Youth Street Rights
A Policy & Legislation Review

Tim Anderson, Steve Campbell & Sheree Turner

University of Technology Sydney's
Community Law and Legal Research Centre
and the Youth Justice Coalition, Sydney
March 1999

Contents

Acknowledgments 5

1. Introduction 6

2. Summary of Findings 9
- 2.1 Application of human rights standards 9
- 2.2 Young people and crime 9
- 2.3 Police Youth Policy 9
- 2.4 New Laws -- the Children (Protection and Parental Responsibility) Act 10
- 2.5 New laws -- the Detention After Arrest Act 10
- 2.6 New laws -- the Young Offenders Act 11
- 2.7 New laws -- the Police and Public Safety Act 12
- 2.8 Observing the new laws 13
- 2.9 Conclusion: Young people's rights and responsibilities 13

3. Methodology 15

4. Previous studies 18

5. The International Recognition of Youth Rights 36
- 5.1 Rights and Responsibilities 36
- 5.2 Relevant Sections of the Convention on the Rights of the Child 38
- 5.3 Some Australian Responses to CROC 39
- 5.4 How Relevant Are International Human Rights Treaties? 41

6. Young People & Crime 44
- 6.1 What do we know? 44
- 6.2 Policing and Juveniles 45
- 6.3 Perceptions of Juvenile Crime 47

7. Police Youth Policy 50
- 7.1 The 1995 Police Youth Policy 50
- 7.2 Zero Tolerance Policing 51
- 7.3 Policing by Security Guards 53
- 7.4 Conclusion 53

8. New Laws Affecting Young People in Public 55

8.1 Children (Protection & Parental Responsibility) Act 1997 55
8.2 Detention After Arrest Act 1997 60
8.3 Young Offenders Act 1997 64
8.4 Police and Public Safety Act 70

9. Observing the New Laws 78

9.1 Case Study Areas 78
9.2 Overview of the Case Study Areas 79
9.3 The Consultation Process 79
9.4 Limitations of the Consultation Process 80
9.5 Local Responses to Social Issues 81
9.6 The Policing of Young People 82
9.7 The Children (Protection and Parental Responsibility) Act 84
9.8 The Detention After Arrest Act 86
9.9 Demanding Identification from Underage Drinking Suspects 87
9.10 The Police and Public Safety Act 87
9.11 The Young Offenders Act 90
9.12 Summary Findings 91

10. Young People's Rights and Responsibilities 93

Bibliography 99

Appendix: *Convention on the Rights of the Child* (1989) 103

Acknowledgments

Thanks to the Youth Justice Coalition and the UTS Community Law and Legal Research Centre for their joint sponsorship of this report. The report was funded by the Law Foundation of New South Wales, and special thanks are due to Steven Reynolds and Simon Rice for their time and interest in the project. This report, however, does not necesarily reflect the views of the Board of the Law Foundation of New South Wales.

The project (which included a booklet on youth rights and new laws, as well as this report) was co-supervised by Janet Loughman for the Youth Justice Coalition, and Peter O'Brien, for the UTS Community Law and Legal Research Centre. In addition, the authors periodically sought advice from a number of people in a broader Reference Group. For comments on drafts of this report, special thanks are due to Associate Professor David Dixon, Janet Loughman and Louise Boon Kuo. Thanks also to Louise Blazejowski, Kirrily Marsden and Jane Sanders for their support during this project. Of course, despite all this advice and support, the authors take full responsibility for the final report.

We would also like to thank the following groups and individuals, who we consulted while compiling this report: Ballina Koori Youth Workers, Ballina Legal Aid, Ballina Youth Service, Ballina Youth Activity Centre, Ballina Youth Support Workers, Barnardos Streetwork Program, Buena Vista Group Home, Burnside (Cabramatta) Adolescent Legal Service, Canterbury City Council, Canterbury Multicultural Youth Health Service, Canterbury Youth Accommodation Service, The Drum Youth Café (Burnside), Campbelltown, Durri Aboriginal Medical Service (Kempsey), JPET Ballina, JPET Orange, Many Rivers Aboriginal Legal Service, Marrickville Community Legal Centre, Northern Rivers Community Legal Centre, Orange Youth Refuge, Orange City Council Youth Crime Prevention Officer.

1. Introduction

This report is a policy and legislation review of developments in youth street rights and the relevant police powers, since the *Kids in Justice* (Youth Justice Coalition) report of 1990.

The authors have carried out this review as part of the 'Youth Rights and Responsibilities Project', organised by the University of Technology's Community Law and Legal Research Centre, in conjunction with the Youth Justice Coalition, and with financial support from the Law Foundation of New South Wales.

Kids in Justice was backed by a coalition of community sector youth advocates and youth workers, and was effectively a 'youth impact statement' on the totality of the criminal justice system in New South Wales. This report, however, focuses on the rights and responsibilities of young people in public space and at the edges of the legal system. We abbreviate this focus to 'youth street rights', and have already produced a booklet by this name. This booklet reviews the several relevant new laws created in 1997 and 1998, alongside existing law, to provide a guide to legal rights in such areas as:

- the use of public space
- identification and questioning by police
- police searches
- police warnings and cautions, and
- arrest and detention

The 1990s have seen important national and international developments in youth rights. On 17 December 1991 the Convention on the Rights of the Child (CROC) was ratified by the Australian Government and by about that time CROC had been signed and ratified by all the nations on earth, except the USA and Somalia (ALRC 1997: 75 & 15). This is an extraordinarily high level of acceptance for any treaty, and reflects both a universal acceptance of this formulation of the rights of young people -- those under eighteen -- and the perception by a wide range of political regimes that there is a great popular legitimacy to be gained by identifying with the rights of young people and with CROC.

In Australia, however, there have been contradictory trends in governmental recognition and acceptance of basic human rights principles, especially regarding young people. In the federal sphere, an Australian Labor Government responded positively, if slowly, to the United Nations Human Rights Committee's finding that the Tasmanian Criminal Code discriminated against homosexual men (Toonen v Australia (1994) Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992). The offending law (Sections 122 & 123 of the *Tasmanian Criminal Code Act* 1924) was eventually repealed by the Tasmanian Parliament, after federal pressure from a *Human Rights (Sexual Conduct) Act* 1994, which prohibits any arbitrary interference with the right to sexual privacy. On the other hand there was a strong reaction when, in a deportation case, the High Court of Australia read into administrative law the CROC requirement:

> [that] in all actions concerning the children .. the best interest of the child shall be a primary consideration (Article 3)

The High Court affirmed that:

> Australia's ratification of the Convention can give rise to a legitimate expectation that the decision-maker will exercise that discretion in conformity with the terms of the convention (Teoh v R 1995, Mason & Deane 183 CLR 273)

Two successive federal Governments declared their intention to legislate against this common law recognition of rights in international law. A Senate Inquiry into the latest incarnation of this legislative intent (*Administrative Decisions (Effect of International Instruments) Bill* 1997) produced both conservative and majority Labor support for the Bill (Senate Legal and Constitutional Committee 1997). The Bill would have the effect of blocking all common law recognition of Australia's human rights obligations, unless there were express parliamentary authorisation, by legislation.

In a similarly contradictory fashion in New South Wales, on the one hand, bipartisan support was mobilised for a law which seeks to "provide an alternative process to court proceedings for dealing with children who commit certain offences" (*Young Offenders Act* 1997, s. 3) consistent with treaty obligations (CROC Article 40 (3)(b)).

On the other hand, a roundly condemned 1994 law (*Children (Parental Responsibility) Act* 1994) which allowed police to remove young people under 16 from public places was substantially replicated three years later (*Children (Protection and Parental Responsibility) Act* 1997). These successive Acts contravene Australia's international human rights obligations (*Convention on the Rights Of the Child* Article 15) as they deny children freedom of association and freedom of peaceful assembly. A State Government commissioned report (Evaluation Committee 1997: 22) said as much.

While the legislative defiance of human rights commitments is regrettable, we say these contradictory trends reflect genuinely different and contradictory views on the rights and responsibilities of young people. Identification of these conflicting views is therefore a major theme of this report.

We begin our report by setting out our methodological approach, which is a fourfold

- interest group analysis,
- human rights audit,
- identification of the barriers to justice and
- a conceptualising of young people's rights and responsibilities.

Included in these steps is a particular focus on the impact of policy and legislation on children and young people from Aboriginal and non-English speaking backgrounds, as previous studies have suggested a disproportionate impact on these groups of new initiatives in policing. We then review some of the significant and relevant studies, in recent years. Instead of integrating these studies, which may have been more analytically satisfying, for convenience and accessibility we have cited them separately like a list of brief book reviews. Next, we consider the general recognition of human rights in the Australian socio-legal system, the main relevant features of CROC, and some Australian responses to CROC.

An outline of young people and crime looks at what is often popularly cited as the basis for focussing on or attempting to redefine young people's rights and responsibilities. Police youth policy, responding to the divergent trends mentioned above, is also considered.

We then embark on a review of several significant new laws, introduced in 1997 and 1998. These either exclusively or significantly alter the legal recognition of young people's rights. They reflect a particular mix of paternalism, protection, intolerance and maturity. We consider each Act in turn.

Finally we report on the several consultations we carried out, in urban and rural New South Wales, to see the initial impact of the new laws. Ours is of necessity only a provisional and perhaps an indicative view, but one important in completing the policy review process. We draw on this in presenting our final assessment of the rights and responsibilities of young people, and the role of the various social forces which seek to construct and reconstruct these rights and responsibilities.

Tim Anderson
Steve Campbell
Sheree Turner
for the University of Technology Sydney's
Community Law and Legal Research Centre,
and the Youth Justice Coalition

2. Summary of Findings

This chapter comprises a summary of the findings from each substantial section of this report.

2.1 Application of human rights standards

Correctly viewed, rights do not compete with responsibilities, rights reinforce social responsibilities. A person's right to life, for example, imposes a responsibility on all others not to harm that life. And it is fundamental to the integrity of a rights based system that rights must be universal and inalienable. Rights must be inviolate and apply to all. They cannot be diminished by a person's individual misconduct, or an individual's failure to respect the rights of others -- this simply allows society to correct that breach of responsibility, not to deny the rights of an individual. Attempts to 'link' individual rights with individual responsibilities must be fundamentally corrosive of the fabric of universal human rights, as the stress on human rights as intrinsic to all people is a powerful socialising force.

Rights and responsibilities are complementary, and must proceed together rather than in competition. A young person, who is not allowed to make simple responsible and informed choices in ordering her or his life, will not develop a sense of responsibility. Denied rights, a young person cannot become responsible. The notion that children's and young people's rights and responsibilities must advance together, that both are best underpinned by a system of recognised rights, and that at times their responsibilities (but not their rights) may be shared (by parents, carers and, at times, the state), runs through this report.

There has been an extremely high level of ratification of the *Convention on the Rights of the Child*, and this reflects a near universal acceptance of this treaty's formulation of the rights of children and young people, and the perception by almost all political regimes that there is much to be gained by identifying with the rights of young people, and with CROC.

2.2 Young people and crime

Children and young people are generally not highly overrepresented in reported offending groups, yet they are significantly overrepresented in groups targeted by police, largely because they are significantly visible and occupy public space. While undetected petty offending rates may be high, this reinforces the widely accepted need (CROC Articles 37 (b), 40 (3)(b)) to divert children and young people so far as possible from formal legal processes, rather than adopt an intolerant approach which would seek to detect and prosecute every possible offence.
Indigenous children and young people are extremely over-represented at all levels of the juvenile justice system. Many law and order policies in recent times, including substantial police powers, have been directed at Indigenous children and young people, with little justification.

2.3 Police Youth Policy

The Police Youth Policy Statement 1995-2000 is welcome in its policy thrust and acknowledgment of some of the issues surrounding the policing of young people. However it lacks clear detail on the accountability of police in relation to breaches of children and young

people's rights, and it does not acknowledge their rights in sufficient detail. Police often demonstrate a poor understanding of the rights of young people. However it is hard to expect police officers to be aware of and to be able to fully respect children and young people's rights when their Minister is unaware of them (Cameron and Scott 1998). We suggest that the principles of the *Convention on the Rights of the Child* relevant to policing be incorporated into the Police Youth Policy, and that these principles be additionally distributed and explained (in relation to each Act and in operational instructions) to every police officer in the NSW Police Service.

There is also a need to regulate the powers of security guards, who play an increasingly important role in young people's lives, as shopping malls grow and thrive. The youth-security guard relationship needs to be conditioned according to an understanding of CROC principles, just as does the youth-police relationship.

The Police Youth Policy has been repeatedly undermined by administrative and legislative changes, such as the partial acceptance of notions of 'Zero Tolerance', or selective 'blitz' policing, by the *Children (Protection and Parental Responsibility) Act* 1997, and the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998, by threats to further restrict bail under the *Bail Act* 1988, and by proposals to remove the right to silence (NSW Law Reform Commission 1998). Police youth policy cannot be effective in respecting the rights of children while this onslaught of populist 'law and order' continues to corrode respect for the rights of young people.

2.4 New Laws -- the Children (Protection and Parental Responsibility) Act

This Act was said to hold parents responsible for supervising offending children, and to give some additional powers to police to protect children from harm. However with criticism from almost every quarter, including the United Nations (Committee on the Rights of the Child 1997: 16) -- yet supported by cynical political interests, concerned with securing the 'law and order' vote -- the *Children (Protection and Parental Responsibility) Act* 1997 survives in a nearly ineffective yet still dangerous form. It is a national and international embarrassment, and should be repealed.

The local crime prevention planning requirements, which have been grafted onto this Act, deserve support where they work with genuine community input and where they provide a chance for young people to be heard in the process. However the essential elements of the law

- creating the offence of allowing a teenager, supposedly under a parent or guardian's control, to commit an offence, and
- providing police in 'operational areas' with effective preventive detention powers over all those under the age of sixteen

clearly violate human rights obligations and should be repealed. Useful crime prevention schemes do not need a home in this offensive legal framework.

2.5 New laws -- the Detention After Arrest Act

The *Crimes Amendment (Detention After Arrest) Act* (1997) and its Regulations were designed to provide police with custodial time to pursue interrogation of suspects, yet add some safeguards in the way of clearer rights for those detained. However the Act breaches human rights commitments, by facilitating extended periods of custody, rather than ensuring

minimal periods, as required by the *Convention on the Rights of the Child*. Custody rights have been introduced but are weakly entrenched and are formally subordinate to police administrative requirements. Further, there is now a threat to children and young people's rights from a Government ordered review of the right to silence. Finally, the failure to regulate searching and strip searching under the Act enhances a pre-existing degrading treatment and an arbitrary interference with privacy, which is also in breach of human rights standards and commitments.

To meet international standards for children and young people

- the substantial rights under the *Detention After Arrest Act* should be codified under a separate Act such as a Bill of Rights Act,
- a lesser maximum period of detention must be prescribed for children under eighteen
- the minimal custody requirement from CROC should be added to the *Detention After Arrest Act* -- that children and young people should be held in custody "only as a measure of last resort and for the shortest appropriate period of time"
- the Act should strictly regulate searching and strip searching of young people, setting up a warrant type procedure, with appeal rights, to make strip searching exceptional rather than routine.

2.6 New laws -- the Young Offenders Act

The *Young Offenders Act* 1997 is based on sound principles and has adopted many of the principles of the *Convention on the Rights of the Child,* as well as some recommendations on the treatment of indigenous children, from the *Royal Commission into Aboriginal Deaths in Custody* (Johnston 1991). The Act's implementation of a hierarchy of diversionary measures, such as warnings, formal cautions and family conferences is to be applauded. However in our consideration of the warnings and cautions procedures, we have a number of concerns about implementation.

- There is a great gap in readily available legal advice (particularly in rural areas) to help children make informed decisions about acknowledging guilt, and thus accessing the diversionary measures. Properly funded legal aid services are essential for protecting the rights of the many children from low income and disadvantaged backgrounds, who may be faced with decisions about formal cautions. The Legal Aid Commission's telephone advice line, set up in December 1998, is inadequate for this purpose.
- We have real concerns that Aboriginal children in particular, but also children from some non-English speaking backgrounds, will continue to 'progress' rapidly up the hierarchy of measures, and thus miss out on the promise of so far as possible avoiding formal legal procedures, as required by Articles 37(b) and 40(3)(b) of the *Convention on the Rights of the Child*. Close scrutiny of the operation of the Act is required to detect this, and to ensure measures are taken to deal with discriminatory treatment.
- Police training in cross-cultural sensitivity is essential to the non-discriminatory application of the benefits of this Act. The potentially discriminatory application of this Act must be monitored.
- Community ownership of diversionary measures, along the lines suggested by Indigenous advocates, should be a key goal of this Act. For example, with some basic provision for the protection of rights, indigenous communities should be given the power to deal with indigenous young offenders themselves, within their own communities.

2.7 New laws -- the Police and Public Safety Act

This Act is a composite law, primarily containing some 'anti-gang' dispersal powers and additional police powers to conduct wholesale (though regulated) searches for knives. However there are two main areas of human rights concern. First, the 'stop and search' power is drawn far too wide. The redefinition of "reasonable grounds" for suspicion, as encompassing "the fact that a person is present in a location with a high incidence of violent crime", is an artificial contrivance, and constitutes an "arbitrary interference" with a person's liberty and privacy, proscribed by Articles 9 and 17 of the *International Covenant on Civil and Political Rights* and Articles 16 and 37(b) of the *Convention on the Rights of the Child.* Location in a certain general area, in ordinary circumstances, cannot be a specific or particular enough reason to suspect a person of committing an offence. We therefore say these provisions of the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998 -- now Section 28A(3) of the *Summary Offences Act* 1988 -- violate the above human rights obligations. This section should be repealed. We note also that, soon after proclamation of this law, police began routine and random knife searches (in addition to other routine searches) on groups of young people in certain public places.

Second, the new law in parts of its 'anti-gang' provisions, seeks to proscribe free public gatherings, with no actual threat from those people. This section is effectively aimed at young people. Unreasonable and unjustified interference with a child's or an adult's freedom of association and assembly would breach both Article 22 of the *International Covenant on Civil and Political Rights* (1966) and Article 15 of the *Convention on the Rights of the Child* (1989). While parts of the new 'move on' law apply to those obstructing or harassing others, other parts are more arbitrary, and rely of the subjectivity of third parties, rather than any real conduct of the supposedly offending child or adult. We say the subjectivity of this test is so vague as to be arbitrary, and that these provisions of the *Crimes Legislation Amendment (Police and Public Safety) Act* (1998) -- now Section 28F(1)(c), 28F(2) and 28F(8) of the *Summary Offences Act* 1988 -- violate the above human rights obligations. These sections should be repealed.

The 'anti-gang' approach, in this case, parallels a broader failure to address youth policy as an integrated process. The knife issue was in many ways a peripheral and incidental issue in this whole 'anti-gang' law making process. Where was the consideration of youth employment, youth services and facilities, youth education and the sharing of public space in the responses to demands for the 'move on' powers? The public debate was underscored by a poor understanding of rights, and repeated attempts by the mass media, police and occasionally politicians, to portray arguments of human rights as little more than special interest claims. Young people's rights were trivialised in a rush to enforce protectionism and paternalism.

To meet international standards for children and young people

- Section 28A(3) should be repealed; its only purpose is to redefine "reasonable grounds" in terms of general geography, so that searching for knives may be carried out in an arbitrary and 'street sweeping' manner
- those parts of the Act which seek to proscribe free public gatherings, where there is only an apprehension from a third party but no actual threat [28F (1) (2) and (8)], should be repealed; the subjectivity of the tests in these parts is so vague as to be arbitrary.

2.8 Observing the new laws

Many youth workers felt that increasing legal intervention in the lives of young people simply compounded the problems which they faced. With the exception of elements of the *Young Offenders Act* and elements of the *Detention After Arrest Act,* youth workers and young people opposed new laws which increased police intervention in the lives of young people. Laws such as the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998, new powers to demand identification under the *Summary Offences Act*, and the *Children (Protection and Parental Responsibility) Act* were seen as inappropriate responses to the needs of young people.

In all the areas that we visited, the quality of police-youth relations was poor both before and after the implementation of the laws. In three of the case study areas, Orange, Campbelltown and Canterbury, police-youth relations were seen to be on the decline. In Ballina, where some aspects of police-youth relations were seen to be improving, this was because a significant amount of intervention had been taken over by the youth workers, indicating a shift in what was seen to be 'police business'.

There was consensus, amongst the youth workers and young people we spoke with, that police misused the power that they had, and in the most inappropriate ways. Many young people did not trust police nor did they wish to interact with them. Young people reported unacceptable levels of, and in some instances illegal, police intervention. Continuous intervention made young people feel criminalised, outcast and unworthy. Young people who were the victims of crime would be less likely to go to the police for help because of their experiences. High visibility, high levels of public space frequenting and traditional police targeting were common additional factors for many Aboriginal youth.

In this report we have documented anecdotal evidence of groups of young people who have poor interactions with the police and who complain of being mistreated by them. They have also reported an escalation in police interventions, and put this down to changes in the adult community and the perceptions they had of young people, rather than an escalation in youth crime rates or young offending. We also note with concern the greatly increased arrest rate for juveniles in 1998 (Nixon 1998). This bears out some of our worst fears about the new laws, and the climate in which they have been created.

2.9 Conclusion: Young people's rights and responsibilities

Young People's Rights have been poorly understood and often ignored in the policy and legislative process in New South Wales. The populist notion of rights and responsibilities effectively presents rights as some sort of privilege extended by society, a privilege which may be withdrawn if particular individual responsibilities are regarded as not being met. However, this view stunts the development of responsible adult behaviour in young people and contributes to social irresponsibility by fostering a general disrespect for the rights of others. It also ignores the delicate balance between the rights of citizens and the potentially dangerous power of the state.

Legislation such as the ill-considered *Children (Protection and Parental Responsibility) Act* 1997 and the subsequent *Crimes Legislation Amendment (Police and Public Safety) Act* 1998

demonstrate that there has been a disregard for the rights and an overemphasis on the responsibilities of young people. This has led to increased police powers, increased intervention, increased penalties, and a greater reliance on institutionalisation. Unfortunately, much of the goodwill of restorative justice, including that embodied in the *Young Offenders Act* 1997, has been swamped by the law and order wave. One effect of this has been the dramatic surge in the arrest rate for juveniles, despite the proclamation of the *Young Offenders Act* and its system of warnings and cautions, which was expected to reduce the arrest and charging of juveniles. This seems to be the result of the confusion of genuine 'crime prevention' measures with draconian police 'street sweeping' measures, under law and order rhetoric.

If legislators and policy makers had the will to support and enforce youth rights, in the course of promoting fair and effective legal processes, we would propose the following steps.

Step 1: Recognise, accept and implement the provisions of the Convention on the Rights of the Child. The state government should formally agree to share the federal government's treaty obligation to report periodically to the UN Committee on the Rights of the Child.

Step 2: Codify in law the provisions of the Convention on the Rights of the Child, preferably through a *Bill of Rights Act*. In addition, the formulation of legal principles which apply to children in criminal proceedings, in the *Children (Criminal Proceedings) Act* 1987, should be amended so as to be consistent with CROC.

Step 3: Appoint properly resourced human rights monitors to provide guidance on the policy and legislative process. The first level of monitoring should be in the office of Parliamentary Counsel, where legislation is drafted and reviewed for all parties and members of parliament. At Governmental level a similar monitoring process should be assigned either to counsel in the office of the Premier, or the office of Attorney General.

Step 4: Organise education on the rights of the child. We urge Government and community groups to prepare careful programs of education on the rights of the child, particularly in view of the poor understanding of the rights of the child and the weak culture of human rights in this country. The New South Wales Police Service should also undertake to educate all its members on the provisions of both the *Convention on the Rights of the Child* and the *International Convention on Civil and Political Rights*, and to review its policies to ensure they are consistent with these principles.

3. Methodology

In considering the existing legal framework for recognising the rights of children and young people -- and the contributions of new policy, law and practice -- we proceed in four ways.

First, we review the history of each new step, observing the role of particular interests in the formulation of policy, law and practice. For example, we look at the role of local councils in developing the *Children (Protection and Parental Responsibility) Act*. We also consider the roles of police, property owners, youth workers and advocates, and political parties in formulating new proposals or defending old ones. In other words we consider the differing interest groups that influence the regulation of young people's lives.

Second, we audit new policy, law and practice, using the *Convention on the Rights of the Child* (CROC) as our reference point. To what extent does our regulatory regime match the international minimum standard? Similar audit processes have been carried out elsewhere and some generalised qualifications have been created. For example, looking at possible violations of civil and political rights in the United Kingdom, Klug et al (1996) set up a three part test based on a composite of the *International Covenant on Civil and Political Rights* (1966), on the one hand, and the *[European] Convention for the Protection of Human Rights and Fundamental Freedoms* (1953) on the other. They asked in each case:

- is the violation 'prescribed by law'?
- does it comply with one of the recognised aims of the ICCPR?
- is the violation 'necessary in a democratic society'?

As the European Convention is not relevant to Australia, we have confined our qualifications to those set up by those articles of CROC relevant to youth street rights, that is:

Article 2 non-discrimination,

Article 3 considering the best interests of the child,

Article 5 the responsibilities, rights and duties of parents,

Article 12 the right to be heard,

Article 15 freedom of association and peaceful assembly,

Article 16 no arbitrary or unlawful interference with privacy,

Article 37 no cruel or inhuman treatment; no arbitrary, unlawful deprivation of liberty; and arrest and imprisonment are to be measures of last resort, and

Article 40 due process rights are to be observed including the presumption of innocence, the right to silence and access to justice options other than judicial proceedings and institutional care.

The full text of these articles is reproduced and discussed in chapter five below. Taking into account the qualifications allowed by CROC, and bearing in mind the Australian commitment to this treaty (with just one reservation on 37(c), concerning the segregation of children from

adults in custody, but which is strictly not relevant to this report), we ask: where are there clear breaches, or possible breaches, of this treaty? On the other hand, are there examples of policy, law and practice which match or surpass the standards set by CROC?

Third, we consider the context of youth policy and ask, are there barriers to justice in the area under study? That is, do legislation, policy or social forces, or particular cultural influences, prevent young people accessing their rights or having their rights recognised?

Finally, and once again using the CROC standard, we look at how young people's rights have been conceptualised in our regulatory regime, and we consider how popular perceptions of rights and responsibilities have influenced the policy debate. The starting point for this process, in recent times and in this state, is the *Children (Criminal Proceedings) Act* (1987), which attempted a formulation of just this question, as follows:

> **6 Principles relating to the exercise of criminal jurisdiction**
>
> A court, in exercising criminal jurisdiction with respect to children, shall have regard to the following principles:
>
> (a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,
>
> (b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,
>
> (c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,
>
> (d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,
>
> (e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind.

We endorse (a) to (d) as consistent with CROC, but would amend (e) to better and more firmly establish the widely accepted diminished responsibility of youth (CROC Article 40; Youth Justice Coalition 1990: 2.3) and the need for "minimum appropriate intervention" so as to prioritise "rehabilitation and reintegration into the community" (ALRC 1997: 557). A presumption against institutional care (CROC Article 40; HREOC 1997: 50) should also be built into this section. We therefore say that such a provision should read:

> (e) that the penalty imposed on a child for an offence should be less than that imposed on an adult who commits an offence of the same kind, that all alternatives be exhausted before proceeding to formal trial and that the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time;

Kids in Justice recommended that the *Children (Criminal Proceedings) Act* 1987 should be amended to incorporate the following principles, concerning children's rights and responsibilities:

> (i) that the rationale of the juvenile justice system is that the diminished responsibility of young offenders demands special mechanisms and measures to respond to their offence and situation;

> (ii) that young offenders be encouraged to accept responsibility for their actions; and
>
> (iii) that young offenders should be dealt with in a way that acknowledges their needs and gives them the opportunity to develop in responsible, beneficial and socially acceptable ways (Youth Justice Coalition 1990: 2.4)

We endorse this latter proposal, but would qualify the second point, to pay closer attention to CROC's requirement that children (i) have "the right to prompt access to legal and other appropriate assistance" (Article 37) and (ii) that they "not be compelled to give testimony or to confess their guilt" (Article 40). We also begin with the presumption that we are always dealing with children as people, not simply as 'young offenders'. In the legislation we would use 'children' to refer to all children and young people under eighteen (per CROC) and we would put 'children' in place of 'young offenders'. Thus we would reformulate point two to read:

> (ii) that children be encouraged to accept responsibility for their actions, provided that their right to prompt legal and other appropriate assistance is respected, and that they are not compelled to give testimony or confess their guilt.

We consider in chapter five, and return again at the end of this report, to attempt a more complete answer to this central question: what is the most satisfactory overall formulation of the notion of young people's rights and responsibilities?

4. Previous studies

This section gives an account of most of the major reports and studies on young people's street rights and responsibilities, mostly after the Youth Justice Coalition's 1990 report *Kids in Justice*. For convenience and accessibility, we have kept the summaries separate.

Criminal Justice in North-West New South Wales (1987)

Chris Cuneen & Tom Robb (1987) *Criminal Justice in North-West New South Wales*, Bureau of Crime Statistics and Research, Attorney General's Department, Sydney

Following claims in 1985 in some NSW country towns (particularly Dubbo) that there was a "crime wave", and a breakdown in law and order amounting to a "crisis", the Bureau of Crime Statistics and Research was requested by the Premier to investigate and report on these claims. The 1987 report by Chris Cuneen and Tom Robb looked at the crime and policing statistics and social background of the Orana (western) region. It also considered the critical issues of crime and juvenile justice, and the position of Aboriginal people in the 'law and order' debate.

Cuneen and Robb found that towns in the north west region of the state were not homogenous, but that they did share some common economic infrastructure, and a common racial divide. The proportion of Aboriginal people in Orana towns (including Dubbo, Bourke, Brewarrina, Wellington and Walgett) was greater than most other parts of the state, and Aboriginal people experienced extremely high rates of unemployment, substandard housing, health, and education, and were unusually dependent on social security. They were a "severely disadvantaged" community (35).

