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***The Children (Parental
Responsibility) Act 1994:
An Update***

by

Marie Swain

Briefing Paper No 6/97

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EXECUTIVE SUMMARY

- ▶ The *Children (Parental Responsibility) Act 1994* was introduced in November 1994 and commenced limited operation in March 1995 in the towns of Orange and Gosford. This pilot scheme has now been evaluated and the retention and expansion of the legislation foreshadowed (pp3-11)
- ▶ In summary the Act: (i) gives courts the power to require parents to be present at criminal proceedings against children; (ii) permits courts to release children on condition that they give undertakings as to their future behaviour; (iii) enables courts to require parents to give undertakings as to the future behaviour of their children; (iv) gives courts the power to require a child found guilty of an offence to attend counselling with its parents; (v) makes it an offence for a parent, by wilful default or by neglect to exercise proper care and guardianship, to contribute to the commission of an offence by a child; (vi) permits rules of court to be made regarding the attendance of parents and children; (vii) allows warrants and summonses to be issued to ensure attendance of those required; (viii) gives police the power to remove an unsupervised child, who they believe on reasonable grounds to be of, or under, 15 years of age, from a public place and escort it to its parent's home, where they consider this action may reduce the likelihood of a crime being committed or of the child being exposed to some risk; and (ix) if it is not possible to take the child to its parent's home, then the police can take the child to 'a place of refuge' prescribed by the regulations. Detailed commentary on the legislative provisions is provided on pages 11 to 22.
- ▶ While there has been support for the Act from a number of quarters, the legislation has not been without its critics. The issues most commonly raised by those opposed to the legislation include: it breaches general legal principles; it breaches Australia's international obligations; it recriminalizes what are essentially welfare issues; it allows police to harass young people; it disregards the position of wards of the State; it impacts disparately on different sections of the community, particularly those from a non-English speaking background and Aboriginal youth; the cost of its implementation is not justified; and it has attracted the dissatisfaction of many operational police (pp22 - 28)
- ▶ Variations on the legislation can be found in other jurisdictions, both in Australia and overseas (pp29 - 35)

INTRODUCTION ¹

With the foreshadowed extension to the *Children (Parental Responsibility) Act 1994*, ² (referred to hereafter as the CPR Act) it would appear that law and order issues remain very much in the forefront of the current political debate. In 1994 the CPR Bill was introduced, in part, as a response to the increasing public concern about the perceived level of crime, particularly violent crime, occurring in the community. That 'people not only have the right to be safe, but to feel safe, on our streets' ³ is seen as fundamental. The CPR Act was passed in the lead up to the 1995 State election in which law and order was a major policy issue. ⁴

The CPR Act was seen by the former Coalition Government as complementing other measures taken by it in relation to juvenile crime, and the attempt to apportion responsibility between young offenders and those responsible for their upbringing represented a shift in focus from holding the young person solely responsible to acknowledging that 'no responsible Government can place all the blame on young and impressionable shoulders'.⁵

The first section of this Paper sets out the general background to the CPR Act; the second section examines some of the issues and implications raised by it; the third section presents a number of reflections on the Act since the commencement of its limited operation; and section four outlines similar legislative approaches in other jurisdictions.

1 BACKGROUND

In a survey of community attitudes towards crime conducted for the New South Wales Police Service by independent consultants, Price Waterhouse Urwick, in early November 1994 it was shown that almost half (48%) of the 1,293 people surveyed feared that they or their families may be murdered, and even more believed they would be victims of violent crime (58%).⁶ Official figures supplied by the Bureau of Crime Statistics and Research suggested that such community perceptions were not in keeping with the actual incidence of crime. Dr Don Weatherburn, the Director of

¹ This *Briefing Paper* is a substantially revised and updated version of *Briefing Paper 34/94* which it supersedes.

² Hon B Carr MP, Premier, Minister for the Arts and Minister for Ethnic Affairs, Press Release, 'Parental Responsibility Act to be extended throughout country NSW', 11 March 1997.

³ Hon J Fahey MP, then Premier and Minister for Economic Development, Second Reading Speech, *NSWPD*, 24 November 1994, p5819.

⁴ 'Facts not allowed to get in the way of the politics of fear', *Sydney Morning Herald*, 24 November 1994.

⁵ Hon J Fahey MP, Second Reading Speech, op cit, p5819.

⁶ 'City of fear' suits MPs, media, police', *Sydney Morning Herald*, 18 November 1994.

the Bureau said that: 'there has been no change in the recorded rate of murder, robbery not involving a firearm, sexual assault, break enter and steal offences and drug use and trafficking offences over the past three years.'⁷ However, the then Senior Children's Magistrate, Rod Blackmore, stated that while levels of offending in New South Wales may have fallen in the general population, it was not the case in relation to juvenile crime. According to Mr Blackmore, although burglary and car theft rates had declined, the incidence of street violence, muggings, robberies and assaults committed by juveniles were on the increase.⁸ The focus on the law and order debate, with particular emphasis on juvenile crime, intensified following the release of a report prepared for the NSW Police Service on street gangs, which estimated that there were 50 street gangs with an estimated 1500 members, who were committing crimes ranging from graffiti and theft to drug dealing and murder.⁹

Many criminologists and academics working in the area have pointed out that there is a difference between an actual increase in crime and an increase in community perception that this has occurred. The explanation for why there is a disproportionate fear in the community, is attributed by some to the tendency of the media to place undue focus on crime and the tendency for law and order issues to become the subject of political debate.¹⁰ Social researcher Hugh Mackay says the fear of crime is genuine, if largely unfounded and symptomatic of a wider malaise, namely that people are more anxious because their lives are more uncertain:

Many of the old givens, like a regular job, disappeared in the economic restructuring of the 80s ... there is a deep-seated sense of longing in the community 'to get things under control', to restore a sense of security.¹¹

More recent statistics indicate that the largest age group (45%) appearing before criminal courts is not juveniles but adults aged from 20 to 29, with the majority aged between 20 and 25. According to Dr Don Weatherburn, the most common offences committed by these young adults were stealing, breaking and entering and car theft, with most offenders coming from a background of below average income; higher than average unemployment; a higher proportion of poor, single parent families; families where there is a drug or alcohol problem; and parents who reject and/or neglect their children.¹²

⁷ 'Fear of murder is rife, survey reports', *Sydney Morning Herald*, 17 November 1994.

⁸ 'Youth violence near crisis point', *Daily Telegraph Mirror*, 22 November 1994.

⁹ Ibid.

¹⁰ 'City of fear' suits MPs, media, police', *Sydney Morning Herald*, 18 November 1994.

¹¹ 'Crime and the big lie' *The Australian*, 7 September 1996.

¹² 'Statistics do not support concern', *The Australian*, 21 January 1995.

History of Summary Offences Legislation ¹³

Before examining the CPR Act in detail, the legislation needs to be put in an overall context. While Part 2 of the Act deals with the responsibility of parents for the behaviour of their children, the issues with which Part 3 is concerned, can be variously described as 'public order offences', 'street offences' or 'summary offences'. As Brown et al point out:

these references highlight the main features of this area of the law: the centrality of the police (and police discretion); the regulation of behaviour in public places; the divergence from the common law criminal law and process; and the processing of most charges summarily in the lower courts. ¹⁴

The need for such summary offences type legislation has been seen differently over the years. The first comprehensive summary offence legislation in New South Wales was the *Police Offences Act 1901* which prohibited a number of activities such as washing clothes in a public fountain or failing to darken all doors and windows within one hour after sunset. In 1970 the Askin Government introduced the *Summary Offences Act* 'as part of a law and order campaign and in direct response to the anti-Vietnam War demonstrations of that era'.¹⁵ This Act repealed and replaced the *Police Offences Act 1901*. In so doing it removed a number of archaic offences (such as those outlined above), introduced new offences regarding trespass, and increased penalties for other offences.

Repeal of the *Summary Offences Act 1970* formed an important part of the Labor Party's 1976 campaign platform, and upon winning government, it enacted the *Summary Offences (Repeal) Act 1979*. In its place was substituted a package of 15 other Acts which formed the basis of public order offence law in New South Wales. In late 1986, in a climate of increasing community concern about street crime, with people allegedly afraid to walk, or to use public transport, at night, the Labor Government announced plans to impose harsher penalties for 'anti social behaviour'. As a result the *Offences in Public Places (Amendment) Act 1987* was introduced, which substantially increased the fines available for existing public order offences. ¹⁶

Brown et al writing in *Criminal Law* continue at page 969:

In the State Government election campaign of February/March 1988, both sides campaigned on law and order platforms, attempting to

¹³ The information in this section is taken from David Brown et al, *Criminal Laws*, The Federation Press, 1990, p965.

¹⁴ Ibid, p960.

¹⁵ Ibid, p966.

