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**THE NSW YOUNG OFFENDERS ACT 1997 :
A COURT DIVERSION PROGRAM**

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I. INTRODUCTION

The NSW Young Offenders Act 1997 (YOA) commenced on 3 April 1998. It built on a range of administratively-based programs which had been trialled in NSW. It provided for a comprehensive range of options for dealing with young offenders. These measures were designed to divert them from the formal court process through the use of police warnings and cautions for minor offences, whilst allowing for the use of youth justice conferencing as a new option for more serious offenders. Attendance at court was stipulated as a last resort.

This paper will provide a brief background to the YOA followed by an overview of the legislative framework and the general principles governing the diversionary options. It concludes with a brief note on the impact of the YOA.

II. BACKGROUND TO YOA.¹

Prior to the introduction of the Act, a range of administratively based pre-court diversionary schemes had been trailed in NSW . These included -

- the Wyong Scheme², which involved the use of community aid panels, was a form of diversionary program under which a young person was placed in some community activity after being convicted of an offence but before being sentenced. Subject to the young person behaving appropriately in the program, the court would then proceed to deal with him by way of either dismissing the charge without making a finding of guilt, or place the young person under a good behaviour bond or otherwise;
- the Aboriginal diversionary program, which was similar to the community aid panels scheme, was managed almost exclusively by the Aboriginal community; and
- the Wagga Wagga Scheme, which was a culturally directed program based on the New Zealand scheme of conferencing young offenders.³

These schemes had been trialled in six centres in New South Wales. Two of the schemes which had been operating in the west extensively involved the Aboriginal communities. Although they had been outstandingly successful in achieving a marked decrease in juvenile offending rates, they were not sustained through the lack of police commitment. By 1997 there was only one centre in the metropolitan area where the scheme remained operative but was not outstandingly successful.

A legislative-based program was undoubtedly needed, which came into operation on 3 April 1998.

¹ Material sourced from second reading speech of The Hon. J.P. Hannaford (then Leader of the Opposition) Young Offenders Bill, 21 May 1997

² Initiated by Magistrate Acridine

³ Was established by Sergeant Terry O'Connell as part of the police cautioning powers in response to local concerns

III. YOUNG OFFENDERS ACT 1997 (YOA)

(i) Objects of YOA⁴

The objects of the Act are :

- to establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of cautions, warnings and youth justice conferences;
- to establish a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences; and
- to establish and use youth justice conferences to deal with alleged offenders in a way that:
 - i. enables a community based negotiated response to offences involving all the affected parties,
 - ii. emphasizes restitution by the offender and the acceptance of responsibility by the offender for his or her behaviour, and
 - iii. meets the needs of victims and offenders.

(ii) Age of child and range of offences covered by YOA

The Act applies to a child aged between 10 – 18 years⁵ at the time of the offence.

An important aspect of the statutory scheme is that it only applies to criminal offences investigated by police officers.⁶ The rationale for not including other officials or bodies, which might investigate or initiate certain types of offences, was mainly because of practical difficulties in applying all elements of the scheme to investigating officials outside the Police Service.⁷

⁴ s 3

⁵ s 4

⁶ s8

⁷ The Hon. J.W. SHAW (Attorney General, and Minister for Industrial Relations) Second Reading Speech, Young Offenders Bill, 21 May 1997.

The range of offences covered by the statutory scheme includes summary offences and indictable offences that may be dealt with summarily.⁸ Certain types of offences are excluded because they are considered to be unsuitable for a warning, caution or conference. These include serious drug trafficking offences, breaches of apprehended violence orders, most sexual offences, offences that result in death and traffic offences where the offender is old enough to obtain a learner licence or permit to drive the motor vehicle to which the offence relates. In traffic offences, it was considered that issues such as licence disqualification might require the institution of formal proceedings and that the general emphasis of the statutory scheme on precourt sanctions might be inappropriate.⁹

(iii) General Principles of the Scheme¹⁰

The principles underlying the operation of the scheme and persons exercising functions under the scheme are clearly stipulated as follows:

- a. 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 to be considered under the Act.
- b. Children alleged to have committed an offence are entitled to be informed about their right to obtain legal advice and to have an opportunity to obtain that advice.
- c. Criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.
- d. Criminal proceedings are not to be instituted against a child solely in order to provide any assistance or services needed to advance the welfare of the child or his or her family or family group.
- e. If it is appropriate in the circumstances, children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties.