On crime rates the study found that there was little evidence of a crime wave in Dubbo, though there had been a small increase in reported crime across the region. While there had been no great increase, reported crime rates were higher in Dubbo than in the surrounding district, but not high compared to the cities (51). On the other hand, Aboriginal people were over-represented more than three times in arrests by police in the Dubbo district. For a number of offences, including assault, assault police and offensive behaviour, they were five times over-represented. The authors considered whether this was due to discriminatory practices by police or to over offending by Aboriginal people, and decided it was probably due to a combination of both (95-98).

The juvenile crime statistics for the region were "remarkably stable" over the period in question, though there were differences within the region. However Aboriginal youth were highly over-represented in the juvenile justice system, and even more so at the level of criminal charges. Aboriginal youth were charged at a rate which was from six times (Dubbo) to forty-six times (Wellington) and even ninety times (Walgett) that of the charge rate for non-Aboriginal youth (144). Research also showed that the use of "cautions" involved "considerable discretion", not often exercised in favour of Aboriginal youth, and that the laying of criminal charges by police was the "preferred method" of dealing with juvenile offending (150).

Cuneen and Robb concluded that there was a long history of police intervention in the lives of Aboriginal people, and that this must be understood to appreciate the "deep underlying hostility" Aboriginal people felt to the police. Some of the western towns had a history of attempts to legally control the local Aboriginal population and, with the breakdown of the old segregation, the "social visibility" of Aboriginal people was central to complaints about law and order (215). Most of the law and order accusations had therefore been directed at Aboriginal people in public space, and particularly at Aboriginal youth. However there had only been a 4% increase in reported crime prior to the alleged "crime wave", yet there was a 30% increase after the allegations. Cuneen and Robb say that only some of this could be due to an actual increase in offending, and that "the majority" was likely due to increased reporting of crime and changes in police practices (such as "crack downs") (219).

Over-representation of Aboriginal people in the criminal justice system could be explained by a combination of higher offending rates and over-policing. Discriminatory policing was enhanced by the high numbers of charges such as assault police, hinder police and resist arrest. Over-policing was also aggravated by particular legislation which increased the focus on Aboriginal people. So 'unlawful assembly' and 'affray' had been used against groups of Aboriginal people. Local government ordinances prohibiting the drinking of alcohol in public places also had a disproportionate impact on Aboriginal people (221). Over-commission of offences and over-policing were not seen as separate issues, but as Part of a continuum (222).

Kids in Justice (1990)

Youth Justice Coalition (1990) *Kids in Justice: a blue print for the nineties*, Sydney

This report was a consumer and community review of the NSW Juvenile Justice System as it stood in 1990. It aimed to address the areas of juvenile crime and social policy, policing, community based programs and detention centres in order to set the agenda for reform in the juvenile justice system through the nineties.

The report researched five key areas: (i) the social context of juvenile crime and juvenile justice, including media, territory and equity, and families; (ii) the 'system' of juvenile justice; (iii) the policing of young people; (iv) community-based correctional programs; and (v) detention centres

Key amongst the report's basic juvenile justice policies were:

1. the emphasis in developing strategies for dealing with young offenders should be towards: reorientation towards prevention, decriminalisation, increased diversion, priority to community-based programs, and detention as a last resort and for the minimum period possible;
2. education and training should be given priority over punishment in juvenile justice policy;
3. where possible young offenders should be dealt with in their communities in order to re-integrate them and to sustain and enhance family and community ties;
4. community policing should be extended and refined to ensure that it works for and not against young people;
5. intervention in the lives of young offenders and their families should be determinate and accountable;

6. intervention should be developed in consultation with families and young offenders, and should be restricted to dealing with an identified criminal offence;
7. custody should be the last resort of juvenile justice determinations, and is only justifiable from the viewpoint of public safety.
8. the loss of liberty in custodial sentencing should be the punishment
9. in a multicultural society, juvenile justice policy should reflect the needs of all social groups, and should be sensitive to differing cultural practices and be non-discriminatory.
10. juvenile justice should promote self-determination and full participation of different cultural groups and should ensure equal access to services;
11. there is a need to improve and sustain the competence of personnel involved in juvenile justice services and to develop explicit boundaries on the rights, duties and responsibilities of agents in the juvenile justice system;

And on social policy:

1. the development of social and economic policies should incorporate a consideration of their impact on crime, and should integrate delinquency prevention strategies;
2. crime prevention strategies should be developed at the community, and neighbourhood level rather than focus on the individual. These policies should encourage youth participation and facilitate youth involvement in decision-making; and
3. social justice should be the priority for developing policies for youth.(10)

The Youth Street Rights project believes that some of these policies have in fact been considered during the intervening period, some of them have been compromised and some have been ignored.

The Kids in Justice Report proceeded on the basis of several theoretical positions expressed as follows:

- **Young people must have the same rights as other citizens. This is a basic principle in a democratic society.**

Kids in Justice maintained that whilst young people did not have the right to vote, they were entitled to all the other advantages that were concomitants of citizenship in a democracy. These included not only the authority and legitimacy advanced to both citizens and government agents under the rubric of the 'Rule of Law' but also the limits.

The Youth Street Rights project endorses this point of view.

Kids in Justice asserted that:

> "To see young offenders as putative citizens allows us to recognise their interests in relation to the agencies of the juvenile justice system. These can be summarised as:
>
> - the right to openness - public confidence requires scrutiny of decisions;
>
> - the right to propriety - decisions must be properly made and well-founded;
>
> - the right to fairness - decisions must not be arbitrary or capricious;

- the right to accountability - decisions should be justified;

- the right to participation - good decisions require all interests to have input;

- the right to efficiency - government should be responsive and effective; and

- the right to review - illegal or bad decisions should be able to be challenged."

We also endorse this point of view.

- **Due to their special place in our society, and their developmental and emotional difference from adults, young people should be given special protections.**

Young people, due to there special status and differing levels of development and experience should be seen as different from adults. This is a concept which is widely acknowledged throughout our juvenile justice system. Not only is it unreasonable to expect young people to behave or think in the same way as adults, it is also anathema to treat young people the same way. Young people should be cared for. This attitude must be borne out at all levels of the justice system.

- **Some groups are particularly marginalised by the system because of their class race/ethnicity gender and disability.**

Class, ethnicity, age and gender are fields of youth oppression yet they are complex, diverse and inextricably entwined. The economic, collective and political powerlessness of youth generally, but particularly experienced by those most frequently in contact with the coercive arm of the state, amplifies this vulnerability.

- **The response to young offenders and juvenile offending cannot be undertaken in an ad hoc way. There must be clear understanding of the issues and a balanced response to them.**

The report stated that society's approach to juvenile crime should be premised on a clear understanding of the causes, nature and extent of the problem, but that successive governments had approached this task in a considerably ad hoc manner. Governments had to ensure that their approach to these issues was based on sound information, not on the vagaries of ideological fashion nor on attempts to seek scapegoats. Governments had to be extremely wary of the issues related to punitive and coercive techniques.

- **There are limited social returns in the ideology of law enforcement and its focus on the act of the individual.**

Kids in Justice emphasised what we know about coercion and institutionalisation being a determinant of future offending.

> More police, more powers, more courts and more institutions may have some immediate effect; but they ultimately add to the levels of reported crime over the long-term because of the self-generating effects of intervention, and the crimino-genic effect of institutionalisation. Such an approach does not reduce crime, nor does it make the

> community feel more secure. It is doubtful whether even cost-benefit analyses would support our current and growing investment in control (Youth Justice Coalition 1990: 36).

- **Young people's needs and rights must be recognised by the Juvenile Justice System.**

As young people were the main subjects of the juvenile justice system, their interests had to be dealt with up front and in an accountable way. There should be no instances of young people's rights or needs being ignored or eroded.

> In particular, if rights are not recognised or respected, then their existence is at best hollow, and at worst a sham. Moreover, breaches and denial of rights bring both the law and those who enforce it into disrepute. The 'bad' attitude of many young people towards the police must be seen, at least in part, as a response to negative experiences and expectations. …..Just when adults are demanding 'respect' and 'responsibility' from young people, if our commitment to rights is found by them to be wanting, then we are undermining our credibility and aims, and creating a vicious cycle of negative responses. Adults, as well as young people, must acknowledge the reciprocal nature of rights and responsibilities (Youth Justice Coalition 1990: 37).

- **The basis for reappraisal and restructuring of the juvenile justice system must be one of 'social justice'.**

Kids in Justice sought to approach juvenile justice from the perspective of 'social justice', in the interests of young people, their families, victims of crime and the community. This was based in the premise that the achievement of a fair society necessitated a commitment to equity, equality, access and participation.

- **A main focus for improvement in the justice system is increased accountability of its agents and greater visibility of its processes.**

Accountability was stressed as a key theme of the report. This was developed through two approaches. First, accountability referred to whether young people were treated fairly and justly by the system, and secondly it referred to whether the system was open to public participation and scrutiny. In other words, accountability must operate both at the individual but also at the systemic level.

- **There must be improved knowledge and respect for the rights and responsibilities of all concerned.**

The issue of rights has entered popular discourse in a way in which certain commentators are willing to assert that young people have too many rights or that they undermine the rights of others or of their families. These myths have not been borne out in the day to day operation of the juvenile justice system nor in substantive legislation. Adults must learn about the rights and responsibilities that both they and young people actually have.

Young people frequently do not know or understand their rights, and should be made aware of what rights they possess. Situations in which power is unequal frequently renders young people unable to assert those rights, and individuals who do assert their rights very often

suffer as a result. The Youth Street Rights project would add that adults should have a positive duty to ensure that young people's rights are respected.

- **Any changes to criminal justice which will lead to a more just system must recognise that the Police have the most critical influence on the way in which young people interact with that system.**

Kids In Justice had wide ranging coverage of policing practices, much of which deserves replication.

> In general, the criminal law and police powers outside the police station do not provide specifically for young people. However, in several respects, the policing of young people is a distinct social practice, with its own informal standards. In order to understand this, some comments on the essential nature of policing must be made. The central dual mandate of policing is law enforcement and order maintenance. In public places, particularly the streets, order maintenance is (and always has been) the priority. The tools for this are the imposition of authority, the use of discretionary powers (such as stop/search), and broad criminal offences (notably offensive language and behaviour). Police collect names and addresses, check who is about, move on groups of young people (particularly those regarded as being out of their area), 'invite' them to come to the station to check details or for questioning, and sometimes arrest, using the wide range of potential charges available. Criticism is often made of individual police officers without understanding that their actions, far from being deviant, are direct products of this method of policing ... The most common reaction of young people to the police is the objection that they are picked on, that once the police know them they keep them under surveillance, that they investigate them first in connection with offences occurring in their vicinity, or with those in the style of that young person's previous offences. While such attention may be regarded by officers as rational and efficient, it is often unjustified and consequently may damage police-youth relations (Youth Justice Coalition 1990: 231-2).

Recommendation 106 of the Kids in Justice Report says that policy on the policing of young people should contain commitments to a number of principles, including the following:

- 'good' policing of young people demands a professional approach based on broader concerns and outcomes than merely apprehending and ensuring the punishment of young offenders,
- police intervention should occur only when necessary and desirable in all the circumstances, diversion should be considered at each level of police involvement and the least coercive alternative should be used at all times,
- multi-agency approaches should be explored and referrals to relevant support agencies should always be considered,
- there should be a network of officers specially selected and trained in dealing with young people, based in all patrols,
- local community-based strategies should be used rather than specialist squads or other outside police groups (e.g. those conducting 'street-sweeping' exercises),
- physical violence should never be used except where there is no other alternative to the use of reasonable force for self-defence, or for effecting a lawful search, arrest or escort,
- verbal and other forms of abuse and intimidation should never be used,
- the needs and rights of young people to use public space should be understood and respected,

- the legal and human rights of young people and their need for advice and advocacy should be understood and respected,
- as the family and community links of young people are crucial to their development, these should be enhanced through police action,
- racial and other prejudices and discriminatory actions are inimical to the professional policing of young people,
- consultation with and input from young people, and youth, welfare and legal workers, at local, regional and state levels is necessary,
- the experiences and perspectives of young people subject to the juvenile justice system, and those who live and work with them, should be routinely sought and considered to monitor and evaluate police practices and to develop programs,
- the professional policing of young people requires effective mechanisms to ensure accountability, and
- professional development for all officers in relation to the policing of young people, especially General Duties police and Patrol Commanders, is necessary. (224).

A considerable amount of change has occurred in the NSW Juvenile Justice System since Kids in Justice, much of it as a direct result of the report's findings being public. For instance:

1. Specialist Youth Liaison Officers have been established in every police patrol
2. Police have an increased amount of training in relation to young people.
3. Pre court interventions have been explored and established as an alternative to children's court. This was established through the Young Offender's Act.
4. The Department of Juvenile Justice has been established as a distinct entity which has responsibility for a wide range of justice issues during court proceedings, in detention centres and in post-release settings.

However a large proportion of the recommendations of Kids in Justice have not been carried through. It seems as if there have been two divergent trends post Kids in Justice. One trend is towards considered, inclusive and rational progress in the Juvenile Justice system. The other trend is of ill considered law and order populism which has been given legislative voice since 1990 and especially between 1994-98. These dichotomous threads have been pursued by both sides of politics.

Aboriginal Deaths in Custody Royal Commission (1991)

Elliot Johnson (1991) *National Report: Overview and Recommendations*, Aboriginal Deaths in Custody Royal Commission, AGPS, Canberra

The Aboriginal Deaths in Custody Royal Commission, set up in 1987, looked at ninety-nine Aboriginal deaths in police and prison custody between 1 January 1980 and 31 May 1987. It prepared reports on each of the deaths, but also a *National Report* (Johnson 1991) with an overview and 339 general recommendations. While it did not attribute serious criminality to police or prison officers, it did find that Aboriginal people died in custody at an extremely high rate because they were arrested and imprisoned at an extremely high rate. The report therefore stressed the need to divert Aboriginal people in general, and youth in particular, from arrest and imprisonment. It also emphasised the need for governments to support Aboriginal community efforts towards self determination.

In view of the findings of this Inquiry, there was an "urgent need" to develop strategies to keep young Aboriginal people out of the welfare and justice systems, and to reduce the rate at which they were separated from their families through care or imprisonment regimes (Rec 62). All Aboriginal people should, as far as possible, be diverted from police custody and imprisonment. This should occur through decriminalising drunkenness (Rec.s 79-85), avoiding arrest for the offence of offensive language, in police interventions (Rec 86), using arrest as a "sanction of last resort" and ensuring that police promotion and advantage do not accrue because of arrest or charge rates (Rec 87). Police should consult with Aboriginal organisations to avoid over-policing and to replace inappropriate policing with community policing, crime prevention and liaison work (Rec 88). The entitlement to bail should be respected and Aboriginal Legal Service officer should be given access to those denied bail (Rec.s 89-90). Imprisonment should be used "only as a sanction of last resort" (Rec.s 92-121).

The report also stressed the need for greater attention to keeping young Aboriginal people out of care and justice procedures, and within their own communities. "Community based and devised strategies" for youth had the best prospects for success, and so should be supported (Rec 236). Policy should ensure that police did not arrest Aboriginal youth rather than caution them, and "the test whether arrest is necessary should, in general, be more stringent than that imposed in relation to adults" (Rec 239). This recommendation concurs with Article 40 (3) & (4) of the *Convention on the Rights of the Child* (1989). Police should be encouraged to use cautions, and where possible give these in the presence of a parent or adult relative (Rec 240). Aboriginal youth should not be detained in police lockups "except in exceptional circumstances", and if interrogation is necessary this should be done in the presence of a parent or carer (Rec 242). These recommendations broadly concur with sections 11, 13, 15 & 17 of the *'Beijing Rules'* (*UN Standard Minimum Rules for the Administration of Juvenile Justice*) (1985).

The Police and Young People in Australia

Rob White and Chris Alder (Eds) (1994) *The Police and Young People in Australia*, Cambridge University Press, Melbourne

The Police and Young People in Australia is an overview of various aspects of the relationship between young people and police in Australian society. It investigates the links between policing as a distinct form of social practice and the specific position of young people economically and socially. Naturally, a good deal of these interactions occur in public space.

Mark Finnane develops a historical account of young people and police relations, underpinning the ongoing responsibility that police have had for the governance and surveillance of young people's lives. This has always meant more than mere crime detection and processing and has always involved more interference into young people's lives than would be acceptable for adults. The responsibility has included changing forms of governance over time mediated by factors such as the construction of the category of juvenile delinquent, the development of compulsory education (and hence truancy), the development of various welfare interventions such as the charge of 'uncontrollable' and the development of shop stealing as a discreet offence. The bulk of police actions involving young people and police

are for petty crime and public order/status offences. The level of street interaction which does not appear in charge/court statistics can only be sketched historically.

Ian O'Conner focuses on the rights of young people in their interactions with police. He describes a gap between the rhetoric of rights and the reality of police-youth interactions and the operation of a justice system which relies on young people not exercising their rights. Indeed, the very nature of police-youth interactions militates against the exercise of the suspect's rights. Other mechanisms operate to diminish the exercise of youth rights such as lack of access to lawyers, complaint and review mechanisms, court procedure and a lack of rights education. It is important to address police culture in terms of police-youth relations because rights are fundamental to the proper exercise of state power, and police culture is continually disrespectful of them.

Rob White argues that the crucial elements of police-youth relationships are constructed in the context of the street. Furthermore the use of public space is socially constructed and institutionally regulated. Increasingly these spaces are constructed as consumer spaces and hence young people are seen as a threat/inconvenience/alien. Young people need to inhabit public space as their access to privacy is hindered by their lack of access to money and power. Indeed, the use of public space by young people is important to their construction of social relationships. Some groups of young people are more likely to be the object of harassment and violence than others. This contradictory dynamic leads to the increase of tension between young people and police, particularly given the pressures on police to 'do their job' and on economically and socially disadvantaged young people.

Chris Cuneen argues that the relationship between Aboriginal young people and the police is necessarily defined by the relationship between indigenous peoples and the operation of colonial state control. In fact, this relationship has historically fallen into three categories: open warfare, protectionist/welfare and criminalisation. The continued over-institutionalisation of Aboriginal young people is a continuation of earlier welfare policies aimed at the removal of children from their families, which constructs them as a 'law and order' problem, diverting attention away from endemic racism. The role of police is crucial in this process.

In her chapter on the policing of young women, Christine Alder describes a complex set of factors which are involved in producing the experience of young women. These include class, race, offence type, the suspects attitude to police intervention and their adherence to 'appropriate' sex-role behaviour. Welfare issues such as perceived 'wildness' and promiscuousness are often linked to and intertwined with policing. Girls more often report being sexually harassed and intimidated, while young Aboriginal women are more susceptible to experience police intervention and violence than Anglo-Australian young women.

Janet Chan explores the adequacy of community policing as a strategy for policing young people from a non-English speaking background. She concludes that youthfulness is the major factor influencing the way these young people are policed, rather than their ethnicity. Given that visible young people are more generally constructed as outside of the 'law abiding' community, the NESB young person's marginalisation is merely exacerbated by lack of access to language skills and cultural norms. Chan suggests that a fundamental change must occur in police values in order to enhance young people's status to full citizenship.

Nobody Listens

Youth Justice Coalition (1994) *Nobody Listens*, Youth Justice Coalition, the Western Sydney Juvenile Justice Interest group, and the Youth Action and Policy Association, Sydney

Nobody listens is a report based on research with young people about their experiences of contact with police. The results of this research highlight what are disturbing and often common findings. The findings included that police contact with many young people is vigorous to the point of harassment, contact generally involved verbal abuse, contact was regularly physically violent and contact sometimes resulted in serious injury.

Specific groups of young people were targeted by police -- Aboriginal, Asian and Pacific Islander youth -- showing high levels of institutional and individual racism. These types of contact were breaches of international human rights and the point of contact was usually in a public place. Young people contacted by police were usually in groups of two or more. What stands out most is the very high rate of searches involved in the contact, that young people tend to not complain to official sources after contact and that the treatment by police of these groups of young people is inconsistent with police policy goals.

The report includes discussion on these issues:

- police responses to young people are influenced by law and order rhetoric and political-media representation of young people
- police are involved in differential policing due to the visibility of some ethnic groups, racism, media stories, and a belief that police are reflecting the community's concerns
- police don't understand young people -- police are not trained to work with young people
- young people from some backgrounds see police as part of a repressive state which is not to be trusted -- this then conditions the reaction of young people to the police

In conclusion the study confirms that the behaviour of police towards too many young people routinely breaches even minimum standards required by public officials, and that policy statements need to be translated into practice -- there is a need for far greater accountability of police to young people, to communities and to their police superiors

In its recommendations this report calls for:

1. The implementation of the recommendations of the Kids in Justice Report, in particular,
   - the publication of a Policy on Policing Young People; the policy should be further developed through a process of consultation with police, young people and youth, welfare and legal workers at local, regional and state levels (Rec.s 105,106)
   - the implementation of a comprehensive range of mechanisms to provide for accountability in the policing of young people (Rec 112)
   - The establishment of a better resourced, more accessible independent complaints mechanism such as a children's ombudsman (Rec 45)

2. The development of a comprehensive program of legal advocacy for young people.

3. Compliance with Australia's obligations under the United Nations *Convention on the Rights of the Child*, and the *International Covenant on Civil and Political Rights*.

4. Priority be given to consolidating the positions of Police Youth Liaison Officer in every patrol, and these positions be managed by a joint community/police committee. Police in these positions must:

- be responsible for the development of youth/police relationships in the local area;
- be closely linked with young people's groups, and youth and community services; and
- help coordinate (in conjunction with a committee drawn from the whole community, (including young people who have regular contact with police) the training of police in youth issues.

Young People and Police Powers (1995)

Harry Blagg and Meredith Wilke (1995) *Young People and Police Powers*, Australian Youth Foundation, Sydney

Young People and Police Powers is an important overview of the current state of interaction between young people and the police in Australia. The book drafts minimum standards of practice for the governance of police actions and offers them as model legislation for Australia.

Blagg and Wilke are concerned by the over policing of young people and the negative effect this has on young people's sense of alienation and frustration. By comparing current police practices and research into youth aspects of policing, and comparing them with international instruments such as CROC, Blagg and Wilke conclude that in most respects, Australian police practice falls far short of the standards of our international agreements.

However, any change which is proposed to police practice must also be accompanied by changes in social policy such as reversing the contraction of the public realm in order to reinstate young people as citizens with a right to access, and the close scrutiny of 'shaming' techniques.

By comparing CROC and state legislation, model standards of police practice are offered as the minimum required to establish Australian practice in line with that international agreement. The model standards include, among other things, clauses relating to the prohibition of arbitrary stops, the conduct of authorised stops, arrest as a last resort, warnings, the duties of the arresting officer, detention for the purpose of a formal caution, the issue of formal cautions, freedom from violence, searches, interrogation and bail.

Race Relations and Our Police (1995)

NSW Ombudsman (1995) *Race Relations and Our Police*, Report to NSW Parliament, January

The Race Relations and Our Police report was undertaken due to the concerns of the Police Minister and the Ombudsman about the implications of various policing incidents, from

which police bias against minority groups, or racism, might have been inferred. It was written by the Ombudsman's office and addressed to the NSW Parliament. It examined the NSW Police Service practices and procedures in its dealings with racial, ethnic and other minorities.

Crucial to its findings were that despite problems in ethnic and Aboriginal relations having been targeted by the Executive of the Service, not enough had been done to implement or foster change. The report is critical of 'community based' policing, not in its intent, but in its delivery. The police failed to implement lines of communication from the top down and from the bottom up in regards to ethnic and racial issues; and they failed to adequately challenge and change the attitudes and practices of officers. The report also noted a police failure to recruit from all sections of the community.

The Ombudsman concluded that he was:

> not satisfied that the Police Service had given Aboriginal and ethnic community issues…. the priority and attention that the issues require in a culturally diverse society.

The report makes recommendations in the following areas: operations, recruitment, education and training, and audit.

Keeping Aboriginal and Torres Strait Islander People Out of Custody (1996)

> Chris Cuneen and David McDonald (1996) *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, ATSIC, Canberra

In this evaluation of changes five years after the report of the Royal Commission into Aboriginal Deaths in Custody (Johnston 1991), Cuneen and McDonald revisit the relationship between Aboriginal youth and the juvenile justice system. They conclude that the Royal Commission's recommendation on negotiation with Aboriginal communities to reduce the incarceration of Aboriginal youth "has been ignored" (p.186). The level of adult Aboriginal over-representation in prisons remained much the same between 1988 and 1993, at 14 times the general rate (p.34), while juvenile over-representation was even higher, at 21 times the general rate in 1994 (p.40). Policies in most states have resulted in the incarceration of *more* Aboriginal and Torres Strait Islander young people, rather than less, and the development of community based alternatives to prison "is not central to the way juvenile justice policy is being developed in most states and territories" (p.186). Reliable data on cautioning rates was not available, though the limited information showed "arrest is still too frequently used", instead of cautioning. Indigenous young people were still held "in police lock ups across the length and breadth of the country", and there still was "enormous scope" to improve the implementation of the recommendations of the Royal Commission, and to reduce the numbers of young people in custody (p.187).

Seen and Heard (1997)

> Australian Law Reform Commission (1997) *Seen and Heard: Priority for Children in the Legal Process*, Report No 84, Australian Law Reform Commission & the Human Rights and Equal Opportunities Commission , AGPS, Canberra

In 1995 the Australian Law Reform Commission and the Human Rights and Equal Opportunities Commission were asked to report on a wide range of issues concerning children and the legal process. The report *Seen and Heard* was delivered in late 1997. Of relevance to this study, the report considered the roles of children, families and the state, in context of our international human rights obligations, and it looked at children's involvement in the criminal justice process.

The report began by expressing a "fundamental assumption" that the state and the family are "jointly responsible" for fostering the development of children. "Families have the primary responsibility ... [and] the state assists families in this effort and intervenes in certain [limited cases]" (71). This approach is broadly consistent with the preamble and principles of CROC. The concept of childhood involved contradictory views, the report said. It was both a "time of innocence" requiring protection, and state intervention in families in the case of neglect and abuse, though views on the threshold of intervention vary. However it was also sometimes thought of as a "period of irresponsibility" where children "are in need of firm, often coercive control" (72).

Taking CROC (ratified by Australia on 17 December 1991) as the benchmark, the report said it was important to consider how children should be involved when the state does intervene. CROC says children have a fundamental right to be heard: "to express their views freely and have those views given due weight in accordance with the age and maturity of the child" (Article 12). On the respective rights and responsibilities of children and parents, and the responsibility of the state, the report noted that:

> CROC itself seeks to balance the competing claims, views and interests, and recognises the child's right to care and protection, the position of the family as the primary social unit and the obligations of the state towards both parents and children (73).

There were also a range of other treaties, ratified by Australia, that must be taken into account. CROC, however was centrally important. The report pointed out that the standards of CROC:

> have not been created by CROC. [On the contrary] CROC provides explicit recognition of the applicability to children of their previously existing inalienable rights. It does not limit the rights of parents or prescribe conditions on the relationship between parents and children. [But] by ratifying CROC the Australian government has made a commitment to the children of Australia. This commitment is that in all aspects of children's involvement in society they will be treated in accordance with their fundamental human rights entitlements (76).

The report devotes Chapter 18 to consideration of children's involvement in the criminal justice process. Recognising the welfare and justice models applied to juvenile justice, the report also acknowledged and was inclined to prefer a third approach, a "restorative model" which encouraged the acceptance of responsibility by the young person, and at times involved victims. The report recommended that national standards stress the joint importance of rehabilitation of the young person and restitution to the victim and the community (476-7).

Diversion from formal legal processes was therefore considered centrally important. The report quotes with approval the opinion that:

> Diversion of a juvenile offender away from the criminal justice system to community support services is the optimal response to the problems of juvenile crime (Findlay et al 1994: 267)

Diversionary procedures, such as police cautions, avoid the stigma or prosecution and conviction, and prevent juveniles identifying with or joining in institutionalised communities. Noting though that not all youth groups received the same benefits of cautioning, and that for example Aboriginal youth in Victoria had been recorded as being three times under-represented in police cautions (Mackay 1996: 9), the Commission proposed that national standards provide "best practice guidelines" in police cautioning to ensure "equal treatment" of young people (480). Similar guidelines should apply to family group conferencing (483), another diversionary scheme.

Young people's relations with police were acknowledged as "problematic throughout Australia". The Commission's studies, including focus groups had shown "that police are generally hostile and aggressive towards young people and treat them all as troublemakers" (485). The Commission was also concerned at security guards acting as quasi police, especially in shopping centres. Guards had created their own regimes of surveillance, intervention and even sanctions. The Commission recommended regulations to ensure that private security organisations "should not have the power to extend the scope of the criminal law" (489).

The Commission called for the repeal of all preventive detention laws applying to young people, and in particular the NSW *Children (Protection and Parental Responsibility) Act* 1997. National standards should ensure that no Australian government should make laws which impose curfews, or extra trespass laws, to restrict the movement of young people who have not been suspected of committing a crime (491).

Consistent with the CROC requirement to minimise the arrest and detention of young people, the Commission proposed that national standards include provisions that, if police are to proceed with a charge against a juvenile, they should generally (subject to some specified exceptions) proceed with a summons or court order. Police should be trained to make greater use of charge by summons, and should have cross-cultural training to deal with indigenous suspects (496). In the event of arrest police should be required to notify the child's carers "as soon as possible", to inform the child of his or her rights prior to any interview, to electronically record any interview, to both allow and require an interview friend of the child's choice to be present during police questioning, and to not detain any child for questioning more than two hours (497-505). National standards should also require that indigenous children be assisted to understand their rights "through processes developed in conjunction with Aboriginal legal services" (507). Children should only be strip searched pursuant to a court order, an order which they may legally oppose (513). This latter was a novel and welcome recommendation.

Bringing Them Home (1997)

> Human Rights and Equal Opportunities Commission (1997) *Bringing them Home: National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families*, HREOC, Sydney

This was an inquiry into the 'Stolen Generation', Aboriginal children taken from their parents as part of the racist official policies of 'Protection', then 'Assimilation'. Successive policies throughout Australia involved special laws to control the lives of Aboriginal people, to marginalise their communities and destroy their languages and culture.

