CHAPTER THREE

COURT DIVERSION SCHEMES

3.1 INTRODUCTION

Many witnesses and submissions indicated to the Committee that most juvenile crime is transitory. As statistics confirm, most young offenders grow out of juvenile crime:

> "One of the most consistent and basic findings in criminological research is that crime rates tend to peak in the late teenage years and then drop off dramatically. This pattern has been observed across many Western countries and from studies as far back as 1840."[1]

Moreover, the New South Wales Police Service maintains that in general the "criminal careers" of juveniles have been completed by the time they become adults.[2] Evidence also indicated that the vast majority of offences committed by young people relate to public order, street offences, minor dishonesty offences and summary offences.

The Police Service submission notes further that:

> "When the proportion of juveniles who come under formal police notice is viewed in relation to all people coming under formal police notice, it appears that juvenile representation has remained relatively stable whilst the percentage of adult representation has increased."[3]

Court diversion schemes are a significant aspect of the Juvenile Justice System. The Committee noted in its introduction a number of the myths surrounding juvenile offending as well as the principles which have formed the basis of its deliberations and recommendations. Those principles include:

- the Juvenile Justice System must continue to be discretely managed, with every effort being made to prevent the progression by young people from Juvenile Justice Centres to adult gaols,

[1] Submission 33. p.22
[2] Submission 30. p.2
[3] Submission 30. p.3

- diversion, particularly Police Cautions, should be the first response to minor offences,

- the needs of victims should be considered, and

- the young offender and, where appropriate, his or her family should be involved at all levels of proceedings.

In addition, the Committee considers that all young offenders in New South Wales are entitled to be treated equally for the same offence irrespective of race, sex or area of residence.

The formal processing of juveniles by the court has long been an area of concern, especially in jurisdictions where formal diversionary procedures are implemented. It is necessary when considering court diversion to evaluate whether the way in which a young offender is dealt with through a diversionary process has a better outcome than proceeding through the court process. Proceeding through the courts may create a perception that the young person is an offender and may lead to harassment of the young person. The court process may have the effect of the young person being stigmatised as a criminal, perceiving themselves as an offender and becoming unnecessarily caught up in the process. Keeping at least first or minor offenders out of the court system is usually justified on three grounds:

> "first, that it avoids labelling the child as a known offender, which may subsequently result in the young person coming to perceive himself/herself as a criminal and acting accordingly;
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> secondly, that informal diversionary procedures often provide the opportunity for dealing with a child's behavioural problems more constructively than does a court appearance, thereby reducing the likelihood of further offending; and
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> thirdly, that on economic grounds, non-serious matters do not warrant the time and expense of a ... hearing."[4]

Evidence has shown that the Children's Courts are not necessarily appropriate forums to deal with particular offences and offenders. Such evidence has presented a number of issues which are relevant when considering court diversion. These issues are outlined in the following paragraphs.[5]

[4] Gale. 1989 p.1

[5] Submission 74. pp.11-12

The majority of offences officially processed are not serious offences. Statistics consistently indicate that 60% of juvenile offenders make only one appearance in court and do not subsequently re-offend.[6] Thus, if each young offender is processed through the courts, the cost to the community is considerable. Further, for minor offences it is considered inappropriate that they are dealt with through such a forum as the Children's Court.

Attendance at court and a conviction of a juvenile through the court, gives a stigmatising label which has been said to promote "the development in the juvenile of a deviant self image and a sustained criminal career".[7] As most juveniles grow out of offending behaviour, exposure to events which may lead to the development of a poor self image or an anti-social attitude should be minimised.

The proceedings of the court are often slow, with young people remanded for lengthy periods. This can cause individuals hardship and also have the effect of making the eventual sentence less effective due to the distance in time from the precipitating offence. The Committee has been informed that effective responses to juvenile offending should be as related to the offence as possible, so that the causal connection is clear.

On a number of occasions the Committee heard that it is quite common for young people not to understand court proceedings which may mean that they do not fully comprehend the implications of their offending behaviour.[8] The Committee considers and has heard evidence that it is in the interests of both the community and the young offender to fully understand the implications of his or her offending behaviour. Further, the Committee considers that court diversion schemes provide a framework in which young offenders might understand the effects of their offending behaviour and, more importantly, be dealt with out of the court system.

Diversion is not an end in itself. Both the effect of court diversion on a young offender and its impact on recidivism rates are essential factors in considering the success of court diversion programs.

In the course of its Inquiry, the Committee heard of a concept called "shaming".[9] Described as the communication of disapproval whilst maintaining a relationship of respect for an offender, "shaming" was said to be something effective families within our society could accomplish. Research suggested that institutional practices which brought stigma, degradation, humiliation and disrespect into the process of dealing with offenders

[6] Submission 1. p.5

[7] Morris. 1987 p.138

[8] Seymour. 1988

[9] Braithwaite. 1989

prohibited the opportunity for "shaming".[10] The concept of "shaming" is fundamental to the New Zealand court diversion system for young offenders which is outlined later in this Chapter.

There are a number of advantages in responding to juvenile offences through court diversion schemes. Generally schemes which divert young offenders from the courts encourage a greater degree of participation by the offender's family. This encourages continued family involvement in preventing further offending by the young person.

Prosecuting young offenders and proceeding formally through the courts places the young person in a position where they risk loss of freedom for either a short period whilst on remand or following a committal for a longer period in a Juvenile Justice Centre.

The Committee heard that institutionalisation, particularly for Aboriginal children, alienates young people further from the society in which they need to learn to survive. Further, offenders in institutions are encouraged into a "criminal" sub-culture and develop knowledge and skills for offending in a more sophisticated manner.[11] The Committee heard that young offenders who were incarcerated were more likely to re-offend and proceed into offending as an adult:

> "young people placed in custody in juvenile institutions have a 90% chance of proceeding to the adult system" [12]

3.2 TYPES OF COURT DIVERSION

In the latter part of the twentieth century, various alternatives to prosecution of young offenders have been introduced in other states throughout Australia and in other parts of the world. As previously discussed, court diversion strategies for young offenders serve to remove juveniles from participating in court processes and possible subsequent detention and loss of liberty. Diversionary practices, including warnings and formal cautions by police officers, are outlined below.

[10] Braithwaite. 1991 p.12

[11] Submission 74. p.15

[12] Submission 48. p.3

3.2.1 Warnings

Police have a discretion to issue warnings to those who, due to their age, the nature of their actions or some other reason, do not warrant any further action. The Commissioner's Instructions to members of the New South Wales Police Service direct that:

> "no formal action is required in relation to trivial offences committed by a child, rather a warning would be issued either on the run or at the police station"[13]

Such warnings have become known as on-the-spot or informal cautions. This form of action is not acknowledged in legislation and whilst records are maintained by individual police officers in their note books, no formal records are kept enabling a statistical analysis of these actions.[14]

3.2.2 Cautioning

The Committee considered that Police Cautioning should be the primary means of court diversion. Cautioning is a formal reprimand given by a police officer, to a young person, who admits guilt to a first and or minor offence. Procedures of charging, bail determinations and court appearances are dispensed with, although a formal record is made which can be produced later in court should the young person re-offend.

The common use of the phrase "informal caution" to describe a warning was perceived to lead to some confusion over the use and value of a formal caution. Throughout this Report the Committee refers to formal Police Cautioning as cautioning. Evidence to the Committee concerning cautioning showed that the process may take about three hours. The process is therefore significantly different to an "on-the-run" warning.

