

Review of the YOA and the CCPA
Legislation, Policy and Criminal Law Review
Department of Attorney General and Justice
GPO Box 6
SYDNEY NSW 2001

Dear Sir/Madam

Enclosed herewith is a submission in relation to the Government's review of the Young Offender's Act and the Children (Criminal Proceedings) Act 1987).

Yours sincerely,

Dr Don Weatherburn
Director
12/12/11

Submission on the Young Offenders' Act (1997)

Background

The main problems

There are three fundamental problems with the Young Offender's Act (YOA). The first is its implicit assumption that contact with the court system is inherently criminogenic. The second is its implicit assumption that, left to their own devices, most juvenile offenders coming into contact with the justice system will desist from offending of their own accord. The third is the notion that a YJC is a sanction intermediate in severity between that of a police caution and that of a court appearance. The first two assumptions are false (see below). The notion that YJCs are a sanction is misconceived.

The first two problems have prompted a 'hands off' approach to juvenile offending, the worst manifestation of which is that Government agencies do not generally become involved with young offenders until they receive a supervised order from the Children's Court. This 'late stage' intervention approach flies in the face of everything we know about the best approach to reducing juvenile re-offending. The notion that referral to a YJC is a sanction one step up in severity from that of a police caution, on the other hand, has artificially constrained the use of a very well regarded facility for building public confidence in the administration of justice. In what follows I explore these issues in greater detail.

The assumption that most juvenile offenders spontaneously desist

The consultation paper contends that most juvenile offenders desist from offending without being sanctioned by the court system or placed in any form of rehabilitation program. This is undoubtedly true. *It does not follow, however, that most juveniles coming into contact with police and courts will desist* without extensive or intensive intervention. Juveniles arrested by police are *not* a representative sample of all juvenile offenders. They tend to be among the more persistent of offenders (which is why they get caught). Bureau research has shown that 42 per cent of those cautioned and 58 per cent of those referred to a youth justice conference are reconvicted of a further offence within five years (Vignaendra & Fitzgerald, 2006). The risk of re-offending among juveniles who have received several cautions or conferences is even higher (Lind, 2011).

The assumption that contact with the court system is criminogenic

It has occasionally been suggested that contact with the formal criminal justice system (i.e. referral to court) increases the risk of juvenile re-offending. This notion originates from Labeling Theory (Lemert, 1972), according to which, social rituals that stigmatize offenders (e.g. appearance in court) prompt them to identify as a deviant or, in Braithwaite's (1989) terms, to adopt deviance as a 'master status'. This theory is often used as a justification for

diverting young offenders away from court. There is no evidence, however, that contact with the juvenile court system is inherently criminogenic. Studies that control for prior risk factors (e.g. age, prior criminal record) generally find little or no difference in reconviction rates among juvenile offenders dealt with by the court system and juvenile offenders referred to some court diversionary scheme, such as conferencing (McGrath, 2008; Smith & Paternoster, 1990).

A court appearance may not be any more effective than a police warning or caution in reducing the risk of further offending but courts have many advantages over police when it comes to balancing the often competing interests of young offenders and the broader community. The main reason for keeping juvenile offenders out of the court system is that courts are not the most cost effective or efficient way of dealing with juvenile offenders who commit minor offences and who do not have a significant criminal record. Such cases are arguably best dealt with (as they currently are) via a warning or caution (more on this below). *The same is not true of juvenile offenders who have accumulated several contacts with the criminal justice system (warnings, cautions or conferences).*

The assumption that YJCs reduce re-offending

Although the State Plan seeks to reduce re-offending, reducing re-offending is not one of the objects of the YOA. Indeed, the only reference to re-offending appears in section 34 of the Act, which states that measures for dealing with children who are alleged to have committed offences [should] provide the child with developmental and support services that will help the child overcome the offending behavior.

Some of these measures are implemented in the course of YJCs (Taussig, 2011). There is little international evidence, however, that restorative justice programs reduce the risk of re-offending (Smith & Weatherburn, 2011). Luke and Lind (2002) found lower rates of reconviction among juvenile offenders dealt with by a YJC than by a similar group of juvenile offenders referred to the Children's Court. Luke and Lind (2002), however, were not able to rule out the possibility that the effects they observed were attributable to pre-existing differences between the conference and court groups in their risk of further offending. More recent and more rigorous research on Australian samples (Smith & Weatherburn, 2011) comparing carefully matched samples of juvenile offenders dealt with either via YJC or via the Children's Court found no difference in the likelihood of re-offending, the seriousness of re-offending, the time to re-offend or the frequency of re-offending.

