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**Juvenile Justice: Some Recent  
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by

**Honor Figgis**

**Briefing Paper No 5/99**

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# **Juvenile Justice: Some Recent Developments**

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**Honor Figgis**

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## CONTENTS

### Executive Summary

1.	Introduction .....	1
2.	Extent of Juvenile Crime in NSW .....	1
3.	Age and Criminal Responsibility .....	4
3.1	Age threshold for criminal responsibility .....	4
3.2	<i>Doli incapax</i> principle .....	6
4.	Parental Responsibility .....	10
4.1	Parental support and education .....	11
4.2	Parental responsibility or liability .....	13
5.	Diverting Young Offenders from Court .....	17
6.	Public Naming of Juvenile Offenders .....	29
7.	Conclusion .....	31

### Appendix A: Main juvenile justice legislation in each Australian State and Territory

## EXECUTIVE SUMMARY

**Extent of juvenile crime:** It is difficult to measure accurately the nature and extent of juvenile crime. A 1998 self-reporting survey of secondary school students in NSW found that nearly half of them reported that they had participated in some form of crime in the last 12 months. The report concluded that juvenile offending is highly prevalent but transient. A 1996 review of juvenile crime statistics concluded that the overwhelming majority of juvenile crime is not 'serious': juvenile offending is generally not violent in nature; is directed at property; is not 'organised'; when drug-related predominantly involves the use of cannabis; has not significantly risen during the 1980s and 1990s; and is very transient (pp 1-4).

**Age of criminal responsibility:** The minimum age for criminal responsibility in NSW and most other Australian jurisdictions is ten; in Tasmania it is seven and in the ACT it is eight. There have been calls for the minimum age of criminal responsibility to be lowered below ten. The age at which a juvenile becomes an adult for the purposes of the criminal law is 18 in NSW; it varies between 17 and 18 in other jurisdictions (pp 4-6).

***Doli incapax* principle:** There is a presumption at common law that a child under the age of 14 is not capable of committing a crime because he or she does not know that the criminal conduct is wrong. This presumption, which is known as the *doli incapax* [incapable of crime] principle, means that the prosecution must prove beyond a reasonable doubt that the child knew when the offence was committed that it act was wrong. This presumption has been criticised on the grounds that it is unnecessary, outdated, misguided, and illogical. It has been defended on the grounds that it is a useful and necessary method of protecting children under 14 from the full force of the criminal law, allowing for a gradual transition to full criminal responsibility. There have been several proposals to abolish or modify the presumption (pp 6-10).

**Parental responsibility:** The importance of parents and family life in influencing a child's involvement in crime has been brought into focus by recent research linking juvenile crime to neglectful or abusive parenting. This research has led to intense interest by policy-makers and legislators in preventing child neglect, in order to reduce crime. Two broad approaches to this problem can be seen: one is to provide training and support to parents who may not be adequately raising their children; the other is to compel parents to supervise their children, for example by returning unsupervised children to their parents or by using criminal penalties against parents who allow their children to break the law. Both these approaches have found a place in New South Wales (pp 10-17).

**Diverting young offenders from court:** Every Australian jurisdiction has some form of diversionary scheme, although the form, emphasis and scope of these schemes varies widely. The trend has been towards establishing a statutory two-tier system of diversion, with police cautions as the first level of response to juvenile wrongdoing, and family conferences at the second level. Now, New South Wales, Queensland, South Australia and Western Australia have statutory diversionary systems along these lines. Tasmania has also enacted a similar system, although this legislation is yet to commence. In the ACT and the Northern Territory,

there are police-run family conferencing pilot programs, and in Victoria a conferencing project is run by a charitable organisation in association with the Children's Court and the police (pp 17-28).

Evaluations or assessments of pilot conferencing projects have been carried out in most jurisdictions. These reviews have largely been positive, with reports that a large majority of victims, offenders and their families were satisfied with the conferencing process. There have also been some significant reductions in the number of juvenile criminal cases being processed by Children's Courts. On the negative side, there have been some concerns in several jurisdictions that referral rates to conferencing have been lower than desired, particularly for indigenous youths. In addition, there is some evidence of a 'net-widening' effect; that is, formal cautioning or conferencing procedures may be used for children who would otherwise have received a lower level of intervention, such as an informal warning or no intervention at all (pp 17-28).

**Multi-agency teams:** Measures such as the Juvenile Justice Teams in Western Australia, and the Youth Offending Teams in the United Kingdom, are an innovative means of engaging the multiple agencies concerned with young people at risk - schools, health services, police, local government, courts, and departmental officers - to avoid the potential for young people to 'fall through the gaps' of a complex system (p 32).

**Public naming of serious juvenile offenders:** In all Australian States and Territories there are restrictions on publication of the identity of juveniles involved in criminal court proceedings. There have recently been calls in NSW and elsewhere for these laws to be relaxed to allow serious violent juvenile offenders to be publicly identified. In the United Kingdom the courts may allow juveniles to be named having regard to the public interest, and in some Australian jurisdictions, the restrictions on naming juveniles can be lifted in particular circumstances (pp 29-30).

The arguments against naming serious juvenile offenders are that: anonymity may enhance the child's prospects for rehabilitation; there is a risk that some offenders may actually welcome the attention they receive from being publicly named; the restrictions on identifying juvenile offenders are consonant with Australia's international obligations to protect the privacy of children in the criminal justice system; naming juvenile offenders is unlikely to act as a deterrent, since most juvenile crime is largely unplanned and impulsive; and there has not been a wave of violent crime by juveniles to warrant a change in the law (p 30).

The arguments in favour of naming serious juvenile offenders are that: it would increase the personal accountability of young offenders for their actions; it would increase public safety by alerting members of the community to the presence of young offenders who have committed serious crimes; it would prevent juveniles deliberately taking advantage of the special protections available to them; naming juvenile offenders would act as a deterrent to the young offenders themselves, and to other young people; legislation allowing the naming of young offenders could be restricted to those who are aged 17, who in some other Australian jurisdictions are currently treated as adults for the purposes of the criminal law (p 30).

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## 1. INTRODUCTION

In 1996 the NSW Parliamentary Library published a briefing paper about juvenile justice in New South Wales (the Juvenile Justice Briefing Paper), which outlined how the NSW juvenile justice system operates, and discussed the issues of family conferencing for young offenders, and the public naming of young offenders.<sup>1</sup> This present briefing paper updates the earlier paper, and should be read in conjunction with it. The object of this paper is to provide information on some recent legal and policy developments in the areas of family conferencing, public naming of young offenders, the age of criminal responsibility, and parental responsibility for preventing criminal behaviour by their children.

It is beyond the scope of this paper to outline all the recent developments that are taking place in juvenile justice. As the earlier briefing paper observed, 'juvenile justice' is a very broad term, encompassing 'all the people and practices involved in the control, investigation, adjudication, the punishment and the rehabilitation of young people. It covers the investigative and other practices of police, the various administrative agencies who have roles in implementing the legislation, the courts, and the detention centres'. All these areas tend to receive a great deal of attention from policy makers and legislators, as well as the media and the general public. As a result, new programs and initiatives are continuously being developed and evaluated across the Western world.

The focus of this paper is on New South Wales. Appendix A contains a list of the main legislation dealing with young offenders in the Australian States and Territories. For an outline of the juvenile justice system in each State and Territory, see *Juvenile Justice and Youth Welfare*, a recent report by the Australian Institute of Health and Welfare.<sup>2</sup>

## 2. EXTENT OF JUVENILE CRIME IN NSW

It is very difficult to establish an accurate picture of how much and what kind of crime is committed by young persons. There are problems with using police report statistics to infer the actual rate of crime, and even greater problems with trying to determine the juvenile component of this figure.<sup>3</sup> Many offences are not reported to the police, and of those that are, many are not cleared up. The statistics on juvenile court cases provided by the Children's Court can also be misleading, since they can be skewed by a number of factors. For example, children are more likely to be caught by police than are adults, which can give

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<sup>1</sup> Manning F, *Juvenile Justice in NSW: Overview and Current Issues*, Briefing Paper No 9/96.

<sup>2</sup> Australian Institute of Health and Welfare, *Juvenile Justice and Youth Welfare: a scoping study*, Commonwealth of Australia, 1998, pp 27-74. This study describes the key features and functions of the juvenile justice system in each jurisdiction, as well as the integration and linkages between juvenile justice and youth welfare systems, and the types of programs available to young people in each juvenile justice system.

<sup>3</sup> Crime Prevention Division, NSW Attorney General's Department, *Juvenile crime in New South Wales: a review of the literature*, Sydney, 1996, 1. See also the Juvenile Justice Briefing Paper, n 1, p 10.



an inaccurate impression of the proportion of crime committed by juveniles. Changes in the resources for police and prosecutors, and changes in policing and prosecution practices, can also affect Children's Court statistics.<sup>4</sup> These measurement difficulties should be kept in mind when considering the following selection of juvenile crime statistics.

- A 1998 self-reporting survey of secondary school students in NSW found that nearly half of them reported that they had participated in some form of crime in the last 12 months. 29% of students had assaulted someone, 27% had maliciously damaged property, 15% had received or sold stolen goods, 9% had shoplifted goods worth \$20 or more, 5% had committed break and enter and 5% had stolen a motor vehicle. The majority of students involved in crime, however, had only a very limited involvement. Many had offended only once or twice in their life.<sup>5</sup> The report concluded that the fact that juvenile offending is highly prevalent but transient in nature indicates that many juvenile offenders are unlikely to be apprehended.
- The same self-reporting survey found that high levels of truancy, cannabis use and alcohol use were identified as being the most important factors contributing to student involvement in assault, malicious damage and property crime. Poor parental supervision was also identified as being an important factor contributing to involvement in malicious damage and property crime.
- The NSW Attorney-General's Department in 1996 reviewed juvenile crime statistics and analyses. It concluded that 'the overwhelming majority of juvenile crime is not 'serious'. Statistical patterns have shown that juvenile offending is not violent in nature; is directed at property; is not 'organised'; when drug-related predominantly involves the use of cannabis; has not significantly risen during the 1980s and 1990s; and ... is very transient, the majority of juvenile offenders desisting from crime after their first court appearance. Finally, the juvenile component in 'serious' crime is a great deal smaller than the adult contribution.'<sup>6</sup>
- In 1997-98 there were 15,619 criminal appearances before the Children's Courts, down 3% on the previous year.<sup>7</sup> 1997/98 is the first time since 1992/93 that an annual reduction in finalised Children's Court appearances has been recorded.