The formal cautioning policy requires an admission of guilt from the young person and the attendance at the police station of the child and a person responsible for the child. Those parties must consent to the cautioning process. As with a warning, there is no statutory right to caution, rather the appropriateness of the action to caution is determined by an authorised police officer. Police instructions specify that a caution should not be administered if it is considered that the child, and the person responsible for the child, agree to the procedure to avoid court proceedings.[15]

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[13] NSW Police Commissioners Instructions. 1991 no. 75.02

[14] Submission 74. p.12

[15] NSW Police Commissioners Instructions. 1991 no. 74.04

In accordance with the Committee's principles to involve the family at all levels of proceedings, the Committee considers that where possible, a Police Caution should be given in the presence of a parent, adult relative or person responsible for the care of the juvenile. In instances where a Police Caution is given other than in the presence of such a person with the care and responsibility for the juvenile, that person should be notified in writing of the fact and details of the caution administered. **The Committee notes and concurs with the recommendations on juvenile cautioning in the Report of the Royal Commission into Aboriginal Deaths in Custody particularly in relation to the presence of a person responsible for the care of a juvenile.**[16]

3.2.2.1 Cautioning Practices

In September 1985, revised police cautioning guidelines became operational in New South Wales. Police were encouraged to consider cautioning juveniles for all but the most serious offences. The Committee heard that the aim of formal cautioning was to make the system work better and in particular to overcome the inappropriateness of all offences proceeding through the children's court.[17] New South Wales had, at the time, a higher rate of committal to detention centres of its juvenile offenders than the national average and a higher percentage of formal interventions resulting in prosecutions. These committal rates remained high in a period where juvenile offences remained stable. Official cautioning provided an alternative response to incidents of juvenile crime.[18]

Some changes have been made to cautioning policy since 1985, including the restriction, in 1987, of cautionable offences to those considered to be summary or offences that can be dealt with summarily under Sections 476 and 501 of the Crimes Act. In 1988 the ability to caution a juvenile for car theft was removed.[19]

Matters which were formally subject to a warning or a caution are now frequently subjected to a charge. The Committee believes that cautioning of juveniles is an effective way to deal with some offences such as offensive language which now may incur a penalty of imprisonment for three months.

Cautioning in New South Wales has always been low compared to other Australian states. Prior to 1985, Police Cautions stood at about 7%, rising in 1986/87 to 25% and falling to 18% in 1987/88 and 10% in 1990.[20] In Queensland statistics show that cautioning rates

[16] Royal Commission into Aboriginal Deaths in Custody. 1991(b) p.184

[17] Ibid

[18] Submission 74. p.10

[19] NSW Police Service. 1991(b) p.26

[20] Ibid

were 70.9% in 1986/87, 70.1% in 1987/88 and 71.9% in 1988/89.[21] Evidence before the Committee indicated that figures for Victoria ranged between 60% to 65%.[22]

Evidence before the Committee showed a lack of consistency in the rate of convictions and cautions between areas within New South Wales with a high rate of cautions not necessarily precluding a high rate of juvenile prosecutions in the same area. In the Western and North-West Region of New South Wales, which the Committee visited, available figures for 1986/87 showed some variation between prosecutions and caution rates. In this period the rate of juvenile convictions for New South Wales was 14.9 per 1,000 of 10-19 year olds. The conviction rates in Bourke, Walgett and Moree, with a high concentration of Aboriginal people were 82, 60.2 and 35.9 respectively.

Over the same period the average rate of cautioning for New South Wales was 5.6 per 1,000 of 10-19 year olds. In Bourke, Walgett and Moree, the rates were about 16.4, 18.2 and 34.8 respectively, significantly higher rates than the state average. Each of the areas concerned had both high prosecution and high cautioning rates.[23]

The Committee noted during its visit to Queensland that police have a discretion to caution a young offender up to three times and in respect of a range of offences.[24] Discussions with relevant people in that state indicated that the use of cautioning is the preferred method of dealing with a young, minor offender and it appears to have the general support of the members of the Queensland Police Service.

3.2.2.2 Effectiveness of Cautioning

In New South Wales, a 1986 survey showed that 70% - 75% of juveniles who were given an official Police Caution did not come under police notice in the following 18 month period. Nevertheless in almost 90% of formal interventions involving young offenders in 1990, police in New South Wales decided to deal with juvenile offenders by sending them on to court. Court outcomes, however do not appear to be the most effective way to deal with juvenile offenders as 79% of juveniles appearing before the court, in 1985-86, did not reappear within the following 18 months.[25]

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[21] Queensland Police Department. 1987-1990
Note: The Committee was advised that the method of gathering statistics is under review.

[22] Evidence 4.2.92

[23] Cunneen. 1988. p.26

[24] Discussion. 4.3.91

[25] NSW Police Service. 1991(b) p.26

More recent figures in 1988 show that Police Cautioning was gaining an 82% success rate. That is, "within a year of being cautioned no more than 18% of those cautioned re-offended."[26] Thus the success rate of court cautioning, under section 33(1)(a) of the Children (Criminal Proceedings) Act 1987, may be less than the police cautioning success rate. Police cautioning can therefore be seen to be an effective tool in preventing repeat offending by juveniles.

Most cautions have been shown to have been given to those with fewer prior formal cautions and Aboriginal children had lower rates of cautions than non-Aboriginals.

Apart from the positive effects for juveniles of cautioning, it has also been shown that cautioning is far less expensive than charging. According to a study, the cost to police in money terms of charging a juvenile is close to $1,000 per instance. Cautioning can be as effective in its outcome as charging and less than half the cost to police and therefore the community.[27]

However, the Committee heard that there is a reluctance for police officers to caution. Some reasons behind this were related to the paper work involved and that they believed that cautions were ineffective. Evidence from a Patrol Commander indicated that the cautioning system has some flaws. He said:

> "I hold a belief that the current cautioning system suffers from some major shortcomings that are clearly obvious ...police are very practical people and tend to see the last possibility first and deal with all matters straight off." and
>
> "the cautioning system as it stands in New South Wales...doesn't do two things. It calls for no commitment from the alleged offender, the person being cautioned. He or she doesn't have to make any effort to improve themselves, not to do the alleged thing that they have been accused of again, or to make any retribution to the people involved. The other aspect is that after the caution is issued...police don't see that as having any positive effect on the young person, having any guidance or assistance or any oversight in ensuring that they don't offend again...It is very ineffectual and police see it as such."[28]

[26] Submission 15. p.8

[27] NSW Police Service. 1991(b) p.26

[28] Evidence 28.1.92 p.17

The Committee acknowledges the view espoused, but considers that cautioning is an effective means of court diversion and that the problems raised can be resolved through specific training on cautioning and its potential benefits. The Committee considers also that police officers would benefit through a tightening, revision and simplification of the cautioning procedures. It was considered that a standard form for cautioning which outlines the steps to be taken and information given to juveniles such as what a caution means, should be distributed to all police stations. In addition the merits, underlying philosophy and measurable effectiveness of cautioning needs to be communicated in a clear and appreciable manner to police officers.

Similarly the Committee supports the police administration in its encouragement of police officers to proceed by way of cautioning rather than having the matter determined by the court.

The Committee recognises the value of cautioning, particularly in relation to Aboriginal young people. The Royal Commission into Aboriginal Deaths in Custody noted that "the process of (a) police caution ... operates to a significant degree in many jurisdictions and has the benefit of keeping a child totally out of the official and recorded process of the criminal justice system." The Commission recommended in relation to this matter that legislation be reviewed to ensure:

> "that police officers do not exercise their powers of arrest in relation to Aboriginal juveniles rather than proceed by way of formal or informal caution or service of an attendance notice or summons unless there are reasonable grounds for believing that such action is necessary."[29]

The Committee supports the views of the Commission and supports amendments to police guidelines. Such amendments would need to indicate that unless an alleged offence is grave or the juvenile is likely to repeat or commit other offences at that time then arrest should not be effected.

