

REGULATING POLICE DISCRETION: AN ASSESSMENT OF THE IMPACT OF THE NEW SOUTH WALES YOUNG OFFENDERS ACT 1997

**Jenny Bargaen, Director
Youth Justice Conferencing, New South Wales
Department of Juvenile Justice, Australia**

Plenary Speaker, Saturday, 5 March 2005

Published with permission from
the *Criminal Law Journal*, 7 January 2005.

Co-authored with Janet Chan, School of Social Science and Policy, University of New South Wales; Garth Luke, Director, Developing Options; and Garner Clancey, Consultant. The authors would like to thank Elizabeth Maloney and Sally Doran for their research assistance, and the New South Wales Police for permission to interview and conduct focus groups with officers.

This article summarizes results of research on the impact of the Young Offenders Act 1997 (NSW) on the juvenile justice system. Available statistics on the Act's first three years of operation suggest that it has led to a substantial increase in warnings and cautions and a corresponding decline in court proceedings. It has also resulted in an almost 50 per cent drop in the odds of an Aboriginal first offender being taken to court, although this group is still over-represented. The article concludes that the Act has been generally successful in regulating police discretion, but a number of impediments remain.



Jenny Bargaen

INTRODUCTION

Since the 1960s, juvenile justice in Australia has moved substantially away from the quasi-welfare model of the late nineteenth century

towards a bifurcated approach that combines a more traditional ‘justice’ model of running the children’s court with a movement towards pre-court diversion, such as police cautions and children’s panels.¹ The main objective of diversion was to minimize the harmful effects of stigmatisation and unnecessary state intervention, especially among less serious offenders. While this hybrid system of justice is still operating today, a new restorative justice model has been gathering momentum since the early 1990s. By the beginning of the new century, all Australian states and territories have introduced some form of restorative conferencing as part of their juvenile justice system.²

This article examines New South Wales’ Young Offenders Act 1997 (YOA) as a case study of this new approach in juvenile justice. The new approach is not entirely about restorative justice, although restorative justice does play an important part in the reform. Most significantly, the reform has sought to use legal rules as a way of institutionalising a fresh approach to juvenile justice—one that regulates police discretion at the gatekeeping level, emphasizes diversion as a principle, introduces restorative conferencing as an intermediate intervention and relegates the use of courts to the last resort.

Given the short history of the YOA, this article is necessarily limited in its ability to assess the Act’s long-term impact: It aims to provide an overview of the development, implementation and impact of the Act on juvenile justice practices during the first three years of operation. The article draws on the results of a research project, *Reshaping Juvenile Justice*, conducted by the University of New South Wales, and funded by an Australian Research Council SPIRT Grant, with the Department of Juvenile Justice and the Aboriginal Justice Advisory Council as industry partners.³ A variety of research techniques were used, including statistical analysis; case file and documentary analysis; interviews and focus group discussions with policymakers, practitioners and other stakeholders; interviews with a sample of young people, their family or support persons, and victims whose matters were dealt with under the Act.⁴

This article will primarily draw on the results of two aspects of the research: the statistical analysis of system-level data and the qualitative interview and focus group material. The aim of the statistical analysis was to obtain system-level data for comparing trends in the processing of juvenile offenders over three years prior to and three years following the introduction of the Act. The main sources of data were: the Client Information System (CIDS) and the Children’s Court Information System (CCIS) databases from the NSW Department of Juvenile Justice, and the Computerised Operational Policing System (COPS) database through the NSW Bureau of Crime Statistics and Research. The aim of the interviews and focus group discussions was to canvass the views

of policymakers, practitioners and other stakeholders in relation to the Act and to identify barriers to implementation and weaknesses in the legislation. A total of 39 interviews were conducted, including 11 policymakers, nine magistrates (seven specialist children's magistrates and two non-specialist), ten lawyers (two non-specialist lawyers and six interviews were conducted with eight specialist lawyers), two prosecutors, five Aboriginal 'elders'⁵ and five conference administrators. Most of the interviews took place between April and December 2001. A total of 24 focus group discussions were held with a total of 182 participants, including 14 conference administrators, three Aboriginal conference administrators, 81 conference convenors, 18 youth workers, eight Aboriginal Legal Service lawyers, 37 police youth liaison officers (YLOs), 15 general duties police officers and six senior police. Most of these took place between May and December 2001, although two focus groups were held in August and September 2002.

The rest of the article is organized as follows: The next section briefly canvasses issues relating to the use of legal rules to regulate discretion. This is followed by two sections which describe the development and implementation of the YOA. The impact of the Act is then assessed. The final section summarizes the strengths and weaknesses of the Act and discusses its future directions.

LEGAL REGULATION OF DISCRETION

Since its 'discovery' over 40 years ago, discretion and its pervasiveness in criminal justice practices have now been taken for granted.⁶ The exercise of police discretion to stop, search, arrest or charge suspects is now regarded as inevitable and not necessarily improper, given the limits of police resources, variations in the seriousness of offending behaviours and the inappropriateness of criminal law for dealing with some situations of conflict and disorder. Hawkins sees discretion as central to the legal order since 'the complexity of contemporary society, the sheer size and burden of the legislative task, and the growing dependence upon specialist, technical, or scientific knowledge and expertise' have meant that legal systems must rely on legal and administrative officials to give effect to the law.⁷ Discretion is also part and parcel of interpreting legal rules, which are never unambiguously and precisely written.

There is near consensus that the problem with discretion is its misuse—not only in terms of corrupt or violent practices,⁸ but also in terms of departure from the principles and standards required by the law, e.g., consistency, equity, proportionality, due process and justice. Prior to the YOA, police decisions in relation to the cautioning of young offenders were uneven and inconsistent.⁹ The literature has also documented instances of police stereotyping, harassment and breaches of basic

human rights of young people.¹⁰ One issue of particular concern has been the differential treatment of Aboriginal and Torres Strait Islander young people, who were found to be less likely than non-indigenous young people to be cautioned or referred to diversionary processes.¹¹ These studies raise the legitimate question of whether police discretion had been properly exercised.

The need to guide and regulate police discretion is therefore rarely disputed, but the appropriate mechanism for this regulation has been the subject of much debate and research.¹² The use of rules—whether in the form of statute, case law or administrative rules—to regulate police discretion is the most popular method for structuring discretion. Yet, as Dixon¹³ points out, the relationship between policing and legal rules is far from straightforward. Academic opinions vary substantially. While the ‘pure’ form of legal rationalism—the belief that the mere establishment of rules will ensure compliance in practice¹⁴—may be losing its currency, there is nevertheless a persistent perception that regulation is achievable through the refinement and elaboration of legal rules. At the other extreme, there is a ‘pure’ form of legal nihilism, an article of faith that no matter what rules are put in place, police would find a way to resist or subvert them. In fact, a natural extension of this view is that all attempts at reform should be avoided as they may backfire and produce ‘adverse unintended consequences’, ‘degenerate into empty formalism’ or shift discretion to another part of the criminal justice system.¹⁵ Even if ‘nothing works’ may be discarded as too pessimistic a position, the obstacles to effective regulation are legion: There may be technical, ideological, cultural and political factors that render such efforts futile.¹⁶ There is, of course, a middle ground between these extremes, one that is more strategic in approach and more appreciative of the obstacles: It requires an examination of how specific types of rules can affect conduct in particular situations.¹⁷

As Black points out, the use of rules can be problematic in any context because of ‘their tendency to over- or under-inclusiveness, their indeterminacy, and their interpretation’.¹⁸ These problems of rules are both a consequence of the nature of rules and the nature of language:

Prescriptive rules are anticipatory, generalized abstractions, and when endowed with legal status are distinctive, authoritative forms of communication. They are also linguistic structures: how we understand, interpret, and apply rules depends in part on how we understand and interpret language.¹⁹

Rules have by nature an ‘open texture’²⁰ because rule makers cannot anticipate all possible future events and circumstances to

which the rules apply. Because rules are generalisations, they may exclude (or include) issues that are in some cases relevant (or irrelevant). Since rules have to be interpreted in order to be applied, they need an 'informed audience' who 'understands the context of assumptions and practices in which the rule is based, which gave rise to it, and which it is trying to address'.²¹ Rules are therefore vulnerable to the 'interpretive strategies' of those they seek to regulate, including those who comply literally but at the same time subvert the intention of the rules.