¹⁶ For minor acts of vandalism (defacing walls, damaging fountains or monuments) the maximum penalty rose from \$100 to \$300. The amendments also increased from \$1000 to \$2000 the amount which a court may order for repairs or compensation caused by a person committing one of the vandalism offences.

outbid the other with promises of more police, more prisons and tougher measures. The Liberal/National party campaign expressly undertook to reinstate the *Summary Offences Act* ... as part of 'an immediate and dramatic overhaul of the administration of justice in New South Wales to restore public confidence [and] rebuild respect for authority, for other people and for private property'.

Following the Coalition's electoral success, the *Summary Offences Act 1988* was introduced. However, Brown et al claim that this piece of legislation contained fewer substantial changes than those introduced by the Labor Government in 1979 and that the changes could easily have been achieved by amending existing legislation such as the *Crimes Act*.¹⁷

Children (Parental Responsibility) Act 1994: On 21 November 1994 announcements came from both sides of politics in relation to juvenile justice issues: the then Leader of the Opposition, Hon B Carr MP, outlined the Labor Party's stance on teenage gangs at a press conference in Marrickville,¹⁸ and the then Premier, John Fahey, announced details of tough anti-gang laws to be introduced by the Coalition Government.¹⁹ These measures would increase the powers of the police and would place a greater onus on parents to ensure that their children do not get involved with gang and juvenile crime activities.²⁰

On 24 November 1994 the *Children (Parental Responsibility) Bill 1994*, accompanied by the *Summary Offences and Other Legislation (Graffiti) Amendment Bill 1994*, was introduced and read a second time.²¹ Although there was some opposition to the CPR Bill, it was supported in the main with certain amendments being made. In essence these were: that the legislation was to be reviewed in one year not five; that a police station was expressly to be ruled out as a 'prescribed place of refuge'; and that police officers were to have an obligation to notify the Department of Community Services if they believed a child returned home by them is at risk of abuse.

The Bill was assented to on 12 December 1994 and commenced on 23 December 1994, with the exception of sections 5-9 and Part 3: Welfare of Children in Public Places,²² which commenced in a limited capacity on 13 March 1995.²³ In light of

¹⁷ David Brown et al, op. cit., p970.

¹⁸ 'Youths throw bottle at ALP Chief', *The Australian*, 22 November 1994.

¹⁹ Ibid.

²⁰ Hon J Fahey, Premier and Minister for Economic Development, Press Release, 'Fahey Government moves against juvenile offenders', 21 November 1994.

²¹ For a discussion of the provisions of the *Summary Offences and Other Legislation (Graffiti) Amendment Bill 1994* please see the Parliamentary Research Service *Briefing Paper* No 34/94.

²² Government Gazette, Number 174 of 23 December 1994, p7565.

²³ Government Gazette, Number 23 of 3 March 1995, p1036.

certain misgivings expressed about the Act, it was decided to implement the legislation in a limited fashion, with the areas of Gosford and Orange chosen as the locations for a 12 month trial. The rationale for their selection was, according to the then Minister for Police, the Hon G West MP, that:

those two communities were selected because both of them have an acknowledged juvenile problem. In both areas we have sought and achieved the support of the local patrol, we know that both of those communities have the back up support of other agencies and we have the ability to find the safe house where these juveniles can be taken and detained.²⁴

The trial scheme run in Orange and Gosford has reportedly had mixed results. By most accounts the citizens and police in Orange felt positive about the trial in their area.²⁵ However, the pilot was seen as less than successful in Gosford, although in the early stages police said that there was a noticeable decrease in the number of young people out after dark and they were encountering less violence on the streets.²⁶ In part the differencing outcome has been attributed to the fact that in Gosford the scheme was limited to the CBD rather than the suburban malls where young people tend to hang out, and there was not the same degree of community support for the scheme.²⁷

It would appear that the Orange community had already put in place certain local strategies to deal with young people who may have been at risk, prior to the commencement of the CPR Act. Similar initiatives are being implemented in Bourke, where the families of children involved in petty crime and vandalism have approved the sharing of confidential information for a long term project involving police, juvenile justice, community service, and health and education authorities, which involves the families undertaking training in living skills, hygiene, parenting, drug and alcohol counselling and basic budgeting. A street worker program has been sponsored by the Department of Community Services and the Presbyterian Church's Burnside Homes; volunteer civilians are being trained at the Goulburn Police Academy for court support work, so that police can be released for other duties; and the Department of Juvenile Justice is undertaking an Aboriginal mentor scheme, training Aborigines to be role models for children on court orders.²⁸

²⁴ 'Juvenile crime bill to be given test run', *Sydney Morning Herald*, 9 February 1995.

²⁵ Information provided by police in Orange indicated that the street enforcement procedure over the 18 month period of the trial had resulted in an estimated 18% reduction in petty street offences. 'Mayors hail law to let police nab youths', *Sydney Morning Herald*, 12 March 1997.

²⁶ 'New youth powers give police the whip hand', *Telegraph Mirror*, 10 May 1995.

²⁷ 'Night street sweep cut youth crime' *Sunday Telegraph*, 8 September 1996.

²⁸ 'Bourke tries self help to solve its race and crime problems', *Sydney Morning Herald*, 20 December 1996. On 15 April 1997, the Minister for Community Services said that the Aboriginal mentor scheme now has more than 150 mentors helping juvenile offenders, and that a general mentor scheme is being introduced

In December 1995 the latest figures available for both towns showed that 20 children had been picked up by police in the first year of the scheme. Only one child was taken to the Orange safe house and 8 were taken to the safe house at Gosford.²⁹ (By September 1996, 59 children, two of whom have come under police notice more than once, had been picked up by Orange police. No up to date figures for Gosford were provided.)³⁰

In October 1995 the Attorney-General, Hon J Shaw MLC, mentioned the existence of a committee, comprising both government and non-government agencies, which had been established to oversee the evaluation of the CPR Act. No action would be taken until this Committee had delivered its report.³¹ The initial evaluation was undertaken by private consultants, Kearney MacKenzie and Associates, and submitted to the CPR Act Evaluation Committee³² in September 1996. Both Reports are said to have recommended against the retention and expansion of the CPR Act,³³ describing it as 'limited', 'superficial' and 'unworkable'. The point was also made that 'taking youths off the streets does nothing to address the causes of juvenile offending',³⁴ and that the CPR Act 'breached international rights conventions and the principle that apprehension by police required a crime.'³⁵ To date, neither the Kearney MacKenzie Report, nor the Evaluation Committee's Report has been made publicly available.³⁶ In March 1997 Premier Carr announced that the CPR Act

in the greater Sydney area for young offenders from other cultural backgrounds. Hon R Dyer MLC, *NSWPD* (LCProof), p19.

²⁹ Figures provided by a spokesman for the Minister for Community Services, 'Clamp on children violates rights', *Sydney Morning Herald*, 28 December 1995.

³⁰ 'Night street sweep cut youth crime', *Sunday Telegraph*, 8 September 1996.

³¹ *NSWPD*, Legislative Council Estimates Committee No 1, 30 October 1995, p40.

³² The following organisations had representatives on the Evaluation Committee: Attorney General's Department; Department of Community Services; Ministry for Police; the Police Service; Aboriginal Affairs; Juvenile Justice; NCOSS; Youth Justice Coalition; Youth Action and Policy Association; Association of Childrens Welfare Agencies; Local Government and Shires Association; Juvenile Justice Advisory Council; the Cabinet Office; Local Courts Administration; and the State Network of Young People in Care.

³³ 'New street law gets OK', *Sunday Telegraph*, 12 January 1997; 'Carr backs youth loiter law for bush', *Daily Telegraph*, 11 February 1997; and 'Carr rejects youth plea', *Daily Telegraph*, 14 February 1997.

³⁴ 'New street law gets OK', *Daily Telegraph*, 12 January 1997.

³⁵ 'Country children may be detained and delivered home', *Sydney Morning Herald*, 11 March 1997.

³⁶ As neither Report is available the above paragraph has been drawn entirely from press accounts. This has meant verifying the accuracy of the reported comments has not been possible. Furthermore, even if the reported statements are accurate, it is not totally clear from the press coverage which Report said what. Certain comments are attributed in some articles as being contained in the consultants'

was to be amended and its coverage extended, saying that 'the retention and expansion of the Act forms part of an entirely new approach to crime prevention in country New South Wales'.³⁷ The applicability of the laws to country towns and cities was explained in terms of the short distances police would have to travel to return children to their homes and the fact that in the majority of cases the police would know the young people and their families. This was contrasted with the situation prevailing in metropolitan centres like Sydney.

