

Thesis

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**For the Degree of Master by Research in Social
Science**

**The Nature of Police Attitudes to the
Structure of the *Young Offenders Act 1997*
(NSW)**

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Certificate of Authorship

I hereby declare that this submission is my own work and that, to the best of my knowledge and belief, it contains no material previously published or written by another person nor material which to a substantial extent has been accepted for the award or any other degree or diploma at Charles Sturt University or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by colleagues with whom I have worked at Charles Sturt University or elsewhere during my candidature is fully acknowledged.

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Signed: _____

Fiona Leahy

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Abstract

This thesis considers, in an exploratory way, the attitudes of police in the New South Wales Police Force to the *Young Offenders Act 1997* (NSW) and in particular to the structure of that Act. Little research has been undertaken on police attitudes to the *Young Offenders Act* since its introduction into New South Wales law in 1998. The author's research firstly highlights the need to determine what police attitudes to the *Young Offenders Act* are and consequently determines that there are diverging attitudes between police officers towards procedural options for young people in New South Wales. The research, conducted through semi-structured interviews with thirteen New South Wales police officers, indicates that police generally understand the structure of the *Young Offenders Act* and use the Act regularly when dealing with young people. Further training regarding its use is suggested by police as is some modification of the Act. Data from this research also indicates that clarification of legislative requirements may be necessary for police, when children are confined or detained through the use of the *Young Offenders Act*.

1. Introduction

This study will, by way of exploratory research, determine what police attitudes to the structure of the *Young Offenders Act 1997* (NSW) (“the YOA” or “the Act”) are. By ‘structure of the Act’ the author will be referring to the procedural scheme of conferencing, cautions and warnings provided in the provisions of the Act. This study will determine that there are diverging attitudes between police officers towards this procedural scheme for young people in New South Wales. The research, conducted through semi-structured interviews with thirteen general duties New South Wales police officers, will indicate that police generally understand the structure of the YOA and use the Act regularly when dealing with young people. Some of the police officers interviewed do not, however, support the outcomes which result from the procedural options available under the Act. Following a review of the literature on police attitudes to the YOA the author arrived at the following research questions:

“What are the attitudes of New South Wales general duties police to the structure of the *Young Offenders Act 1997* (NSW)? Do these attitudes have any impact on the implementation of the Act by these police officers and what are the influences on these attitudes?”

(i) Aims

The foundation of this research is to analyse the attitudes of general duties police to the *Young Offenders Act 1997* (NSW) and in particular to the schemes for diversion provided by the YOA. The YOA is the pre-eminent procedural Act for dealing with young persons in the New South Wales criminal justice system. As such it is critical to understand its use as the Act places the discretion for its use in the hands of police. Thus, in this project, the author has sought to interview New South Wales police officers to ascertain their views of the Act.

As a result of looking at relevant literature, during this research project, the author has come upon the hypothesis that police may not readily accept and use discretionary legislation. Though this thesis may presuppose a negative attitude to the Act, the author interviewed participants at an open and broad level to seek to determine what their attitude actually is and why they might have that belief.

The author reached certain hypotheses from her reading of the literature relevant to the research question and these are as follows:

1. A police officer's attitude causes them not to use the discretionary procedures under the Act.¹
2. The amount of training in regard to the YOA affects an officer's support of that Act.²
3. Attitudes of police to the YOA and conferencing would improve if police were able to attend conferences.³
4. The community might influence police not to use the Act.⁴
5. Police prefer informal cautions (warnings under the YOA) and formal cautions to conferencing as it allows them to have immediate control of the situation and to undertake pro-active policing.⁵
6. Increased police training, including attendance at conferences, means a better referral rate of offenders to the scheme.⁶

¹ Janet B L Chan 'Implementation of the *Young Offenders Act*' in Janet B.L. Chan (ed), *Reshaping Juvenile Justice* (2005) 25,45,193 and Janet B. L. Chan, Jenny Bargaen, Garth Luke and Garner Clancey, 'Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997' [2004] 28 *Criminal Law Journal* 72, 82.

² Law Reform Commission of New South Wales *Young Offenders- Structuring Police Discretion* Report No 104 (2005) 9 [3.67], Jenny Bargaen, 'Children's Legal Issues: Young Offenders and the New Options in Youth Justice' (1999) 37 (10) *Law Society Journal* (NSW, Australia), 54, 55 and Nancy Hennessy 'Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)' *Report to Youth Justice Advisory Committee* (October 1999) 62.

³ Nicola Silva 'Breaking the Cycle of Juvenile Crime'[August 2001] *Police News* 18, 19, NSW Attorney General's Department *Report on the Review of the Young Offenders Act 1997* (October 2002) and Janet B. L. Chan, Jenny Bargaen, Garth Luke and Garner Clancey, 'Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997' [2004] 28 *Criminal Law Journal* 72, 82.

⁴ Janet B. L. Chan, Jenny Bargaen, Garth Luke and Garner Clancey, 'Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997' [2004] 28 *Criminal Law Journal* 72, 82.

⁵ Joy Wundersitz, *The South Australian Juvenile Justice system: A Review of its Operation* (South Australia Office of Crime Statistics, 1996) 61.

⁶ Law Reform Commission of New South Wales *Young Offenders- Structuring Police Discretion* Report No 104 (2005) 9 [3.67], Jenny Bargaen, 'Children's Legal Issues: Young Offenders and the New Options in Youth Justice' (1999) 37 (10) *Law Society Journal* (NSW, Australia), 54, 55 and Nancy Hennessy 'Review of

7. Without increased training and education regarding young people police do not gain an understanding of the juvenile justice system and the purpose of diversionary legislation.⁷
8. Lack of police consultation before the Act was introduced indicates that police are less likely to use it.⁸

(ii) Significance of this Study

This project came about as a result of informal yet recurring information received from several eminent criminal law barristers in New South Wales, during an earlier research project, concerning the teaching of law to police students. Those barristers were asked about areas in which, in their opinion, there seemed to be disagreement and misunderstanding about legal procedural options for young people by general duties police and the legal profession. One of the areas the barristers raised was some discrepancy in understanding amongst police and the legal profession, about the rights of young people and the responsibilities of police when dealing with those persons.⁹

After having these discussions the author undertook some preliminary research on legislation relating to young people and the police. In the course of the research the author found that

Gatekeeping Role in Young Offenders Act 1997 (NSW)' *Report to Youth Justice Advisory Committee* (October 1999) 62.

⁷ Law Reform Commission of New South Wales *Young Offenders- Structuring Police Discretion* Report No 104 (2005) 9 [3.67] and Ann L Parker, Phillip B. Mohr & Carlene Wilson 'Attitudinal and Personality Predictors of Diversionary Behavior by Police' (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 10.

⁸ Julie People and Lily Trimboli *An Evaluation of the NSW Community Conferencing for Young Adults Pilot Programme* (NSW Bureau of Crime Statistics and Research, Sydney, 2007x, The Honourable Justice James Wood, *Royal Commission into the NSW Police Service: Final Report* (1) (May 1997) 38. <<http://www.pic.nsw.gov.au/OtherReportsAndPublications.aspx>> at 30 June 2009, New South Wales, *Parliamentary Debates*, Legislative Council, 18 June 1997, 10485 (Dr Marlene Goldsmith), Muncie, John, *Policy Transfers and 'What Works': Some Reflections on Comparative Youth Justice* (December 2001) <http://yjj.sagepub.com> >at 1 October 2008, 34 and Janet B L Chan, Jenny Bargen, Garth Luke and Garner Clancey, 'Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997' in Janet B. L. Chan (ed) *Reshaping Juvenile Justice* (Sydney Institute of Criminology, 2005) 107.

⁹ As the referencing format of legislation and case law is very specific and guided in Australia by the *Australian Guide to Legal Citation* (AGLC) (Uni of Melbourne Press) the author has chosen to use this format for referencing.

little investigation had been undertaken on police attitudes to young people or the legislation that is used in New South Wales to deal with young people. Further investigation indicated that there was little research on police attitudes to the policy behind the YOA or its structure.

The YOA sets up a diversionary scheme to keep children who offend and admit their offence, out of the criminal justice system, through a system of warnings cautions and conferencing. When debating the implementation of the Act in 1997, the NSW Parliament acknowledged that current approaches to juvenile crime were not acceptable as they often ignored the social and economic dimensions of crime¹⁰, that is that juvenile offending was often due to broad societal factors rather than the fault of the child.¹¹ As a reaction to the view that bringing juveniles before the Court often did not work¹² the NSW Parliament passed into law the YOA, which placed the emphasis on prevention rather than punishment of minor crimes committed by juveniles.¹³

Upon investigation of the Act the author found that there was little recent research on police attitudes to the structure of the YOA or the policy philosophy behind it. By ‘structure of the Act’ the author refers to the wording of the Act and the guidelines it provides to what police can do under that Act. The reason the author sought to pursue this topic was because an alleged failure to understand the rights of young people and the legislative structure in place to deal with them has significant implications for those young people. An alleged failure to properly implement the Act by those with the power to do so also raises the issue of the entitlement of young people to be dealt with in accordance with laws enacted to protect them. This is particularly the case in regard to the YOA, which creates a discretionary diversionary scheme for young offenders and which was clearly implemented to steer children away from the criminal justice system.¹⁴

The author chooses to look at police attitudes to the structure of the YOA as its discretionary

¹⁰ New South Wales, Parliamentary Debates, Legislative Council, 18 June 1997, 10492 (I. Cohen).

¹¹ New South Wales, Parliamentary Debates, Legislative Council, 18 June 1997, 10490-10499 (I. Cohen).

¹² New South Wales, Parliamentary Debates, Legislative Council, 21 May 1997, 8958-8962 (J.W. Shaw).

¹³ New South Wales, Parliamentary Debates, Legislative Council, 21 May 1997, 8958-8962 (J.W. Shaw).

¹⁴ New South Wales, Parliamentary Debates, Legislative Council, 21 May 1997, 8958-8962 (J.W. Shaw).

use by police has a direct impact on keeping children out of the criminal justice system:

“...police determine which young people will enter the juvenile justice system, as well as the terms on which they will enter”¹⁵.

It is crucial to understand police attitudes to the structure of the YOA in the modern context of policing and law making, as the YOA is ultimately a diversionary scheme. As police are often the first authority group to deal with young offenders and the determiners of whether the Act will be used, their views must be taken into account in assessing the viability of this legislative scheme.

(iii) Influences on Outcomes of the Study

Certain influences inform this study and potentially have impact on its outcomes. These influences are acknowledged at the outset, as they define and potentially affect the parameters of the study.

The author notes that there may be some perceived bias in her focus on the YOA in that she made an inherent presumption regarding it being a worthwhile piece of legislation that police must embrace wholeheartedly.¹⁶ The author has been involved in some preliminary teaching of the Act to police students in New South Wales for several years. That teaching is premised on the assumption that the Act is a useful tool for police in New South Wales. The author takes this position on the basis that the YOA is law in New South Wales, which, as such, must be followed by those that enforce the law generally in this state. At first instance, the author therefore takes the view that our elected Parliament introduced the Act and that its spirit and guidelines should thus be followed.¹⁷ The author is also influenced by preliminary research that indicates that the YOA has been successful in diverting young offenders from

¹⁵ Chris Cunneen and Rob White *Juvenile Justice – Youth and Crime in Australia* (Oxford University Press, 2nd ed, 2007) 153.

¹⁶ Katy Charmaz said in her chapter ‘Grounded Theory in the 21st Century: Applications for Advancing Social Justice Studies’ in Norman K. Denzin and Yvonna S. Lincoln (eds) *Sage Book of Qualitative Research Third Edition* (Sage Publications, 2005) 507, 510 that “No analysis is neutral-despite research analyst’s claims of neutrality. We do not come to our studies uninitiated. What we know shapes but does not necessarily determine what we ‘find’.”

¹⁷ Janet B L Chan, Jenny Barga, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ [2004] 28 *Criminal Law Journal* 72, 90.

the criminal justice system.¹⁸

Some misunderstanding of the YOA by general duties police appears to be apparent following the research and this finding may cause the outcomes to be less than definitive. This is discussed in detail in Chapter 7. At the same time this outcome indicates several paths for further exploration.

(iv) Exploration of the Topic

The author will commence discussion in this thesis in Chapter 2 by providing a summary of how parliamentary processes brought about the introduction of the Act in 1997. In Chapter 2 the author will also provide some detail of the legislative provisions in the Act and how it is structured.

In Chapter 3 the author will provide a review of the literature in regard to police attitudes to young people and the YOA, as well as police discretion regarding young people.

In Chapter 4 the author will detail the methodology used in this study and the basis upon which the data was analysed.

The data findings will be analysed in Chapter 5 firstly in regard to conditional and unconditional support for the Act and the attitudes of police to the three discretionary options provided in the Act. In this chapter the author will then move on to discuss additional comments raised by the participants in regard to the effect of the structure of the Act on victims and offenders and socio-economic factors influencing offender behaviour. The author will further consider in this chapter some legal issues arising out of use of the structures of the Act, including delay, legal advice given to offenders and modification to the Act.

In Chapter 6 the author will summarise and compare the findings in the literature with the findings provided by the data.

Chapter 7 will consider in further detail some of the issues raised in Chapters 5 and 6, including the effect on victims and offenders of the use of the Act, as well as legal

¹⁸ Law Reform Commission of New South Wales, *Young Offenders*, Report No 104 (2005).

implications in regard to how some police use the Act.

2. Background to *Young Offenders Act 1997 (NSW)*

(i) Introduction

In this chapter the author will consider how the YOA came into being in the New South Wales Parliament and what legislation and conventions from here and overseas convinced Parliament that it ought to be introduced as law in New South Wales. The author will then analyse and discuss the structure of the Act, by way of its provisions and provide a summary of how each of the procedural options of conferencing, cautioning and warnings function within the Act.

(ii) The Foundations of the *Young Offenders Act*

The decisions of Australia governments about children in the legal system are framed by our ratification of the United Nations' *Convention on the Rights of the Child* as well as by our acceptance of the *Standard Minimum rules for the Administration of Juvenile Justice 1985 (Beijing Rules)*.¹⁹ Whilst these conventions are not strictly binding upon a Parliament when it decides whether to pass new legislation, they provide a background of human rights, stemming from the United Nations conventions, by which Parliament should abide. Such principles have been introduced into our common law²⁰ through the courts' assertions that children should be treated differently to adults in the criminal justice system and that there should be a primary focus on the rehabilitation of young offenders.²¹

These principles, already enunciated in conventions and case law, have slowly been replicated in legislation. Since the late 1980s various common law jurisdictions have

¹⁹ For a summary of these conventions see Chris Cunneen and Rob White *Juvenile Justice – Youth and Crime in Australia* (Oxford University Press, 2nd ed, 2007) 91.

²⁰ Common Law is the term used to broadly describe law that derives from judges' decisions in court cases. This forms part of our law, alongside the statutes passed by Parliament.

²¹ *Yorkshire v R (WACCA)* (20 June 1988) (unreported) as noted in Chris Cunneen and Rob White *Juvenile Justice – Youth and Crime in Australia* (Oxford University Press, 2nd ed, 2007) 264.

introduced legislation, which is intended to remove children (and especially teenagers) from court systems that have not previously prioritised their welfare.²² This legislation was introduced to remove children from the criminal justice system, in the hope that it would reduce recidivism and deter children from the commission of more serious offences.²³ New Zealand was seen to be at the forefront of this programme of restorative justice when it introduced the *Children, Young Persons and Their Families Act 1989* (NZ). This was followed at an administrative level in New South Wales when enhanced police cautioning was introduced at Wagga Wagga²⁴ by local members of the New South Wales Police Force. This scheme spread to further police commands around New South Wales. As the scheme was not based on any legislation, but on a concept of what cautioning should be, it was implemented at various police stations in different ways, as there were no guidelines as to how the scheme should run at a local level. Without this legislative basis, a lack of consistency and accountability was later identified as having occurred.²⁵

Following the introduction of an informal scheme of administratively based cautioning in the mid-1980s,²⁶ the New South Wales Parliament began to look more closely at the New Zealand model.²⁷ The New Zealand concept of restorative justice outcomes for perpetrators of crime and their victims was formally raised in the New South Wales Parliament by the Parliamentary Standing Committee on Social Issues Report of May 1992, when it noted in its findings that institutionalisation should be the last resort for juvenile offenders.²⁸ This was

²² Janet B L Chan, Jenny Bargaen, Garth Luke and Garner Clancey, 'Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997' [2004] 28 *Criminal Law Journal* 72, 76.

²³ Australian Institute of Criminology, 'Trends in Juvenile Detention in Australia' (May 2011) 416 *Trends and Issues in Crime and Criminal Justice* 1, 1.

²⁴ Informal cautioning has been part of police practice for many years but was made more systematic on this occasion.

²⁵ New South Wales, Parliamentary Debates, Legislative Council, 21 May 1997, 8958-8962 (J.W. Shaw).

²⁶ Janet B L Chan, Jenny Bargaen, Garth Luke and Garner Clancey, 'Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997' [2004] 28 *Criminal Law Journal* 72, 76.

²⁷ This included visits by parliamentarians to New Zealand to review their model of restorative justice under the *Children, Young Persons and Their Families Act 1989* (NZ). New South Wales, Parliamentary Debates, Legislative Council, 18 June 1997, 10457-10461 (J.P Hannaford).

²⁸ New South Wales Parliament Standing Committee on Social Issues, *Juvenile Justice in New South Wales* (May 1992), 10.

based on findings by the Committee, in the course of their research, that juvenile detention centres were becoming places where “young people would learn more about crime”.²⁹ The Committee also found that diversion should be the first response to minor offending and that the victim should be considered in any outcome.³⁰

In September 1996 the Attorney General’s Department issued a discussion paper entitled “Report of the NSW Working Party in Family Group Conferencing and the Juvenile Justice System”.³¹ This report provided the foundations of the restorative justice system which was introduced to the New South Wales Parliament through the *Young Offenders Bill 1997*.

The YOA was introduced into law in New South Wales as a specific means of diverting children from the ages of 10 to 18 from the New South Wales criminal justice system. The Act was assented to by the New South Wales Parliament in 1997 and commenced operation the following year.³² The idea of diversion arose from the view of New South Wales legislators that children who break the law should be treated differently from adults, due to their immaturity and the often existing welfare issues that may account for their criminal activities.³³ The Act allowed for police to choose the options of warnings, cautions and youth justice conferencing for certain offences, so that children did not have to be processed through the courts.³⁴ The legislation was introduced as involvement in the criminal justice

²⁹ New South Wales, Parliamentary Debates, Legislative Council, 18 June 1997, 10503-10506 (J.W. Shaw).

³⁰ New South Wales Parliament Standing Committee on Social Issues, *Juvenile Justice in New South Wales* (May 1992), 10.

³¹ Attorney General’s Department of New South Wales, *Report of the NSW Working Party in Family Group Conferencing and the Juvenile Justice System*, Discussion Paper (September 2006).

³² New South Wales Government, *NSW Legislation Historical Notes*, (30 November 2010) NSW Legislation <<http://www.legislation.nsw.gov.au>> Ann L. Parker and Rick Sarre, ‘Policing Young Offenders: what role Discretion?’ (2008) 10,4 *International Journal of Police Science and Management* 474, 475.

³³ Malcolm Hill, Andrew Lockyer & Fred Stone ‘Introduction: The Principles and Practice of Compulsory intervention when Children are ‘At Risk’ or Engage in Criminal Behaviour’ in Malcolm Hill, Andrew Lockyer & Fred Stone (eds) *Youth Justice and Child Protection* (J. Kingsley, 2007) 10.

³⁴ The researcher uses the term ‘processed’ deliberately as the criminal justice system is a rather narrow road that produces outcomes, but outcomes which do not necessarily take into account the circumstances that cause a child to offend. See Nancy Hennessy ‘Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)’ *Report to Youth Justice Advisory Committee* (Youth Justice Advisory Committee, October 1999) 12 for a summary of the options under the YOA.

system was seen to perpetuate offending, rather than reduce it.³⁵

The Second Reading speeches and Parliamentary debate of the New South Wales Legislative Council of 21 May 1997 and 18 June 1997 showed that during debate on the *Young Offenders Bill 1997*, the focus of politicians was strongly on the introduction of youth justice conferences in the new Act.³⁶ It was hoped that conferencing would give victims the opportunity to express their feelings in relation to the offence. It might also address any dissatisfaction with the traditional Court process, which was seen to provide little redress for the harm done to victims.³⁷ Conferencing would also assist in the identification of support mechanisms to assist young people to overcome their offending behaviour.³⁸

(iii) The Structure of the *Young Offenders Act*

Following the introduction of the YOA New South Wales police were required to implement a number of changes to their policing systems, to take account of the new legislative requirements. The Act introduced the roles of specialist youth officer (“SYO”) and youth liaison officer (“YLO”)³⁹ into New South Wales policing. In order to be appointed in these roles, general duties officers undertake a course of training within the police system in relation to youth issues and the YOA.

The role of the SYO, as described in the New South Wales Police Specialist Youth Officer Course- Participant Manual, is to ensure that all requirements of the legislation, regulations and police policies and procedures have been complied with in making a determination of the most appropriate action to take with a young person. Additionally the Manual states that it is

³⁵ Quentin Beresford, *Police Practices and Juvenile Crime: The Case of Western Australia*. [April/May 1993] *Criminology Australia* 8, 8.

³⁶ New South Wales, Parliamentary Debates, Legislative Council, 21 May 1997, 8958-8960 (J.W. Shaw). New South Wales, Parliamentary Debates, Legislative Council, 18 June 1997, 10457-10462 (J.P. Hannaford).

³⁷ New South Wales, Parliamentary Debates, Legislative Council, 21 May 1997, 8958-8960 (J.W. Shaw).

³⁸ New South Wales, Parliamentary Debates, Legislative Council, 18 June 1997, 8958, 8961 (J.W. Shaw).

³⁹ Both ‘specialist youth officer’ and ‘youth liaison officer’ are defined (somewhat unhelpfully) in s 4 *Young Offenders Act 1997* (NSW) to be persons appointed by the Commissioner of Police in those roles.

the responsibility of the SYO is to ensure this is done ethically and equitably.⁴⁰ Once officers have undertaken their training to be appointed as SYOs they provide advice and support to other police who are dealing with young people under the Act. YLOs are SYOs with additional responsibilities that include the giving of cautions, implementing and co-ordinating crimes reductions programmes for youths, providing advice regarding youth justice conferences or court proceedings and representing the New South Wales Police Force at a local level in relation to youth justice issues.⁴¹ YLOs have not been given these specific powers by the Act but through the designation of tasks co-ordinated by the NSW Police Force. In certain Local Area Commands, particularly in rural areas, SYOs can provide backup and assistance for YLOs.⁴²

Matters involving cautions or conferencing are referred to a YLO by the police officer who first investigates the matter.⁴³ It is usual for a YLO to carry out formal cautions and to refer matters to a juvenile justice co-ordinator for a conference, if the YLO believes the matter is appropriate for conferencing.⁴⁴ YLOs also liaise between young people and police by attending schools to discuss issues relating to children, such as stranger danger, road safety and illegal drug taking. This role is also performed by SYOs on many occasions.

As noted above, the YOA provides three options of diversion from the Court process, being warnings, cautions and youth justice conferences. Each diversionary option has certain legislative requirements that must be met before its use. Their use is also dependant on the discretion of the investigating official and /or the YLO. Below is a summary of how each option is used, in a practical sense, as well as details of their respective legislative requirements.

⁴⁰ New South Wales Police, *Specialist Youth Officer Course- Participant Manual* (March 2010) 64.

⁴¹ New South Wales Police, *Specialist Youth Officer Course- Participant Manual* (March 2010) 64.

⁴² New South Wales Police, *Specialist Youth Officer Course- Participant Manual* (March 2010) 64.

⁴³ The police officer who first attends and investigates the matter is known under *Young Offenders Act* s 3 as the ‘investigating official’.

⁴⁴ *Young Offenders Act 1997 (NSW)* s 36 provides guidelines the specialist youth officer must consider when determining if a conference is appropriate.

Warnings: A warning is usually given by the officer who attends the matter⁴⁵ and may only be given for summary offences, that is offences that have a maximum penalty of incarceration of two years.⁴⁶ Warnings cannot be given for offences that involve violence or in circumstances where the investigating official believes it is in the interests of justice to deal with the matter in another way.⁴⁷ There is no maximum limit to the number of warnings that can be given by a police officer to a child.

Warnings are given when a police officer talks to the child at the place they have found them (usually somewhere in a public place) and tells them what they have done wrong. It involves a conversation between the officer and child, in which the officer tells the child that their behaviour is inappropriate and advises why that is so. Following that discussion and the taking of the child's details the child is usually allowed to leave or is taken home or to another safe place.⁴⁸ No conditions can be placed on a warning and it cannot involve any form of punishment⁴⁹. Police may notify the child's parents of the warning if they think it appropriate according to the circumstances of the matter.⁵⁰ A record of the warning must be kept on the police computer system (known as 'COPS') but is to be expunged when the child turns twenty-one years of age.⁵¹

Caution: In order for a child to be given a caution certain criteria must be met under s 19 of the Act. In particular the child must admit the offence and consent to the giving of the caution. If the child does not wish to admit the offence the option of a caution is not available. Cautions are usually given by YLOs⁵² at the local police station and on an

⁴⁵ Known under *Young Offenders Act 1997 (NSW)* s 4 as the 'investigating official'.

⁴⁶ *Young Offenders Act 1997 (NSW)* s 13.

⁴⁷ *Young Offenders Act 1997 (NSW)* s 14.

⁴⁸ The author notes that the Act does not provide any guidelines for what the officer is to do with the child or where they are to take them (in a practical sense) once the warning has been given. The problems arising from this lack of guidance in legislation are discussed further below.

⁴⁹ *Young Offenders Act 1997 (NSW)* s 15.

⁵⁰ *Young Offenders Act 1997 (NSW)* s 16A.

⁵¹ *Young Offenders Act 1997 (NSW)* s 17.

⁵² *Young Offenders Act 1997 (NSW)* s 27 provides that a caution may be given by a SYO, a person authorised by the Commissioner of Police or a respected member of the community at the request of the above authorised

appointed day. Written notice must be given of the caution⁵³ and it must take place within a designated time frame.⁵⁴

The caution refers to an officer speaking to the child about why their behaviour was wrong and the impact that behaviour has on others, particularly the victim of the crime. Should the victim wish to do so they may provide a statement describing the impact of the crime upon them.⁵⁵ This statement can be handed to the offender at the time of the caution. No more than three cautions may be given to a particular offender⁵⁶ and the cautions must be recorded by police on COPS.⁵⁷

Conferencing: As with cautions, in order for a conference to take place a child must admit the offence and consent to a conference taking place.⁵⁸ Conferences are convened by persons appointed by the Department of Juvenile Justice. If a SYO (usually a YLO) from the local police station believes that a conference is appropriate, they will refer the matter to a juvenile justice officer from the Department of Juvenile Justice, who will make arrangements for the conference. The victim may attend the conference if they wish, with or without support persons.⁵⁹ The offender must attend the conference and may do so with support persons.⁶⁰ Police officers are not required to attend the conference, but may do so if they wish. They do not have any involvement in running the conference. As with cautions, a written record must be kept of conferences.⁶¹ There is no restriction on the number of conferences that may be held for a particular offender.

police officer or SYO.