⁸ s 8

⁹ the Hon J.W. Shaw, Attorney General and Minister for Industrial Relations, Second Reading Speech, Young Offenders Bill, 21 May 1997

¹⁰ s7

- f. Victims are entitled to receive information about their potential involvement in, and the progress of, action taken under this Act.

IV. DIVERSIONARY PROCEDURES UNDER YOA

The statutory scheme operates at a hierarchy of four different levels of intervention into juvenile offending: warnings, cautions, conference and attendance at court as the last resort. The particular level selected will depend upon the type of offence that has been committed, how serious it is, the amount of violence involved and the harm caused to the victim.

(a) Warnings¹¹

For minor or summary offences which do not involve violence a warning may be given, unless the investigative officer considers that it is otherwise not in the interests of justice for the matter to be dealt with by way of a warning. A warning can be given on the spot and to more than one child at the same time by the investigating officer, who must make a record of any warning given and the name and gender of the child. No conditions to a warning must be attached, nor must any additional sanctions be imposed on a child to whom a warning is given. The investigating officer must take steps to ensure that the child understands the purpose, nature and effect of the warning. A warning can be given whether or not the child concerned admits to the commission of the offence.

(b) Cautions¹²

Police cautions are a more formal means of intervention than warnings, and can be given for more serious offences covered by the Act. Essentially these are summary matters for which a warning is not appropriate and certain indictable offences which are capable of being dealt with summarily. A child is not to be dealt with by way of a caution where an investigating officer considers it is not in the interests of justice for the matter to be disposed by way of caution. The factors that must be

¹¹ see Part 3 of Act - ss13-17 inclusive; see also regulation 14 (2).

¹² See Part 4 of Act –ss 18 - 33 inclusive.

taken into account include the seriousness of the offence, the degree of violence involved, the harm caused to any victim and the number and nature of any previous offences committed by the child.

As part of the reform package to improve the effectiveness of the YOA, an important provision was introduced in 2002 which limits to three the number of times a child can be cautioned by any authorised person or court under the Act. In a nutshell, “three strikes and you’re out”. The reasons for this new provision were stated by the Attorney General when introducing the amendment in these terms:

“While young offenders should be given sufficient opportunity to mend their ways, it is recognised that three cautions are sufficient and a more intensive form of intervention may be needed. Given the proven success of conferencing in reducing reoffending, there are cases where conferencing a young offender will produce a better outcome than issuing further cautions. In other cases, prosecuting the young offender before the court rather than further cautions or conferencing will be the most appropriate way to deal with a matter. I am aware that there is a perception among some members of the public that juveniles who repeatedly offend are being treated too leniently under the Act. While the Government does not believe there is strong evidence to support this perception, limiting the number of cautions a young offender can receive should address some community concerns in this regard.”¹³

If a child has already received three cautions, a specialist youth officer will determine in consultation with the investigating officer whether the child should be referred to a youth justice conference or whether the matter should proceed to court.

A caution can be given when the young person has admitted the offence and agrees to being dealt with by way of a caution. A caution will generally be given by a police officer authorised for this purpose; the Act also allows for the police officer to arrange for a respected person from the community, for example, a person from the Aboriginal or Torres Strait Island community or the ethnic community of the young person, to administer the caution or to be present when one is given.

¹³ The Hon. G. Debus (Attorney General, Minister for the Environment, Minister for Emergency Services and Minister Assisting the Premier on the Arts) - Second Reading Speech Young Offenders Amendment Bill, 4 June 2002.

The YOA allows for the police officer to refer the matter to a specialist youth officer to consider whether the child should be dealt with by way of youth conference where he determines that it is not in the interests of justice for a matter to be dealt with by way of a caution. Another criteria for such a referral is where the officer considers that the victim has suffered substantial harm or that the victim's circumstances are such that it is appropriate to do so even though the offence does not involve any degree of violence or is not of a serious nature.

i. Cautions: Right to obtain legal advice

Before a caution is given, an investigating officer must explain to a child in language readily understood by the child matters, which include the child's right to obtain legal advice, to be told where that advice may be obtained and to have an opportunity to obtain that advice.