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<sup>4</sup> See Crime Prevention Division, *Juvenile crime in New South Wales*, n 3, 1.1; Mukherjee S, 'The Dimensions of Juvenile Crime' in Borowski A and O'Connor I (eds), *Juvenile Crime, Justice and Corrections*, Addison Wesley Longman Australia Pty Ltd, 1997; Freeman K, *Young People and Crime*, Crime and Justice Bulletin No 32, NSW Bureau of Crime Statistics and Research, November 1996.

<sup>5</sup> Baker J, *Juveniles in Crime - Part I: Participation Rates and Risk Factors*, NSW Bureau of Crime Statistics and Research, 1998.

<sup>6</sup> Crime Prevention Division, *Juvenile crime in New South Wales*, n 3, 1.3.

<sup>7</sup> Department of Juvenile Justice, *Annual Report 1997-98*, p 6.

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- The bulk of offences committed by juveniles in 1997-98 were theft offences (41.2% of appearances overall), although the number of theft offences fell between 1996/97 and 1997/98, as did the number of appearances for break and enter. Within the theft category, there has been a sustained decline in appearances for motor vehicle theft.<sup>8</sup> Offences against the person were down both in absolute and percentage terms in 1997-98. There was an increase in appearances for drug offences, which constituted 14.9% of appearances. Appearances for drug possession accounted for four in every five drug related appearances.
  - In 1997-98 there were 27 appearances for homicide and related offences such as manslaughter and driving causing death, accounting for 0.2% of all appearances before the Children's Court. In 1996/97 there were 15 appearances for homicide-related offences.<sup>9</sup>
  - In 1997, the most common outcome for a proved offence in the Children's Court was a recognizance (good behaviour bond), imposed for 19.4% of proven charges. A control order (detention) was imposed in 6.8% of matters.<sup>10</sup> The number and proportion of custodial sentences for juveniles has increased between 1992-93 and 1996-97. Notwithstanding this trend, over 90% of sentences are still non-custodial.<sup>11</sup> The average number of young people in custody on any day in 1997-98 was 394.<sup>12</sup>
  - Most of the juvenile offenders appearing before the Children's Court for criminal matters are older juveniles - in 1997, 29% were aged 17 and 23.4% were aged 16.<sup>13</sup>
  - Aboriginal youth remains significantly over-represented in the juvenile justice system.<sup>14</sup> A recent study by the Judicial Commission found that there were statistically significant differences in the penalties received by Aboriginal and Torres Strait Islander and Pacific Islander juveniles compared with their Anglo-Australian counterparts, with the first two groups receiving harsher penalties.<sup>15</sup>
  - A study of repeat offending by juveniles in NSW found that juvenile recidivism is

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid.

<sup>10</sup> NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 1997*, p 46.

<sup>11</sup> NSW Council on the Cost of Government, *Law, Order & Public Safety: Service Efforts and Accomplishments*, Sydney 1997, p 88.

<sup>12</sup> Department of Juvenile Justice, *Annual Report 1997-98*, p 19.

<sup>13</sup> NSW Bureau of Crime Statistics and Research, *NSW Criminal Courts Statistics 1997*, p 50.

<sup>14</sup> Cunneen C, 'Indigenous Young People and Juvenile Crime' in Borowski and O'Connor, *Juvenile Crime, Justice and Corrections*, n 4; Department of Juvenile Justice, *Annual Report 1997-98*, p 19.

<sup>15</sup> Gallagher P and Poletti P, *Sentencing Disparity and the Ethnicity of Juvenile Offenders*, Judicial Commission of New South Wales, No 17, 1998.

‘not a problem of epidemic proportions’. Seven out of every ten juvenile offenders did not re-appear before the Children’s Court on a second proven criminal matter. Of the 30% of offenders who did re-offend, around half returned to court only once. Very few juveniles become persistent or chronic offenders. However, a small number of persistent offenders are responsible for a disproportionately large number of proven criminal appearances - for example, 9% of juvenile offenders were responsible for 31% of all proven offences.<sup>16</sup> It appears that the more serious the penalty that an offender receives for the first offence, the higher the offender’s rate of recidivism.

### **3. AGE AND CRIMINAL RESPONSIBILITY**

In Australia and other Western societies, it is generally agreed that children should not have all the rights and responsibilities of adults, because they do not have the capacities of adults. This view of the specially vulnerable and malleable nature of childhood underlies the exemption of very young children from any legal sanction for their criminal acts, and for older children, the creation of a juvenile justice system separate from the adult system.<sup>17</sup>

There is less consensus about how these stages of childhood are to be identified. When should young children be subject to some legal responsibility for their criminal acts? When should a teenager be exposed to the full rigour of the adult criminal laws? How should our laws deal with the undoubted fact that children mature socially and morally at very different rates? This part of the briefing paper looks at the two mechanisms used in New South Wales to determine how the criminal law is applied to young persons: the legal age of criminal responsibility; and the presumption that children aged under fourteen are not capable of committing a crime because they do not know that their criminal conduct is wrong.

#### **3.1 Age threshold for criminal responsibility**

The minimum age of criminal responsibility varies among the Australian States and Territories. The following table sets out the ages when a young person comes within the jurisdiction of the juvenile justice system in each State and Territory.

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<sup>16</sup> Cain M, *Recidivism of Juvenile Offenders in NSW*, Department of Juvenile Justice, 1996, p 1.

<sup>17</sup> See the Juvenile Justice Briefing Paper, n 1, pp 10-11.

	Minimum Age	Maximum Age
New South Wales	10	Under 18
Victoria	10	Under 17
Queensland	10	Under 17
South Australia	10	Under 18
Western Australia	10	Under 18
Tasmania <sup>18</sup>	7	Under 17
Northern Territory	10	Under 17
Australian Capital Territory	8	Under 18

These different age thresholds indicate that there is an element of arbitrariness to selecting an age at which children become legally responsible for their offences.<sup>19</sup> Under the common law inherited from the United Kingdom, the minimum age for criminal responsibility was seven years. This minimum age was raised by statute to ten in New South Wales during the 1970s, because few children under this age appeared on criminal charges, and those who did were better dealt with as welfare or care and protection cases.<sup>20</sup> The minimum age is now ten in most Australian jurisdictions, as it is in the United Kingdom and New Zealand. The age of criminal responsibility is generally higher in European civil law countries - it is 13 in France and 15 in Norway and Denmark.<sup>21</sup>

There have been some calls for the minimum age of criminal responsibility to be lowered below ten, on the basis that younger children can benefit from early involvement in the juvenile justice system. For example, a recent opinion piece argued that:

<sup>18</sup> These are the age thresholds under the current *Child Welfare Act 1960* (Tas). A new juvenile justice statute, the *Youth Justice Act 1997* (Tas), has been enacted but has not yet been proclaimed to commence. When it comes into force, the minimum age will be 10 and the maximum age will be under 18.

<sup>19</sup> In 1984 a symposium sponsored by the Australian Psychological Society and the Victoria Law Foundation considered some of the debates about age and criminal responsibility in children. The participants agreed that the use of any single chronological age as a factor in the determination of whether a child has the capacity for criminal responsibility cannot be justified by contemporary psychological research: Cummins R and Burgess Z (eds), *Age and Criminal Responsibility in Children*, Australian Psychological Society, Victoria, 1985, p 4.

<sup>20</sup> Cunneen C and White R, *Juvenile Justice: an Australian Perspective*, Oxford University Press, 1995, p 218.

<sup>21</sup> Australian Law Reform Commission with the Human Rights and Equal Opportunity Commission, *Seen and heard: priority for children in the legal process*, Report No 84, Commonwealth of Australia, 1997, p 470. As the report points out, however, these countries do not recognise the *doli incapax* principle, discussed in Part 3.2 of this briefing paper.

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When kids as young as eight are on a rampage there is virtually nothing police can do. In the eyes of the law they are too young to know right from wrong and therefore the criminal justice system won't touch them. Laws dealing with juveniles need an overhaul for the sake of those children as much as anybody else... We should lower the age of criminal responsibility and haul these kids before the courts. Give them the fright of their lives. Their parents don't care enough to reprimand them, but the community should be given a forum to let these kids know their behaviour will not be tolerated.<sup>22</sup>

On the other hand, the inquiry into children and the legal process conducted by the Australian Law Reform Commission and the Human Rights and Equal Opportunity Commission (the ALRC/HREOC Inquiry) recommended that all Australian jurisdictions should agree on and legislate a uniform age of criminal responsibility of ten. The Inquiry noted the element of arbitrariness in setting age thresholds, but observed that setting an age provides certainty for both the law and children.<sup>23</sup>

### 3.2 *Doli incapax* principle

There is a presumption at common law that a child aged under 14 is not capable of committing a crime because he or she does not know that the criminal conduct is wrong. This presumption is known as the *doli incapax* [incapable of crime] principle. For a child aged between 10 and 14, the presumption can be rebutted by proof that the child did know that the conduct was wrong. The presumption is expressly included in the criminal codes of Queensland, Tasmania, Western Australia and the Northern Territory. In the other States and Territory, it is part of the common law inherited from the United Kingdom.

The effect of the presumption is that in order to prosecute children who are aged 10 to 13 inclusive, the prosecution must produce evidence proving to the court beyond reasonable doubt that the child knew when the offence was committed that the act was wrong, in the sense of seriously or morally wrong, rather than mere naughtiness or childish mischief. The older the child concerned, the easier it is for the prosecution to rebut the presumption.<sup>24</sup>

Although the *doli incapax* principle has an ancient history, the operation of the principle has raised concerns in recent years about its continuing justification. It was abolished by statute last year in the United Kingdom.<sup>25</sup> The decision of the UK Government to abolish the presumption followed a case in which the Queen's Bench Division held that the presumption

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<sup>22</sup> Carty L, 'Too late to save most young crims', *Illawarra Mercury*, 28/10/98. See further Cunneen C and Robb T, *Criminal Justice in North-west New South Wales*, NSW Bureau of Crime Statistics and Research, Sydney, 1987, p 231.

<sup>23</sup> ALRC/HREOC, *Seen and heard*, n 21, p 470.

<sup>24</sup> See Scarlett S, 'The Doli Incapax Presumption', *Children's Court of NSW Information Bulletin*, May 1997, Nos 36 & 37, pp 2-3.

