JUVENILE DIVERSION IN AUSTRALIA: A NATIONAL REVIEW

Prof Kenneth Polk, Department of Criminology
University of Melbourne

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This paper is a summary of the report "Early Intervention: Diversion and Youth Conferencing – A Nation Profile and Review of Current Approaches to Diverting Juveniles from the Criminal Justice System" by Kenneth Polk, Christine Alder, Damon Muller and Katherine Rechtman, prepared for the Crime Prevention Branch of the Commonwealth Attorney General's Department (in press).

1. Introduction

One of the objectives of this project was to provide a description of the nature of the diversion processes at different stages in the juvenile justice system, and the extent of their application within Australia. In achieving this objective, a brief review of the historical development of diversion is provided which indicates that the specific term "diversion" entered the vocabulary of justice practice as a result of work of the President's Crime Commission in the mid-1960s. Diversion as a practice has existed in Australia well before that time, as indicated both by the establishment of children's courts in the late 19th century (diversion from the adult criminal justice system), and the formalisation of police cautioning in Victoria in 1959, and Queensland in 1963 (Challinger, 1985).

Diversion is one of a number of processes designed to reduce the volume of juveniles who enter the formal system of justice. Other processes include delinquency prevention, decriminalisation, and deinstitutionalisation, all of which have at one time or another had some place in the system of juvenile justice in Australia. This study defines juvenile diversion as *programs and practices which are employed for young people who have initial contact with the police, but are diverted from the traditional juvenile justice processes before children's court adjudication.*

This examination of diversion in Australia involved site visits to each state and territory, and in most cases there were at least two such visits. The research established that the concept of diversion is widely used throughout each of the eight Australian jurisdictions, especially in terms of police cautioning and family group conferencing. Both of these approaches to diverting juveniles from formal juvenile justice practices are covered in individual chapters of this report. In addition, the field work with leading justice representatives in the states and territories identified the problem of significant numbers of young people being held in detention on remand who where subsequently not being sentenced to periods of detention. Therefore consideration was also given to approaches to diverting these young people from pre-trial detention. Finally, a small number of more limited and focused diversion programs in individual states are described. A separate section also is provided to address the particular issue of the implications of diversion for Indigenous juvenile offenders.

2. Police Cautioning

From its origins in Victoria and Queensland in the mid-1960s, by 2002 police cautioning has spread and is now established as a major approach to juvenile diversion in all eight jurisdictions in Australia. Two levels of caution were found in Australia: (1) informal cautions, where the young person is simply warned and released, and (2) formal cautions where the admonition is recorded (it was observed that the actual terminology for these states varies somewhat). Formal cautions are now employed in all Australian states and territories, and informal cautions are found in all but the ACT.

There are three rather different ways that cautioning can be carried out. A first model, consistent with what some writers have termed "true diversion" (Cressey and McDermott, 1974) consists of the situation where the caution diverts the young offender out of the system with no other action being taken. A second model is where after some warning process (a formal caution) the young offender is referred on a voluntary basis to a program such as a drug or alcohol-counselling centre (that is, diverted out of the justice system but *into a program*). A third model is where the young

offender is cautioned, but there are *undertakings required* (eg fine, or community service, or attending a program) as part of the caution. In this model the individual is diverted out of the justice system, but if specific conditions are not met, there is the possibility of a re-entry back for action on the original offence.

The following overall observations are presented regarding police cautioning:

1. *In all jurisdictions there is a mix of informal and formal cautioning.*
2. *Some forms of police cautioning, both informal and formal, continue as diversion **out** of the juvenile justice system.*
3. *Across the jurisdictions, there tend to be a number of features that are common to the formal cautioning process (Wundersitz, 1997)*:
    a. There must be sufficient admissible evidence to establish the offence.
    b. The young person must be willing to admit the allegations.
    c. The young person must be willing to consent to the caution process.
    d. The process is generally limited to first-time and non-serious offenders.
    e. The caution itself consists of an interview session, most of which are held at the local police station, conducted by a senior police officer, and involving the offender, and the parents, guardians, or other nominated adult representing the offender.