A person responsible for the child or an adult chosen by the child or a legal practitioner chosen by the child must be present when the explanation is given. During the cautioning process itself a child, a person responsible for the child, or an adult chosen by the child (but does not include a legal practitioner) or a member of the child's family or extended family, or a respected member of the community chosen by the child are to be present.

At any time before a caution is given, a child may decide not to proceed with the caution and elect to have the matter dealt with by a court.

ii. Cautions: Victims and sanctions

Arising from a caution, a child can be requested to provide a written apology to any victim of the alleged offence. Any such apology will take place only after the cautioning process has been completed, the reason being that it would be inappropriate for the child and the victim to be

brought into contact at an earlier stage.¹⁴ Apart from the provision of an apology arising from a caution, no other conditions or sanctions are to be imposed on the child. No further proceedings are to be taken against the child for an offence in respect of which a caution was given.¹⁵

After a child is cautioned a caution notice, which must be signed by the child, is to be given to the child. It must be in language readily capable of being understood by the child. The notice must contain information about the caution being given, which includes details of the offence concerned, the person giving the caution, the persons present when the caution was given and, more importantly, the purpose, nature and effect of the caution.

A police officer, specialist youth officer or a court must make a record of any cautions given by the police officer or court.¹⁶

(c) **Youth Conferencing Scheme**¹⁷

The youth justice conferencing scheme was established for dealing with more serious offenders. The principles underlying the new youth conferencing option contain a number of important features; these are designed to -

- to encourage children to accept responsibility for offending behaviour;
- to enhance the rights and place of victims in the juvenile justice process;
- to produce a plan to restore the harm done and
- to provide an offender with developmental and support services to help overcome offending behaviour.

¹⁴ per The Hon JW Shaw (then Attorney General and Minister for Industrial Relations) – Second Reading Speech, Young Offenders Bill 21 May 1997

¹⁵ s 32

¹⁶ s 33

¹⁷ ss 34 – 59 inclusive

The purpose of a conference is to encourage discussion between those affected by the offending behaviour and the young offender in order to determine an outcome plan. In reaching decisions at a conference, the participants are also required to have regard to matters which focus upon the young offender taking positive action to put right the wrong done. These are identified as -

- the need to hold children accountable for offending behaviour;
- the need to encourage children to accept responsibility for offending behaviour;
- the need to empower families and victims in making decisions about a child's offending behaviour; and
- the need to make reparation to any victim.

i. Conferences: Range of offences¹⁸

Conferencing is available for the same range of offences as cautions; it is selected over a caution where a matter is considered inappropriate for a caution because of the seriousness of the matter, the amount of violence involved, the harm done to the victim and/or the number of prior interventions involving the young offender. A child can be referred for conferencing when the child has admitted to the offence and consented to the having the matter dealt with in that way.¹⁹

ii. Referrals for Conference

Referrals to the conference administrator for conferencing may come from three sources: a specialist youth officer, the Director of Public Prosecutions (DPP) and the court. Where an investigating officer considers that it is otherwise not in the interest of justice to deal with a matter by way of a warning or caution, he can refer it to a specialist youth officer to consider whether to hold a conference.²⁰ Where a specialist youth officer considers that it is inappropriate to hold a conference, but that it is more appropriate to deal with it by commencing proceedings,²¹ the specialist youth officer must

¹⁸ s35

¹⁹ ss 36 & 37

²⁰ see ss 14(4) and 21

²¹ s37

refer it to an investigating official or other appropriate authority for the commencement of proceedings.²²

Where the conference administrator considers that a matter is inappropriate to be dealt with by holding a conference, he must consult with the specialist youth officer and investigating official as to whether a conference should be held.²³ If the conference administrator, specialist youth officer and investigating officer, after consultation, fail to agree as to how the matter should be dealt with, the conference administrator must refer it to the DPP to determine whether the matter should be dealt with by holding a conference or by commencing court proceedings.²⁴

