

Youth Justice in Western Australia

**Prepared for the Commissioner for
Children and Young People WA**

by

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Executive Summary

The aim of this paper is to advance debate about the future of youth justice in Western Australia. The focus is on how we can improve outcomes for the small number of children who are coming into contact with the criminal justice system. It argues that youth justice practice has been allowed to drift over the past decade, principally because of lack of focus on the specific needs of young offenders due to the subordinate status of youth justice within what is essentially an adult focused correctional bureaucracy, and because of waning commitment to the principle of diversion on behalf of the police. These two phenomena are interconnected. Lack of clarity regarding the role of youth justice has led to a decline in the quality of support for children and families at risk, which has, in turn, undermined confidence within the police regarding the benefits of diversion from the system. Diversion is simply about choosing the least intrusive option when dealing with young offenders.

This paper follows the lead taken by two important reviews of the youth justice system, undertaken by Auditor General of Western Australia (2008) and the Price Consulting Group (2009), by restating key principles of the Young Offenders Act 1994 (WA) (the YO Act), which acknowledge the need for special provisions to deal with young offenders, and recognises the importance of the family as the key influence on young people. Blurring the boundaries between youth justice and adult corrections appears to have done little to further the aims of the YO Act.

There are some key areas for priority action to bring practice into line with the aims of the YO Act and best practice in other jurisdictions. This paper expresses particular concern over:

- the weakness of controls and checks on police discretion to arrest and remand children in custody;
- the lack of a consistent commitment to diversion as the primary mechanism for dealing with much youth offending;
- the lack of appropriate diversionary options (particularly in regional and remote areas);
- the defacto 'correctionalisation' of youth justice and consequent separation of young offenders and families from welfare support.

There is a concern that children and young people who are at risk are falling through the safety net of both the Department for Child Protection and the Department for Corrective Services. We need to consider whether children and young people will be better protected by the reinstatement

of a social welfare orientated approach to youth justice by merging youth justice with the Department of Child Protection (DCP). It is also time police practices were modernised. Decision making on the ground needs to be subjected to rigorous screening. The key lesson here is that the arresting officer should not make the final decision to prosecute a young offender and that there needs to be a number of opportunities for further screening of cases and referral to less intrusive alternatives. Decisions to prosecute need to be carefully screened to ensure that all opportunities for diversion have been exhausted before a case is referred to court.

According to Department of Corrective Services data it cost \$473.78 a day to incarcerate a juvenile in 2007/2008, over \$190,000 per year. Remanding children in custody (discussed below) costs the government around \$15,000 per stay (Auditor General, 2008). However, research shows that locking up children is no more effective than community based orders in reducing the likelihood of re-offending (Weatherburn et al, 2009).

Some key priorities for action include:

1. a renewed police commitment to the principle that arrests, remands in custody, court appearances and the use of detention, should be options of last resort.
2. a more rigorous approach to gatekeeping of the justice system. Effective gatekeeping could be ensured by:
 - a. a renewed police commitment to cautioning;
 - b. the introduction of 'screening officers' to review decisions to prosecute children and young people (Inspector level or above);
 - c. the creation of a specialist youth section in the police along the lines of Victoria, South Australia, and New Zealand;
 - d. firming up police orders in relation to decision making on matters such as the use of diversionary options (arrest, detention, bail, and so on) and giving these greater force by giving them the status of Codes of Practice, appended to legislation.
3. a focus on community based options for young people in danger of enmeshment in the criminal justice system with the aim of ensuring their reintegration into the community. Current local justice initiatives in Geraldton and Kalgoorlie have had considerable success in raising the diversion rate and reducing remands in custody. These initiatives need to be fully supported by government and expanded to other regions, such as the Pilbara and Kimberley.

4. removing youth justice out of adult correctional services and placing responsibility for youth justice with a human services agency (such as the Department for Child Protection). The best practice models discussed in this paper, particularly Victoria, show that it is possible to greatly reduce the use of detention and provide support to families without sacrificing public safety.

While much of the focus of the paper has been on front end diversion and the role of youth justice services, the courts have a crucial role to play in the creation of a better youth justice system for Western Australia. The success of the Koori Children's Court in Victoria illustrates the potential for involving Aboriginal Elders and employing a less adversarial format when dealing with young offenders. The paper supports a more 'interventionist' or 'solution focused' approach by the Children's Court, where the court takes a more assertive stance in relation to ensuring agencies fulfill their responsibilities in relation to service for young people at risk and their families.

Introduction: Youth Justice, a Social not a Correctional Issue

The paper was developed largely on the basis of a review of relevant national and international research literature. The literature review was supplemented by some targeted discussions with key personnel from a diversity of relevant government and non-government organisations in Western Australia and Victoria. These discussions were invaluable as they shed light on a number of immediate debates, ideas, strategic options and problems largely ignored by the available literature.¹

Since the early 1990s youth justice in Western Australia has been firmly under the stewardship of a correctional system designed chiefly to manage and control adult offenders. The Young Offenders Act 1994 (WA) (the YO Act) acknowledges the need for special provisions to deal with young offenders, and recognises the importance of the family as the key influence on young people. This is at odds with correctional philosophy where the emphasis is on individual responsibility and accountability and where the role of correctional officers is essentially to police compliance with court orders. Evidence from other states shows that it is possible to achieve a balance between sound law and order and the welfare of children. Victoria has managed to run youth justice from within a human services directorate, divert children from the criminal justice system and remain parsimonious in the use of custody, without being deluged by waves of juvenile crime. A recent examination of the youth justice system in Western Australia by the Auditor General (2008) unambiguously affirms the YO Act as the guiding force in terms of youth justice practice. The Auditor General was critical of declining adherence to core principles of the YO Act in relation to diversion from custody and a collegiate approach to working with young offenders.

The situation with regards to Aboriginal young people is particularly worrying. On any day, anywhere between 70% and 80% of young people detained in Western Australia are Aboriginal. In 1991 the Royal Commission into Aboriginal Deaths in Custody, stressed the need to divert Aboriginal young people from the justice system, as a prerequisite for breaking the cycle of Aboriginal involvement in the criminal justice system. Blurring the boundaries between youth justice and adult corrections has done little to achieve these aims.

We need to consider the merit of a social welfare orientated approach to youth justice by merging youth justice with a human services agency, such as the Department of Child Protection (DCP).

¹ See Appendix 1 for a list of consultations.

The proposal by the Price Consulting Group (2009), to create a separate Youth Justice entity within the Community and Juvenile Justice Division, while it may assist in 'decorrectionalising' youth justice, may not be sufficient in itself to create the necessary degree of integration with children and family services.

One of the key sources of concern in Western Australia is the critical disconnect between the justice and welfare systems where children from families in crisis are concerned. The division of responsibilities between justice and child protection services, has meant that the most vulnerable children are falling between the gaps and are not being adequately supported. Better coordination and integration of services might be achieved by closing the gap between justice and welfare. The best practice examples detailed in this paper are from jurisdictions (Victoria and New Zealand) where youth justice has remained part of human services rather than absorbed into corrections.