Unfortunately, we were unable to locate any recent data on the outcomes or effectiveness of police cautioning. Earlier investigations (Challinger, 1985) raised the possibility that such programs might contribute to forms of net-widening, but the absence of any recent information makes it impossible to examine such claims in the contemporary context. Since that time the police cautioning options have significantly expanded in most states, with some systems providing for penalties to be associated with a caution. Especially in light of this notable elaboration of the cautioning processes, some priority should be given by justice system policy makers to a careful assessment of the process and outcomes of police cautioning in the various jurisdictions in Australia.

3. Juvenile Conferencing

One of the most striking recent developments in juvenile justice in Australia has been the rapid spread of the use of group conferences. While unknown prior to the 1990s, conferences had by 2002 spread to all states and territories. In most jurisdictions (for example, New South Wales, the Northern Territory, Queensland, South Australia, Tasmania, and Western Australia), the state legislation (reviewed in the report, below) has been revised so that there are formal links between police cautioning at the early stages (the front end) of the justice system, and conferencing somewhat deeper in that system. While there are important jurisdictional differences in terminology and procedure, in general the process of conferencing fits the dynamics that have been described by one researcher as follows:

A young offender (who has admitted to the offence), his or her supporters (often, a parent or guardian), the victim, his or her supporters, a police officer, and the conference convenor (or coordinator) come together to discuss the offence and its impact. Ideally, the discussion takes place in a context of compassion and understanding, as opposed to the more adversarial and stigmatising environment associated with the youth court. Young people are given the opportunity to talk about the circumstances associated with the offence and why they became involved in it. The young person's parents or supporters discuss how the offence has affected them, as does the victim, who may want to ask the offender "why me?" and who may seek reassurances that the behaviour will not happen again. The police officer may provide details of the offence and discuss the consequences of future offending.

After a discussion of the offence and its impact, the conference moves to a discussion of the outcome (or agreement or undertaking) that the young offender will complete… The sanctions or reparations that are part of agreements include verbal and written apologies, paying some form of money compensation, working for the victim or doing other community work, attending counselling sessions, among others. (Daly, 2001: 66-67)

Our research fieldwork in the various jurisdictions differentiates three basic approaches to conferencing that can be distinguished primarily in terms of where in the juvenile justice system the conferencing approach is located. The first approach, often referred to as the "Wagga Wagga Model", is where the police are responsible for organising and facilitating the conferences (this is the model used in the ACT, Northern Territory and for some of the conferences in Tasmania). A second approach, common to the states that have an integrated system of cautioning and conferencing, entails police referring individuals to conferences that are administered by a separate justice system organisation (the model found in New South Wales, Queensland, South Australia and Western Australia, and partially in Tasmania). A third approach is where the referral to a conference is from the Children's Court in the pre-sentencing phase. This the model favoured by Victoria (and provided for in the legislation in the Northern Territory, although the numbers suggest that there are now no cases being referred through that process)

For conferencing, unlike cautioning, there is a considerable body of data assessing its processes and outcomes. However, a review of the empirical record regarding recidivism and conferencing reveals conflicting evidence and claims. Certainly a number of innovative studies have been conducted which are suggestive of positive impacts. One study in NSW uses a quasi-control group method, and finds using a sophisticated form of "survival" analysis that recidivism is lower among conferenced young offenders than among those who have been referred on to court. Studies in both South Australia and New Zealand examine characteristics of "successful" conferences and conclude that success in terms of lowered levels of recidivism was more likely when young offenders are remorseful and participate effectively in determining conference outcomes, and also when families of offenders similarly are remorseful and involved in the conference outcomes. Unfortunately, these positive findings are balanced by finding of "no difference" in the most rigorous of the evaluations (the RISE project in Canberra), and by a quasi-control group study in Victoria.

There are three problems identified that complicate any attempt to read the evidence regarding the impact of conferencing on recidivism. First, there is the question of the control for selection biases. That is, throughout the criminal justice system there are deep and complex processes at work so that some young people exit the system early and successfully, other persist and end up deeply enmeshed in criminal careers. These selection biases are directly at work in the sorting of some young offenders, but not others, into conferences and can make any comparison for evaluation purposes invalid (which is why the randomised experimental procedures, such as in employed in the RISE project, are employed).