In a country city like Orange, the police on duty picking up children who are causing problems, very often know the parents and there is not a long distance to go to take those kids to the parental home. In the city, by contrast, the police have got a real problem. The police on the streets at Kings Cross can't really be expected to pick up young people and transport them for an hour or two hours to get them home to Campbelltown or Camden.³⁸

The foreshadowed amendments include provisions: (i) to ensure that police inform the parent or guardian of a child removed under the Act; (ii) that young people may also be taken by police to another relative if the parents are not home; and (iii) that a child must be taken inside and not left on the doorstep of the home to which it has been returned. A \$1.5 million 'Safer Communities Development Program' is to be introduced and as part of that program further changes will be made to the CPR Act which will: (i) allow for the establishment of local crime prevention committees; (ii) enable the creation of agreements to be known as Safer Community Compacts; and (iii) ensure that communities wishing to have the Act enforced in their local area can apply to the Attorney-General, who will consider the views of the Commissioner of Police; the level and nature of crime in the area; local crime prevention planning; and whether a safer community compact has been developed.³⁹

The foreshadowed changes to the CPR Act have been welcomed in some quarters but not others. A number of rural communities have expressed interest in having the legislation apply to them since the scheme was trialed in Gosford and Orange,⁴⁰ and representatives of the Country Mayor's Association have said that 'their constituent councils are confident the Government's initiative will lessen a significant and growing crime rate, particularly muggings and petty theft, on country streets at

report, yet in others, they are said to have been made by the Evaluation Committee.

³⁷ Hon B Carr MP, Premier, Minister for the Arts and Minister for Ethnic Affairs, Press Release, 'Parental Responsibility Act to be extended throughout country NSW', 11 March 1997.

³⁸ Hon B Carr MP, 'Carr backs youth loiter law for bush', *Daily Telegraph*, 11 February 1997.

³⁹ Ibid.

⁴⁰ Wagga Wagga, Bourke, Albury, and Tamworth have all expressed interest. 'Curfew: Premier to face revolt in Caucus', *The Newcastle Herald*, 13 February 1997.

night.⁴¹

Support can also be found in a March 1997 Report by the NSW National Party Community Behaviour Committee:

... virtually every community visited raised the issue of this legislation under trial in Orange and Gosford. Most saw it as filling an essential gap in the laws available to police to deal with young children on the streets, perceived to be at risk of coming to harm or getting into trouble ... many communities are calling for the widespread implementation of this law. Despite some calls by civil libertarians for the law to be abandoned as a serious infringement of children's civil liberties, the Committee wholeheartedly endorses the scheme for those communities which are anxious to adopt it and work with local police in managing young people at risk on the streets.⁴²

However, the move is seen as departing from a resolution passed at the October 1996 ALP State Conference where delegates backed a motion to 'comprehensively review issues relating to, with a view to repealing, the Children (Parental Responsibility) Act'⁴³. A joint statement by five ALP left-faction parliamentarians was issued outlining their opposition to the proposal,⁴⁴ and NSW Young Labor was also critical of the move, calling on the Premier to repeal the CPR Act.⁴⁵ Similarly the NSW Council for Civil Liberties criticized the decision saying it 'empowered police to beat up kids on the streets'.⁴⁶

2 COMMENTARY ON THE CHILDREN (PARENTAL RESPONSIBILITY) ACT 1994

In summary, the *Children (Parental Responsibility) Act 1994*:

- gives courts the power to require parents to be present at criminal proceedings against children. "Child" for the purposes of parental responsibility is defined as "a person who is under 18 years of age".
- permits courts to release children on condition that they give undertakings as to their future behaviour. If such an undertaking is breached, the courts have the power to require parents to appear.

⁴¹ 'Mayors hail law to let police nab youths', *Sydney Morning Herald*, 12 March 1997.

⁴² Extract from the NSW Parliamentary National Party Community Behaviour Committee Report to the National Party Room, March 1997, p3.

⁴³ 'Curfew: Premier to face revolt in Caucus', *The Newcastle Herald*, 13 February 1997.

⁴⁴ Ibid.

⁴⁵ 'Young Labor attacks Carr', *Daily Telegraph*, 14 February 1997.

⁴⁶ 'Street kids law attacked', *The Australian*, 12 March 1997.

-
- enables courts to require parents to give undertakings as to the future behaviour of their children **either** by the giving of security (which could be in a monetary form or otherwise) **or** by giving a supplementary undertaking guaranteeing the child will comply with any undertaking it has given. It is also possible for the court to obtain an undertaking from the parents that they will do, or refrain from doing, certain things as specified by the court.
 - gives courts the power to require a child found guilty of an offence to attend counselling with its parents.
 - makes it an offence for a parent, by wilful default or by neglect to exercise proper care and guardianship, to contribute to the commission of an offence by a child. The maximum penalty for this offence is \$1000.
 - permits rules of court to be made regarding the attendance of parents and children.
 - allows warrants and summonses to be issued to ensure attendance of those required.
 - gives police the power to remove an unsupervised child, who they believe on reasonable grounds to be of, or under, 15 years of age, from a public place and escort it to its parent's home, where they consider this action may reduce the likelihood of a crime being committed or of the child being exposed to some risk.
 - if it is not possible to take the child to its parent's home, then the police can take the child to 'a place of refuge' prescribed by the regulations. A police station cannot be a prescribed place of refuge. It is an offence for a child taken to such a place to leave without consent. The maximum penalty for committing this offence is \$500.

(i) Definitions - section 3:

'Child' is defined to mean a person who is under the age of 18 years.

Comment: However, under Part 3 of the Act which permits police officers to remove children from public places, the relevant age of the child is 'of or under 15 years'.

'Parent' includes a guardian or a person who has custody of the child, but does not include the Minister administering the *Children (Care and Protection) Act 1987* or the Director-General of the Department of Community Services.

Comment: During the Debate on the CPR Bill, the then Opposition spokesman on family, community and disability services, expressed concern:

that the Government has excluded both the Minister for Community Services of the day and the Director-General of the Department of Community Services from the definition of 'parent' ... the Bill casts positive duties upon natural parents and other parents who are

guardians of children. The Minister and the Director-General of the Department, and by extension, officers of the Department of Community Services have escaped that responsibility. If any State ward happens to commit an offence under this provision the Minister and the Department will escape responsibility and will not bear the duty that is cast on a natural parent to be responsible for property damage or whatever else may result. That is inconsistent ... it is hypocritical that the Minister and the Department will not have a similar responsibility in regard to State wards.⁴⁷

Comment: There is no definition given of 'parental responsibility' in the Act but it is probably meant in a more literal sense than that ascribed to the phrase in the *Family Law Reform Act 1995 (Cth)* context. There 'parental responsibility' has replaced the old concept of 'guardianship' and is understood to mean all the duties, powers, responsibilities and authority, which by law, parents have in relation to children. In the CPR Act context the parents are held responsible for the actions of their children.

(ii) Attendance of parents at proceedings

Under Section 5 a court is given a discretionary power to require parents to be present in criminal proceedings involving their child. It will also be a matter for the court whether one or more parents should be present and indeed which one/s. Although the Act does not contain details on how the court will determine when parents will be required, or which particular parent should attend, there is provision in Section 10 for rules of court to be made.⁴⁸ These issues, amongst others, could be dealt with in this way. However, the making of such rules is not mandatory. There is also a power to make regulations relating to the attendance of parents and children provided by Section 15. Similar provisions were available under legislation such as the *Children (Care and Protection) Act 1987*, where the Children's Court has the power in care proceedings to require the attendance of any person responsible for the child.

Comment: A consequence of this new provision may be the issue of a bench warrant if the court orders one or more parents to attend and this order is not complied with. Section 10(3) states that the provisions of the *Justices Act 1902* relating to warrants and summonses for the attendance of witnesses apply to the 'attendance of any person required under this Act to attend'. As the discretion to require a parent's attendance lies with the court, presumably if an order is made and not complied with, a bench warrant could be issued and the parent arrested and brought before the court.

(iii) Undertakings by children

Under Section 6(1) if the court finds a child guilty of an offence, it has the option of

⁴⁷ Hon R Dyer MLC, *NSWPD*, 2 December 1994, pp6200-6201.

⁴⁸ It would appear that no rules of court or practice directions have issued as yet but given the limited operation of the Act this is not unexpected.

releasing the child, provided the child gives an undertaking in relation to its future behaviour. This could be to submit to parental or other supervision, to participate in specified programs, to reside with a particular person nominated by the court or to comply with other directions which may be given.

Comment: Under the *Children (Parental Responsibility) Act* the court appears to have been assigned an active role. As mentioned above, it is the court which orders the parent to attend, and the court which would issue a bench warrant if there is non-compliance with this order. This is in contrast to the usual practice where the parties to an action determine who shall attend or in criminal proceedings where non-compliance with a subpoena to attend is pursued by the police. Similarly in Section 6(2) provision is made for the court to direct a child and its parents to be served with a notice to come before the court, if it appears to the court that a child has failed to comply with an undertaking. Once this has occurred, if the court is satisfied that the child has not complied with its undertaking, it can cancel the undertaking, continue it or vary it. The court cannot however extend the period of the undertaking. If it cancels the undertaking, it can release the child or impose any of the penalties which would have been originally available. Certain procedural issues may arise such as how failure to comply with an undertaking would come to the notice of the court.