The best practice examples referred to in this paper are from jurisdictions where decisions to prosecute are screened both internally within the police and by a non-police authority to ensure that all opportunities for diversion have been exhausted before a case is referred to court. It is time police decision making on the ground was subject to greater scrutiny by senior officers. The arresting officer is not always best placed to judge whether prosecution is in the public interest or that of the child.

What is Diversion?

Diversion is simply about choosing the least intrusive option when dealing with young offenders—this is known as the 'parsimony' principle. While diversion can occur at a number of decision making points, the principle point of diversion is at the 'front end' of the system - at the point of contact with the system's major 'gatekeeper', the police. Diversion can simply consist of a verbal or written warning. Most children and young people handled in this way never come into contact with the system again. In other instances, for example where there are previous offences, the offence is more serious, and/or where there are concerns about the child's social situation, diversion may involve referral into some kind of support service. Police in jurisdictions across Australia, the UK and New Zealand routinely caution children and young people and divert them into community based networks of care and support. Detention remains an option of last resort for the most serious offences.

Police in Western Australia also have discretion to refer the matter to a Juvenile Justice Team, conditional on the offence not falling within one of the Scheduled Offences of the YO Act . Section 24 of the YO Act sets out some core principles for diversion:

- a) the treatment of a young person who commits an offence that is not part of a well-established pattern of offending should seek to —
 - (i) avoid exposing the offender to associations or situations likely to influence the person to further offend; and
 - (ii) encourage and help the family or other group in which the person normally lives to influence the person to refrain from further offending;

Diversionary strategies introduced under the YO Act have succeeded in reducing the number of children being placed before courts by about half. They have not, however, been successful in consistently reducing the number of Aboriginal children coming into contact with the youth justice system. The main beneficiaries of police diversion have been non-Aboriginal young people. In many cases, police have not been using their discretion under the YO Act to divert Aboriginal young people.

Priority Areas for Action

Western Australia lags behind other states in terms of controls over police discretion, and in no other state is youth justice so comprehensively controlled by adult corrections. There are some key areas for priority action, centering on the need for stricter gatekeeping measures, increased diversion and shifting responsibility for youth justice to the Department of Child Protection. Of immediate concern are:

- the weakness of controls and checks on police discretion to arrest and remand children in custody;
- the lack of a consistent commitment to diversion as the primary mechanism for dealing with much youth offending;
- the lack of appropriate diversionary options (particularly in regional and remote areas);
- the defacto 'correctionalisation' of youth justice and consequent separation of young offenders and families from welfare support.

This paper calls for a specifically child and young person centered approach to youth justice, underpinned by a commitment to children's rights, rather than the current 'offender management' approach with its minimalist commitment to achieving change. The first step in achieving this

would be to clearly delineate between the adult and youth justice systems. It is encouraging that steps to separate out youth justice from adult corrections are being made as part of the response to the Price Consulting Group's (2009) review of the youth justice system. The review pointed to a 'dilution' of the focus on youth justice in Western Australia's Department of Corrective Services (Price Consulting Group, 2009) and recommended a range of measures designed to create a distinctive, integrated youth justice service in Western Australia. The Auditor General's (2008) examination of the youth justice system explicitly sets out from the premise that the YO Act still provides the rationale for the youth justice system. The YO Act sets out government expectations regarding the treatment of young people who have come into contact with the law. The YO Act expresses a clear preference for employing non-judicial options when dealing with young people. A youth justice system based on the YO Act's principles would be concerned with promoting the reintegration of young offenders into society and giving support to families - not just simply ensuring compliance with judicial orders.

Some key priorities for action include:

1. a renewed police commitment to the principle that arrests, remands in custody, court appearances and the use of detention, should be options of last resort. Section 7(g) of the YO Act states that consideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence. There is a clear presumption under the YO Act to use the least intrusive option when dealing with young offenders. Section 7(h) of the YO Act states that detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary.
2. a more rigorous approach to gatekeeping of the justice system. Section 22(b) of the YO Act states that a police officer, before starting a proceeding against a young person for an offence, must first consider whether in all the circumstances it would be more appropriate — (a) to take no action; or (b) administer a caution to the young person.

Effective gatekeeping could be ensured by:

- a. a renewed police commitment to cautioning;
- b. the introduction of 'screening officers' to review decisions to prosecute children and young people (Inspector level or above);
- c. the creation of a specialist youth section in the police along the lines of Victoria, South Australia, and New Zealand;

- d. firming up police orders in relation to decision making on matters such as the use of diversionary options (arrest, detention, bail, and so on) and giving these greater force by giving them the status of Codes of Practice, appended to legislation
3. a focus on community based options for young people in danger of enmeshment in the criminal justice system with the aim of ensuring their reintegration into the community, consistent with Section 6(d)(iii) of the YO Act which places emphasis on rehabilitating young persons who have committed offences towards the goal of their becoming responsible citizens. Current local justice initiatives in Geraldton and Kalgoorlie have had considerable success in raising the diversion rate and reducing remands in custody. These initiatives need to be fully supported by government and expanded to other regions, such as the Pilbara and Kimberley.
4. removing youth justice out of adult correctional services and placing responsibility for youth justice with a human services agency, such as the Department for Child Protection. The best practice models discussed in this paper, particularly Victoria, show that it is possible to greatly reduce the use of detention and provide support to families without sacrificing public safety.

A Statistical Snapshot

Statistics from the Australian Institute of Criminology (2006-2007) show that in the final quarter of 2007 Western Australia had the second highest juvenile detention rate in Australia at 59.4 young people per 100,000. The highest rate was found in the Northern Territory (127.9 per 100,000), the lowest in Victoria (9.0 per 100,000) and New South Wales had the rate closest to that of WA (38.0 per 100,000) (Taylor, 2009). The statistics also reveal Aboriginal young people to be 28 times more likely than non-Aboriginal young people to be detained in custody. In Western Australia the rate of over-representation ratio (the Aboriginal rate divided by the non-Aboriginal rate) was anywhere between 40 and 50 times in 2007 – an increase on previous years (Australian Institute of Criminology, 2009). Aboriginal young people are more likely to be proceeded against by way of arrest and bail, and to be held in police custody, and less likely to be issued with a court attendance notice than non-Aboriginal young people (Ferrante et al, 2005, 46). Consistently, over the past decade or so, Aboriginal young people have represented around half of all young people apprehended by the police (Blagg, 2008). A recent review of juvenile justice by the Price Consulting Group (2009) noted that in 2007 roughly 80% of non-Aboriginal young people were being diverted from court, while only 55% of young Aboriginal people were diverted.

There is no evidence to suggest that Aboriginal youth offending is significantly more serious than that of non-Aboriginal young people. Aboriginal young people tend to be processed more frequently for property and public order related offences and non-Aboriginal young people are more likely to be processed for property, drugs and driving related offending: only a fraction of both Aboriginal and non-Aboriginal young people are processed for offences against the person (Ferante et al, 20004). The key difference between Aboriginal and non-Aboriginal profiles lies in the fact that Aboriginal young people come into contact with the system much younger and more frequently than non-Aboriginal young people, largely because they are more likely to be 'street present', disengaged from school, come from a chaotic home environment, and subjected to a relatively greater level of surveillance in public settings (Johnson, 1991; Blagg and Wilkie, 1995; Cunneen and White, 2004).

