.
31. *Bail Act 1978* (NSW) s 32(1)(b1); these are the person(s) against whom the offence was allegedly committed, any close relatives of such person(s), or any other person considered to be in need of protection because of the circumstances of the case.
32. *Bail Act 1978* (NSW) s 32(1)(c); note that s 32(c)(b)(i)-(vi), 32(2) and 32(2A) detail the only matters to which the court may have regard in determining the protection and welfare of the community.
33. New South Wales Office of the Director of Public Prosecutions, *Submission* at 7.
34. New South Wales Office of the Director of Public Prosecutions, *Submission* at 6.
35. The Law Society of New South Wales, *Submission* at 8.
36. New South Wales Young Lawyers (Criminal Law Committee), *Submission* at 5.

> *Conditions shall not be imposed that are any more onerous for the accused person than appear to the authorised officer or court to be required:*
>
> *(a) by the nature of the offence, or*
>
> *(b) for the protection and welfare of any specially affected person, or*
>
> *(c) by the circumstances of the accused person.*

10.26 The practice could also be seen as subverting, indirectly, the principles of sentencing set out in s 6 of the CCPA, most specifically s 6(e), which provides that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

Presumption in favour of bail for young offenders

10.27 The connection between the granting of bail and the common law presumption of innocence of an accused is reflected by a general presumption in favour of granting bail in the Bail Act.[37] However, amendments to the Bail Act have eroded the applicability of the overarching presumption in favour of bail.[38] There is a specific presumption *against* the granting of bail in respect of serious drug offences involving commercial quantities;[39] terrorism offences;[40] serious firearms and weapons offences;[41] and certain repeat property offenders.[42] In addition, the presumption in favour of bail has been specifically *removed* (noting the difference) for: murder or manslaughter;[43] murder-related offences;[44] wounding with intent to cause harm or resist arrest;[45] certain serious sexual assault and sexual intercourse with a child offences;[46] kidnapping;[47] armed robbery firearm offences;[48] certain serious drug offences under the *Drug Misuse and Trafficking Act 1985* (NSW) and the *Criminal Code* (Cth);[49] certain domestic violence offences;[50] offences committed while on bail, parole, in custody, or serving a sentence not in custody, or where the offender is

37 *Bail Act 1978* (NSW) s 9.
38. *Bail Amendment (Repeat Offenders) Act 2002* (NSW); *Bail Amendment Act 2003* (NSW); *Bail Amendment (Firearms and Property Offences) Act 2003* (NSW); *Bail Amendment (Terrorism) Act 2004* (NSW). See G Brignell, Bail: An Examination of Contemporary Issues at 1.
39. *Bail Act 1978* (NSW) s 8A.
40. *Bail Act 1978* (NSW) s 8A(1)(c).
41. *Bail Act 1978* (NSW) s 8B.
42. *Bail Act 1978* (NSW) s 8C.
43. *Bail Act 1978* (NSW) s 9(1)(f).
44. *Bail Act 1978* (NSW) s 9(c); see *Crimes Act 1900* (NSW) s 26, 27, 29, 30 and 31.
45. *Bail Act 1978* (NSW) s 9(c); see *Crimes Act 1900* (NSW) s 33.
46. *Bail Act 1978* (NSW) s 9(c); see *Crimes Act 1900* (NSW) s 61J, 61JA, 61K, 66A and 66B.
47. *Bail Act 1978* (NSW) s 9(c); see *Crimes Act 1900* (NSW) s 86.
48. *Bail Act 1978* (NSW) s 9(c); see *Crimes Act 1900* (NSW) s 95-98.
49. *Bail Act 1978* (NSW) s 9(d) and (e).
50. *Bail Act 1978* (NSW) s 9A.

subject to a good behaviour bond or intervention program order;[51] offenders who have previously failed to appear;[52] repeat offenders charged with an indictable offence;[53] and repeat serious personal violence offenders.[54]

10.28 The Bail Act currently has no specific presumption in favour of granting bail to young people who have been arrested. In their joint 1997 Report, *Seen and Heard: Priority for Children in the Legal Process*, the ALRC and the Human Rights and Equal Opportunity Commission recommended the implementation of a presumption in favour of bail for all young people charged with offences.[55] We note that Queensland's *Juvenile Justice Act 1992* (Qld) contains a presumption in favour of bail for children.[56] Under this Act, in deciding whether to keep a child in custody, the court or officer must decide to release the child, unless, according to the criteria under the Act, the child poses an unacceptable risk.[57] Even in circumstances where for adults there is a presumption against bail, a child's bail application is considered on its merits. The explanatory notes to the Bill that introduced these amendments observed that these provisions are consistent with the implementation of the juvenile justice principle that for a child, detention is the option of last resort.[58] It also implements the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*:[59]

> *13.1 Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.*
>
> *13.2 Whenever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home.*

51. *Bail Act 1978* (NSW) s 9B(1).
52. *Bail Act 1978* (NSW) s 9B(2).
53. *Bail Act 1978* (NSW) s 9B(3).
54. *Bail Act 1978* (NSW) s 9D.
55. ALRC Final Report 84, Recommendation 228.
56. The *Juvenile Justice Amendment Act 2002* (Qld) cl 12 inserted s 37A(4) (renumbered as s 48(4) in reprint No 7 of the principal Act) into the *Juvenile Justice Act 1992* (Qld).
57. *Juvenile Justice Act 1992* (Qld) s 48(5).
58. "Clause 12 inserts new section 37A and introduces the bail regime to be considered when dealing with a child. Because of the amendment made by clause 128 to section 16 of the *Bail Act 1980*, the 'show cause' provisions in that Act no longer apply to children. This is consistent with the juvenile justice principle that for a child, detention is the option of last resort. The provisions in section 37A provide that a court or a police officer must consider a broad range of matters when deciding the issue of bail and that the child must be granted bail unless there is an unacceptable risk posed by the child against listed criteria. The child must not be released if release would threaten the child's safety (examples are provided of when a child's safety might be threatened by release on bail) and there is no other reasonably practicable way of ensuring the child's safety.": *Juvenile Justice Amendment Bill 2002* (Qld) Explanatory Notes at 13.
59. Adopted by General Assembly Resolution 40/33 of 29 November 1985.

10.29 A number of submissions argued that there ought to be a general statutory presumption in favour of bail for all young people.[60] The Children's Court recommended a rule having the effect that custody in the form of bail refusal is an alternative of last resort for juveniles.[61]

10.30 By way of comparison, s 33(2) of the CCPA currently provides that a court shall not make an order for the detention of a young offender under s 33(1)(g) of the CCPA unless the court is satisfied that it would be "wholly inappropriate" to make a non-custodial order under s 33(1) (a)–(f).

10.31 In balancing the best interests of the young person with the right of the community to be protected from criminal conduct, the Commission does not support the creation of a blanket presumption in favour of bail for young people. Rather, we favour the development of specific bail criteria that address the needs of young people, as well as measures that protect the young person's welfare and safety if he or she is detained. The adoption of Recommendations 10.2, 10.3 and 10.4 would, in the context of the Bail Act's existing presumption in favour of bail, be consistent with the principle of detention as the option of last resort and a logical extension of s 33(2) of the CCPA.

CRITERIA CONSIDERED IN BAIL APPLICATIONS

10.32 The sole criteria to which reference may be made in considering an application for bail are set out in s 32 of the Bail Act.[62] The only criteria which are specifically relevant to young people are s 32(1)(b)(v) (special needs arising from youth) and s 32(4) (irrelevance of not living with a parent or guardian).

Special needs arising from youth

10.33 Section 32(1)(b)(v) of the Bail Act provides that, in making a bail determination, an authorised officer or court must take into consideration the interests of the accused, having regard to any special needs arising from the fact that the person is under the age of 18 years. This provision was inserted into the Act by the *Bail Amendment (Repeat Offenders) Act 2002* (NSW).

60. Shopfront Youth Legal Centre, *Submission* at 15.1; The New South Wales Commission for Children and Young People recommended a statutory requirement that children be granted bail unless there are exceptional reasons for holding them in custody: *Submission* at para 12.03. The New South Wales Office of the Director of Public Prosecutions suggested there be a presumption in favour of bail for young people, save where there is a presumption against bail: *Submission* at 6.
61. The Children's Court of New South Wales, *Submission* at 23.
62. See *R v Hilton* (1987) 7 NSWLR 745: the Court held that s 32 of the *Bail Act 1978* (NSW) is a mandatory, exhaustive and exclusive statement of the criteria to be considered in bail applications.