Entrenched disadvantage and dispossession mean the removal of indigenous children continues today, through the welfare and justice systems. Indigenous children are six times more likely to be removed for child welfare reasons and twenty-one times more likely to be removed for juvenile justice detention than non-indigenous children.

The Inquiry found that the forcible removal of children was "a gross violation of their human rights", that it was racially discriminatory and, as it intended to destroy the group by the forcible removal of children, it was an act of genocide, directly contrary to the *Convention on Genocide* (1949). Any sincere but misguided belief about the 'best interests' of these children is irrelevant to a finding of genocide. Even by the common law standards of the day, before the Conventions on Genocide and Racial Discrimination, the children were denied their legal rights. This was because under British common law children should not be removed from their parents except by a court order, and parents are the legal guardians unless a court orders otherwise. These principles were denied to generations of Aboriginal children and their parents.

This inquiry found many reasons for the high rates of removal. Policing and the administration of justice are just two of the factors involved in removal in the juvenile justice area. The inquiry, like the Aboriginal Deaths in Custody Royal Commission before it, recommended that self determination should be supported in all indigenous communities. Therefore if a community wants control of juvenile justice systems the transfer of power should be facilitated.

The inquiry recommended that the social justice recommendations of the Royal Commission into Aboriginal Deaths in Custody should be implemented. For those children and young people whose communities choose to remain under the jurisdiction of the state, the inquiry recommended minimum standards and rules, set in the main by accredited indigenous organisations.

Minimum standards for juvenile justice are set out in the report. The Inquiry recommended that national standards legislation provide that the removal of indigenous children from their families and communities by the juvenile justice system, including for the purposes of arrest, remand in custody or sentence, should be used only as a measure of last resort. An indigenous child is not to be removed from his or her family and community unless the danger to the community as a whole outweighs the desirability of retaining the child in his or her family and community.

This inquiry was one of several which have addressed particular Australian dilemmas, and in particular indigenous dilemmas, which have been exhaustively researched and have received broad support. The principles the Inquiry developed to deal with the issue parallel the principles of the *Convention on the Rights of the Child*. They also parallel and build on recommendations of the *Royal Commission into Aboriginal Deaths in Custody* (Johnston 1991), as noted below. The main recommendations regarding juvenile justice could be summed up as follows:

1. Avoiding arrest and charge:
Arrest and charge of a young indigenous person should be actions of last resort, if a charge is to proceed it should generally be by way of summons or court attendance notice rather than by arrest (Rec. 53b, Rules 1-2; see also Johnston 1991: Rec.s 62, 86, 87, 239 & 240). In the case of arrested or detained indigenous youth, the appropriate indigenous organisation must be notified and consulted (Rec. 53b, Rules 3-4; see also Johnston 1991: Rec.s 90 & 243). These are consistent with the *Convention on the Rights of the Child,* Articles 37(b) & 40(3)(b).

2. Interrogation rights:
Police interviews for an offence should only proceed in the presence of a parent or responsible adult, a legal adviser chosen by the young person and an interpreter if necessary (Rec 53b, Rule 5; see also Johnston 1991: Rec.s 90 & 244). A caution concerning self-incrimination should be explained before an interview, free consent to the interview should be obtained and every interview must be audio or audio-visually recorded (Rec 53b, rules 6-8). The former is consistent with the *Convention on the Rights of the Child,* Article 40(2)(b)(iii), the latter consistent with Article 40(2)(b)(iv).

3. Bail as a right:
Unconditional bail is a right, as is the review of refusal of bail. Bail hostels or group homes should be used for young people, rather than cells (Rec 53b, Rules 9-11; see also Johnston 1991: Rec.s 62, 89, 91 & 242). The initial point is consistent with the *Convention on the Rights of the Child,* Article 37(b), and the *International Covenant on Civil and Political Rights*, Article 9(3).

4. Detention and imprisonment as last resort
No young indigenous suspect should be confined in police cells "except in extraordinary and unforeseen circumstances", while custodial sentences should only be a sanction of "last resort" and, if imposed, for the "shortest possible time" (Rec 53b, Rules 12-15; see also Johnston 1991: Rec.s 62, 242 & 92). This is consistent with the *Convention on the Rights of the Child,* Articles 37(b) & 40(3)(b).

Anh Hai (1997)

> Lisa Maher, David Dixon, Wendy Swift & Tram Nguyen (1997) *Anh Hai: Young Asian Background People's Perceptions and Experiences of Policing*, UNSW Faculty of Law Research Monograph Series, University of New South Wales, Sydney

Anh Hai explores young Asian background people's experiences of policing in and around South West Sydney, but particularly focussing on the Cabramatta area. The research was conducted by interviewing 98 young Indo-Chinese heroin users using ethnographic techniques. The participants were asked a range of questions covering demographic information, patterns of drug use and experiences of street policing.

The report expresses a significant disparity between what could be counted as fair treatment by police in a western liberal democracy and the actual experiences these young people had of street policing. Most of the respondents felt they had been treated unfairly by police, not

because they were being arrested and charged but because they were very aware they were not being dealt with according to law. Significant abuses of police powers were recounted by the vast majority of respondents including random and illegal searches (contrary to both legislation and the Police Commissioner's instructions) and unlawful confiscation of drugs and money. Overpolicing, harassment and intimidatory practices were recounted. The report found that racism was endemic in the Cabramatta police patrol and that the police took an active role in perpetuating myths about the client group.

Anh Hai concludes that the current pattern of policing young people of Asian background leads to a range of negative outcomes. Policing practices are counterproductive to both the reduction of the drug trade and to harm minimisation amongst the users. A lack of respect for law enforcement agencies is generated amongst both the young people and the wider Australian-Asian community, many of whom have experience of oppressive and authoritarian regimes. The young drug users in question believe that justice is rarely administered fairly and their local community believes they are unfairly targeted. Police powers are inadequately defined and are used by police as a 'flexible resource' in order to administer 'street justice'. This conclusion is important to both police officers who in this study have abused their authority, and law makers who are unprepared or unwilling to define powers adequately or encourage corrupt or abusive police officers to be brought to account.

Rethinking Law and Order (1998)

Russell Hogg & David Brown (1998) *Rethinking Law and Order*, Pluto, Sydney

Hogg and Brown present a critique of "the uncivil politics of law and order", characterising "law and order commonsense" as a historically durable and popular set of assumptions which are, however, false. These assumptions include that: crime rates are soaring, we are on the edge of a crisis, and extraordinary police powers and far tougher penalties are needed to deal with this crisis. Hogg and Brown point to the futility of this formula, and to a wide range of its counterproductive features. They stress that there are tensions which arise within the logic of this "law and order commonsense", as the formulaic "solutions" do not deal easily with major justice issues such as domestic violence, white collar crime and the gun debate.

One stark contradiction of this orthodoxy lies in its approach to the policing of young people. Hogg and Brown comment (p.6) on the social dysfunctionality of the orthodox approach, by reference to the *Children (Parental Responsibility) Act* 1994:

> It appears the public outrage at family and institutional abuse of young people and simultaneous demands for tougher controls on street kids belong to two different orders of reality. It is as if they referred to two quite separate groups of children: one at risk, in need and deserving of our sympathy, support and protection; the other, out of control and in need of being forced back into the bosom of the family or some surrogate institution. But what if, as seems clear, it is the same group of children?

"Law and order commonsense", the authors say, finds accommodation within neo-liberalism, which while relegating many public functions to the private sector, strengthens the authoritarian base of the state. Hogg and Brown prefer an "associative" model of society within which new and varied institutions of regulation are distributed. They cite Paul Hirst

(1994), who speaks of publicising civil society and pluralising the state. Within the criminal justice system this model would encompass strengthening the recent initiatives of community policing, collaborative crime prevention schemes, socially reintegrative sanctions and youth-family conferencing.

5. The International Recognition of Youth Rights

The chapter examines rights and responsibilities, the relevant detail of the *Convention on the Rights of the Child* (CROC), some Australian responses to CROC and the relevance of international human rights treaties.

5.1 Rights and Responsibilities

Before considering the particular rights relevant to our study, it is valuable to consider briefly the broader issue of rights and responsibilities. It is sometimes said that young people's rights are stressed at the expense of their responsibilities, suggesting perhaps a broad tension between the two. But, correctly viewed, rights do not compete with responsibilities. Rights reinforce social responsibilities. Any system of thought based on responsibilities must suggest rights, just as a system of thought based on rights must suggest responsibilities.

Sometimes the result is much the same. For example, a system emphasising responsibilities will say "thou shalt not kill", while a system based on rights will pronounce the need to respect and protect "the right to life". To protect this right, a responsibility is imposed not to harm others. However systems of responsibilities, which often stress personal or non-social values, do not always suggest a *social* right which is to be protected. It is not always obvious, for example, what infringement on another's right is suggested by the charge, "don't be lazy". On the other hand systems of rights, whether natural or legal, and on which most modern constitutional notions of society are based, always imply social responsibilities. To disrespect someone's right is always a "wrong", and a breach of one's social responsibility. So systems of rights are generally a more satisfactory way of viewing *social* ethics.

Our approach to rights is a philosophical one, not one based on British common law concepts. We are thus discussing 'natural' rights, on which we argue legal rights must be based. We see the common law notion of a 'duty' creating a right (as in the 'duty of care') as simply another model in which responsibilities are held primary, and rights are created from these responsibilities or duties. By this model, a right does not exist unless there is a corresponding duty. However we have explained above why we say a system based on rights is preferable.

Systems of rights also have the advantage of stressing the inherent and equal worth of all human beings, and (in Kantian terms) the need to treat human beings as an end in themselves, rather than a means. The preamble to the *Universal Declaration of Human Rights* (1948) presents this case, while stressing its practical worth, in the sober aftermath of world war:

> [R]ecognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world ... [and] it is essential, if man is not compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

It is fundamental to the integrity of such a system that rights must be universal and inalienable. That is, rights asserted must be inviolate and apply to all. Attention given to the historical denial of rights to some group will not undermine this principle. While social support may vary according to need, rights remain equal. However the selective or discriminatory application of basic rights does indeed undermine social responsibility, and social cohesion.

Further, rights cannot be diminished by a person's individual misconduct, or failure to respect the rights of others. Attempts to 'link' individual rights with individual responsibilities must be fundamentally corrosive of the fabric of universal human rights. For example, it is commonly said that the failure of a robber to live up to his social responsibilities (of respecting the personal and property rights of others) means that the robber therefore deserves less rights. Nothing could be more wrong. If safeguards to protect rights adjust themselves according to the perceived worth of the individual, then we would inevitably revert to a society based on a hierarchy of privilege and patronage. The wealthy businessman would be entitled to a fair trial but the uneducated robber would not. Prejudice would rule. We would formally create differing systems of law and social support for those presumed to be more or less deserving of their 'earned rights'. Such societies have existed and do exist, but they are not those that respect universal human rights or democratic ideals.

There are particularly good reasons to protect the rights of those who have abused the rights of others, whether they be robbers, corrupt police or irresponsible children. The stress on human rights as intrinsic to all people is a powerful socialising force. If we claim that a person's right to be treated fairly depends on that person treating others fairly we invite an argument of infinite regress, where abusers may claim their own prior mistreatment absolves them of responsibility for their actions. If on the other hand we say that all persons have the right to be treated fairly, even when they may have treated others unfairly, then we enhance the capacity of the state in the name of society to impose a corrective measure for that breach of responsibility. This distinguishes justice from retribution. It means that one person's individual breach of responsibility to others cannot justify a breach of that person's intrinsic and indivisible human rights.

Rights therefore cannot be considered in isolation, despite the need to focus on particular rights for particular purposes. The *Vienna Declaration and Programme of Action* (1994) stressed this point, by asserting that "all human rights are universal, indivisible and interdependent and interrelated". Provisions in the major human rights treaties often take account of this, for example, by adding qualifications that certain individual freedoms must not infringe "the rights and freedoms of others". In this way the coherence of a system of rights, and its maintenance of the relevant social responsibilities, is protected.

While individual breaches of responsibility cannot be taken to violate an individual's fundamental rights, in a general sense we can recognise that rights and responsibilities are complementary, and must proceed together rather than in competition. A young person, who is not allowed to make simple responsible and informed choices in ordering her or his life, will not develop a sense of responsibility. The need to experience personal freedom and choice plays a major part in adolescent development. Being uninformed of rights, unable to assert rights or denied rights makes difficult the taking on of adult responsibility. Unable to earn or spend money, how can a young person learn to be financially independent? In other words, denied rights, a young person cannot become responsible.

Additionally, in the development of young people, there is a widely accepted notion that, while full rights are extended to them, their responsibilities are diminished somewhat, and instead some additional responsibilities (one might say the deficit of their full social responsibilities) are carried by parents or carers. at times assisted by the state. Parents, carers and the state may thus share the responsibilities of young people, but may not similarly

assume their rights. The rights of a child or young person must be assumed directly for that young person's full responsibility to develop.

The notion that children's and young people's rights and responsibilities must advance together, that both are best underpinned by a system of recognised rights, and that at times their responsibilities (but not their rights) may be shared (by parents, carers and, at times, the state), runs through this report.

5.2 Relevant Sections of the Convention on the Rights of the Child

Due to its breadth and universal acceptance, the Convention on the Rights of the Child is an invaluable touchstone of children's rights, and we apply it in this report. While CROC may not be the last word on children's rights, a number of its articles provide an important basis for auditing existing policy and legislation regarding children's and young people's street rights. While recognising the need to continually regard CROC in its entirety, we draw attention to the following provisions (which we paraphrase), relevant to our discussion:

Article 2 non-discrimination,

Article 3 considering the best interests of the child,

Article 5 the responsibilities, rights and duties of parents,

Article 12 the right to be heard,

Article 15 freedom of association and peaceful assembly,

Article 16 no arbitrary or unlawful interference with privacy,

Article 37 no cruel or inhuman treatment; no arbitrary, unlawful deprivation of liberty; and arrest and imprisonment are to be measures of last resort, and

Article 40 due process rights are to be observed including the presumption of innocence, the right to silence and access to justice options other than judicial proceedings and institutional care.

The full text of CROC is reproduced as an appendix to this report.

To pursue an audit of youth street rights in New South Wales, with reference to 'clear' and 'possible' breaches of international standards (cf. Klug et al 1996) we need to first clarify the nature of any qualifications applying to these standards.

There are no qualifications to the provisions prohibiting discrimination, prohibiting "cruel, inhuman or degrading treatment or punishment", asserting the best interests of the child or requiring that a young person be heard. Rights to privacy and liberty are not to be denied by either "arbitrary" or "unlawful" means. There are some qualifications on the rights and responsibilities of parents, as well as the weight to be given to a child's views, depending on the stage of development of the child. Due process rights are formulated in a very similar fashion to those of the *International Covenant on Civil and Political Rights*. The only relevant broad qualification applies to the right to freedom of association and peaceful assembly in Article 15. This freedom may be qualified by restrictions:

> imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others (CROC Article 15 (2)).

Something more deserves to be said about the rights and responsibilities of parents. Parents, and guardians in their place, have the rights of any individual, but they have some additional responsibilities towards their children. The question then arises: are there any "parents' rights" in addition to their human rights, or do parents simply have additional responsibilities? CROC, the world's leading standard, answers the question this way. Parents have a right as well as a responsibility "to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child" of his or her rights (Article 5); and parents have a right to "maintain personal relations and direct contact" with the child and vice versa (assuming there is no abusive relationship) and to be informed by the state of the child's whereabouts, in the event of any state-caused separation (Article 9). The other relationships are characterised as duties or responsibilities. The state also has a responsibility to protect and assist the family, so that those within the family can in turn "fully assume their responsibilities within the community" (Preamble; & Article 3).

The Australian commitment to CROC has just one reservation on Article 37(c), concerning the segregation of children from adults in custody, but this is not strictly relevant to our report.

5.3 Some Australian Responses to CROC

The Australian Government's first report of its compliance with CROC was tabled in the Senate on 21 December 1995, and then forwarded to the UN Committee on the Rights of the Child. Such reporting is required by CROC (Article 44), though this one was late. A large number of laws, policies and programs were listed, but not evaluated.

The Government's report was immediately criticised:

> It does not state clearly what steps have been taken to bring domestic law in line with the principles of the UN Convention on the Rights of the Child and it does not contain an honest and objective appraisal of Australia's performance in implementing CROC over the three and a half years since it was ratified ... The information is frequently self-serving, selective and out of date. (National Children's and Youth Law Centre 1996: 4).

An alternative report (Defence for Children International 1996) was produced the following year and submitted to the UN Committee. This report noted the lack of community consultation involved in preparation of the Federal Government's report, and the lack of Government commitment to the Convention. Attention was drawn to a number of serious denials of children's rights, including abuses in systems of care, denial of the rights of children of asylum seekers, denial of the rights of indigenous children in legal and welfare systems, regressive laws designed to deliver harsh punishment to young offenders, police protection of paedophilia, and preventive detention laws which deny children the right to public space. The alternative report called for CROC to be implemented in Australian law, for a Commissioner for Children and for administrative procedures to ensure compliance with the guaranteed principles of CROC (Defence for Children International 1996: 9-12).

A number of conservative and religious community groups (eg. the Parents Rights and Support Group Tasmania; the Festival of Light Western Australia; the Australian Family Association, Western Australian Division; and the Endeavour Forum) have opposed Australia's ratification of the treaty, mainly on the grounds that parents' rights are somehow diminished by CROC, and sometimes with the wildly mistaken view that CROC does not acknowledge the role of the family. For example, one Queensland branch of the National Party wrongly claimed that, under CROC:

> parents have no right to guide and protect their children ... nowhere does the Convention give parents the right to make decisions affecting their children ... [and further] the Convention is fundamentally opposed to the whole concept of the family" (Joint Standing Committee on Treaties 1997: I: 31-32)

Clearly this author had not read CROC's preamble, or Articles 3, 5, 9, 10, and 18, all of which affirm and support the role of parents. David Malcolm, the Chief Justice of Western Australia, made this same point:

> Those that have criticised the Convention as an attack on parental rights .. fail to appreciate the central role which the concept of the family plays in the Convention. (Defence for Children International 1996: 4)

On the other hand, many community groups closely involved with young people (Burnside; the Australian College of Paediatrics; the National Aboriginal Youth Law Centre; Defence for Children International Australia; Ethnic Childcare, Family and Community Services Co-op; and the Youth Action and Policy Association) expressed strong support for the Convention and for its application in Australian law and policy (Joint Standing Committee on Treaties 1997).

A survey carried out by university students in Sydney (Cameron & Scott 1998) reviewed attitudes to children's rights and to CROC. At the State Government level, where much of the damage to children's rights can occur, it was disturbing to hear Minister for Police Paul Whelan admit that he was "not familiar" with CROC. The Shadow Police Minister Andrew Tink similarly expressed little interest in or respect for CROC. Police Inspector Ian Borland suggested that responsibilities were somehow a precondition for young people to "claim" their rights: "Obligation should be put on them [young people] in claiming these rights", wrongly suggesting that those young people who did not meet their responsibilities might not be entitled to rights. All this suggests that there is a great deal of ignorance about CROC and young people's rights, even amongst those legislating and enforcing the law.

A more reasoned view was expressed by Parents and Citizens Federation President, Bev Baker. She pointed out that it was a "denial of natural justice" to suggest responsibilities as a prerequisite for rights. Children and young people's rights were "intrinsic" and inviolable. However full responsibility for respecting the rights of others could only be assumed by children and young people so far as their developmental capacity allowed. (Cameron & Scott 1998). In contrast to the ill-considered views of some politicians and police, this view more accurately reflects the formulations of rights in CROC.

Justice Elizabeth Evatt, an Australian judge on the UN Human Rights Committee, notes the high level of ratification of CROC - 190 countries (Joint Standing Committee on Treaties 1997: I: 16). These include Indonesia, Malaysia, Thailand and Vietnam -- countries which have not yet ratified other important treaties, such as the ICCPR. We said at the start and we

repeat here, the extraordinarily high level of acceptance for CROC reflects a near universal acceptance of this formulation of the rights of children and young people, and the perception by almost all political regimes that there is much to be gained by identifying with the rights of young people and with CROC.

5.4 How Relevant Are International Human Rights Treaties?

It is often said that various Australian laws contravene our international treaty obligations, particularly our obligations under the *Convention on the Rights of the Child* (CROC) and the *International Covenant on Civil and Political Rights* (ICCPR). But what does this mean in practice for Australian children and young people? Are they able to exercise rights at a local level which exist for them in international law? Are they able to have laws changed or have their convictions quashed under the umbrella of international treaties?

The answer is not straightforward. The relationship between international law and domestic law and the tension which is inherent in that relationship is both complex and dynamic. International law and domestic law interact and develop in a complex way, and therefore the basis of this interaction and indeed its very theoretical description, is controversial. Consequently, the effectiveness of exercising individual rights under international law entails a haphazard and remote process. The difficulty for Australian citizens wishing to access their internationally guaranteed rights is due as much to the shallowness and lack of commitment displayed by Australian governments to those rights as it is to the vagaries of international law.

Australia is in a unique position regarding the relationship between its domestic law and international law. The process by which the Federal Government enters into and implements treaties, and the way in which our law interacts with other sources of international law, is constructed through the operation of our distinct constitution and polity.

In principle, rights guaranteed under treaty are enforceable against Australia as a matter of international law. However, treaty obligations to the international community do not by themselves have legal effect within Australian law. This is a distinction between Australia as an international citizen, and Australia as a sovereign state. In order to have complete legal effect, or at least for Australian courts to recognise international obligations, treaties must be passed by legislation into domestic law. The *International Covenant on Civil and Political Rights* (ICCPR) is a good case in point because although it has been signed and ratified, only parts of it have been passed into domestic law (eg. in the *Race Discrimination Act* 1975, the *Sex Discrimination Act* 1984 and the *Human Rights (Sexual Conduct) Act* 1994), and individuals have difficulty asserting their rights under it. Indeed, even the High Court does not, as a matter of course, recognise treaties which have not passed into Australian legislation. The High Court will however sometimes incorporate norms created by international law into common law judgements. This was the process by which the concept of terra nullius was rejected in the Mabo decision on Native Title (High Court of Australia 1992). However there is no process by which any source of international law becomes 'self-executing' in the domestic sphere.

The recognition of human rights standards and treaty obligations in domestic law has been largely left to the States. It is however glaringly apparent that once the Commonwealth has entered into human rights treaties, a legislative silence tends to follow both at State and

Federal levels. Indeed, in recent times, many States and Territories have been engaged in an overt legislative retreat from the basic rights enshrined in international law. We mentioned the response of successive Commonwealth Governments to the High Court's decision in the *Teoh* case (High Court of Australia 1995), in our Introduction.

Human rights treaties do not include methods of enforcement, but rather reporting mechanisms whereby the Federal Government can be found to be in breach of its obligations by a UN committee. This committee does not serve a judicial function however and so a direction from the UN does not necessarily lead to a change in legislation.

The *International Covenant on Civil and Political Rights* (ICCPR) does provide a more concrete external remedy in that Australia is a party to the First Optional Protocol to the ICCPR, which allows individual complaints to be made to the Human Rights Committee. In theory, a finding by the committee is not binding on a state in violation of the Covenant, but in practice it has been regarded as decisive of a state's legal obligations.

Toonen v Australia (Human Rights Committee 1994), the first individual complaint made against Australia under the First Optional Protocol, tested whether the ICCPR could be called upon to overrule Tasmanian laws banning male homosexuality. The ICCPR's First Optional Protocol allows individuals to seek a determination from the UN Human Rights Committee, as to whether a specific law contravenes the ICCPR. *Toonen* shows that the mechanism for asserting rights at international law is in existence, and can be potent. However, the protection of individual rights via this mechanism assumes first of all an individual with the resources and information to lodge a complaint and secondly the presence of a Federal Government willing to exercise the external affairs power in order to obligate recalcitrant States to comply. The success of the Toonen complaint did indeed lead to the federal *Human Rights (Sexual Conduct) Act* 1994, but this sort of outcome from any future appeals is by no means guaranteed.

Toonen has not forged an immediate path for protecting children's rights under CROC, nor the rights of refugees in detention under the ICCPR, nor the rights of NSW citizens who are now subject to arbitrary police stop and search powers through the NSW Labor Government's *Police and Public Safety Act* 1998. Although the Federal or a State government could be contravening international law, there is no directly coercive remedy that can change that position. Australia may be directly subject to the decisions of International tribunals and courts, if it has conceded to be a party to an action, or if it has accepted that obligation via the treaty process. In this way, Australia became subject to the findings of the International Court of Justice in Nauru v Australia. However no such mechanism exists under CROC or ICCPR.

Under CROC, Australia has acceded to an international reporting mechanism. Every five years the federal government is obliged to report to the UN on our practical response to commitments under the Convention. Australia has recently been questioned for breaches of treaty commitments under CROC. The UN Committee on the Rights of the Child has been reported to be concerned that although Australia has signed and ratified CROC, it appeared not to have upheld it on several specific issues such as the mandatory sentencing legislation for juveniles in Western Australia (*Criminal Code Amendment Act W.A. (No2)* 1996), the Northern Territory (*Juvenile Justice Act (NT)* 1997 Sec 53(a(e)); and the sweeping powers of the NSW *Children (Protection and Parental Responsibility) Act* 1997 (Loane, 1997).

The practical reality of exercising international law as a protection for individual rights is also problematic. Under most treaties, complainants have first to exhaust all domestic remedies before approaching the international arena. This is a costly and time consuming process and may require taking a case all the way to the High Court.

What is significant is that Australian governments continue to enact legislation which contravenes international treaties to which Australia is a signatory, and then attempt to hide behind constitutional arrangements which deny Australian citizens these rights. Australian governments regularly attempt to develop profiles as good international citizens, while at the same time denying their citizens the rights which they have promised to protect. This attitude highlights a hypocritical and shallow commitment to human rights, and helps explain the weak culture of human rights in this country.

The rights of children and the remedies provided by the International community therefore provide a source of symbolic importance, yet have only established a tenuous grip on domestic institutional arrangements. We can do better than this.

Both the ICCPR and CROC provide standards around which the actions of our governments can be measured. They provide both tangible and symbolic standards which non-government and community organisations can assert as the basic rights of Australian citizens. Indeed for some vulnerable groups such as children, international instruments may be their best option. We in the community need to stress the obligations that governments have accepted through the treaty process.

6. Young People & Crime

This chapter will discuss a number of factors which influence juvenile crime (offences by those under eighteen) and the perceptions of juvenile crime. It will include:

- What do we know? -- the statistics on juvenile crime
- Policing and Juveniles -- over representation, public space, gender and policing, young people and complaints
- Perceptions of Juvenile Crime

6.1 What do we know?

Statistics on crime come from several different sources; cases recorded by the police, cases decided by the courts, self-report surveys and surveys of victims. Each of these sources has its advantages and disadvantages (Freeman 1996). A full picture of crime, particularly juvenile crime can never be obtained. This report will not attempt to present an in depth examination of the extent and nature of juvenile crime. There are however some things of which we have a reasonably clear picture (Freeman 1996):

- only 2% of juveniles come into contact with the juvenile justice system, and around 80% of these are male,
- a small number of juveniles who persist in offending account for a disproportionately large percentage of appearances, and 70% of young offenders do not reappear after the first appearance,
- sixteen and seventeen year olds accounted for 53% of all juvenile appearances in 1994-95 (Freeman 1996),
- serious violent offences typically constitute much less than 1% of all charges finalised in the children's courts, while less serious assaults constitute less than 15% (NSW Children's Court Information System 1998)
- theft offences make up the largest proportion of crime committed by juveniles, and between 1990 and 1995 there was an upward trend in the number of appearances for assault and shoplifting,
- approximately half of the assaults committed are against other juveniles of the same age group, and group assaults are rare,
- young Aboriginal people are extremely over represented in the Juvenile Justice system, (Luke and Cuneen 1995) and young people from some NESB backgrounds are over represented in the Juvenile Justice system (Freeman 1996).

It is important when looking at juvenile crime to make a distinction between juveniles and young adults (18-24 year olds). The 18-24 age group makes up 11% of the population and 35% of the offending population. Juveniles (10-17 year olds) make up 11% of the population and 12% of the offending population (Freeman 1996). Juveniles are therefore not significantly overrepresented in the overall official reported crime statistics.

As we go on to discuss some of the issues related to the factors associated with juvenile crime, there are a number of issues to keep in mind. Firstly there is the danger of making sweeping generalisations, particularly with regard to the causes of juvenile crime. Secondly and most importantly is the difficulty of determining whether or to what extent the causes of juvenile crime can be linked to the impact of the juvenile justice system itself.

> Are young people who have trouble at school more likely to commit offences, or are they more likely to be reported to authorities and become the subject of surveillance and intervention? Are the young of minority groups more likely to appear in arrest rates because they commit more offences, or because they are members of minority groups and subject to differential treatment and sometimes racism? ... In other words, the factors that are often presented as predictors of delinquency may in fact be predictors of intervention (Cuneen and White 1995: 111).

A recent self-report survey of offending amongst secondary students in New South Wales (Bureau of Crime Statistics and Research 1998) has demonstrated similar results to earlier US studies (Bureau of Justice Statistics 1996):

- that there is a very high level of minor offending (assault, malicious damage, petty theft) amongst young people under eighteen,
- that it is overwhelmingly not detected, and
- that most young people do not go on to re-offend.

Nearly half of the NSW school students surveyed admitted they had engaged in some form of crime in the past 12 months. 29% had been involved in an assault, 27% had been involved in malicious damage to property and over 20% had been involved in some sort of petty theft (Bureau of Crime Statistics and Research 1998). However given the transient nature of this offending, and that most are unlikely to be apprehended, it was suggested that:

> Effective strategies to reduce juvenile crime should therefore focus more on prevention, rather than rely solely on criminal justice approaches such as increasing police numbers and penalties for offending. Such prevention strategies include parent training, anti-truancy and adolescent substance abuse programs (Bureau of Crime Statistics and Research 1998).

We endorse this view, and say that it should add impetus to the widely accepted need (CROC Articles 37 (b), 40 (3)(b)) to divert children and young people so far as possible from formal legal processes, rather than adopt an intolerant approach which would seek to detect and prosecute every possible offence.