⁵³ *Young Offenders Act 1997 (NSW)* s 24.

⁵⁴ *Young Offenders Act 1997 (NSW)* s 26 notes that a caution should be given between ten and twenty-one days of the offence occurring.

⁵⁵ *Young Offenders Act 1997 (NSW)* s 24A.

⁵⁶ *Young Offenders Act 1997 (NSW)* s 20.

⁵⁷ *Young Offenders Act 1997 (NSW)* s 33.

⁵⁸ *Young Offenders Act 1997 (NSW)* s 36.

⁵⁹ *Young Offenders Act 1997 (NSW)* s 47.

⁶⁰ *Young Offenders Act 1997 (NSW)* s 47.

⁶¹ *Young Offenders Act 1997 (NSW)* s 59.

The discretion given to police under the YOA is placed within some parameters provided by the structure of the Act. Section 8 of the YOA notes that a child cannot be dealt with under the Act in relation to traffic offences, offences resulting in death or serious injury, offences involving apprehended violence orders or domestic violence as well as those involving supply or trafficking of drugs. It is only when the offence fits the class of offence designated by the legislation that the Act can be used. The YOA commenced with a limited number of offences to which it could apply. This range of offences has been expanded over time.

Police have a significant discretion, as provided by the wording of the YOA, as to whether or not they should use its diversionary schemes for a particular offender. The wording of s 9(2) of the *Young Offenders Act (1997)* outlines the role for police as follows:

An investigating official dealing with a child who has committed, or is alleged to have committed, an offence must, before issuing a summons or attendance notice or otherwise commencing criminal proceedings against the child, determine:

whether the offence is one covered by this Act, and

in the case of such an offence, whether the child should be dealt with under Part 3 (warnings) or 4 (cautions) or the matter should be referred to a specialist youth officer under Part 5 to determine whether a youth justice conference should be held.⁶²

(Underlining is the author's own.)

The *Young Offenders Act 1997* (NSW) s 9(2) therefore sets out the main guidelines for police discretion when dealing with a young offender. They are that police *must* consider whether a child should be dealt with under the Act. Whilst the wording does not say that officers *must* use the Act it provides that certain matters *must* be considered before police decide whether or not to use the Act.⁶³ After having, in each instance, considered that it is appropriate to use

⁶² 'Investigating Official' is defined in *Young Offenders Act 1997* (NSW) s 4 to include police officers.

⁶³ *Young Offenders Act 1997* (NSW) ss 7, 7A and 8.

the Act the officer should then decide which of the three options is the most appropriate.⁶⁴

During the course of this research it has become apparent to the author that there may be some misunderstanding of the breadth of police discretion given in the structure of the YOA. This is discussed below.

(iv) Conclusion

The YOA was introduced into New South Wales in order to divert young people from the criminal justice system. Its structure provides three procedural options for police to use when dealing with young offenders. The choice of the use of each or any of these three options is provided to police at their discretion. The Act was implemented through the appointment of YLOs and SYOs and training of general duties police officers.

⁶⁴ *Young Offenders Act 1997* (NSW) ss 14, 20 and 37.

3. Current Knowledge of Police Attitudes to Young People and the Legislative Schemes that Involve Them

(i) Introduction

In this chapter the author will review the literature on police attitudes to young people and the YOA as well as police discretion as it relates to young people. A review of the literature on policing and young people indicated that police discretion plays a role in how police decide to deal with young people. This chapter will consider the impact of a police officer's attitude to young people and the possible influence of police culture on their use of discretionary legislation. It will also consider whether police attitudes to legislation could be changed by consultation prior to legislation being introduced. These factors are relevant to a study of police attitudes to the structure of the YOA as they may influence those attitudes in a broad sense and impact upon use of the Act.

(ii) How Police Discretion is used with Young People

At a basic level, police discretion exists when officers have choice as to how to respond to a particular situation.⁶⁵ It involves an officer having the power to decide which rules apply and whether or not to apply these rules.⁶⁶ Police discretion is said to be generally influenced by the police officer's attitude to young people and diversionary schemes generally.⁶⁷ The discretion is also influenced by the nature of the offence and the background of the offender. How and when police discretion is used can also be affected by the attitude and demeanour of young people and how they react to police.⁶⁸ As police discretion is the starting point of the

⁶⁵ Roger G. Dunham and Geoffrey P. Alpert *Critical Issues in Policing – Contemporary Readings* (Waveland Press Inc., 4th ed, 2001) 118.

⁶⁶ R. Ericson, *Reproducing Order: A Study of Police Patrol Work* (University of Toronto Press, 1982) in Roger G. Dunham and Geoffrey P. Alpert *Critical Issues in Policing – Contemporary Readings* (Waveland Press Inc., 4th ed, 2001) 119.

⁶⁷ Quentin Beresford, 'Police Practices and Juvenile Crime: The Case of Western Australia'. [April/May 1993] *Criminology Australia* 8, 13.

⁶⁸ Chris Cunneen and Rob White *Juvenile Justice – Youth and Crime in Australia* (Oxford University Press, 2nd ed 2007) 225. Ann L. Parker and Rick Sarre, 'Policing Young Offenders: what role Discretion?' (2008) 10, 4

Act, the success of the schemes provided in the YOA depend almost entirely on the attitude of police to their implementation:

“...a lot depends upon how police discretion is regulated at the gate-keeping level, and how ‘diversion’ itself as a concept is interpreted by police agencies.”⁶⁹

Senior officers, in terms of rank and age, appear more likely to deal more harshly with young offenders,⁷⁰ indicating that environmental and situational influences can have an impact on police use of discretion with young people.⁷¹ The efficacy of the scheme under the YOA can also be influenced by the prevailing political views on reactions to criminal behaviour, as well as the standing opinion of the higher commands in the various local police districts.⁷² As noted above, opinions of higher commands and policy shifts have also influenced police use of their discretion in relation to cases of mental illness and domestic violence.⁷³

Despite such influences, research carried out approximately seven years after the YOA’s introduction showed that police use of the YOA has increased over time, due to their discretionary decisions to implement its diversionary schemes.⁷⁴ The question then arises as to what influences the officer to make that discretionary choice to use the Act and whether

International Journal of Police Science and Management 474, 482.

⁶⁹ Chris Cunneen and Rob White *Juvenile Justice – Youth and Crime in Australia* (Oxford University Press, 2nd ed, 2007) 344.

⁷⁰ Ann L Parker and Rick Sarre, ‘Policing Young Offenders: what role Discretion?’ (2008) 10, 4 *International Journal of Police Science and Management* 474, 481.

⁷¹ Michael D. White, *Current Issues and Controversies in Policing* (Pearson, 2007) 175.

⁷² These are known in New South Wales as Local Area Commands (LAC) and have at their head a superintendent who is known as the Local Area Commander. It appears that whatever the attitudes of these commanders to various policing roles, it may permeate the decision making processes of police at that Command. Brendan Delahunty ‘Taking ‘Kiddie Cops’ and ‘Care Bears’ Seriously’ (1998) 23(1) *Alternative Law Journal* 13, 17.

⁷³ Ronald J. Berger, Marvin D. Free Jr and Patricia Searles *Crime, Justice and Society – An Introduction to Criminology* (Lynne Rienner Publishers, 3rd ed, 2009) 411 and Michael Rowe ‘Rendering Visible the Invisible: Police Discretion, Professionalism and Decision-Making’ (3 September 2007) 17 *Policing and Society* 279, 293.

⁷⁴ Law Reform Commission of New South Wales *Young Offenders- Structuring Police Discretion* Report No 104 (2005) 10 [3.72].

their attitude to the YOA influences that discretion.⁷⁵

(iii) How a Police Officer’s Attitude Might Affect Discretion

Much of the analysis of the YOA and review of its implementation took place in the early years following its introduction. It appears that no significant research has been undertaken on the YOA in the past seven years. It is therefore timely and necessary to consider police attitudes to the structure of the YOA, as well as any perceived influences upon that attitude. It is also important to note that most of the research on the structure of the YOA (or indeed the YOA generally) had been focussed on the conferencing option. There has been little analysis of police attitudes to the warnings and cautions available under the YOA. These are the first options for diversion under the YOA.⁷⁶ Conferencing is the third and most ‘severe’ option.⁷⁷

The research which has been carried out on the YOA generally, from the police perspective, has focused on whether or not police use the Act. Very little research has been carried out on their attitudes towards it⁷⁸, though these two issues must be inter-related.

The fundamental point of this thesis is that unless we are informed about the attitude of police to the structures inherent in the YOA, we may be stymied in our knowledge of how and why the Act is being used. We cannot comment on the efficacy of its use unless these fundamental points are first answered.

⁷⁵ Joel. W. Godfredson, James R.P. Ogloff, Stuart D.M. Thomas and Stefan Luebbbers, ‘Police Discretion and Encounters with People Experiencing Mental Illness: the Significant Factors’ (12 December 2010) 37 *Criminal Justice and Behavior* 1392, 1394.

⁷⁶ *Young Offenders Act 1997 (NSW)* s 14 and following for warnings. *Young Offenders Act 1997 (NSW)* s 20 and following for cautions.

⁷⁷ *Young Offenders Act 1997 (NSW)* s 36 and following for conferencing. Anna Louise Stewart and Frances Smith said that: “Despite the pivotal gatekeeping role of police officers, there was only limited empirical research examining the police officers’ understandings of and attitudes towards conferencing” in Anna Louise Stewart and Frances Smith ‘Youth Justice Conferencing and Police referrals: The Gatekeeping Role of Police in Queensland, Australia’ (2004) 32 *Journal of Criminal Justice* 345, 347.

⁷⁸ For example Youth Justice Coalition *Young People’s Experience of the Young Offenders Act* (Law and Justice Foundation of New South Wales, 2002) 36 where the research involved questionnaires sent to youth liaison officers regarding their compliance with the procedures in the Act.

As research shows that early use of the Act was less than optimal,⁷⁹ there are questions that arise regarding why police might or might not use the Act. For example, the research indicated in 2005 that senior police dealt with offenders more severely than younger officers.⁸⁰ Why might this have been the case? Do some police still have this attitude today? As use of the YOA is discretionary, any influence on police attitudes to the structure of the Act must in one way or another affect that use.⁸¹

Discretion, as it relates to policing, can be seen as ‘the decision by police not to invoke legal sanctions when the circumstances are favourable for them’⁸² or when the officer is free to make a choice among courses of action or inaction.⁸³ The use of discretion by police has been seen as legitimate and often desirable,⁸⁴ but able to be influenced by the officer’s attitudes and beliefs.⁸⁵

Police discretion can be influenced by many factors including the education, age and experience of the officer and their family background; the race, age, gender demeanour and attitude of the alleged offender and the bureaucratic environment in which the officer

⁷⁹ Janet B L Chan, Jenny Bargen, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ [2004] 28 *Criminal Law Journal* 72, 74.

⁸⁰ Ann L Parker and Rick Sarre, ‘Policing Young Offenders: what role Discretion?’ (2008) 10, 4 *International Journal of Police Science and Management* 474, 481.

⁸¹ As noted by Adam Crawford and Tim Newburn certain criminal justice organisations may not have a restorative justice philosophy, may have different organisation priorities or cultural approaches or may simply not appreciate the criteria upon which a restorative justice scheme works in Adam Crawford and Tim Newburn, *Youth Offending and Restorative Justice: Implementing Reform in Youth Justice* (William Publishing, 2003) 40.

⁸² J. Goldstein, ‘Police Discretion not to Invoke the Criminal Justice Process: Low Visibility Decisions in the Administration of Justice’ in G.F. Cole and M.G. Gertz (eds), *The Criminal Justice System: Politics and Policies* (Wadsworth Publishing Co., 7th ed, 1998) 85.

⁸³ K.C. Davis, *Discretionary Justice* (Louisiana State University Press, 1969) 4.

⁸⁴ Michael Rowe ‘Rendering Visible the Invisible: Police Discretion, Professionalism and Decision-Making’ (3 September 2007) 17 *Policing and Society* 279, 280, Simon Bronitt and Phillip Stenning, ‘Understanding Discretion in Modern Policing’ (2011) 35 *Criminal Law Journal* 319, 329 and Bryan Vila, ‘The Effects of Officer Fatigue on Accountability and the Exercise of Police Discretion’ in Candace McCoy (ed), *Holding Police Accountable* (2010) 161, 163.

⁸⁵ Joel W. Godfredson, James R.P. Ogloff, Stuart D.M. Thomas and Stefan Luebbers, ‘Police Discretion and Encounters with People Experiencing Mental Illness: the Significant Factors’ (12 December 2010) 37 *Criminal Justice and Behavior* 1392, 1393.

works.⁸⁶ These influences can be more broadly described as being environmental, organisational and situational⁸⁷ and can affect an officer's choice of enforcement action in a wide range of areas, such as traffic offences, domestic violence matters, mental health matters and police powers affecting arrest, search and so forth.⁸⁸ The effects on police discretion by the above factors can be difficult for researchers to determine, due to the overlap between variables; for example the difference in weight upon discretionary decision making in circumstances where an officer has family experience of an event as compared to a policy push not to arrest for that particular offence. The data produced in such circumstances can be difficult to evaluate.⁸⁹ A police officer's attitude is considered by some to be one of the factors that can influence police officer discretion. When writing on police using their discretion in dealing with people with mental illness, Joel Godfredson et al noted that there had been little systematic research on the relationship between police discretion and police attitudes. They further noted that:

“An increased understanding of police officers' attitudes is important, because research suggests that attitudes can affect our behavior and, in particular, behaviors that are easy to enact and are low in social desirability”.⁹⁰

In the research carried out by Godfredson et al it was determined that the officers' attitudes to mental illness might lead them to use restrictive outcomes or to walk away from the situation, neither of which could be considered desirable outcomes for mental health sufferers.⁹¹

⁸⁶ Roy Roberg, Kenneth Novak and Gary Cordner, *Police and Society* (Oxford University Press, 4th ed, 2009, 245.

⁸⁷ Michael D. White, *Current Issues and Controversies in Policing* (Pearson, 2007) 175.

⁸⁸ Simon Bronitt and Phillip Stenning, 'Understanding Discretion in Modern Policing' (2011) 35 *Criminal Law Journal* 319, 321.

⁸⁹ Michael D. White, *Current Issues and Controversies in Policing* (Pearson, 2007) 177.

⁹⁰ Joel. W. Godfredson, James R.P. Ogloff, Stuart D.M. Thomas and Stefan Luebbers, 'Police Discretion and Encounters with People Experiencing Mental Illness: the Significant Factors' (12 December 2010) 37 *Criminal Justice and Behavior* 1392, 1394.

⁹¹ Joel. W. Godfredson, James R.P. Ogloff, Stuart D.M. Thomas and Stefan Luebbers, 'Police Discretion and Encounters with People Experiencing Mental Illness: the Significant Factors' (12 December 2010) 37 *Criminal Justice and Behavior* 1392, 1401.

It was also noted in a study by Mastrofski et al that officers with a positive attitude to community policing tended to use their discretion to make fewer arrests than those officer who had less favourable attitudes towards it.⁹² Further research indicates that police discretion can be significantly influenced by a police department's organisational style of policing and that such departmental policy choices can override the influence of a police officer's attitude to their discretionary choices. This of course suggests that attitudes influence discretion in the first place, but that the extent of this influence can be manipulated by factors other than the police officer's attitude.⁹³

In a recent study by Michael Rowe regarding a policy push for arrests in domestic violence incidents in England, it was noted that the policy overrode the personal attitudes of the police officers to domestic violence incidents and how that might have influenced them to deal with the incident; that is it took away their discretion and any influence their attitudes might have had upon it. Whilst such policy changes might take away the variability of an officer's attitudes influencing their discretion, it may also have a negative influence on police professionalism and the ability of officers to use their discretion to best fit the circumstances of the incident.⁹⁴

By contrast White considers that the characteristics of a police officer, including their attitudes, appears to have little influence on officer behaviour.⁹⁵ White's comments appear to have been based on research carried out in the 1980's and 1990's and the author submits that more recent research, as discussed above, shows a stronger link between attitudes and discretionary choices.

There remain, however, pieces of legislation that allow a police officer's discretionary choices to determine the outcome for the alleged offender. The YOA is one such legislative

⁹² S. D. Mastrofski, R. E. Worden and J. B. Snipes 'Law Enforcement in a Time of Community Policing', (1995) *Criminology* 33 in Roy Roberg, Kenneth Novak and Gary Cordner, *Police and Society* (Oxford University Press, 4th ed, 2009), 245.

⁹³ Ronald J. Berger, Marvin D. Free Jr and Patricia Searles *Crime, Justice and Society – An Introduction to Criminology* (Lynne Rienner Publishers, 3rd ed, 2009) 411.

⁹⁴ Michael Rowe 'Rendering Visible the Invisible: Police Discretion, Professionalism and Decision-Making' (3 September 2007) 17 *Policing and Society* 279, 293.

⁹⁵ Michael D. White, *Current Issues and Controversies in Policing* (Pearson, 2007) 177.

scheme. As the above research indicates that attitudes can influence an officer's discretionary choices, it is important to understand what those attitudes to the scheme provided by the YOA might be, so as to understand how they might affect outcomes under the Act.

As police discretion plays a role in use of the YOA it is important to note that its influence can be negative as well as positive. Discretion is seen to influence the interpretation of legal rules.⁹⁶ It may be a flexible way to deal with social problems and to avoid strict adherence to the letter of the law, which may be too harsh.⁹⁷ On the other hand it may allow police “to redefine justice in terms of their own priorities”.⁹⁸ Police discretion to use diversionary options can be influenced by police attitudes, which were noted, for example, for producing fewer diversionary outcomes in police dealings with Aboriginal and Torres Strait Islander young people, as compared to other young people.⁹⁹

Police attitudes, generally, have long been discussed and analysed. The Wood Royal Commission final report of May 1997 provided a detailed report on police insularity, cynicism and pessimism.¹⁰⁰ In 1998 Brendan Delahunty briefly looked at the impact of police attitudes and cynicism regarding their work with young people. In his article on NSW Police YLOs and the impact of their opinions on their colleagues, Delahunty suggests that these liaison officers are best equipped to provide the leadership that will assist in a change of attitude to the YOA¹⁰¹. What the article does support is the concern, in the Wood Royal

⁹⁶ Janet B L Chan, Jenny Bargaen, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ [2004] 28 *Criminal Law Journal* 72, 73.

⁹⁷ Richard K. Wortley, ‘Measuring Police Attitudes Towards Discretion’ (2003) 30 *Criminal Justice and Behaviour* 538, 540.

⁹⁸ Richard K. Wortley, ‘Measuring Police Attitudes Towards Discretion’ (2003) 30 *Criminal Justice and Behaviour* 538, 540. See also Janet B L Chan, Jenny Bargaen, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ [2004] 28 *Criminal Law Journal* 72, 73-74.

⁹⁹ Janet B L Chan, Jenny Bargaen, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ [2004] 28 *Criminal Law Journal* 72, 73-74.

¹⁰⁰ The Honourable Justice James Wood, *Royal Commission into the NSW Police Service: Final Report* (1) (May 1997). <<http://www.pic.nsw.gov.au/OtherReportsAndPublications.aspx>> at 30 June 2009.

¹⁰¹ Brendan Delahunty ‘Taking ‘Kiddie Cops’ and ‘Care Bears’ Seriously’ (1998) 23(1) *Alternative Law Journal* 13, 13.

Commission findings, that negative attitudes to young people were well entrenched in the police force before the Act was introduced.¹⁰² This does not demonstrate a negative attitude to the structure of the YOA but may influence the use of the YOA.

When the Act was originally introduced it was suggested that police would make approximately 70% of all conference referrals.¹⁰³ In November 1999 Jenny Bargaen cited the number of referrals from police as being 50% or less.¹⁰⁴ She notes that by early 2000 new training procedures for police would ensure a clearer understanding of the police role under the Act and an increase of referral rates.¹⁰⁵

Further research, in the early years after the Act was introduced, suggests that the legislation was achieving its intended aim, but that there was reluctance on the part of some police to use the procedures in the Act:¹⁰⁶

“The Act also required practitioners to overcome pre-existing prejudices and cultural norms to work together to achieve the Act’s intended goals.”¹⁰⁷

Some barriers to use of the Act reported by Chan et al in 1999 were:

1. Police were making decisions to refer matters to Court without first consulting a

¹⁰² Ibid. Janet B L Chan, Jenny Bargaen, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ [2004] 28 *Criminal Law Journal* 72, 74.

¹⁰³ Under *Young Offenders Act 1997 (NSW)* s 40 referrals to a conference may also be made by the Court and the Department of Public Prosecutions.

¹⁰⁴ Jenny Bargaen, ‘Children’s Legal Issues: Young Offenders and the New Options in Youth Justice’ (1999) 37 (10) *Law Society Journal* (NSW, Australia), 54, 55.

¹⁰⁵ Ibid.

¹⁰⁶ Ann L Parker, Phillip B Mohr & Carlene Wilson ‘Attitudinal and Personality Predictors of Diversionary Behavior by Police’ (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 10. See also the later report by Ann L. Parker and Rick Sarre ‘Policing Young Offenders: what role Discretion?’ (2008) 10,4 *International Journal of Police Science and Management* 474, 481. Brendan Delahunty ‘Taking ‘Kiddie Cops’ and ‘Care Bears’ Seriously’ (1998) 23(1) *Alternative Law Journal* 13, 17 and 18. Nicola Silva ‘Breaking the Cycle of Juvenile Crime’ [August 2001] *Police News* 18, 19. Janet B L Chan ‘Conclusion: Reshaping Juvenile Justice’ in Janet B.L. Chan (ed), *Reshaping Juvenile Justice* (Sydney Institute of Criminology, 2005) 187,194.

¹⁰⁷ Janet B L Chan ‘Implementation of the *Young Offenders Act*’ in Janet B.L. Chan (ed), *Reshaping Juvenile Justice* (2005) 25,45.

specialist youth officer (this has now been rectified in the structure of the Act);¹⁰⁸

2. Police were not using their discretion in accordance with the legislation. (One could query here whether the author meant that police were not using the Act as often as it was felt they should be using it and if so how was this criterion determined);
3. Police had insufficient information about the Act and insufficient training.¹⁰⁹

In 2001 Nicola Silva noted that there was a perception amongst police that conferencing was too easy on offenders.¹¹⁰ This was addressed in her interview with Ike Ellis, then Police Corporate Youth spokesman, who said that attitudes change when police have the opportunity to attend a conference.¹¹¹ It is also noted that police time is saved by conferencing rather than a referral to court and that the time saved by conferencing is seen as positive by police.¹¹² The negative perception of what is seen as non-crime fighting police work, however, remains an issue, at least in some jurisdictions. In 2005, research carried out by Venessa Garcia in the United States pointed out that officers felt their status in the force was reduced by their work in areas such as community policing and juvenile crimes investigation, if they do not have agency support for their work.¹¹³

In October 2002 the New South Wales Attorney General's Department commissioned a report reviewing the YOA.¹¹⁴ In that report, it was suggested that police who have a good understanding of the Act and who attend a youth justice conference have a positive attitude towards the Act. Acceptance of the discretionary schemes in the Act are also influenced by the community in which the police work and whether or not that particular community sees

¹⁰⁸ *Young Offenders Act 1997* (NSW) s 21.

¹⁰⁹ Nancy Hennessy 'Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)' *Report to Youth Justice Advisory Committee* (October 1999) 62.

¹¹⁰ Nicola Silva 'Breaking the Cycle of Juvenile Crime'[August 2001] *Police News* 18, 19.

¹¹¹ *Ibid.*

¹¹² Silva, above n 110.

¹¹³ Venessa Garcia, 'Constructing the 'Other' within Police Culture: An Analysis of a Deviant Unit within the Police Organization' (2005) 6 *Police Practice and Research* 65,77.

¹¹⁴ NSW Attorney General's Department *Report on the Review of the Young Offenders Act 1997* (October 2002).

the diversionary processes as being too lenient.¹¹⁵

(iv) The Influence of Police Culture on the Use of Discretionary Legislation

In light of the research surrounding police use of the YOA, the question arises as to whether the introduction of a piece of legislation can, of itself, change police attitudes. Not necessarily, is the answer given by the Honourable Alan Corbett, member of the Legislative Council of New South Wales, in relation to the introduction of the Young Offenders Bill in parliament. He stated:

“It is a fact that some young people who may be the subject of this bill will already be known to the police officers in their community, who may not be willing to permit these young people to be dealt with by way of cautions and conferences.”¹¹⁶

Mr Corbett goes on to suggest that if police have long-standing issues with a particular child those police might choose not to use the Act.¹¹⁷ Research demonstrates that attitudes of police become more conservative the longer they have contact with the force.¹¹⁸ At its worst, this may mean that police culture cannot be influenced in regard to conservative views on youths and diversionary schemes.¹¹⁹ There is therefore an argument that police culture of itself will stymie use of the Act and that legislation alone will not change this attitude.¹²⁰ Janet Chan notes that changes in the formal rules governing policing alter the way policing is carried out

¹¹⁵ Ann L Parker, Phillip B. Mohr & Carlene Wilson ‘Attitudinal and Personality Predictors of Diversionary Behavior by Police’ (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 19.

¹¹⁶ New South Wales, Parliamentary Debates, Legislative Council, 18 June 1997, 10499-10502 (A.G Corbett).

¹¹⁷ New South Wales, Parliamentary Debates, Legislative Council, 18 June 1997, 10499-10502 (A.G Corbett).

¹¹⁸ Christie Gayre, Simon Petrie and Perri Timmins, ‘The Effect of Police Education, Training and Socialisation on Conservative Attitudes’ [1996] 29 *The Australian and New Zealand Journal of Criminology* 299,312.

¹¹⁹ Ibid.

¹²⁰ Richard K Wortley, ‘Measuring Police Attitudes Towards Discretion’ [2003] *Criminal Justice and Behaviour* 30, 538. It is interesting to note that negative police attitudes cross jurisdictions as this problem has also been found to occur in the United States. Venessa Garcia, ‘Constructing the ‘Other’ within Police Culture: An Analysis of a Deviant Unit within the Police Organization’ (2005) 6 *Police Practice and Research* 65, 66.

but the change may not be substantial or even discernable.¹²¹ She further considers that whilst training in regard to the proper use of police discretion may be laudable, the reality of police work and the ‘commonsense’ of the police occupational culture may cause the positive effect of training to be stymied in the field.¹²²

“It may be that tightening the law is easier to achieve than changing police culture, but the results of both can be unpredictable.”¹²³

In many jurisdictions, including New South Wales, university education is now a required part of the training to be a police officer. This was introduced partly as a result of the recommendations of Justice Wood in May 1997.¹²⁴ There may therefore be a possibility of influence through a deeper level of tertiary education. This additional education might help police to understand the nature of this discretionary scheme and why it should be used. As noted by Parker et al, diversionary schemes require a more considered response than the usual reactive practice of traditional policing.¹²⁵ Perhaps tertiary education provides sufficient scope to canvass discretion and the benefits of the use of a more considered response. Some research suggests that education can assist this process but to what extent is still unclear.¹²⁶

Further education for police officers regarding the nature of diversionary schemes such as the YOA and its aims and achievements, with such training supported by peer groups and

¹²¹ Janet Chan, ‘Changing Police Culture’ [1996] 36 *British Journal of Criminology* 109, 131.

