UNDERSTANDING THE IMPORTANCE AND 'POTENTIAL' OF THE *YOUTH OFFENDERS ACT 1997* (NSW) IN ADDRESSING THE OVER-REPRESENTATION OF ABORIGINAL JUVENILES IN THE CRIMINAL JUSTICE SYSTEM

by David Pheeney

INTRODUCTION

The factors responsible for the ever-increasing incarceration of Aboriginal juveniles in New South Wales ('NSW') are complex and varied. This article will provide a perspective that argues part of the problem is a consequence of the lack of court alternate diversionary options available within the NSW criminal justice system for Aboriginal juveniles. The source of this outcome is explored through a critique of the *Young Offenders Act 1997* (NSW) ('the Act'). The ability of an Aboriginal juvenile to access diversionary options like cautions and warnings is currently restricted due to the 'gatekeeper'[1] role the NSW police occupy in how the legislation is interpreted and applied.

This article will argue that amendments to the legislation are needed around two principle areas. Firstly, expanding the definition of what constitutes a victim in relation to juvenile offending, from a fixation upon the individual, to one that incorporates a community perspective to reflect a more culturally appropriate definition. This article also argues the case that a shared police–community partnership should be cultivated in respect to the way the legislation is interpreted and applied to Aboriginal juveniles. By doing so, it would depart from the traditional police 'gatekeeper' model that has excluded the broader Aboriginal community's participation in this vital area of the NSW criminal justice system.

YOUNG OFFENDERS ACT 1997 (NSW): OVERVIEW AND IMPORTANCE TO ABORIGINAL JUVENILE OFFENDERS AND THE WIDER COMMUNITY

The guiding principles set out in section 7 of *Young Offenders Act 1997* (NSW) aim to establish;

- Alternatives to court proceedings such as cautions and warnings for certain types of offences;[2]
- Outcomes that support dealing with children who have offended in their own communities in order to promote rehabilitation, sustain family support structures and re-integration back into the wider community; and[3]
- Sanctions that are the least restrictive for children who have committed offences.[4]

Significantly, the legislation acknowledges that cautions and warnings are to be utilised to address the over-representation of Aboriginal juveniles in the criminal justice system.[5] However, the current legislation has not lived up to promises it held out when enacted 16 years ago. The statistics around Aboriginal juvenile detention rates reflect this fact. For example, from 2010 -11, the average daily intake into detention for all juveniles in NSW was 434, of which 204 were Aboriginal.[6] Similarly, the Justice Reinvestment campaign estimates that Aboriginal juveniles are '28 times more likely' to find themselves in detention. From a financial perspective, the costs incurred by the wider community are significant as the average expenditure required to keep a juvenile in detention is $652 per day, which equates to $237 980 annually.[7]

In terms of recidivism, the research relied upon by the Justice Reinvestment campaign has higlighted that diverting Aboriginal juveniles away from the criminal justice system at the first available opportunity provides future benefits also.[8] When introduced and placed into a culture of detention, the evidence overwhelmingly shows that Aboriginal juveniles find it difficult in moving out of the criminal justice system. This was recently highlighted in the High Court case of William Bugmy who entered into juvenile detention at the age of 12 years old.[9] Tragically, Mr. Bugmy had never celebrated a birthday out of custody as a juvenile and later as an adult.[10]

CULTURAL LIMITATIONS: A PRE-OCCUPATION WITH INDIVIDUALISM AT THE DETRIMENT OF THE COMMUNITY COLLECTIVE

A critique of the Act provides a unique insight through which an alternate understanding of the over-representation of Aboriginal juveniles in the NSW criminal justice system can be explored. This relates to the problematic definition of what constitutes a victim from an Aboriginal cultural

perspective. Under the legislation, a victim is 'a person'[11] who suffers property loss, physical or psychological harm. The definition is further confined to an organisation or government authority.'[12] This is a culturally bias definition from an Aboriginal perspective. A clear acknowledgement that juvenile offending harms the whole Aboriginal community must be reflected in the legislation.

While an individualised perspective has merit, this focus is limited in its application when assessing what constitutes harm, whether it be physical, psychological or to property because as a community, the collective interests are impacted through the extended kinship relationships across Aboriginal communities. This important cultural reality is overlooked by the Act in its current form. For remote Aboriginal communities in locations such as Bourke and Brewarrina, the impact of juvenile offending is a shared experience. Juvenile offending impacts everyone in the community. The benefit of the legislation acknowledging the existence of this reality would be considerable. It would raise the profile and importance of the Act, particularly in reference to the issues surrounding the over-representation of Aboriginal juveniles in the criminal justice system. Governments, policy advisors, police and the courts would be directed towards understanding that diversionary options provided for under the legislation, such as warnings and cautions, have greater significance for the Aboriginal community as a whole because of the cultural dynamic surrounding this issue.

GETTING AROUND THE ENTRENCHED GATEKEEPER MODEL: A POLICE AND ABORIGINAL COMMUNITY SHARED ARRANGEMENT

Similarly, the gatekeeper position the NSW Police Force occupies in the administration of the Act should be highlighted for discussion. In determining if an Aboriginal juvenile can access a caution or warning, any police officer can refuse this on the grounds that, in their opinion,[13] having regard to the 'interests of justice,'[14] it is more appropriate to place the matter before the Children's Court. While other factors are determinant of whether an Aboriginal juvenile is dealt with under the Act, the widely defined language expressed by the legislation that provides such discretionary powers is problematic. What constitutes the 'interests' of justice is a very complex consideration we direct police to undertake on behalf of the community. Even legally trained professionals such as lawyers and judicial officers would recognise applying such a legal concept is a difficult undertaking.