10.34 In the second reading speech of the *Bail Amendment (Repeat Offenders) Bill 2002*, the Attorney General put forward the rationale behind s 32(1)(b)(v) in terms echoing the policy basis of the CCPA:

> *The literature on juvenile reoffending shows that once children are incarcerated in a detention centre, the probability of them committing further offences is very high. Gaol as a last resort for juveniles is, therefore, a particularly important concept.*[63]

10.35 However, the legislation itself does not clarify what "special needs" may arise from the fact that an accused is under 18 and gives no guidance to the judicial officer considering a bail application. The legislation being silent, the judicial officer must interpret the requirement on a case-by-case basis, which, in the Commission's view, has its advantages.

Separate bail criteria for young people

10.36 Some other Australian jurisdictions, also acknowledging that young people have special needs with respect to bail, have incorporated into their bail legislation distinct procedures for bail assessment of young people.

10.37 The Australian Capital Territory has separate provisions dealing with both bail criteria and bail conditions for young people,[64] set out in separate sections of the legislation.[65] The criteria for granting bail to children include all of those relevant to adults[66] but also specify that reference must be made to s 5 of the *Children and Young People Act 1999* (ACT). This section resembles s 6 of the CCPA. Thus, in the ACT, in determining a child's bail application, a court must have regard to the following principles:

> *(a) the need to strengthen and preserve the relationship between the child and his or her parents and other members of his or her family;*
>
> *(b) the desirability of leaving the child in his or her own home;*
>
> *(c) the desirability of allowing the education, training or lawful employment of the child to be continued without interruption or disturbance;*

63. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 20 March 2002, the Hon R J Debus, Attorney General, Second Reading Speech, *Bail Amendment (Repeat Offenders) Bill 2002* at 818.
64. See *Bail Act 1992* (ACT) s 23 (criteria for granting bail to children) and s 26 (conditions which may be imposed on the grant of bail to a child).
65. *Bail Act 1992* (ACT) s 22 for adults and s 23 for children.
66. These closely resemble the provisions of s 32 of the *Bail Act 1978* (NSW).

> *(d) the desirability of ensuring that the child is aware that he or she must bear responsibility for anything that he or she does that is contrary to law;*
>
> *(e) the need to protect the community or a particular person from the violent or other unlawful acts of the child.*[67]

10.38 In addition, s 68(c) of the *Children and Young People Act 1999* (ACT) provides that a young person may only be detained in custody for an offence, whether on arrest, in remand or under sentence, as a last resort.

10.39 We have already referred, in paragraph 10.28, to Queensland's bail regime for juveniles. The *Juvenile Justice Amendment Act 2002* (Qld) amended the *Bail Act 1980* (Qld) to create a system "tailor-made to children".[68] The *Bail Act 1980* (Qld) remains applicable to children, but subject to the operation of Part 5 of the *Juvenile Justice Act 1992* (Qld). This part deals specifically with the bail and custody of children and sets out a separate range of matters that a court or police officer must consider when determining a child's bail.[69]

10.40 In its submission, the Children's Court recommended that the Bail Act set out the considerations that the court must take into account in making a young person's bail determination, including the age of the accused.[70] As discussed in paragraphs 10.31-10.35, a court must already consider any special needs arising from the fact that the accused is under 18, but the absence of any definitional guidance with respect to "special needs" makes the practical application of the provision less straightforward.

10.41 The Commission agrees with the submission of the Children's Court and supports the approach taken in other jurisdictions. The special needs of young people would be better addressed if the Bail Act listed separate criteria, consistent with the principles contained in s 6 of the CCPA,[71] to be applied to young people. The

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67. *Children and Young People Act 1999* (ACT) s 5.
68. Queensland, *Parliamentary Debates (Hansard)* Legislative Assembly, 19 June 2002, the Hon J Spence, Second Reading Speech, *Juvenile Justice Amendment Act 2002* (Qld) at 1897.
69. This includes the nature and seriousness of the offence; the child's character, criminal history and other relevant history, associations, home environment, employment and background; the history of any previous grants of bail to the child; the strength of the evidence against the child relating to the offence; submissions made by the community of an Aboriginal or Torres Strait Islander child; and any other relevant matter. See *Juvenile Justice Act 1992* (Qld) s 48(3).
70. The Children's Court of New South Wales, *Submission* at 23.
71. The principles contained in s 6(b)-(d) of the *Children (Criminal Proceedings Act) 1987* (NSW) are as follows:
    (a) …
    (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

application of such criteria would deter unnecessary refusals of bail and the imposition of harsh and inappropriate conditions.

Recommendation 10.2

Section 32 of the *Bail Act 1978* (NSW) should be amended to include separate bail criteria for young people that include the existing criteria and incorporate the principles set out in section 6(b)-(d) of the *Children (Criminal Proceedings Act) 1987* (NSW).

Significance of not living with a parent or guardian

10.42 A person's residence is a relevant matter to take into account in making a bail determination. For the purpose of doing so, however, the fact that a person who is under 18 does not live with a parent or guardian must be ignored.[72] In contrast, submissions were in agreement that, in practice, not living with a parent or guardian is a barrier to accessing bail. As the Children's Court observed in its submission:

> *this provision [s 32(4)] is not of any assistance to the court when neither the young person's family, DoCS officer or DJJ officer can find him or her accommodation that offers some kind of prospect of the young person being able to comply with other bail conditions.*[73]

10.43 Police and courts often take homelessness or lack of appropriate accommodation into consideration when deciding whether to grant bail to a young person,[74] and homelessness is a "de facto ground for bail refusal" when residential conditions that a young person cannot meet are nonetheless imposed.[75]

10.44 In its submission, the Legal Aid Commission noted that current court practice for dealing with a young person who is unable to provide an appropriate address for residence, but is otherwise suitable for bail, is to impose a condition that the young person resides as approved by the Department of Juvenile Justice ("DJJ").[76] Where a young person is under the age of 16, the DJJ must notify the Department of Community Services. After consultation, the Departments jointly place the young person in accommodation.[77] However, Shopfront observed that homeless young

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> *(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,*
> *(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home…*

72. *Bail Act 1978* (NSW) s 32(4).
73. The Children's Court of New South Wales, *Submission* at 22.
74. Legal Aid Commission of New South Wales, *Submission* at 10.
75. The Law Society of New South Wales, *Submission 2* at 7
76. Legal Aid Commission of New South Wales, *Submission* at
77. Legal Aid Commission of New South Wales, *Submission* at 10.

people often remain in custody because the Department of Community Services is "unable or unwilling" to find accommodation.[78] The issue of limited bail accommodation is discussed in detail in paragraphs 10.92 to 10.95.

10.45 The potential impact of inadequate accommodation on the bail decision has been a concern for some time. In 1992, the NSW Legislative Council Standing Committee on Social Issues recommended that bail legislation specifically provide that lack of accommodation is insufficient reason for the refusal of bail.[79] In 1997, the ALRC and HREOC argued the same:

> *No inference as to a child's likelihood of appearing in court or committing further offences should be drawn from the fact that he or she lacks permanent accommodation.*[80]

10.46 Although s 32(4) aims to remedy this situation, it does not effectively ensure that young people without appropriate accommodation, who would otherwise be suitable for bail, are released. In line with other jurisdictions, the Bail Act should clarify that a young person should not be refused bail on the sole ground of homelessness or inadequate accommodation.[81]

10.47 The nature of the accommodation available to a young person if bail is granted is not the only relevance of accommodation to the bail decision. If bail is refused, the young offender will be detained in custody. The Commission strongly believes that before any bail decision is made, the court must have regard to the nature of the place where the person will be detained to ensure that its environment will not impact adversely on the young person's welfare. This factor ought to be listed separately in the bail criteria developed for young people in accordance with Recommendation 10.2.

Recommendation 10.3

The bail criteria for young people should specify that the court, when assessing whether to grant or refuse bail, must have regard to the nature of the place where the young person will be detained in custody if bail is refused.

Recommendation 10.4

The *Bail Act 1978* (NSW) should specify that a young person must be granted bail if no appropriate place of detention is available.