¹²² Janet Chan, ‘Police Accountability in a Multicultural Society’ [May 1995] *Criminology Australia* 2, 3.

¹²³ Janet Chan, ‘Changing Police Culture’ [1996] 36 *British Journal of Criminology* 109, 131.

¹²⁴ The Honourable Justice James Wood, *Royal Commission into the NSW Police Service: Final Report (II)* (May 1997) 541. <<http://www.pic.nsw.gov.au/OtherReportsAndPublications.aspx>> at 30 June 2009. In order to qualify as a police officer in New South Wales students must obtain the minimum standard of an associate degree in policing practice. This has been the position in New South Wales since 1998 through the collaboration of Charles Sturt University and the NSW Police Force.

¹²⁵ Ann L Parker, Phillip B. Mohr & Carlene Wilson ‘Attitudinal and Personality Predictors of Diversionary Behavior by Police’ (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 10.

¹²⁶ Ann L Parker, Phillip B. Mohr & Carlene Wilson ‘Attitudinal and Personality Predictors of Diversionary Behavior by Police’ (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 19.

senior officers might go some way to effecting acceptance of the scheme provided by the Act.¹²⁷ The extent to which training alone could effect change might, however, be questionable. Chan notes that the extent to which training, along with other measures such as community consultation, disciplinary procedures and incentives may impact on police culture and day to day policing depends on the commitment to change of the LAC, the quality of supervision, trust by junior police of management as well as accountability mechanisms.¹²⁸ She suggests that a model of police cultural change would have to acknowledge the relationship between the social, legal and organisational context of policing and that more than one mode of police cultural change would be required to implement that change down to street level policing.¹²⁹

It has been said that the police response to an offence is determined by the offence itself and that discretion and diversionary schemes are not part of police practice.¹³⁰ Further research indicates that policing might attract those who crave the exercise of authority over others or that working as an officer for a period of time engenders this behaviour.¹³¹ This suggested police authoritarianism can be a significant obstacle to the implementation of schemes involving the concept of restorative justice.¹³²

When called upon to implement the diversionary scheme implemented by the YOA, it is possible that the preference for authoritarian outcomes as well as the punishment prescribed for a particular offence might influence police not to use the Act. Police might consider the YOA as an alternative to punishment and not an alternative punishment and as such to be

¹²⁷ Janet Chan, 'Police Accountability in a Multicultural Society' [May 1995] *Criminology Australia* 2, 3.

¹²⁸ *Ibid.*, 5.

¹²⁹ Janet Chan, 'Changing Police Culture' [1996] 36 *British Journal of Criminology* 109, 131.

¹³⁰ Ann L Parker, Phillip B. Mohr & Carlene Wilson 'Attitudinal and Personality Predictors of Diversionary Behavior by Police' (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 10.

¹³¹ Richard K Wortley, 'Measuring Police Attitudes towards Discretion' [2003] 30 *Criminal Justice and Behaviour* 538, 539.

¹³² Richard Young, 'Just Cops Doing "Shameful" Business': Police-led Restorative Justice and the Lessons of Research' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles* (Hart Publishing, 2nd ed, 2003) 195, 221.

inconclusive in changing offender behaviour.¹³³

Traditional police culture, and the authoritarian and questionable practices it can generate, present a significant obstacle to the successful implementation of restorative justice.¹³⁴

Parker et al consider that there are two clear causes for police distrust of diversionary schemes, being empathy for youth and an authoritarian approach to the legal system.¹³⁵ These findings, though, do not prescribe a cause for a negative police attitude to a diversionary Act but suggest more broadly that cultural or social influences may have an influence upon police attitudes. Analysis of this question is outside the focus of this thesis, which concentrates more specifically on the structure of the Act, but the issues raised by Parker et al provide scope for further investigation.

Research has also shown that the longer the prior record of an offender, the less likely it is that a restorative justice programme will work.¹³⁶ It is also interesting to note, as an aside, that police accountability can be enhanced by the conference process as participants can voice their opinions without the restrictions of a Court process.¹³⁷ This might include their opinion on how they believe police handled their particular matter. The issue of accountability and transparency of action might also drive police away from the conferencing option under the YOA.

Police may also prefer the cautioning option, which has been in use as a discretionary tool for

¹³³ Richard Young, 'Just Cops Doing "Shameful" Business': Police-led Restorative Justice and the Lessons of Research' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles* (Hart Publishing, 2nd ed, 2003) 195, 198.

¹³⁴ Ibid, 220.

¹³⁵ Ann L Parker, Phillip B. Mohr & Carlene Wilson 'Attitudinal and Personality Predictors of Diversionary Behavior by Police' (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 19.

¹³⁶ Nancy Rodriguez, 'Restorative Justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism' (2007) 53 *Crime and Delinquency* 355, 373.

¹³⁷ Richard Young, 'Just Cops Doing "Shameful" Business': Police-led Restorative Justice and the Lessons of Research' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles* (Hart Publishing, 2nd ed, 2003) 195, 210.

many years, as it allows them to have more immediate control of the situation. Similarly, the option of referral to Court also allows police to remain in their prosecutorial role, which provides an element of control over the proceedings and particularly in terms of the information that is available to the Court.¹³⁸ This attitude is found in a study in South Australia regarding police use of cautioning under the *Young Offenders Act 1994* (SA), which is similar to the scheme introduced by the YOA. Joy Wundersitz notes in her research that police strongly support informal cautioning, as it allows an immediate and active role for them in resolving youth offending.¹³⁹ Formal cautioning is also seen in a positive light by police as giving a constructive option.¹⁴⁰ Thus there appears to be support for at least part of the structure of that state's legislation. Police have a preference for being proactive in their work¹⁴¹ and it appears that a discretionary diversionary scheme can allow them to feel that proactive policing is taking place. The officers want an obvious outcome to an interaction with a juvenile offender and a diversionary scheme can provide that.

In their study of the police role in implementing the *Juvenile Justice Act 1992* (Qld), Stewart and Smith found that there are significant differences in the attitudes of officers to conferencing. Officers who have been trained in conferencing and have attended at least one conference will refer children to a conference. Officers who have not been trained about conferences nor attended one, have not referred offenders to a conference.¹⁴² Stewart and Smith suggest that attending a conference and increased training in the scheme will bring about an increase in referrals.¹⁴³

¹³⁸ Joy Wundersitz, 'Juvenile Justice in Australia: Towards the New Milenium' in Duncan Chappell and Paul Wilson (eds), *Crime and the Criminal Justice system in Australia: 2000 and Beyond* (Butterworths, 2000) 102, 114.

¹³⁹ Joy Wundersitz, *The South Australian Juvenile Justice system: A Review of its Operation* (South Australia Office of Crime Statistics, 1996) 61.

¹⁴⁰ *Ibid* at 80.

¹⁴¹ Ann L Parker, Phillip B. Mohr & Carlene Wilson 'Attitudinal and Personality Predictors of Diversionary Behavior by Police' (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 10.

¹⁴² Anna Louise Stewart and Frances Smith, 'Youth Justice Conferencing and Police referrals: The Gatekeeping Role of Police in Queensland, Australia'. (2004) 32 *Journal of Criminal Justice* 345, 349.

¹⁴³ *Ibid* at 355.

In 2004 Janet Chan led research, conducted with the University of New South Wales, the Department of Juvenile Justice and the Aboriginal Justice Advisory Council, into the YOA and its implementation.¹⁴⁴ This research found that some police and youth liaison officers say that police abide by the Act. Other practitioners state that some officers remain resistant and see cautioning as a soft option, particularly when influenced by tough community attitudes to crime.¹⁴⁵ Again it appears that once police attend a conference or become more familiar with the Act they are more likely to support it.¹⁴⁶ The conclusion reached by Chan is that:

“the Act has made a difference to the pattern and substance of police decisions at the ‘gatekeeping’ stage. In spite of resistance from some police officers, the status of the *Young Offenders Act* as an Act of Parliament meant that the majority of officers took it seriously.”¹⁴⁷

The Law Reform Commission of New South Wales Review of Police Discretion, in relation to young offenders, received a number of submissions suggesting that education of police and others involved in juvenile justice would be helpful.¹⁴⁸ The submissions were made by, amongst others, The Legal Aid Commission of NSW, The Law Society of New South Wales and The Shopfront Youth Legal Centre. One could infer from these submissions that education is thought to be a key to making the Act work. Ironically, it appears this

¹⁴⁴ Janet B. L. Chan, Jenny Bargaen, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ [2004] 28 *Criminal Law Journal* 72, 72.

¹⁴⁵ Janet B. L. Chan, Jenny Bargaen, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ [2004] 28 *Criminal Law Journal* 72, 82. This contradicts somewhat the research conducted in South Australia (Wundersitz, above 101), which indicated that cautioning was a positive method of policing.

¹⁴⁶ Janet B. L. Chan, Jenny Bargaen, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ [2004] 28 *Criminal Law Journal* 72, 107. Joy Wundersitz, *The South Australian Juvenile Justice system: A Review of its Operation* (South Australia Office of Crime Statistics, 1996) 54.

¹⁴⁷ Janet B L Chan, Jenny Bargaen, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ in Janet B. L. Chan (ed) *Reshaping Juvenile Justice* (Sydney Institute of Criminology, 2005) 193.

¹⁴⁸ Law Reform Commission of New South Wales *Young Offenders- Structuring Police Discretion* Report No 104 (2005) 9 [3.67].

submission was not made by the New South Wales Police Force.

Despite this, Chan noted that the impact of training and education is not entirely effective if philosophical commitment by police to the Act is lacking.¹⁴⁹ In 2007 research was conducted on police attitudes to conferencing of young adults in the Liverpool and Tweed Heads circuits of the Local Court of New South Wales.¹⁵⁰ This conferencing was not undertaken under the scheme provided by the YOA, but was a pilot programme which enabled Magistrates to refer offenders to conferences, when there was a likelihood of a prison sentence otherwise being ordered. The research conducted regarding the pilot scheme showed that, despite an apparent improvement of police attitudes to conferencing over the preceding years, police officers from Liverpool thought that police officers were only required to attend conferences as a safety measure for participants. At the same time, officers were still complaining of a lack of training in conferencing.¹⁵¹ It was suggested by the authors that the police may have considered themselves to have been inadequately consulted during the development phase of the legislation. This may have led to their negative attitude towards it.¹⁵² This was a similar diversionary programme to the YOA scheme and so its results may be illuminating.

This leads to the issue of policy change and legislation being introduced before stakeholders are asked about whether it will work and the reasons for that view:

“Too often it appears to have been assumed within the NSW Police Service that once a policy or plan for reform has been formulated, its successful implementation will follow as a matter of course. The reality is that no reform can be achieved within a police service of any size without a clearly planned strategy that embraces commitment, communication, monitoring, evaluation and

¹⁴⁹ Janet B. L. Chan, Jenny Barga, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ [2004] 28 *Criminal Law Journal* 72, 194.

¹⁵⁰ Julie People and Lily Trimboli *An Evaluation of the NSW Community Conferencing for Young Adults Pilot Programme* (NSW Bureau of Crime Statistics and Research, Sydney, 2007). The programme allowed a draft intervention plan to be drawn up at the conference, which was then sent back to the Magistrate for approval.

¹⁵¹ Julie People and Lily Trimboli *An Evaluation of the NSW Community Conferencing for Young Adults Pilot Programme* (NSW Bureau of Crime Statistics and Research, Sydney, 2007) x.

¹⁵² Julie People and Lily Trimboli *An Evaluation of the NSW Community Conferencing for Young Adults Pilot Programme* (NSW Bureau of Crime Statistics and Research, Sydney, 2007) 55.

reinforcement.”¹⁵³

The literature may therefore suggest that unless the police *want* to use a discretionary Act, it will not be used and extensive resources in putting that legislation in place will be wasted.

Research shows that the reoffending rates for juveniles are reduced if those offenders can be diverted from the harsher criminal justice system.¹⁵⁴ Rates are further reduced if young offenders are referred by police to support services after being cautioned.¹⁵⁵ That being the case, it appears that the diversionary scheme under the YOA is having some positive impact on offence rates, although Stewart et al do note that as of 2004 there was little empirical evidence to suggest a reduction in recidivism.¹⁵⁶ If the scheme has some success in reducing recidivism and child involvement in the adult criminal justice system, it seems necessary for police to support the Act’s aims and to involve themselves in its implementation. If indications are that police do not like diversionary schemes, further research must therefore be carried out to determine the cause for this attitude. It is only once the cause is understood that steps can be taken to remove the negative influences upon discretion, which form the ultimate barrier to the Act’s use.¹⁵⁷

(v) Effect of Pre-Legislative Consultation and Police Attitudes

As a result of looking at relevant literature for this project, the author hypothesises that police will not readily accept and use discretionary legislation when they have not been involved in

¹⁵³ The Honourable Justice James Wood, *Royal Commission into the NSW Police Service: Final Report* (1) (May 1997) 38. <<http://www.pic.nsw.gov.au/OtherReportsAndPublications.aspx>> at 30 June 2009.

¹⁵⁴ Auditor-General’s Department, *Auditor-General’s Report Performance Audit: Addressing the Needs of Young Offenders* (2007) 16. Research has also shown this to be the case in some parts of the United States, though first and second time offenders benefit the most. Rodriguez, Nancy ‘Restorative justice at Work: Examining the Impact of Restorative Justice Resolutions on Juvenile Recidivism’ (2007) 53 *Crime and Delinquency* 355, 371 and 373. Armour, Marilyn Peterson and Mark S Umbreit, ‘Restorative Justice and Juvenile Offenders’ in David W Springer and Albert R Roberts (eds), *Juvenile Justice and Delinquency* (Jones and Bartlett Publishers, 2011) 391, 406.

¹⁵⁵ Auditor-General’s Department, *Auditor-General’s Report Performance Audit: Addressing the Needs of Young Offenders* (2007) 31.

¹⁵⁶ Anna Louise Stewart and Frances Smith, ‘Youth Justice Conferencing and Police referrals: The Gatekeeping Role of Police in Queensland, Australia’ (2004) 32 *Journal of Criminal Justice* 345, 346.

¹⁵⁷ Nancy Hennessy ‘Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)’ *Report to Youth Justice Advisory Committee* (October 1999) 38.

its development or implementation. A pilot scheme of cautions introduced prior to the YOA showed the police had a reluctance to use that scheme. The similarly structured YOA was introduced despite these concerns¹⁵⁸ making the very people who did not approve of the previous scheme the ones who now had the discretion to use its successor.

This issue was raised by the Honourable Dr Marlene Goldsmith during the second reading debate regarding the *Young Offenders Bill 1997* in the Legislative Council of New South Wales. Dr Goldsmith commented, during debate about police participation in conferencing, that: “if police are entirely excluded from the process there is a risk they will not be co-operative”. Dr Goldsmith went on to say that trials of conferencing conducted previously had not been as successful as hoped, due, in part, to police being left out of the process of its implementation.¹⁵⁹

In this research the author interviewed police about whether they thought the Act ought to be changed (see Chapter 4 below for methodology). Whilst such questions might presuppose a negative attitude towards the YOA the responses do not indicate that the participants wish the Act to be repealed or significantly amended. The author does acknowledge, however, that this question was asked at the end of the interviews and that several participants indicated they could not answer fully without further time to consider the matter.

John Muncie, in his article “Policy Transfers and ‘What Works’: Some Reflections on Comparative Youth Justice”, states that in many jurisdictions the legislators and policy makers look overseas for inspiration and then decide to bring those foreign policies home for trial. In the case of the YOA the New South Wales legislators looked directly at the *Children, Young Persons and their Families Act 1989* (NZ).¹⁶⁰

Muncie states that in adopting policy directly from overseas we are failing to implement

¹⁵⁸ Janet B L Chan, Jenny Barga, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ in Janet B. L. Chan (ed) *Reshaping Juvenile Justice* (Sydney Institute of Criminology, 2005) 77.

¹⁵⁹ New South Wales, *Parliamentary Debates*, Legislative Council, 18 June 1997, 10485 (Dr Marlene Goldsmith).

¹⁶⁰ New South Wales, *Parliamentary Debates*, Legislative Council, 21 May 1997, 10485 (J.W. Shaw). New South Wales, *Parliamentary Debates*, Legislative Council, 18 June 1997, 10482-10486 (Dr Marlene Goldsmith).

systems of crime prevention and punishment that are philosophically defensible or locally relevant.¹⁶¹ Muncie's comments appear to have validity here as Chan's research¹⁶² clearly suggests an unwillingness by police to use a new cautioning scheme, of which they had no prior knowledge or input. The research therefore suggests that negative police attitude to legislation might be improved if police are asked about modelling alternatives, prior to any legislative decisions being made.¹⁶³

Some may debate the findings that conferencing and diversionary procedures keep young people out of the criminal justice system.¹⁶⁴ Despite this, the YOA received support from both sides of politics when it was introduced.¹⁶⁵ Did this then lead to the quick fix solution of seeing what trials were taking place overseas and implementing them here, prior to finding out if stakeholders (those at the front line of implementation) believed it would work?

The above research raises the issue of the implementation of new legislation without prior consultation as a possible cause of police being unwilling to use a new scheme. This hypothesis might well influence police attitudes and decision-making in regard to new legislative provisions but as yet there is insufficient data and literature to test this theory. It could equally be that it is the on-going lack of training of police to help them understand the basis for the legislation and the success of similar schemes overseas and interstate that could cause this unwillingness.

¹⁶¹ Muncie, John, *Policy Transfers and 'What Works': Some Reflections on Comparative Youth Justice* (December 2001) <http://yjj.sagepub.com> >at 1 October 2008, 34.

¹⁶² Janet B L Chan, Jenny Bargon, Garth Luke and Garner Clancey, 'Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997' in Janet B. L. Chan (ed) *Reshaping Juvenile Justice* (Sydney Institute of Criminology, 2005) 107.

¹⁶³ This alternative would be a system that is philosophically based on a set of principles to which the stakeholders add practical infrastructure for implementation. See Muncie, John, *Policy Transfers and 'What Works': Some Reflections on Comparative Youth Justice* (December 2001) <http://yjj.sagepub.com> >at 1 October 2008, 34.

¹⁶⁴ Anna Louise Stewart and Frances Smith, 'Youth Justice Conferencing and Police referrals: The Gatekeeping Role of Police in Queensland, Australia' (2004) 32 *Journal of Criminal Justice* 345, 346.

¹⁶⁵ Joy Wundersitz, 'Juvenile Justice in Australia: Towards the New Milenium' in Duncan Chappell and Paul Wilson (eds), *Crime and the Criminal Justice System in Australia: 2000 and Beyond* (Butterworths, 2000) 102, 114.

This thesis focuses on influences upon police attitudes and not any causal relationships. In some instances, the causes for those attitudes are sufficiently identified by some of the participants for the author to comment on their existence but the value of these findings is a matter for further research.

(vi) Conclusion

Police discretion is affected by a police officer's attitude to young people, their attitude to diversionary schemes and the influence of police culture. Some negative police attitudes to young people were evident before the YOA was introduced. The Act legislated the use of police discretion in implementing these options, which lie outside the criminal justice system. This did not, however, necessarily correlate with a positive attitude from police to the Act or its scheme.

Education of police has had some influence on changing their negative perception of diversionary schemes, but the negative perceptions of young people, which may be exacerbated by police culture, may hinder the use of discretion at a broad level. Consultation with police prior to the introduction of discretionary legislative schemes will not necessarily change their opinions of schemes they see as being 'soft'.

4. Methodology and Data Analysis

(i) Introduction

In this chapter the author will describe the foundations upon which the analysis of data occurred, as well as the procedure by which each interview was conducted and how the data was analysed.

(ii) Methodology

This study is based upon the theoretical framework of socio-legal studies. Socio-legal study locates legal practices in the context of social practices, which constitutes law's immediate environment. It subjects legal practices and theory (including legislative provisions as in this study) to enquiry, which scrutinises not only the legal articulation of the legal rules, but the meaning and effect of those rules and processes as interpreted, enforced and experienced.¹⁶⁶

In this thesis socio-legal studies focuses on the impact of the written word of the law on its users, being in this instance police, and how that might influence their decision making processes.

From the chapters above we are informed as to why the legislative provisions inherent in the YOA were introduced by the New South Wales Parliament and what those provisions mean (following a 'black and white' analysis of law). What this study will further seek to show is the impact of the provisions of the YOA on the decision making process of police and how their attitudes to the structure of the Act and their use of it might be influenced.

This project is exploratory in nature. It is conducted through analysis of qualitative data, obtained from in-depth semi-directed interviews with seven general duties police officers, three SYOs and three YLOs.

The literature and the author's research question directed her research method. The author's

¹⁶⁶ Nicola Lacey, 'Normative Reconstruction in Socio-legal Theory' (1996) 5 *Social and Legal Studies* 131,132.

hypotheses were found in the literature considered by her in the preliminary stages of undertaking her research. These hypotheses were a tentative explanation of a research problem or a tentative proposition that would then be subject to verification through the author's subsequent investigation.¹⁶⁷ There was little literature available on the author's chosen topic and therefore the author also consulted related literature on police discretion and police culture to develop her hypotheses. As these hypotheses were generated, to some extent, through research findings of studies in other disciplines the data grounded the analysis¹⁶⁸ and testing of the hypotheses.¹⁶⁹

The author chose to consider a number of narrow hypotheses instead of one broad hypothesis as there were interconnecting but still separate issues raised by the literature, particularly as the author had to consult a broad scope of literature to take account of the limited literature on the topic. Due to the limited amount of research previously conducted in the area, the author could not say at the pre-interview stage if some of the hypotheses had less 'validity' than others and so should be excluded. As this research was exploratory and the existing literature somewhat limited, the eight hypotheses allowed scope for exploration of the research question.

The author chose to focus on the YOA's structure, due to the explorative nature of the research, which arises from the limited previous research on this area. This focus did not, however, prevent officers from being able to comment on what it appears they believed the philosophy of the YOA to be. Many did in fact comment on this, in addition to commenting on its structure.

Research was conducted by drawing on ethnographic methodology, which includes friendly conversations with participants, into which the author slowly introduced new elements through questions. As the focus of the research is the first-hand experiences of the participants,¹⁷⁰ these elements assisted participants to provide information, which answered

¹⁶⁷ Zina O'Leary, *The Essential Guide to Doing Research* (Sage, 2004) 37 and Michael G. Maxfield and Earl Babbie, *Basics of Research Methods for Criminal Justice and Criminology* 34.

¹⁶⁸ Sotirios Sarantakos, *Social Research* (Palgrave MacMillan, 3rd Ed, 2005), 137, 149.

¹⁶⁹ Michael G. Maxfield and Earl Babbie, *Basics of Research Methods for Criminal Justice and Criminology* 34.

¹⁷⁰ Paul Atkinson, Amanda Coffey, Sara Delamont, John Lofland, Lyn Lofland 'Editorial Introduction' in Paul

the research questions.¹⁷¹ An interview schedule (see Appendix “A”) was used to semi-structure the interview process and this was supplemented by additional questions to clarify and obtain more detail of the participants’ answers, if required.¹⁷²

It is also noted that some questions in the interview schedule remained unasked in certain interviews when that information had already been given. The semi-structured interviews created gentle boundaries for the participants to think through their answers. It also assisted in the provision of clear statements about their attitudes to various parts of the legislation.¹⁷³

This research also draws upon forms of grounded theory in that information in the data leads to the conclusions of the study. The author may have some preconceptions about what the data will show, due to the preliminary interviews with barristers which led to this research, as well as the subsequent literature review. These preconceptions are not significant, however, as the data discloses the answers to the interview questions. The preconceptions therefore do not influence the outcomes, as the data tests the questions raised by the research proposal and ultimately determines the conclusions of the research project.¹⁷⁴

The author chose to undertake a qualitative exploratory study as there was insufficient information about the research topic in existing literature, which caused the formulation of hypotheses and the operationalisation of the question to be difficult or even impossible.¹⁷⁵ Further, the author chose grounded theory as it...”aims to develop theory through the research, not to subject research to theory; it is most suitable in areas, where theories are not

Atkinson, Amanda Coffey, Sara Delamont, John Lofland, Lyn Lofland (eds), *Handbook of Ethnography* (Sage, 2001) 1,4.

¹⁷¹ Uwe Flick, *An Introduction to Qualitative Research* (Sage, 2nd ed, 2002) 90.

¹⁷² The researcher has over 10 years experience in conducting semi-structured interviews for the purpose of litigious civil legal proceedings and is cognisant of the pitfalls of a semi-structured interview process, when issues such as interrogation-type formality or allowing a participant to move away from the topic at hand, may occur.

¹⁷³ Uwe Flick, *An Introduction to Qualitative Research* (Sage, 2nd ed, 2002) 93.

¹⁷⁴ *Ibid* at 232.

¹⁷⁵ Sotirios Sarantakos, *Social Research* (Palgrave MacMillan, 3rd Ed, 2005), 137.

available...”¹⁷⁶

The author chose the emergent methodology of grounded theory as the basis for her research as it allowed the theory of police attitudes to be investigated and analysed from the data, as existing assumptions from other research were limited in the chosen topic area. Grounded theory allowed the author to analyse the data to develop concepts, which led to some suggested theories. The data provided plausible support for these theories as they were grounded in that data.¹⁷⁷

The author also relied upon grounded theory as it generated rich data from the personal and professional experiences of the police officers interviewed. The grounded theory approach is a method for discovering theories, concepts, hypotheses and propositions directly from data rather than from a priori assumptions, other research or existing theoretical frameworks.¹⁷⁸ The author explored data to establish a baseline with which further changes might later be compared or built upon.¹⁷⁹ As the author undertook an exploratory study, such comparisons were undertaken at a preliminary level with indications suggesting that there was scope for further research arising from some of the findings.

One of the strengths of grounded theory is that it allows rich data to be generated from the personal experiences of people, has the capacity to develop theories, has rigorous procedure and is theory neutral. In this exploratory study rich data was able to be produced from a relatively small cohort of participants, but which still allowed a number of theories to be developed.¹⁸⁰ Of course the argument that it is theory neutral is open to criticism as the personal experience of the researcher can provide an overlaying influence on the

¹⁷⁶ L. Pfeifer, ‘Sachverhalte, Konstruktion und Wichtigkeit’ (Self-published, Wien, 2000) in Sotirios Sarantakos, *Social Research* (Palgrave MacMillan, 3rd Ed, 2005), 119.

¹⁷⁷ Steven J. Taylor and Robert Bogdan, *Introduction to Qualitative Research Methods* (John Wiley & Sons Inc., 1998) 137.

¹⁷⁸ Steven J. Taylor and Robert Bogdan, *Introduction to Qualitative Research Methods* (John Wiley & Sons Inc., 1998) 137.

¹⁷⁹ Michael G. Maxfield and Earl Babbie, *Research Methods for Criminal Justice and Criminology* (Thomson Wadsworth, 4th Ed, 2005), 19. See also *Basics of Research Methods* Michael G. Maxfield and Earl Babbie (Thomson Wadsworth, 2006), 18.

¹⁸⁰ Sotirios Sarantakos, *Social Research* (Palgrave MacMillan, 3rd Ed, 2005), 121.

interpretation of the data and cause one theory to be pursued as compared to another.