<sup>25</sup> *Crime and Disorder Act 1998* (UK) s 34.

should no longer form part of the criminal law. That decision was reversed on appeal by the House of Lords. In the original decision of the Queen's Bench Division,<sup>26</sup> Laws J set out the problems with the *doli incapax* principle that had led him to the conclusion that it had 'no utility in the present era'. These criticisms of the principle included that:

- the *doli incapax* principle had arisen in an earlier era, when criminal sanctions for young offenders were much more draconian, and capital punishment was the sanction for a number of offences. In these circumstances, it was natural for the law to develop a means to extend mercy to child defendants. Today, however, the philosophy of criminal punishment has changed beyond all recognition. Particularly for juveniles, the focus is on rehabilitation, not retribution. The need for the presumption of incapacity therefore no longer exists.
- the system of compulsory education for all children means that children today are more knowledgeable and grow up faster than before.
- the rule is divisive because it tends to attach legal penalties to the criminal acts of children coming from 'good homes', who have an understanding of right and wrong, more readily than to the acts of children who come from homes where moral education was inadequate. Young persons who may know no better than to commit crimes should not be held immune from the criminal justice system, but sensibly managed within it; otherwise they are left outside the law.
- the presumption is out of step with the general criminal law. There is no other requirement elsewhere in the criminal law that a defendant should be proved to understand that his or her act is morally or seriously wrong.
- the presumption is illogical because it seems that it can be rebutted by proof that a child was of normal mental capacity for his or her age. That is, the principle presumes that all children have below average understanding for their age.

The *doli incapax* principle is also controversial because it can be difficult for the prosecution to provide evidence that a child knew that the act charged was wrong. The prosecution may be able to use evidence that, for example, the child ran away when pursued by police, but this kind of evidence is sometimes not available. It is claimed that there are children who commit serious crimes and go unpunished because the prosecution cannot prove that they had the requisite knowledge of wrongdoing.<sup>27</sup> To alleviate these evidential difficulties, the courts may permit the prosecution to adduce evidence that would normally be inadmissible

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<sup>26</sup> *C v DPP* [1994] 3 WLR 888; 3 All ER 190. The decision is discussed in Blazey-Ayoub P, 'Doli Incapax', (1996) 20 *Criminal Law Journal* 34.

<sup>27</sup> 'Junior criminals slip out of loopholes', *The Australian*, 11/12/98, citing McGuire J, the President of the Children's Court of Queensland.

in order to rebut the presumption.<sup>28</sup> In these circumstances, it is argued, the principle may not protect children, but be to their disadvantage.<sup>29</sup>

The criticisms made by Laws J of the *doli incapax* principle were acknowledged as having considerable force by the House of Lords on appeal.<sup>30</sup> The House of Lords reversed the decision of the Queen's Bench Division mainly on the grounds that it was for Parliament, not the courts, to make such a change in the law. Nevertheless, Lord Lowry did note some counter-arguments to the points made by Laws J. For example, he agreed that the presumption is out of step with the general criminal law, but observed that the purpose and effect of the presumption is to protect children from the full force of the criminal law.

Supporters of the *doli incapax* principle have generally defended it on the grounds of this protective function, rather than the logic of the presumption. The ALRC/ HREOC Inquiry, for example, considered that the principle was 'a practical way of acknowledging young people's developing capacities. It allows for a gradual transition to full criminal responsibility'.<sup>31</sup>

The difficulties with the operation of the *doli incapax* principle have led to calls for legislators to clarify both the underlying policy intention of the doctrine, and the matters that can legitimately be used to determine the competence of an offender.<sup>32</sup> The core problem was identified by the Supreme Court of Victoria in *R (A Child) v Whitty*,<sup>33</sup> in which Harper J said, 'The wisdom of protecting young children against the full rigour of the criminal law is beyond argument. The difficulty lies in determining when and under what circumstances that protection should be removed.'

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<sup>28</sup> For example, evidence of a child's prior convictions has been held admissible to rebut the presumption. Normally evidence of prior convictions is inadmissible (because it is highly prejudicial) except in limited circumstances, such as where the accused has claimed that he or she is of good character. Lord Lowry in the House of Lords decision in *C v DPP* put forward the view that evidence of prior convictions should not be admitted to rebut *doli incapax* because it would put a child defendant in a worse position than an adult defendant.

<sup>29</sup> ALRC/HREOC Inquiry, n 21, p 471.

<sup>30</sup> *C v DPP* [1995] 2 WLR 383; 2 All ER 43.

<sup>31</sup> ALRC/HREOC Inquiry, n 21, p 471. See also Grove M, 'Are you old enough? In defence of *doli incapax*', (1996) 70 *Law Institute Journal* 38.

<sup>32</sup> Bartholomew T, 'Legal and Clinical Enactment of the *Doli Incapax* Defence in the Supreme Court of Victoria, Australia', (1998) 5 *Psychiatry, Psychology and the Law* 95.

<sup>33</sup> (1993) 66 A Crim R 462.

In Australia, a committee reviewing federal criminal law recommended that the principle should be retained but that the onus for the presumption should be reversed.<sup>34</sup> This would mean that it would be up to the accused to demonstrate that he or she did not understand that his or her criminal act was wrong. This proposal was discussed by Blazey-Ayoub, who commented that:<sup>35</sup>

On the positive side, the recommendation would avoid a child being exposed to evidence of his or her prior offences being adduced to ascertain guilty knowledge. On the negative side, putting the onus of proof on a child in this age bracket can require the added expense of adducing expert testimony and tends to put the child in the same category as a person claiming insanity, a somewhat onerous position.

In the United Kingdom, consideration was given to reversing the presumption, but eventually this proposal was rejected in favour of abolishing it entirely, as this was the simplest course and would provide least hindrance and delay to court proceedings. It was also claimed that it would best serve the interests of justice, of victims, and of the young people themselves. If children who commit offences are prosecuted where appropriate, then youth justice professionals are able to address the issues that led to the offending and to provide rehabilitation.<sup>36</sup>

Abolition or modification of *doli incapax* is also on the agenda in some Australian jurisdictions. The President of the Children's Court of Queensland, McGuire J, has recommended that *doli incapax* should be abolished in that State,<sup>37</sup> and in New South Wales Mr P Blackmore MP was reported to be planning to introduce a Private Members Bill that would lower the scope of the presumption to children under 12 years.<sup>38</sup> A similar suggestion has been made by the Senior Children's Magistrate of the NSW Children's Court, Mr S Scarlett, who has said that:

In a world of video cassette recorders and the Internet, I suggest that many 12 and 13 year old children are a lot more sophisticated these days than they were 30 years

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<sup>34</sup> Commonwealth Attorney-General's Department, *Review of Commonwealth Criminal Law: Interim Report - Principles of Criminal Responsibility and Other Matters*, AGPS, Canberra 1990, recommendation 8.15.

<sup>35</sup> Blazey-Ayoub, 'Doli Incapax', n 26, p 39.

<sup>36</sup> Home Office, *No More Excuses - A New Approach to Tackling Youth Crime in England and Wales*, CM 3809, November 1997, 4.3-4.5. For comment on the UK legislation see Fionda J, 'New Labour, Old Hat: Youth Justice and the Crime and Disorder Act 1998', [1999] *Criminal Law Review* 36 pp 38-39.

<sup>37</sup> Children's Court of Queensland, *Third Annual Report 1995-96*, Brisbane Qld, 1997, pp 29-46.

<sup>38</sup> 'Bid to cut crime age', *The Newcastle Herald*, 23/9/98. Mr Blackmore MP gave notice of motion to introduce a bill, the Children (Criminal Proceedings) Amendment (Age of Criminal Responsibility) Bill, on 17/9/98. The notice of motion lapsed when Parliament was prorogued.



ago, and that the legislature should think seriously about drawing the line at a younger age, say 12. While this may decrease the use of this defence in the specialist Children's Courts, I believe that until the presumption is given some legislative support it will continue to be virtually ignored outside the Newcastle/Sydney/Wollongong area.<sup>39</sup>

Blazey-Ayoub has given some arguments for abolishing *doli incapax* in New South Wales:<sup>40</sup>

- children are now dealt with in specialised Children's Courts (except for very serious offences) and protected by special legislation, the *Children (Criminal Proceedings) Act 1987* (NSW);
- closed courts protect children from public scrutiny and juvenile offenders cannot be publicly identified;<sup>41</sup>
- a conviction cannot be recorded against a child under the age of 16 who is found guilty of an offence, unless it is an indictable offence that is not disposed of summarily;<sup>42</sup> and
- sentencing options are flexible.

Nevertheless, she concluded, the question of the abolition of *doli incapax* should not be undertaken without detailed examination by a Parliamentary committee. 'As children under the age of 10 are held incapable of committing a criminal offence, it is a quantum leap to expect children attaining the age of 10 and for the following few years, to suddenly appreciate the wrongness of their behaviour for the purposes of the criminal law.'<sup>43</sup>

#### 4. PARENTAL RESPONSIBILITY

The importance of parents and family life in influencing a child's involvement in crime has been brought into focus by recent research linking juvenile crime to neglectful or abusive

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<sup>39</sup> Scarlett, 'The Doli Incapax Presumption', n 24, p 3.

<sup>40</sup> Blazey-Ayoub, 'Doli Incapax', n 26, p 39.

<sup>41</sup> *Children (Criminal Proceedings) Act 1987* (NSW) ss 10 and 11.

<sup>42</sup> *Children (Criminal Proceedings) Act 1987* (NSW) s 14. Indictable offences, except 'serious indictable offences', are normally dealt with summarily in the Children's Court: s 31.' Serious indictable offences' are defined in s 3 of the *Children (Criminal Proceedings) Act 1987* to include, in brief, homicide, offences punishable by imprisonment for 25 years to life, and certain sexual assaults. These offences must be dealt with by the District or Supreme Courts.

<sup>43</sup> Blazey-Ayoub, 'Doli Incapax', n 26, p 40.

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parenting.<sup>44</sup> As the NSW Bureau of Crime Statistics and Research explains, ‘The more interest a parent shows in a child, the more a parent gets involved with a child, the more a parent supervises a child, and the more warmth and affection a parent shows a child, the less likely the child is to become involved in delinquency’.<sup>45</sup> In turn, poor parenting is linked to social and economic stress on families. These stresses, such as poverty, single parent families and crowded dwellings, affect the level of juvenile participation in crime mainly by increasing the rate of child neglect.