78. Shopfront Youth Legal Centre, *Submission* at 13.
79. New South Wales, Parliament, Legislative Council, Standing Committee on Social Issues No 4, *Juvenile Justice in NSW* (Report, 2002), Recommendation 22 at 76.
80. ALRC Final Report 84 at 18.164 and Recommendation 228.
81. See, for example, s 129(7) of the *Children And Young Persons Act 1989* (Vic) which provides that "bail must not be refused to a child on the sole ground that the child does not have any, or any adequate, accommodation".

BACKGROUND INFORMATION IN BAIL DETERMINATIONS

10.48 One means of improving the process of bail decision-making is the provision of full and proper background information to the court. The Children's Court observed that there is insufficient time for the court or duty solicitor to obtain detailed information in a contested bail application, and the availability of DJJ officers is limited.[82] It argued that courts should have better access to information on accommodation and other support options, and on the extent of any problems experienced by the child's parents or carers.[83] It also recommended that DJJ officers be required to supply certain information to the Court when a young person comes before it from DJJ custody.[84] Similarly, the Legal Aid Commission recommended that a Department of Community Services intake officer should be rostered to attend at every sitting of a Children's Court, including weekend bail courts.[85]

10.49 By way of comparison, in the Australian Capital Territory, a court hearing any proceedings against a young person may order a report about the young person from a public servant "whose duties relate to the welfare of children and young people".[86] If the court has received such a report, it must consider the report when determining bail.[87] The Commission recommends the introduction of a similar provision into the Bail Act.

10.50 Obviously, however, to be of use to the Court, and not to delay a young person's release, the report would need to be immediately relevant and available. If the Court is to grant bail to a person at the earliest opportunity, it needs to be presented with a viable solution, or a plan, to get the young person out of custody. A magistrate needs to have such up-to-date information as where the young person could be accommodated *that* night, who could supervise him or her from *that* day, and so forth. The Commission envisages that such a report would be provided by the DJJ case manager.

Recommendation 10.5

The *Bail Act 1978* (NSW) should be amended so that a court, in determining bail for a young person, may order that a background report relating to the young person's welfare be furnished to the court, by a deadline ordered by the court.

82. The Children's Court of New South Wales, *Submission* at 21.
83. The Children's Court of New South Wales, *Submission* at 21.
84. The Children's Court of New South Wales, *Submission* at 22.
85. Legal Aid Commission of New South Wales, *Submission* at 10.
86. *Children and Young people Act 1999* (ACT) s 73(1).
87. *Bail Act 1992* (ACT) s 23(1)(c).

BAIL UNDERTAKINGS AND CONDITIONS

Statutory requirements

10.51 A person cannot be released on bail unless he or she undertakes, in writing, to appear in court on the specified date.[88] This undertaking may include conditions,[89] although there is a general presumption under s 37(1) of the Bail Act in favour of unconditional bail. The court will not act upon this presumption if it is of the opinion that conditions should be imposed for:

- the purpose of promoting effective law enforcement;[90] or
- the protection and welfare of any specially affected person,[91] or of the community;[92] or
- reducing the likelihood of future reoffending by promoting the treatment of rehabilitation of the accused person.[93]

10.52 Despite the existence of this presumption, a senior police officer has described unconditional bail as "a thing of the past".[94]

Inappropriately onerous bail conditions

10.53 Section 37(2) of the Bail Act prohibits inappropriately onerous bail conditions. Conditions cannot be imposed if they are any more onerous for the accused person than is required by the nature of the offence;[95] for the protection and welfare of a specially affected person;[96] or by the circumstances of the accused.[97] Any bail conditions imposed must, in the opinion of the authorised officer or court, be "reasonably and readily able to be entered into".[98]

88. *Bail Act 1978* (NSW) s 34(1)(a).
89. *Bail Act 1978* (NSW) s 36(1).
90. *Bail Act 1978* (NSW) s 37(1)(a).
91. *Bail Act 1978* (NSW) s 37(1)(b).
92. *Bail Act 1978* (NSW) s 37(1)(c).
93. *Bail Act 1978* (NSW) s 37(1)(d). This subsection was introduced by the *Crimes Legislation Amendment (Criminal Justice Interventions) Act 2002* (NSW) Sch 2[5].
94. Chief Inspector Tony Trichter, Senior Manager of the Operational and Special Advice Unit in the Court and Legal Services Branch of the NSW Police Service, quoted in R Johns, *Bail Law and Practice: Recent Developments* (New South Wales Parliamentary Library Research Service Briefing Paper No 15/02, Sydney, 2002) at 12.
95. *Bail Act 1978* (NSW) s 37(2)(a).
96. *Bail Act 1978* (NSW) s 37(2)(b).
97. *Bail Act 1978* (NSW) s 37(2)(c). Other technical restrictions are contained in s 37(3)-(4)
98. *Bail Act 1978* (NSW) s 8(2)(b)(ii).

10.54 The practice of imposing harsh and inappropriate bail conditions on young people has been the subject of repeated concern over the last decade or more. The Children's Court has noted that onerous bail conditions have been criticised in a number of key reports.[99] In its 1992 report, *Juvenile Justice in New South Wales*, the Legislative Council Standing Committee on Social Issues reported that "magistrates take on the role of parent at times to restrict the movement and modify the behaviour of young people", so that conditions imposed by police and courts were frequently "elaborate, unenforceable, unreasonable and impossible to comply with".[100] Bail conditions were sometimes more onerous than those placed on adults, and unrelated to the circumstances of the actual offence, or the young person's likelihood of reoffending.[101]

10.55 In 1993, the Juvenile Justice Advisory Council emphasised that bail conditions need to be proportionate to the nature of the offence and relevant to the situation of the young person.[102] It recommended that a Code of Practice be developed, identifying what are suitable and reasonable bail conditions to impose on young people.[103] The ALRC and HREOC argued that police should not deal with anti-social behaviour by imposing restrictive bail conditions on young people, stating that "bail conditions should not criminalise a young person's non-offending behaviour".[104]

Response to Issues Paper 19

10.56 The issue of inappropriately onerous bail conditions was raised in the Commission's Issues Paper 19 ("IP 19").[105] In response to IP 19, it was submitted that, although strict bail conditions may be warranted in some circumstances, "they are often imposed in an indiscriminate manner".[106] Other submissions stated that "magistrates and police regularly impose conditions on children that are culturally

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99 The Children's Court of New South Wales, *Submission* at 23. See Australia, Royal Commission into Aboriginal Deaths in Custody, *National Report Volume 5* (Australian Government Publishing Service, Canberra, 1991), Recommendations 90 and 91; Juvenile Justice Advisory Council of NSW, *Future Directions for Juvenile Justice in New South Wales,* Green Paper (Sydney, 1993), Section 2.5; New South Wales, Parliament, Legislative Council, Standing Committee on Social Issues No 4 at 75-76.

100. NSW Youth Justice Coalition, *Kids in Justice: A Blueprint for the 90s* (Sydney, 1990) at 256-259.

101. New South Wales, Parliament, Legislative Council, Standing Committee on Social Issues No 4 at 77. See also Youth Justice Coalition, *Kids in Justice: A Blueprint for the 90s* at 256-259.

102. Juvenile Justice Advisory Council of New South Wales, *Future Directions for Juvenile Justice in New South Wales*, Green Paper, Section 2.5 at 100.

103. Juvenile Justice Advisory Council of New South Wales, *Future Directions for Juvenile Justice in New South Wales*, Green Paper, Recommendation 195. The Youth Justice Coalition has also recommended a Code of Practice be developed as to reasonable bail conditions for young people: Youth Justice Coalition, *Kids in Justice: A Blueprint for the 90s*, Recommendation 156.

104. ALRC Final Report 84 at 18.159.

105. New South Wales Law Reform Commission, *Sentencing: Young Offenders* (1ssues Paper 19, 2001), Issue 15 and para 3.77.