6.2 Policing and Juveniles

Police are the gatekeepers of the criminal and juvenile justice systems, and their decision making is generally targeted and often discriminatory.

> To a large extent police determine which young people will enter the juvenile justice system, as well as the terms on which they enter. Police must continually decide whether to intervene and how to intervene. All available evidence demonstrates that their discretionary decisions work against the interests of indigenous young people (Cuneen and White 1995)

Aboriginal juveniles often don't receive the benefits of cautions, they are more likely to be arrested and more likely to be refused bail. "In rural NSW the likelihood of bail refusal was 129% greater for Aboriginal young people" (Luke and Cuneen 1995). On top of this Aboriginal young people were more likely to receive unrealistic or unachievable bail conditions.

The most recent statistics from the NSW Department of Juvenile Justice (1998) reveal a 25.9% incarceration rate for Aboriginal juveniles; they make up 1.8% of the juvenile population. This is 13 times over-representation. Young Aboriginal people are by far the most over represented group in the juvenile justice system. However young people from some

non-English speaking backgrounds are also overrepresented. Those groups overrepresented are Indo-Chinese, Lebanese, Pacific Islander and Maori young people (Department of Juvenile Justice 1998).

Differential policing practice has been found to be significant and widespread for young people from non English speaking backgrounds. *Nobody Listens* (Youth Justice Coalition 1994) a report into the experience of contact between police and young people found that these groups of young people were more likely to be arrested, more likely to be searched and more likely to be injured in their contact with police (Youth Justice Coalition 1994).

Another observation which can be made about policing is that it usually involves young men policing even younger men. One group of these young men has state sanctioned power while the even younger group does not. This policing takes place within a culture where aggressiveness, physical strength and lack of feelings of sympathy play a big part in the identity of each young man. The assertions of power which often take place in these interactions are almost inevitable.

The fact that young women are policed in very different ways and for different reasons supports the need for further investigation into the role male gender stereotypes play in policing all young people. For instance, young women often come to the attention of police for supposed moral reasons and their path to the juvenile justice system is often likely to be through the care and protection system (Carrington 1993).

Young people are generally policed in public, and as they often congregate in groups in public they are highly visible. Young people from distinct ethnic backgrounds and Aboriginal young people are even more visible. They are often seen as a threat to 'public order'. It is the responsibility of the police to maintain 'public order' and protect the rights of citizens. Police contact with young people in this context is seen by young people as confrontational. Contact can be vigorous to the point of harassment and routinely breaches the minimum standards required by public officials (Youth Justice Coalition 1994). Many charges laid against young people, particularly 'good order' offences, are related to the interaction between police and young people in public, rather than any criminal behaviour on the part of the young people prior to the interaction.

Young people are also increasingly policed by the private security industry. The powers of security guards in interactions with young people are even more blurred and less defined than those of the police. However, as with many police practices, security guards when stopping, questioning and searching rely on an assumed 'consent' from the young person. Generally, the powers of arrest possessed by security guards are no different to those of ordinary citizens. Security guards have no additional powers to search or question individuals and individuals detained by security guards don't have to answer any questions (Morey 1991). Yet security guards, acting on behalf of property owners, do assume such power.

> However, as agents of private authorities they have a range of sanctions available, which are more potent and perceived as more effective than those available to the criminal justice system. They are able to exclude "wrongdoers" from their premises without resorting to the legal system. ….the emergence of mass private property has given a sphere of independence and authority to private corporations far greater than that enjoyed by individuals and rivals that of the state. This has led to an increase in the power of the owners of mass private

property to intrude upon the privacy of citizens, with this authority rarely being questioned (Morey 1991).

Young people's experiences of security guards are often reported as negative and young people are subjected to high levels of surveillance. Young people also report being harassed by security guards and some young people report being assaulted. In a sample group of 155 young people 32 reported being assaulted (Morey 1991).

The use of police and security guards to monitor where young people choose to be and to socialise, if they are not directly interfering with the rights of others, is just unacceptable. The rights of children and young people to assemble in public (CROC Article 15) should not be interfered with. The use of police and security guards to control 'anti-social behaviour' is not only limited in its results it also infringes the basic human rights of these young people. When policing practice is discretionary and lacks accountability it becomes discriminatory. This then becomes a breach of human rights through arbitrary detention (CROC Article 37) and an arbitrary breach of privacy (CROC Article 16), including the degrading breaches implicit in arbitrary searches, particularly strip searches. When intervention involves harm to the young person it becomes a criminal abuse of power. Wilke (1995) argues that police 'stops' on young people are so routinely abusive that they should be limited wherever possible. She points out that both CROC and the Beijing Rules require the "least possible intervention" by legal authorities in young people's lives.

We know that young people tend to not complain through official channels about the treatment they receive at the hands of law enforcement agencies. There is an entrenched lack of trust by young people of the types of systems set up to deal with such matters, along with a general feeling that nothing would change anyway, even if they did make official complaints. Young people also fear reprisals (NSW Ombudsman 1997). Nevertheless there has been recent rise in the reporting of complaints, perhaps due to a better publicised mechanism. In 1996 the NSW Ombudsman employed a Youth Liaison Officer in a bid to make the complaints mechanism more accessible to young people. In 1996-97 written complaints received by the Ombudsman tripled (NSW Ombudsman 1997). For the purposes of this study it would have been useful to find out how many young people from Aboriginal and NESB had made complaints, however the office couldn't give us a breakdown of these figures. This is unfortunate given the traditional relationship between police and these groups.

6.3 Perceptions of Juvenile Crime

Throughout Australia during the 1990s concern about and fear of crime are on the increase. Unfortunately the fear of crime and particularly juvenile crime, engendered in the community is out of all proportion to the actual incidence and prevalence of crime. In a 1994 McNair survey (quoted in Freeman 1997) 70% of respondents ranked concern about violence as an issue of real concern. However the majority of respondents also stated that there were no crime or public nuisance problems in their neighbourhoods.

In Australia two studies undertaken on the fear of crime, or public concern about crime (Indermaur 1990; Criminal Justice Commission 1994), reveal that the general public overestimate the risks of criminal victimisation. This exaggerated fear of victimisation then attaches itself to the more visible sections of the population, young people (Youth Action and Policy Association 1997).

These perceptions raise a number of questions. How do we respond to the fear of crime? How do we respond to actual crime? What impact does this have on the development of legislation and policy, and more importantly the affects our responses have on young people? Crime and the fear of crime has an impact on communities; also communities have an impact on responses to crime and the fear of crime. Simple solutions, knee jerk reactions and quick fixes are not the answer, because tougher penalties and more police, simply do not have the effect of reducing crime or the fear of crime (White and Alder 1994; Hogg and Brown 1998).

It would seem that many have a vested interest in the area of juvenile crime. Our understanding about the extent, the nature, the effects and the causes of juvenile crime are developed by and through the relationships of these interest groups, some of whom are popular and powerful. Hogg and Brown discuss the so called 'commonsense' view of crime and law and order issues;

> this commonsense is built, layer upon layer, through constant repetition by popular and authoritative sources of a number of questionable views and assumptions which have assumed the status of a set of givens within the debate about crime (Hogg and Brown 1998: 18).

The media plays a major role in the portrayal of juveniles and crime, which in turn affects public opinion. It also shapes responses to juvenile crime (Brown and Hogg 1998: 20-44).

In this decade the political rhetoric around juvenile crime has been stepped up. Politicians have joined the media in a 'war against juvenile crime', as a way of capturing votes.

> Law and order has become an issue of considerable electoral significance. It has been a political catchcry in all the state and territory elections throughout Australia in recent years (Hogg and Brown 1998: 116).

Each successive campaign extends the rhetoric as the parties attempt to outbid each other. It is the search for votes, through the marketing of issues to a swinging electorate, whose anxieties and concerns will decide the day; and hence "no party aspiring to win government can afford not to participate" (Hogg and Brown 1998: 116).

One could easily get the impression that young people are seen as a threat, as different, as a possible target, as irresponsible, as lazy, as having no respect, as not part of the community, as anti-social, as violent and as criminal. This raises a most important question for each of the interest groups involved in the law and order debate -- how do these perceptions about young people affect young people?

Certainly one of the repercussions of the current style of law and order rhetoric is that it conveniently serves to deflect community concerns from the other social and cultural concerns of the day. In relation to young people this means that there is little action with regard to issues such as, depression, unemployment, homelessness, child abuse, domestic violence, poverty, racism and participation by young people.

The outcomes of this for children and young people are that they are heard less and less, they become more marginalised, they have fewer rights, they are less willing to participate and they feel like they don't belong. We only have to listen to what children and young people say

to understand how vitally important it is for a young person's well-being to be given a real opportunity to be an active participating member in, and to belong to, his or her community.

If we focus on juvenile justice policy to the exclusion of broader social policies, then we are only able to respond from a narrow almost blind view point. We begin to see children and young people from one perspective and we forget they have a right to a good education, to good health, and to support services. The impact of our one sided , knee jerk perceptions and responses are diabolical for young people. The further down this path we go the more likely it is that, what we set out to respond to, we create.

In conclusion, children and young people are generally not highly overrepresented in reported offending groups, yet they are significantly overrepresented in groups targeted by police, largely because they are significantly visible and occupy public space. While undetected petty offending rates may be high, this reinforces the widely accepted need (CROC Articles 37 (b), 40 (3)(b)) to divert children and young people so far as possible from formal legal processes, rather than adopt an intolerant approach which would seek to detect and prosecute every possible offence. Indigenous children and young people are extremely over-represented at all levels of the juvenile justice system. Many law and order policies in recent times, including substantial police powers, have been directed at Indigenous children and young people, with little justification.

7. Police Youth Policy

The Police Youth Policy Statement 1995-2000 (NSW Police Service 1995) was developed in response to the recommendations of the White Paper Implementation Plan commissioned by the Juvenile Justice Advisory Council after the release of the Department of Juvenile Justice White Paper (1995) *Breaking the Crime Cycle*. The police were under some pressure from the youth sector to produce a policy at that time.

7.1 The 1995 Police Youth Policy

The Police Service policy was developed over a two year period, with assistance from ten government and community organisations; the Departments of Community Services, Health, Juvenile Justice and School Education; the Juvenile Justice Advisory Council, the Office of Aboriginal Affairs, the Office of Youth Affairs, the University of Western Sydney (Macarthur), the Youth Action and Policy Association and the Youth Justice Coalition. Consultations with these groups were by way of working group meetings. Participants in those consultations recall that the police representatives were keen to listen to and incorporate their ideas. The acceptance of the need for the document and the way in which the youth sector was consulted was acknowledged as a positive part of the background to this policy (Bargen 1998). The Police Service policy is current at time of writing, but its operation is greatly curtailed by the thrust of many recent 'law and order' legislative developments.

The policy covers multiple areas of police-youth relations. Welcome amongst its aims and objectives are; the need to treat young people fairly and with dignity, the intent to proactively address the fundamental causes of juvenile criminality, the implementation of programs aimed at crime prevention and problem solving, increased levels of education and training for officers in youth issues, the intent to help reduce community fear by counteracting misinformation about juvenile crime, the improvement of procedure to take into account Aboriginal, ethnic and cultural considerations and the examination of procedure to ensure it protects the rights of young people and children. Crucial to this policy is the acknowledgment of young people's rights and police commitment to their protection, over and above the populist focal point of youth 'responsibilities'.

However the policy does not recognise clear rights and responsibilities for police or for children and young people. Absent from the policy is a commitment to concrete accountability for police digression from the policy's philosophical base. The document merely "outlines roles and responsibilities" (NSW Police Service 1995: 1). The then Police Commissioner Tony Lauer wrote that he:

> [encouraged] officers to read the document and put the ideas into practice in their day to day dealings with young people (NSW Police Service 1995: 3).

Furthermore, the Policy Statement of Intent states that the Police Service "aims to, treat young people fairly, and foster social change". It avoids any direct mention of street policing practices other than to say that "research projects will be undertaken to study the policing of children and young people" (NSW Police Service 1995: 4-5). The policy does not acknowledge detail of children's rights, as spelt out in the *Convention on the Rights of the Child*, and it refrains from being in any way prescriptive of unacceptable street level police behaviour, it merely 'outlines' and 'encourages'.

On one hand the view could be formed that these omissions of clarity and accountability reflect a certain shallowness of the document. On the other hand, policy from many government departments can be viewed as a model of best practice, something one refers to when 'things go wrong' in a general sense. Therefore, in this case, the policy may be seen by police managers as a sufficient public statement of philosophy, and sufficient to hold some police accountable to its aims and objectives.

So far as it goes, the policy appears to be broadly in accordance with Australia's international obligations under the *International Covenant on Civil and Political Rights*, and the *Convention on the Rights of the Child,* and it could in general be seen as concurring with the thrust of recent reports, such as the Australian Law Reform Commission's report (1997) *Seen and Heard*. However it does not go nearly as far as that report in recognising rights, nor is it as specific. This may not be surprising, when the Police Minister Paul Whelan acknowledged that he was "not familiar" with the detail of the *Convention on the Rights of the Child* (Cameron and Scott 1998).

Although the intent of the police youth policy is welcome, it could also be said that it is merely a public relations exercise and is deeply out of touch with the realities of police-youth interactions. Ingrained anti-youth policing practices and culture have been widely documented (Youth Justice Coalition 1994; Luke and Cuneen 1995; Blagg and Wilke 1995). The problems of police racism and culture, including the denial of young person's rights, are barriers to the effective operation of the policy in practice. The policy makes a welcome commitment to police training and increased awareness of issues, but it is reasonable to suspect that in practice the effect of training may be undermined in the context of dominant patrol cultures (Youth Justice Coalition 1994).

In addition, regardless of the recognition of youth issues, in many ways the policy runs counter to the ideological shift in legislation of the last decade. The policy in some respects implies that it is possible for 'order' in society to include young people's exuberance, mistakes, rights when they break the law, and tendency to socialise in groups (Bargen 1997b: 13). However governments appear to be saying the opposite. The current thrust of a great deal of recent legislation (eg. the *Children (Protection and Parental Responsibility) Act* 1997; and the *Crimes Amendment (Police and Public Safety) Act* 1998) and policy has been generally intolerant of children and young people, and is about containing and controlling their lives. In addition, the increased use of police powers, given by legislation, decreases the focus on pro-active community strategies and indeed on the recognition of youth rights per se.

7.2 Zero Tolerance Policing

In September 1997, the Commissioner of the NSW Police announced that while the policy of 'Zero Tolerance' would not be introduced as NSW policing policy, it would be used in some areas such as in Cabramatta (O'Brien and Campbell 1997). Then in October 1997, Professor James Q Wilson, an important intellectual influence on the mid-1990s New York police strategy of 'Zero Tolerance' was in Sydney discussing the strategy. His tour attracted extensive media coverage calling for the introduction of 'Zero Tolerance' in NSW (O'Brien and Campbell 1997). NSW Police Association members then visited New York and returned with the idea that Zero Tolerance could support their industrial claim for greater police numbers.

The concept of 'Zero Tolerance' had been used in the US, specifically as a 'blitz' policing practice aimed at street offending, but also by legislators on drug and alcohol policy and by school administrators in relation to weapons, drugs and sexual harassment. As a street level strategy, 'Zero Tolerance' policing means intense policing of of drug users, certain classes of petty offenders and aggressive street policing. As a sentencing strategy 'Zero Tolerance' manifests itself in mandatory sentencing regimes. A respected Australian analyst has labelled the claims for New York style 'Zero Tolerance' policing as exaggerated, irrelevant to the Australian experience and ignoring the substantial costs of such a strategy (Dixon 1998: 97).

Zero tolerance is particularly problematic in relation to young people because it purports to rob police *within certain operations* of any level of discretion, and opens up young people to higher levels of systemic harm via the process of arrest, charge and sentence. This is contrary to Articles 37(b) and 40(3)(b) of the *Convention on the Rights of the Child*, which require that the arrest and detention of a child be "used only as a measure of last resort" and that formal legal procedures be generally avoided. It has been widely documented that the framework of 'Zero Tolerance' enables grossly unjust events to occur, such as the notorious Winbyne case in the Northern Territory where a young Aboriginal woman was jailed for fourteen days for receiving a stolen can of beer.

The Royal Commission into the New South Wales Police Service (Wood 1997) disavowed the notion of Zero Tolerance, as also the idea that simply 'more police' would properly protect communities against crime. The Commission said this was "a myth" because:

- "repeated analysis has consistently failed to find any connection between the number of police officers and either crime rates or the proportion of crimes solved
- "it is incontrovertible that most causes of crime are social and economic factors over which police have no control, and
- "it has not been demonstrated that increasing the number of police will satisfy a public which has been described as having an insatiable demand for 'less crime and more order"

The Commission argued that, instead of attempting to increase resources and expand the scope of police interventions, the Police Service should "improve the quality of service by the available police rather than to assume that quantity is the answer", and "refocus on the type of work which actually needs to be performed by sworn police, and release those who are inappropriately included in non-operational duties to operational roles." (Wood 1997: 247-8)

Contrary to the notion of 'Zero Tolerance', one object of the Police Youth Policy is to extend diversionary and pre court intervention strategies in order to move young people away from court procedures, and to enhance the caution and warning schemes available to police. The policy also calls for enhanced police skills in dealing with young people in this fashion. A legislative or administrative attempt to undermine these objectives via the use of 'Zero Tolerance' would produce an opposite result, with more children coming into contact with the full ambit of the juvenile justice system. However the 'street sweeping' operations introduced under legislation such as the *Crimes Legislation (Police and Public Safety) Act* 1998 has overshadowed the Policy Youth Policy, and introduced elements of 'zero tolerance'.

7.3 Policing by Security Guards

A further level of surveillance and confrontation, that parallels the police-youth relationship, occurs between young people and security guards. In many ways the problems of young people at a street level are compounded by the proliferation of the private security industry in recent times. This is happening in both private and public space. Whilst it is acknowledged that security guards also protect the rights of young people at times, the nature of the relationship makes it important to highlight the problem of young people who are harassed in contravention of their right to peacefully enjoy these areas. Young people are more and more frequently confronted by the presence of security guards in public space such as railway stations, on trains and in community spaces such as parks.

Young people who frequent shopping centres and malls come under the gaze of both the police and security guards. This is because of the ambiguous nature of the legal status of these spaces. Whilst on one level these spaces are public in the sense of being utilised by the general public at no cost, they are also legally private spaces in that they are owned and controlled by private enterprise. Private property rights are thus protected and enforced, often aggressively, by security guards. This presents an increase in the potential for friction in that young people may become liable to intervention through both the public policing function (of property and summary offences) and the exercise of private rights (eg. trespass, and the assumption of terms and conditions upon entry to a commercial space). However, the assumed consent of young people -- to requests that they do such things as move on, provide their names and open their bags -- lies at the root of the power exercised by security guards.

The security industry is becoming somewhat more regulated through compulsory training and licensing, however this does not necessarily guarantee that the rights of young people are respected by individual security operatives. There is little specific legislation or common law in relation to the conduct of security guards, other than that which attaches to the actions of the private citizen (eg citizen's arrest) and the correlation of a guard's powers to the rights of the property owner via the rules of agency.

The complaints of young people in relation to their experience of private security are becoming more strident (Morey 1991). There is little in the way of empirical research to prove that security guards are continually disregarding the rights of young people, but there is substantial colloquial evidence of this, particularly within the youth sector.

Although it may not be possible for the interests of all sections of the community to be met, it is imperative that conflicts in the use of community space are addressed with some measure of understanding of the needs and rights of all users, not simply those who are most vocal or most powerful (Pearce 1997: 73).

7.4 Conclusion

As 'gatekeepers' to the justice system, police have a vital role to play in their handling of young people. The Police Youth Policy Statement 1995-2000 is welcome in its policy thrust and acknowledgment of some of the issues surrounding the policing and processing of young people. However it lacks clear detail on the accountability of police in relation to breaches of young people's rights, and it does not acknowledge children's rights in sufficient detail. Police often demonstrate a poor understanding of the rights of young people. We suggest that the principles of the *Convention on the Rights of the Child* relevant to policing be incorporated

into the Police Youth Policy -- in particular that legal intervention be avoided so far as possible -- and that the reasons behind these principles be explained (in relation to each Act and in operational instructions) to every police officer in the NSW Police Service.

There is also a need to regulate the powers of security guards, who play an increasingly important role in young people's lives, as shopping malls grow and thrive. The youth-security guard relationship needs to be conditioned according to an understanding of CROC principles, just as does the youth-police relationship.

The Police Youth Policy has been repeatedly undermined by administrative and legislative changes, such as the partial acceptance of notions of 'Zero Tolerance', or selective 'blitz' policing, by the *Children (Protection and Parental Responsibility) Act* 1997, and the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998, by threats to further restrict bail under the *Bail Act* 1988, and by proposals to remove the right to silence (NSW Law Reform Commission 1998). Police youth policy cannot be effective in respecting the rights of children while this onslaught of populist 'law and order' continues to corrode respect for the rights of young people.

8. New Laws Affecting Young People in Public

This chapter reviews several pieces of legislation, relevant to youth street rights, passed in 1997 and 1998. In particular we review:

- the *Children (Protection & Parental Responsibility) Act* 1997
- the *Crimes Amendment (Detention After Arrest) Act* 1997
- the *Young Offenders Act* 1997
- the *Summary Offences Amendment Act* 1997
- the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998

We follow the methodology set out in chapter three. That is, we review the history of each piece of legislation, observing the role of particular interests in its creation. Then, we audit the new law, using the *Convention on the Rights of the Child* (CROC) as our reference point. Finally, we consider whether the legislation has created barriers to justice and how it has conceptualised young people's rights and responsibilities.

8.1 Children (Protection & Parental Responsibility) Act 1997

The *Children (Protection and Parental Responsibility) Act* 1997 has developed over a space of several years. A precursor, the *Children (Parental Responsibility) Act*, was enacted in 1994. The original Act was introduced by the Fahey Liberal-National government as a strategy to address the incidence of juvenile crime. It was proposed and passed into law during the build up to the 1995 NSW State election in an atmosphere of media and political hysteria over the perceived 'gang problem' (O'Sullivan, 1995), with both sides of politics attempting to outbid each other on tough law and order strategies.

There was a populist notion at the time that families and parents were failing to take responsibility for their children, and that in order to protect the community, legislation should successfully force parents to be accountable for the actions of their offspring. That was the effect of one part of the Act. However, it was also felt that it was inappropriate for parents to be responsible for the whereabouts of children aged sixteen and above, therefore that part has only ever applied to children under the age of sixteen.

The 1994 Act had two main elements. The first element empowered police to remove a child under sixteen from a public space, if police believed on reasonable grounds that the young person was not subject to the supervision or control of a responsible adult, or if the young person was 'at risk'. The definition of 'at risk' included being in danger of injury or harmful behaviour, or likely to commit an offence. Police were to take young persons to their parents or carer's home, or to a 'prescribed place of refuge'.

The second element was directed at compelling parents of children who commit offences to take responsibility for their children's actions. Under this part, parents could be required to attend court and to take responsibility for the past or future actions of their children. The court could release a child on an undertaking by the parents that the child would refrain from a prohibited act for a period of twelve months. Parents whose child went on to commit another offence could themselves be guilty of an offence. The court was given the power to compel a parent to undergo counselling and to issue a warrant for them to do so if they did not comply

with the order. This second element was transferred into the 1997 Act and is currently valid throughout the State.

In 1994 the Labour opposition was split over the efficacy and implications of the Bill. Through the party process consensual support for the Bill was developed, in principle, but with various amendments put forward, including that police stations were not to be used as 'prescribed places' and that the legislation was to be reviewed after one year. The legislation was criticised for having been introduced with little community consultation, and for being likely to be used disproportionately on children of disadvantaged and indigenous backgrounds (Evaluation Committee, 1997). A decision was therefore made to trial the laws for a space of one year in Orange and Gosford.

This original Act was proclaimed in December 1994. The one year trial took place with a very significant amount of money being spent on setting up and staffing two safety houses in the trial ares. However:

> as at 31 December 1996, 67 children had been picked up at Orange, with nine being taken to the safe house. In Gosford, 14 children have been detained under the Act, with seven of these young people being taken to the safe house. (Evaluation Committee 1997: 4).

As a proportion of the gross amount spent on the safe house scheme, approximately $10,700 was outlaid for every night a young person spent in one of the houses. (Evaluation Committee 1997: 47). The safe house scheme was a distinct disappointment. However there continued to be significant support for the Act, particularly from rural Councils and Chambers of Commerce.

An evaluation of the trial was required under Section 16 of the 1994 Act. It was conducted by independent consultants and referred to an Evaluation Committee convened by the Attorney General. The Evaluation Report was scathing, particularly in its condemnation of the unrealistic objectives of the Act and whether they could be met in any way, and the cost effectiveness of the Act particularly in respect to the safety houses. Indeed the evaluation questioned whether the Act could do anything at all to remedy juvenile crime in NSW. It stated that the Act

- was motivated by racial tensions and the desire to remove Aboriginal youth from the streets
- ran contrary to the recommendations of the Royal Commission into Aboriginal Deaths in Custody
- did nothing to reduce juvenile crime, and that it
- infringed basic human rights, in particular the freedom from arbitrary arrest and detention (Evaluation Committee 1997)

However, determined to reintroduce the Act, Premier Bob Carr was reported as refusing to even read the evaluation. Attorney-General Jeff Shaw publicly admitted that the Act was partly about keeping Aboriginal children off the streets in country towns (Jamal 1997).

The *Children (Protection and Parental Responsibility) Act* was assented to in July 1997. In addition to the original main two parts, the legislation was amended to include a new Part empowering the Attorney General to declare an area 'operational' for the purposes of the Act. Each local council has to apply to the Attorney in order for the extra police powers under the Act to be used. Police in a particular local government area can not be armed with the Part Three powers without this declaration.

The power to declare an area 'operational' is linked to an examination of the crime prevention solutions that have been adopted in the area, community consultation about appropriate crime prevention strategies, and the provision of youth services and amenities with particular notice being taken of disadvantaged and indigenous young people. The objectives of these changes mark a distinct reinterpretation in the philosophical approach of the Act, in that the police powers are conferred on an area as part of a strategic approach to crime prevention, rather than as knee-jerk coercion.

The Crime Prevention Division of the Attorney General's Department is currently engaged in assessing, negotiating and administering these 'Crime Prevention Plans' and 'Safer Community Compacts'. Crime Prevention Plans are meant to be developed in consultation with all sectors of the community and are said to act on good practice and research findings, to be realistic and achievable, to focus on priority issues, to combine situational and social crime prevention and to seek to prevent crime now and in the future (Attorney General's Department 1997: 10). Safer Community Compacts are in essence an endorsement by the State Government of the local Crime Prevention Plan. Finalisation of a Safer Community Compact additionally enables councils to apply for funding under the Safer Communities Development Fund.

On the issue of the consultation process, Bernardi (1997) notes that extensive research conducted by the Community Legal Service for Western NSW found that in areas where councils intended to implement the Act, 92% of Aboriginal people surveyed had not been approached by their local council. Instead, what alerted many Aboriginal people to their council's intention was an announcement in their local media. As to whether they had prior knowledge of the CPPR Act, 79% said they were completely unaware of the legislation and its possible effect on their children (Bernardi 1997).

The Act does not require a council to have a local Crime Prevention Plan or a Safer Community Compact in place in order to be declared an operational area, although the Attorney General is to have regard to local crime prevention initiatives in his assessment of an application. Practically, under the current administration, these crime prevention initiatives need to be in place for an area to be given operational status. However, because the link was not established legislatively, it is possible that future Attorneys General could confer operational status in a far more expeditious way.

Interestingly, the legislation is now only designed to operate in rural areas, given the jurisdictional problems that would occur in the city (ie. police officers having to escort young people from one Local Government Area where the Act is operational to an LGA where the Act is not). As at the time of writing, the Act was still in operation in Orange (by way of extensions granted in the 1997 legislation), and Ballina, Moree and Coonamble been granted operational status by the Attorney General in December 1998. Yet, after five years and a great deal of public money, there have been few substantial outcomes. Local Government has been forced to look at crime prevention strategies, however many of these strategies are based on a continuum of traditional criminal justice enforcement measures (Pearce 1996). However the 'police powers' strategy to counteract the 'problem', identified by the 1995 moral panic, has proven to be of little value.

One further outcome of the development and implementation of the Act has been the substantial amount of press coverage that it has received, particularly in rural areas. This coverage has substantially focussed on the need for the coercive powers of the Act rather than the crime prevention aspects. The public portrayal of the Act has therefore been distorted, particularly given the near absence of operational areas. A further evaluation of the 1997 Act is under way at the time of writing. This evaluation aims to determine whether the Act has in fact assisted to reduce crime involving young people, as well as to pay particular attention to the needs of rural areas.

Whatever its efficacy, there remain serious human rights objections to the Act. The legislation discriminates against young people, for whom public space is a normal environment (YAPA 1997: 9), because of their visibility in that normal environment. The legislation discriminates against innocent young people in public space, who don't need protection and are not breaking the law. The UN Committee on the Rights of the Child has expressed its concerns at this law, "which is an infringement on children's civil rights, including the right to assembly" (Committee on the Rights of the Child 1997: 16).

Under several statutes -- for example the *Summary Offences Act* 1988, the *Crimes Act* 1900, the *Intoxicated Persons Act* 1979 and the *Children (Care and Protection) Act* 1987 -- there were more than sufficient powers for police to deal with young people who are harming or interfering with other people in public space. There has been and is also ample scope for offenders, or those who are attempting to commit offences, to be held accountable.

The Act contravenes a first principle of the criminal law that police should only be empowered to arrest or detain those reasonably suspected of having committed or having attempted to commit an offence. Sec 19 (3(c)) empowers police to apprehend young people who are 'at risk' of committing an offence. This significantly extends the envelope in which police can detain young people and confers an arbitrary power of preventive detention on the police.

The Act contravenes the *Convention on the Rights Of the Child* (Article 3(1)) whereby in all legal proceedings the best interests of the child should be paramount, because the practical purpose of the Act is to serve sectional interests of the community. We make this statement despite the inclusion of Sec 21(2):

> the police officer's paramount duty is to ensure that any action taken in respect of a person to whom this Division applies who is removed from a public place under this Division is in the best interests of the person.