Black suggests three complementary strategies for ameliorating the limitations of rules. First, it is important to recognize that there are many types of rules: 'rules with different scope, character, status, sanction, and structure.'²² Rule makers should be aware that there are trade-offs and tensions between choices. For example, flexible rules may create uncertainty, leading to inadequate compliance,²³ while precise rules may be too rigid, resulting in avoidance, resistance or creative compliance.²⁴

Second, given the necessity of 'sympathetic' interpretation for rules to achieve their purpose, Black argues for the building of 'interpretive communities':

For the rules to 'work' in the sense of being applied in a way that would further the overall aims of the regulatory system, then the person applying has to share the rule maker's interpretation of the rule; they have to belong to the same interpretive community ... The greater the shared understanding of the rule and the practices it is addressing, the more the rule maker can rely on tacit understandings as to the aim of the rule and context in which it operates, the less the need for explicitness, and the greater the degree to which simple, vague rules can be used.²⁵

Where shared cultures or definitions do not exist within the 'regulatory space',²⁶ they can be created through training and education. Through the development of interpretive communities, it is possible to overcome the inherent problems of uncertainty and indeterminacy in rules and neutralize resistance to regulation.

Finally, Black suggests that by adopting a 'conversational' style of regulation, it is possible to overcome the uncertainty and ambiguity of rules:

In conversation, the problems of generalisations and to an extent of open texture can be, and are, resolved by expla-

nation and latitude in interpretation and understanding on the part of those participating ... Conversation uses generalisations, and can tolerate them simply because it has the capacity for qualification, clarification, and embellishment. It is when this process of adjustment cannot or does not occur that the over- or under-inclusiveness of generalisations and the indeterminacy of rules poses a problem.²⁷

A conversational style of regulation may involve continual amendments to rules, adaptations through individual exceptions and waivers, the development of a system of individualized application of rules or a 'compliance' strategy of enforcement which 'focus[es] on improving compliance with the regulations by informing the regulatee of how to comply in the future rather than imposing sanctions for past infringements'.²⁸

These strategies are, of course, not without problems (e.g., resource implications, accountability, differential standing of participants) and may not apply in all regulatory situations. Nevertheless, Black's analysis provides a useful framework for understanding and exploring the limits and possibilities of legal regulation of police discretion as intended by the YOA.

DEVELOPMENT OF THE YOUNG OFFENDERS ACT

Diversion of Young Offenders in New South Wales prior to the YOA

The use of informal warnings and cautions by police in New South Wales dated back to the 1930s, although police cautions were not formally introduced until the mid-1980s.²⁹ Prior to the YOA, the NSW Police Commissioner's Instructions set out procedures and guidelines for warnings and cautions. However, these diversionary options were not well utilized. Wundersitz³⁰ noted that the percentage of young people cautioned in New South Wales went from 6 per cent in the early 1980s to 21 per cent following the introduction of new cautioning procedures in 1985, but by 1990-1991 the rate had fallen to 12 per cent. In contrast, in excess of 50 to 60 per cent of young offenders were diverted from court in other jurisdictions, predominantly via police cautions.³¹

Research into the use (or lack) of diversion in New South Wales identified various factors as contributing to the limited use of diversion. Kraus suggested that to increase the use of cautions, there would have to be a reduction in paperwork associated with cautioning, the level of determination would have to be lowered and the officer recommending a caution would have to be relieved of any follow-up work.³² The NSW Standing Committee on Social Issues, in their review of the NSW juvenile justice system, suggested that police were reluctant to use

cautions because they regarded cautions as ineffective.³³ To overcome these barriers, the Youth Justice Coalition recommended that diversion should be promoted through 'statutory recognition, policy endorsement, training, stricter management and state wide monitoring'.³⁴

Reforms prior to the YOA

Over the past ten years there have been significant shifts in thinking about the processes and practices of juvenile justice in New South Wales. In 1989, Australia became a signatory to the UN Convention of the Rights of the Child (CROC). A year later the Youth Justice Coalition released its report *Kids in Justice*,³⁵ a comprehensively researched critique of juvenile justice that set out a 'blueprint for the '90's'. The report measured the performance of the juvenile justice system in the late 1980s against the provisions of CROC and other international human rights instruments applicable to the 'treatment' of young offenders. Many of the recommendations in the report were adopted by the government. These included the establishment of a separate Office (now Department) of Juvenile Justice and the appointment of an independent Juvenile Justice Advisory Council.

The Juvenile Justice Advisory Council's first task was to carry out a comprehensive investigation into all of the legislation, practices and policies of juvenile justice in New South Wales. The Green Paper³⁶ that was eventually produced emphasized the need to instigate crime prevention strategies for keeping children and young people out of the processes of juvenile justice. It also recommended the use of Community Aid Panels as an alternative to court processing, despite concerns expressed about the absence of any protections of the legal rights of young offenders.³⁷

Around the time when juvenile justice was being reviewed in New South Wales, a new diversionary experiment was happening in New Zealand. The Family Group Conference (FGC) was introduced with the Children, Young Persons and Their Families Act 1989 (CYPFA). This new scheme was based on a different paradigm from those operating elsewhere: it puts family support and victim satisfaction at the centre, rather than the perimeter, of reactions to offending by young people. The philosophy underlying the CYPFA has four main strands: 'family responsibility, children's rights, (including the right to due process), cultural acknowledgment and partnership between the state and the community'.³⁸ The Act was responsible for a dramatic decrease in the number of young offenders appearing before the Youth Court.³⁹

It did not take long for the idea of FGCs to reach Australia. By 1991, a trial conference scheme was initiated in Wagga Wagga, NSW, with the support of the local patrol commander. Sergeant Terry O'Connell

became an enthusiastic advocate of the scheme, in spite of the lack of formal support from the Commissioner and the Premier.⁴⁰ The Wagga Wagga conferencing scheme differed from the NZ model in significant ways: It was entirely run by the police, held at a police station and was based on Braithwaite's⁴¹ theory of reintegrative shaming.⁴² The scheme was found to have led to a substantial reduction in matters referred to court,⁴³ but youth advocates objected to the scheme being run by police.⁴⁴

The White Paper that followed the Green Paper promised to 'develop effective and regulated diversionary interventions for young people who have offended which empower the victims of crime'. A pilot scheme of Community Youth Conferences (CYC) and revised training on informal and formal police cautioning were promised.⁴⁵ The CYC pilot scheme that began in February 1995 was run by Community Justice Centres using a mediation process. An evaluation of the pilot⁴⁶ found 'a number of systemic and structural problems' with the scheme and police were 'reluctant gatekeepers' who made few referrals to the process.⁴⁷ The evaluation recommended that legislation was required to 'govern the conferencing process' as well as the 'issuing of cautions and warnings by police'.⁴⁸

Development of the Act

Following the evaluation of the CYC pilot scheme, a cross-government committee, the Minor Offenders Punishment Scheme (MOPS) Working Party, was established in 1996. Its brief was to consider the recommendations of the evaluation report,⁴⁹ write a discussion paper for extensive community consultation and prepare draft legislation to introduce the final agreed form of an alternative to court processing to operate Statewide. A discussion paper was subsequently distributed, followed by a period of active consultation with a wide range of stakeholders, from government agencies to youth advocacy groups, victim groups, Aboriginal and ethnic organisations, and youth workers.⁵⁰ The Bill that became the Young Offenders Act 1997 contained the framework for both changing police practices with young offenders and introducing a form of conferencing that draws on the NZ model.

The new approach to juvenile justice had to grapple with some major issues about the structure of decision making and the nature and operation of diversionary options. While the Bill that was subsequently drafted specified rules guiding police discretion in referral decisions, it did not adopt the NZ mandatory referral system in relation to conferencing.⁵¹ Nevertheless, not unlike the NZ system, it was decided that conferencing was not to be used for minor offenders—these were to

be dealt with by way of warning or caution. The issue of who should run conferences was also subject to debate. In view of the experience with the CYC pilot, it was decided that neither Community Justice Centres nor the police should be running conferences. Instead, an independent agency was to have the responsibility for conferencing. The nature of police caution was another issue that remained controversial. The decision was not to adopt the Wagga Wagga model, which involved victims participating in the cautioning process.