Second, there is the question of what comparisons need to be made in order to assess the outcomes of conferences. The evaluations to date have either compared outcomes for different groups of young people who have been conferenced (addressing the issue of which conferencing processes are most successful, but not how conferencing outcomes compare with alternative juvenile justice programming), or have compared conferenced young offenders with court adjudicated young people. We would urge that the comparison ought to include a comparison between a conferenced group and one that is cautioned and released. That is, a critical issue from the viewpoint of diversion is not how outcomes for conferenced young persons are different from those referred to court (the approach taken in most of the existing comparative studies), but instead how are conferenced young persons different from those *diverted out of the justice system altogether*. These data are pertinent both to consideration of ensuring that young people receive the least intrusive intervention that is ultimately in their best interest and also to consideration from a systemic point of view of efficiency of service delivery.

Third, there is the issue of how to best measure recidivism. Criminologists have long known of the problem in the use of official statistics, especially when compared with other techniques such as self-report or victim reports (for an example in the conferencing evaluation literature, see Hayes and Prenzler, 1998: 41). Despite this, virtually all of the outcome measures found in the available conferencing evaluations restrict themselves to official measures of criminality.

Any assessment of conferencing programs, however, must extend well beyond the issue of recidivism. A major objective of this approach to justice is to involve victims in a restorative process, and therefore it is important to examine the impact of these programs on victims. Evaluations conducted in both Queensland and WA suggest high levels of victim satisfaction with the conferencing process. In addition, it is important to examine carefully the costs of this approach, since the actual process of arranging conferencing can absorb a considerable number of staff hours. The report cites recent work in Northern Ireland that notes the high costs of conferencing, and suggests that given these costs, such an approach ought to be reserved and targeted on those cases where the problems are serious enough to warrant the expense of the intervention. It is also suggested that care must be given to the issue of the "timeliness" of the intervention. Unless there is careful control over the conferencing process, the time period between the offending behaviour and the conference can become exceptionally long, and for both the offenders and victims questions can be raised regarding the damaging impact such lingering process might have.

Further, it is important to be specific about the extent to which conferencing actually constitutes a form of diversion. Such claims would refer specifically to the possibility that juvenile conferencing becomes a way of diverting young people away from formal court processes. Some data, as in New South Wales and South Australia, suggest that there this may be happening, whereas the trends in other states are less clear. Equally important, in the view of this report, is the observation that conferencing represents different form for juvenile justice, in particular one where victims and families of offenders together with the offender can be brought together in a social encounter that is more effective than the process that typically occurs in the childrens court. Thus, the strength of the claims for conferencing rest on how it provides a different form of justice, one which is restorative, more than it does on the possibly dubious claim that it diverts young offenders out of the justice system altogether.

It is clear, however, that conferencing at present enjoys high levels of support within the juvenile justice system. This approach has become cemented solidly into the general system of juvenile justice, and is regarded by many as an important device both for providing a better response to juvenile offenders and a way of involving victims in a process of restitution and restoration. However, it is clear that there remain a number of questions about conferencing that need to be addressed in future research.

4. Diverting Young Offenders Being Held on Remand

In the course of our fieldwork, juvenile justice administrators in some jurisdictions indicated that a common problem they were encountering consisted of: (1) proportionally very high figures of young offenders being held on remand; and (2) the high proportion of remandees with a subsequent non-custodial court disposition. This observation is inconsistent with obligations to ensure that detention is used as a last resort for young people and that the actions of the juvenile justice system are in the best interests of the child. From an administrative point of view it also raises the possibility that expensive resources of the state are not being used efficiently through the unnecessary pre-trial detention of young offenders where that detention is demonstrably inappropriate.

A number of different responses to this problem in the jurisdictions are identified. Both Queensland and WA, for examples, have created special supervised bail programs as ways of facilitating bail in appropriate cases. Several states now provide various forms of hostels for those having problems obtaining bail. The Banana Well program that operates in the Kimberely region of WA is described as an example of a program designed to meet the particular difficulties of regional and Indigenous Australians.

The situation in Victoria is noteworthy because of the comparatively low numbers of juveniles being held on remand. Field research suggested that some years before Victoria, too, had high numbers of juveniles in pre-trial detention. This problem was identified as one that needed addressing. Subsequently, a broad range set of directives and services were put into place to reinforce the legislative requirement that pre-trial detention was only to be used in exceptional circumstances. The result is that currently on any given day, only a handful of young people are now being held in detention on remand in Victoria, a situation strikingly different from some other jurisdictions.

