

A black and white photograph of a young person jumping over a wall. Another person is sitting on the wall, looking towards the jumper. The background is a wall with a grid-like pattern.

Young People's Experiences of the Young Offenders Act

Youth Justice Coalition

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Independence and Innovation

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Summary

Youth Justice Coalition

young people's experiences of the young offenders act

The *Young Offenders Act* 1997 (NSW) introduced diversionary processes for young people alleged to have committed criminal offences. Its introduction was the result of growing recognition of the need to refocus resources on prevention rather than law and order responses to juvenile crime.

The Act created a hierarchy of interventions for juvenile offending:

- a warning by police is the least intrusive measure;
- cautions are the next level of intervention; and
- conferences are the third and most onerous level of intervention under the *Young Offenders Act*.

An admission of guilt is a prerequisite to a caution or conference.

The Youth Justice Coalition welcomed the introduction of the *Young Offenders Act*, but was concerned to ensure that the rights of young people were protected, particularly the right to timely and appropriate legal advice. The research reported in this paper attempts to shed some light on how young people experience the processes in place under the Act and whether the provisions and spirit of the Act are being observed in the cases studied.

The Research

The research is a qualitative research project to gather the voices and experiences of young people who had been cautioned or had been to a youth justice conference under the *Young Offenders Act*. Interviews were carried out with 24 young people about 29 experiences of cautions and conferences. The interviews were conducted between March – December, 2000 in 6 locations in NSW: Cabramatta, Campbelltown, Sydney, Kempsey, Wagga Wagga, Wollongong. The small number of cases reviewed in

the project mean that the data cannot be taken as a quantitative survey representing all cases dealt with under the Act. Nevertheless, these cases do highlight some issues in the operation of the Act, particularly in relation to young people's knowledge of their rights and access to information and advice. These issues relate more to the way the provisions of Act were administered in these cases, rather than pointing to shortcomings in the Act itself.

In addition to interviews with young people, the project also sought the views of Youth Justice Conference Administrators and Youth Liaison Officers by administering a questionnaire. [See Appendices 2 and 3].

The young people were aged between 12 and 17 years. Over 80% were born in Australia. However 25% indicated that their parents were born overseas and 13% identified as Aboriginal or Torres Strait Islander.

The research collected data about 14 cautions.

A snapshot of caution data indicates:

- 50% of the young people were either not sure that they were told, or were not told, about court as an alternative to a caution.
- 36% of the young people were not aware that they could change their minds about the caution.
- 42% of young people thought that they were not fairly treated or were unsure about whether they were fairly treated.
- Overall, 75% of young people who attended a caution understood the caution.

The research collected data about 17 conferences.

A snapshot of conference data indicates:

- 25% of the young people were either not sure that they were told, or were not told, about court as an alternative to a conference.

- 35% of young people claimed that the option of a conference was explained to them before they admitted the offence.
- overall in 60% of cases the young person felt that the conference convenor helped them to understand more about the conference and their rights. In 53% of cases young people felt involved at the conference and in 59% of cases felt supported during the conference.

Issues Arising from the Research

Section 10 of the Act – Responsible Adult

In 31% (9) of the cases there was no responsible adult present at the police station. These 9 young people were still cautioned or referred to a conference despite the provisions of section 10 of the Act requiring a responsible adult to be present in order for an admission to be accepted for the purposes of the Act.

Without access to legal advice in every case, as occurs when matters go to Court, the police are not being held accountable for ensuring that admissions comply with section 10.

If admissions are made without complying with section 10 the police and youth justice conference convenors or administrators should not proceed to caution or conference. Consideration should be given to ways of ensuring compliance with section 10. The YJC recommendation is that this is most appropriately done by requiring legal advice to be given in all cases.

Promises and Inducements

In only 14 % (4) of the cases did the young person agree with what the police officer said because they felt that the police officer was mostly right. Three young people were unsure about this.

In 21% (6) of the cases the young person agreed with what the police officer said about what happened because they wanted to get it over and done with. In an additional 2 cases the young person was unsure whether this was the only reason that they had agreed.

In 45% of the cases the young person indicated that they were made promises. While not all the respondents gave examples, those that were reported were:

I was told I could go home if I told who had the dope.

The copper said “if you do this for me we won’t charge you”

They said that if I told them what I did I wouldn’t have to go to court I would just be cautioned.

I was told that if I didn’t pay for the damage I’d be charged

It is of concern that young people are channelled through the process because of admissions made after police promises or inducements.

In criminal proceedings, the reliability of an admission by a young person which was made as the result of an inducement by a police officer would be challenged and excluded as reliable evidence.

The court will take into account the circumstances in which the admission by the young person was obtained, and whether those circumstances (such as a promise made to the young person by a police

officer) might adversely affect the truthfulness or the reliability of the admission. Any threat, promise or other inducement made by a police officer to a young person in criminal proceedings would mean that the admissibility of an admission by a young person would be in question.

The results of this research call into question the accountability of the police and show the failure to turn into reality a child's right to be protected from their own vulnerability in criminal justice processes. The combination of, firstly, the failure to comply with section 10 of the Act in relation to a responsible adult being present when an admission is made and secondly, reports by young people of admissions made after promises or inducements, add up to a breach of the protections which children are entitled to.

Criminal responsibility – Doli incapax Issues

The common law presumption of *doli incapax* provides an essential protection from prosecution for children between the ages of 10 and 14 who cannot be shown to have reached the age where they can form criminal intent. The presumption acknowledges that children are particularly vulnerable in the criminal justice system and that moral development occurs at different stages for different children.

Our research included 4 young people who were under the age of 14 years at the time of the offence. One was referred to a caution and the other 3 to a conference. None of the young people under the age of 14 years indicated that they knew what they were doing at the time of the offence was seriously wrong. (However, among the older group only 20 per cent replied that they knew their actions were seriously wrong).

The *doli incapax* presumption has the merit of making police, prosecutors and the courts consider the degree of responsibility of each individual child. Matters dealt with under the *Young Offenders Act* do not have the courts as a watchdog protecting this right. Reliable access to competent legal advice can provide this watchdog role for matters dealt with under the Act.

Detention after arrest

The detention after arrest legislation provides that the person who is under arrest may be detained for up to four hours, and defines the rights of the accused person during the process. The legislation provides for special rights for children. These rights include an entitlement to have a support person present and the right to consult with a friend or relative. A support person can assist and support the child being interviewed, observe whether or not the interview is being conducted fairly and identify any communication problems that may arise. (*Crimes (Detention after Arrest) Regulation 1998* cl.22; 23; 26).

In only 5 cases did the young person report that the police explained the 4 hour detention period.

Right not to proceed with a caution or conference

In 36% (5) of the cases of young people being referred for a caution the young people reported they were not told that they had an alternative, which was to attend court.

In 23% (4) of the cases of young people referred for conferences the young people reported they were not told that they had an alternative, which was to attend court.

The right not to proceed is a fundamental right of the *Young Offenders Act* and the overall scheme. It is mandatory for police to explain this right to young people before they proceed to arrange for a caution to be given. The caution notice also explains this right but is separate to section 22 of the Act which specifies the investigating official's requirements under the Act.

Unfair treatment

It is cause for concern that such a high incidence of alleged unfair treatment by the police was disclosed amongst the small sample of young people interviewed. It would appear that many of the young people who complained of unfair treatment by the police may have had grounds for making a complaint to the NSW Ombudsman. Many of the complaints are serious and should have been investigated. It was outside the scope of this project to gauge whether the police behaviour they reported actually occurred. However in light of the findings about legal advice, it appears fair to conclude that very few of the young people interviewed would have been aware of their rights in this regard.

Another aspect of unfair treatment can be seen in the intersection between school discipline procedures, police intervention and the *Young Offenders Act*, as experienced by W in Case Study 2.

Legal Advice

Nineteen (66%) of the young people involved in either cautions or conferences reported they were either not told, or were unsure whether they had been told, that they had a right to legal advice. In only one case was a young person told how to obtain legal advice. In 22 (76%) of the cases the young person indicated that they did not understand the importance of getting legal advice.

Only 6 young people obtained legal advice at some stage through the process, and it seems not one young person obtained the advice prior to making an admission. In 3 cases advice was obtained after admitting the offence and prior to a conference; in one case advice was received at the caution; in one case advice was received at a bail hearing; and in another case advice was received when attending court.

Although the research sample is small and intended to be qualitative in nature, **every** young person should be accessing legal advice prior to making admissions. Therefore 66% of young people not being told about a right to legal advice and none obtaining legal advice prior to making admissions is a very serious issue when considered in the light of failures to comply with section 10 of the Act, admissions made after promises or inducements and issues of *doli incapax* (raised below).

Case Study 1

K had been caught by the store security guard for shop lifting chocolate bars. The security guard was polite to her and told her they would probably not press charges. Then the police were called.