(iv) Undertakings by parents

Section 7 gives the court an option of releasing the child in exchange for certain commitments by the parents. Three types of undertaking are provided for:

- 1 One or more of the parents give security for the good behaviour of the child **until** the child reaches 18 **or** for such shorter period as the court may specify. (Security may be in the form of a monetary deposit, however other forms are possible. Presumably these would be similar to those when security is required in bail matters such as title deeds etc) - Section 7(1)(a).
- 2 One or more of the parents give a supplementary undertaking to the court. This supplementary undertaking is to **guarantee** the child's compliance with any undertaking it may have given, **and** to act in such a way as to assist the child's development and guard against the child re-offending **and** to report at specified periods on the child's progress - Section 7(1)(b).
- 3 One or more of the parents give an undertaking with or without conditions to do or refrain from doing certain things for a specified period (usually 6 months but this can be extended to 12 months in "exceptional circumstances").

Comment: These provisions raise a number of issues, in particular the notion of responsibility under criminal law. For example, in the Second Reading Speech, the then Premier commented that:

... it is important not to lose sight of the fact that it is a principle of our criminal justice system that persons over the age of criminal responsibility, 10 years, are deemed accountable for their own actions. Further the criminal justice system does not usually attribute

responsibility to one person for the criminal actions of another.⁴⁹

However, the then Premier recognised a need for an exception to these principles in relation to minors, when he said that: '... these principles must be considered in conjunction with the fact that parents and guardians are responsible for the welfare of their children until they reach the age of 16 years.'⁵⁰

That children over the age of 10 are held to be responsible for their criminal behaviour is illustrated by Section 6(b) of the *Children (Criminal Proceedings) Act 1987*, which states that: '... children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance.' The point was further made in the 1994 White Paper on juvenile justice: 'Young people must learn that society will not tolerate criminal behaviour. Young offenders must also accept responsibility for their behaviour and be accountable for their criminal actions.'⁵¹

The trend towards making children responsible and accountable for their actions, especially in relation to crime, appears to be on the increase. At the same time, however, attempts are being made to find a more appropriate and acceptable way of "punishing" young offenders. Under the New Zealand *Children, Young Persons and their Families Act* for example, young offenders are brought together with their extended families and advocates (if appropriate), the victim/s and an independent mediator. In this way they are not only forced to confront their wrongdoing but are also able to participate in negotiating an appropriate outcome. A number of initiatives along these lines have been trialed in Australia. (For a full discussion of these see the Parliamentary Library's *Briefing Paper* by Fiona Manning, 'Juvenile Justice in NSW: Overview and Current Issues', No 9/96 especially pp15-29.)

A number of principles relevant to this area contained in the White Paper on Juvenile Justice were adopted by the former Government:

- alternatives to court processing, where possible and appropriate, should be the first option in the juvenile justice system;
- victims of crime should be given the opportunity to actively participate, where appropriate, in the juvenile justice system;
- families and extended families should be recognised as the fundamental influence upon children and should be given support and opportunities to participate in the juvenile justice process;
- the community accepts responsibility for young people and provides support and positive opportunities to enable young people to become valuable

⁴⁹ Hon J Fahey MP, Second Reading Speech, op cit, pp5819-5820.

⁵⁰ Ibid, p5820.

⁵¹ *Breaking the Crime Cycle: New Directions for Juvenile Justice in NSW*, White Paper, Department of Juvenile Justice, released in August 1994.

community members.⁵²

In contrast to the Act, the White Paper contained no proposal that others (parents) should be made responsible for the criminal actions of a child.⁵³

Parental liability for the actions of their offspring can be briefly described as follows: in civil matters, it is very rare for parents to be held vicariously liable for the conduct of their children. Thus, liability on the part of parents for injuries inflicted by their child will generally either be based on an action against the parents for breach of statutory duty, or by establishing that the parent owed and breached a direct duty of care to the person injured by the child's conduct under the general principles of negligence.⁵⁴ Case law has determined that the duty imposed on parents is to exercise their control of their children in such a manner as to avoid any risk of injury which would have been foreseen by a reasonable person in their position.⁵⁵ For criminal acts, unless parents take an active role in the planning or later concealment of the offence committed by their child, they cannot be held responsible for its commission. Furthermore, there is no general duty on members of the public to prevent the commission of criminal offences, and there is no reason to believe that this general rule is altered by the special nature of the parent/child relationship.⁵⁶ However, pursuant to the CPR Act 1994, parents may themselves be found guilty of an offence if they contribute, through wilful default or by neglecting to exercise proper care and guardianship, to the commission of a proven offence by their child.

At present the only real legal "duties" on parents or guardians are to maintain the child and to send it to school until the age of 15 and parents can be charged with neglect where they fail to provide adequate food, nursing, clothing, medical aid or lodging for a child in their care.⁵⁷ If there is to be a legislative responsibility for the action of a child, it is suggested that perhaps some distinction should be made in relation to the different age groups. Can a parent be responsible for a child of 17 when it can legally leave school at 15, can apply for a driving licence at 16, can leave home under the age of 18 and be eligible for certain social security allowances? Determining the point at which a child ceases to be a child is a complex issue, with chronological age, the measure adopted most frequently by the law, often being

⁵² White Paper, op.cit., p3.

⁵³ However, this does not affect the accepted legal position where primary criminal liability is imposed on parents for crimes committed by their children, as if the parents themselves had committed the offence eg where a parent uses a child under the age of criminal responsibility to steal for him or her.

⁵⁴ Australian Torts Reporter, CCH Australia Limited at 2-780.

⁵⁵ Gamble H, *Law for Parents and Children*, 2nd edition, Law Book Co, 1986, p40.

⁵⁶ Ibid, p43.

⁵⁷ *Children (Care and Protection) Act 1987*, section 26.

a suspect classification.⁵⁸

(v) Parents contributing to children's offences

In addition to any legal duties, it is clear that parents have a moral duty in relation to their children. This duty has been enunciated by the courts in the following manner:

Parents have a duty to exercise reasonable care and control of their children in such a manner as to avoid any risk of injury which would have been foreseen by a reasonable person in the parent's position.⁵⁹

Section 9 of the CPR Act creates a new offence which is in effect an assessment of how well parents discharge this moral duty.⁶⁰ Where a child commits an offence and it can be shown somehow that it has come about through the "wilful default" of the parent or through the parent neglecting to exercise "proper care and guardianship" of the child, the parent will be liable. If the offence is proved, the maximum penalty is \$1000 and/or the court can require the parent to undergo counselling.

Comment: Several issues arise which are left to the courts to determine: the evidence necessary to prove a causal link between the child's offence and the standard of parenting it received; the onus of proof; and the responsibility for laying the charges for this offence. Furthermore, complexity in the operation of this provision can be envisaged bearing in mind the many and varied "parental" relationships that exist in the modern day. The allocation of responsibility may be difficult, for example, where a number of adults, not necessarily limited to the biological parents, have been involved in the raising of a child.

A distinction needs to be drawn between provisions in child welfare legislation in some jurisdictions, which empower the court to order parents to pay compensation for damage caused as a result of crimes committed by their children where parental neglect has contributed to the commission of the offence, and the offence created by Section 9. Unlike these other provisions, Section 9 does not require 'compensation' to be paid for actual damage caused, but rather it imposes a fine on parents, fundamentally for 'bad parenting'.

While child neglect would appear to be generally accepted as a contributing factor in juvenile delinquency,⁶¹ the link between 'parenting' per se and the criminal

⁵⁸ Freeman M, 'Taking Children's Rights More Seriously' in Alston P, Parker S and Seymour J (eds), *Children, Rights and the Law*, Clarendon Press, 1992 at p66.

⁵⁹ Chief Justice Latham in *Smith v Leurs* (1945) CLR 256 at 259.

⁶⁰ Under the *Child Welfare Act 1939* (NSW) although provision was made for parental responsibility in criminal matters, there is no evidence that it was ever used by the courts.

⁶¹ A review of national and international research into the cause of juvenile crime undertaken by the NSW Bureau of Crime Statistics and Research found that 'weak parent-child bonds were at the root of juvenile crime'. 'Child neglect crime link',

behaviour of children is not beyond doubt. A two year study of more than 500 pairs of 12 to 18 year old Brisbane siblings, undertaken by researchers from the University of Queensland,⁶² found that the traditional belief in strict parental supervision to keep children out of trouble, reinforced by numerous studies in the United States, was misplaced. The study found that parents' rules and strict supervision had almost no effect on youth crime rates. Instead it identified parental emotional support as 'the crucial issue' in cutting youth crime.

The preliminary findings showed 57% of youths broke the law in families with either no or very few rules, compared with 55% of children who broke the law in families with many rules - a statistically insignificant reduction. By contrast, 77% of youths had broken the law in families with minimal emotional support, compared with only 42% of youths from families with high levels of emotional support. The study gave a grim picture of current levels of emotional support for children in Australian families with 17% of two partner children reporting no or minimal emotional support from both parents. A further 25% of two partner children said they received emotional support from only one parent.

The study also found that youngsters who committed property crimes had the same access to expensive consumer goods such as personal computers and CD players as the rest of the community. What they lacked was access to community facilities such as swimming pools, youth clubs, cinemas and good public transport.