In determining such a referral, the DPP is to take into account the seriousness of the offence, the degree of violence involved, the harm caused to any victim, the young offender's criminal history, and whether the young offender has been dealt with by caution on three or more occasions.²⁵

iii. Referrals by DPP and Court

In a referral matter, the DPP may refer the matter back either directly to a specialist youth officer for a caution, if appropriate,²⁶ or to a conference administrator for a conference.²⁷

In an appropriate matter the DPP or a court may refer a child to a conference administrator for conference, even though the offence involved was not dealt with by an investigating official.²⁸ A court may at any stage of the proceedings refer the matter for conference including after a finding that a

²² s38

²³ The requirement that an investigative officer be consulted was introduced as part of the reform package in 2002 in recognition that investigative officers have first-hand knowledge of the circumstances of the case – see Second Reading Speech Young Offenders Amendment Bill 2002, 4 June 2002, per The Hon George Debus (Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts) Young Offenders Amendment Bill 4 June 2002

²⁴ s41

²⁵ s41

²⁶ s 23

²⁷ ss 40, 41

²⁸ s40

child is guilty of an offence.²⁹ At any time before a conference is held in relation to a matter referred by the DPP or the court, the DPP or the court may determine that the matter should not be dealt with by way of a conference.³⁰

The DPP may, at any time before a caution is given, determine that it is not in the interests of justice for the matter to be dealt with by way of caution and refer the matter to a conference administrator or commence proceedings.³¹ The DPP may, at any time before a conference is held, determine that the matter should not be dealt with by way of conference.³²

iv. Right not to proceed

A young offender may, at any time before a conference is held, choose to have the matter dealt with by a court rather than to proceed with the conference.³³ In this case, the court will still be able to refer the matter back to a conference, if the court is of the opinion that this is the appropriate way to deal with it.

v. Conduct of conferences

A conference may be held at a location agreed by the participants and the conference convenor, but may not be held at a police station, a court house or any office of the Department of Juvenile Justice.³⁴ It may be held at a detention centre if the young offender is detained in the detention centre.³⁵ A youth justice conference will be convened by a conference convenor accredited as such under the legislation and drawn from an available pool of convenors comprising representatives from a number of different cultural backgrounds.

Unlike the formal court process, by holding a conference in an informal and non-threatening environment but friendly environment young offenders and

²⁹ s40 (3)

³⁰ s44 (3)

³¹ s25

³² s44

³³ s44

³⁴ s46 (1)

³⁵ s46 (2)

victims affected by the young person's offending behaviour can reach consensus regarding an appropriate outcome plan.

vi. Conference participants

The legislation sets out the persons who will be able to participate in conferences.³⁶ Those attending a conference may include the young offender, a person responsible for the young offender, members of the young person's family or extended family, an adult person of the young person's choice or a legal practitioner advising the young offender.

At the conference the young offender is required to take positive action to put right the wrong done by considering and articulating what he or she has done, face his or her family and extended family and the victim, show contrition for the offending behaviour, actively participate in making decisions about the offending behaviour and reparation to the victim.

The participation of the young offender's parents or guardians in the conference enables them to play a greater role in taking more responsibility for their child's offending behaviour. The conference allows them to actively participate in the decision-making process. The involvement of the extended family members and other adults significant to the young person provides important alternative support mechanisms for the young person, particularly when the relationship between the young person and his or her immediate family has broken down.³⁷

In an appropriate matter, a conference convenor may invite a representative from the young offender's school community to the conference, who can make a positive contribution to the conferencing process and the outcome of a conference.³⁸ If considered appropriate, a conference convenor may invite other persons including an interpreter and a respected community member, such

³⁶ s47

³⁷ The Hon JW Shaw (Attorney General, and Minister for Industrial Relations), Second Reading Speech, Young Offenders Bill 21.5.97

³⁸ s47(2)(b1)

as an Aboriginal elder, whose role is to give advice to the conference on cultural matters.³⁹

An important feature of the scheme is the recognition of the rights of the victims and the support needs of victims. The scheme provides for their participation in the conference process by enabling them to be accompanied by a support person or persons when attending a conference, or, alternatively, to be represented at the conference by their nominee rather than attending in person. These arrangements give victims the opportunity to participate in discussions, to express their feelings about the offence and to impress upon the young offender the harm caused by their offending behaviour and to determine appropriate restoration to be made by the young person.