I wasn't going to run or anything like that because I already knew I was going to be cautioned. Therefore I, like, walked up to this cop and because he just said I had a few to drink, he thought oh here we go, here's another rowdy one. So he just grabbed me by the arm, like in the usual fashion as they do, like, and I was like swinging, like swung around and said to him, "look mate, you know you're grabbing me a bit too hard there - loosen up", you know. That was it. I nearly was crying eh. Because he grabbed me by the hair, pulled my arm, like pulled me down really, like, close to him and said, really quietly, like oh hush, hush, he said, "shut the fuck up you little bitch"...

I'm not going to take that being the person I am, I started going off my head and swinging and you know, punches everywhere...the whole crowd... can see this young girl going off her head, but nobody seen actually why and it just made me out to be the biggest idiot...

At the police station:

they say "shut the fuck up you little bitch", you know, "come on loud mouth", they do it all the time, especially when you're in the cells, they love to walk past with their little note book or whatever, peep their head in and right – they just say comments, they just love doing it, "oh no here we go, we've got K back in the cell again". Like that.

But when mum came, you can tell, it really really makes em really angry because you can see the

whole attitude and personality change as soon as somebody else comes into the room...and they start laughing and joking around... It really makes you upset.

At the caution:

This sergeant so and so, he's just here, like, you don't even really get what they're talking about anyway, but I know, I always know what the female's there for, she's got, like, her pen and paper writing down like notes and taking facts and stuff or sometimes even writing out her own – like just writing what I'm saying word for word and yeah, and they basically just asked me what happened and the police officer like her has to pretty much be quiet, you know, he can't jump in and butt in and say, "oh no, that didn't happen...You're sitting there...scratching your head and then they walk back in and yeah, just say, well look, we're going to give you a caution because, you know, this and this and this and yeah, just say can you sign this.

K had received several cautions for petty offences and had not received legal advice at any time. She had not been told of her right to obtain legal advice or encouraged to do so.

Case Study 2

W and his friends were accused of smoking dope on the school oval. W was 15 at the time. He was called into the Principal's office.

She had us there for hours at the school, going on about the dope...She said if you don't tell me I'm going to call the police and they can come in and take over.

W admitted smoking dope to the Principal, but the police were called anyway.

When the local police Youth Liaison Officer arrived he searched W's bag. While this was happening W admitted to the police officer that he had smoked dope on the school oval.

He shook all our books as if we're going to have drugs hidden in pages or something.

W and his friend were then taken to the local police station. They were told,

We're gonna go down the station. If youse run we'll handcuff you.

W and his friends were held at the police station for several hours. W's mum attended the police station but he did not have a solicitor.

I didn't know how solicitors work or that 'cause I wasn't clued in on the whole solicitor/police thing.

W was questioned by the police with his mother present.

I was told that if I told them who had the dope I could go home...The way they said things like "If you don't answer this question" there was something, hindering, they could charge me for...I later found out I could say "no comment" and that end of story.

W attended a conference. The outcome was that he was to do community work on a local garden, which was fine with him. He also got a suspension from school although this does not appear to have been part of the penalty considered at the conference. W's comments about the suspension were: "but that's like the school's own version."

Conclusion

We conclude that the Act does not adequately establish an alternative process to court proceedings for dealing with children who commit certain offences.

Article 40 of the *Convention on the Rights of the Child* states that laws which provide for alternative criminal interventions (such as the *Young Offenders Act*) should not be seen as opportunities to diminish basic rights. This standard is adhered to in the spirit of the Act, however its implementation is problematic.

Consent

The extent to which young people understood that they had a right not to proceed with a caution or a conference and their experiences of inducements, promises and unfair treatment by the police are indications that the informed consent of young people to the diversionary options has not been obtained.

Recommendation 1

That measures be introduced to minimise the potential for coercion at all levels in the diversion process.

Procedural safeguards

The research findings show a disregard for procedural safeguards for young people. Proceeding to caution or conference where the obtaining of admissions of guilt do not comply with the Act, without the presence of a responsible adult nor legal advice add up to an erosion of procedural safeguards.

Recommendation 2

If admissions are made without complying with section 10 of the Act, the police and youth justice conference administrators and convenors

should not proceed to a caution or a conference. Consideration should be given to ways of ensuring compliance with section 10, which may most appropriately be done by requiring legal advice be given in all cases.

Recommendation 3

Consideration should be given to non-complying admissions being deemed to have no effect. Where a young person refuses to seek legal advice, the right to legal advice should not be waived but the matter referred to court.

Recommendation 4

The research confirms the crucial importance of reliable access to competent legal advice for **all young people** dealt with under the *Young Offenders Act*. It is recommended that this is the most practical way of safeguarding the rights young people are entitled to in criminal justice processes – diversionary schemes being no exception.

Recommendation 5

Consideration should be given to a system that ensures the provision of legal advice. Practical measures should be taken to ensure that Legal Aid NSW and other organizations have the resources to provide this essential legal aid service either by telephone or face to face.

Recommendation 6

A network of youth advocates be funded throughout NSW based in community legal centres and other community based organizations (as recommended by the NSW Parliament Standing Committee on Social Issues Inquiry into Children's Advocacy 1996).

Review and accountability

Any discretion exercised in the diversion process should be subject to accountability measures. The *Beijing Rules* emphasise the provision of specific guidelines on the exercise of discretion and the provision of systems of review and appeal to permit scrutiny of decisions (*Beijing Rules* 6.2).

Recommendation 7

The experiences of young people of the operation of the *Young Offenders Act* indicate that consideration should be given to developing and publishing guidelines on the exercise of discretion for key decisions made under the Act and developing review and accountability mechanisms which are effective.

Monitoring

An effective, fair and humane juvenile justice system requires mechanisms for monitoring and evaluation to curb any abuses of discretionary power and to safeguard rights. (*Beijing Rules* 30 and *Tokyo Rule* 2.4).

Recommendation 8

The review of the operation of the *Young Offenders Act* should provide an opportunity to assess whether monitoring and evaluation systems are adequate.

Recommendation 9

The experiences and views of young people should be part of an on-going monitoring and evaluation system.

Recommendation 10

A system to monitor the efficacy of outcome plans should be implemented.

Protection

Diversionary options should be developed and implemented in a way which protects and guarantees the physical integrity of the child and in a way in which children can develop their full potential (treatment should be appropriate to the age of the child). (*Convention on the Rights of the Child*).

Recommendation 11

This research be brought to the attention of the NSW Ombudsman and a response sought about the treatment by police.

Recommendation 12

When consideration is given to a system which ensures the provision of legal advice and practical measures taken to ensure that Legal Aid NSW has the resources to provide this essential legal aid service, that the needs of young people in relation to making complaints be included.

Recommendation 13

A system which monitors the efficacy of outcome plans should guard against punishments which are cruel, inhumane or degrading; and promote outcomes which allow children to develop to their full potential and which are age appropriate.

Recommendation 14

School discipline procedures should comply with the model set out in *Being Fair: A Procedural Fairness Manual for Australian Schools*, a report by the National Children's and Youth Law Centre. Particularly, if a matter is to be referred to police, schools should notify the student and their parents before undertaking further investigation. Schools should not seek

statements or admissions which might later be used in court against the young person. The possibility of young people being punished twice, through school disciplinary processes and penalties imposed by an outcome plan, should be avoided.

Introduction

Youth Justice Coalition

The Youth Justice Coalition (NSW)

The Youth Justice Coalition (YJC) is a network of youth workers, children's lawyers, policy workers and academics concerned about juvenile justice and the rights of children and young people.

The YJC has been active for many years, consulting with young people, writing submissions and reports to government and providing community legal education. Examples of the work of the YJC include the 1990 report *Kids In Justice (A Blue Print for the Nineties)*, and more recently *Youth Street Rights – A Policy and Legislation Review* (1999). The YJC contributed to the Australian Law Reform Commission and Human Rights and Equal Opportunity Commission inquiry on children in the legal process (1997) and has written submissions to the NSW government on various measures increasing police powers over children and young people. The YJC has also recently produced *Joe's Conference*, a video for young people about youth justice conferencing.

The Young Offenders Act 1997 (NSW)

The introduction of the *Young Offenders Act* (the Act) was the result of growing recognition of the need to refocus resources on prevention rather than law and order responses to juvenile crime.

The NSW Government established the Juvenile Justice Advisory Council (JJAC) in 1991. JJAC was made up of independent representatives appointed by the Attorney General to advise the government on future directions for juvenile justice. In February 1993 JJAC released the Green Paper, *Future Directions for Juvenile Justice in NSW*, which was followed by the Government's White Paper *Breaking the Crime Cycle: New Directions for Juvenile Justice in NSW*. This paper focused on juvenile crime prevention,

community alternatives to court processing, education and health issues and the needs of Aboriginal young people.

In 1995 a community youth conferencing scheme commenced as a pilot in a number of locations across NSW and in 1996 the scheme was evaluated. This resulted in the formation of a working party whose role was to develop a conferencing scheme for young offenders in NSW.¹ In November 1996 the working group released a discussion paper, the focus of which was a legislative scheme of cautioning and conferencing. Over 50 submissions were received. The legislative process followed and in April 1998 the Act was proclaimed.