The High Costs of Incarceration

According to Department of Corrective Services' data it cost \$473.78 a day to incarcerate a juvenile in 2007/2008, over \$190,000 per year. Remanding children in custody (discussed below) costs the government around \$15,000 per stay (Auditor General, 2008). The phenomenally high costs of incarcerating young offenders, as opposed to employing community based alternatives, might be justified if they led to reduced recidivism. A rigorous study in NSW found that locking up children was no more effective than community based orders in reducing the likelihood of re-offending (Weatherburn et al, 2009). The same study supported earlier research by Fagan and Fagan (1999) demonstrating that incarceration yielded few positive outcomes while generating many negative outcomes in terms of diminished future employment opportunities and entrenched marginalization, and that of Hunter and Borland (1999) demonstrating how the incarceration of Aboriginal and Torres Strait Islander people significantly harmed employment opportunities.

The introduction of diversionary strategies under the YO Act has been estimated to have saved the government approximately \$8.7 million per annum (Auditor General, 2008, 13).

Remands in Custody

Recently, the Chief Justice of Western Australia warned that Western Australia is condemning a large number of Aboriginal young people to long term enmeshment in the adult justice system as a result of unnecessary incarceration as juveniles². Increased remands in custody have been the principle driver of rising rates of detention in WA, particularly for Aboriginal children and young people – as they have in New South Wales. Well over fifty per cent of juvenile detainees are on remand, not sentenced, as compared to around sixteen per cent in the adult system. It is unacceptable that children and young people should receive more onerous conditions placed on their access to bail. Furthermore, the majority of these young people were remanded not because of the seriousness of the offences they were alleged to have committed but because they could not meet stringent bail criteria. The Chief Justice called for the creation of culturally appropriate bail initiatives – including residential places. Criminological research demonstrates that being remanded in custody, irrespective of the seriousness of the offence, increases the likelihood of receiving a custodial sentence when arriving in court (Ashworth 2004). There is a powerful labeling effect created by processing young Aboriginal people through the detention system: it can reinforce negative stereotypes of Aboriginal young people as high risk offenders requiring more intensive forms of control than other sections of society. The case involving an Aboriginal child from Onslow, remanded in custody in Perth for the theft of an ice cream (discussed further below), illustrates that police decisions to remand in custody are not always based on calculations of offence seriousness. The Commissioner for Police asserts that the ‘genesis of the problem’ lies in the exposure of Aboriginal children to greater ‘risks’, linked to family life³. It is misguided to believe that these risks will be reduced by remanding children in custody. It needs to be borne in mind that young people on remand have not been convicted of a criminal offence. Indeed, the majority will not receive a custodial sentence when they arrive in court. It is essential these numbers are reduced.

A new initiative is required, involving local Aboriginal communities and representative organisations in the regions and the metropolitan area, to create some new safe options for children, including placement with other families/communities and appropriate supervised accommodation.

² The Australian (16/10/2009) *Public Alarm Driving WA Policy: Chief Justice Wayne Martin*. <http://wl.theaustralian.news.com.au/story/0,25197,26216422-5013945,00.html>

³ The Australian (17/10/2009) <http://www.theaustralian.news.com.au/story/0,25197,26149148-5006789,00.html>,

The problems currently being experienced in relation to youth justice flow directly from an approach to the issue that has placed incapacitation ahead of rehabilitation: making youth justice more like adult justice. Not all states have taken this approach. In Victoria, responsibility for youth justice rests with the Department of Human Services which runs two detention centers. In Queensland, the Department of Communities manages youth justice, in South Australia it is the Department of Families and Communities. New South Wales is the exception and is experiencing a form of creeping correctionalism. While there is a separate Department of Juvenile Justice which controls most of the youth justice system there is also the Kariong Juvenile Correctional Centre which is operated by the adult Department of Corrective Services, holding between 30 and 40 young people. New South Wales' rates of youth detention are on a par with Western Australia's and have increased sharply due to new restrictions on the use of bail – in 2007/08, 85% of Aboriginal young people being detained were on remand (Cunneen, 2009).

Good Practice: Victoria

Victoria has the lowest rate of youth detention and over-representation of Aboriginal young people in Australia. The current Juvenile Justice Reform Strategy in Victoria is founded on three themes: diverting young offenders from entering the Juvenile Justice system; providing better rehabilitation of high risk young offenders; and expanding pre-release, transition and post-release support programs for custodial clients to reduce the likelihood of reoffending.

The system includes a unique 'dual track' system as part of a diversionary approach to youth offending. It is the only state in Australia to implement this system. The Sentencing Act 1991 allows the adult courts to sentence a young person aged 18 to 20 years to serve their custodial sentence in a youth justice centre as a direct alternative to a sentence of imprisonment. The dual-track system is underpinned by an approach which prioritises reintegration over punishment. It is designed to provide an alternative to prison and prevent early entry into the adult system for offenders who are vulnerable or who have a greater prospect of rehabilitation. Courts can order 17–20 year-olds to serve their sentence in a Youth Training Centre in situations where 'there are considered reasonable prospects for the rehabilitation of the young offender' and 'the young offender is particularly impressionable, immature or likely to be subjected to undesirable influences in an adult prison' (Sentencing Act 1991).

The Office of the Inspector of Custodial Services (2009) had raised the prospect of the dual track approach having voiced concerns about the management of vulnerable young adults, particularly Aboriginal young people from the regions, in the adult system. The announcement that a dual track policy is being considered for Western Australia is, therefore, welcome - with a facility for 18-22 year olds concentrating on helping 'young offenders turn away from a life of crime to ensure that they do not become habitual criminals' (Office of the Inspector of Custodial Services, 2009, 1), and providing strong release and resettlement supports.

Through Care

There is a strong focus on through care arrangements for young offenders in Victoria. In Western Australia the degree to which the system has drifted away from the most fundamental principles of youth justice is reflected in the lack of commitment to 'through care' (Price Consulting Group, 2009), even though through care is acknowledged to be a 'vital aspect of effective juvenile justice'. Through care has become 'probably the most significant gap in service' and 'in decline in the Department' (Price Consulting Group, 2009, 25). It notes that:

the role (of juvenile justice workers) seems to have moved away from engagement of the young person and their families and has moved towards ensuring compliance and writing reports (Price Consulting Group, 2009, 25).

The Need for Systemic Change: Adhering to the Principles of the Young Offenders Act 1994

Implementing the recommendations made by the Price Consulting Group (2009) would enhance the quality of justice services for young people. The report recommended the separation of youth justice from adult corrections, as a necessary prerequisite for structural reform. The Auditor General's inquiry into youth justice (2008) makes the point that the YO Act requires that the justice system treats young people differently from adults.