vii. Representation at conference⁴⁰

At the conference, a young offender is entitled to be advised, but not represented, by a legal practitioner, unless the conference convenor permits the child to be represented by a legal practitioner either generally or subject to such conditions or limitations.

viii. Conference outcome plan

A conference outcome plan will not be regarded as valid unless the young offender and the victim agree to the outcome plan. The young person and any victim who personally attend the conference have a right to veto any outcome plan proposed at the conference or any decision proposed to be contained in an outcome plan, regardless of the views of any other participant in the conference.⁴¹ The provision in the Act for a victim's right to veto a proposed outcome plan is to "recognise and enhance the rights of victims in the criminal justice system so that they are no longer 'invisible' in the criminal justice system. The youth justice conferencing process gives victims a 'voice', victims are given the opportunity to explain how the crime has impacted on them and they also have a say in how the young offender should make amends

³⁹ s47 (2)

⁴⁰ s50

⁴¹ s52(4)

for the harm they have caused. It is important for victims to be satisfied with the outcome plan proposed at a conference, and for victims to have a right to veto a plan if they consider aspects of it to be unsatisfactory. It is equally important for the young offender to agree to the terms of an outcome plan. Securing the young offender's agreement will mean that the offender is more committed to complying with the plan."⁴²

ix. Nature of outcome plan

The YOA initially provided that an outcome plan developed at a conference may include –

- the offender making an oral and/or written apology to the victim,
- the offender making reparation to the victim or the community,
- the offender participating in an appropriate program and
- actions directed towards the reintegration of the offender into the community.

Amendments were later introduced to provide for the kinds of programs considered to be appropriate to be included in an outcome plan.⁴³ This was to ensure that young offenders who are conferenced are able to access programs that will help them overcome their offending behaviour. These programs include counselling programs, drug and alcohol rehabilitation programs, educational programs and other programs aimed at improving a child's prospects, and programs offered through any government agency or educational institutions or organizations such as police and community youth clubs.⁴⁴

⁴² introduced as part of the reform package to improve effectiveness of YOA per The Hon G. Debus (Attorney General, Minister For the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts), Second Reading Speech Legislative Assembly, Young Offenders Amendment Bill, 4 June 2002 -

⁴³ Part of the same reform package introduced in 2002

⁴⁴ s52 (5A)

Under the scheme, an outcome plan must be realistic and appropriate and any sanctions contained in the plan must not be more severe than those that might have been imposed in court proceedings for the offence concerned.⁴⁵

xi. Satisfactory completion of outcome plan

Satisfactory completion of the outcome plan by the young offender will put an end to the matter and the relevant parties, including the referring body or person will be informed⁴⁶. Where a court has referred the matter for conferencing without making a finding of guilt, it must dismiss the charge against the child on receiving notice that the child has satisfactorily completed an outcome plan relating to the offence concerned.⁴⁷ If a child fails to satisfactorily complete the outcome plan formal court proceedings may be continued or commenced in relation to the offence.⁴⁸ If the court has released a child on condition that the child comply with an outcome plan, and the child fails to comply with the outcome plan, an authorised justice may issue a summons or warrant for the arrest of the child.⁴⁹

IV. PRIVACY PROTECTION

The YOA prohibits the publication and broadcasting of the name of any child or any information tending to identify a child dealt with under the Act.⁵⁰ The Act further prohibits the disclosure of any record relating to cautions and conferences concerning a child to persons other than those persons or bodies who acquire information or prepare reports in the exercise of their functions under the Act.⁵¹

⁴⁵ s 52 (6)

⁴⁶ s56

⁴⁷ s57(2)

⁴⁸ s 64

⁴⁹ see note to s 57

⁵⁰ s65

⁵¹ s66

V. STATEMENTS INADMISSIBLE IN PROCEEDINGS

Any statement, confession, admission or information made or given by a child during the giving of a caution or a conference is not admissible in evidence in any subsequent criminal or civil proceedings.⁵²