The *Young Offenders Act* 1997(NSW) introduced diversionary processes for young people alleged to have committed criminal offences. The Act created a hierarchy of interventions for juvenile offending:

- a warning by police is the least intrusive measure. Warnings are informal and no admission of guilt by the young person is necessary, although a record of the warning is kept on COPS²;
- cautions are the next level of intervention. Cautions are given at the police station and can only be given where an admission of guilt has been made by the young person; and
- conferences are the third and most onerous level of intervention under the *Young Offenders Act*. A conference provides a forum for a young offender to meet the victim of the offence and discuss the matter with family, police and a convenor from the Department of Juvenile Justice. An outcome plan is arrived at through the participation of all parties and the agreed penalty or recompense should not be more onerous than a penalty that a court would have

1 NSW Attorney General's Department, Report of the NSW Working Party on Family Group Conferencing and the Juvenile Justice System; Discussion Paper; Sep 1996.

2 COPS - Computerised Operational Policing System - the NSW Police Service incident reporting system.

imposed. Referrals for conferences can be made by the police or by the Children's Court. Again, an admission of guilt is a prerequisite to this type of intervention.

Warnings, cautions and conferences do not form part of a young person's criminal history. The scheme is intended to deal with young offenders in a way that "enables a community based negotiated response to offences involving all the affected parties and emphasises restitution by the offender and acceptance of responsibility by the offender for his or her behaviour" (section 3(c))

Development and aims of the research project

The YJC welcomed the introduction of the *Young Offenders Act*, but was concerned to ensure that the rights of young people were protected, particularly the right to timely and appropriate legal advice.

All young people who appear before Children's Courts in NSW receive free legal advice and representation through the NSW Legal Aid Commission. It is clear that a young person who receives a warning, caution or conference is less likely to obtain such advice and assistance. Although the Act recognises that children who are accused of a criminal offence "are entitled to be informed about their right to obtain legal advice and to have an opportunity to obtain that advice (section 7(b)), there were concerns about how this would operate in practice.

The NSW Legal Aid Commission established the "Hotline for Under 18's" in late 1998 with the specific objective of providing such advice. The telephone advice service, available through a 1800 number, provides direct access to children's lawyers during extended operating hours. Processes were put in

place to encourage appropriate referrals by the NSW Police Service, including the development of colourful posters to be displayed in police stations. These developments were welcomed by the YJC.

However, the following questions remained:

- are young people making free and informed decisions about whether to receive cautions or attend conferences rather than go to court?
- what supports and safeguards are present or lacking when a young person admits guilt? Are there young people who are receiving cautions or attending conferences whose admissions of guilt would not be admissible as evidence against them if the matter proceeded to court?
- at what points in the process was legal advice offered, considered and/or accessed by the young person. Was legal advice easily accessible to the young person?
- are particularly vulnerable young people, such as Indigenous young people, those with a disability or those who are below the age of full criminal responsibility, being protected when accessing the diversionary processes of the *Young Offenders Act*? Are there children being dealt with under the *Young Offenders Act* who, if they had attended court, would be found to be incapable of forming the requisite criminal intent? In short, is the *Young Offenders Act* capturing young people who should not in fact be subject to any form of legal intervention?

In 1999 the YJC applied to the NSW Law Foundation and was successful in securing funding to research and report on young people's experiences of the *Young Offenders Act*. The YJC set up a sub-committee to manage the project and in March 2000 commissioned Sheree Turner as the consultant for the Project.

Adopting a Human Rights Framework

The research report uses an international human rights framework, as well as the domestic legislation, to consider young people's experiences of the implementation of the *Young Offenders Act*.

The *Convention of the Rights of the Child* (CROC) recognizes the importance of diverting young offenders from the formal processes of the criminal justice system. CROC was adopted in 1989 and ratified by Australia in 1990.

By becoming a party to CROC, we have undertaken to ensure that diversionary measures in juvenile justice comply with minimum standards, particularly Article 40.3(b) which provides that

States parties shall introduce whenever appropriate and desirable, measures for dealing with ... children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

In addition to CROC other United Nations rules and guidelines³ also establish principles for the development of diversionary options and particularly relevant to the issues raised in this research.

3 UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules); UN Standard Minimum Rules for Non-Custodial Measures 1990 (Tokyo Rules); UN Guidelines for the Prevention of Juvenile Delinquency 1990 (Ridyardh Guidelines); UN Rules for the Protection of Juveniles Deprived of their Liberty 1990; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR).

A black and white photograph of three young people walking on a set of train tracks. The person on the left is a young woman with long hair, wearing a dark jacket. The person in the middle is a young man wearing a beanie and a dark jacket. The person on the right is a young man wearing a baseball cap and a dark jacket, with his right arm raised. They are walking away from the camera towards a city skyline in the background. The word "Methodology" is overlaid in large white text across the middle of the image.

Methodology

Youth Justice Coalition

young people's experiences of the young offenders act

Research Methods

The report into young people's experiences of cautions and conferences under the *Young Offenders Act* is based on research including:

- interviews with young people
- a questionnaire for Conference Administrators
- a questionnaire for Youth Liaison Officers
- a literature search.

Interviews with young people

The primary methodology used for data collection was individual interviews with young people. These interviews took the form of encouraging and supporting the young person to tell their story in relation to either a caution or a conference. At times the young person may have been asked a specific question to elicit further information. The interviewers filled out questionnaires during the interview.

Profiles of each young person were also gathered. (See appendix for full questionnaire and profile sheets).

Each interview was taped and transcribed in full.

At the commencement of the project the target number of interviews was 50. However due to the difficulties in accessing young people, the target reached was 24 young people about 29 experiences of cautions and conferences.

Interviews were conducted in six locations across NSW. These included:

- Cabramatta
- Campbelltown
- Sydney
- Kempsey
- Wagga
- Wollongong

We accessed young people in the following ways:

Phase 1 – March – July 2000

- Youth Justice Conference Convenors in liaison with Conference Administrators in each of the nominated areas asked each young person participating in a conference whether they would be interested in being interviewed for this project. Administrators were provided with written information about the project and with written information for the young people. The Convenors were asked to explain the information to each young person. If a young person was interested in being interviewed the convenor gave them an "agreement to contact" note. The young person signed this note and it gave permission for the interviewer to contact the young person. It also included a parental permission note, if the young person was under 16.

This method was the preferred way to make contact with young people because it meant that young people were self-selecting rather than being selected by an Administrator or a Convenor.

- Youth Justice Conference Administrators provided information to young people directly, as outlined above. This approach was taken when we were

unable to access young people through Convenors and was particularly helpful in country NSW.

- Police Youth Liaison Officers were asked to provide young people with information and to collect agreement to contact notices if a young person was interested in being interviewed.
- Youth Services/Youth Workers working with young people who may have been involved in a conference or a caution were asked to provide written information and an invitation to young people to take part in either a focus group discussion or an individual interview. The focus group method was used as an alternative in this case for two reasons: ease of access to young people for example, who may have been attending a drop-in session and because some young people may have felt more comfortable in a group as opposed to an individual interview.

Law/Social Work students from UNSW undertaking their placements at Kingsford Legal Centre conducted all the interviews in Phase 1. The consultant for the project trained the students in interview techniques.

The total number of interviews conducted during Phase 1 was 23.

Phase 2 – July – December 2000

- Solicitors with the Children's Legal Service of the Legal Aid Commission were invited to ask young people whom they knew had been involved in a caution or a conference whether they would be interested in being interviewed. Once again written information was provided for the lawyers and for young people.

Youth Justice Coalition members conducted the interviews in Phase 2.

Questionnaire for Youth Justice Conference Administrators

To seek a broader range of views and to provide a context for the stories told by young people during their interviews, a questionnaire was distributed to Administrators seeking their views about the operation of the *Young Offenders Act* and the Youth Justice Conferencing Scheme. (See Appendix 2).

Questionnaire for Youth Liaison Officers

A questionnaire was also devised by the consultant and the NSW Police Service Youth Policy Officer and distributed to the Youth Liaison Officer executive. A collated summary was returned to the consultant. (See Appendix 3).

YJC Sub-committee

A sub-committee of the Youth Justice Coalition managed the project. The members were: Jane Irwin (ShopFront Legal Centre), Ian Irving (Inner City Legal Centre), Rebecca Neil (Redfern Legal Centre) and Janet Loughman (Marrickville Legal Centre). The role of the sub-committee was to steer the project, to assist the consultant with preparation of the questionnaires, to liaise with the funding body, review the draft report and prepare it for publication.

The Collation of Data

Data was collated from the interviews using the individual profiles of young people, the questionnaires and the tapes. The tapes of interviews with young people were transcribed by the law firm Blake, Dawson, Waldron (as a pro bono

initiative). Quantitative data was then collated by Julia Perry and Maria Karras of the Law and Justice Foundation which provided an additional in-kind grant for this task. The qualitative data in the report comes primarily from the interviews with young people, but also from observations made by Administrators and Youth Liaison Officers.