Both reports draw heavily on the principles underpinning the YO Act which emphasises the need for a holistic approach to dealing with young people involving family as much as possible. The YO Act's principles enshrine the need to:

- ensure the fair treatment of a young person alleged to have committed offences (principle (a));

- consider measures other than judicial proceedings for the offence (principle (g));
- detain young people in custody only as a last resort and, for as short a time as is necessary (principle (h)).

Principle (m) has particular relevance in regards to youth justice in relation to Aboriginal young people:

(m) a young person who commits an offence is to be dealt with in a way that:

- (i) strengthens the family and family group of the young person;
- (ii) fosters the ability of families and family groups to develop their own means of dealing with offending by their young persons; and
- (iii) recognises the right of the young person to belong to a family.

These principles, which bear close resemblance to key principles of the *Children, Young Persons and their Families Act 1989* (NZ), contrast sharply with the principles underpinning adult corrections, with its greater emphasis on individual 'responsibilisation', accountability, surveillance, risk management and the supervision of punishment.

There remains though the vexing problem of punishment as a goal of the Western Australian young offender legislation, which is in keeping with adult justice principles. Section 6 of the YO Act sets out the legislative objectives, which include:

(d) to enhance and reinforce the roles of responsible adults, families, and communities in —

- (i) minimising the incidence of juvenile crime;
- (ii) punishing and managing young persons who have committed offences; and
- (iii) rehabilitating young persons who have committed offences towards the goal of their becoming responsible citizens.

Youth justice principles, as espoused under children's rights principles are fundamentally at odds with notions of punishment. New Zealand offers a model of youth justice that does not espouse punishment as an aim of intervention and focuses on the need to advance the welfare of children, young people and family.

Good Practice: New Zealand

Youth justice principles under the *Children, Young Persons and their Families Act 1989* (NZ) are a good reference point in terms of practice. The principles apply to any person exercising powers conferred under the Act, including the police. The principles state that:

- (a) ... unless the public interest requires otherwise, criminal proceedings should not be instituted against a child or young person if there is an alternative means of dealing with the matter:
- (b) the principle that criminal proceedings should not be instituted against a child or young person solely in order to provide any assistance or services needed to advance the welfare of the child or young person, or his or her family, whanau¹, or family group:
- (c) the principle that any measures for dealing with offending by children or young persons should be designed—
 - (i) to strengthen the family, whanau, hapu, iwi, and family group of the child or young person concerned; and
 - (ii) to foster the ability of families, whanau, hapu, iwi, and family groups to develop their own means of dealing with offending by their children and young persons:
- (d) the principle that a child or young person who commits an offence should be kept in the community so far as that is practicable and consonant with the need to ensure the safety of the public:
- (e) the principle that a child's or young person's age is a mitigating factor in determining—
 - (i) whether or not to impose sanctions in respect of offending by a child or young person; and
 - (ii) the nature of any such sanctions:
- (f) the principle that any sanctions imposed on a child or young person who commits an offence should—
 - (i) take the form most likely to maintain and promote the development of the child or young person within his or her family, whanau, hapu, and family group; and
 - (ii) take the least restrictive form that is appropriate in the circumstances:
- (g) the principle that any measures for dealing with offending by children or young persons should have due regard to the interests of any victims of that offending:
- (h) the principle that the vulnerability of children and young persons entitles a child or young person to special protection during any investigation relating to the commission or possible commission of an offence by that child or young person.

1. Whanau is a Maori term meaning family.

Gate-keeping and Gatekeepers

Children's due process rights in the justice system do not begin once a child has been placed before the court but are triggered at the point of first contact between the justice system and the young person – that is, the police. The police are the system's gatekeepers and principle decision makers. Actions police take affect a person's fundamental freedoms. The actions of the police need to be as rigorously constrained within a rights framework as the court and trial stages (Blagg and Wilkie, 1995, 1997).

Children are vulnerable to rights abuses at the point of contact and require special measures in light of their comparative vulnerability, lack of maturity and ignorance of the law. The police carry the burden of ensuring that children's rights are respected, as Naffine writes:

...children should be able to possess rights, in particular the rights to have their interests protected, which do not depend on their ability to invoke them (Naffine, cited in Blagg & Wilkie, 1995, 10).

Because around nine out of ten children plead guilty when arriving in court, they forgo procedural due process rights, including the opportunity to challenge police actions and decisions. So, while police often point to the fact that their actions are covered by the law, the law, in reality, rarely concerns itself with the exercise of police powers as it relates to the treatment of children and young people. Current gate-keeping practices must be reviewed and brought into line with best practice standards. Legislation in Western Australia governing the rights of children and young people is weak in comparison with other states.

An Emphasis on Diversion

The Police need to be aware that arrest should be a sanction of last resort. In New Zealand, under the *Children, Young Persons and their Families Act 1989*, every enforcement officer who arrests a child or young person without warrant has to provide a written report to the Commissioner of Police within 3 days of making the arrest, stating the reason why the child or young person was arrested. Furthermore, the rules governing the arrest, interrogation and detention of young people are clearly embedded in the legislation. The principles of YO Act state:

- 7(a) there should be special provision to ensure the fair treatment of young persons who have, or are alleged to have, committed offences;
- 7(b) a young person who commits an offence is to be dealt with, either formally or informally, in a way that encourages the young person to accept responsibility for his or her conduct;
- 7(g) consideration should be given, when dealing with a young person for an offence, to the possibility of taking measures other than judicial proceedings for the offence if the circumstances of the case and the background of the alleged offender make it appropriate to dispose of the matter in that way and it would not jeopardize the protection of the community to do so;
- 7(h) detaining a young person in custody for an offence, whether before or after the person is found to have committed the offence, should only be used as a last resort and, if required, is only to be for as short a time as is necessary.

Police Operational Guidelines

The Western Australian Office of the Director of Public Prosecutions, in the Statement of Prosecution Policy and Guidelines 2005, acknowledges that special considerations apply to the prosecution of juveniles. It is stated that, 'The longer term damage which can be done to a juvenile because of an encounter with the criminal law early in his or her life should not be underestimated'.

The Law Reform Commission of Western Australia provides this example.

In May 2005 a young Aboriginal boy from Onslow was detained in custody for 12 days for attempting to steal an ice cream. After being arrested by a police officer and refused bail, the boy was driven in police custody for 300 kilometres to Karratha where he spent the night in the Karratha police station. After appearing before two justices of the peace he was remanded in custody and taken by aeroplane to a Perth juvenile detention centre (at a cost to the public purse of \$10,000). Although the young boy was subject to a conditional release order (in respect of a previous offence) imposed by the President of the Children's Court, it was stressed by his defence counsel that the police failed to exercise their discretion in the boy's favour in a number of ways: he was arrested rather than served with a notice to attend court; he was remanded in custody rather than being released on bail; and he was formally charged rather than cautioned or referred to a juvenile justice team – all for an offence that does not include imprisonment as a penalty. When he was finally dealt with by the President of the Children's Court in Perth the boy was released with no further punishment (Law Reform Commission, 2006 240).