106. Shopfront Youth Legal Centre, *Submission* at 12.

insensitive and inappropriate"[107] and that "young people are often subject to extremely onerous bail conditions which are out of proportion to the seriousness of the alleged offence".[108]

10.57 The Children's Court argued that unnecessarily onerous bail conditions lead to increased custody rates.[109] It recommended that s 36 and 37 of the Bail Act, which deal with bail conditions, be amended to provide a new set of standard conditions for young people.[110] It advocated the inclusion in the Bail Act of a requirement that conditions imposed on young people are "reasonable and are not excessive or setting the young person up to fail".[111] The emphasis would be upon ensuring that the accused attends court on the specified day, and to protect the community, "rather than inviting either the police or the courts to engage in pre-sentence social control."[112]

10.58 Submissions identified the following particular problems with bail conditions.

10.59 **Curfews.** Curfews may, in theory, be a way of protecting the community against offending while on bail, and are preferable to bail refusal.[113] The Children's Court, however, submitted that breaches of bail are most likely to arise in relation to failure to comply with a curfew, even if there is no actual offence committed at the time.[114] The DPP has observed many cases where police have arrested young people for breaching curfews.[115] The Law Society submitted that curfews are regularly imposed on young people, even when the alleged offence did not occur during the hours subsequently imposed for the curfew.[116]

10.60 The terms of a curfew can be quite onerous. A young person may be required to be at home between a range of hours, for example, between 7.00 pm and 7.00 am, or may be ordered not to leave home unless accompanied by a responsible adult.[117] A 24 hour curfew effectively amounts to home detention, despite the fact that

107. Legal Aid Commission of New South Wales, *Submission* at 10. See also Public Defenders, *Submission* at 4: "inappropriate bail conditions are imposed on young people".
108. Shopfront Youth Legal Centre, *Submission* at 12. See also NSW Young Lawyers, *Submission* at 5.
109. The Children's Court of New South Wales, *Submission* at 23. See also Legal Aid Commission of New South Wales, *Submission* at 11.
110. The Children's Court of New South Wales, *Submission* at 24.
111. The Children's Court of New South Wales, *Submission* at 24.
112. The Children's Court of New South Wales, *Submission* at 24.
113. ALRC Final Report 84 at 18.159, footnote 364. But "[n]o study has proven conclusively that enactment or enforcement of juvenile curfew laws achieves any of the laws' express policy goals": D Norton, "Why criminalize children? Looking beyond the express policies driving juvenile curfew legislation" (2000-2001) 4 *Legislation and Public Policy* 175 at 194.
114. The Children's Court of New South Wales, *Submission* at 24.
115. New South Wales Office of the Director of Public Prosecutions, *Submission* at 6.
116. Legal Aid Commission of New South Wales, *Submission* at 11.
117. Legal Aid Commission of New South Wales, *Submission* at 11.

the young person has not even been tried, let alone sentenced, for the alleged offence.

10.61 Curfews may also exacerbate existing problems in the home environment by forcing constant and/or inappropriate contact with families or imposing policing roles on carers.[118] A curfew is inappropriate where a young person is safer on the street than at home, for example where alcohol or drug abuse or domestic violence is a problem in the home.[119] The Law Society recommended legislation requiring information on the young person's accommodation circumstances to be provided to the court before a curfew condition may be imposed.[120] The Commission agrees with this, although the information need not be given in a formal report.

10.62 **Reporting.** A person may be required to report to a police station while on bail. Reporting conditions can be quite burdensome, for example, where a young person is required to report to police every day. The Legal Aid Commission submitted that reporting conditions are often imposed on a young person even though he or she is not at risk of flight, has not failed to appear at court, and has strong community ties.[121]

10.63 The DPP stated that many Supreme Court judges do not like imposing reporting conditions on young people, as they do not consider it appropriate to have them attending police stations unnecessarily. Instead, they are put under the supervision of their families or the DJJ.[122]

10.64 The Children's Court noted that police may seek a condition that an offender "present him/herself at the door [of their home] to police", in effect giving police an opportunity to go to a home several times a night. This, the Court submitted, undermined community relations.[123]

10.65 **Area restrictions.** A young person may have to agree not to frequent or visit a specified place or district.[124] Such conditions restrict a young person's freedom of movement significantly. Case examples given by the Legal Aid Commission are conditions that the young person not enter Redfern, or the Sydney CBD, or the

118. ALRC Final Report 84 at 18.159 and Recommendation 228. See also Youth Justice Coalition, *Kids in Justice: A Blueprint for the 90s*, Recommendation 81: "Children should not be subject to bail conditions or sentences which have the effect of forcing inappropriate contact with their families (for example, 24 hour curfews; home detention), or which impose onerous 'policing' roles on families".
119. The Law Society of New South Wales, *Submission* at 9; The Children's Court of New South Wales, *Submission* at 24; NSW Law Reform Commission, *Consultations* (Broken Hill, 3-5 June 2002).
120. The Law Society of New South Wales, *Submission* at 9.
121. Legal Aid Commission of New South Wales, *Submission* at 11.
122. New South Wales Office of the Director of Public Prosecutions, *Submission* at 6.
123. The Children's Court of New South Wales, *Submission* at 24.
124. *Bail Act 1978* (NSW) s 36B(1)(b).

township of Bourke.[125] Similarly, a young person may be prohibited from attending certain shopping or urban areas.

10.66 The New South Wales Court of Criminal Appeal criticised similar restrictions in the form of conditions placed on a bond given to an adult under s 12 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).[126] One of the conditions of the offender's bond was that he was to stay away from Wilcannia during the term of the bond unless he had the trial judge's prior permission to visit the town. The Court found this condition to be unduly harsh and unreasonable, given that the bond was for almost two years.

10.67 An area restriction amounts to banishment, when conditions are imposed that "require the young person to leave the town and reside elsewhere until the time of the court appearance".[127] The Aboriginal Justice Advisory Council has reported that:

> *[i]n one location in 52% of decisions where bail was granted a condition of that bail was the defendant leave the town and not return until they were required to appear at court. This was specifically the case for juvenile defendants. There has been a number of criticisms made by Aboriginal people in that community that these conditions adversely affect defendants and their families and specifically remove those defendants from the influence that their families may have.*[128]

10.68 **Non-association restrictions.** A young person may have to agree not to associate with a specified person. Under the provisions of s 36B of the Bail Act, "associate with" means to be in company with, or to communicate with by any means, including post, facsimile, telephone or email.[129]

10.69 The non-association provisions introduced into the Bail Act in 2002 were part of the State government's legislative response to gang-related crime. The submissions of the Law Society of New South Wales and NSW Young Lawyers suggested that police place disproportionately strict restrictions on young people, preventing them from associating with their friends, or in public places.[130] These provisions should be used sparingly, and their use subject to continuing monitoring, particularly as they may result in the type of worsening of relations between police

125. Legal Aid Commission of New South Wales, *Submission* at 11.
126. *R v Bugmy* [2004] NSWCCA 258.
127. Juvenile Justice Advisory Council of New South Wales, *Future Directions for Juvenile Justice in New South Wales*, Green Paper, Section 9.6 at 211.
128. Aboriginal Justice Advisory Council, *Aboriginal People and Bail Courts in NSW* (Sydney, 2002) at 11.
129. *Bail Act 1978* (NSW) s 36B(1)(a) and s 36B(8). These sections were inserted into the Bail Act by the *Justice Legislation Amendment (Non-Association and Place Restriction) Act 2001* (NSW), Explanatory Notes at 5.
130. The Law Society of New South Wales, *Submission* at 10; NSW Young Lawyers, *Submission* at 5.

and young people that leads to young people's further involvement with the criminal justice system.[131]

10.70 **Bail Accommodation.** A person may be required, as a condition of bail, to reside in bail accommodation.[132] The court must consider whether placement in bail accommodation is available and suitable for the accused person, having regard to the person's background, particularly if the person is Aboriginal or Torres Strait Islander.[133] One significant problem with this condition is the shortage of bail accommodation. This is discussed in paragraphs 10.89 to 10.95.