Research Findings

Youth Justice Coalition :

Questionnaires to Administrators and Youth Liaison Officers

The questionnaires administered to Youth Justice Conference Administrators and Police Youth Liaison Officers and the data collated from these questionnaires are contained in the Appendices, but where relevant referred to in the research findings.

Interviews with young people – Sample size and demographics

Sample

Twenty-nine surveys were completed in total. Five of these surveys were filled out by young people who were involved in two conferences or cautions. To avoid double counting these young people we have only entered their demographic details once. Our total sample size for demographic details is therefore 24.

Data considerations

Some of the surveys contained missing responses and at times contradictory data. Every attempt has been made to extract useful and accurate results. It is, however, important to consider the results with the understanding that some findings will be based on more accurate data than others. For instance, findings based on questions to which few young people responded are to be considered less reliable than those which are based on questions to which nearly all of the young people responded.

The findings include case studies and quotes from the transcribed interviews with young people to capture individual experiences of cautions and conferences.

Gender

Two-thirds (16) of the young people were male and one-third (8) were female.

Age

The young people who responded to the survey ranged from 12 to 17 years of age. The average age was 15 years. The most common age was 16 or 17 years with 54% of the young people being one of these ages.

Country of Birth

The majority (20) of young people were born in Australia. Only three young people indicated that they were born in another country, namely Iraq, Vietnam and Thailand. One young person did not provide his country of birth.

Parents' Country of Birth

Twenty-five percent (6) of the young people indicated that their parents were born overseas in the following countries:

- Cambodia
- England
- Germany
- Iraq
- Malaysia
- Vietnam

Aboriginal and Torres Strait Islander Descent

Three (13%) of the young people indicated that they identified as Aboriginal or Torres Strait Islander.

Education and employment

Nine (38%) of the young people indicated that they were presently attending school, whereas 8 (33%) were completing higher education. Five (21%) indicated that they were unemployed and 2 (8%) were working part time.

Region

The young people were asked to indicate the town or suburb that they live in. Table 1 below summarises the number of young people that live in each suburb.

Table 1: Town or suburb

	Number	Percent
Unknown	1	4%
Cabramatta	2	8%
Camden	1	4%
Campbelltown	1	4%
Fairfield	1	4%
Kempsey	1	4%
Port Macquarie	2	8%
Rozelle	1	4%
Wagga	11	46%
Wauchope	1	4%
Wollongong	2	8%
Total	24	100%

Living arrangement

More than two thirds (16) of the young people were living with their parent/s. A further 2 (8%) were living with other family. Two (8%) of the young people were staying with friends, and one young person was living in share accommodation. One young person indicated that he was living on the streets.

Table 2: Housing

	Number	Percent
with parents	16	67%
other family	2	8%
share accommodation	1	4%
streets	1	4%
staying with friends	2	8%
other	2	8%
Total	24	100%

Cautions and Conferences

Cautions – general data

The responses to the survey indicate that 14 (48%) of the cases resulted in the young person receiving a caution. Of concern is that two of these young people indicated that they did not agree to the caution and one indicated that he was unsure whether he had agreed to the caution or not. On the survey form for one other respondent there is a note that it was unclear whether or not a formal caution was received. This young person's response, therefore, could not be included.

A greater proportion of male respondents received a caution than did female respondents. Fifty-six percent of the male respondents received a caution whereas 38% of the female respondents did so. Given the small number of respondents (particularly female) it is not possible to determine whether or not this is a reliable (statistically significant) difference.

Conferences – general data

The responses to the survey indicate that 59% (17) of the cases resulted in the young person participating in a conference. One of these young

people indicated that they did not agree to the holding of the conference.

A greater proportion of female respondents participated in a conference than did male respondents. Seventy-five percent of the female respondents participated in a conference whereas 44% of the male respondents did so. Given the small number of respondents it is not possible to determine whether or not this is a reliable (statistically significant) difference.

Legal advice

Right to legal advice

In only 31% (9) of the cases the young person was told that they had a right to legal advice. In one of these cases the young person indicated that the police had informed him of this right, in all others cases the young person did not indicate who had informed them of this right.⁴

In one case the young person was unsure if he had been told he had a right to legal advice. In the remaining 66% (19) of the cases the young person indicated that he or she was not told that they had a right to legal advice.

Before we go to the conference she (conference convenor) says like you can ring this number and ask for legal advice or something like that. But the police never have...

Q Have you ever got legal advice before conferences?

A No

Q You never have. Why not?

A Dunno. I thought I was you know, it was the police that I was talking to.

I had thought that sort of stuff was for court. Yeah. Like every time I've been to a conference no-one said do you want to seek legal advice. They've all thought it was for Court.

Every time I got in the police station I got charged. They never say anything about solicitors or that.

How to get legal advice

In one of the cases the young person was told how to obtain legal advice. In an additional two cases the young person was unsure whether or not they had been told how to get legal advice. In one case the young person did not respond to this question. In the remaining 86% (25) of the cases the young person indicated that they were not told how to obtain legal advice.

There's the signs, and there's the pictures, all over the walls, like the Kids Help Line things, all over the walls but it's not true.

Understanding of the importance of obtaining legal advice

In 76% (22) of the cases the young person indicated that they did not understand why it might be important to get legal advice. In only 17% (5) of the cases the young person indicated that they understood why it might be important to get legal advice. In the two remaining cases the young person did not respond to this question.

Q Did you understand why it might have been important to get legal advice?

A No, I haven't heard nothin about that when I've been down there.

⁴ In two other cases the young person reported they were notified of their right to legal advice by the police, however, this did not occur until the bail hearing in one case and in the other case until two weeks after when the young person returned for their caution.

I thought that if I came along and I dunno rung up some legal eagle and said no you know I didn't do anything and they come along and went na, na, na, na, na, and you know at the police then I'd get in even more trouble than I was to start with.

When did the young person obtain legal advice

The majority of young people did not respond to the questions asking when they had obtained legal advice. This may be because the majority did not obtain legal advice. Given the small number of responses it is misleading to report percentages, therefore we will only report numbers in this section.

In three cases the young person indicated that they obtained legal advice after admitting the offence. In the same three cases the young people indicated that they obtained advice before the conference, two of them doing so after meeting the convenor.

In one case the young person received advice at the caution because he did not arrive with a support person. Only two other instances of legal advice being obtained were reported, in one case for a bail hearing and in the other case for attending the Children's Court.

Commentary – legal advice

In 66% (19) of the cases of young people involved in either cautions or conferences young people were either not told, or were unsure whether they had been told, that they had a right to legal advice. In only one case was a young person told how to obtain legal advice. In 22 (76%) cases the young person indicated that they did not understand the importance of getting legal advice.

Only 6 young people obtained legal advice at some stage through the process, and it seems not one young person obtained the advice prior to making an admission. In 3 cases advice was obtained after admitting the offence and prior to a conference; in one case advice was received at the caution; in one case advice was received at a bail hearing; and in another case advice was received when attending court.

The Youth Liaison Officers reported that generally young people were being told about their right to legal advice. Conference Administrators reported that they believed young people were being told about their right to legal advice, however in some instances this was only through notices. Administrators also commented that young people were not encouraged by the police to access legal advice, but were being encouraged after a referral to a conference.

Although the research sample is small and intended to be qualitative in nature, every young person should be accessing legal advice prior to making admissions. The fact that 19 young people were not told about the right to legal advice, in addition to the fact that not one young person obtained legal advice prior to making admissions is a serious issue. When considered in light of failures to comply with section 10 of the Act, admissions made after promises or inducements, and issues of *doli incapax* (raised below), there is cause for particular concern.

It is a fundamental right of every citizen that any criminal charge against them be heard in a court of law where proceedings are based on the presumption of innocence until proven guilty according to law.

The *Convention on the Rights of the Child* (Article 40) enshrines these basic rights for children. Laws that provide for alternative criminal interventions (such as the *Young Offenders Act*) should not be seen as opportunities to diminish such basic rights. Article 40

also provides that where measures are developed for dealing with children without resorting to judicial proceedings human rights and legal safeguards should be fully respected.

The *Young Offenders Act* provides for the right to legal advice in the principle at section 7(b) “that children who are alleged to have committed an offence are entitled to be informed about their right to obtain legal advice and to have an opportunity to obtain that advice”.

It is acknowledged that young people should not be subjected to a caution or a conference without first having admitted the offence. However, an admission may not be in the young person's best interest – there may be issues of criminal responsibility (*doli incapax*); the young person may technically have committed a less serious offence than the police allege; there may not be enough evidence for a prosecution to succeed without admissions.