The YOA and best practice in juvenile justice intervention

In the last ten years a number of programs have been shown to reduce the risk of juvenile re-offending (Aos et al. 2006). Sophisticated risk assessment tools (e.g. the YLS-I) have also been developed to identify young people at high risk of re-offending and the factors (criminogenic needs) that need to be changed to reduce the risk of re-offending. These programs and tools ought to play a central role in the Government's response to juvenile offending. However the YOA provides no framework for this.

Police and YJC conveners are not qualified to carry out proper risk assessments or to make appropriate referrals for treatment and rehabilitative support. Warnings, cautions and YJCs are, in any event, not appropriate devices through which to assess the risk of further offending and the measures that might be needed to reduce that risk. These assessments and

determinations should be made by the Children's Court. Only in that context is it possible to ensure that the obligations and burdens placed on the young offender in the interests of rehabilitation are appropriate given the nature of any proven offending and the prior history of the offender. Only in that context, in other words, is it possible to properly balance the sometimes competing interests of the young offender and those of the wider community.

There are many ways in which a scheme of this type might be realized but one approach would be to ensure that all juvenile offenders meeting certain specified risk of re-offending criteria (e.g. three warnings or cautions within some specified period) are referred to the Department of Juvenile Justice (DJJ) for risk/needs assessment and placed before the Children's Court. The Court could then determine on advice from DJJ and the child's legal representative whether any formal intervention is warranted and, if so, what form that intervention should take. The suite of interventions offered to the court, however, should be limited to those that have been shown to be effective in reducing juvenile re-offending, whether in Australia or some similar context overseas. Given the Government's commitment to evidence-based policy it may be worth establishing a system of accreditation for rehabilitation programs to ensure those on offer comply with best practice in relation to juvenile rehabilitation.

The future of warnings, cautions and conferences

A large proportion of juvenile offenders (though not the majority) will have only one or two contacts with the criminal justice system and then desist. Many others will be found to be at low risk of re-offending after a formal risk assessment has been carried out. It would be a waste of scarce resources to refer low risk non-serious young offenders to court or to place them on a rehabilitation program. There is ample justification, therefore, for preserving the current system of warnings and cautions for young offenders have not committed a serious offence and are judged not to be at significant risk of reoffending.

The situation as far as the YJC scheme is concerned is rather different. The YOA conceives of YJCs as sanction intermediate in severity between a police caution and referral to a court (although courts can refer a young offender to a YJC). But YJCs are not a type of sanction. Offenders elect to attend a YJC, they are not forced to attend as punishment for offending. The outcomes of conferences range from a simple apology to substantial restitution (Taussig, 2011). Properly understood, YJCs are a device through which juvenile offenders can express remorse, apologize to victims and make amends for their offence or offences. Willingness to participate in a YJC ought to be a factor that prosecuting authorities can take into account when deciding how to proceed in relation to an alleged case of juvenile offending. It ought also to be a factor that courts take into account when deciding what sanction to impose on a young offender. It ought not to be thought of as a sanction, let alone one intermediate in severity between a caution and a court appearance.

Victims of crime who participate in YJCs generally express considerable satisfaction with both the process and the outcome (Trimboli, 2000). Given this and the arguments advanced in the preceding paragraph, there is no reason not to make YJCs more widely available. Except where the offence concerned is very serious (e.g. involves an offence excluded from the current YJC scheme), involves no identifiable victim (e.g. a drug offence) or involves a victim who does not want to participate in a YJC, all young offenders ought to be given an opportunity to participate in a YJC. As already noted, prosecuting authorities should take willingness to participate in a YJC into account when deciding whether or not to refer a

young offender to court. Courts should take willingness to participate in a YJC into account when deciding what penalty to impose on a young offender.

Reform of the YOA

The legislative framework

The YOA gives too little weight to offender rehabilitation and too much weight to restorative justice. Our understanding of juvenile offending has changed dramatically in the 14 years since the YOA was passed, in ways that suggest a need for significant change to the legislative framework underpinning juvenile justice. The four most important of developments have been:

1. Recognition that a substantial proportion of juvenile offenders coming into contact with the criminal justice system will re-offend within five years
2. The failure to find any consistent evidence that restorative justice procedures reduce the risk or seriousness of juvenile re-offending
3. The discovery of a range of other interventions that do reduce the risk of juvenile re-offending
4. The development of new tools through which to assess the risk of juvenile re-offending

The YOA needs to be reformed so as to give a higher priority to offender risk assessment and rehabilitation.