The problem lies in the fact that the key point of reference for the police is not the YO Act itself but the highly discretionary Police Operational Manual, viewed by police as guidelines rather than rules. The Police Operational Manual states that the police have adopted 'the concept of diversion as an appropriate option for dealing with the majority of juvenile offenders' (Operational Manual, JV-1.1). As noted, however, this is weakly enforced as the Manual goes on to state that any option will 'be left to the discretion of the member concerned'. In relation to referral to Juvenile Justice Teams, decisions regarding bail and similar diversionary options the focus is on 'may' rather than 'must'.

The Law Reform Commission of Western Australia notes:

Although there are some legislative and policy guidelines in relation to police diversion it has been observed that the emphasis is on 'may' rather than 'must' and that police do not consider that they are bound by police guidelines (Law Reform Commission, 2006, 240).

In the UK, like New Zealand, the Codes of Practice governing the treatment of suspects, especially vulnerable groups such as children, are appended to the legislation (*Police and Criminal Evidence*

Act 1984), giving the Codes of Practice the force of law, and making the infraction of the codes a disciplinary offence. In other states police options when deciding whether to proceed by arrest or by issuing a notice to attend are clearly spelled in relevant legislation. Section 42 of the YO Act provides that, unless inappropriate, a notice to attend court is the preferred option. The Operational Manual provides that a police officer may arrest a young person for a scheduled offence if the offence is serious, if destruction of evidence is likely, if it will prevent a further offending; if it will ensure attendance at court, or if there is no other appropriate course of action. These guidelines should be given the force of law and placed in the legislation rather than in the 'guidelines' only Operational Manual.

In Western Australia discretionary powers reside with the arresting officer, with little, or no, review by senior officers. Senior police are aware of this tendency towards 'tunnel vision' and are involved in reforms to the system intended to reduce the police 'stake' in prosecution to a more forensic rather than prosecutory one. Under the 'Frontline First' approach police want to get out of functions that do not fit with what the police determine to be 'core business'. Police intention is to transfer prosecutor services to the DPP or some new prosecutory body modeled on the Scottish system, where responsibility rests with a Procurator Fiscal⁴. This may signal a decline in the highly adversarial 'win or lose' mentality that has informed not only police culture but also that of the work of defense lawyers in Western Australia (Crime Research Centre, 2006). This culture is only very slowly changing. There needs to be a shift in police culture away from the view that a 'successful' conviction is the principle measurement of endeavour.

Secondary Screening

The key lesson here is that the arresting officer should not make the final decision to prosecute a young offender and that there needs to be a number of opportunities for further screening of cases and referral to less intrusive alternatives. There is a need for a secondary screening process. In the first instance, action should only be taken against children when a senior officer agrees. In New Zealand and Victoria there are specialist youth sections in the police. Part of their role is to

⁴ A procurator fiscal is essentially a public prosecutor in Scotland also carrying out some of the investigatory functions done by the coroner in other jurisdictions. For the majority of offences the procurator fiscal present the cases for the prosecution in the lower (Sheriff's) courts and District Courts. The Procurator Fiscal has a great deal of discretion as to whether to proceed with prosecutions. The procurator is also involved in the Children's Hearing System (*Children (Scotland) Act 1995*). The system is basically welfare driven. Children under 16 are only considered for prosecution in court for serious offences such as murder, assault which puts a life in danger or certain road traffic offences which can lead to disqualification from driving. In cases of this kind the Procurator Fiscal has to decide if prosecution is in the public interest.

gate-keep entry into the system – they can discontinue prosecutions where they believe prosecution is not warranted.

Victoria police's approach to working with young people in general is coordinated and managed through a very active and well resourced Youth Affairs Office which has responsibility for leading policies around the reduction of repeat offending, youth victimisation and increased diversion from the system. Establishing a specific Youth Affairs portfolio has been resisted by the West Australian police since the idea was first mooted by the State Government Advisory Committee for Young Offenders in 1991 – as part of the package of measures which established the Juvenile Justice Teams.

In New Zealand, cases involving young people have to be referred to a Youth Justice Coordinator by police who will convene a diversionary family group conference (FGC) under the Act. If the police attempt to circumvent the process by arresting the child and placing him/her before the court, the court itself is compelled to refer the matter to an FGC, except in extremely serious cases. These screening mechanisms have ensured that only around 20% of cases involving contact between police and young people in New Zealand end up in court – the majority of these are then dealt with through a Family Group Conference, with the courts acting as a 'backstop' (McElrea, 1996).

The Juvenile Justice Teams

Internationally, there has been a growing awareness of the benefits of diversion from the formal justice system and an interest in restorative forms of justice. Restorative justice holds that the goal of justice should be to repair harm, rather than inflict punishment, and has provided 'an important counterweight to traditional retributive methods' (Cunneen 2008, 44). Aboriginal young people have not benefited to the same extent as non-Aboriginal young people from diversionary initiatives and restorative justice. The impact of restorative justice has been uneven and may itself have had the unintended consequence of contributing to the steady bifurcation in Australian youth justice practices, with non-Aboriginal young people benefiting from diversionary restorative conferencing and Aboriginal young people being channeled into the more punitive reaches of the system (Cunneen, 2008; Cunneen and White, 2008; Blagg; 2008; Polk, Alder, Muller and Rechtman, 2003).

Flagging police enthusiasm for Juvenile Justice Teams

A report by the Auditor General of Western Australia in 2008 noted the overall rate at which police were directing young people away from court had declined significantly (by 13% since 2003). While this could largely be attributed to the fact that some road traffic offences had recently been made scheduled offences, the report also noted a reduction in police referrals to Juvenile Justice Teams (JJs), which are a key alternative to court under the YO Act. The JJs had been Western Australia's flagship initiative in the areas of restorative justice, enhanced inter-agency cooperation and diversion from the criminal justice system. The JJs represented Western Australia's investment in principles of restorative justice at a time when most states and territories were establishing diversion based restorative justice programs (Daley and Hennessy, 2001).

The JJs were rolled out as part of the YO Act. The Auditor General's (2008) examination of youth justice points to a declining police commitment to JJs with 'frontline police' reporting that they had 'become less inclined to refer young people to juvenile justice teams' (Auditor General, 2008, 32). The report notes that:

Referrals had dropped from a high point in 1998 when they referred young people around 2,650 times. This number has steadily declined to around 1 600 police referrals eight years later (Auditor General, 2008, 32).

Police referrals to JJs decreased since 2003 in 12 of 14 police districts with four districts reducing by more than half. Only two metropolitan districts had 'experienced consistent or increasing levels of police referral' during the same period. Tellingly, recruits were only receiving 2-3 hours training on the JJs, with no follow up. Even in the early 1990s concerns were expressed regarding the disappointing lower rates of referral to JJs for Aboriginal young people (Blagg and Ferrante, 1995). Reduced police enthusiasm was also reflected in the fact that, in some districts, police were leaving it to the courts to refer young people to JJs. Data revealed that 'court referred juvenile justice teams had increased by an amount equivalent to the decrease in police referred juvenile justice teams' (Auditor General, 2008). Confusion about the purpose of the teams, and lack of commitment to the diversionary principle where Aboriginal young people are concerned, was captured in a statement by a juvenile justice worker in Carnarvon who told researchers, 'when police have evidence they charge, if the evidence is weak they refer to JJT, if there is no evidence they caution' (Roberts, Indermaur, Blagg and Clair, 2007).