10.71 **Financial requirements.** A person may be released on bail after agreeing to give security, or deposit or forfeit a specified amount of money upon failing to comply with a bail undertaking.[134] A young person who is unable to meet a financial bail condition must remain in custody, subject to the application of s 8 of the Bail Act. Section 8 gives an accused a right[135] to release (conditionally or unconditionally) on bail for minor offences.[136]

10.72 The Commission for Children and Young People submitted that a young person is unlikely to have the means to provide a bail bond and should be released on their signed undertaking to appear in court on a specified date.[137] The ALRC and HREOC recommended against imposing monetary bail criteria on young people.[138] The Juvenile Justice Advisory Council and the Legislative Council Standing Committee on Social Issues recommended against imposing onerous monetary bail conditions with which young people cannot comply.[139]

131. See Chapter 3.
132. *Bail Act 1978* (NSW) s 36(2)(a1).
133. *Bail Act 1978* (NSW) s 36(2A).
134. *Bail Act 1978* (NSW) s 36(2).
135. This right is subject to the exceptions set out in s 8(2)(a)(i)-(iv). In addition, a person is not entitled to bail if he or she is already imprisoned for some other offence and is likely to remain in prison for longer than the bail period that would otherwise be granted: *Bail Act 1978* (NSW) s 8(4).
136. These include (excepting "failing to appear" offences): all offences not punishable by imprisonment (except fine default); summary offences punishable by imprisonment and those prescribed by the regulations; and offences related to breaches of good behaviour bonds or community service orders.
137. New South Wales Commission for Children and Young People, *Submission* at para 12.02.
138. ALRC Final Report 84, Recommendation 228. In Queensland, amendments to the *Juvenile Justice Act 1992* (Qld) introduced by the *Juvenile Justice Amendment Act 2002* (Qld) provide that a court or police officer granting bail to a child must release the child on his or her own undertaking without sureties or deposit of money or other security, unless this option is inappropriate: *Juvenile Justice Act 1992* (Qld) s 40A(2).
139. Juvenile Justice Advisory Council of New South Wales, *Future Directions for Juvenile Justice in New South Wales*, Green Paper, Recommendation 194; New South Wales, Parliament, Legislative Council, Standing Committee on Social Issues No 4, Recommendation 27.

10.73 **Acknowledgment by an acceptable person**. An acceptable person may be required to acknowledge that the young accused is a responsible person who is likely to comply with his or her bail undertaking.[140]

10.74 **Rehabilitation**. A young person may be required to agree to participate in an intervention program or other program for treatment or rehabilitation[141] (including for drug or alcohol addiction). The difficulties with the availability of treatment facilities for young people are discussed in Chapter 8 at paragraphs 8.98-8100.

The Commission's view

10.75 The Commission is of the view that, while the imposition of strict bail conditions may, in some instances, be beneficial to a young person or his or her family and the community, consideration should always be given to the repercussions of the imposition of any one of the conditions referred to above. While this is, in the end, a matter of judicial commonsense, we believe that the bail legislation should generally ensure that bail conditions are appropriate for young people.

10.76 Those Australian jurisdictions that have separate bail conditions for young people tend to state specific and additional considerations relevant to a court's consideration of whether to impose bail conditions. In the Australian Capital Territory, for example, the court or an authorised officer[142] may impose any additional conditions deemed appropriate, having regard to the principles set out in the *Children and Young People Act 1999* (ACT).[143] A court is prohibited from imposing a condition that puts a greater obligation on a young person than is necessary to secure the usual purposes of bail, such as the requirement to attend court at a later date.[144]

10.77 The Commission agrees, as was argued by the Children's Court, that bail conditions should be no more onerous than is required to secure the young person's attendance at court and ensure that they do not offend while on bail. Accordingly, we make the following recommendation.

Recommendation 10.6

The *Bail Act 1978* (NSW) should be amended to provide that conditions attaching to the grant of bail in the case of a young person must be reasonable having regard to the principles in s 6(b)-(d) of the *Children (Criminal Proceedings) Act 1987* (NSW), and are not excessive or unrealistic.

Recommendation 10.7

140. *Bail Act 1978* (NSW) s 36(2)(b).
141. *Bail Act 1978* (NSW) s 36A.
142. "Authorised officer" means the chief police officer; or a police officer exercising the functions of a superintendent or sergeant; or another police officer authorised in writing by the chief police officer: *1992* (ACT) Dictionary at 61.
143. *Bail Act 1992* (ACT) s 26(1)(b)(i).
144. *Bail Act 1992* (ACT) s 26(4).

The *Bail Act 1978* (NSW) should be amended to provide that information on the young person's accommodation circumstances must be provided to the court (although not necessarily in a formal report) before a curfew condition may be imposed.

Explanation of bail conditions

10.78 Section 39B of the Bail Act requires "the officer or court to whom a bail undertaking is given" to ensure that the accused, and any person entering into a bail agreement, are made aware of the bail obligations and consequences of a breach. There is some concern that young people may not sufficiently understand the conditions imposed on them and, as a result, may unintentionally breach bail.[145] The Aboriginal Justice Advisory Council has suggested that this is a particular concern with conditions imposed upon young Aboriginal people.[146]

10.79 The Commission believes that it is possible to avoid, or at least minimise, unintentional breaches of bail by young people by enacting a provision applying specifically to them in terms similar to s 37(2A) of the Bail Act. Section 37(2A) provides as follows:

> *Before imposing a bail condition on an accused person who has an intellectual disability, the authorised officer or court is to be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the accused person to understand or comply with the bail condition.*

Recommendation 10.8

The *Bail Act 1978* (NSW) should be amended so that, before imposing a bail condition on a young person, the authorised officer or court must be satisfied that the bail condition is appropriate having regard (as far as can reasonably be ascertained) to the capacity of the young person to understand and comply with the bail condition.

Breach of bail conditions

10.80 Section 50 of the Bail Act provides that, where a police officer believes on reasonable grounds that a person released on bail has breached, or is about to breach, a bail undertaking or condition, the police officer may arrest the person without warrant and take him or her as soon as practicable before a court.[147]

145. The Shopfront Youth Legal Centre observed that some children under 14 are placed on onerous bail conditions that they may not fully comprehend: *Submission* at 12.
146. Aboriginal Justice Advisory Council, *Aboriginal People and Bail Courts in NSW* (Sydney, 2002) at 11.17.
147. *Bail Act 1978* (NSW) s 50(1)(a).

Alternatively, an authorised justice may issue a warrant to apprehend the person and bring him or her before the court or issue a CAN.[148]

10.81 Breach of bail is not an offence in itself. Rather, s 50 of the Bail Act provides a mechanism to bring a person back before the court to reconsider the question of bail. Pursuant to s 50(2) of the Bail Act, the court can release the person on the original bail, or revoke the original bail and deal with the person according to law. If bail is revoked, the court can make a fresh grant of bail or commit the person to prison.[149]

10.82 The Commission is of the view that this provision affords a young person sufficient protection and opportunity for the appropriateness of the bail conditions and undertakings to be reviewed. A decision to take no action on a breach will necessarily involve a consideration of the appropriateness of the original conditions set. On the other hand, in setting new bail, the court will necessarily reflect on whether more appropriate conditions, or any conditions at all, should be attached. Accordingly, we make no recommendation for reform of s 50.

REPEAT OFFENDERS

10.83 There is a specific presumption *against* the granting of bail in respect of certain repeat property offenders.[150] Bail is to be granted to repeat serious personal violence offenders in exceptional circumstances only.[151] In addition, as outlined in paragraph 10.27, the *Bail Amendment (Repeat Offenders) Act 2002* (NSW) removed from the Bail Act the presumption in favour of bail for various other classes of repeat offender. The amending Act inserted s 9B, which provides that, regardless of the type of offence alleged, there is no presumption in favour of bail where the person:

- was already on bail, parole, in custody, or serving a sentence not in custody, or is subject to a good behaviour bond or intervention program order;[152]
- has previously failed to appear before a court in accordance with the person's bail undertaking;[153] or
- is charged with an indictable offence, and has previously been convicted of an indictable offence. [154]

10.84 In the Second Reading Speech to the *Bail Amendment (Repeat Offenders) Act 2002* (NSW), the Attorney General stated that the aim of s 9B was to target "those

148. *Bail Act 1978* (NSW) s 50(1)(b).
149. *Bail Act 1978* (NSW) s 50(3).
150. *Bail Act 1978* (NSW) s 8C.
151. *Bail Act 1978* (NSW) s 9D.
152. *Bail Act 1978* (NSW) s 9B(1).
153. *Bail Act 1978* (NSW) s 9B(2)
154. *Bail Act 1978* (NSW) s 9B(3).

offenders who commit less serious offences and are likely to do so again", [155] thereby making it more difficult for potential repeat offenders to be at large in the community.[156]

10.85 Both police demands and a 2001 report by the NSW Bureau of Crime Statistics and Research ("BOCSAR"), *Bail in NSW: Characteristics and Compliance*, gave impetus to the introduction of s 9B.[157] The BOCSAR report highlighted the numbers of alleged offenders who failed to appear at the next court date in compliance with their bail condition to attend. Previously, offenders were granted bail on successive occasions because of the minor nature of their offending. This included offences such as theft, break and enter, shoplifting, and minor assaults.[158]