This research has led to intense interest by policy-makers and legislators in preventing child neglect, in order to reduce crime. Two broad approaches to this problem can be seen: one is to provide education and support to parents who may not be adequately raising their children; the other is to compel parents to supervise their children, for example by returning unsupervised children to their parents or by using criminal penalties against parents who allow their children to break the law. The first, ‘parental support’ approach is often aimed at the parents of infants and young children, while the second ‘parental liability’ approach is directed at the parents of older children who have reached the age of criminal responsibility. Both these approaches have found a place in New South Wales, as outlined below.

#### 4.1 Parental support and education

There is a growing body of crime prevention literature in the United States and the United Kingdom examining how parenting practices for very young children affect the development and conduct of these children as teenagers. Experimental programs for disadvantaged children and their families are gradually producing knowledge about the kinds of assistance and education that are most effective at relieving strains on parents, at reducing child neglect and abuse, and ultimately at improving the prospects for children.

There are several ways in which government and non-government welfare organisations can intervene in families to support parents at risk of providing an inadequate upbringing. At the level of individual families, valuable services may include: home visits by nurses or other care workers to families with infants and young children; parent training; child care; pre-school education programs; and family counselling.<sup>46</sup> Research suggests that the greatest cost-benefit outcomes arise from programs that target babies, infants and pre-school

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<sup>44</sup> See Salmelainen P, *Child Neglect: Its Causes and its Role in Delinquency*, Crime and Justice Bulletin No 33, December 1996; Weatherburn D and Lind B, *Social and Economic Stress, Child Neglect and Juvenile Delinquency*, NSW Bureau of Crime Statistics and Research, 1997.

<sup>45</sup> Salmelainen, *Child Neglect*, n 44, p 1.

<sup>46</sup> See Karoly LA et al, *Investing in Our Children: What We Know and Don't Know About the Costs and Benefits of Early Childhood Interventions*, RAND, California, 1998; Goldblatt P and Lewis C (eds), *Reducing offending: an assessment of research evidence on ways of dealing with offending behaviour*, Home Office Research Study 187, 1998, pp 7-12; Sherman L et al, *Preventing Crime: What works, what doesn't, what's promising*, Office of Justice Programs Research Report, US Department of Justice, Washington DC, 1997.

children.<sup>47</sup> Most of the research evidence in the area of early intervention comes from the United States, and to some extent from the United Kingdom.<sup>48</sup> A range of programs for children and their families exist in Australia,<sup>49</sup> but until recently there has been little emphasis on rigorous evaluation of the effects of programs.

At the macro level, it is argued, the long-term goal should be to reduce the economic and social conditions that foster child neglect.<sup>50</sup> How best to alleviate poverty, isolation and family breakdown are of course perplexing and contentious questions. The NSW Bureau of Crime Statistics and Research has suggested that for the ultimate aim of reducing crime, the most effective programs and services may include an adequate social security system, labour market programs designed to provide employment opportunities for the long-term unemployed, and access to adequate and affordable housing, transport, health and child care services and parent support services.<sup>51</sup> This 'social support' approach has been influential in the United Kingdom, as can be seen in the proposals advanced in a recent white paper on tackling youth crime.<sup>52</sup>

The recent focus on developing effective interventions for the early years of childhood should not obscure the valuable work that can be done with older juvenile offenders and their families. Research into crime prevention, again mostly from the United States, has begun to indicate what the most successful programs for young offenders involve:<sup>53</sup>

- helping young people to resolve problems that contribute to their offending behaviour;

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<sup>47</sup> Goldblatt P and Lewis C, *Reducing offending: an assessment of research evidence on ways of dealing with offending behaviour*, Home Office Research Study 187, p 17.

<sup>48</sup> See for example *No More Excuses - A New Approach to Tackling Youth Crime in England and Wales*, Home Office, Cm 3809, November 1997, 4.8-4.10.

<sup>49</sup> See National Crime Prevention, *Pathways to prevention: Developmental and early intervention approaches to crime in Australia*, Summary volume, Commonwealth Attorney-General's Department, January 1999, pp 22-33; Parliament of New South Wales, Legislative Council Standing Committee on Law & Justice, *Proceedings of the Conference on Crime Prevention Through Social Support*, Report No 11, December 1998, pp 55-112.

<sup>50</sup> Weatherburn and Lind, *Social and Economic Stress*, n 44, p 47.

<sup>51</sup> Ibid.

<sup>52</sup> Home Office, *No More Excuses*, n 48, Ch 3. Measures advocated: include assisting single parents to move from benefits to work; helping to prevent marriage and family breakdown from damaging children; an assault on social exclusion; policies to help children to achieve at school, including good quality nursery education for all four year olds; higher school standards; and steps to tackle truancy.

<sup>53</sup> This list is taken from Buttrum K, 'Juvenile Justice: What Works and What Doesn't!' in Alder C (ed), *Juvenile Crime and Juvenile Justice: Toward 2000 and Beyond*, Australian Institute of Criminology, Research and Public Policy Series No 14, p 67. See also Griffith G and Simpson R, *Street Offences and Crime Prevention*, NSW Parliamentary Library Briefing Paper No 9/98; Goldblatt and Lewis, *Reducing offending*, n 47, chapters 3 and 8.

- assisting young people to develop practical alternative ways of coping with their problems;
- involving the young people's families in working on family problems that contribute to offending;
- improving social skills;
- helping young people to develop work skills which can lead to further training opportunities, qualifications, and jobs;
- assisting young people to establish and strengthen relationships with people who can become role models and mentors.

#### 4.2 Parental responsibility or liability

Most Australian States and Territories have enacted legislation that aims to produce a more immediate effect on juvenile crime by compelling parents to supervise and control their delinquent children. In brief, the powers available to a court may include:

- requiring parents to attend their children's criminal court hearings;<sup>54</sup>
- ordering parents to pay compensation for damage to property or persons caused by their children;<sup>55</sup>
- requiring parents to pay fines imposed on their children;<sup>56</sup>
- fining parents who have wilfully allowed their children to offend;<sup>57</sup>
- releasing young offenders conditionally if their parents agree to certain undertakings;<sup>58</sup>
- requiring parents to deposit security for the good behaviour of the child;<sup>59</sup>

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<sup>54</sup> *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 7; *Juvenile Justice Act 1992* (Qld) s 56A; *Young Offenders Act 1993* (SA) s 34; *Young Offenders Act 1994* (WA) s 45.

<sup>55</sup> *Juvenile Justice Act 1992* (Qld) ss 196-199; *Young Offenders Act 1994* (WA) s 58; *Child Welfare Act 1960* (Tas) s 25. Note that although two statutes have been enacted in Tasmania that will replace the *Child Welfare Act 1960*, these Acts have not yet been proclaimed to commence. Under the new scheme to be put in place by the *Youth Justice Act 1997* (Tas) and the *Children, Young Persons and their Families Act 1997* (Tas), there will be no provision for a parent to be fined or ordered to pay compensation in respect of offences committed by a child. The two new Acts are expected to commence in mid-1999 or later.

<sup>56</sup> *Young Offenders Act 1994* (WA) s 58; *Criminal Justice Act 1982* (UK) s 57.

<sup>57</sup> *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 11; *Child Welfare Act 1960* (Tas) s 25. As explained in n 55, when amendments to the juvenile justice legislation in Tasmania are proclaimed to commence, there will no longer be provision in Tasmania for a parent to be fined for allowing a child to commit offences.

<sup>58</sup> *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 11; see also *Young Offenders Act 1993* (SA) s 27.

<sup>59</sup> *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 9; *Criminal Justice Act 1991* (UK) s 58.

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- requiring a child's parents to undergo counselling;<sup>60</sup>
  - requiring parents to contribute to the cost of detaining a juvenile in a detention centre.<sup>61</sup>

The parental responsibility legislation enacted in each Australian State and Territory was described in detail in a 1996 briefing paper on the New South Wales *Children (Parental Responsibility) Act 1994*.<sup>62</sup> The earlier briefing paper pointed out some of the legal and policy issues raised by the various kinds of parental responsibility laws. This present paper does not repeat that information. Instead, this section outlines the changes to parental liability laws in New South Wales since 1996.

The earlier briefing paper discussed the *Children (Parental Responsibility) Act 1994* (NSW), a statute introduced by the then Coalition Government that gave police unprecedented powers to remove vulnerable and unsupervised children aged under 16 from public places to their homes or to a safe place. The 1994 Act also gave the Children's Court powers to fine parents or require them to enter into undertakings or attend counselling. Since 1996, New South Wales has amended and expanded its parental responsibility laws by the enactment of the *Children (Protection and Parental Responsibility) Act 1997*, which commenced on 22 December 1997 and replaced the *Children (Parental Responsibility) Act 1994* (NSW).

Like the 1994 Act, the 1997 Act allows police to remove vulnerable and unsupervised children from public places, and allows the courts to order parents to take steps to prevent their children from offending. The 1997 Act expanded the scope of the 1994 Act by linking the child removal measures with the development of community-based crime prevention plans. The 1997 Act also provided some additional safeguards for children who are removed from public places. It clarified the circumstances in which a child may be removed by police, and where the child may be taken, established guiding principles for the police in carrying out their functions under the Act, and provided for police to take into account any wishes or feelings volunteered by the child. The basic features of the 1997 Act are outlined below.

**Court orders for parents:** Where a court finds a child guilty of an offence, the court may release the child on condition that a parent of the child gives an undertaking to do or refrain from doing specified acts, or that a parent gives a security for the good behaviour of the child. A court may also require a child and the child's parents to undergo counselling.

Further, if a parent has 'by wilful default' directly contributed to a child's offending, the parent may be fined and/or ordered to undergo counselling.

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<sup>60</sup> *Children (Protection and Parental Responsibility) Act 1997* (NSW) s 10.

<sup>61</sup> *Juvenile Justice Act* (NT) s 55.

<sup>62</sup> Swain M, *The Children (Parental Responsibility) Act 1994: An Update*, Briefing Paper No 6/97.

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**Removal of young people at risk of involvement in crime from public places:** The *Children (Protection and Parental Responsibility) Act 1997* allows the police to remove young people under 16 from public places without charge, if they believe the young people are at risk of committing or being affected by a crime. The police must escort the young person to the home of a parent or close relative, or, if there is no responsible adult at the home who is able and willing to care for the young person, the police can place him or her in the care of the Department of Community Services. The paramount duty of the police under the legislation is to ensure that they act in the best interests of the young person, and the police must take into account any expressed wishes or feelings of the young person before escorting him or her to an appropriate place.