Dr Don Weatherburn has said 'the present research shows that neither tougher penalties nor the opinion of family and friends exert any effect on offending frequency among juveniles with substantial involvement in crime. For these offenders, strategies designed to reduce the extent of cannabis use, or the income need it generates, have the best chance of reducing their rate of offending.'⁶³ In a recent University of Chicago study into youth crime which found that 'parental deviance, parental rejection, parental discord, ineffective discipline and poor supervision appear to be the key risk factors', the authors conclude that the best way to prevent juvenile crime, is 'money invested in early prevention efforts with at-risk families. In the long run this would save money, by reducing the amount of resources needed for corrective services from our education, health and justice systems.'⁶⁴

(vi) Family counselling

Section 8 of the Act gives the court a discretion to order that a child found guilty of

Sydney Morning Herald, 11 March 1997.

⁶² 'Determining the Causes of Juvenile Delinquency: The Sibling Study', D Brereton, R Homel, M Lynch-Blosse, I O'Connor, J Western and P Wilson, 'Strict parents have no effect on teen crime', *Sydney Morning Herald*, 6 December 1995.

⁶³ 'Jail not a worry to young', *Telegraph Mirror*, 24 May 1995.

⁶⁴ The research by Tremblay and Craig from the University of Chicago was referred to by Hon Dr M Goldsmith MLC in 'Youth crime a festering sore', *Sydney Morning Herald*, 24 February 1997.

an offence attend counselling with its parents. Whether such an order is made will be determined having regard to "the welfare, status and circumstances of the case" and Clause 8 of the Regulation stipulates that before a court requires a person to undergo counselling, it is to obtain advice on the availability of appropriate counselling services. Given that many children who come before courts on criminal charges are from dysfunctional families, such an order may not be appropriate in all cases.⁶⁵

(vii) Welfare of children in public places

Essentially under this Part, the police are given the power to remove young people who they consider are at risk or if they consider that removing them will reduce the likelihood of a crime being committed. The Commissioner of Police can issue directions in relation to how these powers are exercised - Section 11(2).⁶⁶ However, the police can only use these powers if:

- the person is in a public place **and** the police officer believes on reasonable grounds that the person is a child of or under 15 years of age **and** that person is not supervised or under the control of a responsible adult - Section 11.

Once the criteria in Section 11 have been met, the police can exercise the functions set out in Section 12:

- a police officer can ask the young person his or her name, age and parent or carer's residential address.
- the police officer can then remove the young person from any public place and escort them to the parent or carer's residence. If this address has not been provided or it is not "reasonably practicable" to take the child home, the police can then take it to "a place prescribed by the regulations".
- This action can only be taken if the police officer has ascertained the details in Section 11 **and** considers that this action would reduce the likelihood of a crime being committed or of the person being exposed to some risk - Section 12. Section 12 seems to give the police power to question children without an adult being present. Further it provides for the police to act on suspicion that a crime may be committed.
- If a child is taken to a place other than the parent or carer's residence notification is required where the parent or carer is known **and** notification is

⁶⁵

Details from a 1993 survey of 409 young people held in a West Australian remand centre, showed that only 20% were living with both their parents; only 56% were living with any of their parents; 75% were not living with their father; 50% were not living with their mother; 20% were living in a two parent family; and presumably even less than 20% with both their biological parents. Alan Tapper, 'Juvenile Crime and Family Decline', *IPA Review*, Vol 46 No 1, 1993, p47.

⁶⁶

Details are contained in Instruction 76.04 'Children at risk' in the New South Wales Police Service Commissioner's Instructions.

practicable.

- Reasonable force can be used to remove the child.

In 1994 the WA police undertook 'Operation Sweep' to remove children from public places in similar fashion to that provided under the CPR Act. In one weekend approximately 118 young people were picked up in Fremantle. However, not all of these young people were juvenile delinquents or neglected children. Some had been picked up as early as 8 pm. None had committed a serious crime and some were even picked up while waiting for their parents to collect them. Many parents were outraged at the police interference in family life and at a public meeting organised by the Fremantle City council, parents expressed anger that police were taking over the role of parent. At issue were questions of what constituted good parenting, whose standards should prevail and to what extent notions of good parenting were class based. The City Council's Director of Community Services said that 'people felt strongly the police had no right or authority to do this, they didn't want police making decisions about parenting.' 'Operation Sweep' was halted in Fremantle, but continued in Northbridge, an area dominated by businesses rather than residents. Here, although the police had community support, the children they encountered were genuine street kids, which posed another problem. 'They tried to take the children home but it became a circular thing' said James McDougall, Co-ordinator of the WA Youth Legal Services 'the reason the children were on the street was because they didn't want to be home. In many cases the reason was that the streets were often safer for them.'⁶⁷

A similar point was made by the NSW Minister for Community Services in a press release which said in part:

I would also emphasise that a curfew may not address the complex social problems which can mean young people are unable or unwilling to be at home during the evening ... there may be issues of domestic violence, drug use, drunkenness, neglect or of sexual or physical abuse.

(viii) Prescribed places

Section 13 deals with prescribed places of refuge, which currently means only 'an intake place' in Gosford or Orange. An 'intake place' is further defined as 'a place designated by the Minister administering the *Children (Care and Protection) Act 1987* by order published in the Gazette.'⁶⁹ Once a child has been taken to such a place it is subject to the direction of the officer in charge and if the child leaves

⁶⁷ 'The trouble with police taking on the role of parents', *Sydney Morning Herald*, 30 November 1994.

⁶⁸ Hon R Dyer MLC, Minister for Community Services, Press Release, 'Media Statement for the Tweed Daily News regarding call by NSW Shires Association for curfew on youth', 8 June 1995.

⁶⁹ Clause 9 of the Children (Parental Responsibility) Regulation 1995.

without the consent of this person, the child will be liable to a maximum penalty of \$500. Given that many of the children who will come to the notice of police will not have the capacity to pay such a fine, there is the possibility that the unpaid fine will be turned into a commitment warrant with the result that a child could spend up to five days in a Juvenile Detention Centre cutting out the commitment warrant, despite not having committed any offence in the first place.⁷⁰

The child can only be detained at a prescribed place for 24 hours or less, after which time it is to be released or 'dealt with according to law'. Section 13 further provides for the child to be released to a parent, if and when available, or to a carer (if this is the case). Despite the specific ruling out of 'police stations' as 'prescribed places', the Act states nonetheless that where a young person is being detained in 'a prescribed place' under these provisions, he or she is to be kept separately from any person detained for committing offences or who are on remand - section 13(7).

In introducing the Bill the then Premier said in the Second Reading Speech:

It is envisaged that the types of places which would be prescribed for this purpose are the Department of Community Services care centres such as Minali and Ormond, youth refuges and other programs run co-operatively by both government and non-government organisations.⁷¹

However, as a protest against the legislation a number of church and welfare groups⁷² indicated that they were unwilling to accept funding to run 'prescribed places of refuge' as outlined in the legislation.

(ix) Review of Act

Following an Opposition amendment to the Bill in the Legislative Assembly on 1 December 1994, Section 16 now requires the Minister to review the Act 'to ascertain whether the policy objectives ... remain valid and whether the terms of the Act remain appropriate for securing those objectives ... as soon as possible after the period of one year from the date of assent.' A report of the outcome of the review is to be tabled in each House of Parliament.

3 ISSUES RAISED BY CRITICS OF THE ACT

As the then Premier noted in the Second Reading Speech, certain aspects of the *Criminal (Parental Responsibility) Bill* introduced novel concepts into the criminal law. Concerns as to the potential operation and impact of the legislation were

⁷⁰ Youth Justice Coalition submission to Kearney MacKenzie and Associates (referred to hereafter as the YJC submission) August 1996, p5.

⁷¹ Hon J Fahey MP, Second Reading Speech, op cit, p5821.

⁷² This group included: the Association of Children's Welfare Agencies; Barnardos; Burnside; Centacare; the Salvation Army; Sydney City Mission; the Society of St Vincent de Paul; Wesley Central Mission as well as several other organisations.

expressed by a number of groups as diverse as the NSW Police Association;⁷³ the Federation of Parents and Citizens Associations in NSW;⁷⁴ the Council of Civil Liberties; the Council of Social Services; and specialist lawyers including the National Children's and Youth Law Centre.⁷⁵ Further comments have been made now that the Act has been in operation since March 1995 and an evaluation undertaken. Some of the more commonly raised points include the following:

► **it breaches general legal principles**

According to the Youth Justice Coalition,⁷⁶ the provisions of Part 3 of the Act relating to welfare of children in public places, violate long standing principles of the common law relating to arrest and detention. The common law states that a person may only be arrested by police if police reasonably suspect them of having either committed, or attempted the commission of, an offence. This position has been codified in section 352 of the Crimes Act 1900 NSW. It is submitted by the Youth Justice Coalition that if a child is picked up by the police and detained under the CPR Act, the child could prosecute the police officer for unlawful detention and arrest.⁷⁷

Other concerns are:

- it goes against the principle of innocence until proven guilty;
- police already had the power to remove children who were 'at risk',⁷⁸ including those involved in prostitution or inebriated in a public place. According to the then Director of the National Children's and Youth Law Centre, Mr Robert Ludbrook: 'This will widen these powers to remove children who police deem to be at risk of doing something they have not already done ... this offends the most basic principles of criminal law and the right of freedom of assembly or use of public places.'⁷⁹

⁷³ The Deputy President of the NSW Police Association wrote that 'police do not have the time to properly care for and convey young people to their homes or some other suitable place. The duty of care already imposed on police for the welfare of prisoners is already horrendous and we are not sufficiently resourced to be given this added responsibility'. Letter dated 29 November 1994 referred to in *NSWPD, LC*, 2 December 1994, p6202.