The path of the YOA's development was not a smooth one. There was strong criticism from sections of the police and some vocal objection from victims' groups to the decision to depart from the Wagga Wagga model. There was, at least initially, not a lot of enthusiasm for conferencing from the magistrates; as one policymaker observed, some magistrates 'didn't like the idea that it was taking away from the rigour of the court process'. Among some magistrates there was little confidence that family group conferencing was going to work among families that were dysfunctional because of problems such as alcohol and drug abuse. Similar concerns about conferencing being a 'soft' option and about dysfunctional families were expressed by some members of ethnic and Aboriginal communities.

Nevertheless, the development of the new legislation was boosted by a number of critical success factors. First of all, there was a strong commitment among senior members of key government agencies to reform the juvenile justice system. Second, the development process involved major criminal justice agencies working together in a constructive way. In developing the Bill, the Attorney General's Department invited all those who were to be principal players in implementing the Act to be members of the MOPS Working Party, or, if not members, to be kept informed of progress in the deliberation of the committee and included in its decision making. Members of the committee were drawn from the Office of the Director of Public Prosecutions, the Legal Aid Commission, the Department of Aboriginal Affairs, the Police Service, the Department of Juvenile Justice, the Judicial Commission and other relevant government departments. Police representatives were from both operational and policy areas and included officers with extensive experience in the policing of young people. A third success factor was the consultation process, which was extensive, involving participation from the youth sector and other community groups.

Over 50 submissions to the Working Party were received and considered. A draft Bill was prepared and subsequently adopted by the government in February 1997. When the Young Offenders Bill was introduced into Parliament in June 1997, there was overwhelming support from all sides of politics.

Decision Making under the Act

The YOA sets out a graduated hierarchy of interventions for young offenders and is largely consistent with the UN CROC. It also establishes general principles of least restrictive sanction, rights to legal advice, victims entitlement to information, family and community involvement (s 7 and s 34). Like the NZ scheme of family group conferences, the Act emphasizes family responsibility, children's rights, cultural acknowledgment and partnership between state and community.⁵²

More specifically, the Act provides a legislative framework for the diversion of young offenders from court. Police discretion in the use of warnings, cautions and youth justice conferences is guided to an extent not usually seen in legislation. The Act sets out the criteria that distinguish between matters that should be dealt with by way of a warning or a caution, and those that should be dealt with by way of conference. Commencement of criminal proceedings should only occur if a young person is not entitled or eligible to be dealt with by diversionary options. Warnings can be issued for summary offences that do not involve violence; an admission of guilt is not required. Cautions can be issued for summary offences and indictable offences that can be dealt with summarily, if the investigating officer is satisfied that the young person meets the criteria of the Act,⁵³ the young person admits the offence⁵⁴ and consents to the caution. A caution will generally be delivered by a Youth Liaison Officer (YLO).⁵⁵ The YOA stipulates that the young offender must also be told that they have the right to obtain legal advice (and where to get that advice) before making any statement or admissions to the investigating officer.

If an investigating officer is not satisfied that the young person is eligible for a warning or caution, the matter is then referred to a Specialist Youth Officer (SYO)⁵⁶ who then decides to refer the matter to a youth justice conference or commence criminal proceedings. The Act contains checks and balances concerning all decisions made under the Act. Decisions by SYOs under the Act can be challenged in the first instance by conference administrators, and if a conference administrator and an SYO fail to agree, they must refer the matter to the Director of Public Prosecutions (DPP). The DPP then makes the final decision on whether the young offender should be cautioned, dealt with by way of conference or referred to court. Where a matter gets to court and the court considers that a less intrusive intervention should have occurred, the magistrate can either administer a caution⁵⁷ or refer the matter back to a conference administrator for conferencing.

The YOA addresses many of the barriers to diversion previously identified. Formalising diversionary options in legislation, reducing the procedures associated with diversionary options, enabling investigat-

ing police to determine the appropriateness of warnings and cautions, establishing SYOs and introducing levels of review of determinations have all gone some way to overcoming the barriers to diversion identified throughout the 1980s and 1990s. The Act is not dissimilar to the legislated conferencing schemes in operation since 1994 in South Australia,⁵⁸ Western Australia⁵⁹ and Queensland⁶⁰ in its focus on community, victim and family participation, but differs from other schemes in the limits it places on the exercise of police discretion, in the provisions made for children's access to legal advice and the overt provisions for the engagement of community people as conference convenors.

IMPLEMENTATION OF THE YOA

The Youth Justice Advisory Committee

The implementation of the YOA continued the multi-agency collaborative approach that was taken during the development phase. The Act prescribes the establishment of a Youth Justice Advisory Committee (YJAC) consisting of representatives from relevant government departments and statutory authorities as well as community representatives. The role of YJAC is to advise the Attorney General and the Director General of Juvenile Justice on the making of regulations, the preparation of guidelines and criteria for the operation of youth justice conferences and the review and monitoring of the legislation (s 70(2)). Many of the initial members of YJAC had worked together in the Working Party that developed the YOA.

In 1999, YJAC commissioned a review of the 'gatekeeping role' of the YOA. This review was partly prompted by a concern 15 months after the Act had been in operation that diversion rates were not as high as 'anticipated'.⁶¹ In particular, YJAC was concerned that the diversion rate of Aboriginal and Torres Strait Islander (ATSI) young people was disproportionately low. The review made 17 recommendations regarding policies and strategies that should be adopted by police and courts to improve the situation. Many of the recommendations were adopted by the Police Service.⁶²

The Youth Justice Conferencing Directorate

Soon after the introduction of the YOA in 1997, the Youth Justice Conferencing Directorate (YJCD) was established as an independent unit within the Department of Juvenile Justice (DJJ). The Directorate is responsible for the coordination and efficient operation of youth justice conferences throughout New South Wales. There are currently 17 conference administrators (now called 'conference managers') employed in the Directorate, each in charge of one Youth Justice Conferencing area in New

South Wales. Conference administrators perform a range of management and administrative tasks in relation to the conferencing process.

Conference conveners are engaged on contract by the DJJ on a fee-for-service basis.⁶³ Conveners are recruited by conference administrators from members of the local community. The policy of hiring conveners on contract was a deliberate move to de-bureaucratize the operations of the conference, to avoid burnouts as experienced in other jurisdictions, as well as to involve members of local communities. There are around 370 active conveners in the State, although over 700 have received training. The role of the conference conducer is to prepare all relevant parties, act as a facilitator for the conference, identify appropriate community resources to include in the outcome plan and ensure that the outcome plan is appropriate.

Implementation within NSW Police

With the enactment of the YOA, the Police Service needed to implement a number of initiatives. For example, SYOs had to be appointed and trained, changes under the Act had to be communicated to all police, changes to the computer information system were required and the new Act had to be 'marketed' internally. Many of these implementation tasks were carried out with great enthusiasm because the YOA was considered 'a winner'. Nevertheless, the process was not an easy one, since the Act requires a significant shift in the philosophy and practice of policing in an organisation of 14,000 sworn officers.

The Youth Issues Working Party, headed by a Regional Commander, successfully obtained approval from the police executive for the appointment of a YLO for each of the 80 local area commands. YLOs have been critical to implementation of the Act through training other police, establishing relationships with conference administrators, monitoring the performance of the Command, reviewing determinations of SYOs and generally promoting the use of the Act.

At the time of writing this article, in excess of 1,500 police officers have received a two-day SYO training program. Several policymakers commented on the special quality of the SYO training program: There is a great deal of emphasis on getting officers to understand the principles of the Act, instead of focusing exclusively on what police are required to do under the Act. The training, jointly delivered by YLOs and youth justice conference administrators, exposes YLOs and conference administrators to each other's values and attitudes, and helps pave the way for a future collaborative working relationship between the two groups—a relationship that can accommodate 'professional, honest, and, where needed, robust' discussions regarding the application of the Act in referral decisions.

The Act was actively promoted within the Police organisation. The promotional strategies include articles in the Police Weekly, segments on Police TV, training videos, the dissemination of brochures and aide-mémoire cards, as well as information on the Police intranet. To institutionalize awareness of the Act among senior police, questions about the implementation of the YOA were included periodically at Operational and Crime Reviews (OCRs) where the performance of Local Area Commanders is reviewed by senior police executives.⁶⁴ These questions were also included in a self-assessment system for LACs.