These fundamental rights need to be upheld for young people – it is widely recognised that young people because of their age and vulnerability need protection through criminal processes. Article 40 of the *Convention on the Rights of the Child* also requires governments to take into account the desirability of a young person assuming a constructive role in society. If we are to encourage young people to become good citizens who accept their responsibilities and are respectful of others, we must model good citizenship behaviour.

The right to legal advice is only a safeguard if practical measures are taken to provide access to the advice. The current provision of legal advice through the Legal Aid Commission 1800 advice line is not well enough resourced to provide a universal service in all matters under the *Young Offenders Act*. Nor is there any provision for face-to face advice.

The question of provision of advocacy services for children and young people in NSW has been the subject of many Inquiries and Reports.

Recommendations have failed to be followed up by Government. It remains a significant unmet need for children and young people, and the results of this research confirm the need. The most comprehensive analysis of advocacy needs of children and young people was undertaken by the Parliament of NSW Standing Committee on Social Issues Inquiry into Children's Advocacy, 1996. That Inquiry recommended that a network of youth advocates be established statewide in NSW. The recommendation was never implemented and is again called for as a result of this research.

Inducements

Reason for agreeing with police officer

In only 14% (4) of the cases the young person agreed with what the police officer said about what had happened because they felt that the police officer was right. In a further 10% (3) of the cases the young person was unsure.

Agreeing with police officer to get it over with

In 21% (6) of the cases the young person agreed with what the police officer said about what had happened only because they wanted to get it over and done with. In an additional 7% (2) of the cases the young person was unsure whether this was the only reason that they had agreed.

Promises

In 45% of the cases the young person indicated that they were made promises. The list below specifies what the young people indicated these promises were. Not all the young people who were made promises specified what these promises were.

- Told could go home if I told who had the dope
- "Tell me other people who do robberies around the city and we will lower your charges"
- That it would not go on record but not sure if this was true
- The copper said if you done this for me we won't charge you
- They said that if I told them what I did I wouldn't have to go to court I would just be cautioned
- They said you would get out of it if you say who the other person was or something
- Told I would get warning
- Was told that if I don't pay for damage I would be charged

Commentary – inducements, promises

It is concerning that any young people are channelled through the process because of admissions made after police promises, inducements or unfair treatment.

In criminal proceedings, the reliability of an admission by a young person that was made as the result of an inducement by a police officer would be challenged and excluded as unreliable evidence. Section 85 (2) of the *Evidence Act* states that evidence of an admission is not admissible unless the circumstances in which the admission was made were such as to make it unlikely that the truth of the admission was adversely affected.

The court can take into account such issues as the person's age, personality, education and any mental, intellectual, or physical disability. The court will take into account the circumstances in which the admission by the young person was obtained, and whether those circumstances (such as a promise made to the young person by a police officer) might adversely affect the truthfulness or the reliability of the admission. As such, any threat, promise or other inducement made by a police officer to a young person in criminal proceedings would mean that the admissibility of an admission by a young person would be in question.

The results of this research call into question the accountability of the police and show the failure to turn into reality a child's right to be protected from their own vulnerability in criminal justice processes. The combination of failure to comply with section 10 of the Act in relation to a responsible adult being present when an admission is made and reports by young people of admissions made after promises or inducements adds up to a breach of protections which children are entitled to.

Fairness of treatment

In 31% (9) of the cases the young person indicated that they were treated fairly. In 7% (2) of the cases the young person was unsure whether they had been treated fairly, whereas in 41% (12) of the cases the young person indicated that they were not treated fairly. In six cases the young person did not respond to this question.

- Q** While you were at the police station and they charged you did feel threatened in any way.
- A** Not really, no... Apart from when they started calling us sluts and whores and trollops.

Oh, I dunno, pretty rough I reckon, putting me in the paddy wagon and that. They were picking me up, with me hands behind me back and they were picking me up by me arms when they were behind my back and I'm just, nearly breaking me arms, you know, going off in me head.

I was just there with my friend and that was when they were you know – basically they were making jokes about not being baby sitters and that sort of thing and making us feel bad about it...I was going to do something about the police officer saying stuff...making us feel uncomfortable, very uncomfortable. And then, but I never really thought that I was in any position really.

They just talk about it and said 'yeah, stop lying to me, I know you're lying. I don't believe a thing you say, you're just a liar. You tell lies.' And then you tell a lie, they think it's the truth, tell em the truth they think you're lying.

A number of young people said that they were too fearful to ask questions or in fact to say anything. Several young people described what would be seen as harassment and abuse by police, including swearing and unreasonable use of physical force.

One 17 year old young woman said she was teased and treated badly by the police until an adult arrived, at which time she was treated completely differently. Another 16 year old young woman said that the police officer grabbed her by the hair, pulled her arm and swore at her, but when her mother arrived the attitude of the arresting officers' changed.

Another young woman said that "we were yelling at them and everything and they put us in this little box

thing in the charge room and then all these officers came in and called us sluts and whores and we were just going off even more....". However, the same young woman said that the police officer that questioned her had treated her fairly.

Several young people complained about being held in the police station too long. One young person complained that the police held him for 8 hours. During this time he was too scared to ask to go to the toilet. Although he had heard about the possibility of legal advice he stated that he did not have the phone number, he could not see a sign and he was too scared to ask. He also reported that police told him "Tell me other people who do robberies around the city and we will lower your charges".

Another young person reported being held in the cells at the police station for about 36 hours:

I couldn't breathe properly. After about 15 hours you would have been breathing the same air what you've breathing out and I couldn't breathe properly so I asked them a couple of times could they move me to the next cell.

One young person perceived that the police kept him at the police station much longer than was necessary: "They just take their time".

Commentary – unfair treatment

It is cause for concern that such a high incidence of alleged unfair treatment by the police was disclosed amongst the small sample of young people interviewed. It would appear that many of the young people who complained of unfair treatment by the police would have had grounds for making a complaint to the NSW Ombudsman. Many of the complaints are serious and should have been investigated. It was outside the scope of this project

to gauge whether this actually occurred. However in light of the findings about legal advice, it appears fair to conclude that very few of the young people interviewed would have been aware of their rights in this regard.

Another aspect of unfair treatment can be seen in the intersection between school discipline procedures, police intervention and the *Young Offenders Act*. Case Study 2, above, is concerning in this regard. In that case W made admissions to the school principal about an offence which had occurred at school. The admissions were made in circumstances where the safeguards of the criminal justice system were not in place. W was threatened with police involvement unless he admitted the offence. Once W admitted his participation in an offence, however, the police were called.

The school principal can be seen to have actively embraced a law enforcement role. This can be seen to be in direct opposition to the duty of care a Principal owes to students. In addition, school disciplinary processes should be administered in accordance with the principles of procedural fairness. The principal can be seen to have failed to provide W with a chance to have a fair hearing.

W attended a conference as a result of the offence and the outcome plan involved community work. Significantly, W received an additional penalty, namely a suspension from school. W received two penalties - one through the diversionary processes of the *Young Offenders Act* and the other through the school disciplinary processes. He might be seen to have therefore received a penalty far greater than that which a court would have imposed. In several respects the objectives of the Act were undermined in W's case.

Responsible adult present

In 59% (17) of the cases a responsible adult was present at the police station. In one case the young person was unsure if an adult was present. In 31% (9) of the cases the young person indicated that there was no responsible adult present. In two cases the young person did not respond to this question.

Did the young person choose the adult?

In 45% (13) of the cases the young person chose the responsible adult who was present. In two cases the young person indicated that they were unsure if they chose the adult. In 28% of the cases the young person indicated that they did not choose the adult. In the remaining six cases the young person did not respond to this question.

Was time spent alone with the adult?

In 35% (6) of the 17 cases in which an adult was present the young person indicated that they had an opportunity to spend time alone with the adult. In two cases the young person indicated that they were unsure if they had spent time alone with the adult. In 53% (9) of the cases the young person indicated that they did not have the opportunity to spend time alone with the adult. In the remaining two cases the young person did not respond to this question.

Commentary – Responsible Adult

In 31% (9) of the cases there was no responsible adult present at the police station. These 9 young people were still cautioned or referred to a conference despite the provisions of section 10 of the Act requiring a responsible adult to be present in order for an admission to be an admission for the purposes of the Act.

This raises issues about the efficacy of the implementation of the *Young Offenders Act*. Without access to legal advice in every case, as occurs when matters go to Court, the police are not being held accountable for ensuring that admissions comply with section 10.

Doli incapax – age of criminal responsibility

There were four young people under the age of 14 years. One was referred to a caution and the other three to a conference. Two of these young people indicated that they had been in trouble with the police before. None of these young people indicated that they knew at the time of the offence that they were doing something seriously wrong. (However, among the older group only 20 per cent replied that they knew their actions were seriously wrong).

Case Study

A 13 year old boy was cautioned for malicious damage to plants in a public cactus garden. He and 2 friends aged 12 and 13 years were caught whacking the cactus plants. When asked about the offence the boy said he thought he would get into trouble from the man in the cactus garden if he got caught, rather than something he would seriously be in trouble over.