The legislation only applies in localities that the Attorney-General has declared to be an 'operational area', upon request by a local council. Before making such a declaration, the Attorney General must be satisfied that adequate crime prevention or youth support initiatives will be available in the area.<sup>63</sup> The Attorney General must have regard to a number of factors, such as whether the council has adequately informed and consulted with the local community concerned, including young people and the Aboriginal community, and whether appropriate arrangements will be made to cater for the needs of young persons who are not able to be taken home. Four localities have been declared 'operational areas' so far: Orange, Ballina, Moree and Coonamble.

**Local crime prevention plans:** The 1997 Act also allows councils to develop local crime prevention plans without becoming 'operational areas'. The Attorney General's Department can assist in developing crime prevention plans, and if the plan is approved as a 'safer community compact', the Department may grant financial assistance to cover expenses incurred in carrying out the compact.<sup>64</sup>

The 1994 Act and its successor, the 1997 Act, have been among the most controversial pieces of criminal justice legislation enacted in recent years. While the 1994 and 1997 Acts were welcomed by many as a practical measure to address the problem of insufficiently supervised children harming themselves and other people,<sup>65</sup> others have expressed concerns about the operation of the child removal measures. A report by an evaluation committee established by the Attorney General to review the 1994 Act questioned the assumptions underlying both the scheme of court orders directed at parents, and the removal of children

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<sup>63</sup> For more information see *Applying for operational areas under the Children (Protection and Parental Responsibility) Act 1997: Local councils and crime prevention guide 3*, NSW Attorney General's Department, 1997.

<sup>64</sup> See *Applying for safer community compacts under the Children (Protection and Parental Responsibility) Act 1997: Local councils and crime prevention guide 2*, NSW Attorney General's Department, 1997.

<sup>65</sup> See Hon D Moppett MLC, *NSWPD*, 24/6/97, pp 11037-39; Hon Dr B Pezzutti MLC, *NSWPD*, 24/6/97, pp 11039-11042.

at risk. The evaluation committee recommended that the 1994 Act be repealed.<sup>66</sup> The 1997 Act addressed some of the criticisms that the evaluation committee had made of the 1994 Act, such as the ambiguity of police powers under the Act, the lack of involvement by local communities, and the unwarranted expense of the 'safe house' scheme. Nevertheless, several Members of Parliament, including Members from the ALP and the Liberal Party, voiced their reservations about the legislation in debate on the 1997 Bill. Some criticisms that have been made of the 1997 Act include that:

- a coercive approach to young people on the streets may aggravate police-youth tensions, when a co-operative youth liaison approach by police and welfare workers can be more constructive.<sup>67</sup>
- it is doubtful whether legislation can force ineffective parents into becoming better, more watchful and careful parents. 'One cannot legislate for good parenting, nor can one solve social problems by giving police more power'.<sup>68</sup>
- the Act may be used to discriminate against youths from particular ethnic backgrounds, especially Aboriginals.<sup>69</sup>
- the Act may contravene a number of international human rights treaties ratified by Australia. The Evaluation Committee report on the 1994 Act found that it contravened the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. It has been said that 'while some of the provisions of the new [1997] Act attempt to redress many of the human rights criticisms of the Act, it is doubtful whether they do so adequately. It may be thus argued that the new Act continues to not be in conformity with international legal principles'.<sup>70</sup> The United Nations is reported as being concerned that the 1997 Act is an infringement of the civil rights of children.<sup>71</sup>

### **United Kingdom *Crime and Disorder Act 1998*: A parental responsibility philosophy**

<sup>66</sup> *Evaluation of the Children (Parental Responsibility) Act 1994*, Report from the Evaluation Committee, February 1997.

<sup>67</sup> Delahunty B, 'Taking 'Kiddie Cops' and 'Care Bears' Seriously', (1998) 23 *Alternative Law Journal* 13 p 17.

<sup>68</sup> Hon Dr M Burgmann MLC, *NSWPD*, 24/6/97, p 11039.

<sup>69</sup> 'KO for curfew trial', *Sun Herald*, 14 December 1997; 'Power to take young off streets', *Sydney Morning Herald*, 26/6/97. See also Fisher W, Garkawe S and Heilpern D, 'Summary Sanitation: The Extension of Police Powers Over Children In New South Wales' (1997) 1 *Southern Cross University Law Review* 120; Bernardi G, 'Recasting Old Solutions to Old Problems' (1998) 23 *Alternative Law Journal* 112.

<sup>70</sup> Fisher, Garkawe and Heilpern, 'Summary Sanitation', *ibid*.

<sup>71</sup> 'Rebuke from UN on child policies', *Sydney Morning Herald*, 14/10/97.

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underlies some of the new juvenile crime prevention orders that have recently been made available to the courts in the United Kingdom under the *Crime and Disorder Act 1998* (UK). These orders, which will be tested in pilot programs, include:

- a ‘*parenting order*’, which may require a parent to comply with any requirements specified in the order, and to attend counselling for up to three months; and
- a ‘*child safety order*’, which is designed to protect children under ten who are at risk of becoming involved in crime or who have already started to behave in an anti-social or criminal manner. The order will be available to local authorities in the family proceedings court. The order may require a child, for example, to be home at specified times, or to stay away from certain people or places, or to attend school. If the order is breached, the local authority can commence care proceedings in respect of the child.

The *Crime and Disorder Act 1998* (UK) also provides for local child curfews, giving new powers for local authorities and the police to set up curfew schemes for children under ten. The *Crime (Sentences) Act 1997* (UK) allows courts to impose curfew orders with electronic tagging on 10-15 year old offenders. These electronically monitored curfews will be implemented on a pilot basis.

The picking-up of truants by police is also given legislative force by the *Crime and Disorder Act 1998*. Section 16 of the Act allows the police, if they have reasonable cause to believe that a child is truanting, to remove the child to a place designated by a local authority, or to the school from which he or she is absent.

## 5. DIVERTING YOUNG OFFENDERS FROM COURT

The 1996 Juvenile Justice Briefing Paper examined various methods for diverting young offenders away from criminal court proceedings.<sup>72</sup> That briefing paper described the rationales behind schemes to steer young offenders away from the formal court system, and outlined the different models for diversion adopted in Australian jurisdictions. Those models included: police cautions; the ‘Wagga Wagga’ system of police cautioning involving holding conferences with offenders and their families; Community Aid Panels constituted by members of the local community; and Community Youth Conferencing, involving family conferences run by government or community organisations rather than the police. The briefing paper also explained the advantages and disadvantages of the various models of family conferencing.

This present briefing paper does not repeat the material on pre-court diversion set out in the

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<sup>72</sup> Juvenile Justice Briefing Paper, n 1, p 15. For other background information on the development of diversionary schemes in Australia, see Wundersitz J, ‘Pre-Court Diversion: The Australian Experience’ in Borowski and O’Connor, n 4; ALRC/HREOC Inquiry, n 21, pp 478-485.



earlier paper. Instead, this paper updates the earlier paper by describing the legislative developments in diversion that have taken place in the Australian States and Territories since 1996. The paper also summarises the initial findings from some evaluations of diversionary schemes.

In brief, the principle of pre-court diversion has continued to gain acceptance across Australia. Every Australian jurisdiction has some form of diversionary scheme, although the form and extent of these schemes varies widely. The trend has been towards establishing by legislation a two-tier system of diversion, with police cautions as the first level of response to juvenile wrongdoing, and family conferences at the second level. These family conferences are generally administered by a government department, rather than by the police. Police cautioning powers are becoming more complex, and also more regulated - several jurisdictions have enshrined the powers of police to caution young offenders in legislation, rather than retaining them in police standing orders or Commissioner's Instructions.

The major changes that have occurred since 1996 have been in New South Wales and Queensland, where statutory diversionary schemes based on police cautioning and family conferencing have been enacted. Now, New South Wales, Queensland, South Australia and Western Australia have statutory diversionary systems along these lines. Tasmania has also enacted a similar system, although this legislation is yet to commence. In the ACT and the Northern Territory, there are police-run family conferencing pilot programs, and in Victoria a conferencing project is run by a charitable organisation in association with the Children's Court and the police.

Although there is some form of family or community conferencing for young offenders in each jurisdiction, there are distinct differences in form and emphasis among the various schemes. Some of these differences include:

- *seriousness of offence*: in some Australian jurisdictions, only the less serious offences can be referred to conferencing. In contrast, in Queensland there is no statutory limit on the types of offences that can be referred to a community conference.
- *'gatekeeping'*: in some jurisdictions it is the police who decide whether a juvenile will be diverted to conferencing, while in others it is only the courts that decide, and in some either the police or the courts can refer a matter to conferencing;
- *conferencing as a sentence*: in New South Wales and several other jurisdictions, conferencing is intended to avoid court proceedings for young offenders. In Victoria, however, a matter is diverted to conferencing only after a decision by a court, for the determination of a sanction which must then be approved by the court. In Queensland, also, community conferences can form part of the court sentencing process, rather than acting as an alternative to court proceedings.

**Evaluations:** Formal diversionary schemes are still relatively new in most jurisdictions, and

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as result evaluations have generally been of pilot or project schemes, rather than fully fledged systems. Evaluations or assessments have been carried out in most jurisdictions. These reviews have largely been positive, with reports that a large majority of victims, offenders and their families were satisfied with the conferencing process. There have also been some significant reductions in the number of juvenile criminal cases being processed by Children's Courts.

On the negative side, there have been some concerns in several jurisdictions that referral rates to conferencing have been lower than desired, particularly for indigenous youths. It appears that indigenous children do not benefit from cautions or conferences to the same extent as non-indigenous children.<sup>73</sup> There have also been questions about whether conferences are being adequately structured for the needs of Aboriginal families. In Western Australia, there also seems to be some evidence of a 'net-widening' effect; that is, formal cautioning or conferencing procedures may be used for children who would otherwise have received a lower level of intervention, such as an informal warning or no intervention at all. The ALRC/HREOC Inquiry recommended that national best practice guidelines for family group conferencing should be developed. Matters to be considered in the guidelines, it suggested, should include monitoring the overall effect of conferencing schemes to ensure that they do not draw greater numbers of young people into the criminal justice system, or escalate children's degree of involvement with the system.