The Legal Aid Hotline for under 18s

Although s 7(b) of the YOA specifies that children are entitled to legal advice, no funding was made available for the provision of that advice until late 1998 when the Youth Hotline was set up. The Hotline provides free, confidential legal advice to people under 18 and their families. It is staffed by solicitors from the Children's Legal Service of the Legal Aid Commission. These practitioners are specialists in children's criminal matters. The legal advice given includes:

- The right to silence and rights and options under the Young Offenders Act including:
 - The elements of an offence and any defences.
 - The ramifications of admitting an offence.
 - The implications of and processes for cautions and conferences.⁶⁵

The Hotline number is 1800 10 18 10 and is available toll free throughout NSW. The original operating hours were 9.00 am to midnight Monday to Friday and 12 noon to 12 midnight on weekends and public holidays. From 9 March 2002 the Hotline has been available 24 hours on weekends and public holidays.⁶⁶ From April 2002 to March 2003, the Hotline received 15,603 calls, giving advice to 5,611 children and making 9,992 referrals to other services.⁶⁷ Approximately 75 per cent of the calls were from the Sydney metropolitan area, 20 per cent from regional New South Wales and 5 per cent from mobile phones.⁶⁸

Strengths of the Implementation Process

According to policymakers interviewed in the research, 'a major strength of the process was the broad and on-going consultation that was undertaken with major stakeholders'.⁶⁹ The 'commitment and co-operative orientation of key players' and 'solid' interagency relationships were also cited as success factors. The transparency of the implementation process was also one of its strengths: as one policymaker put it, 'There were no hidden agendas'. The partnership

that eventually developed between the Department of Juvenile Justice and the NSW Police was, in the words of this policy maker, 'a model of best practice'.

The main source of this collaborative spirit appears to be the solid support that the Act received from all of the government departments involved. The clarity of the Act was also cited by a policymaker as one of its strengths.

The success of the implementation process within the Police Service hinged on the credibility and seniority of the Commander who championed the Act. The ongoing promotion of the YOA within the Police organisation was seen as 'almost unique' compared with the treatment of other pieces of legislation.

Acceptance of YOA among Stakeholders

Chan et al.⁷⁰ found that among juvenile justice practitioners there was general acceptance of the YOA. Focus-group participants believed that police had become more accepting of the Act over time, even though the Act required a major cultural change in the policing of young people. In particular,

According to some police and youth liaison officers ... police are receptive to the options available for young people under the Act largely because it is an Act of Parliament. Thus, police officers felt that even though they may not necessarily like the Act, they do their job well and abide by the provisions of the Act.⁷¹

However, according to some practitioners, there were still 'pockets of resistance among [police] ... that see giving a kid a caution [or sending him or her to a conference] as a soft option'. It was suggested that police who were familiar with the YOA or who had attended a conference were more willing to support the Act and change their practices. Police acceptance of the Act was also said to be influenced by community attitudes—where a 'get tough' approach to crime prevailed, police were likely to be criticized for diverting young offenders from court.

Some focus group participants were of the view that magistrates were generally supportive of the YOA. However, 'the prevailing view was that there was variation among individual magistrates in terms of their acceptance of or application of the Act'.⁷² Similarly, lawyers were seen as generally knowledgeable about and supportive of the Act, although concerns were expressed that many private lawyers were ignorant of the options available under the YOA.⁷³ Other concerns related to the type of legal advice provided to young people:

Some concerns were expressed by various practitioners about the advice ‘don’t say anything’ that young people get from lawyers, especially some areas of the Aboriginal Legal Service. This means that young people who may have been warned, cautioned, or referred to conferencing are instead referred to courts.⁷⁴

Practitioners who took part in the research thought that there had not been any improvement in community attitudes towards juvenile justice following the YOA, and part of the blame went to negative media coverage:

Reservations about the Young Offenders Act, and in particular, the use of cautions and conferences, were thought to be largely the result of negative media attention ... Media attention has also focused on disgruntled victims who were not satisfied with the outcome of the conference ... and local papers often carry sensationalist reports about the level of youth crime and young offenders ... There was a consensus that communities need to be educated, both about the principles of restorative justice and the benefits of diversionary options such as cautions and conferences.⁷⁵

Practitioners and stakeholders noted, however, that most of these attitudes were based on a lack of understanding about the YOA: ‘Once people attended a conference and experienced the process, their attitudes were almost always positive.’⁷⁶

IMPACT OF THE YOA

In determining the outcomes of the YOA, we draw on system level statistics. Outcomes are assessed in terms of system impact, rates of diversion, consistency and equity.

System Impact and Rates of Diversion

To assess the overall impact of the YOA on the processing of cases in the juvenile justice system, we made use of statistical data derived from the NSW Police Service COPS database, which contains recorded crime data.⁷⁷ Note that the basic count is of separate person–events: Each event is a collection of one or more interrelated incidents that have come to police attention at one time. If more than one perpetrator has been involved in the event then each person is counted separately. The following comparisons cover the three years before and three years after

the introduction of the YOA on 6 April 1998. These years are labelled -3 to 3 and cover the periods:

- Year -3 = 6 April 1995 to 5 April 1996
- Year -2 = 6 April 1996 to 5 April 1997
- Year -1 = 6 April 1997 to 5 April 1998
- Year 1 = 6 April 1998 to 5 April 1999
- Year 2 = 6 April 1999 to 5 April 2000
- Year 3 = 6 April 2000 to 5 April 2001

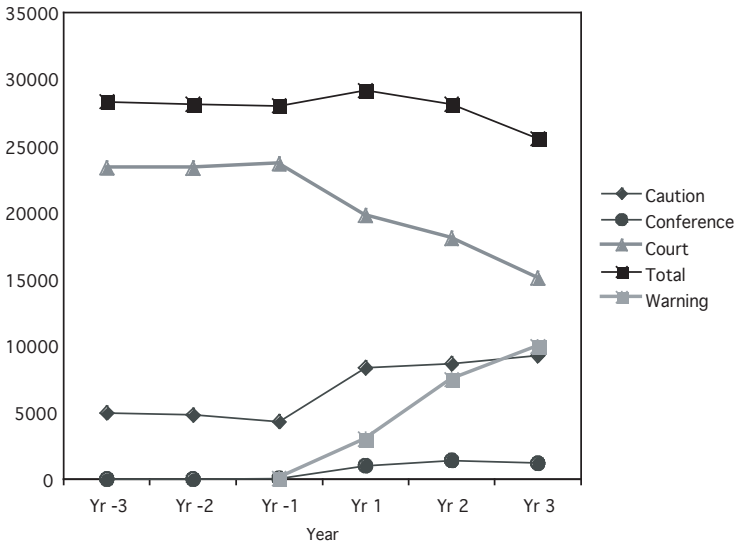
Table 1. Use of sanctions over the six-year period

	Year -3		Year -2		Year -1		Year 1		Year 2		Year 3	
	N	%	N	%	N	%	N	%	N	%	N	%
Caution	4,956	17.5	4,795	17.1	4,305	15.4	8,352	28.7	8,643	30.8	9,270	36.3
Conference	0	0.0	0	0.0	28	0.1	1,007	3.5	1,396	5.0	1,182	4.6
Court	23,335	82.5	23,323	82.9	23,655	84.5	19,773	67.9	18,063	64.3	15,071	59.0
Total	28,291	100.0	28,118	100.0	27,988	100.0	29,132	100.0	28,102	100.0	25,523	100.0
Warning					39		2,989		7,450		9,942	

Source: NSW Police COPS database. Note: As the period is based on the date the incidents were reported to police, some conference records appear before the introduction of the YOA.

Table 1 (graphically represented in Figure 1) shows the proportions of person–events (hereafter ‘cases’) that were dealt with by way of caution, conference or court over the six years. Before the YOA, cautions were used in under 20 per cent of the cases, while the majority (over 80 per cent) of the cases were dealt with in the Children’s Court. The use of cautions increased substantially following the introduction of the Act, rising to 29 per cent in the first year and 36 per cent in the third year. A small proportion (under 5 per cent) of cases were dealt with by youth justice conferences; this proportion rose slightly in the second year but has levelled off by Year 3. At the same time, the proportion of cases that were dealt with by the Children’s Court fell dramatically from 85 per cent to 68, 64 and 59 per cent during the three years after YOA was introduced. Total interventions have stayed steady over most of the period, with a drop in Year 3. While the number of cautions has increased steadily from around 4,500 before the YOA to 9,270 by Year 3, the number of conferences has peaked in Year 2 and has dropped to around 1,200 by Year 3.