Personal involvement by the researcher raises issues of subjectivity and validity. There is no explanation of how hypotheses are to be verified, the method of theory building may not be precise and the process of data collection not very clear. The idea, however, of entering the research without preconceptions is sociologically very questionable.¹⁸¹ The author noted in Chapter 1(iii) that her support of the Act in her teaching could influence the outcome of the study as could her perception that some participants might have misunderstood the structural requirements of the Act. Such influences are acknowledged by the author as was the originally unintended method of finding participants at the Police College, as compared to in the field, due to the difficulty in, what one could argue, was the more randomised method of contacting willing participants by email.

(a) The Interview Process

The hypotheses indicated to the author the nature of the questions she might ask in the interviews. The interview guide questions were formulated from the issues raised in the hypotheses, they being considered to be thematic areas to explore.¹⁸² The author used open-ended questions as they are ordinarily used because they capture rich detail better. The primary disadvantage of having to categorise such answers does not occur in specialized interviewing, such as took place here, because of the small number of subjects and the interest in describing rather than generalizing from a small participant cohort.¹⁸³

The majority of interviews were face-to-face. Three of the thirteen interviews were conducted by telephone, due to the participants being some distance away. This was following initial contact with those participants through randomised email contact as noted above. Interviews were recorded. Once the interviews had taken place, the data was transcribed by a professional transcription service, which regularly undertakes university transcription work and which provides assurances of confidentiality.

¹⁸¹ Sotirios Sarantakos, *Social Research* (Palgrave MacMillan, 3rd Ed, 2005), 121.

¹⁸² Zina O’Leary, *The Essential Guide to Doing Research* (Sage, 2004) 165 and Michael G. Maxfield and Earl Babbie, *Basics of Research Methods for Criminal Justice and Criminology* 210.

¹⁸³ Michael G. Maxfield and Earl Babbie, *Basics of Research Methods for Criminal Justice and Criminology* 211.

As this research project involves an exploratory investigation of police attitudes to legislation, it necessitated the use of semi-structured interviews and open-ended questions to allow participants to fully canvass their opinions. The author chose not to conduct the research by way of questionnaire or quantitative study, as she wished to allow the candidates to have the freedom to voice their opinions and to lead the discussion.¹⁸⁴ The author is of the opinion that questionnaires might have curtailed some points of discussion in police answers and that semi-structured interviews gave sufficient scope for police to freely give their opinions, whilst being guided by topic questions. As almost no research has taken place on police attitudes to the structure of the YOA, the author believes that exploratory investigation is best carried out in a broader context of interview questions and answers than is provided by a questionnaire.

The author is also of the view that police might not express their full opinion or explain any influences on their attitudes in questionnaires. In her experience of teaching police, the author believes that many general duties police have significant skills and experience in oral communication and prefer that to written communication, this factor potentially affecting the quantity of the data and possibly its quality if written questionnaires were used.

Research indicates that police culture,¹⁸⁵ community attitudes¹⁸⁶ and the impact of training¹⁸⁷ influence police attitudes. To a lesser degree, research also indicates that practical structural issues, such as operational support and funding¹⁸⁸ might influence attitudes. As other

¹⁸⁴ Linda McKie notes ‘Quantitative evaluations have been criticised for failing to bring to life not only the everyday workings of policies and projects but also the lessons that might be gained from reflecting upon processes...: Linda McKie, ‘Engagement and Evaluation in Qualitative Enquiry’ in Tim May (ed), *Qualitative Research in Action* (Sage, 2002) 261, 263.

¹⁸⁵ Janet B L Chan ‘Implementation of the *Young Offenders Act*’ in Janet B.L. Chan (ed), *Reshaping Juvenile Justice* (Sydney Institute of Criminology, 2005) 25,46 and Richard K. Wortley, ‘Measuring Police Attitudes Towards Discretion’ (2003) *Criminal Justice and Behaviour* 30, 538.

¹⁸⁶ NSW Attorney General’s Department *Report on the Review of the Young Offenders Act 1997* (October 2002) 28.

¹⁸⁷ Brendan Delahunty ‘Taking ‘Kiddie Cops’ and ‘Care Bears’ Seriously’ (1998) 23(1) *Alternative Law Journal* 13, 17, Jenny Bargen, ‘Children’s Legal Issues: Young Offenders and the New Options in Youth Justice’ (1999) 37 (10) *Law Society Journal* (NSW, Australia), 54, 55 and Ann L. Parker, Phillip B. Mohr & Carlene Wilson ‘Attitudinal and Personality Predictors of Diversionary Behavior by Police’ (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 19.

¹⁸⁸ Brendan Delahunty ‘Taking ‘Kiddie Cops’ and ‘Care Bears’ Seriously’ (1998) 23(1) *Alternative Law*

research less relevant to police attitudes to the structure of the YOA had taken place in previous years, the context for the interview questions had a sharper focus on structure,¹⁸⁹ but with sufficient allowance for police to discuss other issues of concern. The scope of the questions asked gave sufficient leeway for officers to raise matters of concern to them regarding the YOA.

In discussing the structural context of the Act, certain issues were raised, such as practical barriers to the implementation of the Act. The research notes them as being influences on police attitudes, but the exploratory scope of this work does not invite further analysis of these issues.

The interview with each police officer had a duration of between 15 and 30 minutes, depending on how much that police officer wished to comment on the issues raised in the questions. The interview commenced by asking open questions (See Appendix “A” Interview Schedule). During the first interviews that were carried out it became apparent, however, that some police responded very briefly to open questions and provided answers with little explanation for their opinion. It thus became necessary, in some cases, for the author to summarise what appeared to be the participant’s answer and direct that summary as a closed question to the participant. Thus the participant could say whether they agreed or disagreed with the author’s summary.

The author is aware that the asking of these closed questions could have suggested answers to the participants. The structure of the interviews with open questions as their foundation gave, the author believes, sufficient scope for the participants to freely voice their opinions and these opinions were not curtailed by the use of summarising closed questions. On certain occasions and specifically demonstrated by the question regarding suggested changes to the Act, some participants said they could not easily recommend changes. In that instance the author did not suggest any changes but completed the questioning on that point at that time.

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¹⁸⁹ As noted in Chapter 1 ‘Introduction’ above ‘structure of the Act’ refers to the wording of the *Young Offenders Act* and the guidelines it provides to what police can do under that Act.

(b) Participants

Interviews were conducted with police as shown in Table One below.

Table 1. Job Description of Police Participants Interviewed

Position	Location		
	Metropolitan	Regional	Rural
YLO	1	0	2
SYO	0	1	2
GD	5	2	0

Key: YLO = youth liaison officer, SYO = specialist youth officer¹⁹⁰, GD = general duties officer

The author attempted to recruit police participants for this project through email contact. Email addresses were selected from the Police Intranet system, which the author was authorised to access. Emails were forwarded to police who were chosen on the basis of their being from metropolitan, regional or rural locations, to allow for socio-demographic and geographical diversity in the sample. Regional police officers were considered those to be from larger urban areas, excluding Sydney, which had access to numerous services and facilities. Such regional areas were considered to have a city as their base, such as Newcastle or Wollongong. Rural police officers were from towns along the coast or inland that were somewhat isolated and which did not have close access to a city. Metropolitan officers came from Sydney.¹⁹¹

¹⁹⁰ Both ‘specialist youth officer’ and ‘youth liaison officer’ are defined in s 4 *Young Offenders Act 1997* (NSW) to be persons appointed by the Commissioner of Police in those roles.

¹⁹¹ See also definition of ‘regional’ and ‘metropolitan’ in section 4 of the *Regional Development Act 2004* (NSW) as follows:

Region means any part of New South Wales (whether described in terms of a local government area or areas or in other terms), other than the Sydney metropolitan area.

Sydney metropolitan area means the area constituted by the local government areas prescribed by the regulations for the purposes of this definition.

The author had some difficulty in recruiting participants through this method, due to a lack of responses and logistical difficulties in arranging meeting times. Ultimately ten of the fourteen interviews were undertaken with police who were seconded to teach practical training for six months at the New South Wales Police College at Goulburn. Those participants were randomly chosen from police who were available to be interviewed at particular times, which fit in with their teaching schedule, as compared to fulfilling other geographical or role criteria.

The author is aware that the method of recruitment of participants was not entirely randomised as the participants likely included those who asked for a transfer to the College and who may therefore have a specific interest in education. Other secondees may have been transferred at the request of senior staff in their Local Area Command for a variety of other reasons. The author did not ask the participants interviewed at the Police College why they had been seconded to teaching. An answer to this question might have indicated a factor that could have influenced the data and the author identifies this issue accordingly.

The author was initially concerned that some lack of geographical diversity in the sample might skew results, however analysis of the data demonstrates that geographical diversity did not necessarily correlate with a specific body of opinion. Ultimately the geographical location of participants does not indicate any particular view of the YOA for each group of rural, regional or metropolitan participants. Factors such as whether participants worked in areas of high youth population, unemployment and low income had more influence on the study's outcomes than geographical location. Whilst more general duties officers were interviewed than SYOs or YLOs the sample of employment roles proved to be sufficiently randomised for the findings made. This is discussed further in Chapter Five.

Participants were assured of the confidentiality and anonymity of their involvement in the research project and identifying features, such as their name, rank, name of geographical location and name of their Local Area Command are not divulged in this thesis.

The author originally intended to interview approximately five general duties police officers and five specialist youth officers as well as five police prosecutors. Police prosecutors put

forward the police case in criminal proceedings and appear in Local Court matters. As such, they have a role in objectively reviewing police decisions which are made in the field.

The author chose to interview police prosecutors regarding their attitudes to the Act as those attitudes might have had more neutrality to those of some general duties or youth liaison officers, who are in daily contact in the field with young people. Youth liaison officers choose to undertake the specific course of police training to undertake that role. Their constant contact with young people and the reasons they have chosen to work with them might affect the youth liaison officers' views regarding the YOA, including the possibility that they might innately support diversionary legislation. Some general duties police officers might be influenced by their Local Area Command or their past professional experience in regard to their attitude to the Act.

Ultimately, the author interviewed only one police prosecutor, who had been recommended by the Police Prosecution Service. The author had significant difficulty in arranging additional interviews with prosecutors. The police prosecutor's office offered to find other prosecutors to be interviewed but the author declined further assistance. As the proposed participant sample for the prosecutors was small, the author was concerned that the suggested involvement of certain participants by the prosecutor's department did not allow her knowledge of how that suggested preselected sample might have come about. Thus the author could not have clearly indicated how or why those participants became involved and what the impact of those arrangements might have been. In addition, the author could not guarantee the privacy of those participants, if they were recommended by their employer.

In such circumstances the author decided not to pursue any further interviews with prosecutors or to discuss the views of the one prosecutor interviewed in this paper, as that person's privacy cannot be guaranteed, due to the interview having been arranged through official channels.

Whilst it is not unusual for participants to be recruited by third parties; as this research was about attitudes to legislation, the author believes it was essential that the recruitment process for the participants was in her hands, to minimise any influence on those stated attitudes by third parties. Essentially, the nature and extent of any influence by a third party in this study on attitudes could not be clearly acknowledged or described if the author did not know the

process for the choice of those participants. Whilst the author cannot be totally independent of the data in qualitative studies, in this instance, the author is at least able to acknowledge her own influence and its potential impact. The same cannot necessarily be said of the nature of the recruitment of police prosecutors by a third party, due to the potential lack of transparency in that process.

(iii) Data Analysis

This project is confined to obtaining information about police attitudes to the structure of a piece of legislation that they must work with. It focuses on their operational and/or personal knowledge or experience, and how that informs their understanding of and attitude to the legislation. By its nature and definition, the project is therefore an ethnographic study of procedural justice issues.¹⁹²

Data analysis took place via the transcribed interviews provided by the professional transcription service. The author began analysis of the data by use of a table of issues. Each participant was given a reference number and a column was assigned to them for the listing of their key ideas. The author noted areas of specific discussion raised in the text of each transcribed interview and listed them in chronological order of finding in a table. After numerous reviews of each transcribed interview the author narrowed the issues raised into various systematic categories, which formed the outline for the data analysis. These categories included support for the structure of the YOA, attitudes to the three options under the Act and the impact of the Act's structures on victims and offenders.

The author did not categorise the data in accordance with the interview questions as they were semi-structured. The information in the data led to the conclusions of the study and the questions were provided as guidelines only. They were not provided to create arbitrary boundaries for the data or to determine the outcome of the research.

At the time of the first analysis of the data it became apparent that themes were occurring in the answers provided by the respondents. As noted above, these themes did not follow the guideline questions but followed the issues that the majority of participants mentioned when

¹⁹² Uwe Flick, *An Introduction to Qualitative Research* (Sage, 2nd ed, 2002) 90.

thinking about their attitudes to the Act – what was their attitude to the Act overall, what procedural option did they prefer, what impact did the Act have on those involved in its use and so forth. These themes guided the way the data was collated and discussed and ultimately resulted in the format of the data findings as provided in the thesis.

The author used open coding by looking for empirical indicators of concepts from the data. The data was then labelled according to emerging patterns and this formed the basis for the author's theoretical model.¹⁹³ It is necessary to note though, that coding undertaken in grounded theory based research can be undertaken in an inaccurate and undisciplined manner. It can lead to conclusions that are not objectively found in the data.

Similarly the data itself can mislead as the interpretation of an answer of a participant, though seemingly objectively considered by the researcher can be misconstrued.¹⁹⁴ This can particularly occur in instances where participants are not terribly forthcoming in their answers and the questions asked by the researcher are required to be somewhat leading in order to elucidate further material. It will be noted in the discussion of data analysis below that this occurred in some instances for the author of this study. Whilst the author put closed questions to some of the participants in to clarify their answers and to allow the participants to agree or disagree with that assertion, the personal experience of the participants might have hindered their being more forthcoming in their agreement or otherwise. The data itself may therefore have been misconstrued at first instance. A further incidence of this could have occurred in the author's finding that some participants may have misunderstood the structural options provided by the YOA, as will be discussed later.

Coding can also cause problems for users of grounded theory as it must be performed in an accurate and disciplined manner, for example sentences should not be paraphrased but genuine categories found in the direct speech of the participants and categorized accordingly.¹⁹⁵ Once again this may have caused the research findings in relation to some

¹⁹³ Sotirios Sarantakos, *Social Research* (Palgrave MacMillan, 3rd Ed, 2005), 349

¹⁹⁴ Ibid.

¹⁹⁵ 'Sotirios Sarantakos, *Social Research* (Palgrave MacMillan, 3rd Ed, 2005), 349 citing Strauss, A.L. *Grundlagen qualitative Sozialforschung: Datenanalyse und Theoriebildung in der empirischen Sozialforschung* (Wilhelm Fink Verlag, 1991).

participants' understanding of the Act be misconstrued, as this finding was based on comments from some participants that there was a tiered structure to the Act. The participants did not, however, indicate by way of direct speech that they misunderstood the structure of the YOA, but the author believed there was sufficient information provided from their comments to code a category of data as showing that misunderstanding may well exist. Whilst this could therefore be considered as inference from paraphrasing, the author considered the data to provide a genuine category for discussion.

(iv) Delay to Commencement of Research

The commencement of the project in 2008 was delayed as unforeseen obstacles were faced in relation to New South Wales Police approval of the project. Initially the author was advised by New South Wales Police that ethics approval from the School of Policing Studies Ethics in Human Research Committee at Charles Sturt University would suffice as approval for the project from NSW Police. After being granted ethics approval by the Charles Sturt University School of Policing Studies Ethics in Human Research Committee on 16 June 2008 the author was advised by NSW Police that they required a copy of the questionnaire guidelines. The author was advised that interviews could not take place until NSW Police had agreed to the project, as police could not publically comment on matters of policy.¹⁹⁶ Questionnaire guidelines were submitted to NSW Police, and some months later they approved the project, without changes to those questions or any obligatory criteria required to be met.

The author wishes to note that she was disinclined to provide any questions to NSW Police, as this might have affected the independence of the research, if any questions were rejected. The reality of the situation was, however, that without submission of the questions, the interviews would not have been allowed to take place. This brings in a separate but worrying concern about the obstacles a researcher faces when looking at issues in policing and whether the hierarchy of the NSW Police Force easily allows independent review of police opinions, about the legislation that they must work under.

Whilst the author has no objection to Police asking to approve the nature of a research

¹⁹⁶ New South Wales Police Force, *Media Policy*.

project, once the rigours of an ethics approval system have been passed, there is a concern that research may be disallowed because of potential fears of embarrassment for NSW Police or the government of the day, particularly in regard to legislative changes or policy.¹⁹⁷ If the University Ethics Committee did not require viewing of the guideline questions proposed, the author wonders what basis the NSW Police Force might have for such a request, when they did not see a need for their own ethics committee. The author of course cannot answer this question, but raises the issues of these obstacles in this project.¹⁹⁸

(v) Ethics Approval

The author was granted ethics approval for her study by the Ethics in Human Research Committee of the School of Policing Studies at Charles Sturt University. This approval was granted on 3 June 2008. The New South Wales Police Force provided their written approval for the study on 9 February 2009.

Annexed at Appendix “**B**” is a copy of the Ethics Approval Letter from the Ethics in Human Research Committee of the School of Policing Studies at Charles Sturt University dated 3 June 2008.

Annexed at Appendix “**C**” is a copy of the letter of approval from the New South Wales Police Force dated 9 February 2009.

(vi) Conclusion

The foundations of this research are socio-legal. The semi-structured interviews allowed the author to undertake an exploratory study of police attitudes to the YOA. An exploratory platform was required due to the lack of recent or substantive research on the topic. The

¹⁹⁷ New South Wales Police Force, *Media Policy*.

¹⁹⁸ The researcher also notes an example of hindering research and public comment by the postponed release by the government of a study by the NSW Bureau of Crime Statistics and Research on juvenile justice. This was the first time refusal of a publication had occurred since Don Weatherburn was appointed Director of the Bureau in 1988. See Adele Horin, ‘Juvenile Justice Report declared a State Secret’, *The Sydney Morning Herald* (Sydney), 25 June 2009 and also Adele Horin, ‘Dumb and Dumber as Delinquent Laws Waste Lives of Young Offenders’, *The Sydney Morning Herald* (Sydney), 27 June 2009 at <<http://www.smh.com.au/opinion/dumb-and-dumber-as-delinquent-laws-waste-lives-of-young-offenders-20090626-czt8.html>>

nature of the data collected and its analysis allowed for themes or discussion points to lead to the various topics, which formed the boundaries for the data analysis.

5. Data Findings

(i) Introduction

Findings in the data suggested several themes for discussion and analysis by the author. These findings are set out below from the more broad, such as police support for the Act, to more specific findings on the various procedural options available under the Act as well as its impact on victims and offenders. The participants were asked about their opinions on the impact of the Act on victims and offenders in order to determine what these were and what influences they might have on police attitudes. This chapter on data findings concludes with the opinions of the participants on possible modifications to the Act.

For the purpose of anonymity of the participants in this thesis the author identifies each below by a code. Participants from a rural area are described as ‘RR..’. Regional officers are described as ‘R...’ and metropolitan officers are described as ‘M...’. The officers are then further identified by the abbreviation for their job description (see Table 1 above on page 53) and then randomly numbered in accordance with the number of those participants in the participant group, for example ‘MGD1’ stands for metropolitan general duties officer number one, ‘RRYLO2’ stands for rural youth liaison officer number two and so forth.

(ii) General Police Support for the Structure of the *Young Offenders Act*

Participants were asked if they believed police generally supported the YOA. This was a general introductory question to flush out, as it were, different influences that the participants believed might affect that support, be they structural issues in the Act or other broader concerns. All participants except two, being RGD2 and RRSYO1, think police in New South Wales generally support the Act. Participants’ views on the level of support differ considerably. It appears that their views may not be influenced by their job description or geographical location, rather by their level of training in youth issues and the amount of contact they have, on a professional level, with young people.

RRYLO2 said that the Act is:

“just the way we do business now...most bosses would see the benefit of keeping young people out of the court system and dealing with them in an alternate way”.

RRYLO2 believes that more support is needed for YLOs in certain LACs. The officer said that YLOs often have to fill in for general duties officers who are on leave. That work can take them away from their youth liaison duties for days at a time from what, effectively, is a full-time position. RRYLO2 indicates that this demonstrates a lack of understanding of the importance of their role. This officer’s opinion of the Act contrasts with that of RGD2 who said: “The general view across the board is that no one believes it is working.”

RRYLO1 believes that senior police do not support the Act and RGD2 believes that police support overall is poor. RRYLO1 believes that senior police officers, who qualified as police before the Act was implemented, have the opinion that all offenders should be charged. They do not have much training about the Act and therefore do not understand its advantages. The officer considers the problem to be generational but that older officers have some influence upon junior officers and could sway their views of the Act. RRYLO1 works in an area of cultural diversity but does not believe these different ethnographic groupings cause these views of senior officers. The officer further believes that it is a wide-spread view and that those officers who know more about the YOA support it more: “It’s more the people who know about it that agree with it.”

RRYLO1 further comments that there is a lack of training in relation to the Act and this is a cause of the lack of understanding of the benefits of using the Act by police generally.

“There’s a lack of training...before I became a YLO and completed Youth Cautioning workshops and all things like that, I didn’t know anything about the *Young Offenders Act*, to be honest; I had no idea.”

As an interesting aside RRYLO1 also believes that by referring matters to a YLO other officers are saving themselves a lot of time and paperwork. The officer feels that if nothing else, the Act is supported by police generally as it saves time for everyone but the YLO.

Six out of the thirteen officers believe that the Act is supported at their Local Area Command. RRYLO2 states that the Act is very strongly supported in their area. Those

whose Local Area Command support the Act include MGD5 who said they work in a Local Area Command with a small youth population and where the Act is therefore not required to be used often. That officer, however, had previously worked in a regional Local Area Command with a high youth population. MYLO1 believes that some police in their Local Area Command do not want to use the YOA as there is a large amount of paperwork involved in its use and that work is often wasted because there is no real repercussion for the child. Despite this they have the view that their Local Area Command supports the Act:

“Everyone’s pretty much aware that it is legislated, the way that young people are to be dealt with, so I don’t think there’s any command that would discourage the use of the Act.”

RSYO1 believes the Act is supported at their Local Area Command as their YLO is very proactive about working with the Department of Community Services and schools, “... if the command wasn’t in support of it [the Act] I don’t think that would be happening...”

RRSYO2 said their Local Area Command supports the Act and that they have a good system in place for referrals to their YLO. This takes the pressure off other officers, as they are confident that their YLO will appropriately take care of the matter. That officer also said their LAC is supportive of officers attending conferences and time is available in the work roster if a request is made.

MGD1 believes that most officers in their Local Area Command have mixed feelings about the Act. MGD3 said that the view at his previous metropolitan Local Area Command regarding the Act was that, “they were quite disappointed with it, ‘cause they [the young people] just reoffended”.

(iii) Participants’ Support of the Structure of the *Young Offenders Act*

At first instance the participants were asked if they generally supported the scheme provided by the YOA. Views on this varied between officers but results demonstrate that all of the YLOs interviewed unconditionally support the Act, as do the majority of the SYOs. Support from general duties officers is mixed.

(b) Unconditional support

Five out of the thirteen police officers interviewed advised that they unconditionally support the YOA and its aims. By unconditional support the researcher refers to participants who said the Act is helpful to them and do not put any initial condition on its usefulness. All of those who unconditionally support the Act are YLOs or SYOs.

MYLO1 has the view that ‘not all kids are bad’ and that the Court experience is quite negative and might result in a criminal record for the child. The officer views the YOA as being less restrictive in its outcomes than the Court process and more in line with restorative justice ideas:

“I believe it’s a less restrictive outcome. It can be more restorative as well, more of a positive effect on the young person’s life in general and it basically avoids them being caught in the spiral of the criminal justice system.”

RRYLO1, who unconditionally supports the Act, believes that it simply gives them more options for dealing with young people rather than the Court process:

“Some kids do stupid things and don’t realise that what they’re doing is an offence and that’s where the *Young Offenders Act* is really good.”

RRYLO2 believes the Act provides an additional tool to help young people. They also advised that they had decided to train as a YLO, after some years in other areas of the force, as they wished to help young people. In their opinion the Act provides a means of helping young people and also reduces the amount of young people that go to Court:

“I actually support the system of reducing the amount of young people that go to Court. So I felt fairly strongly about wanting to help young people as opposed to just charging them and sending them before the magistrate...it gives you a tool to deal with young people in a way that, I guess, I feel comfortable with.”

RRYLO2 further states that the Act works in their area as many children are from good homes and go to school regularly. The officer said that under peer pressure those children might steal or damage property but they are somewhat traumatised by having to even speak to police informally about their behaviour and do not generally offend again.

Despite unconditional support for the Act, RRYLO2 said that in their work they do not rely solely on the YOA but have school programmes to assist children who might become offenders at a later stage. The officer said teachers can identify children who are misbehaving at school, so that they could be targeted into programmes at the Police Citizens Youth Club or like organisations and have contact with good role models, who might influence the child's behaviour. Thus RRYLO2's view, in summary, is that whilst the Act works and they support it, its use is not the sole answer to youth offending.

RRSYO2 believes the Act benefits the community and makes the job for police easier due to less paperwork and the ability to refer the matter to a YLO for resolution.

RSYO1 believes that the criminal justice process can take away normal social interaction for the child, particularly if they are placed in a juvenile detention facility. The officer believes the Act is a useful tool in bringing offenders back on track without giving them a criminal record:

“...[in] some lower socio-economic areas..there's a lot of broken homes...so the kids get up to mischief and the *Young Offenders Act* sometimes it allow you to get 'DOCS' [Department of Community Services] involved and so rather than them getting a criminal record, getting kicked out of school and all that, you know, getting rid of the last bit of social interactions they've got and send them to....it sort of redirects them back on track I think.”

As noted above, no general duties officers unconditionally support the Act. The reason for this may be the additional training that YLOs have in relation to youth issues before they are appointed as a liaison officer. This training may give them greater understanding of the reasons behind the Act and how it is to be used.

A further reason for their support may also be that the YLO or SYO officers have accepted their role because they are more supportive of young people generally. Arguing somewhat against this thesis, MYLO1 advised that they became a YLO at their metropolitan station as that command was short of a suitably qualified YLO. Despite stating that this was the reason for the officer undertaking that training they are still supportive of the Act, thus adding to an argument that the training could be the impetus for their support.

It is interesting to note that RRYLO1, who unconditionally supports the Act, stated that when police know more about the Act they seem to support it more. This comment supports the above data. YLOs have more training and experience in regard to the YOA than SYOs or general duties officers and the data clearly indicates that they are more supportive of the structures inherent in the Act.

(c) Conditional Support

Eight out of the thirteen police officers interviewed conditionally support the Act, consisting of one rural SYO and seven general duties officers. Various reasons were given for this conditional support.

MGD1 considers the Act to only be useful when the offender shows true remorse for their crime and does not make an admission in order to avoid a harsher penalty in court. The officer believes use of the Act is suited to circumstances involving a minor offence, where the offender had not committed an offence before and they are remorseful in understanding the effects of their behaviour. The officer further said that there are numerous other teenagers who commit offences and who understand they can rely on the Act being used by the police for their offences until they turn eighteen.