The evidence, however, is that discretionary decisions by police result in a "compounding bias" against Aboriginal children (Luke & Cuneen 1995). The 1994 Act was criticised for having this effect, but also for intending this effect (Kerr 1996; Evaluation Committee 1997). The purpose of the Act was thus to promote the interests of a dominant section of the community, rather than to act in the best interests of the young person.

The legislation contravenes Australia's international obligations under both the *Convention on the Rights Of the Child* (Article 15(1)) and the *International Covenant on Civil and Political Rights* (Article 21) as it denies children freedom of association and freedom of peaceful assembly. None of the exceptions provided by either of these articles (that is the interests of

national security, public safety, public order, or protection of the rights and freedoms of others) apply to justify the preventive detention powers of this Act.

The legislation contravenes the *Convention on the Rights Of the Child* "that State parties will ensure that no child shall be deprived of his or her liberty unlawfully or arbitrarily." (Article 37(b)). The basis for the preventive detention is so subjective as to be arbitrary.

The establishment of the consultation process for setting up local Crime Prevention Plans may reflect the *Convention on the Rights Of the Child* requirements for children's participation in decision making (Article 12). However in practice we are concerned whether such participation will occur at all.

Significant sections of this Act are directed at visible young people, especially Aboriginal young people, who congregate in public space. In many instances the sort of behaviour young people display in public space is simply a part of growing up. Young people's exuberance and energy are part of their developmental progress as well as important to their forming of peer groups and their development of adult responsibility. Unfortunately this behaviour can irritate some adults and small business owners, who then demand police surveillance and intervention. The capacity for such intervention is enhanced, given the street sweeping intent of this and other legislation (White 1993). Media hysteria and law and order campaigns intensify the unease felt by the police and sections of the public. An Act of this nature simply heightens perceptions that young people in public space are deviant, at risk and likely to break the law. Furthermore it demands that police monitor youth behaviour which is not criminal and enables police to act on stereotypes. Young people in focus groups have stated "overwhelmingly" that police are "generally hostile and aggressive towards young people and treat them all as troublemakers" (Australian Law Reform Commission 1997: 485-6).

The *Evaluation Report* identified various false assumptions on which the 1994 Act was based. These are important to repeat.

- that juvenile crime cannot be dealt with using established laws,
- that young people in public space are likely to commit crime or be exposed to 'risk',
- that family dysfunction can be remedied by the coercive operation of the criminal justice system (Evaluation Committee 1997: 22).

Via this Act, young indigenous people are constructed as a 'law and order' problem. This construction presumes European norms of behaviour and public space usage, placing Aborigines outside this norm and legitimising further surveillance and intervention. Endemic racism can consequently be both ignored and entrenched. The use of police in the process sadly prolongs the use of state intervention into a community which has long suffered similar forms of systemic intervention and abuse (Human Rights and Equal Opportunities Commission 1997).

The *Children (Protection and Parental Responsibility) Act* 1997 holds that parents whose children break the law in contravention of a parental responsibility order can themselves be guilty of an offence. This idea is clearly in contravention to the maxim of natural justice that only the person who commits an offence can be held accountable for it. While a parent may share some responsibility for his or her children, this cannot extend to criminal liability for unsupervised children.

A further issue noted by Bernardi (1998) is that the Act does not provide means for judicial review of police decisions and is consequently open to police abuse. This is very disturbing given the findings of widespread police abuse and corruption, by the NSW Police Royal Commission (Wood 1997).

This Act was said to hold parents responsible for supervising offending children, and to give some additional powers to police to protect children from harm. However with criticism from almost every quarter, including the United Nations (Committee on the Rights of the Child 1997: 16) -- yet supported by cynical political interests, concerned with securing the 'law and order' vote -- the *Children (Protection and Parental Responsibility) Act* 1997 survives in a nearly ineffective yet still dangerous form. It is a national and international embarrassment, and should be repealed.

The local crime prevention planning requirements, which have been grafted onto this Act, deserve support where they work with genuine community input and where they provide a chance for young people to be heard in the process. However the essential elements of the law

- creating the offence of allowing a teenager, supposedly under a parent or guardian's control, to commit an offence, and
- providing police in 'operational areas' with effective preventive detention powers over all those under the age of sixteen,

clearly violate human rights obligations and should be repealed. Useful crime prevention schemes do not need a home in this offensive legal framework.

8.2 Detention After Arrest Act 1997

The immediate impetus for the *Crimes Amendment (Detention After Arrest) Act* 1997 came from police and their advocates (Taylor 1996: 5; Tink 1996: 5023), concerned to legitimise the police practice of holding suspects for questioning after arrest and before being charged. The new law created a maximum time during which a suspect could be held for questioning, but also specified some limited rights for detained persons. Under regulations, children and other "vulnerable" groups were also allowed some additional rights. However these rights were poorly instituted, and were conceived as subordinate to the administrative needs of police.

The Royal Commission into the NSW Police Service (Wood 1997: 463-466) noted some general police efforts to propose reformulation of their powers, with reference to the British *Police and Criminal Evidence Act* 1984. Of concern was the settling of some issues surrounding arrest, the rights of detained persons, questioning of suspects and powers of search. One issue of particular concern to police was the common law position, restated in the High Court case of *Williams v The Queen* (1986), which required that after arrest a suspect must be placed before a magistrate without unreasonable delay and "as soon as is practicable". If this did not occur, any admissions extracted in custody might be excluded, firstly as a matter of common law, later according to the *Evidence Act* 1995 s.138(3). This was a protection of suspects' rights, as the likelihood of unreliable confessions grows with increased time in police custody (Dixon 1997). From the point of view of police efficacy, however, an investigation might be limited, as the Williams case had held that:

> If ... inquiries are not complete at the time when it is practicable to bring [the suspect] before a justice, then it is the completion of inquiries and not the bringing of the arrested person before a justice which must be delayed (High Court of Australia 1986: 300).

As a consequence, an admission extracted after an excessive period of detention might be ruled inadmissible. Police maintained there was an unreasonable uncertainty about this period (Taylor 1996: 5).

Further, the practice of police fabrication of admissions and artificial delaying tactics were in part attributed to this supposedly deficient law. This is a remarkable but familiar argument by which police abuse of power, or serious corruption, is used to justify an extension of police powers. Attorney General Jeff Shaw thus claimed that "the current position can encourage perjury, contrivance and abuse of police powers" (Morris 1998: 20). The Police Royal Commissioner agreed:

> If the rights of suspects and police are not properly spelled out there will inevitably be confusion and dispute ... [further] it encourages police to perjure themselves in relation to whether suspects being interviewed are under arrest or merely 'assisting inquiries' (Wood 1997: 464-5).

The proposal was couched in terms of 'balancing' the rights of citizens and powers of police, however it was clear that the former was seen as a price to pay for the latter. Some limited rights were to be formalised at the same time as police powers were formalised. However police needs were paramount in this process. The Police Royal Commissioner supported "statutory modification of the common law" in *Williams*, "to allow police a reasonable opportunity to make inquiries following the arrest of a suspect before taking that person before a justice". He "strongly" recommended passage of this legislation "as speedily as possible" (Wood 1997: 465-6). No particular safeguards were specified.

The *Crimes Amendment (Detention After Arrest) Act* 1997 (amending the *Crimes Act* 1900, by adding Part 10A, or ss 354-356Y) thus set out a new regime by which lawfully arrested and detained persons could be held for questioning for a "reasonable time", which should not exceed four hours except with a detention warrant (Shaw 1997). This time could be extended by "time out" periods, which would not be counted in the four hour maximum. "Time outs" would exclude such things as travelling time, waiting for the arrival of police officers, time at the bathroom, and time for the suspect to communicate with a lawyer or a friend (s.356F). A detention warrant could be issued by a magistrate, to extend the four hours by "up to eight hours" (s.356G). The Act created a police 'custody manger' position, and this police officer would have the role to "caution the person that the person does not have to say anything but that anything the person does say or do may be used in evidence", and to provide the arrested person with a summary of his or her rights under this Detention After Arrest law (s.356M). Those rights, according to the Act were principally:

- the right to communicate with a friend, relative, guardian, independent person or a lawyer, and to let that person know where the person is being held
- the right of a foreign national to communicate with a consular official
- the right to an interpreter
- the right to medical assistance
- the right to refreshment and bathroom facilities (ss.356N-356U)

This was the first time such custody rights had been set in statute. However there was no particular provision in the Act for the rights of children.

The Law Society of NSW (1997a) immediately criticised the Detention After Arrest Act as granting police "far greater powers than those they currently have" and for failing to make provisions "for young people, people with physical or intellectual disabilities or other vulnerable members of the community". The Council for Civil Liberties commented:

> The Bill's main problem is that it extends police powers but (despite the rhetoric) provides no substantial suspect's rights. This is critical because the potential for unreliable 'confessions' (the prime objective of detention) increases with time in police custody. Videotaping has not solved this problem, because of (i) threats, inducements and alleged 'confessions' outside the videoed period, and (ii) lack of access to independent legal advice (Anderson 1997).

However, Associate Professor David Dixon, drawing on the English experience under the *Police and Criminal Evidence Act* 1984, suggested that this law might provide an opportunity to regulate a currently unregulated area of police practice. Police already had *de facto* power to hold suspects for considerable periods, through manipulation and judicial laxity. This power might be regulated to provide for an increasingly accountable procedure, based on the responsibilities of a custody officer, and full access to independent legal advice, which (i) allows for police investigation, but also (ii) protects the suspect's legal rights and provides a disincentive for police to continue holding a suspect. The NSW Act, though, had three major weaknesses. It did not fully spell out the powers and responsibilities of custody officers, it did not provide special rights for vulnerable groups, including children, and the rights of the new Act were "insubstantial" (Dixon 1997).

Attorney General Jeff Shaw (1997) responded to these criticisms in several ways. First, he said that the *Evidence Act* 1995 (s.138, which creates a presumption for the exclusion of improperly obtained evidence) and changes to the *Crimes Act* 1900 (s.424A, which requires the recording of police interviews for serious offences), had strengthened the rights of suspects under arrest. Second, he acknowledged that as the funding of legal aid had been "savagely curtailed" there might be problems for some suspects in gaining legal advice. However he claimed the absence of a 24 hour duty solicitor service -- as insisted on the NSW Law Reform Commission (1990) -- did not mean the new regime was "fatally flawed". Third, he promised that Regulations under the Act would make special provisions for vulnerable persons (Shaw 1997).

Regulations under the new Act were gazetted in February 1998 and did address some of this criticism. "Vulnerable persons" were defined as children, those with intellectual or physical disabilities, those from non-English speaking backgrounds, and Aboriginal and Torres Strait Islanders. They were to be assisted to exercise their rights, in particular contacting legal and personal support people. "Support persons" for any detained person were given some rights of attendance and assistance. The "Custody Manager" was defined as a police officer who was not the arresting or investigating officer, and was given the responsibility of keeping custody records and helping a detained vulnerable person become aware of and exercise his or her rights, including the right to make a phone call to a lawyer or support person (Reg 20). Children were not able to waive their right to have a support person present (Reg 23), consistent with provisions of the *Children Criminal Proceedings Act* 1987, which makes any admissions obtained inadmissible in court, if a young person under 18 is questioned by police without the presence of an adult support person (s.13).

In addition to the problem of the subordinate nature of substantial rights, created under the *Detention After Arrest Act* and its Regulations, there are some particular problems with this new law. First, the system depends on lawyers being readily available for legal advice and support, 24 hours a day. However there is no publicly funded roster for such support, and most people arrested are poor. Second, the sensitive issue of placing vulnerable people in cells is addressed in the police guidelines, attached to the Regulations (Schedule 1 Part 2). In particular, the guideline which requires that Aboriginal and Torres Strait Islander children not be placed in police cells unless there are "exceptional circumstances" (Schedule 1, part 2, clause 5) does reflect the principle established by the Royal Commission into Aboriginal deaths in Custody (Johnston 1991) and the Human Rights and Equal Opportunity Commission (1997: 49). However it is only a guideline. Further, the equally sensitive issue of strip-searching vulnerable people remains unregulated. There is great international and domestic concern over the expanding practice of routine body and strip searches. NSW Police conduct routine body and strip searches on adults and children alike, when they are in custody. However there is no requirement that 'reasonable cause' be shown and recorded for such an intrusive and offensive practice. Third, the effective times allowed for police custody are long. With time out periods many detentions will reach eight hours or more. The stress of long periods in custody is likely to be greater for children and young people, with a concurrent increased risk of unreliable confessions, yet there is no special consideration for them in this law. The Law Society (1997b) unsuccessfully sought a reduction of the four hour maximum to two hours.

Finally, there was expressed concern that the traditional police "caution", which the Act defined as explaining that "the person does not have to say or do anything but that anything the person does say or do may be used in evidence" (s.356M), was not similarly defined as meaning a right to silence in the Regulations (Law Society 1997a). This might seem a technical point until one understands that there is a concurrent review of the entire right to silence, conducted by the NSW Law Reform Commission (1998) and that this review came about following proposals by NSW Police Commissioner Peter Ryan. Further, the Director of Public Prosecutions recently told the Law Reform Commission "There is no right to silence" (Cowdery c1997). There has been no indication from either police or prosecutors that children are to be exempt from their proposed abolition of the right to silence. If a total or partial abolition of this right were to follow the Law Reform Commission's review, it would make a mockery of the 'trade off' implicit in this new Act -- the extension of greater certainty for investigating police, while the rights of detained are also given greater protection.

There are two major human rights concerns with the Detention After Arrest law, as it applies to those under eighteen. The first relates to the use of detention, the second to privacy and dignity. The *Convention on the Rights of the Child* 1989 is even stronger in its prohibition of "arbitrary" detention than the *International Covenant on Civil and Political Rights* 1966. Not only must no child be "deprived of his or her liberty unlawfully or arbitrarily" (as in the ICCPR), but arrest and detention must be used "only as a measure of last resort and for the shortest appropriate period of time" (CROC Article 37 (b)). This contrasts with the NSW law, which now provides for a maximum and 'reasonable' period for police interrogation. There is no provision to achieve a 'minimum' period of detention for children, or even a lesser period as compared to that for adults, so the law thus does not comply with the international standard.

The *Convention on the Rights of the Child* also requires (as does the *ICCPR*) that there be no "arbitrary or unlawful interference" with the young person's privacy (Article 16) and that the young person not be subject to any "degrading treatment" (Article 37 (a)). However the routine nature of police body and strip searches on those in custody carries the quality of arbitrariness. Further, the process of such searches is often traumatic and brutalising (Simmering 1995; Maher et al 1997: 35-42). Little has been done in Australia to regulate this common practice, but the *Detention After Arrest* law expands the scope of this practice while doing nothing to control it. The failure of the Act or its Regulations to regulate the routine body and strip searches, while extending police the facility of certain and maximum periods of custody, pays little regard to this principle. Young people's rights to privacy and freedom from degrading treatment have been ignored.

The *Crimes Amendment (Detention After Arrest) Act* (1997) and its Regulations were designed to provide police with custodial time to pursue interrogation of suspects, yet add some safeguards in the way of clearer rights for those detained. However the Act breaches human rights standards, by facilitating extended periods of custody, rather than ensuring minimal periods, as required by the *Convention on the Rights of the Child*. Custody rights have been introduced but are weakly entrenched and are formally subordinate to police administrative requirements and are under threat from a Government ordered review of the right to silence. Finally, the failure to regulate searching and strip searching under the Act enhances a pre-existing degrading treatment and an arbitrary interference with privacy, which is also in breach of human rights standards and commitments.

To meet international standards for children and young people

- the substantial rights under the *Detention After Arrest Act* should be codified under a separate Act such as a Bill of Rights Act,
- a lesser maximum period of detention must be prescribed for children under eighteen
- the minimal custody requirement from CROC should be added to the *Detention After Arrest Act* -- that children and young people should be held in custody "only as a measure of last resort and for the shortest appropriate period of time"
- the Act should strictly regulate searching and strip searching of young people, setting up a warrant type procedure, with appeal rights, to make strip searching exceptional rather than routine.

8.3 Young Offenders Act 1997

The *Young Offenders Act* 1997 has recently (April 1998) become operational across NSW. The Act enshrines in legislation a hierarchy of interventions for juvenile offending, beginning with police warnings and cautions, then conferencing and finally attendance at court. The question of whether a certain type of intervention is appropriate depends on whether the offence meets certain criteria and whether interventions at the lower end of the hierarchy have been considered and are appropriate. At each stage of the juvenile justice process, police, prosecuting authorities and judicial officers will, before proceeding, be required to consider whether the intervention being suggested is appropriate or whether some other form of intervention should be used. (NSW Attorney General's Department, 1996)

The principles of the Act as set out in Part 2 Section 7 are as follows:

- the least restrictive form of sanction should be applied to a child who is alleged to have committed an offence, having regard to certain matters listed in the Act.
- children who are alleged to have committed an offence are entitled to be informed about their right to obtain legal advice and to have an opportunity to obtain that advice.
- criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.
- criminal proceedings are not to be instituted against a child solely in order to provide any assistance or services needed to advance the welfare of the child or his or her family group.
- if it is appropriate in the circumstances, children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties.
- parents are to be recognised and included in justice processes involving children and that parents are to be recognised as being primarily responsible for the development of children.
- victims are entitled to receive information about their potential involvement in, and the progress of, action taken under this Act.

These principles are broadly consistent with, and indeed informed by, the *Convention on the Rights of the Child*.

For the purposes of this report on youth street rights, our focus is on the warnings and cautions sections of the Act and the police role in these procedures.

The *Young Offenders Act* 1997 as opposed to many other pieces of legislation currently operating or being introduced into the juvenile justice arena, has had a long and involved history. The legislation comes as a result of ten years of review of the juvenile justice system and the trials and evaluations of similar schemes in both Australia and overseas.

In 1993 a number of alternative schemes were reviewed by the Juvenile Justice Advisory Council in the Juvenile Justice Green Paper *Future Directions in Juvenile Justice*. As a result, it was decided that interventions for young offenders needed to involve the victims of crime. In 1995 the Juvenile Justice White Paper *Breaking the Crime Cycle* recommended a framework known as Community Youth Conferencing. This scheme was trialed in a number of places in 1995.

After an evaluation of Community Youth Conferencing, and along with an ongoing commitment by the NSW government to introduce a juvenile justice conferencing scheme, a working party was set up to develop a system of conferencing under legislation which would also look at ways of improving and incorporating police cautioning. Over an 8 month period this working group consulted widely about a proposed new system of conferencing and in November 1996 a discussion paper, focusing on the establishment of a legislative scheme of cautioning and conferencing for juveniles, was distributed for comment (NSW Attorney General's Department 1997). Over 50 submissions were received as a response to the paper and in May 1997 the first print of the *Young Offenders Bill* was issued. The bill passed through both houses, entered into law in July 1997 and was proclaimed in April 1998.

Since the trials of conferencing in 1995, a great many groups and individuals became interested and involved in discussion around the new *Young Offenders Act* 1997. The path of

the legislation has at times involved very heated debate, and continues to do so. Most support the basic ideas, but approaches to such procedures as cautioning and conferencing vary widely. Many of the fifty or so different groups who provided written responses to the discussion paper have continued to show an interest in the implementation of the Act. Groups which have been involved on an ongoing basis include: the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, the Police Association of NSW, the Youth Justice Coalition of NSW, Enough is Enough and other victims lobby groups, the Youth Action and Policy Association, the Legal Aid Commission, many Ethnic Community and Youth organisations, peak Aboriginal organisations and the Attorney General's Department.

Given our focus on the police role and involvement in the operation of the Act the debates about police cautioning and more specifically the role of victims in police cautioning is an interesting angle from which to view the various viewpoints.

In April 1997 a forum was convened by the NSW Police Service to discuss issues around the form police cautioning of young people would take, under the new Young Offenders Scheme. Police representatives who supported the Wagga model of police cautioning, and some victims' advocates groups, thought that victims should be able to be involved in police cautions. The other side of this argument was expressed strongly by representatives of the Youth Justice Coalition of NSW and the Youth Action and Policy Association. It was pointed out at the meeting that in fact the Attorney General's discussion paper draws a clear distinction between the proposed categories of appropriate responses to offending behaviour by young people.

> A police caution is proposed as the intervention which lies between informal warnings and conferences. A caution is reserved for those offences which require more than an on the spot warning but less than a more formal and more expansive version (Bargen, J, 1997a).

Given the police role as gatekeepers of the juvenile justice system, it would be fair to say that police having control of mini conferences in the form of cautions, which involve victims being present, would extend the police function and could easily compromise young people's substantial rights.

The introduction of the *Young Offenders Act* has brought with it a myriad of questions and comments from a variety of interested groups. Some of the more pertinent in relation to policing and particularly police cautions and young people's rights are as follows:

- Will young people's rights be protected at the warnings/cautions level?
- What are the protections for young people at this end of the hierarchy, which is police driven?

The approach taken in the drafting of the Act is one which purports to take rights seriously. Part 4 on cautions attempts to legislate to protect the rights of children. In fact it has been drafted and developed with the *Convention of the Rights of the Child* in mind, and with the relevant articles used as a benchmark. However questions need to raised about the actual operation of warnings and cautions, and their monitoring and evaluation. How can the monitoring and evaluation process ensure that warnings and cautions are undertaken with a rights-focused approach?

Part 4 section 22 of the Act states that the investigating official must explain the following matters to the child:

- that the child is entitled to obtain legal advice and where that advice may be obtained, and
- that the child is entitled to elect that the matter be dealt with by a court.

However the operational instructions (No 75) for police with regard to cautions do not mention either of these rights specifically, only that the officer should refer to the Act. In fact the instructions for police are centred around police obligations and fail to specify the rights of the young person.

The fact that a young person has to admit guilt before a caution can take place raises a number of concerns. First, the young person gives up his or her right to due process. How do we ensure that young people are not pressured into consenting to the diversionary process? It is well recognised that many young people tend to agree with adults in positions of authority, whatever proposition is put to them. How do we monitor whether inducements are occurring? Others have noted this problem: "When access to diversion depends on the child's admission of guilt, there is the risk that the child will be induced to admit guilt" (Blagg and Wilke 1995: 80). Again, if legal safeguards are to be put in place, where are the resources to facilitate this in terms of legal advice at the cautions stage? This is even more of an issue in rural NSW, because in most areas there are no funded children's legal services. A recent (December 1998) Legal Aid Commission telephone advice line will meet only a fraction of this need. Young people are some of the most vulnerable when it comes to their interactions with the legal system. The pressure to plead guilty needs to be minimised. Young people require timely and appropriate legal advice if their access to due process is to be a reality. So often young people are known to admit guilt just to get out of the situation they are placed in at the police station.

For the purposes of the *Young Offenders Act* the Commissioner of Police has appointed Specialist Youth Officers who have been trained and instructed in the operation of the Act. The commitment by the NSW Police Service to the position of Youth Liaison Officers to help administer the Act is a positive one, as too is the training of these officers. The Youth Justice Conferencing Directorate has also appointed a number of specialist Aboriginal Conference Administrators, a commitment to the key principle of cultural appropriateness. These administrators are able to send back conference referrals received to the cautions level if they believe the referral is inappropriate. This is a potential check on the decision making by the police, about whether to caution a young person or refer him or her to a conference.

There is some provision for community involvement in the cautioning process. Under Section 27(2), a caution may be given by a respected member of the community at the request of the authorised officer, if the officer is of the opinion that it is appropriate in the circumstances to do so. For example, a caution may be given by a respected member of the Aboriginal community if the child is a member of that community. This part of the Act would appear to be relevant to young Aboriginal people and should also be used in relation to young people from other than English backgrounds, where appropriate. Under 'Cautioning a Child' in the Police Commissioner's Instructions there is a note referring to this section of the Act.

> If you, as an authorised officer, believe a respected member of the community should give the caution, make the necessary arrangements for this to be done (Instruction 75, April 1998).

Similarly, some recognition of cross-cultural awareness has entered police procedures. The Police Commissioner's Instructions (75.03: Interviewing and questioning child offenders) states: "Ensure where possible an Aboriginal Community Liaison Officer is present when you interview an Aboriginal child". It is crucial to the success of warnings and cautions that officers receive cultural awareness training. This may improve the prospects of young people, their families and communities being treated with respect. It may also provide a greater opportunity for changes in culture within the Police Service itself.

The *Young Offenders Act* sets out a process by which a police officer may determine whether or not to caution.

> In considering whether it is appropriate to deal with the matter by caution, an investigating official is to consider the following: (a) the seriousness of the offence, (b) the degree of violence involved in the offence (c) the harm caused to the victim, (d) the number and nature of any offences committed by the child and the number of times the child has been dealt with under this Act (Part 4, section 20)

A concern which must be raised here is whether Aboriginal young people will receive the benefits of this diversionary process, in this case a caution, given that one of the considerations for the appropriateness of a caution is, the number and nature of any offences committed by a child.

> Research indicates that Aboriginal young people are brought into the system earlier than white children and that it may be this early contamination which contributes to the development of criminal careers (Blagg and Wilke 1995).

Additionally, it must be considered whether young Aboriginal people will be cautioned more frequently, and thus be drawn more readily into more formal legal procedures, such as arrest. The potential net widening effect of this Act should be monitored.

Does the Act ensure that young people from non-English speaking backgrounds receive the support, advice and care appropriate to their individual needs? For this to happen 'cultural appropriateness' needs to be just that: all those involved at all stages need to be aware of what is or isn't culturally appropriate in relation to each child's individual needs. For example the involvement of close family members for a young person from a culture with a highly protective or judgmental family background could be counter productive. Will police officers deciding to give formal cautions be able to appreciate this?

Many comments, issues and questions have been raised by a number of groups in relation to the *Young Offenders Act* and Aboriginal young people. One of the major concerns is that even under the new scheme the rate of Aboriginal diversion will remain low. Given that the cautioning end of the hierarchy of interventions is run by police and involves discretionary choices this is a valid and worrying aspect of operation for Aboriginal communities. Whether or not enough attention has been placed on procedures introduced in relation to diversion for young people from Aboriginal backgrounds is a question that will only be answered if the monitoring and evaluation of the scheme makes this area a priority. During the consultations which took place about the Young Offenders Bill at the meeting of the peak Aboriginal organisations

> it was felt that the Aboriginal community should be provided with the opportunity to participate in the evaluation of the effectiveness and the frequency of cautions and warnings and that the community has access to evaluation findings and data collection. It was also

> felt that community feedback should be included in all evaluations (Department of Juvenile Justice, 1997)

Once again in a response to the discussion paper from the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, concerns were raised about police bias in relation to cautioning. The need for a stronger focus on improving equity at a policing level was raised with suggested strategies.

In light of findings in the *Bringing Them Home* report (HREOC 1997) and those of the *Royal Commission into Aboriginal Deaths in Custody* (Johnston 1991), we need to consider & bring to the fore the rights and needs of Aboriginal young people. The question must be asked whether this legislation, developed in the main by non-Aboriginal people, is appropriate for Aboriginal youth. The Aboriginal and Torres Strait Islander Social Justice Commissioner's 1997 Report argues that there must be a new framework for Juvenile Justice:

> one which is consistent with the *Convention on the Rights of the Child* and the *Draft Declaration of the Rights of Indigenous People* and one which has two components. The first would provide mechanisms for Indigenous communities to deal with young offenders themselves rather than handing them over to alien institutions. The second would be preventative and empowering, allowing communities to control local affairs and to tackle the social factors that lead young people into inappropriate behaviour in the first place (Aboriginal and Torres Strait Islander Social Justice Commissioner, 1997)

We agree, and say that indigenous communities must be empowered to deal with young offenders within their own communities.

There are a number of articles of the *Convention on the Rights of the Child* which are relevant to a rights discussion on the *Young Offenders Act*, with particular reference to warnings and cautions. The most important of these is Article 40 which states:

> every child alleged as, accused of, or recognised as having infringed the penal law should be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

Article 40 also specifies that every child has at least the following rights:

- to be presumed innocent
- to be promptly informed of the charge and to have legal or other assistance in the presentation of his or her defence
- to have the matter determined expeditiously by a competent authority in a fair hearing with legal assistance and in the presence of parents or guardians
- not to be compelled to testify or to confess guilt
- the right to a competent, independent and impartial review of decisions and measures imposed in consequence of decisions
- assistance by an interpreter where required
- respect for the child's privacy at all stages

Article 40 also allows for non judicial measures where this is appropriate, subject to proper legal safeguards and respect for human rights. Will these important principles be put into practice, given lack of funding for legal advice and monitoring the implementation of the Act, especially at the level where police are substantially in control of events?

It is clear that in the development of the *Young Offenders Act* there was an acknowledgment of the need to protect children's rights. In the operation of the Act at a cautions level it is yet to be seen whether procedural safeguards will offer the protection necessary to ensure children's rights are upheld. It is certain that the failure of governments to make available timely, adequate and appropriate legal advice is at this stage a substantial obstacle. The Legal Aid Commission's new telephone advice line does not solve this problem, and is no substitute for a properly resourced duty solicitor service at police stations (NSW Law Reform Commission 1990).

Are the rights of young people to procedural certainty and consistency fully protected by law? This is a most important question for all young people. We know that non-English speaking and particularly Aboriginal young people until now have received disproportionately harsher treatment and penalties (Youth Justice Coalition, 1996). So will the Young Offenders Act protect the rights of young people from these backgrounds?

> In any contact with a police officer, the child depends on the conduct of the officer for the enjoyment of his or her rights; relies on the officer to fully respect those rights and is at the mercy of any officer who chooses to infringe or violate those rights. (Blagg and Wilke 1995: 10)

Many of these questions will only be finally answered when the evaluation of the scheme takes place. Both the Youth Justice Conferencing Directorate and the Youth Justice Advisory Committee are beginning the preparation work for this evaluation now. However past experience shows quite clearly that a widened discretionary system of policing will "work against the interests of indigenous young people", that they will receive the benefits of warnings and cautions far less than non-Aboriginal young people, and that they will be arrested and refused bail at greater rates (Cuneen and White 1995).