Figure 1. Use of sanctions over the six-year period



Source: NSW Police COPS database. Note: As the period is based on the date the incidents were reported to police, some conference records appear before the introduction of the YOA. Warnings are not counted in total.

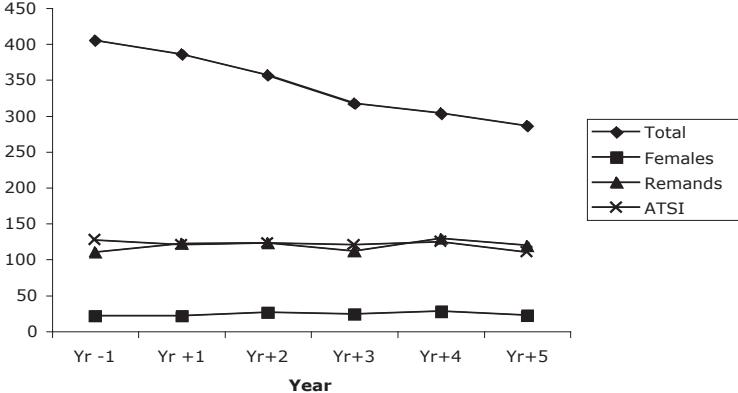
Note, however, that the figures in the Table would have underestimated the number of youth justice conferences that took place,⁷⁸ since court-referred conferences were not always recorded as such on the COPS database. The actual number of conferences could be 20 per cent higher, while the actual number of court cases could be 1 per cent lower. For Year 3, for example, this would translate to 5.6 per cent of cases referred to conference and 58.1 per cent to court.

These trends provide no evidence that the introduction of the YOA has resulted in net widening of the overall juvenile justice system. As the percentage of cases dealt with by caution and referred to conferences steadily grew, there has been a reduction in the proportion of cases referred to court.

Note that warnings have been kept separate in the Table because despite their widespread use by police, recording a warning on the COPS database was not mandatory until 8 February 1999. Following the amendment to the YOA enabling police to record details of the young person receiving a warning, the use of warnings has grown substantially.⁷⁹

To examine the impact of the YOA on the average daily population in juvenile detention centres, we analysed data provided by the Department of Juvenile Justice. Unfortunately, these only went back to 1997. Figure 2 shows that since the introduction of the YOA, there has been a steady decline in the average number of young people in custody. This decline involved mainly male, non-Aboriginal young people sentenced to control order, since the average number of female, ATSI and remand population shows little change from 1997 to 2003. Note, however, that the decline in young people in custody may be a pre-existing trend, not primarily a result of the YOA.

Figure 2. Average number of young people in custody April 1997 – March 2003



Source: Department of Juvenile Justice (special request)

Geographical Variations

An analysis of intervention types according to the location of the incident by DJJ regions suggests there are regional differences in the use of interventions: The use of warnings varied from 17 to 26 per cent; caution from 21 to 30 per cent; conference from 2.7 to 4.4 per cent and court from 49 to 55 per cent. However, both level of crime and population size would also need to be taken into account in any comparison of interventions across regions. When intervention type is analysed according to YJC Region (smaller divisions), we also found regional variations.⁸⁰ Warnings varied from 14 to 29 per cent; cautions from 14 to 35 per cent; conference from 2 to 6 per cent; and court from 42 to 61 per cent. Note that each YJC region covers one or more police LACs.

Our qualitative research suggests that inconsistency of referral practices may be a problem. Practitioners and other stakeholders suggest that police practices in relation to cautioning and conference referrals could have been influenced by extra-legal factors:

Although police referrals were increasing, factors such as police knowledge of the Act, police attitude towards the Act, and the police officer's personal opinion of the young person were influencing the way the police exercised discretion in dealing with young people. Some stakeholders believed that there were still a large number of police who were reluctant to use alternatives to court ... It was suggested that police were making judgments about whether to deal with the young person under the YOA on the basis of the young person's associations or friends, or whether or not the young person had accommodation ... Indeed, some youth workers in an inner city region felt that discretionary powers given to police can lead to discrimination.⁸¹

Regional differences may also be due to the lack of resources in rural areas to support the Act, as pointed out by a number of practitioners.⁸²

*Variation by Gender and Age*⁸³

Using the same system level data, with the abovementioned possibility that conferences were under-counted, we examine the relationship between intervention types and two demographic variables: age and gender. The results⁸⁴ show that young women were more likely to be cautioned (34 per cent vs 24 per cent) or given warnings (23 per cent vs 19 per cent) than young men, but less likely to be referred to court (41 per cent vs 54 per cent) or conference (3 per cent vs 4 per cent). The mean age of the population was 15.5 and the median 15.9. As expected, the group of young people given warnings were younger than average (14.5 years), whereas those referred to court were older than average (16.1). The average age of those given a caution or referred to a conference was 15.3; there was little difference in the age pattern between the two groups.⁸⁵

Impact on Aboriginal Over-representation

The system-level statistical data (see Table 2, but note the large number of missing values and the abovementioned possibility that conferences were under-counted in this database) provide support that in the three years since the introduction of the YOA, Aboriginal young people

were significantly more likely to have been taken to court (64 per cent compared with 48 per cent for non-Aboriginal young people) and half as likely to be cautioned (14 per cent vs 28 per cent) than non-Aboriginal young people. Note, however, that Aboriginal and non-Aboriginal young people were given warnings or referred to conferences at approximately the same rates (around 20 per cent and just over 3 per cent respectively).

Table 2. Aboriginality* by intervention type—Years 1, 2, 3 combined

	Caution		Conference		Court		Warning		Total	
	N	%	N	%	N	%	N	%	N	%
Non-Aboriginal	22,565	28.4	2,793	3.5	38,410	48.4	15,653	19.7	79,421	100
Aboriginal	2,711	13.8	658	3.4	12,495	63.8	3,712	19.0	19,576	100
Total	25,276	25.5	3,451	3.5	50,905	51.4	19,365	19.6	98,997	100

Source: NSW Police COPS database

Frequency Missing = 4141

*Aboriginality includes Torres Strait Islanders

One interpretation of the under-utilisation of cautions for Aboriginal young people may be that they were not given appropriate legal advice. Since warnings do not require admissions, and the majority of conference referrals for Aboriginal young people have been coming from the courts,⁸⁶ the under-representation of Aboriginal young people among the caution group may have been the result of their exercising their right to silence or not making admissions either because of traditional mistrust of the police among Aboriginal people or they did not have access to (or were not given) appropriate legal advice.⁸⁷

Analysis of First Offenders

As prior record is likely to be a significant factor in police and court intervention decisions, the following comparisons hold prior record constant by focusing on ‘first offenders’—those with no prior incidents recorded on COPS. Incomplete historical data on COPS and the recent addition of warnings to the database prevent accurate determination of prior record in all cases. However, it is possible to identify ‘first offenders’ who came to the attention of police in calendar year 2000.⁸⁸ In contrast with earlier results (Table 2) where Aboriginal young people were much more likely to be taken to court, Table 3 shows that Aboriginal first offenders have about the same chance as non-Aboriginal first offenders of going to court or attending a conference. Aboriginal first offenders are, however, less likely to receive a caution but more likely to receive a warning.

Table 3. Aboriginality by intervention type for ‘first offenders’ in calendar year 2000

	Caution		Conference		Court		Warning		Total	
	N	%	N	%	N	%	N	%	N	%
Non-Aboriginal	5,197	38.3	308	2.3	2,887	21.3	5,174	38.1	13,566	100
Aboriginal	380	24.5	29	1.9	294	19.0	848	54.7	1,551	100
Total	5,577	36.9	337	2.2	3,181	21	6,022	39.8	15,117	100

Source: NSW Police COPS database

Frequency Missing = 695, $\chi^2 = 172.0$, $df=3$, $p < 0.0001$, Cramer’s V = 0.1067

Similar analyses⁸⁹ suggest that gender, type of offence, Aboriginality and region all appear to affect the type of intervention used. To assess the independent impact of each of the factors, a logistic regression analysis was conducted with ‘type of intervention’ as the dependent variable. Intervention was dichotomized into ‘court’ or ‘diversion’, which includes warning, caution and conference. The regression shows that each of the factors has a significant independent effect on the type of intervention used (see Table 4).