Recommendation No. 15:

- **That a Police Caution should be given in the presence of a parent, adult relative or person responsible for the care of the juvenile, where possible.**

- **That in instances where a Police Caution is given other than in the presence of such a person with the care and responsibility for the juvenile, that that person be notified in writing of the fact and details of the caution administered.**

[29] Royal Commission into Aboriginal Deaths in Custody. 1991(b) p.184

Recommendation No. 16:

- **That the Police administration develop a structured policy to assist more police officers to utilise more effectively the option of cautioning.**

Recommendation No. 17:

- **That Police be given revised and simplified procedures for cautioning in order that the process itself does not act as a deterrent to cautioning.**

Recommendation No. 18:

- **That Police be given instruction on the merits and effectiveness of cautioning.**

Recommendation No. 19:

- **That Police be given specific training in respect to the use and philosophy of cautioning.**

Recommendation No. 20:

- **That Police guidelines be amended to indicate that unless an alleged offence is grave or the juvenile is likely to repeat or commit other offences at that time, arrest should not be effected.**

In a number of jurisdictions, court diversion schemes involve a panel system. It is most common that the panels include members of the community and are co-ordinated by agencies other than the police who have the primary role as prosecutor. Juvenile and Screening Panels in South Australia and Family Group Conferences in New Zealand offer alternatives to the court process for young offenders. Also in operation is a Council of Koori community representatives who facilitate a local court diversion program for young offenders who are Aboriginal. Attention is given to describing the operation of these schemes later in this Chapter.

3.3 THE POLICE SERVICE AND ADMINISTERING DIVERSION

In most matters, a young person's first contact with the Juvenile Justice System is through the police.

> "In their interactions with young people, it is the police who have the most influence over a whole series of decisions which will later influence the outcome of the contact with the broader Juvenile Justice System. Such decisions relate to the extent to which youth are targeted, to which types of youth are targeted, to the types of charges which will be laid against individual young people, and to how those young people will be proceeded against."[30]

A submission to the Committee showed that the socio-economic background of the family of a suspected young offender influenced the decision by police on whether or not to caution. Research indicated that those from a "good" background were treated more sympathetically than others.[31] In reference to demonstrated police reluctance to charge "whites" compared to Aborigines in the town studied, a police officer indicated, "you don't like locking up people you know".[32] There is a perception that value judgements by the police about the effectiveness of a caution, impact more on poor, Aboriginal and homeless youth.

Another factor in the determination by police on whether or not to charge was said to relate to the demeanour and reaction of the family at the time. Police action against juveniles was said to often be directed at "punishing" families.[33] That is, unintentionally the action taken may be perceived by the family as a reprimand and result in a defensive, negative response rather than one in which responsibility is accepted. The Committee considered that an effective approach is one in which "shaming" occurs. The "shaming" process requires respect to be engendered in the relationship between the young offender, their family and those involved in communicating disapproval over particular behaviour. In addition the practice of punishing a family was considered to be ineffective in encouraging responsibility for offending behaviour.

Relevant workers in the area, young people and members of the Police Service, in New South Wales and inter-state indicated to the Committee that there is on the one hand a general lack of training in dealing with youth issues that can seriously affect day to day

[30] Submission 33. p.210
[31] Carrington. 1989
[32] Carrington. 1989 p.299
[33] Carrington. 1989 p.301

practice and procedures and the relations between young people and the police and, on the other, a distrust of and antagonism towards the police by many young people.

Evidence before the Committee suggested that younger police were less flexible or tolerant of a range of behaviour and that they tended to arrest for swearing as a first response. It has been suggested to the Committee that greater tolerance may lessen the risk of confrontation and the possibility of a minor incident escalating and resulting in additional offences such as resisting arrest.[34]

An example of the lack of awareness of options available to some members of the police services in dealing with young offenders, is the limited use of the cautioning system as discussed above. In part, the lack of awareness has come about because of the perceived need for harsher treatment and penalties of young offenders as well as a lack of education in this regard. The Committee heard in South Australia from a Police Commander that one of the problems with encouraging police to issue more cautions is that it is perceived as involving more paper work and time than charging.

Another area which points to a problem with the manner in which some police deal with young offenders is in the wide use of charging instead of issuing Court Attendance Notices and Summonses. The Committee has heard that once a person is charged he or she is then subjected to a bail determination, fingerprinting and possibly an identification photograph, which are kept on file unless a specific order is made by a court for their destruction.

Section 8 of the Children (Criminal Proceedings) Act 1987, specifically provides that criminal proceedings should not be commenced against a child other than by way of Summons or attendance notice. Exceptions to this rule include where the matter is a serious indictable offence, or indictable offence under Division 2 of Part 2 of the Drug Misuse and Trafficking Act, 1985. Moreover, if in the opinion of the person by whom proceedings are commenced, there are reasonable grounds to believe that the child will not appear at court or the offence and/or the child is of a violent nature then, that child can be subject to a bail determination.

Clearly in isolated communities, there is generally little need to charge alleged young offenders who are likely to be well known and easily found if necessary. For the majority of young people, arrest is equivalent to a penalty in itself.

The procedure of charging can unnecessarily expose many young people to, rather than divert them from, the criminal justice system. In this way the spirit of the Children (Criminal Proceedings) Act can be undermined.

[34] International Commission of Jurists. 1991 p.35

Recommendation No. 21:

That police officers are given training in the use of Section 8 of the Children (Criminal Proceedings) Act, 1987 and that Section be utilised more effectively in respect of proceedings, unless specifically exempt by the legislation.

3.4 BAIL DECISIONS AND CONDITIONS

As previously indicated, once a person is charged he or she is subject to a bail determination. Bail determinations are initially made by the Police. Should that determination result in a refusal of bail, the charged person must be brought before a court, as soon as practicable, for a re-assessment of the police decision. The Bail Act (NSW) 1978, establishes a presumption of favouring bail for most offences. Criteria applied by police and courts in making bail determinations relate to the likelihood that a person will appear at court, the interests of the person and the protection and welfare of the community. Other relevant factors to bail determinations are the age, gender of the child, and family or community ties. Evidence heard by the Committee suggested that some magistrates used refusal of bail, in relation to children, for behaviour modification rather than the purpose in the Act, to make sure the person appeared.[35]

A number of police, magistrates and Clerks of the Court appear reluctant to grant bail in the absence of parents.[36] The Committee heard that should a child not be living with his or her parents that child can often be refused bail. The Committee does not consider it to be a desirable practice for young people to be remanded in custody and thereby denied their liberty "for their own good".

Conditions placed on bail were considered by the Committee. These included curfews, residing with parents or residing with a particular relative. Evidence relating to conditions imposed by police and courts, particularly in country areas, suggested that they were "frequently elaborate, unenforceable, unreasonable and impossible to comply with".[37] Further, the evidence advised that in some instances young people have been bailed to live with families some hundreds of kilometres from their home. It was suggested that magistrates take on the role of parent at times to restrict the movement and modify the behaviour of young people. The Committee recognised such an approach inhibited the young person or their family taking responsibility and undermined family discipline.

[35] Evidence 6.12.91 p.5
[36] Submission 33. p.156
[37] Submission 33. p.285

Evidence showed that homeless children charged with an offence may also be denied bail due to the lack of a fixed address, unstable lifestyle and a lack of alternatives to remand in custody.[38] Such a situation highlights the importance of practical alternative bail options. The Committee considered that lack of accommodation is not an adequate reason to refuse bail.

Recommendation No. 22:

. **That legislation relating to bail should specifically state that lack of accommodation is not a sufficient reason to refuse bail.**

The Report of the National Inquiry into Homeless Children pointed to the need for the provision, co-ordination and funding of alternatives to custody pending trial, and the need for information on these alternatives to be readily available to police, magistrates, court officers, young people and workers with youth. Bail hostels and other suitable non-custodial community placements were recommended by the Inquiry into Homeless Children.[39] The Committee concurred with the need for alternatives to custody including bail hostels and the provision of information on such alternatives.

Recommendation No. 23:

. **That custody alternatives such as bail hostels and non-custodial community placements be provided for juveniles.**

Recommendation No. 24:

. **That information on custody alternatives be readily available to police, magistrates, court officers, young people and workers with youth.**

Evidence before the Committee showed that Aborigines are over-represented among those refused bail. This was said to be a reflection of the general over-representation by this group in the formal Juvenile Justice System.[40] It was considered that there is a need for bail hostels for Aboriginal youths and that they should be provided in areas as the need demands. The Committee recognises the importance of Aboriginal supervisors and staff within bail hostels. The Committee commends the Office of Juvenile Justice for the provision of the recently opened bail hostel in Redfern specifically for Aboriginal Juveniles.