MGD5 believes that the Act is useful for first time offenders but that it is not effective when a child comes under notice on three or more occasions. In those circumstances the officer believes that Court is the most appropriate option. The officer also believes that unless the offender shows remorse, the use of the diversionary scheme under the Act has little impact on preventing reoffending.

MGD4 believes that once offenders reach the age of fifteen or sixteen years they ought to know the difference between right and wrong and thus warnings and cautions are not appropriate for this age group and above. The officer believes that cautions should be seen as a privilege and not a right and that a sense of entitlement to a warning or caution reduces the seriousness of the offence they have committed. They believe that the time spent arranging a caution could be better spent:

“Actually speaking with them and speaking with their family and going about a warning for those sort of offences...”

That officer considers that the discretion for use of the Act is with the offender rather than the officer, as offenders know that the Act should be used as an alternative to court.

MGD4 advised that the police are constantly dealing with the same youths and that conferencing might be the only option to have some impact. The officer also believes that a general lack of respect for authority means that warnings and cautions from police officers have no impact. They thought that the Act has limited success for a child of fifteen years and over and suggest it be limited to children between ten and fourteen years of age:

“Generally speaking when you are talking the 10-14 year old age group, I think the *Young Offenders Act* is more appropriate, because with those young offenders they tend to be less cluey than the older ones.”

The same officer has the view that for recurrent offenders the Court environment, including placing the offender in the cells like an adult, is often a better deterrent than any option under the YOA.¹⁹⁹

MGD3 thinks:

“the *Young Offenders Act* gives them [offenders] the chance to just admit what they’ve done and get off scot-free.”

That officer clarified their view later by saying:

“It does generally work, but I think they need to tweak it a bit, so a lot of the offenders don’t reoffend and don’t get off scot-free.”

MGD5 thinks habitual offenders know they have three options to use up before they have to go to court but that generally:

“I think it’s better to have it than not to have it.”

RGD2, thinks that the Act takes insufficient account of demographic differences and that it is not of use in many instances, particularly for someone who is a recidivist offender:

“It doesn’t take into account backgrounds, social pressures from outside,

¹⁹⁹ The author will comment on the legal implications of placing children in cells in Chapter 7 below.

demographic, it doesn't account for that.”

In those circumstances the officer believes it is an Act that is manipulated by those who know how to use it to their best advantage.

RGD1 believes that the Act is useful, but that its usefulness is limited by its apparent manipulation by offenders:

“..in principle I see the *Young Offenders Act* is great by what it's trying to accomplish but in order for that to happen you've really got to have some sort of understanding and acknowledgement and accountability for the young person.”

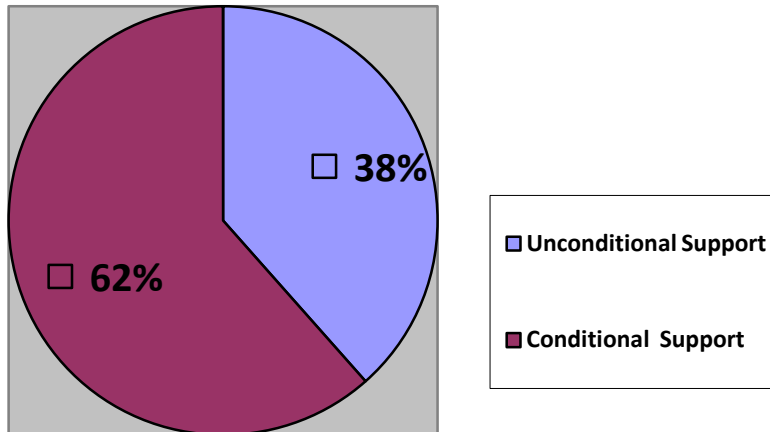
That officer further believes that the Act should be retained, as the majority of offenders, for whom its use is successful, should not suffer due to the Act's manipulation by the minority.

RRSYO1 said they have very marginal support for the YOA. Their reasoning is based on their perception that many youths in their area do not care about what the intention of the Act is and simply use it as a means to keep out of the court system, so they can avoid a penalty:

“Some youths yes, it does form a bit of a deterrent before they get to a conference or being in the Court, but it seems to be it doesn't work for youths that just don't care.”

As noted above, the 62 percent of participants (see Figure 1 below) who give the Act conditional support have varying grounds for their reasons, but a broad summary of their views suggests participants consider the Act to have variable value and lesser impact on habitually offending teenagers, particularly those who are closer to 18 years of age. Thirty-eight percent of participants give the Act unconditional support (see Figure 1 below), which is not predicated upon the location of their LAC or years of experience in the police force. There is, however, some indication that officers from areas of high youth populations and unemployment feel the structure of the Act has limited scope for success.

Figure 1. Participant Support of YOA Structure



(iv) Training in relation to the *Young Offenders Act*

All of the officers interviewed said they know about the YOA and were able to give a brief summary of how it works. RGD1 summarised it as follows:

“It’s just an alternative to placing young offenders instead of putting them before the courts, deal with them in the least restrictive way possible and try to keep them out of the criminal justice system, alternatives, conference, cautions, warnings, along those lines.”

When discussing the YOA some participants, of their own volition, raised the issue of training in relation to the Act and whether or not they believe it is adequate.

It should be noted, at first instance, that half of the participants had been in the New South Wales Police Force for less than five years and the majority of the remaining participants had been in the Force for less than ten years. As the Act was gazetted in 1998 this means that this legislation was already embedded as part of NSW police procedure when these officers entered the force and that learning about the YOA was a compulsory part of their training.

Study of the YOA usually takes place in the first two trimesters of the Associate Degree in Policing Practice at the Police College, when the majority of students study on campus. After these first two trimesters students are placed in the field as probationary constables and

undertake the final three trimesters of study by way of distance education, before they qualify as constables. Other students enter the New South Wales Police Force by way of the Bachelor of Justice Studies (Policing) degree at Charles Sturt University. These students undertake two years of study at the Bathurst campus of Charles Sturt University before transferring to the Charles Sturt University School of Policing Studies at Goulburn to undertake their final year of training.²⁰⁰

Some participants discussed when they learnt about the Act. Several agreed that there is some training at the Police College in relation to the Act, but could not specifically remember when or how that training took place. One RRYLO1 believes that the training is inadequate for general duties police to have a proper understanding of the Act:

“Before I became a YLO and completed Youth Cautioning workshops...I didn’t know anything about the *Young Offenders Act*, to be honest; I had no idea.”

That officer further advised that, whilst they read the police training manual in relation to the Act when training to be a YLO, they had never read the Act itself.²⁰¹

MYLO1 believes that training regarding the Act should take place in the final semesters of study at the Police College, when officers are in the field and undertaking the last part of their course by way of distance education. The officer believes that study of the Act would have more impact when police students, as probationers, were dealing with young people on the streets as part of their training:

“The actual understanding [of the Act] I don’t think comes until you’re putting it into practice and you can relate different parts of the Act to what you’re actually doing on the job.”

Overall the participants believe that training in relation to the Act is inadequate and ought to be revisited.

²⁰⁰ These students graduate with both a Bachelor Degree in Justice Studies (Policing) and an Associate Degree in Policing Practice.

²⁰¹ This is itself of some concern. In the author’s experience of dealing with legislation, this Act is one of the shorter and easier to read pieces of legislation in this jurisdiction and should be compulsory reading for YLO’s at a minimum.

(v) Use of the Three Different Options under the *Young Offenders Act*

(a) Warnings and Cautions

As noted previously, there are three different options for punishment under the Act, being warnings, cautions and conferences.

Officers were asked if they considered there were differences in outcomes between use of these three options. The majority of participants considered that there is not much difference in outcome between warnings and cautions. RRYLO2 said they use cautioning more at their LAC and that is the option they encourage general duties officers to use.

RGD2 advised that warnings are usually used for a first offence and they ‘worked’, that is the offender does not come under police notice again, when the incident seems to be out of character of a generally law-abiding child. They would also consider using cautions in this context, depending on the offence. RGD1 said they tend to use cautions as they believe they are the ‘least restrictive option’.

MGD4 advised that warnings take less time to give than cautions and deal with the offender’s behaviour on the spot, which helps to give the warning some impact. MGD4 prefers warnings as cautions take much longer to give, due to procedural matters. Usually that officer takes the child home and gives them the warning in front of their parents or guardian. They believe, “taking them back to their guardian seems to be more beneficial”.

That officer further believes that if a caution is given the support person chosen by the child is often not their guardian and this does not necessarily produce the best outcome in changing the child’s behaviour. RRYLO1 believes that if a child commits a minor offence and does not have a criminal history they start off with a warning and then move to a caution later if need be:

“Obviously you’ve got to start at the bottom, so if someone hasn’t got a criminal history and if it’s something very minor, I would start off with a warning and then, as it starts to get a bit more serious or they’re starting to build up a bit of a history, then I’d go through each level.”

A child of fourteen and above can choose their support person, known as a ‘person

responsible for the child or an adult' under the YOA.²⁰² RRYLO1 believes that when the child makes an admission, the parents often are not chosen to be their 'person responsible for the child or adult' and so do not know about the child's behaviour. The officer believes that if the child lives in the family home the parents ought to be the ones present for any caution. In the officer's opinion, the choice of responsible person given to the offender reduces the impact of any caution.

RRSYO1 said they use both warnings and cautions but have the view that they do not produce a successful outcome:

“So the warnings and the cautions are just, they're just not working...whether [a conference] is a better way to go rather than three cautions, depending on the offence, maybe it needs to bypass that caution bit and they get three warnings, then straight to conference.”

MGD1 has used the Act less than ten times but believes that whether a warning or caution has more impact is dependent on the circumstances of the particular offender and not the option chosen:

“It comes back down to the offender, I believe....I don't think it's the action itself; it comes down to the offender.”

RSYO1 said they prefer to use cautions as usually the parents attend for the formal caution:

“...You find with a caution then it gives a chance to actually talk to them and then the youth liaison officer then has a talk to them and get through, especially if the parents are there....You don't see them again once you've cautioned most of the time....if you caution them it gets the parents in there and the parents can have the word, saying don't do this again... the YLO talk about it as to why they've done it [and it] puts the brain into gear thinking 'oh this was probably the wrong thing to do'.”

The caution therefore has, in the officer's opinion, greater impact than a warning given on the street.

²⁰² *Young Offenders Act 1997 (NSW)* s 10.

RRSYO2 said they mostly use warning and cautions and that formal cautions now involve significantly less paperwork as the data is input into the police computer system. The officer said they are only involved in the finalisation of warnings and the youth liaison officer at their command gives the cautions:

“Sometimes, ...a warning is suffice (sic) and I’ll do that in consultation with the victim and weight (sic) in the seriousness of the offence.”

The officer takes these matters into account along with the seriousness of the offence, the age of the offender and whether they are previously known to the officer.

MGD2 said that they generally use warnings and cautions. They believe that cautions are often used as the offenders, “haven’t reached their number of cautions so it’s gone that way.”

MGD5 said they use cautions more. MGD4 said that they do not believe that cautions are appropriate beyond fifteen or sixteen years of age, “...they should know what is right or wrong by that stage.”

RGD1 said they use all three options under the Act but most often utilised cautions. RGD2 said they use either warnings or cautions:

“Warning or caution if it’s a first time and you think...if you can pick a person and think this person’s out of character, a warning or caution is great.”

That officer further clarified their view by saying that:

“Before you make any decisions consider who the family is because the family might be the problem.”

(b) Conferencing

RRYLO1 and RRYLO2 had attended several conferences each. MYLO1 had held their role for a short period of time only and so said they had yet to have much experience of conferencing. RRSYO1 and RRSYO2 had both attended a conference. RRSYO2 said that:

“They’re [police hierarchy] always supportive of us, rosters wise, put your request in the book, got a conference that day, they’re happy for us to go. I think they want us to go.”

RSYO1 had helped to arrange a conference but had not attended one. No general duties officers had attended a conference. Several general duties officers, when asked, said they would like to attend a conference if at all possible. RSYO1 said they wished to attend the conference in the one matter they had referred to a conference but could not, due to staffing issues at their Local Area Command.

RGD1 said that they did not know if attending a conference would improve their own knowledge of the Act or its outcomes:

“It would be good in a way but having said that I’ve dealt with the young offender all the way up to that stage. I know the attitude they’ve got but if that would be changed or reflected in any way when they actually deal with the victim and they’re a bit more emotional I don’t know....If I felt that it was worthwhile and they would be a person that would take benefit out of it I would but on the basis that they’ve got a conference already, they’re kind of inclined to be the person who’s not going to pay any attention...”

RGD2 had referred several matters to a conference in circumstances where that offender later re-offended. That officer believes that, accordingly, a conference is not necessarily always the best solution:

“I don’t believe in the warning, caution or conference works with any of them and they only understand ‘Juve’ [juvenile detention].”

The three YLO officers interviewed believe that conferences are better than cautions.

MYLO1 said:

“They [kids] sort of realise that a conference is, in effect, more serious than a caution. Usually I feel that they are a bit less happy at the end, because there’s a whole list of things they have to do as part of the outcome plan. So, whereas caution, I guess, is more of a slap on the wrist, in that effect, there’s no actual...there’s no conditions that could be put on a caution.”

RRYLO2 believes that youth conferencing is the least used option under the YOA. That officer further notes that, as a result of attending a conference, the offender usually has an

agreed punishment, that is they have to do something to make amends for their crime. The officer believes that:

“At the conference stage we can ask the young person to do something.... I do see that having the children do something for what they’ve done has a real benefit.”

RRYLO1 believes that a conference gives a better outcome for offenders as the child often has to sit down and speak to the offender:

“The kids come in for a caution and it’s just like you’re speaking to them out on the street; they don’t really have a lot of respect for Police, a lot of kids we speak to...But it’s different when they have to sit there and speak to the victims. So that’s why a conference I feel is probably a little more confronting to the young person.”

As an aside, the officer said they based this opinion on the opinions of juvenile justice officers in their area.

RRSYO1 said that, in their opinion, conferencing is insufficiently used as cautions and warnings do not work. The officer had participated in one conference and said that the fact that the offender has to confront the victim and explain his/her behaviour appears to help him change their life for the better: “with the conference they actually have to sit down with the people that they’ve hurt.”

After saying this, the officer admitted that if he had cautioned an offender more than once previously he usually would not refer the matter to a conference but would charge the offender instead:

“Like if they’re coming to notice and they’ve had their cautions I guess I don’t utilise the conference side of things as much as I should but when you’re dealing with the same offenders over and over and over again there’s no real point.”

MGD2 had referred a matter to a conference, but had not attended one and felt that it would be useful to attend a conference so they could see the impact it had. This participant said it might then assist officers to know what option might be the most appropriate in the future.

MGD3 said they had not been involved in a conference as they had not dealt with a matter for

which it was the appropriate option. RGD1 said they referred a matter to a conference but had had no feedback on the outcome of that conference, which would have been helpful to their decision making under the Act.

MGD4 said the potential outcome of the conference would determine their use of it:

“Generally if they’ve got quite a lengthy history and their attitude doesn’t appear to be something that would benefit from a conference then I would send them to Court. If I don’t think that them sitting down with the victim and the other stakeholders is going to be beneficial to them gaining something from it, then I’d send them to court over a conference.”

The data indicates that the participants, particularly those undertaking general duties work, would find attendance at a conference to be a valuable experience. This research did not extend to questioning police on any change they might have had in attitude to the legislative options under the Act, when they had attended a conference, but it is suggested that this may be an area of interest for further investigation.

Other than this finding the participants had mixed responses to the value of each of the three options under the Act and no option was particularly preferred over another. It must be noted, however, that most general duties officers interviewed were not present at cautions or conferences and thus, for some at least, their decision as to which option to use might have been influenced by efficiency of process rather than outcome.

(c) Use of Police Time when choosing options under the YOA

Some participants discussed the time it takes to deal with each of the options available under the Act. RRYLO1 and RRYLO2 believe use of the Act is only more time consuming for YLOs as they deal with cautions and conferencing. In RRYLO1’s opinion, a general duties officer referring a matter to a YLO has only to fill in the legal process details rather than having to complete a statement of facts or a brief.

RRSYO2 agrees with this by saying that there is less paperwork involved in cautions than in taking matters to Court, particularly as officers now record cautions on the COPs system. This makes cautions a more attractive option for officers:

“When I first started there was a little bit of paperwork involved, but it’s all on the computer, it’s picked up by the specialist youth officer..the youth liaison officer or the officer who’s delivering the caution and it’s dealt with and you don’t really have anything much more to do with it unless you specifically want to be involved in the caution.”

MGD2 considers that YOA matters can be very time consuming if an officer has to wait for parents to attend the station as support people for the offender:

“When you get a young offender you kind of roll your eyes because you know it’s going to take you off the road for five, six hours...so [the parents] take about four hours to come..to attend the support person role....it takes hours [to process a caution]. It’s just very tedious.”

This does not lead them to say, however, that they prefer warnings or conferences to cautions. The officer also notes the recent change in the legislation that allows a child of fourteen years or above to nominate their own support person. The officer believes that, in their experience, cautions have more impact if a parent of the child is present, rather than another adult chosen by the child.

MGD1 believes that:

“[the Act] could probably be used more...I know of police who just don’t bother...because the amount of paperwork, the amount of work that goes into it and you know they’re just going to walk out and it’s like nothing ever happened.”

MGD3 said that use of the Act is not a time consuming process. MGD4 said that:

“I would prefer to give a warning than a caution, because the process to get the information for the caution takes so long.”

Not all participants commented on the time constraints or otherwise of the use of the Act. Those that did had quite diverging views, with the general duties officers overall believing that its use is time consuming. This comment mostly related to time that is required to be spent in waiting for a child’s support person to attend.

(vi) Effect on Victims of Use of the Structures of the *Young Offenders Act*

One out of the thirteen officers interviewed, being RRYLO1, considers the Act to usually have a positive impact on victims. The remaining twelve officers are mixed in their views on the effect of the Act upon victims. Their views do not follow any pattern determined by geography or job description.

MYLO1 is equivocal about whether the Act's structure is positive for victims, as is a RRSYO. RRYLO2 states that conferencing provides a good outcome for victims but is equivocal about whether cautions or warnings have a positive impact. That officer said that at conferences:

“...there will be an outcome and that will be determined by the victims, the police and the offenders, and basically everyone who's there. So we all come up with some sort of a strategy to satisfy the victim I suppose...”

RRYLO1, who has attended three conferences, believes that the victims are generally satisfied with the outcomes of conferences as they are given the opportunity to express their feelings regarding the offence and the impact it has upon them:

“After it's all done [the conference] they're quite satisfied with what's happened, because they never get the chance to confront the young person...they get to express to them how they feel and stuff like that.”

In relation to cautions and warnings that officer said that victims:

“...Don't really know the process of what goes on. I mean, there is a way that a victim can write statements to the young person in the caution, but that happens very rarely.”

MYLO1 and RRYLO2 consider that the Act provides restorative justice outcomes,²⁰³

²⁰³ MYLO1 and RRYLO2 did not clarify what they meant by their use of the words 'restorative justice' though their discussion appears to indicate that it was identified for them by a positive outcome for the offender and/or victim. Their views seem to fall within an accepted definition of restorative justice by Marshall: “a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with

particularly when conferencing is involved and there is an outcome plan.²⁰⁴

MYLO1 believes that, generally speaking, a victim's happiness with the outcome depends on the nature of the offence, and the offender's remorse rather than any inherent structure of the YOA:

“It depends on a case by case basis, really what the offence was to start with, remorse shown by the young person, if any, throughout the process.”

That officer further believes that conferencing can be a more positive experience for victims than cautions or warnings:

“In regards to the victims it can provide...a bit more restorative justice in things such as conferences. The outcome plan can specify actions that have to be taken by the young person in question to make amends for what they've done, so it can ...have a position effect.”

RSYO1 states that victims appear to be happier with cautions and conferences as they appear to provide a more formal outcome than a warning. The officer believes that victims are often excluded when offenders are charged in a formal Court process and they are more likely to get an apology (which is what they want) from the use of the YOA, “...that's what most people just want to be apologised [to] so they can get on with a life.” That officer believes that victims prefer the option of cautions as they have more say in what is told to the offending child. The officer said that in the court process the victim is often superfluous to the proceedings and in a closed court matter may not even be allowed to witness the proceedings. Victims have told the officer that they feel more involved in cautions, as well as

the aftermath of the offence and its implications for the future”. Tony Marshall, ‘The Evolution of Restorative Justice in Britain’ (1996) *European Journal on Criminal Policy and Research* 4(4) 596 as cited in Kelly Richards, ‘Police-referred Restorative Justice for Juveniles in Australia’(2010) 398 *Trends and Issues in Crime and Criminal Justice* 1. Further discussion of the principles of restorative justice is contained in the chapter by Marilyn Peterson Armour and Mark S Umbreit, ‘Restorative Justice and Juvenile Offenders’ in David W Springer and Albert R Roberts (eds) *Juvenile Justice and Delinquency* (Jones and Bartlett Publishers, 2011) 391, 392.

²⁰⁴ An outcome plan might include an apology, reparation or participation in a programme. The plan is supervised by the conference administrator. Jane Sanders, ‘The Young Offenders Act: a guide for children's lawyers’ (Seminar delivered at New South Wales Young Lawyers Seminar, Sydney April 2002)<<http://www.theshopfront.org/documents/YOA.pdf>>.

conferences. RSYO1 advised that these options can also lead to the offender and/or his or her parents contacting the victim to apologise. This happens less frequently in court proceedings. The officer believes that the outcome most wanted by victims is a heartfelt apology.

RRSYO1 and RRSYO2 do not believe the Act works for victims. This is particularly due to the fact that victims do not see any monetary compensation from property damage matters as such compensation is infrequently given and only in conferences. In matters where the damage could be several thousand dollars, RRSYO1 believes there should be some recompense, possibly from the parents of the offender:

“I don’t think the Act works for them (the victim) at all. At all. Especially when you’ve got an offender that’s damaged their property or something like that. They’re the ones forking out the bill for repairs, whereas the offender gets a caution and let go.”

RRSYO2 believes that:

“Probably half of [the victims] tend to think that [the offenders are] just getting a slap on the wrist...I’ll try and educate them [the victims] in relation to how that *Young Offenders Act* actually works, maybe give them some percentages of how many people reoffend and most of the time they’re quite happy and satisfied with that.”

RGD1 said victims have told them that reporting crime is a waste of time, because of how offenders are dealt with by the legal system:

“Quite often it works very adversely with the victims on the basis that a lot of times they just throw it...they get disgruntled with police and other arms of the criminal justice system on the basis that what’s the point of reporting it, nothing’s going to happen anyway, they don’t care, it’s a joke, it’s a waste of time.”

This reference to reporting crime deals with issues broader than this Act and may not be a reflection specifically of the YOA. RGD1 clarifies this view by further saying that conferences can be a good outcome for victims:

“[In a conference] the victims are a bit more satisfied on the basis that they have a

say and they actually get to speak to them [the offender] first hand, they can actually show what they've been through..."

The view of a negative outcome for victims is supported by MGD4 who said:

"I would say I've turned up to numerous jobs and the victims say to me, 'I know there's nothing you can do about it, they're only going to get a slap on the wrist' and that would be a reasonably regular opinion of the victims. And that's before we even tell them that they're going to get a conference or a caution or something like that."

MGD3 said:

"Some victims are good [in terms of outcomes from the Act]. Some victims are disappointed that it's just a slap on the wrist and they're allowed to go out and reoffend again."

RGD2 agrees with this view and said victims did not understand how the Act works and why police are not treating matters more seriously:

"If they're victims of a fairly traumatic time they're pretty upset that nothing else is happening apart from a caution, especially if it's a caution or a conference. They don't understand it...I've had people who are very upset and wanted to take it further. They wanted to take it further because they just couldn't understand why we weren't getting more serious."

When that officer was asked if they explain to victims why the Act was used they responded:

"You try and explain it but they don't understand it. They think it's a police thing. It's not a police thing. It's not us. We give them the right direction where to go, what they need to do if they want that changed."

MGD1 said that they had not spent much time speaking to victims as they had mainly dealt with matters involving malicious damage to property. They therefore indicated that they would not be able to offer a good response to that question. MGD2 said they had not spoken to victims about how they thought the YOA worked for them and therefore that officer said they could not comment on victims' views of the Act. MGD5 said they generally believed

the outcomes from the use of the Act were not positive and cited the example of an acquaintance at a conference to support that view:

“It can be a bit of a joke for the victims..the parent [of the offender] failed to accept responsibility. [The offender] still didn’t accept responsibility yet they just completed the conference and there’s no further consequences or further actions.”

The majority of officers do not believe that the Act provides positive outcomes for victims, whether that be due to the lack of compensation provided by the Act or the lack of other punishment prescribed in the Act for offenders.

(vii) Effect on Offenders of Use of the Structures of the Young Offenders Act

Many of the thirteen participants do not believe that the YOA necessarily provides good outcomes for offenders. This view is held by all general duties officers, though for different reasons as well as by RRSYO1. The overall view of the general duties officers is that there is a sense of entitlement from some offenders that the Act has to be used and that this sense of entitlement does not lead to offenders apparently feeling remorse over what they have done. Once again property damage offences are mentioned by general duties officers as being demonstrative of the fact that the structure of the Act does not always provide appropriate resolutions. This is due to the fact that the outcomes provided by warnings and cautions do not include compensation for damage.

MGD1 believes that it is the taking of the child back to the police station for a formal caution that often has the most impact, rather than the caution itself. They describe it as a ‘wake-up call’. They believe that the lack of ramifications for the child’s behaviour means that use of the Act has no real impact upon them and therefore causes it to be ineffectual. The officer said some offenders use words to the effect of, “the *Young Offenders Act* doesn’t mean nothing (sic). I know I can get away with it.”

MGD2 feels the Act works very much in the favour of offenders. They said that it is good to use the YOA when the offender does not have a criminal record, but in serious cases or where the offender has come under police notice on many other occasions the officer believes the

Act is not helpful to offenders, as it does not help them to change their behaviour.

The same officer believes the Act might have more impact if children were to be taken to see courts and juvenile detention centres so they understand what awaits them if they offend, “...so if they know they’re going to get it tough then it [their behaviour] does change..”

MGD3 said that the Act does not change offender behaviour:

“I think they just feel that the *Young Offenders Act* gives them a chance to just admit what they’ve done and get off scot-free.”

This officer suggests an option such as community service might be more useful in changing offender behaviour.

MGD4 believes that the Act works better for offenders who are younger and that it ought not to be used past the age of about fifteen years:

“I find it hard to think that a seventeen year old doesn’t understand the consequences of their actions...”

The officer also feels that, aside from the impact of the punitive measure of the Act itself, the procedures under the Act are not helpful to children. The officer said that often children have to be detained in the cells of a police station until their parents arrive. This means they can be detained for many hours and in the company of unsuitable adults.

RGD2 believes that the Act is of assistance to children for whom offending is out of character and who have good family support:

“[The Act] gives us an option...if they know they’ve buggered up and it’s very unusual and that they wouldn’t do it normally it gives them a little piece of mind that it’s not going to bugger up the rest of their lives.”

In some areas the officer believes that the use of warnings, cautions and conferencing is ‘pointless’, as the children have experience of juvenile detention and do not consider anything else to be a deterrent.