One way of summarising these results is to examine the ‘odds ratio’ estimates for each of the factors. The odds ratio in this analysis represents the probability of being taken to court if a young person belongs to one group, divided by the probability of being taken to court if the young person belongs to the other group. Table 5 estimates the odds of a court appearance—all other factors in the regression being equal—for each person when compared on each factor. For example, the odds of a young man going to court are 1.5 times those of a young woman; the odds of an Aboriginal young person are 1.8 times those of a non-Aboriginal young person, and the odds of a serious ‘person’ offender are 194.4 times those of a young person with an offence from the ‘other’ category. Note, however, that while each of the factors is statistically significant even when the other factors are controlled for through regression, caution should be exercised in interpreting these results, as it may be that these characteristics are correlated with some other unmeasured factor that is the ‘cause’ of the decision. For example, it may be that Aboriginal young people are less likely to admit to having committed an offence and thus unable to receive a caution or conference, or that country offenders have a more cooperative attitude towards police.

To compare these results with the situation before the YOA, the same regression analysis on first offenders was run for data from calendar year 1997.⁹⁰ The results (see Table 6 and Table 7) suggest that while most of the factors (except ‘Theft’) had an independent ef-

fect on the type of intervention used, the odds of an Aboriginal young person going to court were 3.5 times those of a non-Aboriginal young person. This suggests that the YOA has resulted in a substantial drop in the odds of an Aboriginal young person going to court compared with a non-Aboriginal young person—from 3.5 to 1.8, a drop of almost 50 per cent.

Table 4. Logistic regression—first offenders in calendar year 2000—court vs diversion

Analysis of Maximum Likelihood Estimates						
Parameter		DF	Estimate	Standard Error	Chi-Square	Pr ChiSq
Intercept		1	-4.4228	0.1746	641.9227	<.0001
Sex	M	1	0.4347	0.0672	41.8070	<.0001
ABTSI	Aboriginal	1	0.5773	0.0974	35.1512	<.0001
Age group	13-15	1	1.2162	0.1637	55.2160	<.0001
Age group	16-18	1	2.6412	0.1604	271.0759	<.0001
Offence gp	Serious person	1	5.2697	0.6033	76.2985	<.0001
Offence gp	Less serious person	1	2.0077	0.0656	938.1024	<.0001
Offence gp	Theft	1	-0.1840	0.0643	8.1923	0.0042
Sydney	Yes	1	0.1374	0.0544	6.3778	0.0116

No of cases: 13118. Note: for the regression, the regions have been aggregated as either within Sydney or not.

Source: NSW Police COPS database

Table 5. Odds Ratio Estimates for logistic regression of first offenders in calendar year 2000—court vs diversion

Odds Ratio Estimates			
Effect	Point Estimate	95% Wald Confidence Limits	
Sex: M vs F	1.545	1.354	1.762
ABTSI: Aboriginal vs non-Aboriginal	1.781	1.472	2.156
Age group: 13-15 vs 10-12	3.374	2.448	4.650
Age group: 16-18 vs 10-12	14.029	10.245	19.213
Offence gp: serious person off vs ' other' offence	194.367	59.579	634.088
Offence gp: less serious person off vs ' other' offence	7.446	6.549	8.467
Offence gp: theft off vs 'o ther' offence	0.832	0.733	0.944
Sydney: yes vs no	1.147	1.031	1.276

Source: NSW Police COPS database

Table 6. Logistic regression—first offenders in calendar year 1997—court vs diversion

Parameter	DF	Estimate	Standard Error	Chi-Square	Pr ChiSq
Intercept	1	-1.9765	0.1064	345.1274	<.0001
Sex: M	1	0.6546	0.0516	160.7631	<.0001
ABTSI: Aboriginal	1	1.2382	0.0822	226.8083	<.0001
Age group: 13-15	1	1.2968	0.0919	199.2544	<.0001
Age group: 16-18	1	2.3829	0.0943	639.0774	<.0001
Offence gp: Serious person	1	4.6718	1.0045	21.6306	<.0001
Offence gp: Less serious person	1	1.2178	0.0778	244.7195	<.0001
Offence gp: Theft	1	0.0761	0.0487	2.4412	0.1182
Sydney: Yes	1	0.1312	0.0464	7.9840	0.0047

No of cases: 10503. Note: for the regression, the regions have been aggregated as either within Sydney or not.

Source: NSW Police COPS database

Table 7. Odds Ratio Estimates for logistic regression of first offenders in calendar year 1997—court vs diversion

Odds Ratio Estimates			
Effect	Point Estimate	95% Wald Confidence Limits	
Sex: M vs F	1.924	1.739	2.129
ABTSI: Aboriginal vs non-Aboriginal	3.449	2.936	4.052
Age group: 13-15 vs 10-12	3.658	3.055	4.379
Age group: 16-18 vs 10-12	10.836	9.008	13.035
Offence gp: serious person off vs "other" offence	106.891	14.925	765.553
Offence gp: less serious person off vs "other" offence	3.380	2.901	3.937
Offence gp: theft off vs "other" offence	1.079	0.981	1.187
Sydney: yes vs no	1.140	1.041	1.249

Source: NSW Police COPS database

CONCLUSION

This research on the first three years of the operation of the YOA suggests that the implementation of the Act has been largely successful.⁹¹ The basic administrative and operational structure for implementing the Act was put in place with the establishment of the Youth Justice Conferencing Directorate, the appointment and training of conference administrators and convenors, the appointment and training of specialist youth police officers, the setting up of the Legal Aid Hotline and the establishment of procedures and guidelines for conferences and cautions. Consultation of stakeholders suggests that there was general acceptance of the Act among practitioners, although pockets of resistance remained among police and some magistrates.

The available data show that the introduction of the Act has led to a substantial increase in the use of cautions and warnings and a corresponding decline in the use of court proceedings. About 5 per cent of cases were dealt with by youth justice conferencing. Moreover, such an increase in diversion has not resulted in net widening. There were, however, substantial geographical variations in outcomes.

The regression analyses show that Aboriginal young people were still more likely to be taken to court and less likely to be cautioned than non-Aboriginal young people, even though they were equally likely to be given warnings or referred to conferences compared with non-Aboriginal young people. Even among first offenders, the odds of an Aboriginal young person being taken to court were 1.8 times that of a non-Aboriginal young person, when other factors such as gender, type of offence, age and location were controlled for. Nevertheless, the Act has had a substantial impact in the reduction of over-presentation of Aboriginal young people: It has resulted in an almost 50 per cent drop in the odds ratio of Aboriginal first offenders being taken to court compared with the situation before the Act.

A number of barriers to successful implementation of the Act were identified.⁹² These include various perceived deficiencies in training, resources, access and quality of legal advice, police practices, the logistics of conference organisation and monitoring of outcome plans—some of which reflect the ‘teething problem’ of the Act’s initial operations, while others require further administrative and legislative fine-tuning.

In this final section, we re-examine these results more analytically within the literature on the use of legal rules to regulate discretion. The YOA in New South Wales has proven to be a case study of unique value for understanding how law reform can reshape juvenile justice practices and what its strengths and limitations are. We conclude by discussing briefly the future directions of juvenile justice in New South Wales.

Success Factors

To understand the factors contributing to the success of the YOA as well as its limitations in structuring police discretion, we re-examine the development and implementation of the YOA against the strategies outlined by Black⁹³ for ameliorating the limitations of legal regulation.

Rule Types.

It should be clear from the results of this research that having rules (the YOA) does matter—the Act has made a difference to the pattern and substance of police decisions at the ‘gatekeeping’ stage. In spite of resistance from some police officers, the status of the YOA as an Act of Parliament meant that the majority of officers took it seriously.

The YOA also uses a combination of rule structures effectively to gain compliance. For example, the Act outlines a set of general principles (ss 7 and 34) that provide guidance for its operation. These principles are broad and no sanctions are attached to their breach. The Act also contains many detailed rules about the types of offences appropriate for each diversionary option and the conditions and procedures that apply. In particular, the COPS enhancement implemented in November 2000 provided a built-in mechanism for ensuring that trained specialist youth officers are involved in decisions to refer a young offender to conference or to the court. The Act also contains various checks and balances so that any disagreements between the SYO and the conference administrator regarding the appropriateness of youth justice conferencing for a particular young offender could be referred to the DPP for determination. Similarly, the Act provides that the DPP and the court can independently refer matters for conferencing. Overall, the Act appears to strike a good balance between flexibility and precision in the types of rules applied.