Can diverting young offenders from the courts reduce their rate of offending? This question cannot be answered yet. There is very little Australian evidence on links between diversion and re-offending, and overseas evidence on effects of diversion on recidivism are ambiguous.<sup>74</sup> It is generally very difficult to determine whether a particular program has had an effect on re-offending rates, because of the range of factors influencing offending, and the resources and time required to carry out scientifically rigorous evaluations of programs.<sup>75</sup>

Some figures and statistics on the use of diversionary schemes and the participation of

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<sup>73</sup> Cant R and Downie R, *Evaluation of the Young Offenders Act (1994) and the Juvenile Justice Teams*, Social Systems & Evaluation, Perth, February 1998; ALRC/HREOC Inquiry, n 21, pp 46-47, citing Crime Research Centre, *Aboriginal Youth and the Juvenile Justice System of WA*, University of Western Australia, Perth, 1995; National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children From Their Families, *Bringing Them Home*, Human Rights and Equal Opportunity Commission, Sydney 1997; Wundersitz J, *The South Australian Juvenile Justice System: A Review of Its Operation*, Office of Crime Statistics, Adelaide 1997.

<sup>74</sup> Wundersitz J, 'Pre-Court Diversion: The Australian Experience' in Borowski and O'Connor, n 4, p 277.

<sup>75</sup> Mukherjee S, 'The Dimensions of Juvenile Crime' in Borowski and O'Connor, n 4, p 21.

indigenous juveniles were collated by the 1997 ALRC/HREOC Inquiry.<sup>76</sup> The Inquiry observed that the number of informal cautions or warnings issued to children is very hard to estimate. Although some jurisdictions are beginning to keep statistics about the numbers of informal and/or formal cautions issued, along with statistics about other diversionary schemes such as family group conferencing, the variations in these schemes make it difficult to compare statistics documenting diversionary outcomes.

**New South Wales:** The *Young Offenders Act 1997*, which commenced on 6 April 1998, made major changes to the way young offenders are treated in New South Wales, with the aim of ensuring that minor offences are dealt with by police warnings and cautions, or by family conferences. Formal Children's Court proceedings are to be reserved for the most serious and persistent young offenders. The Act was largely based on the recommendations of a Working Party established in 1996 to look at introducing a conferencing scheme for young offenders, and improving the current system of police cautioning.<sup>77</sup> The report of the Working Party described the findings of an earlier unpublished evaluation report on community youth conferences,<sup>78</sup> and looked at different models for conferences. The Working Party recommended that a new statutory warning and cautioning system should be established, in conjunction with a scheme for family conferencing. The fundamental features of new system were explained by the Attorney General in the Second Reading Speech:

The Young Offenders Bill builds on the work that has already been done in this State, by introducing a structured, consistent and principled approach to dealing with juvenile offending across the State. The bill provides for a hierarchy of four different levels of interventions into juvenile offending, beginning with police warnings and cautions and graduating through to conferencing and, finally, attendance at court. How a matter is dealt with will depend upon the type of offence that has been committed, how serious it is, the amount of violence involved and the harm caused to the victim.<sup>79</sup>

**Warnings:** Warnings are the least intrusive action that may be taken by police under the *Young Offenders Act 1997*. They may be given by police as an immediate response to most summary offences where no violence is involved in the offending behaviour. A police officer must record the fact that a warning was made, and may identify the child concerned.

**Cautions:** Where a child admits to an offence for which a caution may be given, the police

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<sup>76</sup> ALRC/HREOC Inquiry, n 21, pp 46-48.

<sup>77</sup> NSW Attorney General's Department, *Report of the New South Wales Working Party on Family Group Conferencing and the Juvenile Justice System*, Discussion Paper, September 1996.

<sup>78</sup> Power P, *An Evaluation of Community Youth Conferencing in New South Wales: Report to JW Shaw QC MLC, NSW Attorney General*, March 1996 (unpublished).

<sup>79</sup> Hon J Shaw MLC, *NSWPD*, 21/5/97, pp 8958-59.

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may arrange to have the child formally cautioned, if the child so consents. Cautions are a serious intervention, much more than a 'slap on the wrist'.<sup>80</sup> Cautions are usually given at a police station, but may be given elsewhere if the person giving the caution considers this to be appropriate. A respected member of the community can give a caution, as can a court if it considers that the police should have cautioned the child in the first place.

Parents or carers of a juvenile offender can be present at a caution; victims are not present, but they are entitled to be notified that a decision has been made to caution the offender. The only sanction that can arise from a caution is that the offender may be requested to give a written apology to a victim. Cautions can be an occasion for police to advise children and families of the services available that might be able to assist in the prevention of further offending or provide support for the child and their family.<sup>81</sup>

**Youth justice conferences:** Where a child admits to an offence for which a youth justice conference may be held, the police, the DPP or a court may arrange for the offender and his or her parents or carers to attend a conference, if the child so consents. The victim can also participate, together with a support person or a person chosen by the victim to represent him or her. Legal advisers may participate in a conference, but not as legal representatives except in limited circumstances.

Youth justice conferences are administered by the Department of Juvenile Justice. Conference convenors are community members 'selected by local conference administrators for their common sense, understanding of broader structural issues relating to youth crime, knowledge and understanding of victims's issues, and group work skills.'<sup>82</sup> Conferences may be held anywhere except a police station, a court house, or DJJ office.

At the conference, an outcome plan is to be agreed between the participants. The Director of Youth Justice Conferencing has explained that 'the content of outcome plans is limited only by the good sense and imagination of the conference participants, but the plan must be realistic and not contain sanctions more severe than those a court might impose for a similar offence. Unlike police officers in New Zealand, NSW police have no power of veto over any outcome plan decided at a conference. Agreements will not be enforceable unless agreed to by the child and the victim/s. The victim's agreement is not required when the victim does not personally attend.'<sup>83</sup> If a plan is satisfactorily completed, there will be no further proceedings against the child in relation to the offence; if the plan is not completed, court proceedings may be commenced or continued against the child.

There are a number of offences that cannot be diverted to a youth justice conference. These

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<sup>80</sup> Bargen J, 'The Young Offenders Act 1997 (NSW) - a blueprint for change or more of the same?', *LawTalk* 507, 5 October 1998 p 39.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, p 40.

<sup>83</sup> *Ibid.*, p 40.

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are offences involving:

- homicide, and any offence punishable by a sentence of imprisonment for 25 years to life;
- sexual offences;
- most indictable offences which may be dealt with summarily in the Children's Court - for example, most robberies;
- drug offences;
- traffic offences; and
- breaches of apprehended violence orders.

***Operation of the Young Offenders Act 1997:*** It is too early for any evaluation to be carried out on the operation of the Act, less than a year having elapsed since the Act commenced on 6 April 1998. The Act must be reviewed within three years of commencement, and the review findings tabled in Parliament.

Although there has been no formal review of the Act, some preliminary figures about its operation are available. Sixteen conference administrators have been appointed throughout NSW, four of them Aboriginal, and over 280 community members have been appointed and trained as conference convenors.<sup>84</sup> Over 700 referrals to youth justice conferences have been made and accepted, and over 400 conferences held. (Many conferences involve co-offenders).<sup>85</sup>

According to the Department of Juvenile Justice, preliminary indications are that the operation of the Act, and in particular youth justice conferences, has wide community and government support.<sup>86</sup> It also seems that there has been some improvement in the traditionally low levels of cautioning by police.<sup>87</sup> According to Mr W Merton MP, since the Act was introduced 'Police have reported increased levels of satisfaction with the outcomes produced, with the police cautioning rate in NSW rising from around 5 percent to 50 per cent and referrals being made to conferences in appropriate cases.'<sup>88</sup>

Despite these promising indications, some reservations have been expressed about the extent of benefits to be achieved under the Act. Several commentators have noted that the scope

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<sup>84</sup> Department of Juvenile Justice, *Annual Report 1997-98*, p 40.

<sup>85</sup> Information from Ms J Barga, Director of Youth Justice Conferencing, Department of Juvenile Justice.

<sup>86</sup> Department of Juvenile Justice, *Annual Report 1997-98*, p 40.

<sup>87</sup> Wundersitz J, 'Pre-Court Diversion: The Australian Experience' in Borowski and O'Connor, n 4, p 276.

<sup>88</sup> NSWPD, 17/6/98, p 5997.

of offences for which conferencing may be held is fairly limited. The Senior Children's Magistrate in NSW, Stephen Scarlett, has observed that:

It is clear that this new legislation will not have the same drastic effect on the numbers of matters being dealt with by the Children's Court as occurred in New Zealand, where no more than 10% of all criminal matters are heard by the Youth Court. There are too many exclusions from the operation of the scheme for that to happen..... My own estimate is that the *Young Offenders Act* will see about 20% of the Children's Court workload being diverted.<sup>89</sup>

Another concern about the operation of the Act has been whether it will be suitable for young Aboriginal offenders, and whether these juveniles will receive the full advantages of diversion.<sup>90</sup> These concerns generally centre around:

- police discretion to determine whether juveniles are diverted to cautions or conferences, or are dealt with by the Children's Courts. Some studies indicate that indigenous young people are 'less likely to receive the benefit of diversionary options and are more likely to receive adverse decisions when police utilise discretionary powers'.<sup>91</sup>
- the cultural appropriateness of conferencing to indigenous communities. For example, some Aboriginal societies may traditionally seek to avoid open conflict between victim and offender. Another consideration is whether conferences can be designed to work with Aboriginal social structures and cultural obligations, language barriers, or communication patterns.<sup>92</sup>

In NSW, according to the Director of Youth Justice Conferencing, there are early indications that police are cautioning a higher proportion of Aboriginal young people than was the case prior to the introduction of the Act. However, the indications concerning conferencing are less encouraging:

'In the first weeks of operation of the Act, Aboriginal young people comprised a smaller proportion of the total numbers referred for a conference than of the

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<sup>89</sup> Scarlett S, 'The Young Offenders Act 1997 (NSW) and the Children's Court', *Children's Court of New South Wales Information Bulletin*, May 1998, No 39, 1 p 6.

<sup>90</sup> Barga, n 80, pp 40-41.

<sup>91</sup> Luke G and Cunneen C, *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System*, Juvenile Justice Advisory Council of NSW, Sydney, 1995; Wundersitz J, *The South Australian Juvenile Justice System: a Review of its Operation*, Office of Crime Statistics, Adelaide, 1996; Cunneen C, 'Community Conferencing and the Fiction of Indigenous Control', (1997) 20 *Australian and New Zealand Journal of Criminology* 292.

<sup>92</sup> Cunneen, *ibid* pp 300-303.

proportion of the total number of young people to whom a caution was given. This discrepancy may be related to the fact that during the first few weeks after the proclamation of the Act, Part 5 (Youth Justice Conferences) was not operational in many areas of NSW that have a high proportion of Aboriginal young people. These and other issues emerging from the data will be monitored closely by the YJAC [Youth Justice Advisory Committee].