RGD1 believes that often offenders do not understand the full severity of their actions when the Act is the only form of punishment. It does not make them accountable for their actions.

In certain cases the officer thinks that when children acknowledge their guilt they are only doing so because it will get them out of more trouble. The officer queries whether there is deeper understanding, acknowledgement of the wrong done and real accountability through the procedures allowed by the Act. They believe that there is not necessarily any form of process that shows the offender how their crimes affect others and that they are responsible for their actions:

“The basic attitude that seems to be young people these days with the Act is they know that they can do a lot of things these days and they’re not accountable for their actions. So along the lines of accountability, which is what I see to be a major part of the *Young Offenders Act*, ...that it doesn’t seem to work on the basis that they just see a way of getting out of trouble.”

Despite this apparent negative attitude to the Act and the perceived minimal impact on offenders, the officer states prior to this comment that:

“In regard to if it’s actually turned the behaviour of the young offenders themselves I probably wouldn’t be able to comment that much on the basis, I don’t tend to have a lot of repetition with the same person, so I can’t say if they’re being dealt with by other people or what’s happened from there.”

RGD2 mentioned that there might be a stronger feeling of remorse if the parents of that offender face implications for their child’s actions, such as having to pay for any property damage caused. The officer has the view that this might cause the parents to be supportive of the need for remorse from the offender as well as some understanding from the child, of the financial cost of the damage they have caused.

RRSYO2 believes that the options provided by the Act are a good tool and they place the offender in discussions with police. The options also alert them to the fact that their behaviour is unacceptable and could have more serious implications in the future. For other children who are repeatedly under police notice, it is more a case of using up the options under the Act and finally ending up before the Court. The officer believes that in their LAC this only occurs in about twenty percent of cases dealing with children.

“For offenders [that are] basically good kids, I think the *Young Offenders Act* is

great. It keeps them out of Court, it certainly puts them in the face of the police...and it does a fairly good job in sending the message home to them that, you know, their behaviour wasn't acceptable or what they did was wrong. But like I said there's always those kids that after even only two or three years in policing, you certainly get to know which kids are the ones who just used up their cautions and then the other kids, you know, there's been quite a number of kids that I've referred them for their first conference and that's been it. But like that first caution..there's also been a bit of a lead up of their behaviour towards that. You know been a bit unruly at home or whatever and then they've had that cautions and then I think they sort of sit back and go holy crap! So this is serious and they sort of pull themselves into line. I think [the Act] does a fairly good job in sending the message home to them that, you know, their behaviour wasn't acceptable."

RRSYO1 believes that with repeat offenders, the use of warnings and cautions is not always successful and conferencing ought to be utilised more.

RSYO1 believes that, for example, using a caution under the YOA allows the opportunity for the child to acknowledge the problem and often for police to target what is causing the problem. This is compared to the court process, which the officer believes is an artificial way of dealing with the offender's behaviour. The officer said the magistrate often speaks to the legal practitioners and the police and tells the offender not to commit crime again. The offender then walks out of the court:

"They have no idea what was going on, it just went straight over their head and they had very little acknowledgement of what they did...[there isn't] a lot of interaction with the legal system, with the actual reason why they've done it."

RSYO1 further believes that offender ramifications exist under the Act and that use of Act often helps to 'get to the root of the problem' which has caused the offence. They believe that there is better opportunity, through use of any of the three options under the Act but particularly through cautions and conferences, to discuss any issues and to involve parents or carers in that discussion. RSYO1 has the view that, as appearing at Court is a formalised process, there is little opportunity to go behind the offence and locate its cause.

MYLO1 believes that children generally understand the legal process provided by the YOA. That officer thinks that children who participate in a youth justice conference are less happy at the end of it than if they have been warned or cautioned, due to the fact that there is usually an Outcome Plan at the end of the conference. Some children consider a warning or caution to be a slap on the wrist, as no conditions can be placed on it aside from the admission of the offence. With a conference there is often a list of things the offenders have to do and the children therefore consider it to be more serious. MYLO1 believes that by making amends through an Outcome Plan for the wrong done, the offender experiences a more positive outcome than through the other YOA options or via the criminal justice system. The officer also has the view that by having to admit the offence an offender is more likely to show remorse than through the Court system.

MYLO1 said they experienced some children coming under police notice after previous use of the YOA, but this was limited to about ten to fifteen percent of the children who had previously been dealt with under the Act:

“There have been a few kids that come back under police notice, but the majority, I think...they do learn their lesson, as part of the first caution. So I think, yeah, usually you don’t see them back, back under police notice, which I think is good.”

RRYLO1 believes that use of the Act might not be of assistance to some offenders. The officer believes that the Act is most useful in cases where the child has made a mistake or has been peer pressured or bullied into doing things they did not want to do. The officer said that in their rural community there are not many of these cases and the majority of offending children are repeat offenders and commit more serious offences. The Act does not assist these children.

“Some kids are beyond help and nothing; no process that we give them is going to help them. We could charge them a thousand times and...it doesn’t seem to phase them. But there are some kids, I suppose, that you have to realise that kids make mistakes, or kids get peer pressured and bullied into doing things that they don’t want to do and that’s what the *Young Offenders Act* helps.”

The officer believes that the reality of Court or a conference can be intimidating for a child but the conference usually has more impact as the child has to be involved in the conference,

whereas in Court they do not really have to do or say anything regarding their behaviour.

RRYLO2 states that approximately sixty percent of offenders, for whom the Act is used on a first time basis, do not come under police notice again. That officer also believes that conferences have the most impact on offenders, but only if the victim attends the conference:

“there’s no doubt in my mind, when the victim is present and is able to tell their story and what impact the young person had on their life...often there’s a visible reaction from the young person. Sometimes they’re in tears, often they’ve got their head down in shame and it’s difficult for us to know whether they really are remorseful or not, but often it does appear that way, when there’s a victim. When there’s not a victim, it’s just going through the motions.”

The officer said that when cautions are used, the only action that can be enforced in relation to the child is a letter of apology. The officer’s view is that real benefits from use of the Act come to offenders when they have to do some task by way of recompense.

Some officers specifically discussed whether the Act provided deterrence to future illegal behaviour. MGD1 and RRSYO1 believe that it does provide ‘some’ deterrence. MGD2 and MGD3 believe it does not for a repeat offender and a RGD2 believes the Act is only useful for a non-recidivist offender.

“If it’s a non-recidivist offender, someone who we don’t normally come across, maybe a one off issue, maybe it appears he has been talked into doing something that he shouldn’t have, usually a caution or warning or a conference can help, but there’s other ones where it’s not [helpful].”

The remaining participants do not specifically refer to the Act being a deterrent to future illegal behaviour but their general comments indicate that the Act has mixed success for repeat offenders.

RRSYO1 holds a definite belief that insufficient offender ramifications exist under the YOA, “I would rate it at probably a 20% success rate. I believe it’s not working.”

Aside from the view of this SYO, which is later softened by the comment that successful use of the Act ‘depends on their criminal history’, it appears that SYOs and YLOs are more

supportive of the Act and its success in avoiding reoffending than general duties officers. This might once again be linked to the additional training and experience YLOs and SYOs have of the Act than general duties officers.

(viii) Influence of Socio-Economic Factors on Offender Behaviour

During review of the data it became apparent to the author that several participants commented on family background as being an influence on offender behaviour. The author did not specifically introduce questions to participants on this issue and the information was freely given during the interviews.

Several officers work in Local Area Commands with a high youth population. Those officers mentioned that the chance of offenders improving their behaviour in the future depends on their socio-economic circumstances and the attitudes and support of their parents. If the parents are supportive of the child and are generally law-abiding people, the procedures under the Act are likely to have a greater impact on the offender and they do not come under police notice again.

For offenders from deprived family circumstances there is a higher likelihood that they will understand all of their rights under the Act, including the possible misperception that they have the right to three uses of each option of warning, caution and conference before they must go to court. There is also a higher chance, according to some officers, that they are disdainful of the processes under the YOA and will re-offend, despite the use of the Act.

RRYLO1 states that the success of the Act can depend on factors such as whether the offender is regularly attending school.

RRYLO2 supports this argument by saying that in cases where children regularly attend school and have supportive parents, they might be influenced into illegal behaviour by their friends. In those cases the officer said that they could see that police involvement in the matter is a traumatic experience for the children and they do not reoffend:

“Most kids [in our area] are from a reasonable home, they have supportive parents, they attend school regularly. They go out, they might be egged on by their mates, they might damage property, they might steal something, they might

get into a fight...all of sudden police are involved, for most of our kids you can see that is a traumatic experience to be here, even though we're just sitting down having a chat...and we don't see those kids again."

In other cases the officer said that children from dysfunctional homes do not show remorse and will often re-offend:

"I really feel for those kids, because they haven't really got a chance. You look at their home life and it's a mess. They don't have discipline in their life, they don't have any structure in their life and they don't really give two hoots. The police don't bother them."

That officer also believes that intervention with children at school can pre-empt illegal behaviour. Children who misbehave at school, are destructive of school property or are suspended are likely, in this officer's opinion, to become offenders on the street:

"...Teachers and principals can identify young people what are at risk of becoming offenders, because they're actually offenders at school, in the school system. Either they're a pain in the butt, they're destructive at school, they get suspended from school, yet they haven't committed an offence under the *Crimes Act* or under an Act where the police would get involved."

RSYO1 believes that the outcomes for offenders from use of the Act are usually good in circumstances where there is no criminal record and where the parents appear to be supportive of the child. When they have 'some pretty questionable parents', the circumstances often change:

"Sometimes the parents are unemployed, using drugs or they are sometimes not home, someone has to go check these homes, parents haven't been home for weeks. We don't even know where the parents are. So the kids get up to mischief and [the *Young Offenders Act* sometimes it allows you to get DOCS (Department of Community Services) involved and so rather than them getting a criminal record, getting kicked out of school and all that, you know, getting rid of the last bit of social interaction they've got...it sort of redirects them back on track."

RGD2 believes that in their area there is a problem with youth offending. In some sections of

their Local Area Command the officer believes that use of the Act is ‘pointless’. Those children accept juvenile detention and are not dissuaded to go there. The officer also thinks that before deciding to use the options under the Act the officer should consider the family of the offender, as that family structure might be a cause of the offending.

RGD1 states that in their previous Local Area Command there is a high youth unemployment rate. In that area there are issues brought about by boredom, excessive alcohol consumption and children hanging around on the streets. This causes greater repeat offending and less respect for the legal system when those offences are dealt with under the YOA. The officer believes this is a societal problem and that:

“Community standards are slipping...[if] you don’t want to integrate with society and live by their standards why should society treat you to our standards when you basically just snub your nose at it.”

The officer further believes that with these repeat offenders, police should have more discretion to use stronger alternatives:

“...if this is your attitude...we can put you straight before the Courts...It could also be like that with the young offenders, and say look, you’re not waking up to yourself, you don’t realise it, we’ve got these alternatives.”

MGD3 said that, in their experience of having worked in the past in a Local Area Command with a high youth population, those children that offend most often have parents that offend. The officer said this made the parents’ attendance at cautions worthless as they are unlikely to assist in modifying their child’s future behaviour²⁰⁵.

²⁰⁵ The officer’s views that offending may be influenced by socio-economic factors is supported by Don Weatherburn and Bronwyn Lind who state that “...concentrated disadvantage acts to increase the rate of offending because it increases the level of contact between juveniles already involved in crime and juveniles susceptible to such involvement.” Don Weatherburn and Bronwyn Lind, *Delinquent-Prone Communities* (Cambridge University Press, 2001) 170. Evidence in the United Kingdom also demonstrates that children who come to the attention of their Youth Offending Teams suffer from many aspects of socio-economic disadvantage. See Rod Morgan, ‘Children and Young People: Criminalisation and Punishment’, in Monica Barry and Fergus McNeill (eds) *Youth Offending and Youth Justice* (Jessica Kingsley Publishers, 2009) 56, 68.

(ix) Delay in Use of the *Young Offenders Act* Procedural Options

Unsolicited information was received from officers regarding delays under the Act. RRYLO2 advised that in their area there are often delays in conferences being convened. The officer understands this occurs as a result of the lack of conference convenors from the Department of Juvenile Justice being available to run the conferences. The officer said the result of this delay is that victims lose interest in attending a conference, as they move on with their lives from the incident and do not wish to re-live it up to six months after the event, if they do not have to do so.

It appears that in most Local Area Commands formal cautions are provided by YLOs, as is the procedure prescribed by the NSW Police Force guidelines. RRSYO1 advised that delays can occur in cautions taking place in their Local Area Command. These delays can be up to six months. The officer thinks that the impact of a caution on the offender decreases as a result of this delay.

MGD3 and MGD5 consider that cautions in their Local Area Commands are dealt with very promptly. The remaining officers interviewed do not comment on the matter.

(x) Legal Advice given to Offenders

The procedures under the YOA provide that a child is entitled to legal advice if they or their guardian request it.²⁰⁶ This option is a central tenant of the wider criminal justice system and informs the practice of police in dealing with all alleged offenders.

The issue of legal advice is mentioned by RRSYO2, RSYO1 and RRYLO1 in their interviews, when they raise the topic of admissions by offenders. A caution or conference under the YOA may only be utilised by police when the child admits to having committed the offence to which the caution or conference applies. In many cases where solicitors advise against an admission, the officers believe that the outcome for the child is worse by submitting them to the Court process. Without that admission, however, the police are left with no other option but to send the matter before a Magistrate.

²⁰⁶ *Young Offenders Act (1997) NSW s 7(b)*.

Those officers believe that in following legal advice given to them, the offenders are not following the best option available, which is to admit the offence and be dealt with under the YOA. RRSYO2, RSYO1 and RRYLO1 commented on the fact that once legal advice is sought, some offenders tell the police officers that a solicitor has told them to make no admissions about the offence.

RSYO1 states that the Legal Aid ‘mandate’ (in their words) is to tell offenders not to admit to anything, even if the officer explains that the outcome for the child would be better if an admission is made:

“That’s probably the biggest reason why we don’t charge as well when it comes to admissions because when they speak to the juvenile hotline, the juvenile Legal Aid, their standard answer is don’t say anything...but sometimes Legal Aid, you explain to them well this is what the go is and they will still say no, our mandate is still to tell them not to say anything.”

The officer said it has got to the point of officers recording details of their discussions with Legal Aid staff on the fact sheet²⁰⁷, so that magistrates are made aware that officers have recommended use of the Act, but have been stymied in that process by legal advice of a non-admission. MYLO1 differs in their opinion and said they have not found dealing with Legal Aid to be a problem in this regard.

RRSYO2 believes that on many occasions a child had sought advice from the Youth Justice Hotline and has then been advised not to make an admission:

“That’s the only thing that precludes them from getting their caution, so we’re going from a matter that they would get a caution for, straight to Court and then they go to Court and plead guilty on the first instance and the Magistrate goes, what are you doing here? So then the Magistrate cautions or refers them back to us for a caution. It’s like...there’s that whole time wasted.”

That officer said they have resolved the issue somewhat by speaking to the solicitor when they telephone them at the child’s request. RRSYO2 gives the solicitor a full description of

²⁰⁷ A Fact Sheet is handed up by the prosecution at a hearing and provides details of the police case against the offender.

the events that have occurred and which have led to the charge. By doing this, the officer believes that the children are receiving more informed advice from solicitors and are not simply being told to make no admission, as has been that officer's past experience. The officer adds that this has resolved some of the problems with the general legal hotline but the issue of advice not to admit offences is now more apparent with the Aboriginal Legal Service.

RRYLO1 also notes a concern regarding advice not to use admissions from the Aboriginal Legal Service:

“A lot of Aboriginal kids come through and they speak to the solicitor and the solicitor tells them not to say anything, which throws the *Young Offenders Act* out the window, because you've got to have an admission, so that's where we fall behind in having the *Young Offenders Act* being used as much as I'd like, because of those admissions. We don't get them.”

As noted above, in most instances in country areas the only available legal contact for a child (or any impecunious offender for that matter) is by way of a legal telephone service. RRSYO2 advised that the usual procedure is for a child to speak briefly to the solicitor by telephone, once they have been charged. That solicitor usually has not been given any background on the matter or charge sheet prior to advising the child. The officer believes that it is mainly for this reason that there is a rule of thumb by such solicitors to advise their client not to plead guilty.

In most circumstances of solicitors advising clients a solicitor has a face to face conference with that client (however brief in legal aid matters) and would have at least the fact sheet provided by police, prior to giving advice on a plea. When giving legal advice by phone these options are not always available but would be deemed by most solicitors to be essential to the giving of proper advice. In those circumstances and based on her own years of legal practice, the author finds it unavoidable that such legal advice is given.

By way of contrast MGD1 said that when offenders have advice from solicitors and barristers in person in their metropolitan location, it usually means that the child will make an admission to the offence:

“Well, they’re told to go with the flow so they can get a caution and a warning, because they know it doesn’t mean anything in a couple of years. It’s not a criminal history. It doesn’t have any ramifications such as a charge, so I think the lawyers and barristers [say] ‘do the right thing, just cop to it and you’ll be scot free in a couple of years.’”

(xi) Court’s view of Police Use of the *Young Offenders Act*

Several officers made mention of the Court’s role in police use of the structures of the YOA. RGD2 said that Magistrates are critical if police do not use the Act when there is an admission of an offence, even when the offence is serious and the officer believes it should go to Court, “...you’re sending them to Court because you think they’re a problem and the Magistrate criticises it and sends it back.”

RGD1 feels the overall impression from their Local Court Magistrate is that the Act should be used and there is no indication from that Court that it is being used inappropriately by police. The officer believes, however, that if they refer a matter to the Court, instead of using the YOA, the Court should support that decision:

“I need to be supported from other arms [of the criminal justice system], magistrates and so on and so forth saying ok, you’ve done this against the Act but there are reasons for doing it [referring to Court]. Don’t be critical of the police for trying to help out.”

MGD5 stated that:

“Once they [offenders] they do use up their cautions and they do get charged then I think three chances is it...if they haven’t got it by then, then I think the magistrates need to realise that it sort of defeats the purpose [of] sending them back for another caution when that happens.”

The consensus amongst participants who raised the issue appears to be that the Local Court Magistrates generally do not appear to have concerns with how the Act is used in their jurisdictions, but that the officers occasionally hear of matters being sent back from the Court for cautions and so forth.

(xii) Modification to the Structure of the *Young Offenders Act*

The participants were asked about whether, in their professional opinion, the Act requires modification. MGD1 suggests that the Act be used for a smaller category of offences:

“I’d like it to be harsher for certain offenders, or certain people, like certainly less chances...it just seems to be, for a lot of people, an easy way out and it doesn’t affect them....I think it should be stricter and there should be more ramifications.”

MGD3 thinks that community service should be an option under the Act:

“Maybe give them some community service or something where they’re not just sent back out there, ‘righto, don’t do it again’. But give them something to do. Like whether they do a community service or you...stuff like that.”

MGD5 thinks that too many cautions are issued under the Act:

“In certain circumstances yes where juveniles or kids make mistakes so they deserve a second chance, however once you get three second chances, you know, it’s time that more serious action needs to be taken.”

RSYO1 believes that victims should have more say in cautions, such that there might be a mechanism for the victim to write a letter that is read out to the offender at the caution or for the victim to sit down with the offender and the YLO, so they could tell the offender about the impact of the crime on them.²⁰⁸

Several of the officers did not consider the Act to have flexibility, but do not explain why they think this to be the case. This may be due to the somewhat misguided belief of some of the officers that it is necessary to use the tiered system of three of each of the least restrictive options. This is discussed in Chapter 8 below.

RRSYO1 and MGD4 think that the YOA should not be used for children aged fifteen and above, as they are old enough to understand their actions. RRSYO1 further believes that:

“If the youth admits the offence and [when] receiving the warning they have to

²⁰⁸ There is already allowance under *Young Offenders Act* s 24A for victims to write a letter to the offender, which can be handed to the offender by police at the caution. The victim is not entitled to attend the caution.

come to the police station and bring their parents and then if their parents are not willing to pay for the damage caused well, then it goes to Court I think. I think parents have to start taking responsibility for their children.”

RGD2 considers that police ought to have more discretion in using the Act. They believe that:

“A lot of it’s a case by case basis. It doesn’t take into account backgrounds, social pressures from outside, demographic, it doesn’t account for that. It accounts for youth as a whole...people will rot it to their best advantage.”

RGD1 thinks that police need more discretion to put in place the penalty that the officer thinks best fits the circumstances. They feel that the very supportive attitude of the criminal justice system to the YOA precludes officers from deciding in a particular instance that a more severe penalty is required.

MGD2 thinks that in order to prevent offending in the first place children could be taken to a youth detention centre or Court, as part of a school programme. This might show them the results of offending and dissuade them from taking that path:

If they get taken to a youth detention centre... that they could see that it’s not a good environment.”

RRYLO2 believes that the Act itself does not need to be modified but that more schemes need to be implemented at schools to avoid the Act having to be used in the first place. In essence, the officer believes that by the time the YOA is used for some offenders it is too late for their situation to be changed.

“We work in with the schools and we try and address those young people who are at risk of becoming offenders. So my thinking is that if we can minimise the number of kids that actually become offenders, then it reduces our workload within the *Young Offenders Act* anyway.”

The officer believes that the impact on a child’s behaviour from their dysfunctional family life can not necessarily be repaired by the scheme provided by the Act and that funding should be pinpointed at children misbehaving at school. The officer suggests that this

misbehaviour is often one of the first indicators of potential criminal behaviour, which results from a lack of family guidance and support.

RRSYO2 believes that the Act can come into conflict with the *Evidence Act* (NSW) in that advice against saying anything incriminating is not always given before a child admits the offence under the YOA. If the offence is subsequently not dealt with under the YOA and is heard before a Court, the admission by the offender ought not be mentioned and all other evidence taken by police from the offender might be excluded.²⁰⁹ This matter raises some broader legal issues that are dealt with in Chapter 7 below.

(xiii) Conclusion

The majority of participants believed that New South Wales police officers generally supported the YOA, with varying degrees of support between LACs. When asked their own views of the Act all general duties officers and the majority of specialist youth officers gave conditional support to the scheme provided in the structure of the Act. Youth Liaison Officers were unconditional in their support of the procedural options in the YOA. The majority of participants used warnings and cautions and their experience of conferencing was limited, though the YLOs who had attended conference believed they were more beneficial than cautions.

Participants had mixed attitudes to the impact of the structure of the Act upon victims and did not believe that it necessarily provided a good outcome for them. The officers believed that the Act provided a better outcome for offenders than victims, though this opinion was held more by YLOs and SYO's than GDs officers. The officers who were most vocal in their opinions that the Act did not provide a good outcome for victims and offenders were those who had only conditional support for the Act. This equivocal support was based on their experience of factual instances which they believed demonstrated that the Act did not work terribly well.

Several participants commented on the influence of socio-economic facts on offender behaviour. These officers came from areas with a large youth population and their view was

²⁰⁹ Discretion to exclude admissions is dealt with under Part 3 *Evidence Act 1995* (NSW).

that family and economic factors had a negative influence on re-offending and this re-offending behaviour was not curtailed by the procedural options of the YOA.

Additional issues commented on by participants included the fact that lawyers often advised children not to plead guilty to offences, thus necessitating a Court process instead of application of the Act. Some participants also advised that Courts support use of the Act and refer matters back for its use. Some participants believed that the Act should be modified, though the majority of participants who commented on this advised that they required more time to consider appropriate changes before commenting further.

6. Comparative Analysis of Findings in the Literature and the Data.

(i) Introduction

In this chapter the author will undertake a comparative analysis of theories described in the literature in Chapter 3 and the findings made from the data obtained in this study. Whilst previous research on police attitudes to the YOA has not been substantive nor relatively recent, it has provided some foundational findings on police attitudes to the Act and what might influence such attitudes. The author will summarise the theories found in the literature (with their relevant point in the text noted by chapter reference for location purposes). She will then provide under each heading of “Finding” a summary of the data provided in this study to indicate whether or not a data shift might have occurred in regard to each theory.

(ii) Comparative Analysis

As noted in Chapter 3 above, the author’s findings from the literature indicate that little evidence is currently available regarding police attitudes to the YOA. The author’s research has uncovered significant findings from police, some of which supports the views of the literature with regards to police negativity towards the Act, despite its use. The data on police attitudes referred to in the literature is limited and previous research projects that found that data were focussed on other themes, such as the statistical use of the YOA by police.

The findings in this research project indicate that police are aware of the YOA and use it, thus supporting what little previous research exists on the subject. What the author’s research has also achieved, in addition to supporting this previous finding, is to add significantly to the limited body of knowledge of police opinions regarding the Act.

A summary of the findings in the literature and the impact of the data from this research on those findings are discussed below:

Theory: Some police officers do not support the use of the Act.

Research, in the years following the Act's introduction, indicated that there was a reluctance from some officers to use the YOA and that the options under the Act were perceived to be too easy on offenders.²¹⁰ Research in other jurisdictions indicated that diversionary work was seen as non-crime fighting and of lesser status.²¹¹

Finding: All YLOs are unconditionally supportive of the YOA as are two of the three SYOs interviewed. These officers believe that the Act provides them with a useful restorative justice tool to keep a child out of the Court process, as that process often provides a negative outcome for a child. These officers also believe that the Act provides the opportunity to look behind a child's behaviour to their social and domestic circumstances and to rectify any problems arising there from. These findings suggest that the additional training and experience of YLOs particularly and for SYOs to a lesser extent, play a part in police support of the Act and its discretionary use. This support may also be due to the fact that the majority of YLOs interviewed chose that role and thus may have a more supportive perspective of youth offending than general duties officers.

Chapter 5(iii)(a).

One SYO and all seven general duties officers interviewed have conditional support for the Act. These officers believe that the Act is useful in cases of minor offences, for first time offenders and where the offender is below the age of fifteen years. They do not find it useful for habitual offenders. Those

²¹⁰ Ann L Parker, Phillip B Mohr & Carlene Wilson 'Attitudinal and Personality Predictors of Diversionary Behavior by Police' (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 10. See also the later report by Ann L. Parker and Rick Sarre 'Policing Young Offenders: what role Discretion?' (2008) 10,4 *International Journal of Police Science and Management* 474, 481. Brendan Delahunty 'Taking 'Kiddie Cops' and 'Care Bears' Seriously' (1998) 23(1) *Alternative Law Journal* 13, 17 and 18. Nicola Silva 'Breaking the Cycle of Juvenile Crime'[August 2001] *Police News* 18, 19. Janet B L Chan 'Conclusion: Reshaping Juvenile Justice' in Janet B.L. Chan (ed), *Reshaping Juvenile Justice* (Sydney Institute of Criminology, 2005) 187,194 and Nicola Silva 'Breaking the Cycle of Juvenile Crime'[August 2001] *Police News* 18, 19.

²¹¹ Venessa Garcia, 'Constructing the 'Other' within Police Culture: An Analysis of a Deviant Unit within the Police Organization' (2005) 6 *Police Practice and Research* 65,77.

officers who have experience in areas of high youth unemployment say the Act's structure is not terribly useful as it can be manipulated by offenders, who know to ask for its various options to keep themselves out of the harsher Court process.

Chapter 5(iii)(b).