Objects of the YOA

The objects of the YOA should be revised so that they are framed in terms of the *outcomes* which the Act seeks to achieve, not (as at present) the mechanisms through which these outcomes are being pursued. The Act should seek to:

- Reduce the risk, frequency and seriousness of juvenile offending
- Strengthen public and victim confidence in the response of the criminal justice system to juvenile offending
- Provide offenders with an opportunity to apologize to the victims of their offences and make restitution for the harm they have inflicted

Offences covered by the YOA

YJCs are only meaningful where there is an identifiable victim. Efforts to employ victim representatives where an offence has no readily identifiable victim are contrived and only serve to undermine the integrity of the YJC process. YJCs should be restricted to offences that have an identifiable victim. The current exclusion of all offences under the Crimes (Domestic and Personal Violence) Act (2007), however, is too broad. At the very least, breaches of AVOs should be included.

Warnings and cautions

The risk of re-offending increases markedly with the number of prior contacts with the criminal justice system. The odds of a further conviction within three years are more than 1.7 times higher for juvenile offenders who have had two or three previous contacts (warnings or cautions) with the criminal justice system than for juvenile offenders who have had none. The odds of a further conviction within three years are more than twice as high for juvenile offenders with four or more previous contacts than for juvenile offenders who have none (Lind, 2011).

The critical issue in considering what constraints to impose on the giving of warnings or cautions is not so much the nature of the current offence but the young offender's past history of offending. An impulsive act of violence by a 17 year old offender who had no prior history of offending is less a matter of concern than a theft offence committed by a 14 year old who has a significant history of offending. Given the importance of early intervention, it would seem prudent to impose a general restriction on the total number of warnings and cautions a juvenile offender may receive. Without foreclosing debate on the issue, a useful starting point for discussion would be a limit of three warnings or cautions within five years. Past this point young offenders should be referred for formal risk assessment and possible placement on an intervention program.

Youth Justice Conferences

Under the YOA, if the investigating officer is of the opinion that it is not in the best interests of justice that a warning or caution be given, the officer can refer a matter to the a specialist youth officer (SYO). For reasons explained earlier, it is not clear why one would restrict YJC participation to those circumstances where a warning or caution is deemed 'not in the best interests of justice'. As noted earlier, the option to participate in a YJC should be open whenever (a) an offender admits committing an offence that involves an identifiable victim (b) the victim wishes to participate in a YJC and (c) the offence is not serious.

Conference conveners are not trained in risk assessment, counseling, drug treatment or in the delivery of any other form of treatment or rehabilitation program. YJCs should not be used as an opportunity to assess the risk of re-offending or prescribe a course of action designed to reduce that risk. They should be treated solely as a forum within which to discuss offending, its impact on the victim(s) and the ways in which an offender might make amends or restitution for offending.

Summary

New legislation should be developed gives equal weight to rehabilitation and restorative justice and which, in pursuit of the first aim:

- Establishes a threshold for screening and risk-needs assessment
- Creates a mechanism through which young offenders judged to be at risk of re-offending can be referred for treatment and/or support that has been matched to their criminogenic needs (i.e. factors implicated in offending)
- Ensures that the treatment and support on offer conforms to best practice (i.e. has been shown on the basis of research to reduce the risk and/or seriousness of re-offending).
- Facilitates and encourages interagency cooperation and non-Government sector involvement in the delivery of treatment and support

- Ensures that the obligations and constraints imposed on young offenders in the interests of rehabilitation are proportionate to the seriousness of any offence(s) proved against them.

References

Aos, S., Miller, M., & Drake, E. (2006), Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs, and Crime Rates. Olympia: Washington, State Institute for Public Policy.

Braithwaite, J. (1989), Crime shame and reintegration. Cambridge: Cambridge University Press.

Lemert, E. (1972), Human Deviance, Social Problems, and Social Control (2nd ed), Prentice-Hall, Englewood Cliffs, New Jersey.

Lind, B. (2011), Screening cautioned young people for further assessment and intervention, Crime and Justice Bulletin 149. Sydney: NSW Bureau of Crime Statistics and Research.

McGrath, A., 2008; The effect of diversion from court: A review of the evidence. Psychiatry, psychology and the law 15(2), 317-339

Smith, D.A., & Paternoster, R. 1990, Formal processing and future delinquency: deviance amplification as selection artifact, Law and Society Review, 24, 1109-1131

Smith, N. & Weatherburn, D. (2011), Youth justice conferences v the Children's Court: A comparison of re-offending, unpublished report. Sydney: NSW Bureau of Crime Statistics and Research.

Taussig, I. (2011), Youth justice conferencing: Participant profile and conference characteristics, unpublished report. Sydney: NSW Bureau of Crime Statistics and Research.

Trimboli, L. (2000), An evaluation of the NSW Youth Conferencing Scheme. Sydney: NSW Bureau of Crime Statistics and Research.

Vignaendra, S. & Fitzgerald, J. (2006), Re-offending by young people cautioned or conferenced, Crime and Justice Bulletin 103. Sydney: NSW Bureau of Crime Statistics and Research.