Interpretive Communities.

The success of the YOA in structuring police discretion is also a consequence of the existence and maintenance of a sympathetic 'interpretive community' consisting of representatives from different agencies, including the police. As pointed out earlier, a major strength of the development and implementation of the Act was the broad and on-going consultation, collaboration and partnership among the major agencies charged with putting the Act into operation.

The investment in training, education and regular promotion of the YOA, both in the Police and the DJJ, have also strengthened this interpretive community. According to the stakeholders and practitioners consulted in this study, police acceptance of the Act has improved over the years. However, the impact of training and education can be limited if police officers (and indeed other practitioners) lack philosophical commitments to the YOA. Practitioners we consulted believed that police who have a good understanding of the Act and those who have attended a youth justice conference were more likely to have a positive attitude towards the Act. There may be two reasons for this shift in attitude: First, youth justice conferencing provides an intermediate sanction between caution and court that participants recognized as appropriate (i.e., not a 'soft' option), and second, participants experienced and appreciated the positive and constructive potential of the restorative justice process. Given that community attitudes can also affect police attitudes towards diversion, promotion of the YOA to educate the general public would be vital to the longer term success of the Act.

The development of other sympathetic interpretive communities—especially among juvenile justice workers, lawyers and magistrates—still requires further work. One indication of this is the lack of shared trust and understanding between police and some lawyers regarding the most appropriate legal advice that should be given to young people. Nevertheless, sensible arrangements have been worked out in some communities between police and legal aid lawyers to respect young people's rights to legal advice as well as maximize their interests in being referred to appropriate diversionary options.

Regulatory Style.

There is no special regulatory agency that is responsible for ensuring the police are exercising their discretion according to the Act, although the Youth Justice Advisory Committee has a role in the making of regulations, the preparation of conference guidelines and monitoring and evaluating the Act. The first review of the Act commissioned by YJAC⁹⁴ highlighted a number of early problems that required attention. Since the Police Commissioner (or his nominee) is a member of YJAC, the regulatory style is necessarily 'conversational', in the sense that the focus is on consultation, participation in additional rule-making or amendments and improving compliance. This approach has encouraged the Police to set up training and administrative systems (including using information technology) to improve compliance.

Future Directions

The foregoing section has highlighted some reasons for the general success of the Act in regulating police discretion and reshaping juvenile justice in New South Wales during its first three years of operation. There are still a number of barriers and difficulties that need to be overcome. To maintain the positive results requires commitment, resources and attention to emerging problems and issues. Four basic strategies are recommended: further promotion and education, maintenance of a sympathetic interpretive community, continual monitoring and evaluation and addressing fundamental issues.

Further Promotion and Education.

It is easy for promotional and educational activities to lose momentum once the Act has been implemented, yet the continued success of the Act requires all police officers, conference administrators, conference convenors, lawyers and magistrates, especially newly appointed ones, to understand the philosophical underpinnings and practical applications of the Act. As pointed out before, the task of ensuring that 14,000 police officers are adequately informed of the Act is monumental

enough, but the need to change police practices in accordance with the spirit and letter of the law can be extremely daunting. Promotion and education may help reduce some of the disparities in applications of the law. Similarly, there should be greater effort devoted to the promotion of the Act among Aboriginal communities, since their support is also crucial to the success of the Act. The general public in New South Wales should be more informed about the Act and its benefits.

Maintenance of a Sympathetic Interpretive Community.

With the regular turnover of staff in government agencies, there is a risk that there will be a loss of 'institutional memory'. The great strengths of the developmental and early implementation stages of the Act had to do with the high degree of individual commitments to the principles and practices embedded in the legislation, as well as the unusual capacity of the policymakers to work together towards a common end. It would be unrealistic to expect the dedication and enthusiasm shown in the early stages to continue unabated in spite of staff changes and departures of key sponsors. The maintenance of a sympathetic interpretive community requires more than promotion and education; it requires forums for practitioners to conduct useful dialogues and exchanges of ideas in relation to the operation of the Act.

Continual Monitoring and Evaluation.

Once the Act has been implemented and its initial 'teething problems' ironed out, there may be a temptation to simply 'let it run'. Day-to-day managerial concerns can easily overshadow the need for continual policy analysis. Certainly, the establishment of a better recording and retrieval system would be beneficial to the efficient management of operations and human resources, but the value of continual monitoring and evaluation goes much further than managerial or administrative efficiency. The 'conversational' style of regulation, as evidenced by the role of YJAC in monitoring and facilitating continuous improvement of the Act's operations, is one of its key success factors. There are enormous benefits in instituting a system of data collection that can form the basis of continual review of the Act—one that transcends individual organisational interests while furthering the intended goals of the YOA.

Addressing Fundamental Issues.

The successful diversion of appropriate young offenders is, of course, not the end of the story as far as reshaping juvenile justice is concerned. The system is still left with the almost 60 per cent of young offenders who are referred to court. Because of the filtering of less seri-

ous offenders by the diversionary options, the young people who now appear before the court are likely to be more 'difficult' cases—they are likely to have committed more serious offences and/or have a longer history of criminal offending. There are also likely to be welfare, mental health, drug addiction and other issues that are integral to their offending history. Given the drop in their caseload since the YOA, the court and the DJJ should devote their resources to more innovative approaches for dealing with these more 'difficult' cases at the 'back end' of the system. At the same time, the government should continue to invest in longer-term social developmental and educational initiatives to tackle juvenile crime prevention at the 'front end'.

ENDNOTES

- ¹ Wundersitz J, 'Pre-court diversion: The Australian experience' in Borowski A and O'Connor I (eds), *Juvenile Crime, Justice and Corrections* (Addison Wesley Longman, 1997).
- ² Daly K and Hayes H, 'Restorative Justice and Conferencing in Australia', *Trends and Issues in Crime and Criminal Justice* No 186 (Australian Institute of Criminology, 2001).
- ³ See Chan J, Doran S, Maloney E and Petkoska N with Barga J, Luke G and Clancey G, *Reshaping Juvenile Justice: A Study of the NSW Young Offenders Act 1997* (University of New South Wales, 2003, unpublished).
- ⁴ Chan et al., n 3.
- ⁵ The definition of 'elders' was expanded to include 'elders and respected members of the community' following discussions with the industry partners.
- ⁶ Walker S, *Taming the System: The Control of Discretion in Criminal Justice 1950-1990* (Oxford University Press, 1993).
- ⁷ Hawkins K, 'The Use of Legal Discretion: Perspectives from Law and Social Science' in Hawkins K (ed), *The Uses of Discretion* (Clarendon, 1992) p 12.
- ⁸ See, e.g., *Royal Commission into the NSW Police Service: Final Report* (NSW Govt, 1997); Skolnick J and Fyfe J, *Above the Law: Police and the Excessive Use of Force* (The Free Press, 1993).
- ⁹ Youth Justice Coalition, *Kids in Justice Report: A Blueprint for the 1990s* (Law Foundation and Youth Justice Coalition, 1990).
- ¹⁰ White R and Alder C (eds), *The Police and Young People in Australia* (Cambridge University Press, 1994); Alder C, O'Connor I, Warner K and White R, *Perceptions of the Treatment of Juveniles in the Legal System* (National Clearinghouse for Youth Studies, 1992); Blagg H and Wilkie M, *Young People and Police Powers* (Australian Youth Foundation, 1995); Maher L, Dixon D, Swift W and Nguyen T, *Anh Hai: Young Asian Background People's Perceptions and Experiences of Policing* (UNSW Faculty of Law Research Monograph Series, 1997).