10.86 Some unease was expressed during the parliamentary debates on the *Bail Amendment (Repeat Offenders) Act 2002* (NSW) about the impact which s 9B might have on young people, especially as to whether it would lead to an increase in young people being held in custody.[159] A proposed amendment which would have resulted in s 9B not applying to young people was unsuccessful, and, while it is open to the court to consider any "special needs" arising from the fact that a person is under 18, s 9B remains applicable to both adults and young people.[160]

10.87 In June 2002, the then Minister for Juvenile Justice indicated that her Department did not expect that s 9B would have a significant impact on the number of young people being held in custody. Indeed, research into the impact of the *Bail Amendment (Repeat Offenders) Act 2002* (NSW) carried out by BOCSAR in 2004

155. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 20 March 2002, the Hon R J Debus, Attorney General, Second Reading Speech, *Bail Amendment (Repeat Offenders) Bill 2002* (NSW) at 818.
156. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 20 March 2002, the Hon R J Debus, Attorney General, Second Reading Speech, *Bail Amendment (Repeat Offenders) Bill 2002* (NSW) at 818.
157. M Chilvers, J Allen and P Doak, ,(NSW Bureau of Crime Statistics and Research, Crime and Justice Statistics Bureau Brief, Issue Paper No 15, Sydney, 2001). This research found that, in 2000, 14.6% of Local Court defendants on bail failed to appear and that failure to appear rates were highest among those with prior convictions and multiple concurrent offences.
158. See M Marien and J Hickey, "The *Bail Amendment (Repeat Offenders Bill) 2002*", paper presented at the Institute of Criminology Seminar *Crisis in Bail and Remand*, 29 May 2002 at infolink/clrd1.nsf/pages/ bail_amendmentbill_2002
159. Contrast the prevailing position in Victoria: "Bail is usually given when young people are appearing before court for the first time, are on a community-based order and doing well apart from the recent offence, or offences are old ones that happened before they were locked up and then released on parole. Young people on parole also are likely to get bail if they are doing well": Victoria, Department of Human Services, *Bail: Juvenile Justice* (Melbourne, 2001).
160. See NSW, *Parliamentary Debate (Hansard)*, Legislative Assembly, 10 April 2002, Debate on *Bail Amendment (Repeat Offenders) Bill 2002*; NSW, *Parliamentary debate (Hansard)*, Legislative Council, 7 May 2002 and 9 May 2002, Debate on *Bail Amendment (Repeat Offenders) Bill 2002* (NSW).

found that there had been no change in the bail refusal rate for juvenile defendants since the changes came into effect.[161]

10.88 A consistent theme of submissions and the Commission's consultative process was that one of the main strengths of the current juvenile justice system in New South Wales is its flexibility. The ability to tailor a response to juvenile offending, within the structure of the YOA and the CCPA, appears to be going some way to achieving the policy aim of reducing both the involvement of young people in the criminal justice system and the incidence of recidivism. We acknowledge that there is no evidence that the amendments are disadvantaging young people. Nevertheless, we believe that the law should allow individualised responses to individual offences by young persons. The fact that a young person is already on bail, on parole, on a good behaviour bond, or serving a non-custodial sentence should not remove any presumption in favour of bail in relation to a subsequent alleged offence. Young people should be held in remand as a last resort. Accordingly, we do not believe that s 9B should apply to young people.

Recommendation 10.9

Section 9B of the *Bail Act 1978* (NSW) should be amended so as not to apply to young people.

BAIL ACCOMMODATION

The problem of "welfare detention"

10.89 A young person may be held in custody because there is nowhere else for him or her to go. Well-intentioned police or magistrates may refuse bail as a way of finding accommodation for young people. The ALRC and HREOC have noted that, for some children, being in remand is preferable to being left homeless or left with violent carers, but emphasised that holding children on remand is an inappropriate solution to welfare problems.[162] Currently, there are insufficient options for young people who would be released on bail but for a lack of appropriate accommodation.

10.90 Section 36(2)(a1) of the Bail Act provides that a condition may be imposed upon an accused that the person agrees to live "in accommodation for persons on bail". In doing so, the court must consider whether such accommodation is available and suitable for the accused, having regard to his or her background, particularly whether he or she is Aboriginal or Torres Strait Islander.[163] These provisions were

161. J Fitzgerald and D Weatherburn, *The Impact of the Bail Amendment (Repeat Offenders) Act 2002* (NSW Bureau of Crime Statistics and Research, Crime and Justice Bulletin No 83, 2004) at 4. Prior to the amendments, 8.7% of juvenile defendants were in custody at the time their criminal matter was finalised, compared with 8.2% following the amendments (a statistically insignificant change).
162. ALRC Final Report 84 at 17.171.
163. *Bail Act 1978* (NSW) s 36(2A).

added to the Bail Act by the *Bail Amendment (Repeat Offenders) Act 2002*, in order to create more options for releasing vulnerable people on bail:

> *Often the lack of employment or appropriate residence will be a debilitating factor in deciding whether to grant bail. The availability of supervised bail accommodation and the suitability of the accused person to be bailed to this type of accommodation allows the court to both strengthen existing requirements of bail and divert offenders who might otherwise be incarcerated. This is particularly important for vulnerable accused persons such as juveniles.*[164]

The need to develop alternative accommodation

10.91 The ALRC and HREOC,[165] the Juvenile Justice Advisory Council,[166] the Royal Commission into Aboriginal Deaths in Custody,[167] the Legislative Council Standing Committee on Social Issues[168] and the Legislative Council Select Committee on the Increase in Prisoner Population[169] have all recognised the need to develop alternative accommodation for people who, in the absence of such accommodation, would be refused bail. This would reduce the number of young people unnecessarily held in remand.

164. New South Wales, *Parliamentary Debates (Hansard)* Legislative Assembly, 20 March 2002, the Hon R. J. Debus, Attorney General, Second Reading Speech, *Bail Amendment (Repeat Offenders) Bill 2002* (NSW) at 818.
165. ALRC Final Report 84, Recommendation 228.
166. The Juvenile Justice Advisory Council identified the need to provide alternative placements for juveniles who would otherwise have been refused bail or who are unable to meet bail undertakings in order to reduce the number of young people held on remand. It recommended that bail hostels or safe houses be established as an alternative to incarceration of young people. See Juvenile Justice Advisory Council of New South Wales, *Future Directions for Juvenile Justice in New South Wales*, Green Paper, Section 7.11 and Recommendations 47 and 99. The Juvenile Justice Advisory Council also recommended bail hostels be provided in areas of greatest need, including country locations: see Green Paper, Recommendation 191.
167. The Royal Commission into Aboriginal Deaths in Custody recommended that "government should approve informal juvenile holding homes, particularly the homes of Aboriginal people, in which juveniles can lawfully be placed by police officers if bail is in fact not allowed": Australia, *National Report of the Royal Commission into Aboriginal Deaths in Custody*, Recommendation 242.
168. New South Wales, Parliament, Legislative Council, Standing Committee on Social Issues No 4, Recommendation 23.
169. The Select Committee on the Increase in Prisoner Population recommended the provision of bail accommodation as a means of reducing the size of the remand population. Bail hostels can provide intensive supervision where appropriate, but avoid incarceration: New South Wales, Parliament, Legislative Council, Select Committee on the Increase In Prisoner Population, *Final Report* (Parliamentary Paper No 24, 2001) at 8.4-8.7.

10.92 Bail accommodation for young people is severely limited. The Ja-Biah Bail Support Program in Western Sydney provides accommodation for young Aboriginal and Torres Strait Islander people who would otherwise be refused bail. The service houses up to 6 residents aged between 10 and 18, who are usually referred to Ja-Biah by the courts, upon recommendation by the DJJ.[170] The Nardoola Farm Accommodation Program in Moree also provides bail accommodation for young Aboriginal people. It houses up to eight young people, and offers programs on living and literacy skills, as well as alcohol and drug education, and violence group work.[171] Both services aim to reduce the number of young Aboriginal people remanded in custody because of lack of suitable accommodation.