The Auditor General concludes that the JJTs are not working well, or as intended, particularly in terms of: the targeting of intended groups; long delays between a young person's referral to a JJT and the eventual meeting; inadequate monitoring of JJT action plans, and; victims of crime not always being provided with the opportunity to participate. The Auditor General made a suite of recommendations designed to improve the JJT system. These focus on ensuring that police fully apply the YO Act provisions which require them usually to refer young people who have not previously offended to the JJTs, and Department of Corrective Services to improve the JJT program, by improving timeliness, and ensuring that action plans support the young person's rehabilitation and address the nature and causes of their offending. The recommendations also call for improved support for victims of crime.

A more radical option, should these reforms not bear fruit in terms of increased use of the current diversionary mechanisms, would be to encourage the police to focus on an improved cautioning scheme and creating a more specialised court referred restorative conferencing model, along the lines of Victoria⁵, essentially abolishing the JJT system. This is a radical step and there is some evidence that, given a collegiate rather than adversarial environment, good inter-agency support, and community resources for referral on – JJTs can be effective in raising the rate of diversion.

There needs to be renewed commitment from the key agencies involved to support the JJTs and to ensure participating workers have a sound knowledge of the purposes of the teams. There also needs to be a fresh set of Best Practice Standards with an evidence base constructed from experiences in the state and from other jurisdictions – such as New South Wales, New Zealand and Victoria. Restorative Justice conferencing is labor intensive and the outcomes of conferences in terms of commitments by offenders and families are sometimes on a par with high tariff disposals such as community service. It is imperative therefore that entry to JJTs is also subject to rigorous gate-keeping. The best method for ensuring that only appropriate cases are referred to JJTs is by encouraging police to caution young people. More police may take this route if they have confidence that something will be done to change the young person's behaviour.

⁵ The Youth Justice Group Conferencing project in Victoria is operated by the non-government sector: Jesuit Social Services Melbourne in the metropolitan area; Anglicare in a number of regional centers. The program is intended to be a joint venture between these service providers and the Children's Court of Victoria, Victoria Police, Victoria Legal Aid and the Department of Human Services. With the introduction of the Children, Youth and Families Act 2005 the Children's Court may defer sentence and order a group conference under section 415 of the Act.⁵

Confidence in Cautioning

All effective youth diversionary systems are underpinned by some system of informal warnings and cautions by the police. The 'parsimony' principle dictates that diversionary conferencing should not be used when a caution or warning could be equally as effective. Court should not be considered if a referral to diversionary conferencing is more appropriate. In some instances the police may consider a simple verbal warning – perhaps accompanied by a meeting with family. In other instances the police may wish to employ their discretion to caution but need reassurance that some action will be taken to influence the young person's lifestyle, attitudes and behaviour. Some police officers have also argued that their hands are sometimes tied when dealing with Aboriginal young people because they may not admit to an offence, or not comment, making them ineligible for the cautioning – a consequence, perhaps, of the 'adversarial' approach mentioned earlier. They also mentioned lack of interest by family in the child's behaviour – and inability to track family down.

We could learn from a highly successful scheme in Victoria which has increased the rate of diversion for Koori young people (see below).

It should be borne in mind that any intervention with Aboriginal young people will be strengthened by involvement of appropriate Elders from within the child's community. Cautioning may have more credibility for young people if it is supported by the Aboriginal community. In 2006 the Law Reform Commission of Western Australia proposed amendments to Part 5 of the YO Act encouraging police to allow a 'respected member of the young person's community' to administer a caution (Proposal 38, Law Reform Commission of Western Australia, 2006, 242). This is common practice in Victoria where Aboriginal Community Liaison officers and Aboriginal community representatives on Community Justice Panels routinely participate in the cautioning process.

Good Practice: The Police Cautioning and Koori Youth Diversion Program

This program builds on the research indicating that cautioning can be an effective deterrent for minor offenders and that recidivism rates are lower than for young people who go further into the system. While Victoria has tended to have much lower rates of arrest and imprisonment of Aboriginal young people than other states, there have, nonetheless, been concerns that Koori young people are not being cautioned and diverted at a rate similar to the non-Koori population. The Police Cautioning and Koori Youth Diversion Program (PCKYD) was established to improve justice outcomes by increasing the participation of the Koori community and improving relations between the police and the Koori community. The program took into account police concerns about the 'No comment' interviews, inability to contact parents and lack of adequate follow-up which, it was claimed, had inhibited police cautioning of Koori young people. The follow up component to the cautioning program involved a network of diversionary services and a mapping of gaps in services for Koori young people as well as the involvement of the police and community members in follow up meetings and programs based on recommendations made at the time of the caution.

Essentially this program coordinates relevant community members and local services...to ensure that each youth has a number of resources subsequent to receiving the caution. Each program is individually tailored, based on consultation with the youth, family and other relevant individuals (Victoria Aboriginal Legal Services Co-operative Limited 2009, 7).

The PCKYD Program is currently being implemented in different forms by the New South Wales Police, ACT Police, Australian Federal Police and South Australia Police and should be considered for implementation in Western Australia.

Regional Developments

The situation in regional areas of Western Australia has been a source of concern for several years. There have, however, been a number of promising recent innovations designed to improve services. Initiatives such as the Regional Youth Justice Services have emerged in response to criticisms made in both the Price Consulting Group and the Auditor General's reports regarding the fragmented and ad hoc nature of services for young offenders and families. Before looking at promising initiatives a 'snapshot' from the Kimberley reveals the challenges that still lie ahead in terms of delivering a holistic service to Aboriginal communities.

A Snapshot from the Kimberley: Justice by Geography and Structural Racism

A 2004 report by the Office of the Inspector of Custodial Services described Roebourne, Eastern Goldfields, Broome and Greenough prisons as the 'poor relations' of the custodial system. Correctional services in 'Aboriginal prisons' outside the metropolitan centre tend to be of an inferior quality and generally 'impoverished'. This could equally have been said in relation to community based juvenile justice under corrections. A series of reports by the Inspectorate have pointed to a form of 'structural racism' in Aboriginal prisons. Structural racism exists when a range of inadequate and substandard conditions predominate that would not be tolerated if the predominant population were from the mainstream racial group. It is possible to argue that a form of structural racism has existed in relation to youth justice for regional and remote Aboriginal communities.

Justice by Geography

Aboriginal children and young people in parts of the state, such as the Pilbara, Eastern Goldfields and the East Kimberley are subject to a form of 'Justice by Geography'. Their location determines the quality and consistency of the services they receive. There have been a number of issues raised in the Kimberley area demonstrating that Aboriginal young people in the region receive an inferior service in comparison with the metro area.