In conclusion, the *Young Offenders Act* 1997 is based on sound principles and has adopted many of the principles of the *Convention on the Rights of the Child,* as well as some recommendations on the treatment of indigenous children, from the *Royal Commission into Aboriginal Deaths in Custody* (Johnston 1991). The Act's implementation of a hierarchy of diversionary measures, such as warnings, formal cautions and family conferences is to be applauded. However in our consideration of the warnings and cautions procedures, we have a number of concerns about implementation. First, there is a great gap in readily available legal advice (particularly in rural areas) to help children make informed decisions about acknowledging guilt, and thus accessing the diversionary measures. Properly funded legal aid services are essential for protecting the rights of the many children from low income and disadvantaged backgrounds, who may be faced with decisions about formal cautions. The Legal Aid Commission's telephone advice line, set up in December 1998, is inadequate for this purpose. Second, we have real concerns that Aboriginal children in particular, but also children from some non-English speaking backgrounds, will continue to 'progress' rapidly up the hierarchy of measures, and thus miss out on the promise of so far as possible avoiding formal legal procedures, as required by Articles 37(b) and 40(3)(b) of the *Convention on the Rights of the Child*. Close scrutiny of the operation of the Act is required to detect this, and to ensure measures are taken to deal with discriminatory treatment. Third, police training in cross-cultural sensitivity is essential to the non-discriminatory application of the benefits of this Act. The potentially discriminatory application of this Act must be monitored. Finally, community ownership of diversionary measures, along the lines suggested by Indigenous advocates, should be a key goal of this Act. For example, with some basic provision for the

protection of rights, indigenous communities should be given the power to deal with indigenous young offenders themselves, within their own communities.

8.4 Police and Public Safety Act

The *Crimes Legislation Amendment (Police and Public Safety) Act* 1998 had its roots in the 'anti-gang' policy developed by the Labor Party in the lead up to the 1995 state election. This policy was aimed at groups of young people in public spaces, who were said to be a threat to public safety. A *Street Safety Bill* incorporating 'move on' powers had been drafted by mid 1996, but despite support from police and some sections of the media, the idea lapsed. However by early 1998 the 'move on' law had been revived and combined with new police powers to search for knives, in the *Police and Public Safety Act*. Young people are the main targets of the new law.

Labor's 'anti-gang' strategy, part of its broader law and order strategy, argued the need to fight youth gang activity. The aim of the strategy was said to "ensure that people can go about their business without being impeded, threatened or intimidated by gang behaviour" (ALP c1995). It proposed police powers to move on and/or arrest gang members who intimidated or harassed people. There was also a proposal for a Central Gang Intelligence Unit, to monitor gang activity. The Strategy was to "rid the streets" of gang crime, reduce community fear of crime, provide "harsh punishment" for gang activity and to discourage young people from joining gangs (ALP c1995).

This policy appeared to have much to do with Labor leader Bob Carr's fascination with things North American, including policing and drug prohibition strategies. The menace of armed, Los Angeles styled gangs appears to have caught Mr Carr's imagination. However local evidence to back up this alleged threat was hard to find. While young people were far more likely than older people to be arrested for offences, and while they sometimes offended in groups (Manning 1996: 5), very little correlation had been found between crimes and gang activity (Bureau of Crime Statistics and Research 1995). Consultants to the NSW Police Service had come to the same conclusion:

> the hot spots [of gang activity] do not correlate well with incidents of assault, robbery, breaking and enter, stealing, malicious damage or offensive behaviour ... the lack of correlation is overwhelming. This lack of correlation between gang location and crimes supports the premise that most gangs are not great contributors to crimes. (Pulse Consultants 1994: 7 & 13)

But this inconvenient lack of evidence did little to slow the 'anti-gang' moves.

The police-youth relationship has always been a troubled one, with police complaining of the 'lack of respect' shown by young people, problems of communication, inadequate police powers, inadequate punishments by the courts, and mischievous complaints of police maltreatment (Alder et al 1992: 10). On the other hand young people have complained that they are not listened to, that police constantly harass them in public places, that police are regularly violent and abusive, and that police target specific groups of young people, in particular Aboriginal, Asian and Pacific Islander young people (Youth Justice Coalition 1994). Police and young people and their advocates thus found themselves on opposite poles of the 'anti-gang' debate. The mass media, with its own commercial interest in conflict, most often accepted the threat theory and backed the police.

In mid 1996 a proposal for a *Street Safety Bill* was floated before State Cabinet. Though the proposal never became public, it was widely discussed. Arguing that police had insufficient powers to deal with gangs, Police Minister Paul Whelan proposed a police power to direct groups of three or more people "to leave a public place ... when the police have reasonable grounds to believe that their behaviour is reasonably likely to obstruct, harass or intimidate" (Whelan 1996: 2). While Attorney General Jeff Shaw was said not to have been consulted about the Bill (Owens & Larkin 1996), the proposal received a ringing endorsement from the *Sunday Telegraph*:

> Civil libertarians will raise their voices in protest at the thought of an individual's name being recorded for gang related activity. The rights of these people, they say, are being seriously eroded, by such a policy. But what of those in the community who are victims of these gangs, who cannot walk the streets at night for fear of assault or worse - where are their rights? ... Premier Carr and Police Minister Paul Whelan have today proven they have the best interests of the State at heart. (*Sunday Telegraph* 1996: 51)

It is a significant and characteristic mark of such arguments that a dichotomy is created between supposed wrong doers and innocent victims, and an attempt is then made to suggest that the rights of these two 'groups' are in competition. The suggestion is that rights are not universal, but some type of sectional interest claim. In a similar vein, defending the Bill, Premier Carr argued that "if it means compromising the privacy of younger people who might be running a little wild, then we'll do that" (Fitzpatrick 1996). In these forms of argument there is little recognition that a public right applies to all. The relevant rights here simply required that there be no "arbitrary" arrest or detention, no "arbitrary or unlawful" interference with privacy, and that arrest or detention of a child be only a measure of "last resort" (*Convention on the Rights of the Child* Articles 16 & 37; *International Covenant on Civil and Political Rights* Articles 9 & 17). Justified and restrained intervention are the marks of a responsible approach, informed by respect for universal rights.

However the Government did not have it all its own way, and criticism came from many directions. Ms Helen Bayes, convener of Defence for Children International Australia, said that state and federal governments had been "antagonistic and harmfully ambivalent" to CROC (Horin 1995: 4). Launching the book *Young People and Police Powers* (Blagg & Wilke 1995), former Human Rights Commissioner Brian Burdekin said that police had repeatedly manipulated the law to control young people (Emerson 1995: 5). In 1996 the NSW Ombudsman attacked conditions in the state's juvenile jails (Glascott 1996: 5) while head of Juvenile Justice Ken Buttrum said that the 'get tough' approach to juvenile crime was "not the answer" (Vass 1996). Meanwhile the State Government came under attack when figures showed that it was locking up Aboriginal youth at a higher rate than any other Australian state (Jopson 1996: 4).

The Labor Government's plan was also attacked from within. Labor backbencher Dr Meredith Burgmann publicly opposed her Party's Bill:

> The concerns are that the new power will be used to harass Aboriginal kids in country towns an ethnic kids, particularly Lebanese and Vietnamese, in Sydney. (Fitzpatrick 1996)

Further, Premier Carr was repeatedly and consistently ridiculed (eg. Owens & Larkin 1996; Fitzpatrick 1996; *Sunday Telegraph* 1997) for his pejorative characterisation of young gangs

as consisting of "youths, their baseball caps turned back to front", as though that were a mark of criminality. His credentials with the youth community sector were very low indeed. Then a Parliamentary briefing paper (Manning 1996: 12-13) pointed out that police did indeed have many powers, under the *Summary Offences Act* 1988 and the *Crimes Act* 1900, to deal with the alleged threat from youth gangs. Extraordinary opposition to the still secret proposal for a *Street Safety Bill* was building.

Youth groups protested the proposed new law. Justice for Young People staged a large rally against the *Street Safety Bill* in October 1996, and held a five day vigil or 'Tent Embassy' outside NSW Parliament during youth week in April 1997 (Justice for Young People 1997). More criticism from youth and civil liberties groups came when the Government pushed through its *Children (Protection and Parental Responsibility) Act* in mid-1997, with Attorney General Jeff Shaw admitting that the law was 'partly' about keeping Aboriginal children off the streets in country towns (Jamal 1997: 5).

By late 1997 the idea for the Bill had been shelved *(Sunday Telegraph* 1997). However at the end of that year three changes were made to youth law in the *Summary Offences Act*, through the *Summary Offences Amendment Act* 1997. First, the use or public display of a knife in a public place or a school was made an offence (s.10 already made it an offence to carry a knife); second, the sale of all knives to children under 16 years of age was banned; and third, young people suspected of possessing alcohol (s.11 already made this an offence) were now required to provide their name and address, and proof of identity, to a police officer. A new youth offence, of refusing to provide identification, was thus created. There was little debate in Parliament, the conservative opposition simply arguing that the new infringements did not go far enough, and that higher penalties were required. The knife related offences were said to have been related to the bashing and fatal stabbing of police officer David Carty, in April 1997 (Blake 1998: 7), although none of those charged over his death had been under eighteen.

The February 1998 fatal stabbing of a second young police officer, Peter Forsyth, catalysed further community debate about knives, and led to a raft of new summary offences. Constable Forsyth, off-duty with two colleagues, was said to have been attempting to arrest some young people who had tried to sell drugs, when he was stabbed to death. One of his colleagues was also wounded. Following a Police Association request (Harris & Sutherland 1998: 5), Police Minister Whelan announced he was considering allowing off-duty police to carry guns; Victorian Police commented that they would not consider such a move (Herald Sun 1998). This proposal stalled. However the knife debate widened, and some media attempted to link this to youth gangs, though none of those subsequently charged with the killing of Peter Forsyth were juveniles.

Criminologist Paul Wilson called for public denunciation and 'shaming' of those who carried knives (Wilson 1998). Police Association Secretary Mark Burgess called for laws to prohibit the sale of 'attack weapons' (Blake 1998: 7) though existing law provided for this in the *Prohibited Weapons Act* 1989. The Police Association later agreed that the *Summary Offences Act* already provided "sufficient scope to deal with knives of any description" (Police Association 1998: 3). The supposed link with youth gangs was then pushed by the Sunday Telegraph and the Police Association, the former citing several unnamed knife sellers who spoke of "lots of gangs" who would spend "hundreds of dollars for any kind of knife"

(Blake 1998: 7) while the latter claimed that knives were readily available to 'gang' members (Police Association 1998: 3).

Conscious of a state election looming, the Police Association claimed a range of new powers. The latest crime statistics, on this occasion, helped them. The Police Association demanded additional restrictions on knives, stop and search powers, identification powers, and dispersal powers (Police Association 1998). They were to get them all. The call for a review of the knife laws had been backed by Police Commissioner Ryan (Harris & Snell 1998: 1), and in early May crime statistics showed that robbery with a weapon 'with a weapon other than a gun' had risen strongly. Bureau of Crime Statistics Director Don Weatherburn made the link to heroin addicts, rather than youth gangs, but pointed to a parallel increased use of knives in assaults (Morris 1998: 9). While rival victim groups battled over what penalties should apply to the new knife offenders, Premier Carr accepted the Police Association claim, almost in its entirety (Milohanic 1998: 5). The *Police and Public Safety Act* thus began to take shape.

In arguing for a range of new police powers, the Police Association (1998) anticipated a "counter attack" from others (eg. civil libertarians) who were said to be

> clearly more interested in the rights of a smaller group of individuals, as against the rights of the community as a whole and the standards that the community would wish to maintain.

Once again, the suggestion was that rights were some sort of sectional interest claim, rather than a general community standard. The Council for Civil Liberties did indeed protest the Police Association's "shopping list" of claims for new powers calling it "an opportunistic demand in an election year, and in the wake of several tragic incidents" (Anderson 1998). Premier Carr responded to the Council for Civil Liberties that he was "equally concerned with the rights and liberties of other law abiding citizens" and argued that the pending Bill would contain "important protections" (Carr 1998).

By late May 1998 the *Crimes Legislation Amendment (Police and Public Safety) Bill* 1998 had passed the NSW Lower House and had entered a long debate in the Upper House. The Bill made five main changes to existing law: on knives in public places, police searches for knives, confiscation of knives, police powers to give 'reasonable directions' in public places and a limited police power to demand names and addresses. These were not juvenile specific laws, but they were aimed at juveniles. Human rights concern was expressed most strongly about the new search powers and the new move on powers.

The Bill amended the *Summary Offences Act* to create a new offence of having custody of a knife in a public place or a school, without a reasonable excuse. (This paralleled an existing and wider summary offence of having custody of an "offensive implement" in a public place, without reasonable excuse.) Reasonable excuse was to be proved by the person, but the new provision gives some examples, including food preparation and lawful occupation, recreation or sport. The Bill also amended the *Summary Offences Act* to allow police to search for "knives and other dangerous implements" in public places and schools. (Police already had a similar power under the Crimes Act s.357E, but only for "any thing used or intended to be used" in an indictable, or serious, offence.) Police must "suspect on reasonable grounds" that the person has possession of a dangerous implement before exercising this new power, but the meaning of "reasonable grounds" was extended to include "the fact that a person is present in a location with a high incidence of violent crime". This particular search power regulates the search in several ways, and does not allow a strip search. However it was made

an offence to refuse such a search. Police officers must identify themselves and warn the person that to refuse to comply with the search is an offence.

The *Summary Offences Act* was also amended to allow police in a public place or a school to confiscate "any thing" suspected of being an unlawfully held "dangerous implement". A person can apply in writing to the Local Area Commander of Police for return of the confiscated item. There is an appeal to the Local Court from the Commander's decision. Another amendment allowed police to "give a direction" if a person is obstructing, harassing or "is causing or likely to cause fear". The direction must be reasonable and aimed at reducing the obstruction, harassment or fear. Such directions were not to be given to "an industrial dispute or organised assembly, protest or procession". The Crimes Act was also amended to give police power to demand a person's name and address if the officer "believes on reasonable grounds" that the person may be a witness to an indictable (ie. serious) crime. It was made an offence to refuse such a demand. Police officers must identify themselves and warn the person that to refuse to comply with the demand is an offence. The Ombudsman was required to monitor the operation of this new *Crimes Legislation Amendment (Police and Public Safety) Act* and the Police Minister was required to review and report on it to Parliament.

A large number of amendments were put by Upper House members from all sides. The progressive crossbenchers tried to eliminate some of the worst features of the Bill, with little success. Most of their amendments failed. However after debate over three days there were several amendments.

Firstly, the Government, through Attorney General Jeff Shaw, had an amendment passed which doubled the penalty for knife possession where the person had been "dealt with previously" for a knife related offence. The Government also added an amendment which created an offence for parents who "knowingly authorised or permitted" their child to carry a knife. As the *Children (Protection and Parental Responsibility) Act* 1997 already provided for this, the amendment required that "the offender is not liable to be punished twice" for the same offence.

Several amendments were then secured by cross-benchers. Independent MLC Richard Jones succeeded with an amendment which added "or drink" to "the preparation or consumption of food", as one of the reasons why one might be carrying some form of knife (eg. a pocket knife with a corkscrew). Better Future for Our Children MLC Alan Corbett then had two amendments passed which extended police powers. The first was an amendment which extended the power to search for dangerous implements to school lockers (the original Bill only provided for 'pat down' body searches and bag searches). A locker search must be done in the presence of the student and, if "reasonably possible" a nominated adult who is on school premises. Corbett's second amendment gave police the additional power to "request a person [who is a witness to a serious crime] to provide proof of the person's name and address".

The Opposition failed in its attempt to remove the exemption of an "industrial dispute or organised assembly, protest or procession" from the new police directions power. Then, from the other side, Shooters Party MLC John Tingle attempted a broader exemption. Initially, only part of this was passed -- that part which disallowed police directions to "a procession or an organised assembly". However the numbers had been finely balanced (with some

absences) and the Government returned the following week to successfully complete the Tingle amendment, which finally read:

> This division does not authorise a police officer to give directions in relation to (a) an industrial dispute, or (b) an apparently genuine demonstration or protest, or (c) a procession, or (d) an organised assembly.

The Bill was then passed by the Upper House, and became law on the first of July.

This Act is a composite law, primarily containing some 'anti-gang' dispersal powers and additional police powers to conduct wholesale (though regulated) searches for knives. However there are two main areas of human rights concern. First, the 'stop and search' power is drawn far too wide. This is of particular concern, given that most police seraching is done under a notional (but usually coerced) sense of 'consent'. The relevant section [28A(3)] reads:

> For the purposes of this section, the fact that a person is present in a location with a high incidence of violent crime may be taken into account in determining whether there are reasonable grounds to suspect that the person has a dangerous implement in his or her custody.

Even though "reasonable suspicion" has been a poorly defined term in New South Wales' law, this redefinition of "reasonable grounds" for suspicion, as encompassing "the fact that a person is present in a location with a high incidence of violent crime", is an artificial contrivance. Location in a certain general area, in ordinary circumstances, cannot be a specific or particular enough reason to suspect a person of committing an offence. The U.N. Human Rights Committee's General Comment 16 (1988), concerning the "arbitrary interference" with a person's liberty and privacy, and as spelt out in Articles 9 and 17 of the *International Covenant on Civil and Political Rights* (1966), clearly encompasses "arbitrary interference" provided for by law. This same formulation occurs in the *Convention on the Rights of the Child* (1989), at Articles 16 and 37(b). We therefore say these provisions of the *Crimes Legislation Amendment (Police and Public Safety) Act* (1998) -- now Section 28A(3) of the *Summary Offences Act* 1988 -- violate the above human rights obligations. This section should be repealed. We note also that, soon after proclamation of this law, police began routine knife searches (in addition to other routine searches) on groups of young people in certain public places (see Chapter 9, 'Observing the New Laws').

Second, the new law in parts of its 'anti-gang' provisions, seeks to proscribe free public gatherings, with no actual threat from those people. This section is effectively aimed at young people. Unreasonable and unjustified interference with a child's or an adult's freedom of association and assembly would breach both Article 22 of the *International Covenant on Civil and Political Rights* (1966) and Article 15 of the *Convention on the Rights of the Child* (1989)

> 15(1) States parties recognise the rights of the child to freedom of association and to freedom of peaceful assembly. (2) No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

While parts of the new 'move on' law apply to those obstructing or harassing others, other parts are more arbitrary, and rely of the subjectivity of third parties, rather than any real conduct of the supposedly offending child or adult. For example:

> 28F(1) A police officer may give a direction to a person in a public place if the police officer had reasonable grounds to believe that the person's behaviour or presence in the place ... (c) is causing or likely to cause fear to another person or persons, so long as the relevant conduct would be such as to cause fear to a person of reasonable firmness. (2) The other person or persons ... need not be in the public place but must be near that place at the time the relevant conduct is being engaged in ... [and later] (8) no person of reasonable firmness need actually be, or be likely to be, present at the scene.

We say the subjectivity of this test is so vague as to be arbitrary, and that these provisions of the *Crimes Legislation Amendment (Police and Public Safety) Act* (1998) -- now Section 28F(1)(c), 28F(2) and 28F(8) of the *Summary Offences Act* 1988 -- violate the above human rights obligations. These sections should be repealed.

The 'anti-gang' approach, in this case, parallels a broader failure to address youth policy as an integrated process. The knife issue was in many ways a peripheral and incidental issue in this whole 'anti-gang' law making process. Where was the consideration of youth employment, youth services and facilities, youth education and the sharing of public space in the responses to demands for the move on' powers? The public debate was underscored by a poor understanding of rights, and repeated attempts by the mass media, police and occasionally politicians, to portray arguments of human rights as little more than special interest claims. Young people's rights were trivialised in a rush to enforce protectionism and paternalism.

To meet international standards for children and young people

- Section 28A(3) should be repealed; its only purpose is to redefine "reasonable grounds" in terms of general geography, so that searching for knives may be carried out in an arbitrary and 'street sweeping' manner
- those parts of the Act which seek to proscribe free public gatherings, where there is only an apprehension from a third party but no actual threat [28F (1) (2) and (8)], should be repealed; the subjectivity of the tests in these parts is so vague as to be arbitrary.

9. Observing the New Laws

The Youth Rights and Responsibilities Project carried out consultations throughout July 1998, to examine existing police-youth relations and in particular to examine the impact of the new laws.

9.1 Case study areas

We decided to target two urban and two rural areas for the consultation process in order to achieve some levels of comparison and to ensure broad coverage. From the outset it was felt necessary to engage with rural communities which had some experience of the *Children (Parental Responsibility) Act* 1994 and the *Children (Protection and Parental Responsibility) Act* 1997. To this end, Orange was targeted, due to its long association with the Act. Ballina and Mudgee were identified as areas which could be targeted because they were the closest to being declared an 'operational area' by the Attorney General. Ballina was eventually chosen because of the input that the local youth sector had had in the application process.

The urban areas where we could have consulted were numerous. Eventually Campbelltown and Canterbury were selected. Campbelltown was chosen because it was being represented colloquially as an emerging crime 'hot-spot' and because various members of the youth sector there had established a media profile for being outspoken about youth rights. Canterbury was targeted because it had a well organised and reasonably well resourced youth sector and because of the high population of NESB families in the area. Canterbury also had a well developed youth street work network which worked directly at the coal face of police-youth relations. Canterbury and Campbelltown could also be contrasted as inner and outer urban areas.

Ballina/Lismore/Kempsey

Ballina is a north coast seaside town which relies on tourism and some local primary production, and has total population of 14,500, of which a significant proportion is Aboriginal.

Campbelltown

Campbelltown, a far outer south-western suburb of Sydney, has a high percentage of people on low incomes as well significant Aboriginal and NESB populations.

Canterbury/Bankstown

Canterbury/Bankstown is an inner south-western suburb of Sydney, with a higher percentage of NESB people from a variety of cultural backgrounds. It also has a high youth population.

Orange

Orange is the economic centre of a rural district which is situated three and a half hours west of Sydney by car. The Local Government Area incorporates 284,689 square kilometres. The 1996 census reported a population of 33,963. There were 3,981 young people aged 12 to 18, of whom 2,024 were female and 1,957 male. There were 1,022 people who identified as Aboriginal, which was approximately 3% of the population.

9.2 Overview of case study areas

Each case study area was unique in terms of the range of population and the geographical and social terrain. For instance, during our time in Ballina we also spoke to people in Lismore and Kempsey. Although these towns are similar to a degree (in terms of geography and population), the feedback we received from the consultations revealed that the effects of legislation and its appropriateness for the youth population was very different in each locale. This could be highlighted by the different ways in which Koori young people were treated and policed in each of these areas.

Each case study area presented social problems which were unique, both in terms of their scope and in terms of the range of measures employed to deal with them, as well as the strategies which were generated by the local community. Indeed each area had a disparate range of legislative tools in place, which were exercised and implemented in different ways. Orange was the only area to have operational the special police powers under the *Children (Protection And Parental Responsibility) Act* 1997. Canterbury was the only area to report the use of metal detectors under the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998. Ballina was 'getting ready' for the *Children (Protection And Parental Responsibility) Act*, while in Campbelltown it was not contemplated that this would eventuate. Canterbury reported an increase in zero tolerance type operations whilst Ballina reported some decrease in police-youth interventions.

In each area the intention was to consult with young people, youth workers, and youth advocates. Of particular interest were young people who were more at risk of coming to the attention of the police and the justice system. This group would necessarily include Koori and NESB young people. A conscious decision was made not to consult with members of the wider community. We felt that certain sections of the community such as the media, politicians, local councillors and council employees and police had enough of a voice in the juvenile justice debate. We wished to talk to young people and their advocates in a relaxed and non-threatening environment.

This decision was supported by workers in the communities that we visited. However, some confusion arose over the roles played by certain workers such as police officers from the PCYC and local council crime prevention officers. By and large, these workers were not invited to the consultations, but may have been accessed in follow up interviews. A list of the agencies consulted appears in the Acknowledgments at the start of this report.

By the end of the consultation process the project had consulted with 26 workers and 22 young people.

9.3 The consultation process

The consultations were run as informal focus groups. The aims were:

- to find out how new laws were affecting communities with particularly attention to young people, and to assess their impact.
- to evaluate police-youth relations before and after their implementation.
- to find out the priority issues affecting young people, with targeted attention on indigenous and NESB youth.

- to distribute educational resources and conduct a workshop regarding new aspects of legislation impacting on young people.

The consultations were divided into four sections. In the first section we introduced ourselves, gathered simple demographic information from the young people, briefed the workers and young people about the aims of the project and the consultations, and discussed confidentiality issues. In the second section we consulted with the young people themselves. Workers were not excluded from this session (unless the young people requested it) but were told that we were concentrating on the young people's experiences. We then proceeded to ask the young people a series of questions about their interactions with the police in their respective locales. We inquired about warnings and formal cautions under the *Young Offenders Act*, police practice with regard to the *Detention After Arrest Act*, any relevant local experience with the *Children (Protection and Parental Responsibility) Act*, whether the *Police and Public Safety Act* amendments had yet been utilised, and whether the *Summary Offences Act* amendments in regards to underage drinking had been utilised. We asked the young people general questions about police-youth relations and the state of police powers and youth street rights.

In the third section we concentrated on the responses of the workers. We recapped issues about the *Children (Protection and Parental Responsibility) Act* and general police-youth relations. We then questioned the workers about the priority issues affecting young people in the LGA with targeted attention on indigenous and NESB youth. We concluded by asking whether there were any suggestions regarding police powers and youth rights. In the fourth and final section we offered the young people and workers educational and resource materials.

9.4 Limitations of the consultation process

As the project had a limited amount of time and resources, the consultations were designed to generate a useable amount of information (without extending into the scale of statistically valid research), to illustrate and highlight the issues. In each area a small number of youth advocates were approached and asked to recruit young people to be involved.

The largest group of young people (10) attended the Campbelltown session and the smallest (3) was in Ballina/Lismore. The young people were roughly representative of the groups who would normally have dealings with the police in each area. It is worth noting that every young person we spoke to had, at least, been questioned by the police in a street setting, most of them within the previous month.

Additionally, through our discussions with both the young people and the youth workers, we were able to generate a picture of the issues affecting young people from their perspective. We were not able to consult with the whole community, nor did we feel that this was our brief. In the development of a large proportion of recent legislation it is fair to say that the voice of young people and their advocates has, at the very least, been unable to be heard amongst many competing voices, and at worst, has been silenced. We make no apologies for not consulting with the wider community. Our priority in this consultation process was to give the target group a voice which has been missing from the debate.

Finally, the discussions were conducted in an informal way, in order to be conducive to young people's participation. This was an appropriate method, given the marginalisation and nature of the target group.

9.5 Local responses to social issues

Although the following discussion of social issues affecting street frequenting young people presumes to some degree that some young people are present on the street because of these issues, this does not in any way detract from the fact that many young people who are present on the street have no pressing problems. We wish to stress that public space is a legitimate and normal place for young people to be. Young people should be welcome and encouraged to participate in the public realm.

The issues affecting the young people in each area were unique. And yet, the types and efficacy of police responses were similar. Participants from different areas reported different reasons for their young people being 'on the street' and likely to come to the attention of law enforcement agencies.

In Ballina, the youth workers felt that most if not all the young people who were on the street at night were escaping "binge drinking, fighting and neglect in the home". The main issues identified as affecting people in Ballina were domestic violence (which accounted for upwards of 70% of police work in the town), and poverty (exacerbated by a predominance of part-time, casual and seasonal work). A large percentage of the young people had some experience of neglect. One worker suggested that as many as 40% of students at the High School were, at times, sent to school with no lunch or lunch money.

In Orange the most pressing issues were a high level of drug use and drug availability coupled with a severe lack of recreation opportunities, especially for young people with little disposable income. It was felt that Orange was possibly a large distribution point for drugs in western NSW. A reasonable percentage of the youth population and especially the Koori young people were involving themselves in drug using lifestyles. To compound the perceived drug problem it was pointed out that there were no services for young people with addictions. Addicts would have to travel to Sydney to access services for detoxification and support. Recreational possibilities were limited to those offered by the commercial sector and sporting organisations. A Christian youth centre was open on Friday and Saturday nights but young people found it uninviting and very few frequented it.

Of the areas we visited, Orange seemed the most under resourced in terms of youth specific services. Lack of accommodation services and homelessness was a high priority problem. There were no alternative services offered to the young people in the evenings.

The Canterbury youth workers identified a large range of issues which influenced young people's street frequenting and the reaction that the community had to young people on the street. They identified unemployment, drug and alcohol issues and homelessness amongst the most serious. Over and above this however, issues particularly felt in NESB communities were identified as crucial to their constituencies. Cross generational conflict was seen to be very important. Families had high expectations such as economic and educational success and conformity to traditional cultural norms which the young people had difficulty fulfilling. There was family conflict over the confined and overcrowded living spaces which they

shared. Two groups in particular, the Arabic and Pacific Islanders, were over represented in the local refuges. Furthermore, a lack of recreational opportunities and a lack of services for young women was noted.

Canterbury had experienced a militant Local Council which was determined to crack down on street activity by young people. Canterbury Council had been the contemporary pioneers of no loitering ordinances which were developed in response to public outcry about a perceived street prostitution problem. This strategy had been extended to young people with a no loitering space set up outside the local amusement parlour. Many young people had been policed under this ordinance.

The Canterbury youth workers expressed that crime statistics had been in the decline before the council outcry, and that the reaction had been in response to 'youth crime hysteria' generated by the electronic media and the newspapers. Police and councils were being asked by people within the community what they were doing about 'youth crime' and had to be seen to be responding. Workers felt that although zero tolerance policing had not been officially adopted as a strategy it had unofficially been utilised in some areas.

The Campbelltown group recounted a story similar in many ways to that of the Canterbury workers. Youth workers said there had been an escalation in drug availability and use in the area in the preceding few months. This was credited directly to the utilisation of zero tolerance policing in Cabramatta which had shifted some of the large scale drug dealing into Campbelltown. Homelessness was also an issue. So was the lack of appropriate responses to young people with problems within the education system. Suspension of students was described as 'chronic'. Workers described an 'intolerance to violence' in schools where any transgression was dealt with via suspension rather than engagement with the underlying issues.