Commentary – doli incapax

The common law presumption of *doli incapax* provides an essential protection from prosecution for children under the age of 14 years who cannot be shown to have reached the age where they can form criminal intent. The presumption acknowledges that children are particularly vulnerable in the criminal

justice system and that moral development occurs at different stages for different children.

The research included 4 young people who were under the age of 14 years at the time of the event with none of the group of under 14 year olds indicating that they knew what they were doing at the time of the offence was seriously wrong.

The *doli incapax* presumption has the merit of making police, prosecutors and the courts consider the degree of responsibility of each individual child. Matters dealt with under the *Young Offenders Act* do not have the courts as a watchdog protecting this right. We argue that reliable access to competent legal advice for all young people is the appropriate alternative for a scheme diverting young people from court.

Detention after arrest

In 17% (5) of the cases the young person said the police explained the 4 hour detention period. In 24% (7) of the cases the young person said the police did not explain the 4 hour detention period. In one case the young person was unsure. In the remaining 16 cases the young person did not respond to this question, perhaps because it did not apply to their case.

Commentary – Detention After Arrest

The detention after arrest legislation provides that the person who is under arrest may be detained for up to four hours, and defines the rights of the accused person during the process. The legislation provides for special rights for children. These rights include an entitlement to have a support person present and the right to consult a friend or relative. A support person can assist and support the child being interviewed, observe whether or not the interview is being

conducted fairly and identify any communication problems that may arise. (*Crimes (Detention after Arrest) Regulation 1998* cl.22; 23; 26).

Cautions – further details

This section provides details of the experiences of the 14 young people who received cautions.

Options explained

In 36% (5) of the cases the young person indicated that they were told that they could choose not to be cautioned and that they had an alternative which is to attend court. In 14% (2) of the cases the young person was unsure if they had been told about this alternative. In 36% (5) of the cases the young person indicated that they were not told about this alternative. In two cases the young person did not respond to this question.

In 43% (6) of the cases the young person was aware that they could change their mind about the caution. In 36% (5) of the cases the young person was not aware that they could change their mind. In one of the cases the young person indicated that they were unsure. In two of the cases the young person did not respond to this question.

They asked me a couple of questions. They said, did you do it, to get me to admit it and I said, yes, he hit me with the thing and then I swore at him and then that was it. Then he just writ it all down in the book and said we're going to have to caution ya.

They use a word like, there *might* be a caution, like we *might* give you a caution or we might charge you or – but they leave you hanging on, like for a week to 2 weeks or 3 weeks before they get back to you.

Understanding of the caution

In 57% (8) of the cases the young person indicated that they understood what a caution was. In the remaining 43% (6) of cases the young person indicated that they were unsure what a caution was.

Fairness of treatment at the caution

In 43% (6) of the cases the young person indicated that they were treated fairly at the caution. In 21% (3) of the cases the young person indicated that they were not treated fairly at the caution. In a further 21% (3) of the cases the young person indicated that they were unsure. In two cases the young person did not respond to this question.

Activities after the caution

In 29% (4) of the cases the young person indicated that they had to do something after the caution. In two cases the activity was to sign a form and in another case the activity was to mow lawns. The fourth young person did not indicate the activity that they had to do after the caution.

Conferences – further details

This section provides details of the experiences of the 17 young people who participated in conferences.

Options explained

In 47% (8) of the cases the young person indicated that they were told that they could choose not to attend the conference and that they had an alternative which was to attend court. In 12% (2) of the cases the young person was unsure if they had been told about this alternative. In 23% (4) of the

cases the young person indicated that they were not told about this alternative. In three cases the young person did not respond to this question.

When was the option of a conference explained

In 35% (6) of the cases the young person was offered the alternative of going to a conference before he or she admitted the offence. In 47% (8) of the cases the young person was offered the alternative of going to a conference after they admitted the offence. In three cases the young person did not respond to this question.

Meeting with conference convenor

In 77% (13) of the cases the young person met the conference convenor before the conference. In 18% (3) of the cases the young person indicated that they did not meet the convenor before the conference. In one case the young person did not respond to this question.

Conference rights

In 59% (10) of the cases the young person indicated the convenor helped them understand more about the conference and their rights. In 12% (2) of the cases the young person indicated that the convenor did not help them understand more about the conference and their rights. In one case the young person was unsure whether the convenor had assisted them in this way. In one case the young person did not respond to this question.

In 41% (7) of the cases the young person indicated the convenor told them about legal advice. In one of the cases the young person was unsure whether the convenor had assisted them in this way. In 41% (7)

of the cases the young person indicated the convenor had not told them about legal advice. In two cases the young person did not respond to this question.

Sense of involvement

In 53% (9) of the cases the young person indicated that they felt involved in the conference. In 23% (4) of the cases the young person indicated that they did not feel involved. In the remaining four cases the young person did not respond to this question.

Support

In 59% (10) of the cases the young person indicated that they felt supported at the conference. In 12% (2) of the cases the young person indicated that they did not feel supported. In the remaining five cases the young person did not respond to this question.

The second conference was good. I liked it. But I didn't like the first one at all. I walked out of there crying because I was upset.

Commentary – Right not to proceed with a caution or conference

In 5 (36%) of the cases, young people being referred for a caution were not told that they had an alternative, which was to attend court.

In 4 (23%) of the cases young people referred for conferences were not told that they had an alternative, which was to attend court.

Youth Liaison Officers were asked to comment on whether police were explaining to young people that they have the right not to proceed with a caution or conference. The responses suggested that police probably do not explain this. Feedback indicated that the right not to proceed is clearly stated on the

caution notice and the conference referral, which is given and explained to the young person.

The right not to proceed is a fundamental right of the *Young Offenders Act* and the overall scheme. It is mandatory for police to explain this right to young people before they proceed to arrange for a caution to be given. The caution notice also explains this right but is separate to section 22 of the Act which specifies the investigating officials requirements under the Act.

As with cautions, before a specialist youth officer refers a matter for conference the young person must be informed that they are entitled to elect that the matter be dealt with by a court (part 5 section 39). Subsequently the young person can at any time elect that the matter be dealt with by a court. Section 45(3)(h) of the Act specifies that the convenor must provide the young person with a written notice, which outlines this right.

If there is one instance of a young person not being informed of their right to elect, at any time to attend court rather than a caution or a conference, this is unacceptable.

Aboriginal and Torres Strait Islander young people

ATSI young people made up 13% of the total number of young people.

The transcripts indicated that all but one of these young people had been in trouble with the police on a number of occasions previously and two of the respondents mentioned being in trouble with the police before they were ten years old. One young person was charged with assaulting police and was refused bail - he spent 3 days at the police station.



Conclusion

Youth Justice Coalition

The *Convention of the Rights of the Child* (CROC) recognizes the importance of diverting young offenders from the formal processes of the criminal justice system. As a community we have undertaken to ensure that diversionary measures in juvenile justice comply with minimum standards, particularly Article 40.3(b) which provides that:

States parties shall introduce whenever appropriate and desirable, measures for dealing with ... children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

Other United Nations rules and guidelines⁵ also establish principles for the development of diversionary options and particularly relevant to the issues raised in this research.

Article 40 of the *Convention on the Rights of the Children* is a standard that is adhered to in the spirit of the Act, however its implementation is problematic. We conclude that the Act does not adequately establish an alternative process to court proceedings for dealing with children who commit certain offences.

Consent

Diversion requires the informed consent of the young person to the particular diversionary option (*Beijing Rules* 11.3). They should be given sufficient information about the diversionary options available and any consequences of withholding consent. Young people should not feel pressured into consenting to diversion programs (for example, to avoid a court appearance). Care should be taken to minimize the potential for coercion at all levels in the diversion process.

The findings of this research indicate that there are some issues in relation to this human rights standard. The extent to which young people understood that

they had a right not to proceed with a caution or a conference and their experiences of inducements, promises and unfair treatment by the police are indications that the informed consent of young people to the diversionary options has not been obtained.

Recommendation 1

That measures be introduced to minimize the potential for coercion at all levels in the diversion process.

Procedural safeguards

Diversionary options must respect procedural safeguards for young people as established in CROC and ICCPR. These include the presumption of innocence, the right to be informed promptly and directly of the charges, the right to silence, the right to access to legal assistance and to the presence of a responsible adult

The research findings show a disregard for procedural safeguards for young people. Proceeding to caution or conference where obtaining the admissions of guilt do not comply with the Act, without the presence of a responsible adult nor legal advice adds up to an erosion of procedural safeguards.

Recommendation 2

If admissions are made without complying with section 10 of the Act, the police and youth justice conference administrators and convenors should not proceed to a caution or a conference. Consideration should be given to ways of ensuring compliance with section 10, which may most appropriately be done by requiring legal advice be given in all cases.