- Young Aboriginal people do not appear to get the same access to diversionary options as other young offenders in more urbanised areas. Aboriginal young people are fast tracked through the system and miss out on whatever diversionary initiatives exist.
- Constant changeover in, and lack of, personnel in areas such as the East Kimberly means poorer outcomes for young people. Consequently there is sometimes, despite the best efforts and intentions, lack of knowledge of programs available (of which there

are very few anyway) and little familiarity with local law and culture. Conversely, communities themselves find it hard to build relationships with key workers and there is no consistent community engagement strategy. Juvenile Justice Officers are not properly resourced to supervise offenders on their case loads, leading to errors and burn out.

- Unnecessary remands in custody and transportation of Aboriginal young people: the recent Ward and Sandfire cases alert us to the dangers inherent in transporting over long distances. In the Kimberley children as young as 12 have been transported considerable distances and then remanded in custody. Remands in custody result in young people being detained in lock ups with adult prisoners – in contravention of key human rights principles and the YO Act - and transported to Perth at great expense and in many cases being found not guilty.
- Police are not always complying with the Children’s Court Practice Direction No 2 (2008) to video-link the accused as soon as possible before the first available magistrate for a bail hearing.
- Unnecessary remands also reflect a lack of community service availability and/or local supervision options in relation to bail; often a responsible adult can not be found. On occasion the responsible adult will not sign the undertaking and so the child must remain in the police lock-up until flown to Perth, leading to children as young as 11 spending up to 3 days in custody. There is a need for some kind of supervised bail facility for the East Kimberley, perhaps in conjunction with a children’s safe house with a few beds – not a prison.
- Some bail conditions are utterly unrealistic and set young people up to fail. Orders prohibiting contact with co-accused simply don’t work when everyone lives under the same roof and/or are closely related. There are also concerns that some of the curfew restrictions placed on children are impractical and unduly restrictive.
- The Aboriginal Legal Service is not always being informed immediately when an Aboriginal young person is arrested. Western Australia should introduce a scheme modeled on New South Wales where it is mandatory to contact the ALS and where the ALS has been funded to run a 24/7 service to respond.
- The system of JPs is not working to defend the rights of Aboriginal children. They see their job as endorsing the decisions of the police (see the recent Ward case). A system of video/telephone link-ups with magistrates would improve decision making and prevent potential deaths in custody. A number of contacts in the Kimberly have spoken of ‘deaths in custody waiting to happen’.

Promising Western Australian Initiatives - 1: Regional Youth Justice Services

There are a number of initiatives worthy of support which combine intensive supervision in the community with a focus on nurturing family support systems. The Mid West Gascoyne Youth Justice Services were introduced in Geraldton in August 2008 to provide a more effective way of helping to divert young people away from the criminal justice system in the Geraldton area.

The new service includes a range of mostly outreach programs to support these young people and their families and help them break the offending cycle. The scheme includes an after-hours outreach service for young people who are at risk of coming to the attention of police and an after-hours, seven-days-a-week bail service to help police identify responsible adults to provide bail for young people. The Youth Bail Service also provides limited short-term bail accommodation as a last resort for young people who are granted bail but do not have anywhere suitable to stay before their court appearance (a very welcome innovation); an enhanced JJT, to target young people in the early stages of offending and steer them away from the formal justice system; Consultation in the region had revealed a number of local youth justice concerns similar to those identified in the Kimberley, including unacceptably high rates of young people being remanded in custody, lack of bail facilities and lack of support for families struggling to control their children. Anecdotal evidence suggests the scheme is already having an impact; children are not being remanded to Rangeview Detention Centre. A similar initiative in the Goldfields has seen a 40-50% increase in referrals to JJTs because police have renewed confidence in the system.

Promising Western Australian Initiatives - 2: Intensive Supervision Program

The Intensive Supervision Program (ISP) which provides intensive support for serious and repeat young offenders and families is another recent innovation. Involvement in the scheme is voluntary and the focus is on family support. The initiative is modeled on international Best Practice – which favors an intensive ‘wrap around’ approach to work with those most at risk of enmeshment in the system. ISP is now available in Geraldton and Kalgoorlie as part of the role of the Regional Youth Justice Services.

These developments are extremely encouraging. There is a strong case for expanding the Regional Youth Justice Services to other regions – particularly the Kimberley and Pilbara regions. The initiatives need to be closely monitored and evaluated to ensure critical lessons are not lost and the state is able to build on any demonstrated successes.

The Courts

While much of the focus of the paper has been on front end diversion and the role of youth justice services, the courts have a crucial role to play in the creation of a better youth justice system for Western Australia. Magistrates’ courts have undergone considerable transformation over recent years, diversifying into specialist areas such as drugs, alcohol, homelessness, mental health and community integration. There has also been the introduction of courts specifically aimed at involving Aboriginal communities more directly in the justice process.

The Koori Children's Court

The Koori Children's Court in Victoria builds on the success of the adult Koori Courts which have become the flagship of the Victorian Aboriginal Justice Agreement. The Koori Court was enabled under the *Magistrates' Court (Koori Court) Act 2002* which establishes a Koori Court Division of the Magistrates' Court. The legislation has the objective of:

- 1(b) ensuring greater participation of the Aboriginal community in the sentencing process....through the role to be played in that process by the Aboriginal elder or respected person and others',

The defendant must enter a guilty plea and consent to involvement in a diversionary program. Business is conducted at an oval table rather than from the bench. The young person sits at the table beside his or her solicitor and family member and/or other support person. Once the charges have been read by the police prosecutor and the defence counsel has responded, the young person and the support person are invited to speak directly to the magistrate about the offender's behaviour. Elders take a very prominent role in the process – more than in the adult Koori Court, talking directly to the young person about their behaviour. Considerably more time is taken for each matter than would be the case in a regular court: usually an upper limit of five per session. Importantly also, Aboriginal art is prominently displayed along with the Aboriginal flag. There is also a 'hearth' left in the court room following the smoking ceremony at the launch of the court. The President of the Children's Court points these out to the young offender and also acknowledges the traditional owners at the beginning of each case. The Koori Children's Court is being evaluated by a team from La Trobe University. A previous evaluation by Dr Mark Harris (La Trobe University) of the adult court had been immensely positive in terms of reduced recidivism and high degree of ownership by the Koori community (Harris, 2006).

The Children's Court: Western Australia

It may not currently be feasible to import the Koori Children's Court model into Western Australia. The Community Court in Kalgoorlie remains the only current model resembling an Aboriginal court in Western Australia and government shows little enthusiasm for expanding the pilot, despite a recommendation from the Law Reform Commission of Western Australia that:

The Western Australia government establish as a matter of priority Aboriginal courts for both adults and children in regional locations and in the metropolitan area (Law Reform Commission, 2006 35).

There are, though, a number of elements of the Koori Children's Court model that could be adopted. The model hinges on the quality of support given to the court by agencies. The role of the Koori Justice Worker in acting as a link with the Koori community and engaging with families and young offenders is particularly crucial. So too are the Elders, who provide the cultural continuity in the court. Justice workers and prosecutor services involved in the court appeared committed to providing alternatives to further contact with the system, not finding reasons to breach offenders at any opportunity (which seemed to be the case in WA), and appears to be less adversarial than other courts.