It was generally agreed that there was a range of services in Campbelltown (apart from the lack of a crisis refuge for boys under 18), but that there needed to be more of them. It was felt that there was not the quantity of services available to deal with problems, which could then only be dealt with through the operation of the Criminal Justice System. In Campbelltown, it was felt that crime had been increasing slightly, but whether that was reflected in the crime statistics or not was another question. By and large these workers had seen an increase in drug use and drug availability in the area. However, the local response had been predominantly coercive. The Local council has a Crime Prevention Committee whose task is to address these issues. Membership was described as 'very conservative' and included members of, inter alia, the Chamber of Commerce, the Veterans Association and Neighbourhood Watch. Strategies to date had included purchasing bicycles for police patrols and employing a 'Street Ambassador' whose duties included reporting on street activity and on areas where drug use occurred. This person had displayed negative responses to street frequenting youth.

Currently before the Campbelltown Crime Prevention Committee were suggestions to set up surveillance cameras in the CBD, and to implement no loitering ordinances and zero tolerance policing strategies. The youth workers were very concerned about the evident change in police strategy. They relayed information that a previous Patrol Commander had been reasonably interested in the issues affecting young people, but that the new incumbent

believed that the best way to bring down the crime rate was to target young people and repeat offenders with rigorous policing.

9.6 The Policing of Young People

There is a vast quantity of research which shows that young people and particularly young people of an indigenous or Non-English Speaking Background are over policed (Cuneen and Robb 1987; Youth Justice Coalition 1994; Blagg and Wilke 1995; Maher et al 1997). Given the political and media-driven dialogues occurring in recent times, and the intent of the bulk of the legislation that has been passed in the last two years, we hoped to inquire into the experience of young people in relation to policing, in order to see whether any ground shift had occurred.

Of the twenty-two young people we consulted with, all had been approached by police in a street setting, 20 had been questioned by the police on the street, 16 had been asked to go to a police station to be questioned, 18 had been searched and 14 arrested. Of these, 18 reported having some form of police intervention during June to July 1998, that is, within 8 weeks of the consultation occurring. Even though this was not a representative group, it suggests a high level of police intervention in many young people's lives.

In Ballina, young people reported being regularly stopped, asked for identification, and asked to empty their pockets and bags. In these exchanges consent to the production of identification and searching was not asked for nor given, and so could only have proceeded on the basis of a suspicion of drugs (s. 37(4) *Drug Misuse and Trafficking Act* 1985) or an assumed consent. These interactions rarely, if ever, happened on the main street, but in quieter, less observed areas in the back streets. Some targeted young people were routinely searched.

> Every time we get hammered we are out of sight -- in the back streets, up the park, down the riverbank. When we are up on the main street they don't want to have anything to do with us, won't even come up and talk to us.
>
> Young Koori person, Northern NSW

> We always get pulled over and searched and stuff. They are always watching us.
>
> Young person, Northern NSW

The young people we spoke with in Ballina were particularly upset about two incidents which had occurred in the previous week. In one incident, the police had questioned a group of young people some of whom were Koori, some of whom were Anglo. The police phoned the parents of the white kids to warn them they were 'hanging around with bad types'. In the other incident, the police stopped and searched a car with four white occupants, one of whom was in possession of a stolen TV and VCR. That person was charged, but the parents of the other young people did not receive any cautionary phone call.

In Orange young people and workers complained that police-youth relations were not good. One young person remarked 'the police hate all of us'. In terms of street interactions there was a perception that the young people were being bullied but a worker commented:

> If the police are not seen to be removing kids [under the Children (Protection and Parental Responsibility) Act] the community jump up and down.
>
> Youth worker, Western NSW

But Orange is far from being in the grip of a juvenile crime wave.

> In Orange we don't have gangs, we have kids who congregate. We don't have knives, we have drugs. We should be looking at strategies before young people get to this stage. The Government is so reactive.
>
> Youth worker, Western NSW

The Canterbury group (apart form recounting routine intervention which was often applied along racial lines) felt that police intervention with young people was visibly on the increase, and was definitely more vigorously applied. In March a group of boys were waiting for some friends to arrive on a railway platform. They were mucking about, having a pretend fight. A guard came out with a broom and said 'Shut up and stop making noise.' They boys said 'No, we're not making noise.' Then two guards came out, with broom and ran at them. The boys struggled with them. The guards went back to the office and called the police. A few minutes later a large number of police arrived. The boys jumped on a departing train. The police stopped the train and hauled the boys off. They were spread eagled against a wall and searched. They weren't told why they were being searched. The police warned them for being on the platform without a ticket. They said "Don't come back to this station, go back to Campsie and make trouble there. Don't make trouble in [this area]."

Canterbury youth workers believed that rather than routine checking and searching being the continuing norm, police were engaged in deliberate dispersal operations, targeting areas where young people were known to congregate. As one worker put it: "That's a terrible message to be giving young people …. that you don't want to see them around." The workers believed that the police in the area were taking on the attitudes and practice from the zero tolerance model, although there were no formal arrangements for that to be the case.

In Campbelltown, the policing of young people was vigorous. A young youth worker recalled being made to move on while congregating with a group of friends in their early twenties. One young person said "I've been strip searched so many time for nothing." On the whole, the workers felt that the attitude of the police was improving to a degree, although there was still an element within the patrol which was very negative about young people. It was felt that the police made an attempt to build bridges with the youth sector but that this may have led to a relaxation in the workers perspective. It was felt that things were not improving for the young people at a street level. Because of the escalation in the social problems in the area, increased pressure from the local business community and the Crime Prevention Committee had led to more routine and widening police intervention with the kids.

9.7 The Children (Protection Parental Responsibility) Act

It became apparent during our discussions in Orange that in the opinion of the youth workers the *Children (Protection Parental Responsibility) Act* was linked more to a political fear of the reduction of police numbers, rather than a genuine concern about youth problems or youth crime. Being a large country town, it seemed that there was a continuing worry that police operations would be compromised if political pressure was not maintained. As one person put it, "A good frost in Orange is worth [the loss of] six cops".

> It's all about police numbers and elections. Police numbers is an issue in every town, so every now and then people jump up and down to ensure the numbers.
>
> Youth workers, Western NSW

There were many concerns about the operation of the *CPPR Act* expressed by the participants in the Orange consultations. First of all, the workers expressed clearly that young people knew very little about the Act, and indicated that young people had not been consulted in the lead up to its introduction. Secondly, there was a common perception that the Act was not lobbied for as a genuine response to young people's, parents' or the communities' needs but as a political strategy coming from certain party alignments within the local council. Put simply, the council felt that the Act would ensure the safeguarding of police resources at current or higher levels, and this would be good for votes. As one worker remarked, 'Kids are always the scapegoats'.

Thirdly, workers were concerned about the level of resources that had been made available for the carers and safety house staff who would accept young people if they could not be taken home. Training and payment appeared to be negligible, if it happened at all. There was also concern that there were no carers available for Koori detainees. Some Koori people were possibly prepared to fulfil this role but had concerns with the scheme which had not been addressed. Finally, there was a view that the *CPPR Act* had in some cases worked well for kids who had 'good homes to go to'.

Ballina provided a useful comparison for the operation of the *CPPR Act*. Ballina was in the process of applying to become an 'Operational Area' under this legislation, at the time of our consultation, and had not yet been 'declared'. It was given operational status in December 1998.

Several interesting features became apparent about the Ballina situation. In the preceding three years several new youth work positions had been funded in the area. These had included a new Koori Youth Worker and a Street Worker position. Consequently, as long as a dialogue or relationship existed between the police and the youth workers, the workers believed that the police were less interventionist and more prepared to leave the young people alone. Police were only called on to intervene in situations such as fights. The youth workers worked very hard to maintain this working relationship and were seen to be having a positive hand in the social welfare of the young people. The Youth Street Worker and one of the security guards hired by the Retail Traders Association had taken to driving young people home at night if this was requested by the young people.

On the other hand, an identifiable group of young people were singled out for constant attention. One of the young people reported being continually followed, routinely stopped and searched and subject to genuine harassment. This group of young people included many Kooris, although the young people reported that the peer group mixed well and were not subject to any racial tensions.

Consequently, there was a difference of opinion amongst the youth workers about the efficacy of the *CPPR Act*. On the one hand it was felt that it would be useful only if it were used to target kids 'genuinely at risk', on the other it was felt that the police:

> Won't want to do it. I don't think they'll get into it. You can bring it in, but at the end of the day I'd be surprised if anything at all changed in this town. Police do not want to be social workers - they don't see it as their role.
>
> Youth Worker, Northern NSW

Ultimately, the Ballina workers were still happy to have the area declared 'operational' as long as this meant a guarantee of funding from the Attorney General's Department for the Youth Street Worker position. So from their point of view the Act was only useful in so far as it provided resources to the youth sector, as youth workers were the ones providing the services the young people actually needed.

The majority of the Ballina workers were not confident that the police would exercise power conferred by the Act in a fair way. Given the increasing 'welfare' presence of the youth workers and others, and the police targeting of visible groups in an unfair and arbitrary manner, this seems a reasonable point of view. There was a view that the impact of the *CPPR Act* would more than likely fall on indigenous children. For one thing, indigenous children were more likely to be visible on the street and were present there at an early age. Secondly, the concept of 'parental responsibility' was culturally very different among indigenous communities where parenting was a shared task of the extended family.

Finally, one Ballina youth advocate pointed out that the *CPPR Act* constituted a form, and possibly an illegal form of indirect discrimination in that it only impacts on children from rural areas and not on those from the city and suburbs. It may also constitute illegal racial discrimination, in that it effectively applies to, and in many respects is designed to deal with, Aboriginal youth. These are lines of criticism and possible legal action which deserve further examination.

9.8 The Detention After Arrest Act

Most of the young people who had been arrested during the time that the Detention After Arrest Act was operational reported reasonable levels of compliance with the Act. There were however, some exceptions. One young person reported being arrested five weeks prior to the consultation:

> I wasn't allowed to make any phone calls. I wanted to phone my mum but they wouldn't let me. They said "you have the right to remain silent" and I said "well, OK, I choose to take that right". They got the shits and dragged me up the corridor. They left me in a cell for two and half hours, and then my mum came and took me home. I wasn't charged or anything.
>
> 17 year old Koori young person, Western NSW

In a different incident one month before, a 16 year old Koori young person from south western Sydney recalled being in custody for 6 hours. He was not told he could make a phone call nor was he given access to a phone. No support person was brought in for him. He was eventually cautioned.

Another young Koori male reported being arrested for a break and enter three weeks before. Contrary to the legislation he was not told he was allowed to make a phone call nor did the

police provide him with a support person form his cultural background. The young person remembered a "blond bloke" who was present, presumably the independent adult required under s. 13 of the *Children (Criminal Proceedings) Act*. It did not appear that this person offered the kind of support that is guaranteed by the Act and which was called for after the Royal Commission into Aboriginal Deaths in Custody.

On the other hand, two young people in Sydney recall being treated well and having the police seem to follow the procedures as laid down by the Act. One recalled being allowed to make phone calls and to seek legal advice. He was given a pamphlet with his rights and entitlements written on it. He said "a few years ago they gave you nothing and nobody knew what was going on". It is interesting to report that this young person put the improved treatment down to his own experience and self-advocacy, rather than the new laws. A young woman from South Western Sydney also recalled being treated correctly, and being given the same sort of information sheet. She did however, note that the sheet was given to her after the police had finished questioning her. This would make a nonsense of the attempt to give the person an opportunity to assert her rights.

The Canterbury workers felt that the *Detention After Arrest Act* had improved the way in which young people were treated at the station. In addition, it had improved communication between the police and workers in relation to finding support people for detainees. Young people seemed to have been held for less time since the introduction of the new laws. The role of the Custody Officer was positive and the local Custody Officer had been "surprisingly helpful". But the workers felt that the *Detention After Arrest* provisions had both positive and negative consequences for young people.

Provision of an information sheet was practiced in several of the police patrols. However, it would only be a useful practice assuming that a young person was literate (or else the sheet were read out loud or, preferably, explained by an independent person) was allowed time to absorb and process the information, and was allowed to exercise the rights that they were being promised before questioning and without pressure from the investigating officers.

9.9 Demanding identification from underage drinking suspects

None of the participants in our consultations had any experience of this new summary offences power. It is also notable that none of the participants had any idea that this law had been passed. None of the young people were aware that if they refused to give their name and address under this statute, when suspected of underage drinking, that they would be guilty of an offence.

In rural areas it was suggested that the police probably know most of the young people anyway and that this power would only be utilised to harass kids. However, the police would not need this additional power in order to affect an intimidatory exchange as they were already well equipped with powers of this kind.

9.10 The Police and Public Safety Act

The new *Crimes Legislation Amendment (Police and Public Safety) Act* 1998 was very new when we conducted our consultations. We were able to gauge some response to its implementation and usefulness from both workers and young people.

In rural areas the following responses were quite unanimously voiced:

- The police already routinely searched young people and that the new laws would not enable them to do more than they already did; the knife laws, if anything, were more constraining than current police practices (because of the more regulated search power)
- The police, more often than not, already knew who young people were and did not need any extra power to ask for identification.
- Very few young people carried knives anyway.

In urban areas similar views were expressed, however:

- Young people reported being routinely searched and by and large gave consent to these searches; many of them were unaware that they had the right to refuse many kinds of searches.
- Many of the youth workers were shocked to hear there was new law which transformed young people into suspect persons by virtue of their being present in a particular locale (ie the new 'crime hot spots'); workers were very concerned about the escalation of intervention opportunities and how this would impact on their clients.

One group of Pacific Islander young people had a lot of experience of routine searching:

> They just go "Can we look through your bags?" We say " Do what you want." When they search the bags they just tip them up on the ground and kick the stuff around and then say "Pick up your stuff."

This group had seen police operating with the new Police and Public Safety Amendment power at Lakemba:

> A policeman goes over to this guy looking at magazines at the station. He grabbed him and pulled his jacket back and pushed another guy away. And then he searched him with the metal detector.
>
> Young Pacific Islander Person, Western Sydney

Some young people had been asked to move on at different times but were unclear whether this was under the new laws or not. It is clear that the police practice of asking young people to 'move on', or to empty their pockets and take off their shoes (without any specific suspicion of a crime), has been going on for many years.

One group of young people was sitting on the stairs at MacDonalds. Whenever a customer came to the doors they moved to let them through. However a police car arrived and the police told them to move on. The young people asked why and the answer given was that the staff had phoned to complain. The young people wondered why no-one from MacDonalds came out to talk to them first. They said they hadn't been a nuisance. They moved anyway. Whether or not this request was made under previous legislation or under the *Police and Public Safety Act* is unclear. What is clear is the willingness of the police to respond to the request of a powerful commercial organisation in an exchange which should have been settled in a civil and social manner, and not necessarily in favour of MacDonalds.

There was deep concern at all the consultations that the new powers under the *Police and Public Safety Act* would increase the amount of aggravated interaction between police and young people in a climate which already involved many unnecessary interventions and

arrests. In the inner west, workers had noticed a considerable escalation in police intervention in the previous month.

> There has been a lot of stopping and searching since the new powers arrived. In the city and around kids are complaining and feeling nervous about it. Especially young people who didn't have a lot of contact with the police before. There's a higher number of kids being charged for petty stuff like offensive language.
>
> Youth Worker, Western Sydney.

Furthermore, there were grave concerns from many participants about who would be targeted by these powers.

> I believe the new laws will make things worse, like giving them the power to search. You see heaps of kids getting searched, but never Aussie kids.
>
> Young Person, Western Sydney.

And again:

> They don't pick on Aussie kids. If you're there by yourself and you're black and there's lot of white kids around, the cops will come straight up to you.
>
> Pacific Islander Young Person, Western Sydney.

Finally, in conjunction with the problems of racist policing, there is also the fact that the *Police and Public Safety Act* was introduced in a climate of fear which furthered the construction of the "gang problem".

> If we're in a group they think we're a big gang or something and try and break us up. But we feel safe together.
>
> Pacific Islander Young Person, Western Sydney.

And again:

> The cop said "What does the Bandanna mean?" And I said "It's for keeping my head warm." And he said "Right… you're being a smart arse." It makes me so angry when they do that.
>
> Pacific Islander Young person, Western Sydney

In all areas the young people reported ID demands, searches and orders to move on as a regular, almost everyday occurrence. Some workers were, on the other hand, very concerned about the prevalence of knives amongst young people. Some believed that the new knife laws would encourage young people to hide knives, and could possibly lead to an escalation in knife ownership simply because of their prohibition. Finally many youth workers felt it was very unfair that all young people were now under suspicion and they did not trust police to utilise the powers fairly.

9.11 The Young Offenders Act

The workers in Ballina reported a positive response to the cautioning and warning powers under the *Young Offenders Act*. One young person had been drunk and smashed a car. The person was given a caution instead of being charged.

> Going to the police station and being cut some slack has supported her a bit more to look at what she's doing, rather than treating her like a criminal. It was a good thing.
>
> Youth Worker, Northern NSW

Another said:

> I like Young Offenders [Act]. It's a better way of doing business. Instead of ignoring kids or charging them there's now something in the middle.
>
> Youth Worker, Northern NSW

The young people whom we spoke to about cautions and warnings had a somewhat different opinion. Of most importance was the fact that unofficial warnings were being delivered when in fact no offence had been committed. For instance the boys who were warned not to come back to "this area" (see above) and to "go back to Campsie" and not make trouble around here, had not in fact committed any offence.

In all areas, workers had experience of the introduction, or expansion of the Police Youth Liaison positions, required under the Act. The Youth Liaison Officers were, generally, held to be a useful idea and one which promised much. There was a range of opinion regarding whether the YLO's were useful under current modes of practice. For instance, in one area it was felt that the YLO was doing a great job of making links with the youth network but that this was having little impact at a street level. In another area the YLO, who was of a particular cultural background, had been moved out of his duties in order to provide language services on a clandestine police operation. This was felt to be an unfortunate prioritisation which belittled the role which he was meant to fulfil. In conclusion, YLO's needed to be accessible to young people, and particularly the young people most in contact with the justice system. "We need more YLO's, not someone doing PR", said one youth worker.

In Orange, more emphasis had been placed on giving warnings and cautions in recent times. This was seen as a positive thing. Of the six young people that the workers knew of who had been cautioned under the *Young Offenders Act* in recent times, three had re-offended but three had remained on the right side of the law. This was viewed as a positive result, and one which indicated a preparedness among the police to try innovative strategies which were in the interests of the young people.

However in Campbelltown one lawyer was very concerned about whether young people were accessing legal advice in relation to their admissions of guilt under the *Young Offenders Act*. Only one person had accessed her service (a specialist children's service) to get legal advice before receiving a caution in the previous six months.

We are confident that our findings give an indicative snapshot of police youth relations in the four case study areas in mid-1998.

9.12 Summary findings

Following is a summary of our findings in relation to each aim of the consultation.

Aim 1: Assess how the new laws are affecting communities, with particular regard to young people

It needs to be said at this stage that the new laws which are in place do not seem to be addressing the issues which the young people and their communities are facing. Many of the workers, who were aware of the erosion of social fabric and an increasing sense of unease within their communities felt that increasing legal intervention into the lives of young people was simply compounding the problems which they faced. With the exception of the *Young Offenders Act*, which was given the benefit of the doubt at this stage, and the *Detention After Arrest Act* which held some positives as long as it was used fairly, workers and young people strongly opposed new laws which increased police intervention in the lives of young people, and said attempts to circumscribe youthful behaviour or even to contain deviance were not the answer. Laws such as the *Crimes Legislation Amendment (Police and Public Safety) Act* 1998 , new powers to demand identification under the *Summary Offences Act*, and the *Children (Protection and Parental Responsibility) Act* were seen as inappropriate responses to the needs of young people.

Aim 2: Evaluate police-youth relations before and after implementation of the new laws

In all the areas that we visited, the quality of police-youth relations was poor both before and after the implementation of the laws. Many young people did not trust police nor did they wish to interact with them. Young people reported unacceptable levels of, and in some instances illegal, police interaction. It was expressed that this was unfortunate and would impact on young people's sense of self worth. Continuous intervention made young people feel criminalised, outcast and unworthy. Young people who were the victims of crime would be less likely to go to the police for help because of their experiences.

But most obviously, in three of the case study areas, Orange, Campbelltown and Canterbury, police-youth relations were seen to be on the decline. In Campbelltown and Canterbury, the urban areas, relations had visibly deteriorated within the previous few months, which to some degree was blamed on the climate and operation of increasing police powers, and the consequent escalating police-youth interactions.

In Ballina, some aspects of police-youth relations were seen to be improving, but this was because a significant amount of intervention had been taken over by the youth workers, indicating a shift in what was seen to be 'police business'. This had been effected through an expanding number of youth workers available to deal with many youth problems. Some identifiable young people however were still being singled out for 'special attention' despite this change.

Most crucially, although there was no general agreement as to whether the police had enough, not enough or too much power in relation to young people, there was certainly consensus that the police misused the power that they had in the most inappropriate ways. According to one:

> Young people aren't sure about their rights. They don't know what they are. They have a basic outline. If the police do respect their rights they're going to be respected back. But are the police going to adhere to this? They think "I'm going to control this situation so I'm going to do what I think is right".

> Youth Worker, Western NSW

And according to another:

> The police use their power in the wrong way. They abuse it and then everybody gets the shits and nobody cooperates with them. That makes it harder, and then they bring in new laws.
>
> Young Person, Southern Sydney.

Aim 3: Find out the priority issues affecting young people, with special attention to indigenous and NESB youth.

The issues affecting the young people with whom we consulted were diverse. They included poverty, domestic violence, homelessness, lack of recreational opportunities, and drug use. This list reveals that some street frequenting young people had social issues which may have affected their interaction with the police or their presence on the street. Some of the issues which young people were facing were critical, in some cases life threatening and in other cases, within the current climate, intractable.

However perhaps the biggest issue that many faced was the strategies employed to govern their behaviour in public space, based on an assumption that young people were necessarily engaged in some form of criminal or anti-social activity, in proportion to their visibility. NESB and Aboriginal young people revealed some issues specific to their status as young people and some specific to their other than Anglo-Saxon background. High visibility, high levels of public space frequenting and traditional police targeting were commonly factors for many Aboriginal youth.

In this report we have documented anecdotal evidence of groups of young people who have poor interactions with the police and who complain of being mistreated by them. Over and above this we have observed an apparent increase in these interactions. Youth workers in particular are disturbed by the noticeable increase in police surveillance and intervention in the day to day lives of their clients. This seems to have escalated in recent times, some reporting increases in the month prior to the consultation. Many workers who reflected on the politics and circumstances in their local areas put this increase down to changes in the adult community and the perceptions they had of young people, rather than an escalation in youth crime rates or young offending. However we note with concern the greatly increased arrest rate for juveniles in 1998 (Nixon 1998). This bears out some of our worst fears about the new laws, and the climate in which they have been created.

10. Conclusion: Young People's Rights and Responsibilities

Young People's Rights have been poorly understood and often ignored in the policy and legislative process in New South Wales. It was disturbing to find that senior policy makers and police either admitted ignorance of the *Convention on the Rights of the Child* or expressed a 'homegrown' and populist notion of rights and responsibilities (Cameron and Scott 1998) which demonstrated a poor understanding of both.

This populist notion of rights and responsibilities effectively presents rights as some sort of privilege extended by society, a privilege which may be withdrawn if particular individual responsibilities are regarded as not being met. However, as we explained in Chapter 5, this view of rights as contingent on individual behaviour both stunts the development of responsible adult behaviour in young people and contributes to social irresponsibility by fostering a general disrespect for the rights of others. A correct interpretation of rights and responsibilities must have it that rights are universal and inalienable. Rights are a function of one's humanity, not one's behaviour. While people must be held responsible (children and young people to a lesser extent) for failing to respect the rights of others, attempts to 'link' individual rights with individual responsibilities must be fundamentally corrosive of the fabric of universal human rights. We cannot contemplate a legitimate society where some people are said to deserve rights and others do not. Regimes of patronage and privilege have long existed, but such regimes certainly do not respect universal human rights or democratic ideals.

Children and young people must be assisted in the process of learning to respect the rights of others, but an essential part of this is that their own rights are explained and respected, and that they are encouraged to take responsible decisions in their own lives. It is a well acknowledged principle (CROC passim) that the extent to which children and young people are held accountable for failing to respect the rights of others (and to this extent being irresponsible) will be tempered according to their developmental capacities (Baker in Cameron and Scott 1998). In whatever way children and young people are to be held accountable, their rights must be held as intrinsic and inviolate.

Legislation such as the ill-considered *Children (Protection and Parental Responsibility) Act* 1997, the proposed *Street Safety Bill* 1996 and the subsequent *Crimes Legislation Amendment (Police and Public Safety) Act* 1998 provide new substance to the *Kids in Justice* (Youth Justice Coalition 1990) assertion that there has been an overemphasis (and throughout the 1990s, a sustained overemphasis) on the responsibilities of young people, and a deep disrespect for their rights. This has led to increased police powers, increased intervention, increased penalties, and a greater reliance on institutionalisation. There is now renewed support (ALRC 1997: 96-98, 192) for the *Kids in Justice* contention (Youth Justice Coalition 1990: 2.2) that youth rights are poorly understood; and that with several key state agencies (Police Service, Juvenile Justice, the Courts and State Parliament) keen to enforce youth responsibilities, it is critically important that the actions of all these bodies be measured against, and modified where necessary to be consistent with, the widely accepted formulation of youth rights.

An important move for children and young people in recent years has been the notion of 'restorative justice', principles of which have been most recently enshrined in the *Young Offenders Act* 1997. By this philosophy, socially integrative and rehabilitative sanctions imposed on young offenders (consistent with CROC's requirement to minimise formal legal sanctions for children and young people) are combined with restitution measures which may benefit individual victims and the community at large. The addressing of victims needs within a progressive construct is welcome, as the reverse has often been the case. Most of the socially exclusionary sanctions put up by 'law and order' politics (harsh jail sentences, denial of defendant's substantive rights) have been argued in the name of 'victims rights'. However it has never been clear how victims would really gain through harshly retributive policies, nor indeed why support for 'victims rights' was required to conflict with established human rights (Anderson 1995). Restorative justice, with its broad support, offered the hope that there might finally be some genuine synthesis of two distinct and deep seated demands on the justice system: (i) to recognise and remedy the victims and the social damage of irresponsible behaviour, and (ii) to treat young offenders with respect and minimise the damage done by stigmatisation and institutionalisation, by developing socially integrative and rehabilitative sanctions.

Unfortunately, much of the goodwill of restorative justice, including that embodied in the *Young Offenders Act* 1997, has been swamped by the law and order wave. As Professor Ian O'Connor recently wrote:

> The shift to restorative justice in Australia has been distorted by the strength of punitive and exclusionary discourses ... the paradigm of restorative justice has been penetrated by a punitive discourse -- restoration and reconciliation become transformed into making the juvenile offender pay -- letting the victim get his pound of flesh, not only for this offence but for all juvenile offenders (O'Connor in Alder 1998: 6)

One effect of this in this state has been the dramatic surge in the arrest rate for juveniles (Nixon 1998) in 1998, after the proclamation of the *Young Offenders Act* 1997 and despite the introduction of a new system of warnings and cautions, which was expected to reduce the arrest and charging of juveniles. This seems to be the result of the confusion of geunuine 'crime prevention' measures with draconian police 'street sweeping' measures, under law and order rhetoric. Similarly, upward pressures on sentences, new restrictions on bail and attacks on the right to silence have all applied to children and young people, as much as to adults.

This damage has been brought about through a broad neglect and disregard for youth rights. We have detailed some important elements of this in Chapter 8, and summarised it in Chapter 2. The Police Youth Policy Statement 1995-2000 was welcome in general principle but lacking in clear detail and without a firm commitment to CROC. The *Children (Protection and Parental Responsibility) Act* 1997 was flawed in almost every respect and has been the subject of national and international embarrassment and condemnation. The *Crimes Amendment (Detention After Arrest) Act* 1997 attempted to combine the police demand for expanded detention powers with a clarification of the rights of detainees. However it made the later subordinate and vulnerable to the former, and paid little regard to the special vulnerability of children and young people in custody. The *Young Offenders Act* 1997, as we have said above, embodies sound principle, but has been undermined in its implementation. The *Crimes Legislation Amendment (Police and Public Safety) Act* 1998 was a further acquiescence to the demands of police, and has created a basis for the violation of young peoples rights, particularly through the broad 'street sweeping' search powers given to police.

Much of this legislative push is not formally aimed at young people, however its impact falls disproportionately on children and young people, and in particular on indigenous children and young people.

If legislators and policy makers had the will to support and enforce youth rights, in the course of promoting fair and effective legal processes, we would propose the following steps.

Step 1: Recognise, accept and implement the Convention on the Rights of the Child

Both the state and federal governments should take clear steps to recognise, accept and implement the provisions of the Convention on the Rights of the Child.

By ratification of CROC in late 1991, the Federal Government appeared to have taken this responsibility seriously. However the late report to the UN Committee on the Rights of the Child, the deficiencies of that report (see chapter 5), the failure to implement CROC in federal law and the moves to block court recognition of our human rights obligations (through the *Administrative Decisions (Effect of International Instruments) Bill* 1997) show that federal recognition, acceptance and implementation of CROC is still very weak.

The position of the New South Wales State Government is worse. There has been no overt recognition that the state Government has a responsibility to recognise, accept and implement CROC. The State Police Minister, responsible for policy and legislation affecting young people, said he was unfamiliar with it, and referred questions to the state's Attorney General (Cameron and Scott 1998). More importantly, the State Labor Government has appeared oblivious to criticism from both its own consultants and the UN Committee on the Rights of the Child that its legislation (eg. the *Children (Protection and Parental Responsibility) Act* 1997) has violated the internationally recognised rights of children and young people.