VI. INTERVENTIONS NOT DISCLOSED AS CRIMINAL HISTORY

The YOA provides that a person who has been the subject of a warning, caution or conference is not required to disclose this information to any other person for any purpose. It prohibits the inclusion in a person's criminal history of any such warning or caution or conference. The YOA goes further by providing that a reference contained in a provision in a statutory instrument or an Act relating to a person's character or fitness is not to be interpreted as permitting or requiring account to be taken of any such warning, caution or conference on this issue.⁵³

VII. IMPACT OF YOA

In introducing the reform package in 2002, the Attorney General stated that two recently released reports provided 'irrefutable evidence of the success' of the YOA. Firstly, the Bureau of Crime Statistics and Research [BOCSAR] report entitled "Reducing Juvenile Crime: Conferencing Versus Court", showed that "conferencing can be considerably more effective than the court process in reducing reoffending and in increasing the crime-free period for those juveniles who do reoffend" and that "the risk of reoffending was almost 28% lower for juveniles who were conferenced than for those who went to court."⁵⁴

Secondly, a report by BOCSAR in 2000 found that "young offenders and victims who participated in the conferencing process experienced high levels of satisfaction. More than 80% of victims surveyed as part of the study said they were satisfied with the outcome of the conference and with the way their case was

⁵² s67(1)

⁵³ s68

⁵⁴ see Second Reading Speech Young Offenders Amendment Bill 4 June 2002

handled by the justice system. The report also found that young offenders who attended conferences accepted responsibility for their offence, felt that the offence they had committed was wrong, understood what it felt like for those affected by their actions and understood the harm they had caused to the victim.”⁵⁵

A recent study into the NSW Young Offenders Act 1997 ⁵⁶ concluded that “the introduction of the Act has led to a substantial increase in the use of cautions and warnings, and a corresponding decline in the use of court proceedings. About 5 percent of cases were dealt with by youth justice conferencing. Moreover, such an increase in diversion has not resulted in net-widening.... the Act has had a substantial impact in the reduction of over-presentation of Aboriginal young people: it has resulted in almost 50 per cent drop in the odds ratio of Aboriginal first offenders being taken to court compared with the situation before the Act.”⁵⁷

In addition, the study concluded that “[B] because of the filtering of less serious offenders by the diversionary options, the young people who now appear before the court are likely to be more ‘difficult’ cases – they are likely to have committed more serious offences and/or have a longer history of criminal offending. There are also likely to be welfare, mental health, drug addiction and other issues that are integral to their offending history. Given the drop in their caseload since the YOA, the court and the DJJ⁵⁸ should devote their resources to more ‘difficult’ cases at the ‘back end’ of the system. At the same time, the government should continue to invest in longer-term social developmental and educational initiatives to tackle juvenile crime prevention at the ‘front end’.”⁵⁹

⁵⁵ see Second Reading Speech Young Offenders Amendment Bill 4 June 2002.

⁵⁶ Monograph entitled Reshaping Juvenile Justice, The NSW Young Offenders Act 1977, edited by Janet B.L.Chan, The Institute of Criminology Series No. 22, Sydney 2005

⁵⁷ at p185/6 Ch.8 Impact of the Young Offenders Act, Janet Chan & Garth Luke in Reshaping Juvenile Justice The NSW Young Offenders Act, ed. Janet B.L.Chan, the Institute of Criminology Series No. 22, Sydney 2005.

⁵⁸ Department of Juvenile Justice

⁵⁹ at p197 *ibid*

VIII. CONCLUSION

The NSW Young Offenders Act 1997 introduced a structured consistent and principled 'approach' to dealing with juvenile offending across the State. It established a diversionary process to court proceedings for dealing with certain child offenders under the age of 18 years through the use of police warnings and cautions for less serious offences.

Youth justice conferencing was introduced as a new option for dealing with more serious offenders, aimed in part in providing a young offender with the support mechanisms to overcome offending behaviour. Conferences are focused upon the young person taking positive action to put right the wrong they have done. Through conferencing, victims are given the opportunity to let the young person and the young person's family know the impact of the offence and to play a major role in determining an appropriate outcome plan.

The Act introduced a system of referrals to ensure that referrals for conferencing and commencing proceedings are appropriately made from different sources.

Recent studies indicate that positive results have been achieved in diverting young offenders from the court process with the introduction of the Act.