[38] Human Rights and Equal Opportunity Commission. 1989 p.264

[39] Human Rights and Equal Opportunity Commission. 1989 p.265

[40] Submission 33.

The Committee also took evidence which proposed that, for Aboriginal children, selected Aboriginal families provide bail accommodation.[41] The Committee concurred that such an option was a desirable alternative to custody. It was considered that the Office of Juvenile Justice would need to approve certain families, particularly Aboriginal families and facilitate the process particularly in rural areas.

Recommendation No. 25:

- **That the Office of Juvenile Justice approve families, particularly Aboriginal families, for the provision of bail accommodation.**

The Committee heard of onerous conditions attached to bail, some greater than those imposed on adults. Further evidence before the Committee indicated that bail conditions were often unrelated to the circumstances of a person's offence, or likelihood of re-offending. Such conditions were said to "set children up to fail" by making it very difficult to comply with the conditions imposed. In addition, the Committee heard that there is often a discrepancy between bail determinations given to Aboriginal young offenders and non-Aboriginal young offenders.[42]

An example of a bail determination difficult for an Aboriginal family to meet was heard. It concerned a person acting as surety to be able to provide evidence that they can raise $200. The comment was made that "of course, in most cases, those people don't have bank accounts with $200 in them...(and further)... half our mob (are) lucky to have a shirt on their back, let alone put up a house." The Committee was advised that self surety bail or a member of the family going surety without any amounts of cash involved would be more practical conditions that could be applied.[43] The Committee considers that the imposition of onerous monetary bail conditions should, where possible, be discontinued.

Recommendation No. 26:

- **That training be provided to magistrates and police officers in relation to the nature and type of bail conditions with which a young person could reasonably be able to comply.**

[41] Evidence 4.2.92

[42] Evidence 6.12.91 p.2

[43] Evidence 6.12.91 p.3

Recommendation No. 27:

. **That the imposition of onerous monetary bail conditions should, where possible, be discontinued.**

3.5 SUMMARY OFFENCES ACT

The Committee has heard that many charges, such as offensive language, as provided in the Summary Offences Act 1988, are preferred against young people, particularly Aboriginal young people. Section 8 of the Bail Act 1978, provides for the release on bail where charges are laid under the Summary Offences Act or on other minor offences. The Committee has heard that whilst offences such as "assault police" and "resist arrest" do not arise under the Summary Offences Act they may commonly follow from an arrest on an offensive language charge.

The Committee considered the applicability of the Summary Offences Act 1988, to juveniles at length. Whilst it does not condone offensive language it considers that within the community in general, language deemed offensive was frequently part of the vernacular. To charge a juvenile for offensive language was considered by the Committee to blame the young person for an activity he or she may not recognise as a criminal offence.

In deliberating on this issue, the Committee was clear to distinguish offensive language from offensive behaviour. Instances where young people were behaving provocatively and using offensive language were identified as offensive behaviour and distinguished from instances where young people used offensive language as part of the vernacular.

It was considered that the incidence of young Aboriginals arrested for offensive language was compounded by the history of relations between the Aboriginal and non-Aboriginal community in New South Wales. The police who predominantly present a "white face" and represent "white authority" tend to become the focus in resistance to white culture and authority. This was particularly evident to the Committee on its visit to western New South Wales. In some rural areas, the Committee saw significant evidence of division and antagonism within the community. So much so, that in evidence to the Committee, Aborigines were referred to as "them" and the (white) community as the community.

Evidence by an Aboriginal person in relation to local police radio broadcasts, advised:

> "Constantly it's "them" and we know who "them" is in the town, "them" is Aboriginal people ... it's always "them" ... (and further) ... I think people

> "Constantly it's "them" and we know who "them" is in the town, "them" is Aboriginal people ... it's always "them" ... (and further) ... I think people should not look at (a juvenile) as an Aboriginal person, they should look at them as a human being."[44]

The Committee considers that the penalty for offensive language by juveniles should be reduced to a Police Caution in the first instance and a referral to a Children's Panel for any further offences of that nature. In line with the Committee's stated principles of court diversion on other offences, it considers that summary offences relating to juveniles should not be dealt with through the court system. The Committee considers that bail for juveniles on an offensive language charge should never be refused.

Recommendation No. 28:

- **That the New South Wales Attorney General's Department review the applicability of the Summary Offences Act to juveniles with a view to examining the penalties for offensive language by juveniles.**

- **That, following the review, the New South Wales Attorney General's Department develop guidelines relating to the enforcement of the legislation.**

- **That the maximum penalty for offensive language by juveniles, be a formal Police Caution.**

Recommendation No. 29:

- **That bail for juveniles on an offensive language charge should not be refused, during the review of the Summary Offences Act.**

In regard to these recommendations, the Committee considers that the training of police will be particularly important in achieving due regard to appropriate bail determinations and dealing with offensive behaviour of juveniles, particularly young Aboriginal people.

See also Dissenting Opinion.

[44] Evidence 5.2.92

3.6 JUVENILES AND SPECIALIST POLICE

In Queensland, South Australia and the Australian Capital Territory there are separate arms of the police services that deal with juvenile issues only. In Queensland for example, the Juvenile Aid Bureau has been operating for about ten years now and deals exclusively with child abuse and juvenile offending matters.

Any police officer wishing to join the Juvenile Aid Bureau must apply, and if successful, undertake a training course after which he or she is then supervised in his or her duties by a more experienced officer. The Juvenile Aid Bureau functions as a separate part of the Queensland Police Service and officers can gain promotions and salary increases within the Bureau itself.

Similar systems apply in South Australia and the Australian Capital Territory. Police officers with whom Committee members and staff spoke in those jurisdictions agreed that having a separate Juvenile Bureau was a more effective way of dealing with young people. It was pointed out that those officers in the Juvenile section, particularly in the Australian Capital Territory, were able through their beat patrols to get to know and gain the trust and respect of the young people in their areas. It was felt that it allowed on the one hand, officers to gain an understanding of many of the problems and issues facing young people and on the other, young people to gain an understanding of the work the police officers must undertake.

3.6.1 New Zealand Police

The nature of the specialist police force in New Zealand is outlined in the following paragraphs. The overall system of juvenile justice currently operating in New Zealand is described later in this Chapter.

The police play a crucial role in court diversion in New Zealand. The Police Service has developed a special section called the Youth Aid Section staffed with police skilled in youth related matters. In less serious offences, the police may deal with a young person, without effecting an arrest. Should an arrest take place the process is similar to that of New South Wales, and most common law jurisdictions. That is, the suspect is usually charged, subject to a bail determination, fingerprinted and photographed.

The New Zealand Children, Young Persons and their Families Act 1989, specifies the criteria by which Police may issue a warning rather arrest. Factors considered include the seriousness of the offence, whether there is a victim and the probability of rehabilitation through the family. Checks and balances to an officer's decision lie in the scrutiny by senior officers in a police station who review decisions of officers within a specialist Youth Aid Section of the Police.

A study of the New Zealand system noted that non-arrest cases include:

> ". cases where the police simply issue a warning and take the matter no further;
>
> . cases where, after investigation by the Police's Youth Aid Section, a written formal warning is issued;
>
> . cases diverted by the police after, for example, an apology, reparation, or other actions that expiate the offence;
>
> . cases where there is a referral to the Youth Justice Coordinator in the Department ... to arrange a formal Family Group Conference."[45] [46]

Available statistics show that for the period 1 November 1989 to 30 April 1990, 79% of juveniles brought to the notice of the police for non-arrest matters, were dealt with by the Police.[47]

Arrest cases normally involve indictable offences and unlike the examples noted above for dealing with a young offender, require a court appearance. Statistics reveal that during the period 1 November 1990 to 30 June 1991, 961 juveniles were arrested, which represents 6% of all juvenile offenders.[48]

3.6.2 New South Wales Police

In an attempt to redress the widening problem between young people and the police, and also the dissatisfaction among members of the community with responses to juvenile crime, the General Duties Youth Officer program was introduced in the Police Service in 1988. The program replaced the Police In Schools Program. The program objectives are to:

> ". analyse what creates police work with young people in Patrols and recommend and implement strategies to reduce the work,

[45] Maxwell. 1990 p.17

[46] The role of Family Group Conferences is outlined later in this Chapter.