State Government responsibility for human rights obligations has been a bone of contention within the Australian federal system. Under the Federal Parliament's external affairs power (*Commonwealth Constitution*, s.51 xxix) the Federal Government is responsible for human rights obligations under international law. However state governments are responsible for most of the power relations likely to affect children's and young people's rights. The collection of recent legislation and policy reviewed in this report bears out this general point. Yet to avoid political conflict, federal governments of both major parties have avoided or have sought to minimise the extent to which the clear federal legal authority (*Commonwealth Constitution*, s.109) is expressed in this area.

In a 1984 reservation to the *International Convention on Civil and Political Rights* (a reservation interestingly not lodged on the *Convention on the Rights of the Child,* at ratification in 1991) the Federal Government sought to avoid its responsibility to enforce human rights standards on the states. It claimed:

> Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent states. The implementation of the treaty [the ICCPR] throughout Australia will be effected by the Commonwealth, State and territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise (DFAT 1998).

This attempt to avoid federal responsibility (and clear constitutional power) is despite explicit provision in the ICCPR that:

> The provisions of the present Covenant shall extend to all parts of federal States without any limitations or exceptions (Article 50).

Despite the unsatisfactory nature of the Federal Government's argument, it does draw attention to the need for state governments to share responsibility and be accountable for upholding human rights obligations under international law, and to submit itself to the obligations entered into by the Federal Government. While it is the Federal Government which is required to report periodically to the Committee on the Rights of the Child (*CROC* Article 44), indicating the extent of compliance as well as difficulties and problems, the role of the state in this reporting has been unclear. We say that state governments should formally agree to take on the obligation to report. The NSW State Government report would be to the Federal Government, for conveyance to the UN Committee on the Rights of the Child. This process would focus state policymakers on the need to audit their policy and legislation against internationally accepted principles.

Step 2: Codify in law the provisions of the Convention on the Rights of the Child

The provisions of the *Convention on the Rights of the Child* should be codified in law (state and federal), preferably through a *Bill of Rights Act* (state and federal), which should also incorporate the *International Convention on Civil and Political Rights.* We note that other organisations have been calling for the implementation of CROC into Australian law (Defence for Children International 1996: 9-12).

A *Bill of Rights Act* would then consolidate and clarify all substantive rights. This is a far preferable route to the piecemeal implementation of human rights (as in the federal *Race Discrimination Act* 1975, *Sex Discrimination Act* 1983, and *Human Rights (Sexual Conduct) Act* 1994) or to the creation of rights subordinate to and vulnerable to shifts in police powers (as in the New South Wales *Crimes Amendment (Detention After Arrest) Act* 1997). A *Bill of Rights Act* would apply to all existing law (perhaps after a 2 year adjustment period, such as that which now applies to the 1997 *Bill of Rights* in Thailand) and would create the benchmark for future law and policy.

A further step which should be taken is to amend the legal principles which apply to children in criminal proceedings, to make them consistent with CROC principles. These are presently spelt out in the *Children (Criminal Proceedings) Act* 1987. We have already discussed the existing Section 6 of this Act, in Chapter 3 on Methodology, as well as the *Kids in Justice* (Youth Justice Coalition 1990: 2.4) proposals for amendment. Further to this discussion, and in light of CROC and Australia's ratification of CROC, we propose that the preferred formulation of rights and responsibilities in Section 6 of this Act should be amended to read as follows:

> **6 Principles relating to the exercise of criminal jurisdiction**
>
> A court, in exercising criminal jurisdiction with respect to children, shall have regard to the following principles:

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

(b) that the diminished responsibility of children demands special mechanisms and measures to respond to their offence and situation, and that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

(c) that children be encouraged to accept responsibility for their actions, provided that their right to prompt legal and other appropriate assistance is respected, and that they are not compelled to give testimony or confess their guilt.

(d) that children should be dealt with in a way that acknowledges their needs and gives them the opportunity to develop in responsible, beneficial and socially acceptable ways

(e) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

(f) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(g) that the penalty imposed on a child for an offence should be less than that imposed on an adult who commits an offence of the same kind, and that every alternative be exhausted before institutional care is imposed as a penalty.

Step 3: Appoint human rights monitors to provide guidance on the policy and legislative process

We propose that human rights monitors be appointed to provide guidance on the way in which new policy and legislation either is or is not consistent with our human rights obligations, and in particular with the *Convention on the Rights of the Child*. These monitors should be properly resourced and have sufficient authority to clearly inform all relevant parties of emerging policy or legislation which is in breach.

In New South Wales the first level of monitoring should be in the office of Parliamentary Counsel, where legislation is drafted and reviewed for all parties and members of parliament. This office should be properly resourced to review all new legislation and to inform the parliament if and when proposed legislation is in breach of Australian human rights commitments.

At Governmental level a similar monitoring process should be assigned either to counsel in the office of the Premier, or the office of Attorney General. Once again, these appointees should be properly resourced to review all new Government policy and to inform the Cabinet if and when proposed policy is in breach of Australian human rights commitments.

With such a process in place (and preferably supported by a *Bill of Rights Act*) future policy and legislation might be guided so that it is consistent with both the *Convention on the Rights of the Child* and the *International Convention on Civil and Political Rights.*

We also support the call by Defence of Children International for a federal Commissioner for Children, to monitor compliance with CROC (Defence for Children International 1996: 9-12).

Step 4: Organise education on the rights of the child

We urge Government and community groups to prepare careful programs of education on the rights of the child, particularly in view of the poor understanding (ALRC 1997: 96-98, 192; Youth Justice Coalition 1990: 2.2) and weak culture of rights in this country. The proposal is no more than to respect Article 42 of CROC, where the Australian Government has agreed that:

> States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

We suggest that public education on the rights of the child in New South Wales should be a matter of Cabinet priority, and that appropriately coordinated programs have input from the Education and Attorney General's Department. Campaigns in secondary schools would be particularly valuable.

We also propose that the New South Wales Police Service undertake to educate all its members on the provisions of both the *Convention on the Rights of the Child* and the *International Convention on Civil and Political Rights*, and that the policies of the Service be reviewed to ensure they are consistent with these principles.

Finally we recognise that it is also the responsibility of the community, and community groups, to participate in this educative project. Without a strong general understanding and culture of rights, right across the community, many of the misconceptions about children's and young people's rights and responsibilities are bound to persist.

Bibliography

Aboriginal and Torres Strait Islander Social Justice Commissioner (1997) *5th Report*, AGPS Canberra

Alder, Christine, I. O'Connor, K. Warner & R. White (1992) *Perceptions of the Treatment of Juveniles in the Legal System*, National Youth Affairs Research Scheme, Melbourne

Alder, Christine (Ed) (1998) *Juvenile Crime and Juvenile Justice*, Australian Institute of Criminology, Canberra, Research and Public Policy Series, No 14

ALP (c1995) Labor's Anti-Gang Strategy - Bob Carr: tough on crime, tough on the causes of crime, A Draft Policy, Australian Labor Party, New South Wales

Anderson, Tim (1995) 'Victims Rights or Human Rights?', *Current Issues in Criminal Justice*, Vol 6 No 3, 335-345

Anderson, Tim (1997) 'Detention After Arrest Bill', CCL Memo, Sydney, 10 May

Anderson, Tim (1998) 'The Police Association's demands for new police powers', NSW Council for Civil Liberties' letter to Premier Bob Carr, 31 March

Australian Law Reform Commission (1997) *Seen and Heard: Priority for Children in the Legal Process*, ALRC Report No 84, Australian Law Reform Commission and Human Rights & Equal Opportunity Commission, AGPS, Canberra

Aris, Sharon (1995) 'Legislative Evaluation: the evaluation of the Children (Parental Responsibility) Act NSW 1994', Unpublished Masters Thesis, Macquarie University, Sydney

Attorney General's Department (1997) 'How to Develop Local Crime Prevention Plans', Sydney

Bargen, Jenny (1996) 'Kids, Cops, Courts, Conferencing and Children's Rights', *Australian Journal of Human Rights*

Bargen, Jenny (1997a) Youth Justice Coalition, The Role of Victims in Police Cautions, A view from the Youth Sector, unpublished

Bargen Jenny (1997b) "Young People and Violence: Facts, Perceptions and Realities" in *Young People and Violence*, 12-25 Vol 6, No 1, Youth Action and Policy Association, Sydney

Bargen, Jenny (1998) personal communication, Youth Justice Coalition, 18 February

Bernardi, Gus (1998) "Recasting Old Solutions to Old Problems", *Alternative Law Journal*

Blagg, Harry and Meredith Wilke (1995) *Young People and Police Powers*, Australian Youth Foundation, Sydney

Blake, Sarah (1998) 'Knives sold to teen gangs shock premier', *Sunday Telegraph*, 15 March

Bureau of Crime Statistics and Research (1996) 'NSW Criminal Court Statistics 1995', Press release, 18 September

Bureau of Crime Statistics and Research (1998) *Juveniles in Crime*, Sydney, http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/juv_crime1.html, December

Bureau of Justice Statistics (1996) *Sourcebook of Criminal Justice Statistics: reported prevalence of delinquent behaviour*, US Department of Justice, Washington

Cameron, Hamish and Nicole Scott (1998) 'Rights and Responsibilities of Children', unpublished research report, Community Law and Legal Research Centre, University of Technology Sydney

Carr, Bob (1998) Letter to the NSW Council for Civil Liberties, Premier of NSW, 29 April

Carrington, Kerry (1993) *Offending Girls -- Sex Youth and Justice*, Allen & Unwin, Sydney

Committee on the Rights of the Child (1997) 'Concluding Comments on the Committee on the Rights of the Child: Australia', United Nations, Sixteenth Session, CRC/15/Add.79

Cowdery, Nick (c1997) 'The Right to Silence (so called)', Director of Public Prosecutions, submission to the NSW Law Reform Commission, Sydney

Criminal Justice Commission (1994) *Fear of Crime*, Criminal Justice Research Paper Series, Vol 1 No 2, Queensland Criminal Justice Commission, Brisbane

Cunneen Chris (1994) 'Enforcing Genocide? Aboriginal Young People and the Police' in White, R. and Alder, C. (Eds) *The Police and Young People in Australia*, Cambridge University Press, Melbourne

Cuneen , Chris and Rob White (1995) *Juvenile Justice an Australian Perspective*,

Cuneen, Chris & Tom Robb (1987) *Criminal Justice in North-West New South Wales*, Bureau of Crime Statistics and Research, Attorney General's Department, Sydney

Cuneen, Chris and David McDonald (1996) *Keeping Aboriginal and Torres Strait Islander People Out of Custody*, ATSIC, Canberra

Defence for Children International (1996) *Australia's Promises to Children - the alternative report*, DCI, Canberra, November

DFAT (1998) *International Covenant on Civil and Political Rights*, Department of Foreign Affairs and Trade, Australian Treaty series (with reservations and declarations) Commonwealth of Australia, http://www.austli.edu.au/au/other/treaties/19800023.html
Department of Juvenile Justice (1995) *Breaking the Crime Cycle,* white paper, Sydney
Department of Juvenile Justice (1997) Young Offenders Bill, Minutes of Meeting with Peak Aboriginal Organisations, 5th&6th August
Department of Juvenile Justice (1998) Juvenile Justice Satistics, Sydney, unpublished, May
Dixon, David (1997) 'What's WRONG with the Detention After Arrest Bill?', *Law Society Journal*, 35 (6) 58, July
Dixon, David (1998) 'Broken Windows, Zero Tolerance and the New York Miracle', *Current Issues in Criminal Justice*, Vol 10 No 1, July, 96-106
Emerson, Scott (1995) 'Police use laws to persecute youth', *The Australian*, 27 September
Evaluation Committee (1997) 'Evaluation of the Children (Parental Responsibility) Act 1994', Attorney General's Department, Sydney, January
Findlay, M., S. Odgers & S. Yeo (1994) *Australian Criminal Justice*, Oxford University Press, Melbourne
Fitzpatrick, Liam (1996) 'Plan to give police more power attacked', *South China Morning Post*, 5 September
Freeman, Karen (1996) 'Young People and Crime', *Crime and Justice Bulletin*, Number 32, NSW Bureau of Crime Statistics and Research, November
Freeman, Karen (1997) 'NSW Crime: what's really happening?', NSW Bureau of Crime Statistics and Research
Glascott, Katherine (1996) 'Watchdog lashes juvenile jails', *The Australian*, 11 December
Harris, Sarah and Stuart Snell (1998) He was just doing his job - stabbed to death in city street', *Sunday Telegraph*, 1 March
Harris, Trudy & Tracey Sutherland (1998) 'Officers want right to carry guns off duty', *The Australian*, 3 March
Herald Sun (1998) 'Off duty police may carry guns', 3 March
Hirst, Paul (1994) *Associative Democracy – New Forms of Economic and Social Governance*, Polity Press, Cambridge
Hogg, Russell & David Brown (1998) *Rethinking Law and Order*, Pluto, Sydney
Horin, Adele (1995) 'Children's rights: Australia under fire', *Sydney Morning Herald*, 24 May
Human Rights and Equal Opportunities Commission (1997) *Bringing them Home: A guide to the findings and recommendations of the national Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families*, Human Rights and Equal Opportunities Commission, Sydney
Indermaur, D. (1990) 'Crime Seriousness and Sentencing: a comparison of court practice and the perceptions of a sample of the public and judges', Criminology Research Council Report, Australian Institute of Criminology, Canberra
Jamal, Nadia (1997) 'Power to take young people off streets draws flak', *Sydney Morning Herald*, 26 June
Johnston, Elliot (1991) *Royal Commission into Aboriginal Deaths in Custody: National Report: Overview and Recommendations*, AGPS, Canberra
Joint Standing Committee on Treaties (1997) Submissions: Inquiry into the Status of the United Nations Convention on the Rights of the Child, Canberra
Jopson, Debra (1996) 'NSW leads in locking up black youths', *Sydney Morning Herald*, 17 December
Justice for Young People (1997) 'Tent Embassy', pamphlet, 28 February
Kerr, Susan (1996) 'The Childen (Parental Responsibility) Act 1994 (NSW), report prepared for the Social Justice Unit, Human Rights and Equal Opportunity Commission, Sydney
Klug, Francesca, Keir Starmer & Stuart Weir (1996) *The Three Pillars of Liberty: political rights and freedoms in the United Kingdom*, Routledge, London
Law Society of NSW (1997a) 'New legislation fails to protect the vulnerable', Media Release, 27 June
Law Society of NSW (1997b) 'Crimes Detention After Arrest Regulation 1997, letter to Attorney General's Criminal Law Review Division, 15 October
Loane, Sally (1997) 'Children's Rights', Sydney Morning Herald, Wednesday, October 8
Luke, Garth and Chirs Cuneen (1995) *Aboriginal Over-Representation and Discretionary Decisions in the NSW Juvenile Justice System*, Juvenile Justice Advisory Council of NSW, Sydney
Mackay, M (1996) *Victoria Criminal Justice System Fails ATSI Youth*, discussion paper, Koorie Research Centre, Monash University, Melbourne
Maher, Lisa, David Dixon, Wendy Swift & Tram Nguyen (1997) *Anh Hai: Young Asian Background People's Perceptions and Experiences of Policing*, UNSW Faculty of Law Research Monograph Series, University of New South Wales, Sydney
Manning, Fiona (1996) 'Dealing with Street Gangs: Proposed Legislative Changes', Breifing Paper No 26/96, NSW Parliamentary Library Research Service, Sydney, October
Milohanic, Sonia (1998) 'Carr bows to new knife call', *Sunday Telegraph*, 3 May

Morey, Mark (1996) 'Whose Space is it Anyway?' Masters Thesis, University of NSW
Morris, Rachel (1997) 'Longer Arm of the Law: police to hold suspects up to four hours', *Daily Telegraph*, 16 April
Morris, Rachel (1998) 'Knife has the edge - blade now the weapon', *Daily Telegraph*, 1 May
National Childrens and Youth Law Centre (1996) 'CROC report: Australia's record', *Rights Now*, Vol 4 No 1, February
New South Wales Attorney General's Department (1996) Report of the NSW Working party on Family Group conferencing and the Juvenile Justice System, Discussion Paper, September
New South Wales Children's Court Information System (1998) *Children's Court Statsitics 1990-98*
New South Wales Law Reform Commission (1990) *Criminal Procedure: Police Powers of Detention and Investigation After Arrest*, Report 66
New South Wales Law Reform Commission (1998) *The Right to Silence*, Discussion Paper 41, Sydney, May
New South Wales Ombudsman (1995) *Race Relations and Our Police*, Report to NSW Parliament, January
New South Wales Ombudsman (1997) *Annual Report 1996-97*, Sydney
New South Wales Police Service (1995) *Youth Policy Statement 1995-2000*, A Commitment to Children and Young People, Sydney
Nixon, Christine (1998) personal communication, Assistant Commissioner of Police, October
O'Brien, Peter and Steve Campbell (1997) *Youth and Public Space: legislation and policy overview*, unpublished report, University of Technology Sydney Community Law and Research Centre
O'Reilly, Bernadette and Steve Campbell (1997) 'The New 'Parental Responsibility' Act in a Nutshell', from S. Campbell (Ed) *Advocacy in the System, The Youth Justice Guide*, Macquarie Legal Centre, Sydney
O'Sullivan, Teresa (1995) 'City of Fear', *Alternative Law Journal*, Vol 20 No. 2 April
Owens, Warren & John Larkin (1996) 'Safe Streets: tough new laws to target gang violence', *Sunday Telegraph*, 1 September
Pearce, K. (1996) 'Tackling the Causes', *Alternative Law Journal*, Vol 21 No 2, April
Pearce, K. (1997) *No Standing*, Youth Action and Policy Association, Sydney
Police Association (1998) 'Enhanced authority for police to act for and on behalf of the community', Submission to Minister for Police, Police Association of NSW, 16 March
Pulse Consultants (1994) 'Street Gangs - Study for the NSW Police Service', Sydney, April
Senate Legal and Constitutional Committee (1997) Consideration of Legislation Referred to the Committee, *Administrative Decisions (Effect of International Instruments) Bill* 1997, October
Shaw, Jeff (1997) 'Detention After Arrest: the Attorney General responds to criticism of the new Act', *Law Society Journal*, 35 (7) LSJ 60, August
Simmering, Stella (1995) *Strip Search: Sexual Assault*, video, Coalition Against Police Violence, Casuarina NT
Sunday Telegraph (1996) 'Battle to Make Our Streets Safe', 1 September
Sunday Telegraph (1997) 'Gang Crackdown Fizzles', 16 November
Taylor, L (1996) 'What is the Government Doing?', *Police News*, Vol 76, No 4, April
Tink, Andrew (1996) Speech when introducing Crimes Detention (Police Detention Powers After Arrest) Bill, *Hansard*, NSW Parliament, Legislative Assembly, 17 October
United Nations Committee on the Rights of the Child (1997) 'Concluding Observations: Australia', Committee On The Rights Of The Child, October
Vass, Nathan (1996) 'Get tough approach 'is not the answer', *Sydney Morning Herald*, 11 December
Whelan, Paul (1996) 'Proposal to create the Street Safety Act to give police the power to disperse gangs', New South Wales Confidential Cabinet Minute, 3 June
White, Rob and Chris Alder (Eds) (1994) *The Police and Young People in Australia*, Cambridge University Press, Melbourne
White, Rob (1993) 'Young People and The Policing of Community Space', *Australian and New Zealand Journal of Criminology*, 26(3): 207-18
Wilke, Meredith (1995) 'Police Powers and the Convention on the Rights of the Child', 50th Anniversary Conference, Australasian Law Teachers' Association, unpublished paper
Wilson, Paul (1998) 'The shame of guns and knives', *Courier Mail*, 11 March
Wood, JRT (1997) *Final Report Volume 2: Reform*, Royal Commission into the New South Wales Police Service, Sydney
Youth Action and Policy Association (1997) 'No Standing: Young People and Community Space Project', research report
Youth Justice Coalition (1990) *Kids in Justice: a blue print for the nineties*, Sydney
Youth Justice Coalition (1994) *Nobody Listens*, Youth Justice Coalition, the Western Sydney Juvenile Justice Interest group, and the Youth Action and Policy Association, Sydney

Youth Justice Coalition, Discussion paper "Report of the NSW Working Party on Family Group conferencing and the Juvenile Justice System", November 1996

New South Wales Legislation

Crimes Act 1900
Intoxicated Persons Act 1979
Drug Misuse and Trafficking Act 1985
Children (Care and Protection) Act 1987
Children (Criminal Proceedings) Act 1987
Summary Offences Act 1988
Prohibited Weapons Act 1989
Children (Parental Responsibility) Act NSW 1994
Crimes Amendment (Detention After Arrest) Act 1997
Children (Protection and Parental Responsibility) Act 1997
Young Offenders Act 1997
Summary Offences Amendment Act 1997
Crimes Legislation Amendment (Police and Public Safety) Act 1998
Bail Amendment Bill 1998

Other state and federal legislation

Race Discrimination Act 1975
Sex Discrimination Act 1984
Human Rights (Sexual Conduct) Act (Cth) 1994
Juvenile Justice Act (NT) 1997
Criminal Code Amendment Act (WA) (No2) 1996

High Court of Australia Judgements

High Court of Australia (1986) *Williams v The Queen* -- (1986) 161 CLR 278, FC 86/049
High Court of Australia (1992) *Mabo and Others v Queensland* (No 2) -- (1992) 175 CLR 1 F.C. 92/014
High Court of Australia (1995) *Minister of State for Immigration and Etnic Affairs v. Ah Hin Teoh* F.C. No 95/013 -- (1995) 183 CLR 273

International Legal Judgements and Opinions

International Court of Justice (1992) Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections) 1992 ICJ Rep 240.
Human Rights Committee (1994) *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 from http://www.austlii.edu.au/ahric/hrcomm/toonen.html
Human Rights Committee (1988) General Comment 16 (Twenty third session 1988) UN Doc HRI\GEN\1\Rev.1 at 21 (1994), United Nations

Human Rights Treaties and Declarations

International Covenant on Civil and Political Rights 1966
Convention on the Rights of the Child 1989
'Beijing Rules' -- United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985
[European] Convention for the Protection of Human Rights and Fundamental Freedoms 1953

Convention on the Rights of the Child

G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989).

Ratification Information

PREAMBLE

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children, '

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules) ; and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict,

Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child,

Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows:

PART I

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 2

1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 5

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 6

1. States Parties recognize that every child has the inherent right to life.

2. States Parties shall ensure to the maximum extent possible the survival and development of the child.

Article 7

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and. as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations

under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests. 4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 10

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 11

1. States Parties shall take measures to combat the illicit transfer and non-return of children abroad.

2. To this end, States Parties shall promote the conclusion of bilateral or multilateral agreements or accession to existing agreements.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart

information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.

2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others; or

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14

1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.

2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 16

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 17

States Parties recognize the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:

(a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;

(b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;

(c) Encourage the production and dissemination of children's books;

(d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous;

(e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of articles 13 and 18.

Article 18

1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin; (c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

Article 22

1. States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

2. For this purpose, States Parties shall provide, as they consider appropriate, co-operation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations co-operating with the United Nations to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason , as set forth in the present Convention.

Article 23

1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child. 3. Recognizing the special needs of a disabled child, assistance extended in accordance with paragraph 2 of the present article shall be provided free of charge, whenever possible, taking into account the financial resources of the parents or others caring for the child, and shall be designed to ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development

4. States Parties shall promote, in the spirit of international cooperation, the exchange of appropriate information in the field of preventive health care and of medical, psychological and functional treatment of disabled children, including dissemination of and access to information concerning methods of rehabilitation, education and vocational services, with the aim of enabling States Parties to improve their capabilities and skills and to widen their experience in these areas. In this regard, particular account shall be taken of the needs of developing countries.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures:

(a) To diminish infant and child mortality;

(b) To ensure the provision of necessary medical assistance and health care to all children with emphasis on the development of primary health care;

(c) To combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution;

(d) To ensure appropriate pre-natal and post-natal health care for mothers;

(e) To ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents;

(f) To develop preventive health care, guidance for parents and family planning education and services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

4. States Parties undertake to promote and encourage international co-operation with a view to achieving progressively the full realization of the right recognized in the present article. In this regard, particular account shall be taken of the needs of developing countries.

Article 25

States Parties recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

Article 26

1. States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law.

2. The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child, as well as any other consideration relevant to an application for benefits made by or on behalf of the child.

Article 27

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.

2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.

3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.

4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:

(a) Make primary education compulsory and available free to all;

(b) Encourage the development of different forms of secondary education, including general and vocational education, make

them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;

(c) Make higher education accessible to all on the basis of capacity by every appropriate means;

(d) Make educational and vocational information and guidance available and accessible to all children;

(e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.

2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.

3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29

1. States Parties agree that the education of the child shall be directed to:

(a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

(c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;

(d) The preparation of the child for responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Article 30

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular: (a) Provide for a minimum age or minimum ages for admission to employment;

(b) Provide for appropriate regulation of the hours and conditions of employment;

(c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 33

States Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

Article 35

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 38

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child.

2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Article 39

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

Article 41

Nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child and which may be contained in:

(a) The law of a State party; or

(b) International law in force for that State.

PART II

Article 42

States Parties undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.

Article 43

1. For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child, which shall carry out the functions hereinafter provided.

2. The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention. The members of the Committee shall be elected by States Parties from among their nationals and shall serve in their personal capacity, consideration being given to equitable geographical distribution, as well as to the principal legal systems.

3. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate one person from among its own nationals.

4. The initial election to the Committee shall be held no later than six months after the date of the entry into force of the present Convention and thereafter every second year. At least four months before the date of each election, the Secretary-General of the United Nations shall address a letter to States Parties inviting them to submit their nominations within two months. The Secretary-General shall subsequently prepare a list in alphabetical order of all persons thus nominated, indicating States Parties which have nominated them, and shall submit it to the States Parties to the present Convention.

5. The elections shall be held at meetings of States Parties convened by the Secretary-General at United Nations Headquarters.

At those meetings, for which two thirds of States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

6. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. The term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these five members shall be chosen by lot by the Chairman of the meeting.

7. If a member of the Committee dies or resigns or declares that for any other cause he or she can no longer perform the duties of the Committee, the State Party which nominated the member shall appoint another expert from among its nationals to serve for the remainder of the term, subject to the approval of the Committee.

8. The Committee shall establish its own rules of procedure.

9. The Committee shall elect its officers for a period of two years.

10. The meetings of the Committee shall normally be held at United Nations Headquarters or at any other convenient place as determined by the Committee. The Committee shall normally meet annually. The duration of the meetings of the Committee shall be determined, and reviewed, if necessary, by a meeting of the States Parties to the present Convention, subject to the approval of the General Assembly.

11. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under the present Convention.

12. With the approval of the General Assembly, the members of the Committee established under the present Convention shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide.

Article 44

1. States Parties undertake to submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights:

(a) Within two years of the entry into force of the Convention for the State Party concerned;

(b) Thereafter every five years.

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned.

3. A State Party which has submitted a comprehensive initial report to the Committee need not, in its subsequent reports submitted in accordance with paragraph 1 (b) of the present article, repeat basic information previously provided.

4. The Committee may request from States Parties further information relevant to the implementation of the Convention.

5. The Committee shall submit to the General Assembly, through the Economic and Social Council, every two years, reports on its activities.

6. States Parties shall make their reports widely available to the public in their own countries.

Article 45

In order to foster the effective implementation of the Convention and to encourage international co-operation in the field covered by the Convention:

(a) The specialized agencies, the United Nations Children's Fund, and other United Nations organs shall be entitled to be

represented at the consideration of the implementation of such provisions of the present Convention as fall within the scope of their mandate. The Committee may invite the specialized agencies, the United Nations Children's Fund and other competent bodies as it may consider appropriate to provide expert advice on the implementation of the Convention in areas falling within the scope of their respective mandates. The Committee may invite the specialized agencies, the United Nations Children's Fund, and other United Nations organs to submit reports on the implementation of the Convention in areas falling within the scope of their activities;

(b) The Committee shall transmit, as it may consider appropriate, to the specialized agencies, the United Nations Children's Fund and other competent bodies, any reports from States Parties that contain a request, or indicate a need, for technical advice or assistance, along with the Committee's observations and suggestions, if any, on these requests or indications;

(c) The Committee may recommend to the General Assembly to request the Secretary-General to undertake on its behalf studies on specific issues relating to the rights of the child;

(d) The Committee may make suggestions and general recommendations based on information received pursuant to articles 44 and 45 of the present Convention. Such suggestions and general recommendations shall be transmitted to any State Party concerned and reported to the General Assembly, together with comments, if any, from States Parties.

PART III

Article 46

The present Convention shall be open for signature by all States.

Article 47

The present Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

Article 48

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article 49

1. The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.

2. For each State ratifying or acceding to the Convention after the deposit of the twentieth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

Article 50

1. Any State Party may propose an amendment and file it with the Secretary-General of the United Nations. The Secretary-General shall thereupon communicate the proposed amendment to States Parties, with a request that they indicate whether they favour a conference of States Parties for the purpose of considering and voting upon the proposals. In the event that, within four months from the date of such communication, at least one third of the States Parties favour such a conference, the Secretary-General shall convene the conference under the auspices of the United Nations. Any amendment adopted by a majority of States Parties present and voting at the conference shall be submitted to the General Assembly for approval.

2. An amendment adopted in accordance with paragraph 1 of the present article shall enter into force when it has been approved by the General Assembly of the United Nations and accepted by a two-thirds majority of States Parties.

3. When an amendment enters into force, it shall be binding on those States Parties which have accepted it, other States Parties

still being bound by the provisions of the present Convention and any earlier amendments which they have accepted.

Article 51

1. The Secretary-General of the United Nations shall receive and circulate to all States the text of reservations made by States at the time of ratification or accession.

2. A reservation incompatible with the object and purpose of the present Convention shall not be permitted.

3. Reservations may be withdrawn at any time by notification to that effect addressed to the Secretary-General of the United Nations, who shall then inform all States. Such notification shall take effect on the date on which it is received by the Secretary-General

Article 52

A State Party may denounce the present Convention by written notification to the Secretary-General of the United Nations. Denunciation becomes effective one year after the date of receipt of the notification by the Secretary-General.

Article 53

The Secretary-General of the United Nations is designated as the depositary of the present Convention.

Article 54

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS THEREOF the undersigned plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.