Recommendation 3

Consideration should be given to non-complying

5 UN Standard Minimum Rules for the Administration of Juvenile Justice 1985 (Beijing Rules); UN Standard Minimum Rules for Non-Custodial Measures 1990 (Tokyo Rules); UN Guidelines for the Prevention of Juvenile Delinquency 1990 (Riyadh Guidelines); UN Rules for the Protection of Juveniles Deprived of their Liberty 1990; International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR).

admissions being deemed to have no effect. Where a young person refuses to seek legal advice, the right to legal advice should not be waived but the matter referred to court.

Recommendation 4

The research confirms the crucial importance of reliable access to competent legal advice for all young people dealt with under the Young Offenders Act. It is recommended that this is the most practical way of safeguarding the rights young people are entitled to in criminal justice processes – diversionary schemes being no exception.

Recommendation 5

Consideration should be given to a system that ensures the provision of legal advice and practical measures taken to ensure that Legal Aid NSW and other organizations have the resources to provide this essential legal aid service either by telephone or face to face.

Recommendation 6

A network of youth advocates be funded throughout NSW based in community legal centres and other community based organizations (as recommended by the NSW Parliament Standing Committee on Social Issues Inquiry into Children's Advocacy 1996).

Review and accountability

Any discretion exercised in the diversion process should be subject to accountability measures. The *Beijing Rules* emphasise the provision of specific guidelines on the exercise of discretion and the provision of systems of review and appeal to permit scrutiny of decisions (*Beijing Rules* 6.2).

There are a range of discretionary decisions exercised under the *Young Offenders Act*, and some guidelines exist to assist decision makers. However, the research shows that review and accountability measures are not adequate. For example, the right not to proceed with a caution or a conference is fundamental to the accountability of the discretion exercised by the police to proceed by way of caution or conference. However, 36% of young people being referred for a caution were not told that they had an alternative and 23% of young people referred for conferences were not told that they had an alternative.

Further, the responses from Youth Liaison Officers indicate that police probably do not explain this alternative to young people, relying on the formal written notices given to young people. The effectiveness of this form of information in leading to the exercise of rights is called into question by this research.

The promises and inducements reported by young people indicate that guidelines as well as review mechanisms are necessary for the police in order to make for accountable exercise of discretion.

Recommendation 7

The experiences of young people of the operation of the Young Offenders Act indicate that consideration should be given to developing and publishing guidelines on the exercise of discretion for key decisions made under the Act and developing review and accountability mechanisms which are effective.

Monitoring

An effective, fair and humane juvenile justice system requires mechanisms for monitoring and evaluation to curb any abuses of discretionary power and to safeguard rights. (*Beijing Rules* 30 and *Tokyo Rule*

2.4). Penalties should be monitored to ensure that they are not significantly more punitive than a court would impose.

There is currently being undertaken a review of the *Young Offenders Act*, which is a form of monitoring and evaluation.

The research carried out for this project was not able to determine whether outcome plans are more severe than court. However, the experiences of some young people indicate that this is the case in some circumstances.

One young person was asked to do community work on a local garden and was also suspended from school. If community work is seen as equating to what would be undertaken under a community service order, then this is likely to be a more severe penalty than a court would impose (and therefore not in compliance with section 52(6) of the Act).

Recommendation 8

The review of the operation of the *Young Offenders Act* should provide an opportunity to assess whether monitoring and evaluation systems are adequate.

Recommendation 9

The experiences and views of young people should be part of an on-going monitoring and evaluation system.

Recommendation 10

A system to monitor the efficacy of outcome plans should be implemented.

Protection

Diversionary options should be developed which allow children to develop their full potential and must be appropriate to the age of the child. The physical integrity of the child must be protected and

guaranteed. Treatment or punishment which is cruel, inhumane or degrading must be prohibited. (CROC).

The unfair treatment by police which was reported by young people is cause for concern.

Recommendation 11

This research be brought to the attention of the NSW Ombudsman and a response sought about the treatment by police.

Recommendation 12

When consideration is given to a system which ensures the provision of legal advice and practical measures taken to ensure that Legal Aid NSW has the resources to provide this essential legal aid service, that the needs of young people in relation to making complaints be included.

Recommendation 13

A system which monitors the efficacy of outcome plans should guard against punishments which are cruel, inhumane or degrading; and promote outcomes which allow children to develop to their full potential and which are age appropriate.

Recommendation 14

School discipline procedures should comply with the model set out in *Being Fair: A Procedural Fairness Manual for Australian Schools*, a report by the National Children's and Youth Law Centre. Particularly, if a matter is to be referred to police, schools should notify the student and their parents before undertaking further investigation. Schools should not seek statements or admissions which might later be used in court against the young person. The possibility of young people being punished twice, through school disciplinary processes and penalties imposed by an outcome plan, should be avoided.

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Appendices

Youth Justice Coalition

Appendix 1

Questionnaire - Young People's Experiences of Cautions and Conferencing

Arrest

Were you told you were under arrest? Yes ☐ No ☐ Unsure ☐
Did you think you were under arrest? Yes ☐ No ☐ Unsure ☐
When did this happen?

At the police station

Responsible adult

Was there an adult present at the police station? Yes ☐ No ☐ Unsure ☐
Were they there the whole time you were making a statement? Yes ☐ No ☐ Unsure ☐
Were you able to talk with this person during questioning? Yes ☐ No ☐ Unsure ☐
Did the police question you or ask for statements or comments before this adult arrived? Yes ☐ No ☐ Unsure ☐
Did you and your support person spend any time alone? Yes ☐ No ☐ Unsure ☐
Did you choose the adult who came to the police station? Yes ☐ No ☐ Unsure ☐
Did the police officer choose the adult who came to the police station? Yes ☐ No ☐ Unsure ☐
Or did your parent or guardian choose someone else? Yes ☐ No ☐ Unsure ☐
If you are over 16, did you agree that this adult be your support person? Yes ☐ No ☐ Unsure ☐
Was there a solicitor present? Yes ☐ No ☐ Unsure ☐
What did you think the person was there for? Yes ☐ No ☐ Unsure ☐

Inducements/promises etc

Was there any suggestion by the police that it would be better for you if there was no adult present? Yes ☐ No ☐ Unsure ☐
Did the officer who questioned you say anything about what happened that you thought was untrue? Yes ☐ No ☐ Unsure ☐
Did you agree with what the police officer said about what happened because he/she was mostly right about what did happen? Yes ☐ No ☐ Unsure ☐
Did you agree with what the police officer said about what happened only because you wanted to get it over and done with? Yes ☐ No ☐ Unsure ☐
Did you think that you were treated fairly? Yes ☐ No ☐ Unsure ☐
Were you made any promises? Yes ☐ No ☐ Unsure ☐
Was your story heard? Yes ☐ No ☐ Unsure ☐
Did you feel like you were made to say things that you didn't want to? Yes ☐ No ☐ Unsure ☐
Did the police officer ask you questions you could understand? Yes ☐ No ☐ Unsure ☐
Did you refuse to answer questions at the police station? Yes ☐ No ☐ Unsure ☐
What did you think the person was there for? Yes ☐ No ☐ Unsure ☐
What happened then?

When did you admit the offence?

Describe the way the police officer who questioned you treated you.

Detention after arrest

Do you remember the custody manager – did he/she introduce themselves?
Did the police explain the four hour detention period?
Did you receive any food or drink during the investigation?
How long did you spend at the police station?

Yes ☐ No ☐ Unsure ☐
Yes ☐ No ☐ Unsure ☐
Yes ☐ No ☐ Unsure ☐
Yes ☐ No ☐ Unsure ☐

General

Did you feel like you were given the opportunity to speak and ask questions?
Did you understand what was happening?
Was anyone explaining things to you?

Yes ☐ No ☐ Unsure ☐
Yes ☐ No ☐ Unsure ☐

Doli incapax

How old were you at the time?
When you committed the offence did you think you were doing something seriously wrong?
If you were under 14 had you been in trouble with the police before?
What did you think was going to happen to you because of what you did?

Yes ☐ No ☐ Unsure ☐
Yes ☐ No ☐ Unsure ☐
Yes ☐ No ☐ Unsure ☐

Who did you think you would be in trouble with?

Legal Advice

Were you told that you had a right to legal advice?
Were you told about how to get legal advice?
Who told you about legal advice?

Yes ☐ No ☐ Unsure ☐
Yes ☐ No ☐ Unsure ☐

What information were you given?

Did you understand why it might have been important to get legal advice?
Were you given time to get legal advice?
Were you told you didn't need legal advice?
Who by?
If you didn't get legal advice before the caution, why not?

Yes ☐ No ☐ Unsure ☐
Yes ☐ No ☐ Unsure ☐
Yes ☐ No ☐ Unsure ☐

If you didn't get legal advice before your conference, why not?

If you did get legal advice,
why did you decide to do this?