⁷⁴ The President, Ms Ros Brennan, reportedly described the legislation as 'a hamfisted, hysterical and counter productive response to juvenile justice', 'Fears over juvenile crackdown power', *Sydney Morning Herald*, 30 November 1994.

⁷⁵ 'Fears over juvenile crackdown power', *Sydney Morning Herald*, 30 November 1994.

⁷⁶ YJC submission, op cit, p5.

⁷⁷ Ibid.

⁷⁸ Section 60 of the *Children (Care and Protection) Act 1987*.

⁷⁹ 'Government plan on juvenile crime is condemned', *Sydney Morning Herald*, 23 November 1994.

- there is no right of access by children to a lawyer;
- it would appear that parents do not have a right to a lawyer if they are before the court charged with an offence;
- reference was also made during the Debate on the Bill to the fact that, if passed, it would override the *Anti-Discrimination (Age Discrimination) Amendment Act 1993*, the function of which was to consolidate the position of young people in NSW.⁸⁰

► **it breaches international obligations**

The United Nations Convention on the Rights of the Child was ratified by Australia in December 1990,⁸¹ and it has become a 'declared instrument' under the *Human Rights and Equal Opportunity Commission Act 1986 (Cth)*. This means that the rights in the Convention now fall within the definition of 'human rights' in the Act, and the Human Rights and Equal Opportunity Commission can conciliate complaints about acts or practices of the Commonwealth which breach these rights. The Convention is a document comprising some 50 articles, and the rights set out in it are far ranging. They include ensuring: the 'best interests of the child' is the primary principle upon which all legislation relating to children is based (Article 3); the right to freedom of expression (Article 13); the right to freedom of association and freedom of peaceful assembly (Article 15); the protection of the law against interference or attacks on privacy (Article 16); the proscription against depriving a child of his or her liberty unlawfully or arbitrarily (Article 37(b)); and the prompt access to legal and other appropriate assistance (Article 37(d)).⁸²

In addition the provisions under Part 3 of the CPR Act are said to breach Article 9 of the International Covenant on Civil and Political Rights, which declares that everyone has the right to liberty and security of the person and that no-one shall be subject to arbitrary arrest and detention.⁸³ The Youth Justice Coalition asserts that under the CPR Act, a young person is at risk of unpredictable police interference at any time of the night or day, at any time they are in public, and without having committed an offence or having attempted to commit an offence.⁸⁴

► **it recriminalizes welfare issues**

The CPR Act re-introduces the concepts of 'uncontrollable' and 'neglected' children, which were abolished with the passage of the *Children (Criminal Proceedings) Act*

⁸⁰ Hon C Moore MP, *NSWPD*, LA, 30 November 1994, p5994.

⁸¹ Although there was a reservation to Article 37(c) regarding separate imprisonment.

⁸² Parliamentary Research Service *Briefing Paper* 'Children's Rights' No 17/96 by Fiona Manning, pp8-12.

⁸³ YJC submission, p6.

⁸⁴ *Ibid.*

1987, and in so doing it recriminalises behaviour which has since been treated as a welfare issue.

▶ **it allows police to harass young people**

Recent studies into police-youth relations have described the experiences of many young people in their interaction with police as negative. Typical findings were:

- increasing police presence and interaction with young people on the street often had the result of drawing young people into the criminal justice system,⁸⁵
- many young people felt powerless when interacting with police; a significant number reported abuse, both verbal and physical; and many reported being 'hassled' by police for 'hanging out' in public spaces.⁸⁶ Another finding of the Report was that 'police contact with many young people is vigorous to the point of harassment'
- In the 1995 Report, *Young People and Police Powers*,⁸⁷ the authors, Blagg and Wilkie, found that 'police were manipulating the law to control young people'. They reported that there were many areas of existing law and practice which fell well short of the standards established by the UN Convention on the Rights of the Child and noted other concerns such as: over policing of young people; kerbside justice including intimidation, harassment, verbal and physical abuse and unnecessary detention; and degrading strip searches in public places or with police from the opposite sex present.

▶ **it disregards the position of wards of the State**

Under the *Children (Care and Protection) Act 1987 (NSW)* if a child is declared a ward the Minister for Community Services assumes guardianship of the child and is responsible for providing for the accommodation, care and maintenance of the child. The Minister may discharge his or her responsibility for the well being of the child by placing the child in a State children's home but in practice he or she often places it with paid foster parents. Unlike the situation for natural parents under this Act, the State Government appears to bear no responsibility for the actions of children under its care. Similarly homeless children living on the streets will not be covered by this legislation.

⁸⁵ *Kids in Justice*, Youth Justice Coalition, 1990.

⁸⁶ *Nobody Listens*, Youth Justice Coalition and the Youth Action and Policy Association, 1994.

⁸⁷ The Report was based on interviews with more than 700 young people and consultation with individuals and organisations as well as analysis of regulations governing police contacts with young people. 'Police use laws to persecute youth', *The Australian*, 27 September 1995. 'Young People and Police Powers', Australian Youth Foundation, Sydney, 1995.

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- ▶ **it has a disparate impact on different sections of the community, particularly those from a non-English speaking background and Aboriginal youth**

In its 1994 Report, *Nobody Listens*, the Youth Justice Coalition revealed that young people from Asian, Aboriginal or other non Anglo-Celtic backgrounds were far more likely to be arrested, searched or injured by police. A survey of 149 young people between the ages of 12 and 18 about their experiences with police found that police paid a disproportionate amount of attention to groups of young people who congregated in public places, particularly those of Asian, Aboriginal, or Pacific Islander origin.⁸⁸

A Report published by the University of Sydney Law School in 1995⁸⁹ found that:

- although young people are treated equitably by the courts and police at the bail stage, there was clear evidence of bias against black youth in police decisions to arrest and prosecute (The Report found that Aborigines have an 8 times greater chance of being apprehended, and an 18 times greater chance of being given a detention order);⁹⁰
- while Aboriginal and non-Aboriginal youth are treated equally by the court, due to longer average criminal histories, a much higher proportion of Aboriginal court appearances result in detention;
- the average age of first detention orders is lower for young Australian blacks;

The Report recommended that police discretionary powers to issue formal cautions and court attendance notices be reduced; that police decisions be monitored more closely; new support and diversionary services be provided; and that the courts place greater emphasis on the severity of current offences and less emphasis on prior criminal records.

Evidence shows that wards of the State are 15 times more likely to be jailed than

⁸⁸ 'Police too vigorous in youth treatment', *Sydney Morning Herald*, 8 July 1994.

⁸⁹ Garth Luke and Chris Cuneen examined 18,265 court decisions including 2,165 police cautions and 16,100 finalised court appearances over a 12 month period. 'More Aborigines arrested but no judicial bias, study reveals: Black youth equal in court', *Sydney Morning Herald*, 4 February 1995.

⁹⁰ The point was also made in a Discussion Paper by the Community Services Commission, that part of the reason for the over-representation of Koori children in custody is due to them being '... more visible to police and therefore likely to become a source of police attention', *The Drift of Children in Care into the Juvenile Justice System: Turning Victims into Criminals*, December 1996 referred to by Dr Michael Gliksman in 'Why jailing children hands down a sentence to society', *Sydney Morning Herald*, 10 January 1997.

other children,⁹¹ and as Aboriginal children are a high proportion of State wards (30% as against 2% of the NSW population),⁹² the implications are clear.