Nonetheless, the Director said, 'many Aboriginal communities have generally expressed a commitment to the principles of conferencing.'<sup>93</sup>

**Victoria:** Youth conferencing is available on a limited basis in Melbourne. The Juvenile Justice Conferencing Project, as it is known, has been running for four years. It is administered by a charitable organisation, Anglicare Victoria, in association with the Children's Court of Victoria, the Department of Human Services, the Victoria Police and Victoria Legal Aid.

Juvenile offenders can only be referred to a conference by a Children's Court magistrate, and the magistrate must approve the plan developed by the conference for the offender. This means that juvenile justice conferences do not completely divert young offenders from court proceedings; rather, they form part of the court sentencing process. The conferences are targeted at more serious juvenile offenders - a matter will only be referred to a conference if the offence warrants a 'supervisory order' (an order that is more onerous than probation, generally given to young people who have previous convictions and have been found guilty of a fairly serious offence, or numerous offences).

An evaluation of the conferencing scheme found that feedback on the conference experience was positive for victims, offenders and their families.<sup>94</sup> Early findings on re-offending indicated however, that there were not significant differences in outcome between the group conferencing and a comparison group sentenced to probation.

**Queensland:** In 1996, the Parliament of Queensland amended its *Juvenile Justice Act 1992* to establish a statutory diversionary scheme consisting of two tiers: police cautioning at the first level, and community conferencing at the second level. The scheme took effect on 2 April 1997. Under the new laws, police cautions may be administered by police or, if the child is a member of an Aboriginal or Torres Strait Islander community, by a respected person of the community. Victims may participate in a caution procedure. The Department of Families, Youth and Community Care is responsible for the implementation of community conferencing. There is no statutory limit on the types of offences that may be referred to a conference.

The aim of a conference is to reach a 'community conference agreement'. An unusual aspect

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<sup>93</sup> Bagen, n 80, pp 40-41.

<sup>94</sup> Markiewicz A, *Juvenile Justice Group Conferencing in Victoria: An Evaluation of a Pilot Program, Phase 2 Report*, December 1997.

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of the Queensland community conferencing provisions is that in some circumstances conferencing forms part of the court sentencing process, rather than acting as an alternative to court proceedings. The role that a community conference plays depends on the organisation that refers the matter to conferencing. Conferences may be commenced in one of two ways: first, the police may refer a matter to conferencing instead of starting court proceedings; and second, where court proceedings against a child have been started, the court may refer the matter to a conference if it considers that:

- the offence may be appropriately dealt with by a conference without the court making a sentencing order; or
- a conference would help the court in making an appropriate sentencing order.

If a referral is made on the basis that it would assist the court in deciding on a sentence for the offender, when the court sentences the offender it must consider: the child's participation in the conference; the agreement; anything done by the child under the agreement; and a report on the conference outcome by the conference convenor.

An evaluation of the community conferencing pilot projects reported that the conferencing scheme was successful in its core goal of victim-offender reparation, and that satisfaction levels were consistently high among young offenders, their parents or caregivers, and the victims. However, referral numbers were relatively low, particularly for indigenous offenders, and the pilots did not seem to have reduced juvenile court appearances, as had been intended.<sup>95</sup>

**South Australia:** Under the *Young Offenders Act 1993 (SA)*, South Australia has a two tiered system of diversion: at the first level is formal and informal police cautioning, and at the second level is family conferencing for the more serious cases. Family conferencing is run by the Courts Administration Authority. A matter may be referred to a conference by the police if a juvenile admits the commission of a 'minor offence'. In 1997 the Director of the South Australian Office of Crime Statistics set out some figures on the early use of conferencing in South Australia:

Conferencing has now been in operation since 1 January 1994 and over 2000 have now been held, with the number of people attending any one conference ranging from two to forty. As in New Zealand, the majority have resulted in a negotiated agreement which usually involves some form of restitution for the victim... [O]f those conferences involving a victim-based crime, approximately 75-80% had victim participation.... Preliminary evidence suggests a high level of victim satisfaction with the process. A 1995 pilot survey found that 93% of victims contacted indicated that they found participation in a conference helpful. Despite these positive trends,

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<sup>95</sup> Hayes H and Prenzler T, *Making Amends: Final Evaluation of the Queensland Community Conferencing Pilot*, Centre for Crime Policy and Public Safety, Griffith University, July 1998. See also *Commentary on the Evaluation of the Queensland Community Conferencing Pilot 1998*, Juvenile Justice Program, Department of Families, Youth and Community Care.



however, some initial problems have been identified and need to be addressed. One concern is the fact that police are referring fewer matters to conferences than predicted - namely 15% of cases rather than the anticipated 30%. As a result, the proportion of matters being sent straight to court is currently the same as under the old system (ie 40%) despite predictions that, with the introduction of the new two-tiered diversionary system, court figures would drop to 10%. Another issue of concern is the fact that relatively few Aboriginal youths are being given the option of a conference and are, instead, being fast-tracked into the court system'.<sup>96</sup>

**Western Australia:** The *Young Offenders Act 1994* (WA) provides a legislative basis for police cautioning, and establishes Juvenile Justice Teams (JJs) as a further diversionary option available to the police and the Children's Court. When a matter is referred to a JJT by a court or the police, the teams negotiate with the young person, the family and victim to reach a satisfactory outcome.

Each Juvenile Justice Team consists of a youth justice co-ordinator, a police officer, a Ministry of Education officer and an aboriginal community worker in appropriate areas. The JJTs were developed with the philosophy that an inter-agency approach offered the best hope for addressing all the needs and problems of young people that contribute to their offending behaviour. These JJTs resemble to some extent the multi-agency Youth Offending Teams that have been established in the United Kingdom (see p 28 below).

In February 1998 an evaluation of the *Young Offenders Act 1994*, including the operation of juvenile justice teams and police cautioning, was published.<sup>97</sup> The evaluation found that the Act has been successful in diverting minor offenders from the court system. Between 1994 and 1996, the courts processed at least 10% fewer juveniles, and police cautioning increased by 80%.

However, this positive effect was to some extent the result of a 'net-widening' in the juvenile justice system - that is, an overall increase in the number of young people who came into formal contact with the police, juvenile justice teams and courts. Some young people who would have previously been dealt with informally by the police are being given a formal caution. The evaluation also found that there were still serious concerns about the over-representation of Aboriginal young people in the juvenile justice system. Aboriginal juveniles were not being diverted from the courts as effectively as other young persons. There was doubt about the extent to which in practice Aboriginal juveniles and their families are able to access appropriate services.

Juvenile Justice Teams were rated very highly by offenders, their parents and victims.

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<sup>96</sup> Wundersitz J, 'Pre-Court Diversion: The Australian Experience' in Borowski and O'Connor, n 4, pp 283-284.

<sup>97</sup> Cant R and Downie R, *Evaluation of the Young Offenders Act (1994) and the Juvenile Justice Teams*, Social Systems & Evaluation, February 1998.

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Nevertheless, the evaluation found that there is very limited involvement with the JJTs from community agencies or other government departments such as Education, Health, Local Government or Family and Children's Services. The evaluation observed that 'While such an [inter-agency] approach would have to be implemented locally, it will need strong support from the chief executive officer of each participating agency and also at ministerial level to be effective'<sup>98</sup>

**Tasmania:** A diversionary conferencing pilot program is currently run by the police in Tasmania. There are plans to expand this program, and a new statute, the *Youth Justice Act 1997* (Tas) has been enacted that will provide a statutory basis for family conferencing for young offenders, in addition to setting out statutory police cautioning powers. (Police cautions are currently governed by police standing orders). The new statutory diversionary scheme is not yet in force, however, because the *Youth Justice Act 1997* has not yet been proclaimed to commence. Commencement of the *Youth Justice Act 1997* is expected in mid-1999 or later, when the necessary resources and infrastructure are available.

The new police cautioning provisions in the *Youth Justice Act 1997* will provide for both informal and formal cautions. When the *Youth Justice Act 1997* commences, the police will be able to refer a matter to a community conference, if the young person so consents. Conferences will be administered by the Department of Health and Human Services, who will put the conferencing process to tender to community organisations on a fee for service basis.

**Australian Capital Territory:** The Australian Federal Police carry out some diversionary conferences on a trial basis, aimed at young people who intend to plead guilty in court. A long-term experiment on the effects of these conferences is being carried out by the Australian Federal Police and the Australian National University. The project, known as the Canberra Reintegrative Shaming Experiments (RISE), compares the effects of standard court processing with the effects of a diversionary conference for certain kinds of cases.

Because the experiment is still under way, no final data on the effects of conferencing are available. However, some early findings indicate that victims are dealt with better by a conferencing system than by the traditional court system - for example, victims frequently received apologies during a conference, which hardly ever happened in court proceedings.<sup>99</sup> Conferences also tended to involve greater shaming effects, more forgiveness by victims and more discussion of drug and alcohol problems than court proceedings. Most victims and offenders thought conferences were fairer than courts.

The future of diversionary conferencing in the ACT has yet to be determined. A final

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<sup>98</sup> Ibid, p v.

<sup>99</sup> Sherman et al, *Experiments in Restorative Policing: a Progress Report to the National Police Research Unit on the Canberra Reintegrative Shaming Experiments*, Australian Federal Police and Australian National University, June 1998.

decision on whether, and how, conferencing will be adopted in the ACT will be made when the results of the RISE study are known.

**Northern Territory:** The NT police have run a trial family conferencing scheme in Alice Springs and Yuendumu. The scheme does not have a legislative basis. A 1996 report of the Northern Territory Law Reform Committee reviewed the pilot schemes and recommended that a victim-offender mediation program should be established in the Northern Territory for all criminal cases.<sup>100</sup> The report took the view that while victim-offender mediation is not generally suitable for serious offences against the person, there will be exceptional cases where it should be available.

**United Kingdom:** A new structure for juvenile justice has recently been created in the United Kingdom. The *Crime and Disorder Act 1998* (UK) established a statutory framework of police reprimands and Final Warnings, and provided for youth justice matters to be dealt with by local multi-agency Youth Offending Teams. Under the new system, a first offence by a young person can be met by a reprimand, if it was not serious. Any further offence would have to result in a Final Warning or criminal charges - a young offender must not receive two reprimands. A Final Warning will usually be followed a community intervention program involving the offender and his or her family to address the causes of the offending.