When did you get legal advice?
before you admitted the offence _____ ☐
after you admitted the offence _____ ☐
after the police let you go, but before you went to the caution _____ ☐
after the police let you go, but before you went to the conference _____ ☐
after meeting the conference convenor _____ ☐

at the police station _____ ☐
before the caution _____ ☐
other _____ ☐

Did you understand the advice? Yes ☐ No ☐ Unsure ☐

How did you get legal advice? (you can tick more than 1) Over the phone ☐ and / or

Face to face ☐

Who did you get the information from?

community legal centre ☐

legal aid hot line ☐

private solicitor ☐

other ☐

A solicitor attended my conference to advise me (to support me) ☐

A solicitor attended my conference to represent me (spoke for me) ☐

Cautions

Did you agree to a caution? Yes ☐ No ☐ Unsure ☐

Were you offered a caution before you admitted the offence?

Before ☐ After ☐

Did you understand what a caution was?

Yes ☐ No ☐ Unsure ☐

Did the officer explain why they wanted to give you a caution?

Yes ☐ No ☐ Unsure ☐

Did the officer explain what would happen at a caution?

Yes ☐ No ☐ Unsure ☐

Did the officer explain what it would mean for you?

Yes ☐ No ☐ Unsure ☐

Did the police officer explain to you what the offence was?

Yes ☐ No ☐ Unsure ☐

Did you agree with what the police officer said about how it happened?

Yes ☐ No ☐ Unsure ☐

Were you at any stage told that you could choose not to be cautioned and that you had an alternative, which is to attend court?

Yes ☐ No ☐ Unsure ☐

Did you know that at any stage before the caution you could change your mind about it?

Yes ☐ No ☐ Unsure ☐

Was there a support person present during explanation about the caution?

Yes ☐ No ☐ Unsure ☐

Did you receive a notice about the caution?

Yes ☐ No ☐ Unsure ☐

Did you understand what the notice said

Yes ☐ No ☐ Unsure ☐

How long after you made admissions did you attend the caution?

Did the caution take place when it was supposed to

Yes ☐ No ☐ Unsure ☐

If not, why not?

At the caution

Was it better to go to a caution than go to court?

Yes ☐ No ☐ Unsure ☐

Did you understand the caution?

Yes ☐ No ☐ Unsure ☐

Did you think you were treated fairly at the caution?

Yes ☐ No ☐ Unsure ☐

Who was at the caution?

Who gave the caution?

Did you have to do anything once the caution was over?

Yes ☐ No ☐ Unsure ☐

If so who told you to do this?

Conferencing

Did you agree to the holding of youth justice conference?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Were you offered the alternative of going to a conference before you admitted the offence?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Were you offered the alternative of going to a conference after you admitted the offence?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Do you know if the person you spoke to about the conference at the police station was a specialist youth officer	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did the person who spoke with you explain what a conference was?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did the person who spoke with you explain what a conference would involve?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did the person who spoke with you explain what might happen after the conference?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did the police officer explain to you what the offence was?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did you agree with what the police officer said about how it happened?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Were you at any stage told that you could choose not to go to the conference and that you had an alternative, which was to attend court?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did you receive a written notice about the conference?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did you meet the conference convenor before the conference?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did this person help you understand more about the conference and your rights?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did you know that you could invite certain people to attend?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did you know that if there was someone you didn't want to attend you could tell the convenor about this? (not including the victim of course)	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Before you met the conference convenor, had you had legal advice?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did the conference convenor tell you about legal advice?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did you know that you could have a solicitor at the conference to advise you?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Were you aware that if you felt you needed legal advice during the conference, the convenor could hold up the conference so you could speak to a solicitor?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>

At the conference

Did you feel involved?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Could you express yourself?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did you think that the conference took into account your special circumstances?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did you feel supported?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Who attended the conference	
Did you think that overall the conference focused on what you had done rather than on you?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did you have a say about the outcome plan?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
What was the charge?	
What was the outcome plan?	
Did the conference encourage you to take some responsibility for what you did?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Did it make you feel closer to your family or not?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>
Do you think that the conference did anything to help you with your future?	Yes <input type="checkbox"/> No <input type="checkbox"/> Unsure <input type="checkbox"/>

Appendix 2

Questionnaire for Youth Justice Conference Administrators and Responses

1. In your opinion, on the whole, are the referrals being made appropriate under the Act? Please comment.
2. Are referrals by police being made by the appropriate officer?
3. In your opinion are young people being told about their right to obtain legal advice. At what stage is this happening?
4. In your opinion are outcome plans appropriate and realistic?
5. In practice do you believe that the principles and purposes of youth justice conferencing are being upheld?
6. On the whole do you think the Young Offenders Act is working for young people. Please comment on all levels of the operation of the Act.
7. Any other comments in relation to things that you would change or do differently are welcome, so are any further positive comments you wish to make.

YJC Administrators responses

On the whole conference administrators reported that referrals under the Act were appropriate. There were a number of concerns raised, as follows:

- interventions were sometimes too severe, for example a conference when a caution would be more appropriate;
- court referrals were less consistent and dependent on the magistrate; and
- the pressure of net-widening which came from both negative and positive sources.

Generally speaking, conference administrators indicated that the appropriate officers were making referrals. One issue raised was the undermining of Youth Liaison Officer positions by the Police Service.

In response to the question of whether young people were being informed about their right to legal advice all the administrators said that young people were being informed, however there were a number of comments in relation to how this was happening:

- young people were not being encouraged by the police to access legal advice and there was the suggestion that sometimes the young person was only being informed of the right to legal advice through notices; and
- a number of administrators commented that after a referral to a conference, young people were being encouraged to access legal advice.

Responses in relation to whether outcome plans were realistic and appropriate indicated that outcome plans on the whole were appropriate and that this had continued to improve over time. Sometimes a good conference process led to agreement about an outcome plan that was too severe and that this was difficult to change if all parties agreed.

The question of whether in practice the principles and purposes of youth justice conferencing were being upheld gleaned a number of different responses. However responses generally indicated that the principles and purposes were being upheld. Concerns raised were the need to be especially vigilant in this area, some referring agents ignored the principle in section 7(d) and some principles conflict with each other and this is reflected in practice.

Conference administrators were asked whether they

thought the *Young Offenders Act* was working for young people. This questioned brought out a number of different responses. Generally speaking it was thought that the Act was working for most young people. Some of the comments made were as follows:

- convenors need to maintain a high standard and focus on the spirit of the Act;
- there should be more usage of warnings by police in some Local Area Commands;
- a conference does not always meet the needs of the young person;
- there is more room for diversion - more serious offences should be conferenced more often than currently occurs.
- police should use community members more at cautions.

Further comments included the following:

- funding needs to be available to employ mentors to support young people to complete outcome plans;
- there should be training at the academy for all police which is similar to Youth Liaison Officer training;
- there should be continued pressure on the Police Service in relation to the operation of the Act, and
- more cautions could be issued by Magistrates.

Appendix 3

Questionnaire for Youth Liaison Officers and Responses

1. In your experience, are most young people being provided with assistance to access legal advice. If so, how is this legal advice provided/offered?
2. In the past six months, have you been aware of any examples where young people are either referred to a caution or youth justice conference who have not been interviewed in the presence of an appropriate adult or who have not made full admissions? If so, what action has been undertaken to ensure that such practices are eliminated?
3. Do you think the police are explaining to young people that they have the right not to proceed with a caution or a conference?
4. Do you think that there has been an improvement in the compliance with the requirements of the Act since its introduction?
5. How do you think that the legal community could better help the police to successfully implement the Act?
6. Any other comments about legal issues pertaining to the Act?

Youth Liaison Officer responses

Youth Liaison Officers were asked questions pertaining to compliance with the Act.

In regard to whether young people were being informed of their right to legal advice generally, the response indicated that young people were informed of their right to legal advice and that the Legal Aid Hotline was the most frequently accessed form of legal advice. It was also reported that a significant percentage of young people did not choose to access the services available.

Youth Liaison Officers were asked to comment on

whether young people had been referred to a caution or a conference who had not been interviewed in the presence of an appropriate adult or who had not made full admissions.

The responses indicated that in some Local Area Commands matters had been identified by Youth Liaison Officers where all procedures had not been properly followed. However it was suggested that the problems were not widespread. Generally most Youth Liaison Officers stated that they had not had situations where interviews were conducted in breach of section 10 or where admissions were inappropriately obtained.

Youth Liaison Officers were asked to comment on whether police were explaining to young people that they have the right not to proceed with a caution or conference. The responses suggested that police probably do not explain this. Feedback indicated that the right not to proceed is clearly stated on the caution notice and the conference referral, which is given and explained to the young person.

The Youth Liaison Officers believed that since the commencement of the Act there has been continual improvement in compliance with the requirements of the Act.

The only further comments made related to the issue of a young persons capacity to make admissions based on their mental health. The Police Youth Policy Officer believed that the inconsistency or tension between trying to encourage greater use of the Act, except in the circumstances where the young person is between 10-14 and where it is suspected that they may not be fit to be interviewed or admit the offence, causes some problems for the police. If they fail to use diversionary options in certain circumstances they will be criticised, while in some circumstances they will be criticised for actually diverting a young person.