Although the needs of Aboriginal juveniles are recognised in Clause 10 of the CPR Regulation, which says that at least one Aboriginal staff member of a prescribed place of refuge is to be on call to care for any Aboriginal person who is escorted to that place, the Act is said to ignore the recommendations of the Royal Commission into Aboriginal Deaths in Custody.⁹³ In particular:

- Recommendation 87(a): all police services adopt and apply a policy of arrest as a last resort in dealing with offenders;
 - Recommendation 88(a): police services liaise with Aboriginal organisations to reduce inappropriate or excessive policing;
 - Recommendation 214: greater emphasis be placed on the involvement of Aboriginal communities, organisations and groups in devising appropriate procedures for the sensitive policing of public and private locations utilised by substantial numbers of Aboriginal people; and
 - Recommendation 239: governments review relevant legislation and police standing orders to ensure that police do not arrest Aboriginal juveniles unless a grave offence has been committed or unless the juvenile is about or likely to repeat the offence at the time.
- **the cost of implementing the legislation is not justified**

In a discussion paper prepared for Burnside and the Youth Action and Policy Association in August 1995 the following calculations were made in relation to the possible cost of implementing the CPR Act.⁹⁴ The 'safe houses' being used in the pilot scheme in Gosford and Orange were funded for twelve months. They cost \$200,000 each to set up and run for this period. They are staffed 24 hours per day, 7 days per week, 52 weeks of the year. For the period from 13 March 1995 (when the pilot commenced) until 8 May 1995, the 'safe house' in Gosford had looked after only two 14 year old young people for less than 24 hours, because both absconded. The pilot scheme in Orange had had only one client. On this basis the costing of each 'safe house' is therefore: \$200,000 divided by 52 weeks, which amounts to \$3,846 per week. For the eight week period (13 March to 8 May) the cost was therefore \$30,769. The outcome is that each of the two 'clients' in Gosford who

⁹¹ This figure was given in the Community Services Commission Discussion Paper referred to in 'Why jailing children hands down a sentence to society', *Sydney Morning Herald*, 10 January 1997.

⁹² Hon Dr M Goldsmith MLC, 'Youth crime a festering sore', *Sydney Morning Herald*, 24 February 1997.

⁹³ YJC submission, p7.

⁹⁴ *Can anybody find me ... somebody to blame*' prepared for Burnside and the Youth Action and Policy Association by A Bendall and J O'Brien, August 1995, pp8-9.

were held for less than 24 hours, used \$15,385 worth of public money. The one 'client' in Orange used \$30,769. If a 'safe house' were established in every Department of Community Services area in the State (20 areas), the annual budget for this program alone would exceed \$4,000,000. The Report concluded that it was difficult to see how this could be considered cost effective. In its August 1996 submission, the Youth Justice Coalition said the money spent on the pilot scheme would have been better spent on street based youth programs and increased services for young people.⁹⁵

Furthermore, the safe houses, which stand empty most of the time, are unable to accommodate young people who 'do not conform to the guidelines', even when the local youth crisis refuges are full. Unless a young person is picked up by the police pursuant to the CPR Act, he or she cannot be accommodated at a safe house.⁹⁶

▶ **dissatisfaction of many operational police**

Concern has been expressed by the NSW Police Association that this legislation places police in the role of welfare worker, and takes them away from normal duties in areas where they are most needed.⁹⁷

▶ **Support for the Act**

While it is true to say the Act has had its detractors, it should be re-stated that there have been many in favour of the measures it introduced. Numerous speakers, from across the political spectrum, indicated their support for the legislation during the Debate on the Bill, and since the trial in Orange and Gosford, a number of rural communities have expressed interest in having the scheme extended to their localities, with the initiative being welcomed by representatives of the Country Mayor's Association. The announcement by the Premier that the CPR Act is not only to be retained but extended, is further evidence of government support.

⁹⁵ YJC submission, p8.

⁹⁶ '\$70,000 bill to keep youth off the streets for one night', *Sydney Morning Herald*, 5 August 1995.

⁹⁷ 'Police to press for change to kids law', *Sunday Telegraph*, 8 January 1995.

4 OTHER JURISDICTIONS

Australia ⁹⁸

Queensland: Legislative provision for parental restitution has been available for some time in Queensland. Section 2 of the *Children Services Act 1965 (Qld)* stated that the court could order parents to 'pay compensation or make restitution in respect of the damage or loss occasioned by the offence to a charge of which such a child has pleaded guilty or of which he has been found guilty'. The principle of parental restitution was reaffirmed in the *Juvenile Justice Act 1992 (Qld)*, which, like the earlier legislation, articulated a clear causal link between the negligent actions of parents and the offending behaviour of their children. Up until recently section 197 of that Act stated that if the court could demonstrate that 'wilful failure' on the part of a parent of the child to exercise proper care of, or supervision over, the child was likely to have contributed 'substantially' to the commission of an offence, then the court could seek restitution from the parent/s.

However, there was no clear definition of what might constitute 'wilful failure' on the part of parents in instances of juvenile offending, or how a 'substantial contribution' to the criminal act might be assessed. This difficulty was alluded to by Judge McGuire of the Children's Court of Queensland, who said that no section 197 compensation orders had been made due to the difficulties of proving that a parent has, through want of care or supervision over a child, substantially contributed to the child's offence. ⁹⁹ Section 197 was amended in 1996 ¹⁰⁰ and now gives the court the power to make an order requiring a parent to pay compensation where: (i) it is satisfied that a parent of the child may have contributed to the commission of the offence by not adequately supervising the child, and (ii) it considers that it is reasonable that the parent should pay the compensation. These amendments have made the test for establishing a parent's liability easier as it is no longer necessary to prove that a parent's 'wilful failure' has contributed to the child's offence, nor that the parent's conduct 'was likely to have substantially contributed' to its commission.

The Act further involves parents and guardians directly in the court process by enabling them to 'show cause' why restitution or compensation should not be imposed by the court - section 197. Under the 1996 amendments, a court which calls upon a parent to show cause why it should not pay compensation is to make its decision 'on the balance of probabilities'. Previously the court was required to be satisfied 'beyond reasonable doubt' that a parent's wilful failure to exercise proper care or supervision was likely to have substantially contributed to the commission of

⁹⁸ Much of the information in this section is taken from an article by Richard Hil, 'Who pay for crime?: Punishing young people and their families', *Youth Studies Australia*, December 1996, pp23-27.

⁹⁹ First Annual Report, Children's Court of Queensland, September 1993-August 1994, p108 referred to in the Queensland Parliamentary Library's *Legislation Bulletin* No 4/96, 'The Juvenile Justice Legislation Amendment Bill 1996', by Karen Sampford, p12.

¹⁰⁰ The 1996 amendments commenced operation on 18 November 1996.

the child's offence.¹⁰¹ The maximum amount of compensation that a parent can be ordered to pay is \$5025.¹⁰²

Section 198 still provides that in determining the amount to be paid by a parent by way of compensation, the court must have regard to the parent's capacity to pay the amount, which must include an assessment of the effect any order would have on the parent's capacity to provide for dependents - section 198. Again, the Act provides no clear indication of how the 'ability' to pay restitution is to be assessed and is equally unclear as to how penalties for default of payment are to be imposed. Parents and guardians may thus find themselves facing criminal proceedings in the event of a failure to meet restitution requirements in the agreed time frame.

Western Australia: Under section 58 of the *Young Offenders Act 1994 (WA)* in the event of the child or young person failing to meet restitution payments, the parent ('a responsible adult') may be required to complete such payments. Provision is also made for restitution payments to be divided between parents and their children in such proportions as the court may determine.

Tasmania: The criminalisation of parents in cases involving juvenile offenders has long been part of Tasmania's criminal law. Wording strikingly similar to CPR Act - Section 25 of the *Child Welfare Act 1960 (Tas)* states that:

A parent or guardian of a child who, by wilful default or by neglecting to exercise proper care and guardianship of the child, has contributed to the commission of an offence of which that child has been found guilty, is himself guilty of an offence.

Moreover, parents may also be required to contribute payments in cases where the juvenile is unable to meet the total cost of loss or damages imposed by the court - section 25.

Victoria: In Victoria the principle of restitution in the *Children and Young Persons Act 1989* is restricted to the offender rather than to his or her parents. However, it is clear that consideration of the child's 'financial circumstances' would undoubtedly include the ability of parents to meet such costs.

South Australia: The *Young Offenders Act 1993 (SA)* also makes no specific mention of parental restitution. However, section 27 of the Act requires 'guardians' to agree to certain undertakings. These include a 'guarantee of the youth's compliance with the conditions of the undertakings'; 'specified action to assist the youth's development and to guard against further offending by the youth' and 'to report at intervals stated in the supplementary undertaking on the youth's progress'. This emphasis on parental involvement in meeting the conditions of the court order infers that any breach on the part of the offender may result not only in him or her having to face the court (and the possibility of an increased tariff), but also that

¹⁰¹ Queensland Parliamentary Library's *Legislation Bulletin* No 4/96, 'The Juvenile Justice Legislation Amendment Bill 1996', by Karen Sampford, p13.

¹⁰² 67 penalty units, where 1 penalty unit equals \$75.

parents themselves may have to account for their actions.

Northern Territory: Perhaps the most interesting variation of the principle of parental restitution is the Northern Territory's *Juvenile Justice Act 1984 (NT)* which sets out provisions for parental contributions towards meeting the costs of a detention centre placement. Section 55 of the Act states that parents are liable to pay a proportion of the costs associated with having a young person in a detention centre.

Where ... a juvenile is ordered by the court to be detained at a detention centre, the court may ... order that a parent or the parents of the juvenile pay an amount towards the cost of detaining the juvenile in the detention centre, which amount shall not exceed \$100 per week, for each week during which the juvenile is detained in the detention centre.