Discussions with the President of the Children's Court of Western Australia suggested an interest in involving local Elders in the court process. However, the President was particularly interested in convening Elders' groups to provide advice in terms of identifying credible community resources to support court decisions. His Honour expressed concern about the lack of adequate cooperation and coordination between agencies at a local level and, particularly, the lack of support for persistent young offenders and families from child welfare services. The court is taking a more active rather than passive role in terms of coordinating agencies and improving case management of young offenders. The President's initiation of the Pilot Youth Justice Project in Perth to encourage joint case management in the metro area is a very welcome development, as is the establishment of the cross-agency Youth Justice Steering Committee. The committee has focused on the need to meet unmet demand for family support services and the paucity of options at the front end of the system. The stance being adopted by the court closely resembles what King et al (2009) refer to as a 'solution' oriented court, or what the Law Reform Commission of Western Australian (2009) calls an 'interventionist court'.

An Interventionist Children's Court

The Law Reform Commission of Western Australia defines court interventionist programs as:

programs that use the authority of the court in partnership with other agencies to address the underlying causes of offending behaviour and encourage rehabilitation. The distinguishing feature of court intervention programs is the involvement of the court in supervising offenders; a role traditionally performed by other justice agencies (Law Reform Commission of Western Australia, 2009, 3).

In the case of solution oriented courts the judicial officer monitors the offender's progress on the program and is often directly involved in managing the offender's treatment or rehabilitation regime. The interventionist court should act as a focal point for innovation and enhanced inter-agency cooperation, with magistrates using their authority to ensure that agencies are fulfilling their obligations. This approach encourages magistrates and judges to take a proactive and overtly leading role in the creation of better, well coordinated services for clients – using the authority of the court to ensure agencies fulfill their mandates as well as ensuring offenders complete their programs. In relation to youth justice, the 'interventionist' court has considerable merit because it favors a 'non-adversarial' approach to court proceedings and is 'forward' rather than 'backwards' looking in orientation – that is, focused on encouraging change rather than punishing past deeds.

Concluding Comments: 'Time for Change' in Youth Justice

While there are numerous areas of concern in Western Australia that are addressed in this paper, there are also signs of emerging good practice. The Youth Justice Services in place in Kalgoorlie and Geraldton show the benefits of a coordinated approach on a local level. These initiatives show that the police, courts and justice agencies can work together to reduce levels of involvement in the justice system and work in a less adversarial manner. One major challenge is ensuring sustainability and consistency. Too often in WA investment has been channeled into local areas as a result of pressure to 'do something' about a perceived problem – then the resources are withdrawn once the pressure is off. Commitment to programs frequently expands and shrinks in direct proportion to the level of pressure exerted by politicians, interest groups and the media.

The 'Time for Change' program currently underway in the Goldfields is based on the premise that a collaborative approach is required to deal with youth offending. It also notes the importance of involving the Aboriginal community and ensuring that intervention with young people encourages respect for Aboriginal values. While this paper has largely been concerned with the work of the main agencies involved in youth justice this in no way minimises the importance of strategies which directly empower Aboriginal communities to take ownership of youth related issues. There is an ongoing process of creating local justice agreements and justice plans under WA's Aboriginal Justice Agreement which - if supported by government, agencies and Aboriginal communities – could have positive long term outcomes. Many of the successful initiatives in Victoria which have reduced levels of over-representation have grown directly out of the Victorian Aboriginal Justice Agreement and its representative structures. The ideas floated in this paper are intended to act as a point of departure for dialogue on the crucial issue of youth justice – particularly in relation to Aboriginal young people. Recommendation 62 of the 1991 Royal Commission into Aboriginal Deaths in Custody (Johnson, 1991) stated that the multiple crises affecting Aboriginal young people, if left unattended, have 'potentially disastrous repercussions for the future'. Approaching 20 years on, we are witnessing another generation of Aboriginal children lost to the correctional system. The 'tough on crime' approach has failed to halt the slide. It is time for a renewed commitment to negotiation and partnership.

This paper has argued for a specifically child centered approach to youth justice in keeping with the principles of the YO Act, which acknowledges the need for special provisions to deal with young offenders, and recognises the importance of the family as the key influence on young people. Best Practice examples from other jurisdictions reveal the possibilities for a balanced

approach, where the welfare of children and families is not sacrificed in the name of public order. Creating a more balanced and integrated approach necessitates splitting youth justice from the adult corrective services and re-establishing it on fresh foundations within a human services directorate. The new approach also requires that the police renew their commitment to diversion, and to the principle that arrest should be a sanction of last resort, as the primary mechanisms for dealing with most youth offending. Achieving this aim will require some reforms in police practice, with a greater emphasis on screening of prosecutions by senior personnel to ensure rigorous gatekeeping of the justice system. Police confidence in the use of diversionary options, which has been in decline over recent years, could be bolstered if we were able to develop a network of community placed services that pick up on young people at risk and offer support to them and families – some of the promising initiatives identified under the new Regional Youth Justice Services have been established with this in mind. These promising initiatives deserve the utmost support from government. They would flourish more readily if they were working from within an agency mandated to protect the interests of children rather than incarcerating adults.

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Legislation

Children (Scotland) Act 1995

Children, Youth and Families Act 2005 (Victoria)

Magistrates' Court (Koori Court) Act 2002 (Victoria)

Children, Young Persons and their Families Act 1989 (New Zealand)

The Police and Criminal Evidence Act 1984 (England and Wales)

Sentencing Act 1991 (Victoria)

Young Offenders Act 1994 (Western Australia)

Conventions

United Nations Convention on the Rights of the Child

Manuals

Police Operational Manual, Western Australia

Appendix 1 Consultations

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Consultations Victoria

His Honour Judge Paul Grant – President of the Children's Court of Victoria
Travis Lovett – Indigenous Liaison Officer Koori Children's Court
Lis Moore and Amanda Young – Koori Issues Unit, Dept of Justice
Dr Nicole Bluett-Boyd – Melbourne University (Koori Cautioning Program)
Frank Gueverra – Victoria Aboriginal Legal Service
Cord Sadler and colleagues – Youth Justice, Department of Human Services
Steve Ballard – Aboriginal Affairs, Department of Human Services
Professor Ari Freiberg – Monash University
Sergeant Tim Harman and colleagues – Victoria Office of Youth Affairs.

Western Australia

His Honour Judge Dennis Reynolds – President of the Children's Court of Western Australia
Professor Neil Morgan – Office of the Inspector of Custodial Services
Magistrate Catherine Crawford – East Kimberley
Heather Harker – Deputy Commissioner, Juvenile Justice, Department of Corrections
Lex McCulloch – Juvenile Justice, Department of Corrections
Cheryl Varnon - Youth Legal Service
Karen Ho - Director Policy and Legislation, Department of the Attorney General
Gordon Cole - Aboriginal Justice Agreement, Department of the Attorney General
Acting Superintendent Lawrence Painia – Western Australian Police DPP Liaison
Saune Stack and Caroline Petraboni - Department of Public Prosecutions
Peter Collins – Senior Counsel Aboriginal Legal Service

End