[47] Maxwell. 1990 p.17

[48] Maxwell. 1990 p.15

- advocate on young people's issues in the patrol, and

- liaise with schools and other community agencies in the patrol to develop a multi-agency approach to crime prevention."[49]

In particular, the duties of a General Duties Youth Officer are determined in consultation with his or her Patrol Commander and the local community. Such duties generally include maintaining contact with young people on the streets and in youth clubs and liaising between youth agencies, the police and young people.

Training to assist an officer in performing the work involved in being a General Duties Youth Officer, is initially a four day residential workshop with ongoing training scheduled for approximately every six months. Following the establishment of the Program, organisation of training has become the responsibility of individual Patrol Commanders.

The Committee recognises the need for adequate and appropriate training for police, particularly in relation to young people. At this point in the Report, the Committee states that training in relation to working with young people, the socio-economic and cultural factors likely to contribute to youth offending and the importance of their role in court diversion should be part of any police training program. In acknowledgment of the specific needs of young people and skills required by police, the Committee has outlined in Chapter Five its recommendations concerning an intensive and specialist training program for police.

The Committee endorses the recognition of the particular needs of youth in creating specialist positions in the police service to work with young people. Following consideration of the nature and extent of interface between the police, the community and young offenders, the Committee determined that the role of Police Youth Officers would need to include the provision of specialist advice on youth issues within each patrol area. In recognition of the need for specialist rather than generalist police to work with juveniles, the Committee considers that a position of Police Youth Officer should be developed from the existing General Duties Youth Officer positions.

Appointees to positions of Police Youth Officer should be selected in relation to specific criteria. Such criteria would include the officer's interest and knowledge in youth. The position would also require:

- ability to demonstrate effective and sensitive contact with people from diverse cultural backgrounds, especially Aboriginal,

[49] Submission 30.

- ability to promote co-operation between individuals, groups and organisations providing services to young people and their families,

- ability to facilitate culturally relevant decision making processes, and

- competence and flexibility in working with children, young persons and their families.

Recommendation No. 30:

- **That the position of Police Youth Officer be developed within the New South Wales Police Service.**

Patrol Commanders within the New South Wales Police Service, have been encouraged to select one or more officers within their patrol to hold the position of General Duties Youth Officer. Information received by the Committee indicated that a General Duties Youth Officer has been appointed within 100 of the 170 patrols across New South Wales. The Committee considers that at least one position of Youth Officer should be a requirement for each patrol area. In some patrol areas where there has been a history of juvenile offending or which currently has a high proportion of young offenders compared to other patrol areas, the Committee determined that more than one position of Police Youth Officer would be necessary.

Recommendation No. 31:

- **That at least one position of Police Youth Officer be a requirement for each police patrol area. The number of such officers would be related to the population, proportion of young offenders and the history of juvenile offending in a particular area.**

The Committee considers that Police Youth Officers would require some autonomy in terms of the day to day activities within their patrol area and in relation to policy and its application. It was determined that an appropriate means to achieve the Committee's option would involve the development of an administrative unit within the Head Office of the New South Wales Police Service. Such a Unit would require direct administrative access to the Police Commissioner and would be responsible for the coordination and development of policies and programs relating to the policing of young people. Determining the nature of training and development required in relation to juveniles, for

all police officers, should also be undertaken by that Unit. In addition, the Unit will also need to ensure the monitoring and evaluation of procedures and practices relating to juveniles throughout the state.

It was also recognised by the Committee that a career structure would need to be developed for Police Youth Officers. The Committee considers that Police Service would need to give consideration to the development and establishment of a separate career structure for Police Youth Officers. In developing a separate career structure, the Committee considers that a creative approach could enable officers to move between career streams, particularly within lower ranks. At all times, the Committee considers that the integrity of the positions of Police Youth Officers should be maintained through recognition of the skills and abilities required for these specialised positions and creative management to ensure the officers become an integral part of policing within New South Wales.

Recommendation No. 32:

- **That a specialist police policy unit be established within the Head Office of the New South Wales Police Service with responsibility:**
  - **to oversight the work of Police Youth Officers in relation to practices and procedures for the policing of young people,**
  - **for the co-ordination and development of policies and programs relating to the policing of young people,**
  - **to determine the nature of training and development required for all police officers in relation to policing young people, and**
  - **to monitor and evaluate procedures and practices relating to policing juveniles throughout the state.**

Recommendation No. 33:

- **That the New South Wales Police Service develop and establish a separate career structure for Police Youth Officers which:**
  - **recognises the skills and abilities required,**
  - **would enable officers to move between career streams,**

- **maintain the integrity of the position, and**

- **ensure the positions become an integral part of a policing career within New South Wales.**

In other jurisdictions, the Committee witnessed that the status of specialist youth police officers was an important factor in effective policing. In acknowledgment of the usefulness of recognition of the specific skills required, the Committee supports the view that Police Youth Officers should be appointed to the rank of at least Senior Constable.

Recommendation No. 34:

- **That Police Youth Officers be appointed to the rank of at least Senior Constable.**

3.7 COURT DIVERSION SCHEMES IN OTHER JURISDICTIONS

3.7.1 South Australia

Since 1972, South Australia has implemented a system of diversion in the form of Children's Aid Panels. Modifications were made in 1979 with the introduction of the Children's Protection and Young Offenders Act, to enable the panel system to deal with any youth irrespective of age or method of apprehension and to facilitate the filtering of cases through Screening Panels.

The Screening Panels have sole responsibility for determining which cases are referred to the Children's Court, which to Children's Aid Panels and which cases require no further action. In some instances the Screening Panel may determine that a formal Police Caution be administered.

Children's Aid Panels are non-judicial bodies established in 1972 and primarily designed to channel first offenders or those charged with relatively minor offences away from formal processing through the Children's Court. Each Children's Aid Panel consists of a police officer and a representative of the Department for Family and Community Services, which is responsible for juvenile justice in South Australia.

A juvenile must admit the allegation against them prior to consideration before a Children's Aid Panel but not before attending a Screening Panel. Each Screening Panel consists of a police officer and a social worker who decide what action should be taken.

Should there be unresolvable disagreement between the two, there is legislative provision for that specific case to be referred for adjudication by a magistrate or judge. The "gatekeeping" role to the court system in South Australia is therefore shared between the Police Department and the Department for Family and Community Services.

Comments concerning the Screening Panels have been both positive and negative. On one hand the Screening Panels have been criticised:

> "Screening Panels are not independent of police influence (and this) has been criticised on the grounds that this is in breach of the natural justice principle of *nemo index in causa sua* (no one should judge in his own case). It is not unusual, especially in small rural communities, for a police officer to both apprehend and then screen the same youth."[50]

However, some commentators have stressed the positive aspects of the panel's composition. In particular, the presence of a representative of the Department for Family and Community Services has been said to be useful in enabling a social work perspective to the decision making process.

The Screening Panel does not allow for legal representation or public observation. Guidelines by which the Screening Panels operated stipulate that allegations of rape, arson, serious offences against the person or property and serious offences against good order should be referred to the Children's Courts as well as cases where a child has had at least two prior appearances before a Children's Aid Panel.

Information before the Committee also showed that a disproportionate number of Aboriginal youths have been directed to the Children's Court from Screening Panels. The research indicated that the clear difference in the outcomes for Aborigines related to the method of apprehension rather than racial bias in the process of the panels. Offences which Aboriginal people were more likely to have committed such as street offences of disorderly and offensive behaviour attracted a high court appearance rate compared to cases involving shoplifting of which no cases in the study proceed to court. Further appearances before the panel brought about by way of arrest had a high probability of being referred to the Children's Court compared to appearances based on a police report which were far less likely to be so directed.