This provision is to be used by the court in cases where 'it is satisfied that the parent has or the parents have, as the case may be, failed to exercise reasonable supervision and control over the juvenile' - section 55. Clearly, this provision is in keeping with the principle of parental restitution, although in this case the beneficiary is the government, rather than the victim/s. In effect, those parents deemed to be negligent in terms of care and supervision are penalised for the misdemeanours of their children. Moreover, the fact that parental contributions towards the cost of a detention centre placement are an order of the court means that failure to comply may result in further penalties being imposed - section 55.

Overseas

*United Kingdom:*¹⁰³ The *Children and Young Persons Act 1933 (UK)* had first enabled courts to require parents to pay fines imposed on juvenile offenders. This power was extended under the *Criminal Justice Act 1982*, which required courts imposing a fine or compensation order in the case of a juvenile offender, to order the parent or guardian to pay it unless this would be unreasonable in the circumstances, or the parent or guardian could not be found. This provision currently applies if the offender is under 16. The court has a discretion where the offender is 16 or 17. In 1993 the number of young offenders sentenced for indictable offences in England and Wales whose parents were required to pay fines was 242 representing 6% of the fines imposed in cases of offenders aged under 18. The number whose parents were ordered to pay compensation orders in the same year was 1,296 representing 14% of compensation orders imposed in cases of young offenders. These figures indicate that in practice magistrates use these powers sparingly.

The *Criminal Justice Act 1991* introduced a new requirement whereby, when a child or young person under 16 is convicted of an offence, the court must bind over the parent or guardian 'to take proper care of him and to exercise proper control over

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The information in this section is taken largely from a Report, '*Parental Responsibility, Youth Crime and the Criminal Law*', written by the Penal Affairs Consortium, an umbrella body representing 24 main groups in the criminal justice system in the United Kingdom. It was located on the Internet at: <http://www.penlex.org.uk/pacyouth.html>.

him' if its satisfied that this is desirable in the interests of preventing the commission of further offences. If it does not bind over the parents, the court must state why it is not doing so. The parent is bound over in a specified sum of money (up to £1000) and, if the child re-offends, the parent is liable to forfeit that amount. Binding over requires the parents' consent but, as the Act empowered courts to fine parents who refuse to be bound over, in reality parents have little choice in the matter. In effect, a bind over amounts to a suspended fine.

The binding over requirements of the 1991 Act were highly controversial. Magistrates already had the power to bind over parents, but rarely used it. Moreover, whereas requirements for parents to pay fines and compensation orders imposed on children applied only in cases where a court decided to impose a financial penalty, the binding over provisions of the 1991 Act were to apply in all cases, whatever other penalty was imposed on the juvenile. During the passage through Parliament of the *Criminal Justice Act 1991*, the proposal was strongly criticized by organisations representing magistrates, justices' clerks, probation officers and social workers.

The Magistrates' Association made known its strong opposition, referring to 'the harmful effects these proposals could have in hastening a breakdown of family relationships' and said that 'parents may feel that they are being punished twice for one offence of their child'. An editorial in *The Magistrate* put the position thus:

it is felt by a wide range of organizations, including the Magistrates' Association, that if implemented, these proposals are not only unlikely to achieve the governments objective, but are likely, in many instances, to damage such little cohesion as may survive in already fraught and vulnerable families. One of the most extreme of these proposals concerns the binding over of parents for their children's good behaviour ... Magistrates have daily experience of sentencing offenders. Those who sit in the juvenile court will be only too well aware of the high incidence of already difficult family circumstances amongst the children and young people appearing before them. Why one wonders is the Home Secretary so determined to refuse to listen not only to all the agencies and voluntary organizations working in the juvenile justice field, from many of whom he might expect opposition on ideological grounds, but also to this Association's Juvenile Courts Committee's very clear rejection of the proposal that courts should be required to bind over parents? A rejection that is made not only on the grounds that it will not work in terms of preventing further offending, but that it is likely to be counterproductive, leading to an increase in family breakdown and hence in the already unacceptable levels of homelessness amongst teenagers.¹⁰⁴

Similarly a leading article in *The Times* of 10 November 1990 commented:

This is the kind of proposal that makes perfect sense to middle class

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Editorial appearing in the Magistrates' Association magazine, Dec 1990/Jan 1991 edition.

Ministers, who generally leave the taming of adolescence to their children's boarding schools. For, say, the single mother in Brixton, struggling against the odds to keep a young person on track, they represent only a threat. Many such parents will be tempted to wash their hands of their responsibilities. Parental influence, the last, best hope of deflecting the youngster from a life of crime, will be removed. The magistrates do not want these powers. Parliament should not force them to have them.

The powers were implemented on 1 October 1992 and in the next 3 months they were used on only 97 occasions in the whole of England and Wales. However, in 1993 the number of bind overs increased, and parents or guardians were bound over in 2,050 cases. In that year youth courts bound over parents in 2.6% of all cases and 7% of cases involving offenders aged under 16. The Penal Affairs Consortium asserts that the current evidence suggests that, while many courts rarely use the power, some use it in a substantial number of cases.

The *Criminal Justice and Public Order Act 1994* extended the bind over provisions even further. It empowers courts binding over a parent or guardian to include a requirement for the parent or guardian to ensure that the child complies with the requirements of a community sentence. Whereas under the 1991 Act parents could be required to forfeit up to £1000 if their child reoffended, under the 1994 Act they may also be required to do so even if the child does not re-offend but fails to comply with the requirements of a sentence. This provision commenced in February 1995 but its legality has been questioned by the Magistrates' Association, which has told the Home Office that there is no mechanism to enforce these new procedures. It says:

the court making the bind over is the youth court. And there is no way of bringing back an adult to a youth court. In effect, it renders the courts powerless to make credible use of the new powers ... we simply want them to agree to some kind of mechanism by which parents who are bound over, and who are subsequently in breach can be dealt with by the adult courts. They have not got this into their heads.¹⁰⁵

Whether there are comparable jurisdictional questions in relation to the CPR Act remains to be seen.

The 1994 bind over amendment is seen by the Penal Affairs Consortium as likely to do more harm than good. The Penal Affairs Consortium puts forward the following arguments in support of this proposition. First, the provision could unfairly punish parents who have genuinely but unsuccessfully tried to improve their children's behaviour. Secondly, when parents are penalised for something their child has done, this is likely to increase their resentment and aggravate relationships between them and their children still further. This could put the young people even more at risk

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'Court powerless to enforce new penalty on parents', *The Times*, 13 February 1995, reported in the *Commonwealth Law Bulletin*, July 1995, pp1018-1019.

than ever. Thirdly, financial penalties are likely to increase the degree of pressure and hardship on families which are already struggling to survive against great odds. In those courts which are making substantial use of the power to bind over parents, a high proportion of those affected are single parents. Fourthly, penalising parents rather than children does not help to reinforce the vital need for young offenders to face up to their responsibility for their own actions, if anything, it sends out the contrary unhelpful message that young people can slough off responsibility on to their parents

As there is no provision for the parents to have separate legal representation in the proceedings, bind overs are made without the parents' own representative addressing the court on their behalf. While the child's legal representative could be of assistance, there may be an obvious conflict of interest between parents and child over the question of the extent to which responsibility for the delinquent behaviour lies with the parents rather than the child.

United States: In May 1996 a couple in St Clair Shores, Michigan were charged under a local ordinance, the Parental Responsibility Ordinance, with failing to properly supervise their delinquent son. This Ordinance says it is the 'continuous responsibility' of any parent to exercise reasonable control to prevent a child from committing any delinquent act. The initial breach attracts a maximum fine of \$US 100 (\$125) but jail is a possibility on or after the third offence. Communities in ten other American States have adopted, or are considering, similar provisions to make parents legally liable for their children's misconduct. But civil rights activists in the US have attacked the measures saying they are draconian and do nothing to assist the rehabilitation of juvenile offenders or to help families cope with their children's anti-social behaviour.¹⁰⁶

5 CONCLUSION

While the encouragement of parents to take greater responsibility for their children is undoubtedly a positive step, it is not in itself an answer to the problem of juvenile crime. It is increasingly recognised that 'structural issues such as poverty, unemployment, inequalities of access to education and skills, and social alienation ... cannot be ignored as factors which contribute to levels of juvenile crime',¹⁰⁷ and that the systemic problems underlying juvenile justice will only be addressed when these issues of social need and social justice are met.

¹⁰⁶ 'Court aims to punish parents for child crime', *The Australian*, 13 May 1996. According to this article, the West Australian government was considering the introduction of similar legislation.

¹⁰⁷ In his article 'Young Offenders and State intervention: Issues of Control and Support for Parents and Young People', *Australian and New Zealand Journal of Criminology*, Vol 22, 1989, pp22-39 at p23, Terry Carney cites the *Victorian Equity and Social Justice Report 1984* in which these comments are made.