10.93 There was a consensus among submissions that there is a pressing need to develop accommodation alternatives, so that more young people may be granted bail. The NSW Law Society noted that not only are refuges a very poor alternative form of accommodation in the Sydney-Newcastle-Wollongong region, but even this limited alternative is virtually non-existent in rural New South Wales.[172] The submission of the Children's Court observed that many young people are unable to obtain bail because their current accommodation "facilitate[s] breaches of bail conditions or further offending".[173] It supported the expansion of bail accommodation throughout the State. The Legal Aid Commission recommended that more bail hostels be provided for Aboriginal children, particularly for those living in rural and remote communities.[174]

10.94 The result of the acute shortage of alternative bail accommodation is that s 36(2)(a1) of the Bail Act does not, in most cases, provide the court with any real option for granting bail. This is despite the fact that under s 36(2B) of the Bail Act, the Minister for Corrective Services is under a statutory duty to ensure that adequate and appropriate accommodation is available for the purposes of the placement of persons on bail.

10.95 The NSW Law Society observed that failure to appear while on bail can arise from accommodation difficulties, a chaotic home life, a lack of adult support, or - particularly in the case of young Aboriginal people - the need to travel to see and stay with extended family members.[175] Increased alternative accommodation would not

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170. New South Wales, *Parliamentary Debates (Hansard)* Legislative Council, 28 November 2001, the Hon C Tebbutt, the then Minister for Juvenile Justice, at 18952.
171. NSW Attorney General's Department, Crime Prevention Division, *Crime Prevention Program Directory* at 5.7.
172. The Law Society of New South Wales, *Submission* at 7.
173. The Children's Court of New South Wales, *Submission* at 22-23.
174. Legal Aid Commission of New South Wales, *Submission* at 10. The NSW Department of Juvenile Justice also plans to consider options for alternatives to custody such as bail hostels for young Aboriginal people: *Aboriginal Over-representation Strategic Plan* (2001) at 9. The Royal Commission into Aboriginal Deaths in Custody also recommended the introduction of informal juvenile holding homes in which juveniles can lawfully be placed by police officers if bail is refused: Australia, *National Report of the Royal Commission into Aboriginal Deaths in Custody*, Recommendation 242.
175. The Law Society of New South Wales, *Submission* at 9.

only limit the reliance on remand as crisis accommodation for young people in need of care or protection, but may reduce the likelihood of young people failing to appear at court.

Recommendation 10.10

The Government should establish a Working Party to consider the provision of bail accommodation for young people, to identify the issues and problems pertaining to bail accommodation and to establish those areas most in need of increased bail accommodation, with the express aim of ensuring that no young person is held in remand unnecessarily.

11. Serious Crimes

- Introduction
- Serious crimes under the CCPA
- Current sentencing practice
- The UK approach
- Options for reform in NSW

INTRODUCTION

11.1 Sentencing a young offender raises particular problems where the offence is of a serious nature. Generally in juvenile justice, s 6 of the *Children (Criminal Proceedings) Act 1987* (NSW) ("CCPA") establishes a sentencing regime pertaining to young offenders, setting out the principles that are to apply. In addition, the common law promotes rehabilitation as the dominant principle in sentencing young offenders.[1] However, grave criminality in a young person qualifies the operation of these principles. In particular, the seriousness of the crime in question may demand that greater consideration be given to retribution, incapacitation and personal deterrence in sentencing the young offender than would have been necessary in the case of a less serious offence.[2]

SERIOUS CRIMES UNDER THE CCPA

11.2 Section 17 of the CCPA requires that a young person (under the age of 18 when the offence was committed and under 21 when charged before a court with the offence) who has pleaded guilty to, or been found guilty or convicted of, a serious children's indictable offence be dealt with according to law in the District or Supreme Court. Except for committal proceedings, the Children's Court has no jurisdiction in respect of serious children's indictable offences.[3] "Serious children's indictable offences" refer to: homicide; offences punishable by imprisonment for life or for 25 years; a number of serious sexual offences (including attempts to commit such offences); offences relating to the manufacture or sale of firearms punishable by imprisonment for 20 years; and offences prescribed by regulation.[4] Regulation extends the definition of "serious children's indictable offences" to certain sexual offences where the victim is under ten years of age.[5]

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1. *R v SLD* [2002] NSWSC 758 at para 20. See also K Warner, *Sentencing in Tasmania* (2nd edition, Federation Press, Sydney, 2002) at para 3.218.
2. *R v SLD* [2002] NSWSC 758 at para 20. See also *R v MA* [2004] NSWCCA 92 at [28] (Dunford J): "It is true that in the case of young offenders, there is generally greater emphasis given to rehabilitation and less to deterrence than in the case of adult offenders, but that depends in part on the age of the young person and the circumstances of the offence; and there comes a point at which the seriousness of the crime committed by a young offender, particularly if a crime of violence, is so great that the special attention normally given to rehabilitation in the case of young offenders must give way, and greater emphasis given to punishment and deterrence …". See also *R v LNT* [2005] NSWCCA 307 at [31] (Rothman J).
3. *Children (Criminal Proceedings) Act 1987* (NSW) s 28(1).
4. *Children (Criminal Proceedings) Act 1987* (NSW) s 3(1).
5. *Children (Criminal Proceedings) Regulation 2004* (NSW) cl 4, bringing the offence under s 80A of the *Crimes Act 1900* (NSW) (but only if the victim of the offence was under the age of 10 years when the offence occurred) within the definition of "serious children's indictable offence". (Note that cl 4 of the Regulation also refers to s 78I of the *Crimes Act 1900* (NSW) but that this section has been repealed.)

CURRENT SENTENCING PRACTICE

11.3 Under s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), where a young offender is sentenced for a serious children's indictable offence, the court must first set a non-parole period, that is, the minimum period for which the offender must be kept in detention. The balance of the term of the sentence must not exceed one-third of the non-parole period, unless the court decides that there are special circumstances for it being more.[6] Section 21A of the Act provides that an offender's youth may be a mitigating factor, in that it suggests that he or she has good prospects of rehabilitation.[7]

11.4 The problems presented by the application to young offenders of the sentencing regime outlined above are illustrated in the decision of the New South Wales Supreme Court in *R v SLD*.[8] The young offender in that case was a boy aged 13 years and 10 months who murdered a 3-year-old girl by stabbing her to death. Applying general sentencing principles and the procedure in s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW), Justice Wood imposed a sentence of 20 years, with a non-parole period of ten years.

11.5 The court found the objective seriousness of the offence to be extremely high. Although the offender's criminality was reduced by his emotional immaturity, intellectual impairment and disturbed background, the court found that he posed a substantial risk of committing further offences of both a violent and sexual nature.

11.6 It is not easy for a court to assess the prospects of rehabilitation of a young offender who is still developing, intellectually and emotionally. Expert medical evidence in *R v SLD* suggested that it is difficult to diagnose with certainty a personality disorder before maturity. The experts agreed that reviewing the sentence when the offender was in his early twenties would have merit. By that time, the offender would have served about 6 years in detention, and his progress and potential danger to the community could be better assessed.

11.7 Fortunately, it is very unusual for a court to have to adjudicate on crimes by a young offender of such a horrific nature as those dealt with in *R v SLD*. However, the current sentencing options in these rare cases are limited in a way that appears to benefit neither the public interest nor the interests of the young offender. On general sentencing principles, the response of the court in such cases ought to focus on the rehabilitation, incapacitation and deterrence of the young offender (general deterrence being of little relevance in such cases).[9] Yet, the offender's unknown future emotional and intellectual development and maturing, obstructs the court's ability to balance these principles fittingly.

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6. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44.
7. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(h)
8. *R v SLD* [2002] NSWSC 758.
9. *R v SLD* [2002] NSWSC 758 at para 21.