These findings agree, to some extent, with the findings in previous research,²¹² which indicate that police do not readily support this discretionary restorative justice scheme, despite the fact that they use it. Previous research indicates that police objection to the YOA structure is based on a philosophical view that the scheme is too soft. The reasons given by the officers in this study indicate that their objection is based on their experience of use of the Act over time, perhaps giving those views some factual validity. In addition their views are possibly influenced by their colleagues at their Local Area Command, whom one officer said have mixed feelings about the Act.

Chapter 5(iii)(b).

Support for the YOA was conditional for general duties officers and in some instances carried forward the views expressed by Silva that the Act is too easy on offenders.²¹³

“I think they (the offenders) just feel that the *Young Offenders Act* gives them a chance to just admit what they've done and get off scot-free.”(MGD3)

Despite this view of the general duties officers the research indicated that the majority of the participants used the Act and that its use was supported by the higher command of the NSW Police Force.

Chapter 5(III)(b).

²¹² Janet B. L. Chan 'Implementation of the *Young Offenders Act*' in Janet B.L. Chan (ed), *Reshaping Juvenile Justice* (Sydney Institute of Criminology, 2005) 25,46.

²¹³ Nicola Silva 'Breaking the Cycle of Juvenile Crime' [August 2001] *Police News* 18, 19.

Theory: A police officer's attitude causes them not to use the discretionary procedures under the Act.

Previous research indicates that a police officer's attitude has at least some influence on how they will use their discretion in a chosen situation, be that in regard to mental health issues, domestic violence matters or the use of police powers.²¹⁴ Additional research also indicates that departmental policy choices and police organisational guidelines can override the influence of the police officer's attitude on their discretionary choices.²¹⁵

Finding: Use of the Act is not determined by a police officer's training or their attitude to its structure. The majority of officers say that, as the Act is law in New South Wales, they know they have to use it and believe most other police feel the same. Some officers may be of the mistaken view that they have to use the options under the Act in a certain way and a certain number of times (see Chapter 8 for further analysis of this issue and its implications), but their discretionary choice on most occasions is to use to the Act and they believe this choice is supported by their Local Area Command.

Chapter 5(i).

The author's research indicates that, whilst the YOA allows discretionary choice, some officers feel they are criticised by the Court if, in using that discretion, they determine that the Act should not be used and instead the matter be referred for hearing. Whilst specific detail of such instances was not determined in this exploratory study, these preliminary findings indicate that the officers may be influenced in their choices by organisational constraints, rather than by their attitude and discretion. One officer considers such instances to demonstrate a lack of support for their professionalism as it takes away their discretionary powers to choose the best outcome in the

²¹⁴ Simon Bronitt and Phillip Stenning, 'Understanding Discretion in Modern Policing' (2011) 35 *Criminal Law Journal* 319, 321.

²¹⁵ Ronald J. Berger, Marvin D. Free Jr and Patricia Searles *Crime, Justice and Society – An Introduction to Criminology* (Lynne Rienner Publishers, 3rd ed, 2009) 411.

circumstances.²¹⁶

The general view of some participants is also that, as the Act was the ‘law’ they ought to use it, whether or not they agreed with its structure. Their support for the Act appears to be influenced by departmental and legislative constraints rather than by their own attitude and discretion:

It is...”just the way we do business now” (RRYLO2)

“Everyone is pretty much aware that it is legislated...so I don’t think there’s any command that would discourage the use of the Act.” (MYLO1)

There was originally resistance in some areas of the NSW Police Force to use of the Act.²¹⁷ Over time it appears that the Act has become more accepted by certain LACs and therefore the discretionary choice of officers not to use it may be reducing due to its acceptance at an organisational level. Thus, whilst attitudes to the Act may remain conditional in some instances, these attitudes may now have less influence on police discretion regarding its use than was indicated by research shortly following the Act’s introduction.

Theory: The amount of training in regard to the YOA affects an officer’s support of that Act.

Previous research indicates that officers believed they had inadequate training in regard to the Act. The authors of that research indicated that this might account for the negative attitude of police towards the Act.²¹⁸ Police officers

²¹⁶ Michael Rowe ‘Rendering Visible the Invisible: Police Discretion, Professionalism and Decision-Making’ (3 September 2007) 17 *Policing and Society* 279, 293.

²¹⁷ Janet B L Chan ‘Implementation of the *Young Offenders Act*’ in Janet B.L. Chan (ed), *Reshaping Juvenile Justice* (2005) 25,45,193 and Ann L. Parker, Phillip B Mohr & Carlene Wilson, ‘Attitudinal and Personality Predictors of Diversionary Behavior by Police’ (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9,10.

²¹⁸ Julie People and Lily Trimboli *An Evaluation of the NSW Community Conferencing for Young Adults Pilot Programme* (NSW Bureau of Crime Statistics and Research, Sydney, 2007, 55.

who had attended a conference appeared more likely to refer children to a conference²¹⁹ and those who were more familiar with it had more support for the Act²²⁰. Additional training, however, did not always counteract the effect of a lack of a philosophical commitment to the Act by officers.²²¹

Finding: Participants generally agree that further training in relation to the Act would be helpful, preferably when officers are probationary constables, so that the learning of the Act's structures can have more impact.

Chapter 5(v)(b).

There remain indications of a belief of police officers that they have inadequate training in relation to the YOA. Whilst further training was suggested by some participants, the research carried out by the author did not support previous findings indicating that it would lead to increased use of the Act, as indications are that the Act is used despite some philosophical negativity towards it. Further training is suggested by some participants but the benefit of such training was not elucidated by this research project and may be a matter for further investigation.

Theory: Attitudes of police to the YOA and conferencing would improve if police were able to attend conferences.

Nicola Silva noted that police attitudes to the YOA positively changed when officers were able to attend a conference or had further training regarding the structure of the Act, as prior to such training their attitude to conferencing was

²¹⁹ Anna Louise Stewart and Frances Smith, 'Youth Justice Conferencing and Police referrals: The Gatekeeping Role of Police in Queensland, Australia'. (2004) 32 *Journal of Criminal Justice* 345, 355.

²²⁰ Janet B. L. Chan, Jenny Barga, Garth Luke and Garner Clancey, 'Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997' [2004] 28 *Criminal Law Journal* 72, 72.

²²¹ Janet B. L. Chan, Jenny Barga, Garth Luke and Garner Clancey, 'Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997' [2004] 28 *Criminal Law Journal* 72, 82.

often negative.²²² This view was supported by the NSW Attorney General's Department research in 2002, though other research indicated that police accountability can be enhanced by conferencing and this might influence a negative attitude towards conferencing in some instances.²²³ In 2004 research lead by Janet Chan indicated that once police attended a conference or, as noted by Silva, had further training, they would be more likely to have a positive attitude towards the Act.²²⁴ It may therefore be that training, along with attendance at conferences, possibly as part of that training scheme, may be the key to a positive attitude to conferencing and the YOA.

Finding: Some officers stated that they wish to be able to attend conferences, but due to their workload and other commitments they are unable to do so. The majority of officers who hold this view did not comment on why they have that view and or what use attendance at a conference might be. Whilst the officers generally do not say why attending a conference would be useful YLO1 sums up a possible cause, in that it might assist police to understand the structures of the Act more fully and thus help them decide what option under the Act might be more appropriate in a particular circumstance.

Chapter 5(v)(b).

Attendance at conferences is suggested by participants to be a useful training option, not necessarily to induce a more positive attitude to the YOA, as previous research suggested, but to assist officers to fully understand the structures of the Act and how best to use it.

²²² Nicola Silva 'Breaking the Cycle of Juvenile Crime'[August 2001] *Police News* 18, 19 and Anna Louise Stewart and Frances Smith, 'Youth Justice Conferencing and Police referrals: The Gatekeeping Role of Police in Queensland, Australia'. (2004) 32 *Journal of Criminal Justice* 345, 349.

²²³ Richard Young, 'Just Cops Doing "Shameful" Business": Police-led Restorative Justice and the Lessons of Research' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles* (Hart Publishing, 2nd ed, 2003) 195, 210.

²²⁴ Janet B. L. Chan, Jenny Barga, Garth Luke and Garner Clancey, 'Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997' [2004] 28 *Criminal Law Journal* 72, 82.

Theory: The community might influence police not to use the Act.

Acceptance of the discretionary scheme provided by the Act can be influenced by community views that such discretionary schemes are too lenient²²⁵ and that they are a ‘soft option’ in fighting crime.²²⁶

Finding: The participants do not comment specifically on community influence on their attitudes, aside from giving their views on victim’s views of the Act. Several officers, who give conditional support to the Act, commented that many victims have a negative perception of the Act. It could be argued that these views from victims provide some of the grounds for those officers to conditionally support the Act. It might therefore be said that the community might influence police attitudes to the YOA but it does not appear to influence their use of it. The data indicates that police are generally using the Act, whatever their attitude towards it and the influences upon that attitude.

Chapter56(vi).

The author’s research indicates that, despite negative perceptions from some communities and victims, officers use the Act and will even attempt to explain the Act’s intent to victims.

“You try and explain it but they don’t understand it. They think it’s a police thing. It’s not a police thing.” (RGD2)

Communities can have an additional influence, such as may occur where officers work in areas of socio-economic disadvantage. Such communities can influence officers, through the nature of their dealing with young people, to have a more negative attitude to the YOA that was indicated by other officers in the author’s study. Once again, however, this negative attitude does not appear to cause officers not to use the Act.

²²⁵ NSW Attorney General’s Department *Report on the Review of the Young Offenders Act 1997* (October 2002).

²²⁶Janet B. L. Chan, Jenny Bargen, Garth Luke and Garner Clancey, ‘Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997’ [2004] 28 *Criminal Law Journal* 72, 82.

Theory: Police authoritarianism and conservatism can have a negative impact upon police support for the options provided by the YOA.

Senior officers appear, as defined by rank and age, can deal more harshly with young offenders.²²⁷ This finding follows that of Gayre et al, who determined that attitudes of police become more conservative the longer they remain in the police force. Such conservative attitudes may make officers react defensively to schemes that involve the concept of restorative justice.²²⁸ The Act is seen by some police as an alternative to punishment and not an alternative punishment and therefore not useful in changing offender behaviour.²²⁹ Cultural and social influences may affect police attitudes to the YOA but research has yet to determine the extent to which they have influence.

Finding: The research findings agree to some extent with the literature, but with a focus on the seniority of officers rather than any consideration of authoritarianism or conservatism, though of course these could be linked. Some participants believe that more senior officers have negative views towards the Act in that they simply consider that charging offenders is the preferred option. Others believe that the issue is that older officers have insufficient training on the Act and so do not understand the importance of its structure or the role of YLOs.

Once again the suggestion has been raised by officers in the findings that the more officers are trained in relation to the structure of the Act and its usefulness, the more they are likely to support it.

²²⁷ Ann L Parker and Rick Sarre, 'Policing Young Offenders: what role Discretion?' (2008) 10,4 *International Journal of Police Science and Management* 474, 481.

²²⁸ Richard Young, 'Just Cops Doing "Shameful" Business': Police-led Restorative Justice and the Lessons of Research' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles* (Hart Publishing, 2nd ed, 2003) 195, 221.

²²⁹ Richard Young, 'Just Cops Doing "Shameful" Business': Police-led Restorative Justice and the Lessons of Research' in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles* (Hart Publishing, 2nd ed, 2003) 195, 198.

Chapter 5(vii).

Participants generally agree that further training in relation to the Act would be helpful, preferably when officers are probationary constables, so that the learning of the Act's structures can have more impact. Whilst this appears a fairly straight-forward matter to resolve, Chan's comments on policing in a multicultural society indicate that training alone may not change police culture.²³⁰ The training may have to take place in the context of organisational and social change to be effective.²³¹ The exploratory nature of this research precluded further questioning of the participants on this point but perhaps by saying that training is what is required, the participants have already accepted organisational change. This might demonstrate an acceptance on behalf of the participants that their attitude to the Act and their discretionary choice to use it has been rendered less influential due to the organisation's support of its legislative scheme.

Theory: Police prefer informal cautions (warnings under the YOA) and formal cautions to conferencing.

Research regarding the South Australian *Young Offenders Act (1994)* indicated that police may prefer informal cautions (warnings under the YOA). Warnings under the YOA are dealt with informally by police but in circumstances that provide them with control of the situation. Despite the lack of particular research findings in NSW regarding such police preferences under the YOA²³² an inference can be drawn from the South Australian position and from previous research by Parker et al that police have a preference for being proactive in their duties and that, following this inference

²³⁰ Janet Chan, 'Police Accountability in a Multicultural Society' [May 1995] *Criminology Australia* 2, 3.

²³¹ Janet Chan, 'Changing Police Culture' [1996] 36 *British Journal of Criminology* 109, 131.

²³² Joy Wundersitz, *The South Australian Juvenile Justice system: A Review of its Operation* (South Australia Office of Crime Statistics, 1996) 61.

warning and cautions under the YOA may allow them to pursue such proactive outcomes and thus to prefer warnings and cautions.²³³

Finding: The literature suggests that informal cautions and formal cautions allow police to have immediate control of the situation and to undertake pro-active policing. The data does not support this thesis and does not indicate that officers have a preference for one option over another. Their views on which option might work depend on the circumstances of the offence, the support of the offender's family and what options have been used previously for that offender, if any. It must be noted that cautions are usually undertaken by YLOs and they are usually the only police participants to attend a conference. That being the case, the equivocal findings of no preferred option might be different if general duties police had more involvement in those processes.

Chapter 5(v).

Theory: Increased training, including attendance at conferences, means a better referral rate of offenders to the scheme.

Early research following the introduction of the Act indicated that increased training of police would increase referral rates under the YOA.²³⁴ Further research indicated that police had insufficient training regarding the Act and this was a barrier to its use²³⁵ but that police attitudes became more positive following their attendance at a conference.²³⁶ The extent to which education

²³³ Ann L Parker, Phillip B. Mohr & Carlene Wilson 'Attitudinal and Personality Predictors of Diversionary Behavior by Police' (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 10.

²³⁴ Jenny Barga, 'Children's Legal Issues: Young Offenders and the New Options in Youth Justice' (1999) 37 (10) *Law Society Journal* (NSW, Australia), 54, 55.

²³⁵ Nancy Hennessy 'Review of Gatekeeping Role in Young Offenders Act 1997 (NSW)' *Report to Youth Justice Advisory Committee* (October 1999) 62.

²³⁶ Nicola Silva 'Breaking the Cycle of Juvenile Crime'[August 2001] *Police News* 18, 19 and NSW Attorney General's Department *Report on the Review of the Young Offenders Act 1997* (October 2002).

in itself can assist in forming more positive attitudes has yet to be fully determined,²³⁷ particularly when it is overlaid by influences such as police culture and police authoritarianism.²³⁸

Finding: Participants support conferencing, even if they have not attended one. The majority have not attended a conference and wish to do so, but are not deterred from referring matters to a YLO for consideration of a conference, simply because they have not attended a conference

Chapter 5(v)(b).

Whilst the author's research does not support the thesis that insufficient training (as indicated to still exist by some participants) is a barrier to use of the YOA, it shows that officers with increased training in the Act and its structures, such as YLO's, are more supportive of the Act generally, potentially indicating that positive attitudes can be informed by education.

Theory: Without increased training and education regarding young people police do not gain an understanding of the juvenile justice system and the purpose of diversionary legislation. Research by the Wood Royal Commission prior to the introduction of the YOA indicated that police had a negative attitude to young people.²³⁹ The Act required police to overcome these prejudices²⁴⁰ and

²³⁷ Ann L Parker, Phillip B. Mohr & Carlene Wilson 'Attitudinal and Personality Predictors of Diversionary Behavior by Police' (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 10.

²³⁸ Christie Gayre, Simon Petrie and Perri Timmins, 'The Effect of Police Education, Training and Socialisation on Conservative Attitudes' [1996] 29 *The Australian and New Zealand Journal of Criminology* 299,312 and Richard K Wortley, 'Measuring Police Attitudes Towards Discretion' [2003] *Criminal Justice and Behaviour* 30, 538.

²³⁹ Brendan Delahunty 'Taking 'Kiddie Cops' and 'Care Bears' Seriously' (1998) 23(1) *Alternative Law Journal* 13, 13.

²⁴⁰ Janet B L Chan 'Implementation of the *Young Offenders Act*' in Janet B.L. Chan (ed), *Reshaping Juvenile Justice* (2005) 25,45.

education can assist this to some extent.²⁴¹ Further research, however, has indicated that acceptance and use of diversionary schemes are not part of police practice²⁴² and that police authoritarianism can be an obstacle to schemes involving restorative justice.²⁴³ Proactive policing, however, involving warnings and cautions may assist police to feel in control of their work²⁴⁴ and thus to be supportive of diversionary legislation. Such support appears therefore to be based on a model of authoritarianism and not on support for diversionary legislation and issues encountered by young people in the juvenile justice system.

Finding: The findings do not indicate a focus from the participants on the concept of juvenile justice generally but on the specifics of the structure of the Act. The officers who comment on the matter are of the view that increased training in regard to the YOA and its structure would assist police to have a better understanding of why the Act is used.

Chapter 5(iv).

As noted under the theory above, in relation to an increased referral rate to the YOA scheme, YLO officers, who have increased training in relation to the YOA, are more supportive of the Act generally. This supports the thesis in the literature that education may assist police to have a better understanding of

²⁴¹ Ann L Parker, Phillip B. Mohr & Carlene Wilson ‘Attitudinal and Personality Predictors of Diversionary Behavior by Police’ (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 10.

²⁴² Ann L Parker, Phillip B. Mohr & Carlene Wilson ‘Attitudinal and Personality Predictors of Diversionary Behavior by Police’ (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 10.

²⁴³ Richard Young, ‘Just Cops Doing “Shameful” Business’: Police-led Restorative Justice and the Lessons of Research’ in Allison Morris and Gabrielle Maxwell (eds), *Restorative Justice for Juveniles* (Hart Publishing, 2nd ed, 2003) 195, 198,221.

²⁴⁴ Ann L Parker, Phillip B. Mohr & Carlene Wilson ‘Attitudinal and Personality Predictors of Diversionary Behavior by Police’ (2004) 27(1) *Policing: An International Journal of Police Strategies and Management* 9, 10.

restorative justice schemes. That these views are held by officers who have further education in the YOA than general duties officers, does not of itself indicate that such support of diversionary schemes is brought about by authoritarian attitudes of proactive policing. Whether it is brought about solely by training or by the potentially more supportive attitudes of YLOs to young people is a matter not uncovered in this exploratory study.

Theory: Lack of police consultation before the Act was introduced means that police are less likely to use it.

Chan's research indicated that police had an unwillingness to use the diversionary scheme under the YOA, as they had no prior knowledge or input of its scheme.²⁴⁵ Negative police attitudes could be improved if they were involved in the consultation stage of such legislative diversionary schemes.²⁴⁶

Finding: The findings are silent on this matter. One might therefore assume that, as the YOA has been law in New South Wales since 1998, the attitudes of police to the Act are not now influenced by the lack of consultation prior to its introduction.

(iii) Conclusion

The findings do not indicate a disagreement with the majority of the themes found in the literature. Generally speaking, however, there now appears to be a greater acceptance of the use of the Act by police, despite the continuing equivocal opinion of its scheme of procedural options. Previous indications from police were that they did not like the Act and that this

²⁴⁵ Janet B L Chan, Jenny Bargen, Garth Luke and Garner Clancey, 'Regulating Police Discretion: An Assessment of the Impact of the NSW Young Offenders Act 1997' in Janet B. L. Chan (ed) *Reshaping Juvenile Justice* (Sydney Institute of Criminology, 2005) 107.

²⁴⁶ Muncie, John, *Policy Transfers and 'What Works': Some Reflections on Comparative Youth Justice* (December 2001) <http://yji.sagepub.com> >at 1 October 2008, 34.

view may have been based on a philosophical objection influenced by police culture. The police in this study who indicated that they had a negative attitude to the structure of the Act appeared to base their views on examples of their own work with the Act, when it demonstrated to them that it did not work. Thus the shift appears to have moved from a philosophical objection to one at least partly based on fact. The author does note, however, that police continue to accept that police culture can be an influence on the lack of support for the Act, though the data indicates that this negative influence is now linked more to the attitudes of older officers rather than the attitude of the New South Wales Police Force generally.

Previous findings that increased education would assist with the use of the Act are supported by the data findings in this study, although the current findings do not indicate that it would necessarily increase understanding of the Act. Whether increased understanding would increase use of the YOA is a matter for further research.

7. Discussion: Insights Raised by the Data

(i) Introduction

Whilst the focus of this research is an exploratory study of the attitudes of police to the structure of the YOA, certain topics have been brought to light by the answers given by participants, that have not previously been dealt with in the literature. The author considers that data to have some importance and provides a summary of those findings below. The first topics, being the effect on victims of the use of the Act and the effect on offenders of the use of the Act, were introduced by the author to the participants through the guideline questions.

As noted in the introduction to Chapter 5, the author considered it necessary to raise the impact of the use of the Act upon victims and offenders as this appears to be an influence upon police attitudes to the structure of the Act, that is; police believe that the Act and its structure do not assist victims or offenders and this might be one of the reasons the majority of police interviewed have only conditional support for the Act.

The author goes on in this chapter to discuss the misconstruing of procedures under the Act as well as confining children under the Act as these topics arose from the data presented in this research. These further topics were not contemplated in any detail by the author prior to commencing her research but are potentially of significant concern regarding police procedure when dealing with children. In these circumstances the author wishes to embrace a brief discussion of these issues and their legal implications, which may lead to further analysis, research and teaching on these issues.

As the issues discussed below are somewhat disparate, the author does not provide a conclusion for the chapter, but confines the discussion of each issue to its own part.

(ii) Effect on Victims of Use of the Structures of the *Young Offenders Act*

The majority of participants are equivocal about whether the use of the options under the

YOA provides a good outcome for victims. Some positive views are given in relation to outcomes for victims from conferencing, with less support for warnings and cautions. Some officers mention that the outcomes ought to include financial or other forms of recompense for victims as the scheme does nothing to address these issues. Police are left to deal with often disgruntled victims, who blame them for the outcomes provided by the Act, even in circumstances where police have described its intent.

(iii) Effect on Offenders of the Structures of the *Young Offenders Act* and the Influence of their Background

The findings indicate that the root cause of conditional support by general duties police for the structures of the Act is founded in their view that, overall, the Act has an insignificant impact upon offenders. The majority of officers believe that the Act would have more impact on preventing recidivism if the option of a form of punishment was included in its structure. The YLO participants believe that the Act is effective in changing the behaviour of young people and that conferencing has the most impact in this regard. SYOs agree to a lesser extent with this view.

As noted in Chapter 5(viii) above, several officers raise the issue of socio-economic factors in offending, without having been guided to this issue by the author. The officers who comment on socio-economic factors influencing offender behaviour are mostly general duties officers, who have experience working in areas with high youth population, high unemployment and low income. Their experience in these areas causes these officers to have a more negative attitude to the usefulness of the structures of the Act. It should also be noted that all officers who indicated that they worked in areas with a high youth population and unemployment are generally less supportive of the structures of the Act.

Past research indicates that there is a strong relationship between the low socio-economic background of an offender and rates of offending.²⁴⁷ Weatherburn et al noted that this was

²⁴⁷ Don Weatherburn, Lucy Snowball and Boyd Hunter, 'The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey', 104 [October 2006] *Crime and Justice Bulletin* (NSW Bureau of Crime Statistics and Research) 2 and Mark Lynch, Julianne Buckman and Leigh Krenske, *Trends & Issues in Crime and Criminal Justice* (September 2003) (Australian Institute of Criminology).

previously thought to arise from the bias of police in using their discretion against offenders (that is police making choices of criminal justice options that may have more severe outcomes for offenders), but that there is now seen to be a correlation between economic well-being and offending.²⁴⁸ Thus the officers in the author's research seem to agree with the findings of previous research, that there is likely to be more offending by juveniles in low socio-economic areas and that this may hinder the impact of the YOA to reduce such offending behaviour.

(iv) Misconstruing of the Procedures under the *Young Offenders Act*

The focus of much previous research and discussion on police and their use of the law has been on police abuse of their legal powers.²⁴⁹ It has been suggested that police can be ignorant of potentially applicable rules, can sidestep troublesome rules they think may be applicable or break rules if such action is deemed necessary to get the job done. That is; rules are used creatively to accomplish desired outcomes.²⁵⁰

The findings in the author's research indicate that police are choosing the discretionary procedures under the YOA, whether or not they agree with them. They are not sidestepping these rules or avoiding them to achieve their personally desired outcome, whether or not they have indicated their support for the Act. What the author's research has shown, however, is that some police may misunderstand the wording of the YOA, or be misguided in its application.

The data from some interviews provides some concerning answers from some of the

²⁴⁸ Don Weatherburn, Lucy Snowball and Boyd Hunter, 'The economic and social factors underpinning Indigenous contact with the justice system: Results from the 2002 NATSISS survey', 104 [October 2006] *Crime and Justice Bulletin* (NSW Bureau of Crime Statistics and Research) 3.

²⁴⁹ See for example Wood, the Honourable Justice James, *Royal Commission into the NSW Police Service: Final Report*(1) (May 1997) 38. <<http://www.pic.nsw.gov.au/OtherReportsAndPublications.aspx>> at 30 June 2009 and Janet Ransley, Jessica Anderson and Tim Prenzler, 'Civil Litigation Against Police in Australia: Exploring Its Extent, Nature and Implications for Accountability', (2007) *Australian & New Zealand Journal of Criminology*, 40 who discuss police liability arising from misconduct in civil cases.

²⁵⁰ Richard V. Ericson, 'Rules in Policing: Five Perspectives', *Theoretical Criminology* 11(3) (Sage, 2007) 367, 394.

participants regarding how the structure of the YOA is to be used. All participants were initially asked if they were aware of the diversionary procedures in the YOA. All participants answered 'yes'. They were then asked to describe those procedures. All participants correctly identify the Act as being diversionary with options of warnings, cautions and conferencing.

As the interviews progressed it became apparent to the author that two issues could be at play in regard answers given by some participants about the procedures under the Act. There might either be some confusion amongst some participants as to how the procedures under the YOA work or alternatively they might be appropriately cognisant of the alternate procedures, but feel that they are compelled to use them in some hierarchical order by their police superiors or perhaps by the wider criminal justice system.

As noted above, the Act provides three discretionary alternatives, being warnings, cautions and conferences. An offender may only be dealt with by caution on a maximum of three occasions.²⁵¹ The decision by a police officer as to which alternative to use is based on the nature and circumstances of the offence and not by a requirement that they must use the least restrictive option available and use that option three times (in the case of cautions) before moving up to the next category.²⁵²

Thus, if a child has previously been given a warning on one occasion and commits a further offence, to which they admit guilt, police are able to choose the diversionary alternative that best suits that offence, whether that be a warning, caution or conference. They are not bound to issue a second warning, on the basis that it is the next least restrictive step up the ladder.

The author was mindful not to make the interview questions a test on the structure of the Act, so as not to alienate participants. In these circumstances the author did not feel it helpful to the congenial nature of the interviews to question participants further on their understanding

²⁵¹ *Young Offenders Act 1997 (NSW)* s 20 in relation to number of cautions.