[50] Gale. 1989 p.4

3.7.2 Australian Capital Territory

In the Australian Capital Territory cautioning is used comparatively frequently. However where a young person is charged with a criminal offence, the matter must be referred to the legal branch of the Police Department which then determines what further action should be taken, such as no action, the administration of a caution or referral to court.

Where the determination is that the matter proceed to court, the matter must then go to the Director of Public Prosecutions who after considering a number of factors, such as the nature of the offence, the age of the young offender, the background of the young person and the public interest, makes the final determination as to whether court proceedings should be instituted. The aim of this procedure is to try to divert young offenders from the court system as much as possible.

3.7.3 The New Zealand Juvenile Justice System

3.7.3.1 Outline of the New Zealand Legislation

One of the most innovative court diversion schemes currently in place is that operating in New Zealand. The system is based on a number of principles contained in the New Zealand, Children, Young Persons and Their Families Act, 1989, including the principle that diversion be promoted by the encouragement of the use of informal methods for dealing with young offenders and minimising the imposition of coercive formal sanctions.

Diversion is enhanced at all levels of the New Zealand juvenile justice process. Such diversion has resulted in less than 10% of all interventions now entering the Youth Court.

Features of the system include:

- dispensing with, for a large proportion of cases, the formal court structure,
- considering the needs of victims in the reparation of wrongs,
- increasing the participation of families in juvenile offending matters, and
- increasing the accountability of the offender.

The New Zealand system acts to empower families to take responsibility for offending by their children, increase family responsibility and significantly reduce the number of young people in the criminal justice system including detention centres. The most significant feature is the enhancement of community based responses to young offenders through

what are known as Family Group Conferences. This system embodies the notion of "shaming" in which disapproval is extended to an alleged offender whilst respect for them is sustained. Fundamental to the operation of the legislation is appropriate funding to enact the agreed outcomes of Family Group Conferences.

The Children, Young Persons and Their Families Act, emphasises diversion, accountability, protection of young people's rights, the involvement of families, offenders and victims in the determinations, a responsiveness to indigenous cultural traditions and the use of informal methods and minimum judicial intervention when dealing with young offenders.

Included in the legislation is the provision that a police officer must consider whether it is appropriate to warn, i.e. caution, a child or young person for an offence. A warning is to be considered, "unless it is clearly inappropriate because of either the seriousness of the offence or the nature and number of previous offences committed by that child or young person."[51] There is no similar provision in the New South Wales legislation.

The Children, Young Persons and Their Families Act was developed by the New Zealand Department of Social Welfare which has the responsibility for its administration and provides for the Youth Justice Co-ordinator who facilitates the meetings and determinations, or outcomes, of a Family Group Conference. Further, the Department "acts as a brake on precipitate action by police and other charging agencies."[52]

The police play a crucial role in the operation of the legislation, particularly in relation to its diversion objects. In less serious offences, the police may deal with a young person, without effecting an arrest. The New Zealand Act, as previously outlined, specifies the criteria by which police may issue a warning rather than an arrest.

Arrest cases normally involve the more serious offences and unlike the non-arrest cases, require a court appearance. The 1989 legislation has brought about a decrease in the number and proportion of juveniles arrested with 961 or 6% of juveniles arrested in the period 1 November 1990 to 30 June 1991.[53]

[51] New Zealand Police. 1989 p.61
[52] NSW Police Service. 1990 p.26
[53] NSW Police Service. 1990 p.15

3.7.3.2 Family Group Conferences

Family Group Conferences were set up under the Act as a means of bringing together all parties relevant to the commission of an offence and to discuss the most appropriate determination or outcome concerning the juvenile offender. The Family Group Conferences are convened by a Youth Justice Coordinator following a referral from the Police or the Youth Court. Every offence including rape, vicious assault and repetitive robbery but not murder and manslaughter is dealt with through a Family Group Conference.

Normally present at a Conference are the Youth Justice Coordinator, the victim (should he or she be willing to discuss the outcome of the matter), any support people the young offender may wish to bring, the offender, the offender's family group, the Youth Advocate and a Youth Aid Police officer.

Generally, the Conference forces the young offender to focus on the consequences of his or her actions and then to confront the feelings of his or her victim, the victim's family and his or her own family. The Conference then looks towards what action might be taken by the offender to make amends for his or her actions. Options include a warning, an apology, community work, financial compensation, education, training and work plans.

It was observed that offending mostly occurs in a familial, economic, social or environmental context that has an impact on the child or young person. One of the areas of emphasis of the Act is the provision which enables families to face their contribution to the offending behaviour, and funds are available to provide relevant support to both the family and the young person to prevent offending in the future.

Agreement on the proposed outcome of a Family Group Conference must be made between the victim, the family, the Youth Justice Co-ordinator and the police representative from the Youth Aid Section. In the period April-June 1990, most Family Group Conferences were agreed upon. Disagreements have been relatively rare with 7% nationally in the same period.[54]

In a Family Group Conference every effort is made to devise an outcome which is related to the offence. Custodial sentences are not common now. Secure accommodation in New Zealand before the Children, Young, Persons and Their Families Act was more than 200 beds. When the Committee delegation visited New Zealand in November 1991, secure accommodation was held at 50 beds for the whole of New Zealand. However, the

[54] Maxwell. 1990 p.1

penalties currently put into place by the family may be more severe or restrictive than former non custodial penalties.

3.7.3.3 Custody of Juvenile Offenders

With a focus on community work, supervised activities and a move away from detention centres or custody places, the Department of Social Welfare has closed many of its former detention centres. Following apprehension, juveniles are usually released within 24 hours into community custody placements.

In Auckland, for example, the Department of Social Welfare only provides one institution for housing juveniles and has closed 25 other places. Of the 40 beds available, only 5 were for custody with the rest reserved for care and protection placements. In some instances, the lack of custodial facilities has resulted in, some judges remanding juveniles to police custody and thus to police cells. The Committee delegation was advised that detention of juveniles in police cells is not a common occurrence and in New Zealand, as in New South Wales, it is not considered appropriate. It was recognised by the Department of Social Welfare and the Committee delegation that there remains a need for secure holding places other than police cells.

The Committee heard that the cost to keep a juvenile in secure custody in New Zealand was $10,000 for three months. Depending on the number of beds, the Department of Social Welfare indicated that the cost of secure custody may amount to $120,000 per year. This cost is high compared to the cost of supervised activity given as an order of the Youth Court.

Family Group Conferences convened other than by the Youth Court were said to have an average cost of $750. This figure has been reached after including numerous conferences for which the cost outcome was zero to some which ranged in costs up to $7,000. The sub-Committee was advised that the cost to the community of sentencing outcomes in New Zealand has fallen through the implementation of the 1989 legislation.[55]

3.7.3.4 Dysfunctional families and homeless young people

Where there is a dysfunctional family or an immigrant family with cultural or language problems and where there are few family members, the Committee delegation heard that the Department of Social Welfare may bring additional people to a Family Group Conference with a view to reconstruct an extended family. Additional people who may be included are likely to be community representatives.

[55] Discussion. 8.11.91

Should there be difficulties resolving a Family Group Conference, the Youth Justice Co-ordinator can decide to ask for the case to go back to the Court. A Family Group Conference may have to reconvene on a number of occasions should there be insufficient family members in attendance. This may occur when a juvenile is new to an area, is a migrant or a member of a dysfunctional family. Evidence showed that a conference may be reconvened up to five times. The Committee delegation was advised that Conferences could take approximately three hours each. In a few instances, some Conferences reconvened for a number of sessions.

3.7.3.5 Victims and Attendance

A feature of the New Zealand system includes consideration of the needs of victims in the reparation of wrongs. The legislation provides that Family Group Conferences are held at the victim's convenience. Victims are encouraged to attend Family Group Conferences where they able to express their anger and also participate in reaching a satisfactory outcome for all the parties concerned.