5. Some Focused Model Programs

While much of juvenile diversion in Australia historically has been diversion out of the system, with the increasing complexity and diversity of diversion processes with the option to divert the young person to a program or service, there are an increasing number of programs to which young people are now being diverted. Juvenile justice administrators in each state were asked to nominate exemplary diversion programs of this sort. Three were selected for description as part of this report. Even when their support is derived from justice agencies, these services attempt to position themselves outside of the system in the sense that participation in their activities is voluntary. Most attempt to bring to the situation community resources that are found outside of the justice system.

The Killara program in WA has also been implemented in a similar form as the Youth and Family Support Services (YFSS) program in Queensland. This program was selected as a family oriented service at the very front end of the juvenile justice system that provided advice to young people and their families on a voluntary basis. A second program is the community-based program located in Echuca, Victoria. This program was selected because of its location in a country area, because it is an example of a program that includes both Indigenous and non-Indigenous young people, and because it includes an emphasis on youth employment and training. It is a program that builds upon community support and involvement in a way that draws attention to the broader meanings and possibilities of restorative justice. Arts-based programs were also included for their potential on this dimension. The Metalworx program in South Australia is another program that is reported to work well in rural areas and with Indigenous young people. These arts-based programs were also included to call attention to the developing international research and literature that indicates the broad skills and developmental possibilities these programs offer young people.

Unfortunately, as with most programs and services offered to young people in Australia these innovative approaches have not yet been formally evaluated. With the expansion and elaboration of diversionary processes, it is suggested that juvenile justice policy makers need to consider the matter of proper evaluation of some of the more promising of these programs and services as a matter of high priority.

6. Diversion and the Indigenous Community

There is an urgent need for good data that would examine the impact, if any, diversion has had upon the trends relating to Indigenous young offenders. The data available to this investigation indicate that in general at the front end of the juvenile justice system, Indigenous offenders are less likely to be diverted. In states where the information is available, such as South Australia and Western

Australia, there is a smaller proportion of Indigenous youth in the group that receive police cautions than is true for those who move deeper into the juvenile justice system. This is consistent with a previous study in NSW that found that this difference held even when other important variables were controlled. While a similar result was observed in the Northern Territory, the difference there was relatively small.

Regarding conferencing, more work can be done to address the whole question of the "cultural appropriateness" of approaches to restorative justice in Australia. Daly (2001) has noted that a common misconception is that conferences reflect or are based on Indigenous justice practices. In part this results from the recent history of restorative justice, and the emergence of the pioneering conferencing system in New Zealand that was designed, not so much to re-establish previous Indigenous styles of Maori justice, but to create a contemporary process which was "culturally appropriate".

Some have questioned whether the actual procedures of restorative justice as these have been implemented in Australia share the attribute of cultural appropriateness. Zellerer and Cuneen (2001) argue that there are at least three issues that are problematic in this regard.

Their first concern is whether or not there is adequate recognition of the concerns for self-determination among Indigenous people. A second concern involves the significant role that police play in the conferencing process. Not only does this raise questions about the extension of police powers in ways where there are few accountability mechanisms provided, but the police are not necessarily going to be seen as functioning in a supportive and co-operative way, given the long history of friction between police and Indigenous communities. A third issue is that as the Australian juvenile justice system is increasingly "bifurcated" with minor offenders channelled into diversionary programs, the more serious offenders (often Indigenous) become demonised and the targets for increasing law and order strategies such as "just deserts", mandatory sentencing, or the "three strikes and you're out" legislation.

In the course of our fieldwork, concerns were expressed to us about different aspects of conferencing by those representing Indigenous interests. The representatives from the Indigenous community expressed the view that they had no say in controlling the process, and that the current model placed too great a weight on the victim/offender relationship rather than a more balanced community approach which would divert the young offender into positive community activities. They argued that if conferencing were to be successful, local Indigenous protocols must be respected and implemented and that involvement of the traditional owners and local community resources, including extended families, is essential.

7. Conclusions

One of the major objectives of this consultancy was *to provide a description of the nature of diversion process at the different points in the criminal justice system, and the extent of their application within Australia*. The work undertaken has established that all eight jurisdictions in Australia by 2002 have developed a clear commitment to processes of diversion, including implementing some form of both police cautioning and juvenile conferencing.