THE UK APPROACH

11.8 In his reasons in *R v SLD*, Justice Wood suggested a possible amendment to the law to cater for the difficulty of sentencing young offenders who commit very serious crimes. His Honour said:

> *The cases I have in mind are those involving juveniles who are convicted of offences attracting a possible maximum sentence of 25 years or more, who are aged less than 15 years at the time of the offence, and where the information available at the time of sentencing does not permit the Court to make a proper assessment as to the presence or likely development of a serious personality or psychiatric disorder, and/or propensity for future dangerousness. In such a case it would be desirable, in my view, if the Court could sentence the offender initially to be detained at her Majesty's pleasure, with provision for review and resentencing at a later date, for example at the age of 21 years, or after say 5 years in custody.*[10]

11.9 Justice Wood's use in *R v SDL* of the expression "at her Majesty's pleasure" refers to the requirement in England and Wales to sentence a person under 18 convicted of murder or any other offence for which the sentence fixed by law is life imprisonment, to detention during Her Majesty's pleasure.[11] In all but the most exceptional cases, however, the sentencing judge must specify a minimum term,[12] on the expiry of which the prisoner becomes eligible for release on licence pursuant to the "early release provisions" of the *Crimes (Sentences) 1997* (UK).[13] Nonetheless, the sentencing judge may order that the early release provisions are not to apply to the young offender.[14] In such cases, the Secretary of State determines when those provisions become applicable.[15]

11.10 The minimum term is set at one half of the normal determinate sentence that would have been imposed for the offence if a life sentence were not prescribed.[16] This normal "starting point" (12 years) is then reduced to take into account the maturity and age of the offender.[17] The appropriate reduction to achieve the correct starting point

10. *R v SLD* [2002] NSWSC 758 at para 147.
11. *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 90. See also *Criminal Justice Act 2003* (UK) Chapter 5 dealing with detention of "dangerous offenders" for public protection.
12. *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 82A. See also *Practice Statement* [2002] 3 All ER 412 at para 20. Sch 21 cl 7 of the *Criminal Justice Act 2003* (UK) provides that, for an offender aged under 18 when he or she committed the offence, the appropriate starting point in determining the minimum term is 12 years.
13. *Crimes (Sentences) Act 1997* (UK) s 28(5).
14. *Powers of Criminal Courts (Sentencing) Act 2000* (UK) s 82A(4).
15. *Crimes (Sentences) Act 1997* (UK) s 28.
16. *Practice Statement* [2002] 3 All ER 412 (31 May 2002) para 23.
17. *Practice Statement* [2002] 3 All ER 412 (31 May 2002) para 24.

depends heavily upon the stage of the development of the individual offender.[18] While a "mechanistic approach is never appropriate", a reduction in the starting point of one year for each year that the young person is under 18 years of age provides a "rough check".[19] The judge must then consider any aggravating or mitigating factors in the particular case, which may take the minimum term above or below the starting point.[20] These introduce a sliding scale that recognises "the greater degree of understanding and capacity for normal reasoning which develops in adolescents over time as well as the fact that young offenders are likely to have the greatest capacity for change".[21] The judge also needs to take into account the welfare needs of the young person and the desirability of his or her reintegration into society.[22]

OPTIONS FOR REFORM IN NSW

11.11 Except in the tightly circumscribed circumstances in which mentally ill or disordered persons can be detained in hospital,[23] there is no modern tradition of detention "at pleasure" in New South Wales, where the Attorney General does not have the same functions in relation to sentencing as the Home Secretary does in England and Wales. Further, the Commission affirms its previously expressed general opposition to any form of indeterminate sentencing,[24] which sits uneasily with the emphasis that the High Court placed on proportionate punishment in *Veen (No 2)*.[25]

11.12 However, in the case of young offenders, as Justice Wood stated, the information before the sentencing court to enable a proper assessment of culpability and prospects for rehabilitation may be lacking. The presence or likely development of a serious personality or psychiatric disorder, or a propensity for future dangerousness is difficult to know. A better sentencing mechanism is needed, that allows the objectives of sentencing to be fully realized.

11.13 In the Commission's view, this is best achieved by requiring the judge, in the case of a serious children's indictable offence, to sentence the young offender according to the normal method prescribed by s 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) *and* to invest the judge with a discretion to make an order, in appropriate cases, that the offender be re-sentenced at a specified period before the end of the non-parole period or minimum term.

18. *Practice Statement* [2002] 3 All ER 412 (31 May 2002) para 24.
19. *Practice Statement* [2002] 3 All ER 412 (31 May 2002) para 24.
20. *Practice Statement* [2002] 3 All ER 412 (31 May 2002) para 25.
21. *Practice Statement* [2002] 3 All ER 412 (31 May 2002) para 25.
22. *Practice Statement* [2002] 3 All ER 412 (31 May 2002) para 26.
23. See *Mental Health Act 1990* (NSW) Chap 4, Pt 2, Div 1, especially s 35-37A.
24. See New South Wales Law Reform Commission, *Sentencing* (Discussion Paper 33, 1996) at para 4.99-4.107; New South Wales Law Reform Commission, *Sentencing* (Report 79, 1996) at para 10.3-10.8.
25. *Veen v The Queen (No 2)* (1988) 164 CLR 465.

11.14 Re-sentencing has been extensively used in New South Wales to deal with the effect of changes in sentencing law and policy on existing life sentences.[26] The NSW Court of Criminal Appeal has rejected the argument that "the State Parliament is not empowered to alter sentencing laws applicable to existing offenders".[27] The Court held that "[t]here is no reason in principle that precludes Parliament from so legislating"[28] and that such legislation would not be incompatible with Chapter III of the *Constitution*.

11.15 The Commission has concluded that the availability of a re-sentencing option would inject necessary flexibility into the process of sentencing young offenders convicted of serious crimes.

Recommendation 11.1

Section 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) should be amended to give a judge who sentences a young offender in respect of a "serious children's indictable offence" (as defined in s 3 of the *Children (Criminal Proceedings) Act 1987* (NSW)) the discretionary power to make an order that the young offender be re-sentenced at a determinate time before the expiry of the non-parole period. For this purpose, "young offender" means a person who was under the age of 18 years when the offence was committed and under the age of 21 years when charged before a court with the offence.

26. See *Crimes (Sentencing Procedure) Act 1999* (NSW) Sch 1; and *Sentencing Act 1989* (NSW) s 13A (Note that this Act has been repealed).
27. *R v Baker* (2002) 130 A Crim R 417 at [82] (Ipp AJA). (The case dealt with aspects of the now repealed *Sentencing Act 1989* (NSW)).
28. *R v Baker* (2002) 130 A Crim R 417 at [82] (Ipp AJA).

Appendix A

- List of submissions

List of submissions to Issues Paper 19

Australian Institute of Criminology (4 January 2001)

The Positive Justice Centre (29 January 2001)

Mrs Patricia Ryan (29 May 2001)

NSW Police Service (17 October 2001)

The NSW Bar Association (19 October 2001)

Legal Aid Commission of New South Wales (29 October 2001)

The Shopfront Youth Legal Centre (29 October 2001)

Director of Public Prosecutions (31 October 2001)

Public Defenders (19 January 2001, 1 November 2001)

NSW Young Lawyers (13 December 2000, 7 November 2001)

NSW Commission for Children and Young People (8 November 2001)

Anti-Discrimination Board of New South Wales (30 November 2001)

National Children's and Youth Law Centre (10 December 2001)

Law Society of New South Wales (11 December 2001)

The Hon Carmel Tebbutt, MLC (13 December 2001)

The Children's Court of New South Wales (January 2002)

Mr G A Walsh (14 January 2002)

Sydney Regional Aboriginal Corporation Legal Service (3 October 2001)

Appendix B

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Public consultations, Coffs Harbour (20 and 21 May 2002)

Public consultations, Albury (30 and 31 May 2002)

Public consultations, Broken Hill (3 and 4 June, 2002)

J Bargen (August 2004).

SCM S Mitchell (December 2005)

Appendix C

- List of abbreviations

List of abbreviations

ALRC	Australian Law Reform Commission
ATSI	Aboriginal and Torres Strait Islander
AVO	Apprehended Violence Order
BOCSAR	New South Wales Bureau of Crime Statistics and Research
CAN	Court Attendance Notice
CAPS	Community Aid Panels
CCPA	Children (Criminal Proceedings) Act 1987 (NSW)
CCYP	New South Wales Commission for Children and Young People
COPS	Computerised Operational Police System
CSO	Community Service Order
CYC	Community Youth Conferencing
CYPFA	Children, Young Persons and their Families Act 1989 (NZ)
DJJ	New South Wales Department of Juvenile Justice
DOCS	New South Wales Department of Community Services
DP	Discussion Paper
DPP	Office of the Director of Public Prosecutions
HREOC	Human Rights and Equal Opportunity Commission
IP	Issues Paper
NSWLRC	New South Wales Law Reform Commission
POI	Persons of Interest
SYO	Specialist Youth Officer
TOP	Traffic Offender Program
VIS	Victim Impact Statement
YDAC	Youth Drug and Alcohol Court
YDC	Youth Drug Court
YJAC	Youth Justice Advisory Committee
YJCD	Youth Justice Conferencing Directorate
YOA	Young Offenders Act 1997 (NSW)
YOLRP	Young Offender Legal Referral Protocol

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