In practice, the Committee delegation was advised that the victim was often given short notice of the conference and less than 50% of victims attended conferences. No provision is made for the victim to bring anyone with them as support to the Family Group Conference. On occasions, Family Group Conferences have been held in the home of the offender which was considered, particularly where a large number of the offender's family was in attendance, to be oppressive.

The Principal Judge of the Youth Court, Judge Brown, considers that the involvement of the victim in the operation of a Family Group Conference is similar to the traditional Polynesian way of dealing with wrongs and assisting in the repair of the emotional damage incurred by the victim. Judge Brown considers that the need of the victim to express emotion and indicate to the offender and the offender's family how they feel and the need to receive reparation is an essential element of the process.

The Committee delegation heard that victim support groups have developed. It was important to inform the public on victims' rights and the Committee was told that officers needed to be trained how to explain to victims their rights within the conference proceedings and the Juvenile Justice System.

3.7.3.6 Agencies providing Services

Underlying the success of the legislation is a recognition of the need for effective communication and co-operation between the government and non-government sectors in relation to service provision, program funding and performance contracts.

The non-government sector in New Zealand receives some $1.3 million to provide services such as accommodation and to conduct programs for abused and out of control juveniles.

3.7.3.7 Committee Observations Concerning the Implementation of the New Zealand Children, Young Persons and Their Families Act.

Following the sub-Committees visit to New Zealand and the Committee's examination of the legislation and how it is operating in New Zealand, the following observations were made:

- The Act was considered to be effective, particularly in shaming the young offender and because the young offender has to confront the victim.

- The legislation has not been in place long enough for a reliable evaluation of its effectiveness in terms of recidivism, community acceptance and involvement, family responsibility and cost to the community and government. Departmental reviews and restructuring have affected the evaluation process.

- Commitment to the legislation by members of the police force and other workers involved in its implementation was high.

- It appeared that there had not been sufficient time between when the Act had been passed and when it had come into operation for the necessary administrative practices and systems to be established.

- Systems such as review and monitoring were not yet adequate, a database through which cases and juveniles can be monitored was not yet operational.

- Training, whilst recognised to be important, had been neglected. Key officials, such as Youth Aid Officers and Youth Justice Co-ordinators, indicated they benefit through joint training and meetings. A co-ordinated approach to training by the Police Department and the Department of Social Welfare would assist in developing a joint approach to policies and practices, an appreciation of the issues concerning each administrative area and better use of each Department's services.

The Committee delegation heard that the New Zealand system had difficulties adequately managing repeat offenders.[56] If a Family Group Conference was not effective in preventing re-offending, no further penalty was possible, beyond repeated Family Group Conferences, provided offences stopped short of major crimes.

The New Zealand legislation embodies a number of the principles that the Committee affirms should be part of a Juvenile Justice System for New South Wales. There are a number of aspects of the New Zealand system, however, which limit its direct applicability for transfer to New South Wales. These aspects include the nature of population centres in New Zealand in relation to their size, population spread, social relationships and sense of community.

One of the major barriers to applying the New Zealand approach within New South Wales lies in the historical and societal differences between the Maori population in New Zealand and the Aboriginal population in New South Wales. In New Zealand, Maori culture remains cohesive because it has been recognised as an integrated culture since the onset of white settlement.

Written into the Children, Young Persons and Their Families Act 1989, are the Maori words "whanau", "hapu" and "iwi" which recognise and give legitimacy to Maori kinship groups and authorities.[57] The New Zealand legislation was developed and embodies the particular needs within the Maoris' cohesive and recognised culture. This is different from the Aboriginal family networks which have become fragmented due to the historical separation of children from their families. There is, too, the further difference of Aboriginal language and cultural diversity. Assumptions about a homogeneous Aboriginal society, equated with the Maori model, would then be inaccurate and simplistic. As described to the Committee by an Aboriginal Juvenile Justice Officer:

> "The main reason that the N.Z. system would not work with the Koori community is the large proportion of families that are dysfunctional because of generations of dislocation. The N.Z. system is alright for first offenders or minor offenders, it does not cater (for) repeat offenders as most of our kids are. Many of the (Koori) kids come from families who are not able to compensate the victim, financially. All groups are different."[58]

[56] Evidence 8.11.91 and 6.12.91

[57] Whanau is described as an extended family. Hapu is a clan or section of tribe. The term Iwi refers to a tribe or nation. Concise Maori Dictionary. 1984, pp. 7, 13, 74

[58] Evidence 6.12.91

3.8 CHILDREN'S PANEL: A COURT DIVERSION SCHEME FOR NEW SOUTH WALES

Introduction

The Committee considers that a Police Caution should be the first response to first or minor offenders. However, in order to divert young people from the court system the Committee considers that a panel scheme operating at a pre-court stage should be established throughout New South Wales. It was considered that such a panel would complement rather than usurp the role of police cautioning. As a starting point, the Committee has drawn on aspects of the New South Wales Community Aid Panel which is outlined in the Chapter Four of this Report and the New Zealand Family Group Conference model, outlined earlier in this Chapter.

The principles the Committee affirmed in the first chapter of this report include, that:

- diversion be the first response to minor offences,
- families should participate in decisions affecting young offenders, and
- the interests of victims of offences should be accounted for in measures taken to deal with the offending.

These principles underlie the Committee's decision to recommend that a court diversion panel scheme be introduced within New South Wales. The Committee considers that a pre-court scheme should be developed in accordance with the points outlined in this Chapter of the Report.

The Committee named the proposed pre-court scheme, Children's Panel. It is intended that young people under the age of eighteen years of age may be involved in the scheme. The Committee determined to use the word "children" with the view to being consistent with other areas of the justice system which involve juveniles. The Committee notes that all legislation relating to young offenders in New South Wales refers to them as children and the forum dealing with young offenders is the Children's Court.

Recommendation No. 35:

- **That a pre-court diversion panel scheme, a Children's Panel, be introduced within New South Wales in the form outlined in Chapter Three of this Report.**

Recommendation No. 36:

- That the Children's Panel be implemented initially as a pilot pre-court diversion scheme in six police patrol areas throughout New South Wales.

Recommendation No. 37:

- That the six areas in which the Children's Panels are piloted be in both city and country areas, including areas with high populations of young people from Aboriginal backgrounds or non-English speaking backgrounds.

Recommendation No. 38:

- That the areas in which the pre-court scheme, Children's Panel, is piloted preferably have no Community Aid Panels in operation.

Recommendation No. 39:

- That the scheme of Children's Panels be evaluated after a start up period of six months, followed by an operational period of eighteen months.

Recommendation No. 40:

- That the evaluation of the operation of the Children's Panel scheme be undertaken by an independent body such as the Australian Institute of Criminology or a specialist contracted for that purpose.

Recommendation No. 41:

- That following the evaluation of the operation of Children's Panels, legislation be developed and necessary adjustments made to Children's Panels prior to their adoption throughout the state.

See also Dissenting Report.

A description of the composition, nature and other relevant operational aspects of the Children's Panel proposed by the Standing Committee on Social Issues is outlined below. The Committee considers that the Children's Panel should be used to enhance the court diversion of young offenders and not be an alternative to police cautioning.

Should guilt be denied, the juvenile would proceed through the court process. After an admission of guilt the police would proceed with either a warning or a formal Police Caution of the young person.

Following appropriate Police Cautioning, a juvenile may be referred by the police to the Children's Panel scheme for attention. Offenders who commit offences of a certain serious nature, such as murder, manslaughter, sexual assault, arson, vicious assault, and repetitive robbery, however, should be subject to a charge. Similarly, serious recidivists should be processed through the courts.

The Committee considers that the role of the police in diversion is a crucial one. In particular, police officers would need to be trained in the nature of the Children's Panels, the options available for young people and matters relating to the plea. The Committee determined that a checklist should be developed for police officers to assist them to deliver the appropriate advice.