In a practical sense, the enactment of the Act has created a unique juvenile criminal justice environment that has been largely occupied by police to the exclusion of Aboriginal communities. To its credit however, the NSW Police Force acknowledges the need to ensure Aboriginal communities are active participants around the administration of diversionary options as reflected in the remarks of Assistant Commissioner Geoff McKechnie in the 2012-17 *Aboriginal Strategic Directions Plan*:

> We will continue our focus of community policing by consulting with Aboriginal people regarding offences of concern to them and work in partnership to achieve outcomes that reduce crime and the fear of crime. We will also continue to focus on crime prevention initiatives for Aboriginal youth in recognition that the Aboriginal community has a younger population base than mainstream Australia.[15]

Unfortunately for Aboriginal communities across NSW, the Act does not support the ideals expressed in the Strategic Directions Plan. Questions concerning matters related to the 'interests of justice' and determinations of whether it is 'more appropriate' to deal with an Aboriginal juvenile under formal court proceedings should be equally shared amongst members of the Aboriginal community and police. These discretionary police powers conflict with the notion that consultation with the Aboriginal community can take place within the parameters of the Act.

From my observations as a Children's Court lawyer representing Aboriginal juveniles in remote communities such as Bourke and Brewarrina, police are committed to ensuring the special circumstances of all Aboriginal juveniles who come before the criminal justice system are respected and taken into account. However, for the Act to have any reasonable prospect of adhering to the guiding principle that diversionary options, such as warnings and cautions, can address the over-representation of Aboriginal juveniles in the criminal justice system, the NSW police should consider sharing their discretionary powers with the Aboriginal community. With the establishment of local Aboriginal community justice groups, crucial decisions regarding whether an Aboriginal juvenile should be dealt with under warnings and cautions can be openly discussed amongst police and the community. The knowledge of the local Aboriginal community Elders for instance, would provide police with a more personalised and culturally appropriate understanding of Aboriginal juvenile offenders in a way that is not possible under the traditional model that police officers currently apply. Valuable information can be used to more effectively address the underlying causes that give rise to offending by Aboriginal juveniles. To successfully undertake such a complex process such as this, the direct participation of the Aboriginal community

is vital. In doing so, the relationship between NSW police and the Aboriginal communities in terms of mutual trust and respect could improve over time. For juvenile offenders and the wider community, significant social justice dividends are realised when diversionary options such as warnings and cautions are used. A 2003 NSW Parliamentary Library Research report found that in the Act's first year of operation in 1997, only 62.78 per cent of juvenile offenders appeared before the Children's Court.[16] Diversionary court options for juvenile offenders have a proven track record of success if allowed to be implemented and developed.

CONCLUSION

The consultation and participation of the Aboriginal community in the operation of the *Young Offenders Act 1997* (NSW) is in need of urgent reform to address the over-representation of Aboriginal juveniles in the NSW criminal justice system. While reforms of this nature will not in itself resolve this social justice crisis, it does provide a practical starting point. If any positive and long lasting developments are to be realised, a collaborative approach between the Aboriginal community and the NSW police that draws upon the valuable insights each can bring to a complex issue such as this should be given serious consideration. Ensuring the next generation of Aboriginal juveniles avoid the fate of many who are currently in the criminal justice system demands new and bold approaches, such as the type advocated for by this article. For this opportunity to be realised however, significant changes to the *Young Offenders Act 1997* (NSW) are needed now.

David Pheeney is an Indigenous lawyer working with the Aboriginal Legal Service at Bourke. The views expressed in the article are those of his own and not necessarily those held by the Aboriginal Legal Service (NSW/ACT) Limited.

1 Anna Stewart and Francis Smith, 'Youth justice conferencing and police referrals: The gatekeeper role of police in Queensland' (2004) 32 *Journal of Criminal Justice* 345, 346.

2 *Young Offenders Act 1997* (NSW) s7(c).

3 *Young Offenders Act 1997* (NSW) s7(e).

4 *Young Offenders Act 1997* (NSW) s7(a).

5 *Young Offenders Act 1997* (NSW) s7(h).

6 New South Wales Department of Juvenile Justice (2010-2011) *Annual Report* 151.

7 Justice Reinvestment, *The Facts* <http://justicereinvestment.net.au/about the campaign>.

8 Ibid – A position advocated by the Justice Reinvestment campaign.

9 *Bugmy v The Queen* [2013] HCA 37.

10 Felicity Graham, 'Fernando and Bugmy' (Paper presented at the National Indigenous Legal Conference, Alice Springs, 25 October 2013).

11 *Young Offenders Act 1997* (NSW) s5 – meaning of "victim" No reference to 'community' is expressed within the definition.

12 *Young Offenders Act 1997* (NSW) s5(3).

13 *Young Offenders Act 1997* (NSW) s14 for warnings and s20 for cautions.

14 Ibid.

15 New South Wales Police Force, 'Aboriginal Strategic Direction: 2012-2017' 3.

16 Rowena Johns, 'Young Offenders and Diversionary Options' (Research Brief No 7, Parliamentary Library Service, Parliament of NSW, 2013) 60.

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