Although the United Kingdom does not have a statutory scheme of family or community conferences, the *Crime and Disorder Act 1998* provides for the creation of Youth Offending Teams. These teams are to be established by local authorities, and are to include a probation officer, a social worker, a police officer, a person from a local health authority, and a person nominated by the chief education officer of the local authority. The teams may also include other appropriate persons. The Youth Offending Teams, which are currently being piloted, are to co-ordinate the provision of youth justice services, and carry out other functions under the local authority's youth justice plan. The Teams can also be used to supervise individual offenders; for example, if a court imposes an 'action plan order' on a juvenile, he or she may be supervised by a Youth Offending Team to ensure that the requirements of the order are completed.

In addition to Youth Offending Teams, the Blair Labour Government plans to introduce Youth Offender Panels. The Youth Justice and Criminal Evidence Bill introduced into the House of Lords on 3 December 1998 would allow magistrates to refer first time young offenders to a youth offender panel. Each panel would include a member of the Youth Offending Team and at least two other members directly recruited from the community. Meetings of the panel would be attended by the young offender's parents, victims, and other invited persons capable of having a good influence over the offender.

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<sup>100</sup> Northern Territory Law Reform Committee, *Mediation and the Criminal Justice System: Final Report*, Report No 17A, March 1996.

## 6. PUBLIC NAMING OF JUVENILE OFFENDERS

In all Australian States and Territories there are restrictions on publication of the identity of juveniles involved in criminal court proceedings.<sup>101</sup> There have recently been calls in New South Wales and elsewhere for the laws preventing the naming of juvenile offenders to be relaxed. The Queensland Government is reported to be reviewing the laws relating to the identification of juveniles in that State.<sup>102</sup> The NSW Police Commissioner, Mr Peter Ryan, the Member for Maitland, Mr Peter Blackmore MP, and the President of the Queensland Children's Court, Judge McGuire, are among those reported to have said that juveniles guilty of serious violent offences should be named.<sup>103</sup> These proposals have been opposed by several commentators, including the NSW Director of Public Prosecutions Mr Nick Cowdery QC, and the secretary of the NSW Council for Civil Liberties, Mr Ken Buckley.<sup>104</sup> The United Kingdom Parliament has recently extended the discretion of youth courts to allow the names of juveniles to be released following conviction, where this is in the public interest.<sup>105</sup>

In some Australian jurisdictions, the restrictions on naming juveniles can be lifted in particular circumstances. In Western Australia, the Supreme Court may authorise the publication of a child's name, having regard to both the public interest and the child's interests;<sup>106</sup> in Victoria the Senior Magistrate of the Children's Court can give permission to publish the name of juveniles;<sup>107</sup> and in South Australia, the Youth Court can allow publication of material identifying a child, subject to such conditions as the Court thinks fit.<sup>108</sup>

In New South Wales, the name of a juvenile offender may be published in three circumstances: first, if it is contained in a publication or broadcast of an official report of the proceedings that includes the name of the child; second, if the child is over the age of 16, he or she may consent to the publication; and third, if the child is under 16, the name may

<sup>101</sup> The law in each jurisdiction dealing with the public naming of juvenile offenders is set out in detail in Sampford K, *Identification of Juvenile Offenders*, Queensland Parliamentary Library, Research Bulletin No 9/98.

<sup>102</sup> Ibid; 'Row over naming juveniles', *The Australian*, 13/10/98.

<sup>103</sup> 'Name and shame young criminals says police chief', *Daily Telegraph*, 30/10/98; Children's Court of Queensland, *Fifth Annual Report 1997-98*, pp 73-74; 'Expose juvenile repeat offenders: MP', *Newcastle Herald*, 11/7/98.

<sup>104</sup> N Cowdery QC, 'Voters should beware the political hard cell', *Sydney Morning Herald*, 24/2/99; 'Anger at Ryan's youth shaming plan', *Sydney Morning Herald*, 4/10/97.

<sup>105</sup> *Crime (Sentences) Act 1997* (UK) s 45.

<sup>106</sup> *Children's Court of Western Australia Act 1988* (WA) ss 35-36A.

<sup>107</sup> *Children and Young Persons Act 1989* (Vic) s 26.

<sup>108</sup> *Youth Court Act 1993* (SA) s 25.

be published with the consent of both the court and the child.

The arguments for and against the public naming of young offenders were outlined in the earlier Parliamentary Library Briefing Paper on Juvenile Justice.<sup>109</sup> In brief, the arguments against naming serious juvenile offenders are:

- Anonymity may enhance the child's prospects for rehabilitation. Young offenders who are publicly identified may be stigmatised or ostracised, which may promote further anti-social behaviour. Public naming may affect their opportunities for employment.
- There is a risk that some offenders may actually welcome the attention they receive from being publicly named, and the publicity may reinforce the offending behaviour.
- The restrictions on identifying juvenile offenders are consonant with Australia's international obligations to protect the privacy of children in the criminal justice system under the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, and the United Nations Convention on the Rights of the Child.
- Naming juvenile offenders is unlikely to act as a deterrent, since most juvenile crime is largely unplanned and impulsive.
- There has not been a wave of violent crime by juveniles to warrant a change in the law.

The arguments in favour of naming serious juvenile offenders are:

- It would increase the personal accountability of young offenders for their actions.
- It would increase public safety by alerting members of the community to the presence of young offenders who have committed serious crimes.
- It would prevent juveniles taking advantage of the special protections available to them, in the knowledge that their wrongdoing will not be made public.
- Naming juvenile offenders would act as a deterrent to the young offenders themselves, and to other young people.
- Legislation allowing the naming of young offenders could be restricted to those who are aged 17, who in some other Australian jurisdictions are currently treated as adults for the purposes of the criminal law.

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<sup>109</sup> Juvenile Justice Briefing Paper, n 1, pp 29-31. See also 'Courts battle identity crisis', *The Australian*, 8/12/98.

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The debate about the naming of juvenile offenders should be distinguished from arguments about whether they should be publicly *shamed* or humiliated by wearing distinctive clothing or messages. Proposals to publicly name young offenders are generally targeted at serious violent young offenders who may be a risk to the community, whereas public shaming is aimed at less serious offenders. For example, in the Northern Territory, juvenile offenders who are found guilty of a property offence may be required to wear a distinctive uniform or vest as part of a community service order or a punitive work order.<sup>110</sup> A great deal of controversy was generated recently when the parents of a young boy who was caught shoplifting in the ACT agreed with the police and store manager that the boy should walk through the mall wearing a T-shirt with the words 'I am a thief'.<sup>111</sup>

## 7. CONCLUSION

Legislators and policy-makers around the world are continuing to search for new approaches and techniques to tackle juvenile crime. No single solution to the problem of juvenile crime has yet emerged. Instead, these developments can be seen as adding to the armoury of measures available to address the many facets of youth crime.

As the variety of approaches and measures to deal with youth crime increases, it becomes more difficult to determine an appropriate mixture of different methods and to balance the competing interests and approaches to juvenile justice in a single system. As the earlier Parliamentary Library Juvenile Justice briefing paper observed, 'The challenge to the juvenile justice system is finding the correct balance between making young offenders accountable for their actions, meeting the needs of victims, appreciating the diminished responsibility of youthful offenders and addressing the social and economic dimensions of juvenile crime'.<sup>112</sup>

These different approaches are all represented in the developments outlined in this present briefing paper. The philosophy of making young offenders accountable for their actions is reflected in the adoption of youth justice conferencing, in calls to allow the public naming of serious young offenders, and in proposals to remove the presumption that offenders aged ten to thirteen do not understand that their criminal actions are wrong. The victims' rights movement is given recognition by the youth justice conference system, which allows victims to tell the offender about the effect of the crime, and to have a say in the offender's punishment or reparation. The need to make some allowance for the incapacities of youth is again apparent in the debates about the naming of young offenders and the age of criminal responsibility.

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<sup>110</sup> Flynn M, 'One Strike and You're Out!' (1997) 22 *Alternative Law Journal* 72 p 73.

<sup>111</sup> Hon F Nile MLC, Shanahan B, 'Should children be publicly shamed?', *The Australian*, 6/3/98; 'T-shirt punishment puts shame on us all', *The Australian*, 7/3/98; 'Shame on trial', *Daily Telegraph*, 6/3/98.

<sup>112</sup> Juvenile Justice Briefing Paper, n 1, p 32.

The importance of addressing the social and economic dimensions of juvenile crime is reflected in the research into the links between juvenile crime, poor parenting, and the effect on families of poverty, isolation, unemployment and family breakdown. Although manifested in a very different way, the intensifying interest in the role of parents is also apparent in the introduction of laws aimed at compelling parents to take steps to prevent their children from offending, on pain of penal sanctions.

The proliferation of different theories, programs, techniques and laws makes the effective co-ordination of a juvenile justice system increasingly important. Measures such as the Juvenile Justice Teams in Western Australia, and the Youth Offending Teams in the United Kingdom, are an innovative means of engaging the multiple agencies concerned with young people at risk - schools, health services, police, local government, courts, and departmental officers - to avoid the potential for young people to 'fall through the gaps' of a complex system.

## **APPENDIX A**

### **Main juvenile justice legislation in each Australian State and Territory**



Jurisdiction	Legislation
New South Wales	Children (Criminal Proceedings) Act 1987 Children (Detention Centres) Act 1987 Children (Community Service Orders) Act 1987 Children's Court Act 1987 Sentencing Act 1989 Children (Protection and Parental Responsibility) Act 1997 Young Offenders Act 1997
Victoria	Children and Young Persons Act 1989 Magistrates Court Act 1989 Supreme Court Act 1986 Sentencing Act 1991 Crimes Act 1958 Bail Act 1977
Queensland	Juvenile Justice Act 1992 Children's Court Act 1992
South Australia	Young Offenders Act 1993 Youth Court Act 1993 Children's Protection Act 1993 Bail Act 1985 Criminal Law (Sentencing) Act 1988 Family and Community Services Act 1972 Summary Offences Act 1953
Western Australia	Young Offenders Act 1994 Bail Act 1982 Children's Court of Western Australia Act 1988 Sentencing Act 1995 Police Act 1892
Tasmania	Child Welfare Act 1960 Youth Justice Act 1997 (uncommenced)
Northern Territory	Juvenile Justice Act 1983 Police Administration Act 1978
Australian Capital Territory	Children's Services Act 1986 Crimes Act 1900