Recommendation No. 42:

- **That Police Officers be trained in the nature of Children's Panels, the options available for young people and matters relating to the plea.**

Recommendation No. 43:

- **That a checklist be developed for Police Officers which will ensure that the appropriate and consistent advice on the nature and operation of the Children's Panel scheme is given to young people who are apprehended.**

The Committee considered that Children's Panels should be co-ordinated by a representative of the Office of Juvenile Justice. Initially, the Children's Panel Co-ordinator would determine the appropriate direction in which to proceed. The Co-ordinator would have the discretion to discharge the young person subject to a formal Police Caution. Bearing in mind the guidelines in this Chapter, the Co-ordinator may convene a panel of relevant people to resolve each particular case.

It is intended that the Children's Panel will not be an adjudicating body handing down a punishment or correction to a young person but rather that its outcomes will be determined through agreement between those participating in each panel.

Nothing in the proposal for a Children's Panel should be interpreted as pre-empting the rights, opportunities and obligations of police to issue cautions, formal or informal where relevant and appropriate.

3.8.1 Composition of the Children's Panel

The Children's Panel shall comprise a range of people including a:

- Juvenile Justice Officer (co-ordinator)
- member of the Police service or police community liaison officer
- community representative.

Consideration was given by the Committee to a lawyer participating in the Children's Panel. The Committee was divided on this matter. It was considered that a lawyer may need to be involved in the process to ensure the outcomes were fair. However, it was also considered that due to the nature of the resolution process, a lawyer would be inappropriate on a Children's Panel. Therefore the Committee determined that for the duration of the pilot scheme, Children's Panels would not formally include a lawyer. Should the evaluation of the scheme determine that a lawyer be necessary, the Committee considers that a lawyer may then be included on a Children's Panel.

Prior to the participation by a young person in a Children's Panel, the Committee considered that the young person should be advised in relation to the process. It was considered that the advice should be undertaken by a lawyer or youth advocate and should involve the process, possible outcomes and relationship of the Children's Panel to the court process.

The Committee determined that a legal officer or solicitor should be attached to each Panel on a part-time or full-time basis as required. The legal officer or solicitor may attend a Children's Panel to oversight the proceedings and as a resource to call upon if necessary but would generally not participate in the conciliation process. For the duration of the pilot scheme the Committee considers that consideration should be given to arranging, for a designated period of time, lawyers from the Law Society or those with practicing certificates currently working in government departments, to be attached to a panel.

The Committee determined that a number of people may be present and participate in achieving an agreed outcome from the Children's Panel. These people would include the young offender, his or her family and the victim and his or her support person. In this instance "the family" may be defined as immediate members of the family such as mother, father, sister, brother or more extended family members as appropriate for the young person.

In order that where appropriate, the interests of the victim of an offence, are addressed, the Committee considers that the victim should be encouraged to attend and participate in the proceedings of the Children's Panel. The Committee is mindful that a large number of people participating in the Children's Panel could make decision making difficult. However, it was considered appropriate for the victim to bring supportive persons to the Children's Panel.

Recommendation No. 44:

- **That Children's Panels include a:**
  - **Juvenile Justice Officer (co-ordinator) and**
  - **member of the Police Service or a Police Community Liaison Officer and**
  - **community representative.**

Recommendation No. 45:

- **That the following people must attend a Children's Panel:**
  - **the offender and**
  - **representatives of the offender's family, however that may be defined.**

Recommendation No. 46:

- **That the victim and support persons, as requested, be encouraged to attend the relevant Children's Panel.**

3.8.2 Operation of Children's Panels

The Children's Panels should operate under specific and clear guidelines, in the pilot stage of their introduction. It is considered appropriate for the Office of Juvenile Justice to draft appropriate guidelines for operation of the Children's Panels. The guidelines will lay the foundation for later legislation.

Fundamental to the success of the Children's Panels is information and training. Participants in Children's Panels, particularly the Co-ordinator, should be trained in aspects such as mediation, sentencing options and the services available for juveniles and young offenders. Written information should also be provided for the young offender, the victim and members of the families involved.

Before a young person is referred to a panel he/she must be made completely aware of what this will entail. Information which must be conveyed includes that participation in the Children's Panel scheme will require an admission of guilt or a plea of "offence not denied" and that once the plea is given attendance in the scheme or at court is compulsory. Police training is an important issue in relation to informing a young person on the availability of legal advice prior to a referral to a Children's Panel.

The outcomes of the Children's Panel should be determined between participants of the Panel following discussion with the offender and in consultation with the offender's family or supporters and where involved, the victim. It is not intended that the Children's Panel operate as an adjudicating body rather the outcomes should be determined through agreement between those participating in each panel. The Committee considers that the Children's Panel, in relation to the offence, would facilitate reparation, the process of making amends. It is essential that there is consistency in the nature of Children's Panel outcomes throughout the state and that agreed outcomes are reasonable and fair. Children's Panels should be covered in terms of liability.

Reparations may take the form of the following:

- a verbal apology to the victim,
- a written apology to the victim, and
- participation in a relevant program.

The Committee considers that the nature of the offence will be relevant in determining the outcome of a Children's Panel. For example, it may be appropriate that agreement is reached for the young person to participate, where relevant, in a drug and alcohol program for a specified period of time or that the young person assist in repairing a window that she or he may have broken. The process of reparation within Children's Panels will need to be flexible, particularly to produce outcomes related to the offence.

The Committee in recognising that Community Service work is one of the most serious sentencing options a court may impose, does not propose that the Panel issue "defacto" Community Service Orders.

Where appropriate, referrals to counselling services may be made. This should be decided in consultation with the members of the panel, the offender, the offender's family and if appropriate, the victim. Cautioning may be one of the available options of the Children's Panels.

Magistrates would have a discretion to refer matters to a Children's Panel. Such a situation may arise where, for instance, a young person's legal counsel makes submission to a magistrate that the particular case is one which should have been appropriately dealt with by the Children's Panel. This can be done without entering any formal plea.

Recommendation No. 47:

- **That magistrates be given a discretion to refer a young offender, where appropriate, back to a Children's Panel. Such a procedure should be done in a magistrate's chambers on the submissions of the young person's legal counsel, thereby dispensing with the formalities of court.**

3.8.3 Consideration for Special Groups

The Committee determined that a Children's Panel would be most effective when members reflect the community and have a connection with the background to the young offender. In practice this reflection would be evidenced in the sex, Aboriginality or cultural background of the juvenile.

The Committee determined that where a girl attends a Children's Panel, there should be at least one female member of the Children's Panel. The same consideration should apply to young offenders who are Aboriginal. Juveniles from a non-English speaking background would benefit from a member on their Children's Panel from the same cultural group.

A multitude of issues surround young Aboriginal people in the Juvenile Justice System. The Committee thus determined that in relation to Children's Panels where an Aborigine appears before a panel it is desirable that:

- panel members should be Aboriginal; and

- before determining whether an Aboriginal young offender should proceed to the panel or be sent back for a Police Caution, the panel co-ordinator should consult with an appropriate member of the Aboriginal community.

Recommendation No. 48:

- **That at least one of the members of each Children's Panel be a woman.**

Recommendation No. 49:

- **That at least one of the members of each Children's Panel be of the same cultural group as the young offender.**

Recommendation No. 50:

- **That where an Aborigine appears before a Children's Panel, some panel members should be Aboriginal.**

It was brought to the attention of the Committee that in recent initiatives, programs have developed in which police divert young Aboriginal people to a pre-court panel consisting of local Aboriginal representatives. The Taree Koori Community Justice Council is administered by the Office of Juvenile Justice. The Council includes local Aboriginal elders and was designed to reduce the number of Aboriginal juveniles entering the formal court system. Since its inception in 1991, there has not been a great need for the Council to convene, however it provides the opportunity for members of the Aboriginal community and the police "to work closely together in diverting young offenders from lifestyles that may seen them re-offend."[59]

[59] NSW Office of Juvenile Justice. 1992 p.6