²⁵² *Young Offenders Act 1997 (NSW)* s 7(a) outlines one of the principle of the Act as follows:

“The principle that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, having regard to matters required to be considered under this Act.”

The principle outlined in s 7(a) does not avoid the necessity for the matters in ss 14, 20 and 37 to be considered when determining what option is used.

of why the Act required, that on three occasions the least restrictive option be used, before the next highest option could be used. The focus of this research is on police attitudes to the structure of the Act and not on whether they are appropriately cognisant of its proper use. In any event the potentially mistaken belief appears to be present in the answers of approximately half of the participants. This may be a matter for further investigation at a later stage or require clarification in the teaching of the structure of the YOA at the New South Wales Police College and in the field.

A potential misunderstanding of the Act's procedures may also cause a skewed view of the YOA by some of the participants and colour any reasons given for their support or dislike of the Act. The author provides below evidence of the discussion of some participants that she believes indicates the structural misunderstanding of the Act.

MYLO1 stated that some children know exactly what their legal rights are and 'how many more slaps on the wrist they can use up'. The officer believes that there should be more police discretion as to the number of cautions that are issued and conferences undertaken, before a matter can be taken before the Courts:

“Because a lot of kids don't take it seriously, because they know that they've already used up one caution, they've got two left.”

RRSYO1 said that if an offender has previously had two cautions they often know that they are entitled to another caution. When questioned about whether the officer might decide to send to the matter to Court instead of issuing another caution the officer said they could not, as the offender had already admitted the offence:

“Because if they've admitted the offence they're entitled to a caution so we can't step up that next, that higher level even though we want to.”

RGD2 said that use of the Act is 'only discretionary in certain senses'. The officer said that offenders know of the options available to them under the Act if they make an admission. At the same time some Magistrates refer matters back for cautions or conferencing, even if an officer, in their discretion and knowing the offender's criminal history, has decided that Court is the best option. Thus, according to this officer, it is not a misunderstanding of the Act that causes it to be used in inappropriate circumstances but pressure from other sources.

MGD2 discussed the situation where an offence is committed with malicious intent. They believe that in those circumstances the Act should not be an available option but said, “...because they’re entitled to one (a warning or caution), you have to give them that option.”

The officer was further asked about what options they use most under the Act. The officer replied, “...they haven’t used their number of cautions so it’s gone that way” (i.e. that a caution was therefore used).

In the context of this conversation with the author it appears the officer alluded to the fact that three cautions were available and had to be used.

RRSYO2 stated:

“Starting off with a caution on the run or a warning and then it can move up to a caution which is administered by a trained office or the youth liaison officer mostly. They can get sort of three, about three of those generally or depending on the circumstances it might escalate to the next level of a youth justice conference and then after that it is Court...Well the Act actually requires that you use the graded system...”

Whilst the author suggests this would be the normal course for the use of the Act it does not prescribe use of a graded system.²⁵³ Officers can choose the option under the Act that best fits the nature of the offence and the circumstances in which it was committed, whilst being guided by the objective in the Act that the least restrictive form of punishment be used.

The officer later appears to clarify that comment by saying that when they choose to use either a warning or caution they take into account: “[the] seriousness of the offence plus also the victim’s wishes.”

Despite saying this the officer again confirms that: “cause there’s always those young people, you know, you really just go to go through the process, use up all their cautions...”, potentially indicating a belief that repeat offenders have an entitlement to use the maximum of three cautions allowed under the Act.

²⁵³ *Young Offenders Act 1997* (NSW) s 9(2).

RGD1 stated that offenders say to them words to the effect of, “I can get three cautions, I’ve had one, who cares, I’ve got another two to go.”

The officer further said, “They’re entitled to it [a caution], under the Act unfortunately you don’t have a say in the matter.”

RGD2 discussed the fact that, on occasion, they heard anecdotal evidence that Magistrates sent juveniles back for a caution, when police had decided to charge them instead of using the Act:

“[Use of the Act is] only discretionary in certain senses. In other areas it basically says that if they admit the full offence that they’re entitled to a more lenient [punishment] and magistrates are very critical of us if we don’t take that on.”

One might then wonder if it is not a misunderstanding of the Act that is necessarily the problem but a belief throughout the criminal justice system that it has to be used on nearly every occasion, regardless of the circumstances of the offence or the offenders remorse when admitting the offence.

Whilst none of the participants suggest that, in their opinion, the use of three of each hierarchical options (as they may have understood it) is a problem, this possible misunderstanding must cloud the research findings somewhat. If the conditional support of some police is based on a misunderstanding of the YOA, would they maintain their conditional support for it if they had a clearer understanding of the options for its use?

Of the five officers who may have a misguided view of the options available under the Act, all five have conditional support for the Act. Are these police aware of the flexibility inherent in the Act but feel bound to use the options under the Act due to outside pressures? The author does not have the answer to these questions, due to the exploratory nature of this research, but it is certainly a matter requiring further investigation.

(v) Confining Children without Charge or Arrest

As noted in Chapter 7(iv) above, police work practices can use legal rules creatively to

accomplish desired outcomes.²⁵⁴ In cases of breach of bail Julie Stubbs noted that police can target juveniles for breach of bail as a measure of their performance.²⁵⁵ Police work practices can also involve protecting and regulating public space, such that police use their powers to undertake name checks of juveniles and to move them along in accordance with their powers to do so under section 197 *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*.²⁵⁶

Such research indicates that police may like to have a controlling role with young people and that they: “are deemed to have an important shaping role to play in the public displays and social habits of the young”.²⁵⁷ Thus police are seen to play a social and moral role and to feel that they can legitimately make decisions affecting young people, whether or not those decisions are grounded in legislation or its intent as indicated by Parliament or the Courts.

In the author’s research some data indicated that the participants may concur with the above police views when dealing with young people and that police work practices are manipulated or ignored to achieve the outcome the officer feels best fits the circumstances and their role in protecting the moral character of street life.²⁵⁸

The Act, as stated previously, is a diversionary scheme from the criminal justice system. It does not involve the arrest or charge of young people. Despite this, some findings indicate that police are using procedures normally confined to the criminal justice system, when dealing with children under the YOA. Use of such procedures goes against the spirit of the YOA²⁵⁹ and may be in breach of legislation and police rules that protect children’s rights.²⁶⁰

²⁵⁴ Richard V. Ericson, ‘Rules in Policing: Five Perspectives’, *Theoretical Criminology* 11(3) (Sage, 2007) 367, 394.

²⁵⁵ Julie Stubbs, ‘Re-examining Bail and Remand for Young People in NSW’, 43 *Australian and New Zealand Journal of Criminology* (2007) 485,497.

²⁵⁶ Rob White, Young People and the Policing of Community Space, 26 *Australian and New Zealand Journal of Criminology* (1993) 207,208, 209.

²⁵⁷ Rob White, Young People and the Policing of Community Space, 26 *Australian and New Zealand Journal of Criminology* (1993) 207,209.

²⁵⁸ Rob White, Young People and the Policing of Community Space, 26 *Australian and New Zealand Journal of Criminology* (1993) 207,209.

²⁵⁹ The principles upon which the Act was founded were discussed at New South Wales, Parliamentary Debates,

In one of the guideline questions for this research police were asked if matters dealt with under the YOA took more time than Court proceedings. Several officers commented on the fact that on finding a child who has committed an offence, they had taken that child back to the local police station so that they could wait there for their parents or support person to collect them. MGD4 stated that there is sometimes a delay in matters being finalised quickly, as they have to wait four to five hours for parents to attend the police station and collect their child:

“Cause we’re detaining them (the child) for much longer than we would a normal adult person for that fact that we’re waiting for that support person to get there.”

That officer also commented that the child was sometimes held in the cells and on occasion in the company of a person who was ‘going off their head’. The officer said the delay in arrival of a support person had decreased since the Act was amended in 2008 to allow a child of fourteen years and over to choose their own support person.²⁶¹ This often meant that an adult aside from a parent attended and could do so more quickly.

MGD2 said that dealing with young offenders under the Act often meant they had to go back to their local station with the offender and wait there for five or six hours, so that a support person could attend and collect the child.

RGD1 raised this issue and then detailed their concerns regarding the reading of their rights to a child.²⁶² The officer said that if a child was brought in to the station, so that arrangements could be made for a formal caution later on, the officer had to be careful to inform the child

Legislative Council, 21 May 1997, 8958-8960 (J.W. Shaw).

²⁶⁰ *Children and Young Persons (Care and Protection) Act 1998 (NSW)*, *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*, NSW Commissioner of Police *NSW Police Force Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2010).

²⁶¹ Previously *Young Offenders Act 1997 (NSW)* s 22 had allowed a child of sixteen years and over to choose their own support person.

²⁶² *Law Enforcement (Powers and Responsibilities) Regulations 2002 (NSW)* Reg 34 states the caution that must be given is 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’. Justice Greg James stated in *R v Deng* [2001] NSWCCA 153 at [17] that: “the caution is meant to convey to an arrested person that he/she has the right to choose to speak or to remain silent. It is meant to ensure that the person is aware that if he/she speaks, what he/she says may be given in evidence” as cited in Stephen Odgers, *Uniform Evidence Law* (Thomson Reuters, 9th Ed, 2010) 789.

of their rights before undertaking an interview. The officer said that if the child later did not attend for the formal caution as requested, the only option was to charge them for the offence and to bring the matter before the Court. If the child had not been cautioned (hereinafter referred to as ‘arrest caution’ for the purpose of clarity)²⁶³ prior to being interviewed the case would not be able to proceed before the Court. By saying this, the officer has clearly pinpointed one dilemma facing police when implementing the structure of the YOA. Outlined below are the reasons for the officer’s concerns, which are supported and expanded upon by the author.

(vi) The Legislative Context for Detaining Children

S108 of the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* (known as ‘LEPRA’) states that a police officer is not required to arrest a child if it is more appropriate to deal with the matter under the YOA.

This concurs with the spirit within which the YOA was enacted, as noted by the Honourable J.W. Shaw in the Second Reading Speech of the Legislative Council of New South Wales:

“...the least restrictive form of intervention is to be applied against a young person who is alleged to have offended...criminal proceedings shall not be instituted against a child if there is an alternative and appropriate means of dealing with the matter.”²⁶⁴

The evidence from the participants is that police nowadays use the least restrictive options provided by the Act. Despite this and the best intentions of police when dealing with young people, it appears they are detaining children, whilst they implement the procedures under the YOA. The question then arises as to whether there is any legal basis for such detention,

²⁶³ By use of the word caution in this context the author does not refer to cautioning as has been discussed within the context of the YOA. Cautioning in this instance refers to the warning that must be given to offenders by police before they are questioned or arrested and is recommended to be along the lines of

‘I am going to ask you some questions. You do not have to say or do anything if you do not want to. Do you understand that?’

The author will refer to the word caution in this context as the ‘arrest caution’. See NSW Commissioner of Police *NSW Police Force Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2010) 69.

²⁶⁴ New South Wales, *Parliamentary Debates*, Legislative Council, 21 May 1997, 8959-8960 (J. W. Shaw).

when no arrest is taking place and the YOA does not provide scope for such detention.

As noted previously, data provided by some participants indicates that police appear to be detaining children and taking them back to police stations. This occurs in circumstances when those police decide that the offence committed by the child should be dealt with under the YOA and therefore does not require a formal arrest or charge. No information was given by participants to indicate whether or not the children in these circumstances are formally arrested or cautioned. The question then needs to be asked as to what authority police have to detain the child in those circumstances.

It appears children may be brought to the police station by police for the practical purpose of the child obtaining legal advice, contacting a support person and so that they remain safe until that support person attends.²⁶⁵ There is, however, no requirement under the YOA that children be given a warning at a police station²⁶⁶, nor that arrangements for a formal caution or conference, which are usually held at a later date, be made at a police station or that the child be kept at a police station pending the giving of a formal caution.²⁶⁷

The Act therefore provides no basis for police to bring a child to a police station or to detain them there. One then needs to ask if other legislation provides authority to detain the child.

The usual power to detain a person is contained in the powers of arrest provided by LEPR, though police are given limited circumstances when they can arrest an alleged offender and subsequently detain them under this Act. Section 99 of LEPR deals with the power of police officers to arrest without warrant and subsections (3) and (4) of s 99 state:

(3) A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or

²⁶⁵ Under *Young Offenders Act 1997*(NSW) s 22 a caution should be given in the presence of a support person.

²⁶⁶ *Young Offenders Act 1997* (NSW) s 15, which states that warnings may be given at the place that police find the offender.

²⁶⁷ *Young Offenders Act 1997* (NSW) s 29(2A) states that a person proposing to give a caution to a child may defer giving the caution if a person responsible for the child or the adult chosen by the child is not present—until a person responsible for the child or an adult chosen by the child is present. The section makes no mention of a requirement to detain a child until that adult arrives.

more of the following purposes:

(a) to ensure the appearance of the person before a court in respect of the offence,

(b) to prevent a repetition or continuation of the offence or the commission of another offence,

(c) to prevent the concealment, loss or destruction of evidence relating to the offence,

(d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,

(e) to prevent the fabrication of evidence in respect of the offence,

(f) to preserve the safety or welfare of the person.

(4) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law.

When arresting under s 99(3) the usual circumstance for an offender is that they must be formally given an ‘arrest caution’ before being brought back to a police station.²⁶⁸ A person can be detained without being arrested, but in very limited circumstances provided under s 21 LEPPRA.²⁶⁹ Other than those powers to stop and search a person they must be arrested before being detained or taken back to a police station.

The information given by participants to the author indicates that in some Local Area Commands some children are brought back to the police station and are held there until a

²⁶⁸ See footnote 263 above.. This excludes the options of criminal infringement notices (“CIN”) and court attendance notices (“CAN”), which are now used widely to avoid the necessity of arrest. The notices are given to offenders and they are either fined for the offence (CIN) or given a later date to attend court (CAN). Alternatives to arrest should always be considered. NSW Commissioner of Police *NSW Police Force Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2010) 14.

²⁶⁹ See also *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 115 which notes that a person can be detained for a maximum of four hours after arrest. Thereafter a detention warrant must be sought under s 118 of the same Act.

parent or other responsible person collects them. It is not clear from the interviews if these children are told they are under arrest, or if they are informed that they are free to go at any time. These children may not be given the requisite arrest caution before being taken to the station but may make the presumption that they are under arrest.²⁷⁰

Under the existing powers given to police there is very limited authority to detain a child at a police station or any other place, if the child has not been arrested. Even if the option of arrest is available, s 8 *Children (Criminal Proceedings) Act 1987 (NSW)* states that children should be dealt with by way of Court Attendance Notice, except for the specific circumstances of serious offences, drug offences or where the child appears unlikely to attend court as required. There are thus very limited circumstances where arrest and/or detention of children in New South Wales can be justified.

Legislation exists in New South Wales which may assist officers to remove children from the streets. Under s 43(2) of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* police are authorised to remove a child from a public place if they suspect on reasonable grounds that they are in need of emergency care and protection.

What is meant by care and protection is not easily determined, but assistance with its meaning can be found in the Second Reading Speech of the *Children and Young Persons (Care and Protection) Bill 1998 (NSW)*.²⁷¹ The Second Reading Speech by the Honourable J. W. Shaw indicated that the Bill was intended to deal with care and protection of children in unstable living environments, with concomitant sections relating to care orders, the Court proceedings for same and the responsibilities of the Department of Community Services in caring for children at risk.²⁷²

Thus it appears that the focus of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* is long-term care and removal from harm in domestic situations and that it may

²⁷⁰ If a child is told by a police officer to go with them back to a police station one might reasonably think that the child believes they cannot decline and that they are not free to go.

²⁷¹ New South Wales, *Parliamentary Debates*, Legislative Council, 1 December 1998, 10898-10903 (J. W. Shaw).

²⁷² *Ibid.*

not provide police with the required authority to remove children from the streets and detain them at a police station.²⁷³

The determination as to whether that legislation applies in any particular circumstance would depend on the facts, but the author feels it unlikely that the Courts would read it so broadly that it allowed police to keep children at a police station for several hours or more, without the justification of an appropriate arrest. Even if the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* were to apply there is a necessity for police to refer children to the Department of Community Services, as it is a presumption of s 43 of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* that the children will require emergency care.²⁷⁴ Section 43 does not envisage children being returned to a reasonable family home, as one might understand to be the usual outcome when police deal with children under the YOA.

Were the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* to apply then some police would still have difficulty as under s 43(5) there is a necessity that children must be kept separate from any persons who are detained for committing offences, who are on remand or who are subject to an order under s 33(1)(g) *Children (Criminal Proceedings) Act 1987 (NSW)*.²⁷⁵ This indicates clearly that children should not be placed in a cell with an adult, which appears to be contrary to what some officers have indicated occurs. RRSYO1 said:

“...you’re putting them out in the cell and you’re actually treating them like an adult criminal. Sometimes you gotta be cruel to be kind.”

²⁷³ Section 3 of the *Children and Young Persons (Care and Protection) Act* states that that Act applies to children under the age of 16 years. If there were an argument that this Act should apply in the above circumstances it would not assist police to deal with children from the age of 16 to the age of 18 years, which is the age up to which the *Young Offenders Act* applies in accordance with section 4 of that Act.

²⁷⁴ See *Children and Young Persons (Care and Protection) Act 1998 (NSW)* s 43(5).

²⁷⁵ Notably the *NSW Police Force Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* also says that an officer must not place a child in a cell unless no other secure accommodation is available and it is not practical to otherwise supervise the child, or the cell provides more comfortable accommodation. It further says that a child should not be placed in a cell with an adult, except in rare circumstances where it is necessary for the well-being of the child. NSW Commissioner of Police *NSW Police Force Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* (2010) 48.

One might understand that police, for reasons of safety, may not want to leave a child on the street after they have been given a warning or arrangements for a later caution have been made. This appears to lead police to make the decision that it is in the best interests of the child to take them to a police station, where they will safely await collection by an adult at some later time. Whilst this may practically appear to be the responsible option for police there appears to be limited legislative authority in support of this action and in fact legislative authority prohibiting this action, when police are effectively detaining these children. In a circumstance where a child is injured or comes to some other harm in police custody the NSW Police Force may be therefore be liable.

Unfortunately, should officers decide that the least fraught option is to leave the child on the street, they may also be liable if that child is affected by an adverse event. In the end it appears, in the author's view, that the only option is for police to arrest the child, provide them with the appropriate arrest caution and take them back to the police station²⁷⁶. Once there, the support person can be contacted and the child legally detained in a suitable room (for no longer than four hours without applying for a detention warrant²⁷⁷) until their support person arrives. Once that person arrives police can advise that they wish to proceed with the matter under the YOA. In that case police can discontinue the arrest²⁷⁸ and make appropriate arrangements for whatever option under the YOA is deemed suitable. Of course this option does not follow the spirit or intent of the YOA, but in the author's view is the most suitable legal option, if available, when police wish to safeguard the child and protect their own interests.

²⁷⁶ This of course can only occur in circumstances where an arrest is justified under s 99(3) of the *Law Enforcement (Powers and Responsibilities) Act*. Refer page 124 above.

²⁷⁷ *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* s 118. This period of time does not take into account what is known as a 'time out' under s 117 *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)*. This section provides a list of occurrences that are not to be included in calculating the period of time of the detention. These include time to transport the person to appropriate facilities to conduct the investigation, time for the person to consult with a solicitor, family member or support person or to seek medical assistance.

²⁷⁸ *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* s 105.

8. Conclusion

As noted above, previous research into aspects of the YOA has focused on statistical analysis of whether the Act works in terms of keeping children out of the Court system as well as in regard to how often the Act is used. There has been little research on any aspect of the YOA in the past five years and piece-meal research on police attitudes to the Act. In regard to police attitudes to the structure of the YOA there has been very limited research. This exploratory research demonstrates that some areas of concern regarding negative police attitudes to the structure of the Act exist as well as a probable misunderstanding of the Act itself.

It appears that police attitudes may have less influence on discretionary use of the Act due to the acceptance of the Act by officers as a piece of legislation that must be used. Thus discretion appears to have a lesser role to play than when the Act was first introduced. Where discretion continues to play a role is in relation to police deciding upon the best options to use when taking young people back to the police station. In such cases police appear to follow their own views of the best outcome for the child, which may be influenced by their perceived role as moral and social guardians.

As a positive outcome, this research demonstrates that police are using the Act, despite an often equivocal view of its structure. There are indications that some senior police and Local Area Commands are not as supportive of the Act as they might otherwise be, but, overall, the data demonstrates its acceptance by police as an option for dealing with young offenders. Where conditional support for the Act exists it is based on the police perception that outcomes for offenders are often too soft and do not provide sufficient resolution for victims of crime.

The theme raised by various police officers throughout the data is that they need to be trained further in the use of the Act and, preferably, at a later stage of their Associate Degree course. The data consistently demonstrates that many police do not feel they have sufficient knowledge of the Act and understanding of the reasons behind its implementation. The data

further indicates that this lack of knowledge may hinder best use of the Act. It may also be the cause of the equivocal attitude of general duties officers to the Act, as compared to the more positive views of YLOs and SYOs, who undergo more rigorous training regarding the YOA.

The author's research has indicated that there is a clear difference in attitude towards the YOA between YLOs and general duties officers, but that this difference in attitudes does not cause police to avoid use of the Act. Due to the exploratory nature of this research, the influences on these differing attitudes was not always clearly demonstrated by the data, though increased training of YLOs was indicated as being at least one influence of their more positive attitude. Chan indicated that increased training does not always assist police culture or attitudes to change.²⁷⁹ Further research may provide clarification on this point.

Early research on the YOA indicated that support for its structure was not strong and that this may have influenced police not to use the Act. The author's research shows that, despite negative attitudes from mainly general duties officers, such attitudes do not currently inhibit the discretionary choice of NSW police officers to use the Act. One might argue that these officers now have less discretion as to whether or not they wish to use the Act, due to policy influences of their senior command and the courts and their belief as to how and when its structures must be used (whether in some instances mistaken or not). These areas also provide further scope for research.

As police have arguably the most discretion of all decision makers in the criminal justice system²⁸⁰ it is vital that the context for their attitudes is researched. Issues remain unexplored but it is hoped the author's findings have opened a gateway for areas of research to be tackled in the future. This can only be of assistance in police work and most importantly in protecting the rights of children in New South Wales.

²⁷⁹ Janet Chan, 'Police Accountability in a Multicultural Society' [May 1995] *Criminology Australia* 2, 3.

²⁸⁰ Anna Louise Stewart and Frances Smith 'Youth Justice Conferencing and Police referrals: The Gatekeeping Role of Police in Queensland, Australia'(2004) 32 *Journal of Criminal Justice* 345, 347.

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2. Case Law

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3. Legislation

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Children (Criminal Proceedings) Act 1987 (NSW)

Children, Young Persons and their Families Act 1989 (NZ)

Crimes Act 1900 (NSW)

Juvenile Justice Act 1992 (Qld)

Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)

Young Offenders Act 1994 (SA)

Young Offenders Bill 1997 (NSW)

Young Offenders Act 1997 (NSW)

Glossary of Police Terms

SYO: Specialist Youth Officer

YLO: Youth Liaison Officer

Local Area Command – A geographical grouping of police stations which is overseen by a Local Area Commander

COPS: Police Computer system

Appendices

Appendix “A”

Interview Schedule

Appendix “B”

Copy of the Ethics Approval Letter from the Ethics in Human Research Committee of the School of Policing Studies at Charles Sturt University dated 3 June 2008.

Appendix “C”

Copy of the letter of approval from the New South Wales Police Force dated 9 February 2009.

APPENDIX “A”

Interview Schedule

The following guideline questions formed the basis of the interviews:

1. How long have you been with the New South Wales Police Force?
2. What is your job description?
3. Are you aware of an Act called the Young Offenders Act?
4. How would you describe the procedures under the Act?
5. Is there general police support for the Young Offenders Act?
6. What is your opinion of how the structures of the Act work?
7. What impact does the Act have on victims?
8. What impact does the Act have on offenders?
9. What, if any, are the differences between use of the three options under the Act?
10. Do you suggest any changes be made to the Act?



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3 June 2008

Ms Fiona Leahy
School of Policing Studies
Charles Sturt University
Goulburn NSW 2580

Dear Ms Leahy,

The Policing-Ethics in Human Research Committee has approved your proposal "**Attitudes towards the Young Offenders Act: Implications for the Police and the Legal Profession**" for a twelve month period from 3 June 2008.

The protocol number issued with respect to this project is **108/2008/01**. Please be sure to quote this number when responding to any request made by the Committee.

Please note that the Committee requires that all consent forms and information sheets are to be printed on School of Policing Studies letterhead. Students should liaise with their Supervisor to arrange to have these documents printed.

You must notify the Committee immediately should your research differ in any way from that proposed.

You are also required to complete a Progress Report form, which can be downloaded from www.csu.edu.au/research/forms/ehrc_annrep.doc, and return it on completion of your research project or by 3 June 2009 if your research has not been completed by that date.

The Committee wishes you well in your research and please do not hesitate to contact Dr Anna Corbo Crehan on telephone 02 48 288 954 (EN: 24954) or email acorbocrehan@csu.edu.au if you have any enquiries.

Yours sincerely

Dr Anna Corbo Crehan
Presiding Officer
Policing – Ethics in Human Research Committee

Cc: Dr Isabelle Bartkowiak-Théron

Ms Fiona Leahy
School of Policing Studies
Charles Sturt University
NSW Police College
McDermott Dr
GOULBURN 2580

Monday, 9 February 2009

Dear Ms Leahy

Research Application – Attitudes towards the Young Offenders Act: Implications for the Police and the Legal Profession, Master of Social Science (Hons)

I am pleased to confirm my initial verbal advice that, following consultation with the Corporate Spokesperson, Youth, your application to undertake research at on the above topic has been **approved**.

This approval is contingent on the following conditions:

- That you adhere to ethical research practice as set out in your Ethics Committee application and approval, in particular maintaining the confidentiality of any information collected and the anonymity of NSW Police staff, and respecting the principles of informed consent for all participants.
- In the course of your research you may be exposed to information that falls outside your research topic and is not generally available to the public. You are to maintain the strictest confidentiality in regards to any such information. If you have any questions about the relevance of any such information to your approved research program, please address them to me.
- While attending police premises or conducting observational research, at all times you are to strictly comply with any instructions or requests issued by commanders, duty officers or supervisors.

- Any data you collect is to be used only for your research program and associated academic activities, and is not to be released to any person or used for any other purpose with out express written permission.
- In due course the NSW Police Force will require, as a condition of the grant of this approval, receipt of a final version of your Masters Thesis with an executive summary, along with your agreement that we are able to place the thesis in the NSW Police library, and use the information therein as we see fit, but, of course, with due respect to your moral rights as author. While the NSW Police will be happy to receive recommendations, we remind you that we are under no obligation to implement them .
- Since you are a staff member of Charles Sturt University, this research has been facilitated under Contract *0400641 Collaborative arrangement for the delivery of the educational component of the CEP for NSW Police, 2006-2016*. If you cease being an employee of Charles Sturt University prior to the conclusion of your research, you will need to seek a new approval.
- You note that breaches of these conditions may lead to consultation with your supervisors at CSU and withdrawal of this approval.

Please contact me if there is any thing else that I can do to assist with your research project.

Yours sincerely

Dr Chris Devery
Principal Research Officer.