A second objective for this project was to establish the effectiveness of diversionary practices, processes and programs, particularly in terms of preventing future offending. Unfortunately there is insufficient research available nationally or internationally which will allow for any evidence-based assessment of either cautioning or conferencing in relation to the issue of the prevention of further offending. Overall there are only a very limited number of research studies that have been carried out. Some data exist with regard to conferencing programs, but from the information available, no

clear picture emerges. Research that indicates some potentially successful aspects of conferencing has to be balanced against research that shows no differences in terms of re-offending outcomes of young offenders who experienced conferences in contrast to those who were referred to court.

A third objective of this consultancy was to address the nature of the infrastructure supporting diversion in terms of *legislation, process, administration, and training and skills of those involved in the process and programs*. One of the most significant strengths of the approach to juvenile diversion taken in the Australian jurisdictions has been the way *diversions has been treated as a coherent system of interlocked elements* in the more recent legislation in most of states and territories. The various forms of justice legislation provide for different structures of administration of the diversion processes in the various jurisdictions. Regarding conferencing, for example, in some jurisdictions police have the responsibility for organising and facilitating the conferences, while in others this responsibility is taken by another governmental body (in Victoria, conferences are administered by a private, non-governmental agency).

Unfortunately, there is an absence of research information on the systemic effects of these new, interlocked procedures of juvenile justice and diversion. It is disappointing that it is not possible to describe in a detailed way the *systemic implications* of the changes that have taken place in police, juvenile justice, and childrens court processing. That is, we simply do not know enough about the consequences the implementation of new forms of police cautioning and juvenile conferences have on traditional police decision-making, and on numbers and decisions deeper in the juvenile justice system (such as the flow-on effects in terms of court and detention numbers over time).

A fourth objective established for this report was to address the question regarding *what impact do social and cultural differences have on access to, and successful participation in diversion*? This report has found, as have earlier studies on juvenile diversion, that those diverted at the front end of the justice system tend to be younger, less serious offenders with few previous contacts with the police. We have found, as well, that girls tend to be over-represented at the cautioning stage, while Indigenous youth are under-represented at that level of diversion. The report underscores, as well, the conclusion that general there is a challenge in most jurisdictions to make diversion programs work for Indigenous young offenders.

To date the bulk of the literature and research on conferencing has assumed a “generic”, non-gendered youth population. Previous juvenile justice research suggests significant issues that need to be considered in relation to young women, and the only available preliminary findings from NZ suggest that the conferencing experience may not be as positive for young women as the overall findings suggest they are for young men. This clearly an issue in need of further research

It is also pointed out that since diversion programs are part of the juvenile justice system and process, it is imperative that clear protections of the legal and human rights of young people are respected. This includes such issues as assuring proper legal representations where that is appropriate, providing oversight and review of diversion processes and decisions, and assuring that the punishments handed out in the course of diversion undertakings are no greater than those provided in law for the offence should it be heard in a childrens court. As well, the report underscores the assumptions of a “balanced” approach to restorative justice that assume that while the young person has a responsibility to the community, the community also has reciprocal responsibilities to young people, especially in terms assuring basic principles of social justice.

There is, further, the question of what sanctions are appropriate at which point in the juvenile justice funnel. We need to be constantly reminded that much of the youthful behaviour that is encountered at the very front end of the juvenile justice system is made up of experimental, one-off conduct that is highly unlikely to be repeated. Put another way, only a small proportion of first offenders

encountering the justice system will ever be repeat offenders, and further, most of their offences are of a trivial nature. The social and cultural profile of those young persons first encountering the juvenile justice system argues strongly for consideration of those steps which divert young people away from further justice actions, and certainly suggests that the most expensive and resource-demanding options, such as juvenile conferencing, are best reserved for the more serious cases where such interventions are likely to be most cost-effective.

In summary, the site visits and field research of this consultancy have established that there has been a vigorous development of approaches to juvenile diversion in all states and territories of Australia, especially in the past ten years. These programs of juvenile diversion are found at different levels of the juvenile justice system, ranging from police cautioning at the front end, to programs such as family conferencing which is found much deeper in the system (including, as in Victoria, being a post-court disposition), and various approaches being implemented to reduce the numbers of young persons being held in pre-trial detention. The data on the effectiveness of these programs are scanty and mixed, and one of the most important suggestions that can be made is for public policy makers to consider providing for the systematic collection of information about the nature, and effectiveness, of the new schemes of juvenile diversion that have emerged in recent years in Australia.

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