- ¹¹ Luke G and Cunneen C, *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System* (Juvenile Justice Advisory Council of New South Wales, 1995).
- ¹² See Dixon D, *Law in Policing: Legal Regulation and Police Practices* (Clarendon, 1997).
- ¹³ Dixon, n 12.
- ¹⁴ Dixon, n 12; Hawkins, n 7.
- ¹⁵ Walker, n 6, pp 15-16.
- ¹⁶ Walker, n 6, pp 151-153.
- ¹⁷ Dixon, n 12.
- ¹⁸ Black J, *Rules and Regulators* (Clarendon, 1997) p 6.
- ¹⁹ Black, n 18, p 6.
- ²⁰ Hart HLA, *The Concept of Law* (Oxford, 1961), quoted in Black, n 18, p 11.
- ²¹ Black, n 18, p 12.
- ²² Black, n 18, p 25.
- ²³ Black, n 18, p 217.
- ²⁴ McBarnet D and Whelan C, 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 *Modern Law Review* 848.
- ²⁵ Black, n 18, pp 30-31.
- ²⁶ Scott C, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design' (2001) *Public Law*, Summer, pp 329-353.
- ²⁷ Black, n 18, p 38.
- ²⁸ Black, n 18, p 41; see also Manning P, 'Ironies of Compliance' in Shearing C and Stenning P (eds), *Private Policing* (Sage, 1987).
- ²⁹ Power P, *Restorative Conferences in Australia and New Zealand* (PhD Thesis, Faculty of Law, University of Sydney, 2001).
- ³⁰ Wundersitz, n 1, p 276.
- ³¹ Boss P, Edwards S, and Pitman S, *Profile of Young Australians: Facts, Figures and Issues* (Churchill Livingstone, 1995) p 154; Blagg and Wilkie, n 10, p 56; Wundersitz, n 1, p 276.
- ³² Kraus J, 'Police Caution of Juvenile Offenders: A Research Note' (1981) 14 *ANZ J Crim* 91 at 94.
- ³³ Standing Committee on Social Issues *Report No 4 – Juvenile Justice in New South Wales* (Parliament of New South Wales Legislative Council, 1992) p 70.
- ³⁴ Youth Justice Coalition, n 9, p 130.
- ³⁵ Youth Justice Coalition, n 9.
- ³⁶ Juvenile Justice Advisory Council of NSW Green Paper, *Future Directions for Juvenile Justice in New South Wales* (Sydney, 1993).
- ³⁷ Bagen J, 'Going to Court CAP on Hand' (1992) 4(2) *Current Issues in Criminal Justice* 117.
- ³⁸ Hassall I, 'Origin and Development of Family Group Conferences', in Hudson J, Morris A, Maxwell G and Galaway B, *Family Group Conferences: Perspectives on Policy and Practice* (Federation Press, 1996) p 19.

- ³⁹ Power, n 29, p 190.
- ⁴⁰ Power, n 29.
- ⁴¹ Braithwaite J, *Crime, Shame and Reintegration* (Cambridge University Press, 1989).
- ⁴² Moore D, *Evaluating Family Group Conferences—Some Early Findings from Wagga Wagga* (Australian Institute of Criminology, 1993) cited in Power, n 29, p 199.
- ⁴³ Moore D and Forsyth L, *A New Initiative in Juvenile Justice: An Evaluation of Family Conferencing in Wagga Wagga* (Centre for Rural Social Research, Charles Sturt University, 1995).
- ⁴⁴ Power, n 29.
- ⁴⁵ NSW Government White Paper, *Breaking the Crime Cycle: New Directions for Juvenile Justice in NSW* (Department of Juvenile Justice, 1994) p 13.
- ⁴⁶ Power P, *An Evaluation of Community Youth Conferencing in NSW: A Confidential Report to JW Shaw QC MLC, NSW Attorney General* (unpublished, 1996).
- ⁴⁷ Power, n 29, p 209.
- ⁴⁸ Power, n 29, p 209.
- ⁴⁹ Power, n 46.
- ⁵⁰ Power, n 29, pp 209-210.
- ⁵¹ See Power, n 29, Ch 5 for a comparison of gatekeeping roles of the police in different jurisdictions.
- ⁵² Hassall, n 38.
- ⁵³ Criteria to be considered include: seriousness of the offence, the degree of violence involved in the offence, the harm caused to any victim, the number and nature of any offences committed by the young person and the number of times the young person has been dealt with under this Act and any other matter the official thinks appropriate in the circumstances.
- ⁵⁴ An admission by a young person of an offence is not an admission for the purposes of this Act unless it takes place in the presence of a person responsible for the young person, or an adult (other than the investigating officer official) who is present with the consent of a person responsible for the young person; or if the young person is over 16 years, an adult chosen by the young person, or a legal practitioner chosen by the young person.
- ⁵⁵ YLOs are attached to each Local Area Command in NSW. These officers undertake a range of duties, including assisting with the implementation of the YOA, monitoring the use of the YOA and assisting with determinations, etc.
- ⁵⁶ SYOs are police who have completed appropriate training and received delegation to make determinations under the YOA. Police officers in diverse roles can assume the responsibilities of an SYO. Positions most commonly appointed as SYOs include YLOs, Custody Managers, Duty Officers and Shift Supervisors.
- ⁵⁷ This is to avoid the time delay in sending the child back to the police to arrange a caution.

- ⁵⁸ *Young Offenders Act 1993* (SA).
- ⁵⁹ *Young Offenders Act 1994* (WA).
- ⁶⁰ *Juvenile Justice Act 1992* (Qld).
- ⁶¹ Hennessy N, *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)*, Report to Youth Justice Advisory Committee (October 1999) http://www.lawlink.nsw.gov.au/report/lpd_reports.nsf/pages/yoa_index viewed 22 April 2002.
- ⁶² NSWPS, 'NSW Police Service Response to *Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)*', internal document 11/5/2000; NSWPS, 'Strategies to Improve Diversion Rates under the *Young Offenders Act 1997*', internal document 10/05/2001.
- ⁶³ See Sch 1 and s 60 of the Act.
- ⁶⁴ Clancey G, 'NSW Police Service—*Young Offenders Act 1997: Proposed and current strategies*' (1999) Appendix D in Hennessy, n 61.
- ⁶⁵ O'Sullivan T, 'Provision of legal advice and the Legal Aid Commission's Youth Hotline', paper presented at the Institute of Criminology, University of Sydney (7 May 2003).
- ⁶⁶ O'Sullivan, n 65.
- ⁶⁷ O'Sullivan, n 65.
- ⁶⁸ O'Sullivan, n 65.
- ⁶⁹ Chan et al., n 3, section 3.5.
- ⁷⁰ Chan et al., n 3, section 3.6.
- ⁷¹ Chan et al., n 3, section 3.6.
- ⁷² Chan et al., n 3, section 3.6.
- ⁷³ Chan et al., n 3, section 3.6.
- ⁷⁴ Chan et al., n 3, section 3.6.
- ⁷⁵ Chan et al., n 3, section 3.6.
- ⁷⁶ Chan et al., n 3, section 3.6.
- ⁷⁷ See Chan et al., n 3 (refer to the Technical Appendix for full details of the data and counting methods used).
- ⁷⁸ DJJ records indicate that there were 944 young people referred to conference in Year 1; 1,735 in Year 2 and 1,653 in Year 3. These counts are not directly comparable because of the different date information available from the two databases.
- ⁷⁹ The Act was amended on 8 February 1999 to enable police to record the details of young people receiving warnings. According to data from the NSW Bureau of Crime Statistics and Research, the number of warnings have increased from 2,537 in 1998 to 20,265 in 2001.
- ⁸⁰ Chan et al., n 3, section 6.2.
- ⁸¹ Chan et al., n 3, section 6.2.
- ⁸² Chan et al., n 3, section 6.2.
- ⁸³ It was not possible to provide a detailed breakdown of ethnicity from the police data available because of the subjective nature and limited categories of the 'racial appearance' field and also because over one-third of values in this field are missing.
- ⁸⁴ Chan et al., n 3, section 6.3.

⁸⁵ Chan et al., n 3, section 6.3.

⁸⁶ Source: YJCD.

⁸⁷ Cf Clancey G, *An Evaluation of Police Cautioning in New South Wales*, Master of Criminology, Honours Dissertation (University of Sydney, 1999).

⁸⁸ See Chan et al., n 3, section 6.4 for technical issues in relation to this analysis.

⁸⁹ See Chan et al., n 3, section 6.4 for full details.

⁹⁰ The year 1997 was chosen to maximize the accuracy of the data, since data quality has improved over time. See Chan et al., n 3, section 6.4 for further technical details.

⁹¹ See also Trimboli L, *An Evaluation of the NSW Youth Justice Conferencing Scheme* (NSW BOCSAR, 2000); Luke G and Lind B, 'Reducing Juvenile Crime: Conferencing versus Court', *Crime and Justice Bulletin* No 69 (NSW BOCSAR, 2002).

⁹² See Chan et al., n 3, Ch 7.

⁹³ Black, n 18.

⁹⁴ Hennessy, n 61.